

**COPYRIGHT ARBITRATION ROYALTY PANEL
(CARP) STRUCTURE AND PROCESS**

HEARING
BEFORE THE
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTH CONGRESS
SECOND SESSION

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COPYRIGHT ARBITRATION ROYALTY PANEL (CARP) STRUCTURE AND PROCESS

THURSDAY, JUNE 13, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:30 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee will come to order.

The Founding Fathers understood the importance of copyright to our Nation. In keeping with this tradition, our Subcommittee has always worked to support artists by ensuring that they receive fair compensation for their creative endeavors. Our hearing today will focus on an arcane but yet important component of the present system that reimburses copyright holders for their work.

By way of background, and as part of the 1976 Copyright Act amendments, Congress acknowledged the need for Government to oversee the royalty ratemaking and distribution process by creating the Copyright Royalty Tribunal, or CRT as it became known. The need for this entity was especially critical since the 76 amendments also created 3 new compulsory licenses.

By 1993, Congress, the Copyright Office and ratemaking participants believed that greater efficiencies could be realized under a different system, which led to the development of our present construct, the Copyright Arbitration Royalty Panel, known to many of you all as CARP.

Unfortunately, it now appears that history is repeating itself as the current structure and operation of the CARP system has generated great frustration among those parties required to participate within its statutory confines. Although some critics have criticized our efforts to develop a fair and efficient ratemaking and distribution process as disappointing, I am optimistic that we will ultimately prevail in our attempt to build a better copyright mouse-trap.

We have an excellent panel of witnesses today who will doubtlessly add to our individual and collective understanding or misunderstanding, hopefully understanding, of the CARP system, warts and all. I welcome all of you here today and thank them in advance for sharing their thoughts.

Now, as a bit of background, as you all may well know, the arbiters handed down the CARP decision last February, February 21st, I think. The Copyright Act, as you furthermore know, provides a 90-day period whereby the Copyright Office, which is a part of the Library of Congress, can advise and counsel with the Librarian as to his final decision of rejecting or accepting the CARP decision. The Librarian, handed down his opinion, his rejection, last month, the 21st or—21st of May, Marybeth tells me.

The Copyright Act furthermore provides an additional 30 days during which time the Librarian is afforded the right to examine his thoughts along with the Copyright Office and then submit his final decision. So we expect to see that on or before 20 June.

[The prepared statement of Mr. Coble follows in the Appendix]

Mr. COBLE. Having said all that, and before I recognize the distinguished gentleman from California, you saw me hand him a piece of birthday cake. The Chairman of the full Judiciary Committee is having his birthday today, so Mr. Sensenbrenner shared a couple pieces with Howard and me, and I am sorry the rest of you can't have any. If you go back in the back room, there may be some left.

But I am now pleased to recognize the distinguished gentleman from California Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. He wins the lottery, and I get a piece of birthday cake.

Anyhow, thank you very much for holding this hearing on the Copyright Arbitration Royalty Panel. I am a strong supporter of marketplace solutions to copyright royalty disputes. I think copyright owners have every economic incentive to capture additional revenue by licensing their work, their works, and every right to seek the highest royalties that the market will bear. If they are too short-sighted to capitalize on opportunities for new revenue, or they fail to act rationally, as economists would say, the marketplace will punish them. Furthermore, when copyright owners have engaged in a competitive conduct, the antitrust laws have time after time proven adequate to remedy this conduct.

Compulsory licenses in CARPs, on the other hand, have proven to be imperfect, unwieldy, and costly licensing mechanisms at best. I suspect that many CARP participants would have found a more—far more satisfactory outcome—I am talking about licensees and copyright owners—had they chosen to spend their money and effort negotiating a reasonable settlement in the marketplace rather than in a CARP.

Compulsory licenses tend to outlive their purpose, and they may create marketplace dislocations rather than address them. For example, the cable compulsory license was created to help a struggling and entrepreneurial cable industry keep up with the broadcast industry. Today the cable license continues to exist in an era where the cable industry is able to exercise market power at least comparable to that of the relevant copyright owners.

While I do not have a fondness for compulsory licenses, I recognize that we must do our best to make the ones we do have work. The CARP process was catapulted into national awareness this year because of the controversy of Webcasting CARP. The outcome of the Webcasting CARP has garnered much attention from the

press and public. And I know it is, as the Chairman says, under consideration at the Copyright Office and with the Librarian of Congress. What captured our attention about the Webcasting CARP was not only the royalty rate it set, however, but the process through which it occurred.

While many of the rating distributions determinations are the subject of marked disagreement among the participants, the one thing that even the strongest opponents agree upon is that the CARP process has serious flaws and warrants improvement. The expense is the biggest issue. Participants in a CARP bear not only their own substantial legal fees, but also the cost of the CARP proceeding itself. This is often millions of dollars, sometimes much more expensive than the royalty claim that the CARP is addressing. I believe Mr. Remington is going to speak particularly to the situations in which a participant had to pay tens of thousands of dollars for a CARP to determine the distribution of around \$10 in royalties.

In addition to the problems of cost, I know there are great concerns over the autonomy and independence of the arbitration body, the burden that it places upon the Copyright Office, and the overall fairness and consistency of the outcomes. Our witnesses are experienced participants in CARP proceedings and can speak to the problems they have encountered during CARP arbitration.

The issue of CARP performance reform is not new in our Subcommittee. In 1998, Chairman Coble introduced legislation to reform the methods through which the royalty rate is determined. Ultimately there was not enough support to enact his reform proposals. Given today's climate, however, I believe there is sufficient impetus and sufficient interest to seriously consider changes to the arbitration process, and I anticipate an active discussion today to determine a model that most efficiently accomplishes the goals of the CARP process without unduly burdening the participants.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Berman.

Mr. COBLE. Normally I prefer opening statements to be restricted to the Ranking Member and to me, but we have two gentlemen on each side of the aisle who are very interested in this issue. And incidentally, folks, the small or the diminished attendance here today on the part of the Subcommittee I don't believe reflects their lack of interest. It is the fact that the final bell rang, and there are no more votes today, so they are probably going back to their respective districts.

But let me now recognize the distinguished gentleman from Virginia, Mr. Boucher for his opening statement.

Mr. BOUCHER. Mr. Chairman, thank you very much. I appreciate your indulgence as Mr. Cannon and I contribute to the conversation here in making open statements. I also want to thank you, Mr. Chairman, for a hearing on a very timely subject.

The CARP process, in my opinion, is badly broken. It should be replaced with a more efficient, more affordable and fairer system. In my view, the functions of the CARP should be transferred to a United States district court.

The problems which beset the CARP are many. While the CARP process was designed to produce a streamlined procedure, the lack

of appropriate discovery mechanisms has prolonged the proceedings, achieving the opposite of what was designed.

The process is also too expensive. It is beyond the ability of many interested parties to afford. Having private parties pay the fees of the arbitrator is manifestly unjust to the financially less fortunate and to the nonprofit entities that have a very large interest in the proceedings of the CARP.

No body of expertise is developed by the arbitrators that then could be applied to subsequent proceedings. Starting with a new arbitrator panel each time will lead to inconsistent judgments and a constant process of reinventing the wheel, and the standards which are applied are demonstrably inadequate. In the recent Webcasting decision, the concept of fairness of the payment was totally absent from the deliberation. Fairness is the standard in other proceedings. Standard, for example, is fundamental to—fairness is fundamental to the standard under section 801 for royalty payments for digital music services other than Webcasting. Fairness is also at the heart of the standard under section 119 for royalties that are paid by cable and satellite companies to terrestrial broadcasters for the rebroadcast of terrestrial broadcast signals. But fairness is not an element of the standard under section 114 applicable to Webcasters.

However, we address the procedural problems, and as I have said earlier, I think vetting these rate-setting functions in a U.S. district court is the best approach. We also need to insert fairness of the payment as the governing standard under section 114. We must avoid a repeat of the rules like the most recent one through which a one-size-fits-all approach was adopted, where small Webcasters that measure their royalties in the tens of thousands of dollars annually were saddled with royalty fees in the range of hundreds of thousands of dollars annually. A fairness standard would have prevented that ruling that threatens to put the young and the small companies out of business.

Changes must be made, and I welcome this first hearing of our Subcommittee as we explore the problem, as we hear from a panel of distinguished witnesses who I want to join with the Chairman and Ranking Member in welcoming here today and as we consider this.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

Mr. COBLE. I am pleased now to recognize the distinguished gentleman from Utah, Mr. Cannon for 5 minutes.

Mr. CANNON. I thank the Chairman. I have been sitting here wondering if the average IQ has gone up or down because some people left when they could after the last vote earlier today.

I thank you for calling this important hearing on the structural process of CARP, our royalty-setting panels. I will acknowledge that I was one of the many Members of the Congress who had concerns about the result created by the latest CARP panel for Webcasters.

I would like to remark for a moment on the governing standard by which the CARP determines the royalty rate. In addition to considering CARP structure and procedures, this Committee must also consider why there are separate rate-setting standards for the

sound recording CARPs, for the Webcasters and the satellite TV CARPs, and all other CARPs including the sound recording CARPs for industries other than Webcasting.

In particular the satellite TV and all other CARPs have standards that require rates based on fairness, fair market value and balancing the interest of the participants. The Webcasting CARP has only the willing buyer/willing seller language, which suggests that there is a functioning market that results in a fair price. However, if the Congress and this Committee thought the market was functioning fairly in the context of any compulsory licenses, there would not be any compulsory licenses as they are needed only when a market is dysfunctional or inherently one-sided, which this one clearly is.

Particularly with the nascent industry negotiating against powerful collectives representing content owners such as RIAA, ASCAP and BMI, there is no leverage on the side of the Webcasters, and in that case the willing buyer/willing seller standard seems to require the CARP to ratify the results of a single-seller marketplace that is powered by an industry collective.

I mentioned my concern earlier over the recent CARP rate announced for Webcasters which has been set aside for additional review by Mr. Billington, the Librarian of Congress. It is clear to me the purpose of Congress in putting in place the compulsory license for Webcasters in the DMCA was to promote a nascent online industry up to the point it could flourish and add real diversity to the way the consumers get content delivered. But if the mechanism we have established sets rates that would be detrimental to that goal, do we have a responsibility to reexamine the results? I think the answer is yes when Congress's expressed intent is violated. Such actions are not unprecedented. In fact, we did as much fairly recently when we deemed that the CARP for satellite broadcasting set a rate that was too high for satellite television distributors and took actions to overturn the rate.

I know this will be unpopular with some in this room: There ought to be an acknowledgment today that whatever structure or process which we have for CARPs now or in the future, if the results produced are expressly against the intent of Congress and this Committee in establishing a compulsory license in the first place, then this Committee and Congress have a right and a duty to consider actions that might overturn such results.

I thank the Chairman and look forward to hearing the witnesses discuss how we might improve the CARP process and structure so as to get results that are more consistent with Congress's goals and stated intent. Thank you.

Mr. COBLE. I failed to mention this earlier, folks, but I want to make this clear. It is not my intent for the purpose of this hearing to influence the Copyright Office or the Librarian in their deliberations regarding the Webcasting CARP or for that matter to reverse decisions on previous CARPs. Rather, it is my hope that the Subcommittee is simply trying to determine if the current structure and performance of CARPs are fair and sound, and if not, what changes or amendments should be forthcoming.

You all bear with me each time I do this. I apologize for the lengthy introductions, but for the benefit of the uninformed in who don't know the backgrounds of our witnesses, I think you need to.

Our first witness is Michael J. Remington, who is a partner in the law firm of Drinker, Biddle & Reath, where he specializes in intellectual property law, tort reform, government relations and lobbying. Prior to entering private practice, Mr. Remington held high-level positions in the three branches of the Federal Government. Most impressively, for a total of 13 years he was chief counsel to our Subcommittee, most impressively to us. We guard this very jealously, Mike, as you know.

In the judicial branch Mr. Remington served as a law clerk to the U.S. District Judge John W. Reynolds and Deputy Legislative Affairs Officer to the Judicial Conference of the United States under Chief Justice Warren Burger. In the executive branch he was a prosecutor in the Criminal Division of the U.S. Department of Justice, where he specialized in criminal appeals.

A former Fulbright scholar in Paris, and a Peace Corps volunteer in Africa, Mr. Remington is a graduate of the University of Wisconsin, where he received his law degree in 1973 and was admitted to practice in the State of Wisconsin and the District of Columbia.

Our next witness is Mr. Robert Garrett, who is a partner in the law firm of Arnold & Porter. Mr. Garrett has focused on intellectual property and telecommunications matters since joining Arnold & Porter in 1977. He has practiced extensively before the Federal Communications Commission, the Copyright Office, the Copyright Royalty Tribunal, the Copyright Arbitration Royalty Panels and the Federal courts. He has represented sports leagues, the recording industry, municipal and foreign governments, programming producers and networks, and others in litigation, arbitration and administrative proceedings.

Prior to joining Arnold & Porter, Mr. Garrett served as a law clerk to Justice John Paul Stevens, who was then a judge of the U.S. Court of Appeals for the Seventh Circuit, and as an assistant to the General Counsel Office of the Secretary of the Army.

Mr. Garrett earned his J.D. degree from Northwestern University and his B.A. from Northwestern. Mr. Garrett is admitted to practice in the States of Illinois and the District of Columbia.

Our next witness is Mr. R. Bruce Rich, who is with the law firm of Weil, Gotschal & Manges. He is a nationally recognized expert in intellectual property law, concentrating on issues pertaining to communications, publishing, and cable and commercial broadcasting.

Mr. Rich earned his J.D. from the University of Pennsylvania and is BA magna cum laude from Dartmouth College. Mr. Rich is adjunct professor at New York law school's Media Law Institute.

Our final witness today is the Honorable Marybeth Peters, who is the Register of Copyrights for the United States. Marybeth has served as Acting General Counsel of Copyright Office and as chief of both the Examining and Information and Reference Divisions. She has served as a consultant on copyright law to the World Intellectual Property Organization and authored the General Guide to the Copyright Act of 1976.

Ms. Peters received her undergraduate degree from Rhode Island College and her law degree with honors from the George Washington University Center. She is a member of the bar of the District of Columbia.

Good to have all of you with us, lady and gentlemen. We have written statements from each of you, and I ask at this time unanimous consent to submit them into the record in their entirety.

Now, Marybeth has appeared before us several times, and, Mike, you are familiar with the rule. Folks, as we have previously requested, if you could confine your oral statement to 5 minutes, we don't want to muzzle anyone, but in the interest of time, because we may have a second round of questioning, when you see the red light illuminate brightly into your face, you will know that your 5 minutes have expired. You will not be keel-hauled at that point, but you should wrap up shortly.

Mike, why don't we start with you.

**STATEMENT OF MICHAEL J. REMINGTON, ATTORNEY-AT-LAW
AND PARTNER, DRINKER BIDDLE & REATH, LLP**

Mr. REMINGTON. Thank you, Mr. Chairman.

Mr. Chairman, Mr. Ranking Minority Member, Members of the Subcommittee, I am grateful for the opportunity to testify before you about the subject of CARP structure and process.

Mr. Chairman, there is no greater privilege and prestige than having worked for this Subcommittee. Last night in preparing for this hearing, I was reviewing some past Subcommittee hearings. I read the printed record for a May 1, 1985, hearing on the CRT and the Copyright Office. Mr. Chairman, you and Mr. Berman and Mr. Boucher were Members of the Subcommittee at that time. Mr. Kastemeier set the tone for the hearing, "I have little doubt that the tribunal is in dire need of reform. The Subcommittee has had a classic case of a broken agency on its hands. I do not know whether the agency is broken beyond repair. I certainly hope not." History does indeed repeat itself, as you stated, Mr. Chairman, and as was stated by Mr. Boucher.

I appear on my own behalf as a member of the law firm of Drinker Biddle & Reath. I am authorized to state that my views comport with my principal client, BMI, for which I serve as counsel. This Committee is aware that BMI is a performing right organization representing hundreds of thousands of songwriters, composers and music publishers in the licensing of the public performing right in their musical works.

I am experienced in and familiar with the CARP process and structure. I am also familiar with the CARP's predecessor, the CRT. It is my position and that of BMI that conditions and circumstances relating to the CARP structure and process indicate a clear need for congressional action. Any legislative reform should minimally incorporate first a structure to promote the stability and predictability of results; two, procedures for encouraging settlement and a mechanism for streamlining the resolution of small claims; and three, cost-reduction measures.

First, how to create a structure to promote stability and predictability of results is a difficult problem. Tough choices must be made, and constitutional questions about the location, what branch

of Government, for example, of any new structure must be considered. Any reform should eliminate the ad hoc nature of the current process. I prefer the option of a permanent panel of salaried administrative law judges supported by a professional staff, but would certainly not object to a return of the CRT model. There would be no appeal to the Librarian of Congress. A direct appeal to the D.C. Circuit would be permitted.

Second, Congress should enact a mechanism for streamlining the resolution of small claims. BMI and other music claimants have experienced three such proceedings, two of which I will mention, and Mr. Berman alluded to these in his opening remarks. In the 1992 through 1994 DART distribution proceedings, two pro se individuals were awarded \$11.03 with arbitrator costs of \$12,000. In the 1995 through 1998 distribution proceeding, which resulted in a total award of \$6.06 to the same two individuals, arbitrator costs were in excess of \$21,000; that is almost 3,000 times the amount in controversy. When transaction costs repetitively so greatly exceed the amount of controversy, the CARP system is not an effective dispute resolution mechanism.

As regard to small claims, the Committee should consider three amendments. Specifically you should consider a uniform filing fee analogous to the fee for Federal civil action for all claimants amounts; two, an offer of judgment mechanism analogous to rule 68 of the Federal Rules of Civil Procedure; and three, the elimination of oral hearings.

Third, irrespective of whether Congress legislates these reforms, further cost-reduction measures should be adopted. Congress should require the Copyright Office or any new entity to report cost-deduction information on an annual basis. Moreover, the Office should be forced to cap by regulation the billing rates of the arbitrators if you opt for that system, because hourly rates combined with the number of hours worked could still be too costly. The office should also be empowered to cap on a case-by-case basis the cost of the entire proceeding.

In my written statement I suggested several administrative improvements that would result in further cost reductions.

In conclusion, despite initial optimism about the elimination of the CRT in 1993 and its replacement by the ad hoc CARPs, the new process needs legislative reform. Two former Members of this Subcommittee, both of whom became judges, the Honorable Charles Wiggins and the Honorable George Danielson, often sounded the refrain, and I am sure many of you sound the same refrain, "if it ain't broke, don't fix it." I am sure that both Judge Wiggins and Judge Danielson, and I hope the Members on the dais, would agree that the copyright royalty system is broken.

Mr. Chairman, Members of the Subcommittee, I and my client, BMI, and indeed a larger group of copyright owners look forward to working with you on the reform process. Thank you.

Mr. COBLE. Thank you.

[The prepared statement of Mr. Remington follows:]

PREPARED STATEMENT OF MICHAEL J. REMINGTON

Mr. Chairman, Mr. Ranking Minority Member, and Members of the Subcommittee, I appreciate the opportunity to testify before you on the important subject of "the Copyright Arbitration Royalty Panel ('CARP') structure and process."

The functioning of all institutions of government, including the Copyright Office (the "Office") and the Library of Congress, is critically important. The fact that a governmental operation is funded through user-fees or delegates functions to non-governmental individuals, such as private arbitrators, does not signify a decreased need for legislative oversight. Vigorous program oversight is every bit as important as institutional, agency oversight.

On April 12, 2002, Mr. Chairman, you wrote a letter to interested parties (including myself) requesting thoughts and opinions about the CARP structure process. As a base-line starting point for examination, you further requested a review of a Report of the Register of Copyrights on options to improve the process. *See* Options to Improve Copyright Royalty Rate Setting and Distribution Decision-Making, A Report of the Register of Copyrights (February 23, 1998) ("Register's Report"). You, however, specified that a Register's Report is only a template and that comments need not be restricted to the Report. My statement follows the approach you described in your letter.

I appear on my own behalf but I am also authorized to state that my views comport with those of Broadcast Music, Inc. ("BMI"), for which I serve as Washington, D.C. counsel. In my capacity as an attorney representing BMI, which commenced in 1994, I am experienced in and familiar with the CARP structure and process. I am also familiar with the CARP's predecessor, the Copyright Royalty Tribunal ("CRT").

From 1978 to the present, the U.S. performing right organizations (BMI, the American Society of Composers, Authors and Publishers ("ASCAP") and SESAC, Inc. ("SESAC") [hereinafter "PROs"]) have been active participants in rate and distribution proceedings, first before the CRT and then the ad hoc CARP system that is utilized today. Annually, in the past, the PROs have participated as claimants to cable, satellite and DART royalty funds and, whenever necessary, participate in distribution proceedings. In the past, they have participated in rate-setting proceedings for cable, satellite, non-commercial educational broadcasting, and jukebox royalties. While the PROs have a successful history of settling compulsory license matters prior to litigation, they have occasionally been obliged to litigate distribution and rate controversies. The PROs have experienced three recent CARP royalty-distribution controversies, two in DART and one in cable (within the music category) regarding individual claimants, one section 118 rate-adjustment proceeding between BMI and ASCAP, acting individually, and the public broadcasting industry (the first after twenty years of successful settlements), and another rate-adjustment proceeding between copyright owners and satellite carriers.

For the record, I was a counsel to this Subcommittee for nearly thirteen years. I served as Counsel from 1977 to 1981, Chief Counsel from 1983 until 1991 and Special Counsel from 1991 to 1992. I also previously served as a prosecutor (in the Attorney General's Honors Program) in the U.S. Department of Justice and as Deputy Legislative Affairs Officer in the Administrative Office of the U.S. Courts. I left the committee staff in early 1992 to become Director of the National Commission on Judicial Discipline and Removal ("National Commission") where I served for 18 months; I recently testified before the Subcommittee on "the operations of federal judicial misconduct and recusal statutes." Currently, I am a partner in the law firm of Drinker Biddle & Reath LLP where I am the founding chair of the firm's intellectual property group. I am also an adjunct faculty member at two local-area law schools: Catholic University's Columbus School of Law (where I teach legislation) and George Mason University School of Law (where I teach copyright). Except for BMI's interests, my firm has no other client interests in the matters before the Subcommittee this morning.

As an alumnus of this Subcommittee, I follow its activities very closely. Mr. Chairman, and Mr. Ranking Minority Member, your captaincy of the Subcommittee has been sterling, as has been the leadership of and commitment to vigorous oversight by Chairman Sensenbrenner and the full Committee's Ranking Minority Member, Mr. Conyers. I would be remiss if I did not commend your able staffs.

I. BACKGROUND

Throughout its history, my client, BMI, has participated willingly in facilitating congressional oversight, recognizing that Congress needs to monitor not only how particular copyright laws are being implemented but how government programs are being administered as well. Effective oversight is very useful for government officials responsible for administering programs (such as the Register of Copyrights) because it gives them an opportunity to explain and justify their decisions and priorities; it also gives them the chance to hear the views, including criticisms, of the

public and congressional committees, which control budgets and can rewrite legislation.

I am honored to sit at the witness table with the Register of Copyrights, Marybeth Peters. I know she agrees with the importance of oversight. As we shall see, she and her competent and committed lawyers and staff in the General Counsel's office have a difficult task administering a flawed statute. Furthermore, the role of the Office and that of the CARPs, and the Librarian have in recent years become increasingly more difficult. Congress has created new compulsory licenses in complicated and complex areas, delegating issues of first impression to the Office and the CARPs. As manifested in the recent webcasting proceeding, the responsibility of an initial rate-setting can be much more onerous than a rate adjustment of a previously-established rate.

It is my position that conditions and circumstances relating to the CARP structure and process indicate the need for legislative action. A mere oversight hearing will identify problems, but not resolve them.

Some history is in order. In 1993, Congress replaced the CRT, an independent agency with Presidential-appointed commissioners situated within the legislative branch that was created in the Copyright Revision Act of 1976, with *ad hoc* CARPs within the Library of Congress. See the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (1993). Today, whenever there is a controversy on the distribution of compulsory copyright royalties or the adjustment of copyright royalty rates, the Librarian is authorized to convene a three-person CARP. Administrative responsibilities prior to the declaration of a controversy are assigned to the Copyright Office. I believe that this is the *first* oversight hearing conducted by the Committee specifically on the operations of the CARP structure and process.

In the legislative history that accompanies the Act, this Committee evidenced the view that "*ad hoc* arbitration panels are better suited to handle the functions of the Tribunal. . . . Testimony of witnesses before both Houses on the proposal supports this conclusion." H.R. Rep. No. 103-286, at 11 (1993). In light of clear statutory text and consistent legislative history, one court found that the CARP system was created by Congress and implemented by the Office to facilitate "expeditious and informal settlement of claims at the administrative level and to discourage resort to formal, protracted and costly judicial processes of resolving disputes." *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F. 3d 907, 920 (D.C. Cir. 1998).

Unfortunately, the CARP system has not fulfilled the policy promises of informal, expeditious and inexpensive dispute resolution of royalty controversies. The Copyright Office itself, which sits at the vortex of the CARP system, recognizes that the system has suffered from "major problems." See Register's Report at 11. In retrospect, it was probably an error for the Congress to have abolished the CRT rather than modifying or altering it.

Few dispute that the CARP system has proved to be just the opposite: that is, time-consuming, formal and very expensive. It has not promoted stability and predictability of results. The CARP system does not discourage resort to the costly, formal and protracted process. Settlements are often hard to achieve.

The system should be reformed by Congress, sooner rather than later. Key members of the legislative branch seem to agree. Mr. Chairman, in 1998, shortly after issuance of the Register's Report, you introduced legislation to replace the *ad hoc* CARP system with a permanent Copyright Royalty Adjudication Board composed of full-time chief administrative copyright judges, and such part-time administrative copyright judges as the Librarian upon the recommendation of the Register, finds necessary. See H.R. 3210, 105th Cong., 2d Sess. (1998). Companion legislation was introduced in the Senate by Senators Hatch, Leahy, and Kohl. See S. 1720, 105th Cong., 2d Sess. (1998). Mr. Chairman, on April 12, 2002, you took the further step (described above) of writing a letter to interested parties soliciting views about the CARP structure and process.

In my view, any legislative reforms should minimally incorporate: (1) a structure to promote the stability and predictability of results; (2) procedures for encouraging settlement of small claims and a mechanism for streamlining the resolution of small claims; and (3) cost-reduction measures.

II. CONGRESS SHOULD CREATE A STRUCTURE TO PROMOTE THE STABILITY AND PREDICTABILITY OF RESULTS.

The nature of *ad hoc* arbitration panels inevitably leads to a lack of stability in decision-making and a decrease in the predictability of results, thereby eroding confidence in the process. What to do to reform the process is a difficult problem. Tough choices must be made and constitutional questions about the location (what branch of government) of any new structure must be considered. Any reform should elimi-

nate the *ad hoc* nature of the process either through a standing cadre of administrative copyright judges on salary equipped with a professional staff, a return to the CRT model (with Presidential appointments and advice and consent of the Senate), or appointment of a permanent, salaried administrative copyright judge (with part-time, salaried colleagues) supported by a professional staff. Continuity among decision-makers and a certain degree of institutional memory are essential. As a general proposition, decision-makers should have expertise (or the ability to acquire knowledge through staff) in applicable law, regulations, precedents and subject matter, and in conducting adjudicatory proceedings.

I prefer a replacement of the CARP system. But if the current system is maintained, the pool of potential CARP members should be expanded. And if the pool is expanded—particularly to include qualified non-lawyers—each party should be permitted a specified number of peremptory challenges (to be determined on a case-by-case basis prior to selection) to proposed panel members as is standard practice in other arbitral fora. Such a rule would reduce the potential for prejudice and continue to ensure that panels consist of qualified, impartial members.

The Register's Report sets forth five options for reform. Notwithstanding whatever option is selected by the Congress, the Register recommends that the CARP system should include eleven features. See Register's Report at 11–12. I agree with some of these features, to wit:

- the statutory requirement that CARP panelists have arbitration experience should be deleted;
- the word “adjudicator” can be substituted for “arbitrator” wherever mentioned in the law;
- individuals not associated with an arbitration association, but who meet the qualifications, should be permitted to put their own names into nomination;
- the Office should be statutorily authorized to cap, by regulation, the billing rate of arbitrators; and
- authorize the assessment of CARP costs on any party that fails to negotiate a settlement in good faith (akin to Rule 68, Federal Rules of Civil Procedure).

All of these items address the salutary goals of promoting stability, expeditious decision-making, and decreased costs. They, however, may not go far enough. For example, cost-caps on the billing rates of arbitrators would not, standing alone, cap the overall costs of a proceeding. The Office's authority to cap costs should be broadened to cover the entire proceeding.

Three of the Register's other recommended features are not objectionable:

- Extend the current time limit from 180 days to 270 days per proceeding;
- Extend the current time limit to review CARP decisions from 60 days to 90 days; and
- Provide by law a procedure to petition the CARP for reconsideration of its decision.

Nevertheless, careful heed should be taken to avoid the unintended consequences of delaying expeditious decision-making and escalating costs.

Stated differently, a minimalist approach to CARP reform, even if the Register's features were implemented, would, in my opinion, still be doomed to failure. More radical surgery is required. That radical surgery should remedy two structural problems in the current statute.

First, the Copyright Office is placed in the schizophrenic situation of being the intake agency (a clerk of court, of sorts) and the appellate court (as advisor to the Librarian) for CARP decisions. Such dual responsibility is extremely rare in the United States and the Office clearly has struggled with balancing its two roles. For example, in fear of tainting future appellate decisions, the Office often bucks threshold questions to a CARP, refusing to decide them at the stage of the process when they should be decided. Congress should either eliminate the Office's intake role or remove its appellate responsibilities.

Second, in the U.S. justice system, minimal standards of due process dictate one appeal of right, with a second discretionary appeal (as a safety check on the initial appeal). This was the practice under the CRT's statute, and it basically is the practice adopted by the caselaw of the D.C. Circuit (which is the appropriate circuit for judicial review of copyright arbitration royalty appeals). After determining the appellate role of the Librarian of Congress (and the advisory role of the Copyright Office), this Committee should follow the justice-system standards that have been used over the years for the U.S. magistrate, bankruptcy court, and Article I court systems.

III. CONGRESS SHOULD ENACT PROCEDURES FOR ENCOURAGING SETTLEMENT OF SMALL CLAIMS, AND A MECHANISM FOR STREAMLINING THE RESOLUTION OF SMALL CLAIMS.

The statutory mandate prescribing allocation of CARP costs in a “distribution proceeding in proportion to the royalty funds awarded to each party” has had the unfortunate effect of allowing those with small claims to inflate their claims and force litigation at the expense of other parties. Abuses of the process have occurred and the Office has consistently found that it lacks authority either to prevent these abuses or to expedite decision-making. Arbitrator costs alone far exceed the amount-in-controversy. For example;

- the costs of the arbitrators in the 1992–94 Digital Audio Recording Technology (“DART”) distribution proceeding, which resulted in an award of \$11.03 to two individual claimants were more than \$12,000 (more than one thousand times the amount-in-controversy);
- the costs of the arbitrators in the 1995–98 DART distribution proceeding, which resulted in a total award of \$6.06 to the same two individual claimants (\$5.04 to one and \$1.02 to the second) were in excess of \$21,000 (almost three thousand times the amount-in-controversy); and
- in the 1991 Cable Distribution Proceeding (Phase II), the arbitrators awarded \$63.74 to an individual claimant, yet the costs of the arbitrators were more than five hundred times that amount.

To make it worse from a cost-perspective, all of these matters, after final disposition by the Librarian of Congress, were appealed to the U.S. Court of Appeals for the District of Columbia. The appeal in the second matter was withdrawn; the appeals in the first and third matters necessitated the preparation of a record on appeal and the submission of briefs by the U.S. Department of Justice and the parties. Both appeals were summarily denied. One went even farther because it was subjected to a petition for certiorari in the U.S. Supreme Court and a petition for rehearing before the Court. And, all three proceedings were “paper” proceedings before the respective CARPs designed to reduce arbitrator costs. The PROs were not the only institutional parties forced to bear these costs. Additionally, it should be noted that said costs do not include outside attorneys’ fees, in-house attorneys’ fees and staff time, Copyright Office cost deductions from the funds and costs to the U.S. Department of Justice. In the two DART proceedings, the PROs were part of a “settling party” team that also included the National Music Publishers’ Association, the Songwriters Guild of America, the Gospel Music Coalition, and Copyright Management, Inc., with costs borne by their respective individual members and affiliates. In the cable proceeding, the PROs acted together.

When transaction costs so greatly exceed the amount-in-controversy, the CARP system is not an efficient and effective dispute-resolution device. In all three proceedings, the individuals rejected repeated attempts to settle for reasonable amounts. Neither the Office nor the arbitrators paid more than lipservice to settlement—neither took an active role (similar to that performed by U.S. district court judges or U.S. magistrate judges) to encourage settlements. Claimants with small claims have been able to use existing CARP rules to prolong CARP proceedings and derail settlements at virtually no cost to themselves, but at substantial cost to all other interested parties. In these circumstances, it is abundantly clear that the CARP system has not met the expectations of its congressional sponsors or the parties who are compelled to litigate their royalty distribution disputes within the confines of this system.

Several of the reforms (particularly those related to small claims) discussed in the Register’s Report would foster the goal of settling claims at the administrative level, minimizing costs and encouraging expeditious and efficient resolution of disputes. To achieve these goals, statutory changes are necessary. Otherwise, the Register would already have implemented the proposed changes as regulations.

The Committee should consider three amendments to the Copyright Act to cure statutory defects and misuses of the rules, while at the same time giving due recognition to the rights of those with small, albeit valid, claims to participate in CARP proceedings. The intent of these proposals is to create an incentive for all parties to engage in meaningful settlement discussions prior to commencement of CARP proceedings. The amendments are not designed to injure or threaten unfairly small claimants. Specifically, I propose that there be: (1) a uniform filing fee (analogous to the filing fee for a federal civil action) for all claimants; (2) an offer of judgment mechanism analogous to Rule 68 of the Federal Rules of Civil Procedure applicable to small claims; and (3) the elimination of oral hearings in small claims proceedings.

A. *Establishment of a Filing Fee.* I propose that all parties in a copyright arbitration royalty distribution or rate proceeding pay a filing fee at the time of filing a

notice of intent to participate. The filing fee would be identical to that required for all litigants filing civil actions in federal district courts (currently \$150.00). *See* 28 U.S.C. § 1914. Because the filing fee would be pegged to a notice of intent to participate, a single fee would be paid for each notice filed. The Office now requires a single notice of intent for both Phase I and II proceedings with respect to cable and satellite distributions; therefore, only one filing fee would be paid for each proceeding.

Establishment of a filing fee would ensure that all parties share a base-level burden of the costs of the proceeding. The filing fee would be paid before the commencement of a proceeding because such filing fee could very well exceed the ultimate amount of any award, as it would have in the case of the DART and cable proceedings discussed above.

Moreover, payment of a filing fee—which would be added to the relevant fund or subfund—could help defray the administrative costs incurred by the Office in connection with these proceedings. As stated above, the administrative costs of some proceedings are disproportionately high compared with the funds in controversy. A filing fee would result in a more reasonable relationship between administrative costs and the amount of the funds in controversy.

Finally, payment of a reasonable filing fee by all parties who file a notice of intent to participate in a royalty distribution or rate adjustment proceeding would discourage the filing of frivolous claims and create an incentive for all parties, regardless of the size of their claims, to engage, early on, in meaningful settlement discussions. This is particularly true with regard to those asserting small claims, who have little or no incentive to engage in significant settlement discussions under the current statute and CARP regulations. I would be happy to assist in the drafting process.

B. Offers of Judgment to Small Claimants. An offer of judgment procedure—similar to that found in Rule 68 of the Federal Rules of Civil Procedure—to encourage settlements and to avoid protracted arbitration proceedings should be enacted. Such a procedure would apply only in small claims matters where the amount-in-controversy is \$15,000 or less (per annual fund) and where the costs of the arbitration may well significantly exceed the amount-in-controversy.

Rule 68 has the force of statutory law, having been proposed by the U.S. Supreme Court and permitted to go into effect by the Congress. Application of its concepts to small claims in copyright arbitration distribution proceedings would encourage the settlement of small claims, and would promote the imposition of sanctions in instances of abuse. I would be pleased to assist in the drafting process.

C. Elimination of Oral Hearings in Small Claims Proceedings. Cost savings were achieved in the three small claims proceedings mentioned above because they were all adjudicated on the basis of paper (not oral) proceedings. But unnecessary costs were incurred due to the current unwillingness of the Copyright Office (or lack of authority therein) to grant motions to proceed on paper documents, deferring this decision to an as yet unconstituted CARP where the motion is later subjected to oral arguments. Cases involving small claims (defined statutorily) should automatically be subjected to a paper proceeding. In matters where no genuine issues of material fact exist, the Office should be statutorily authorized to make a summary judgment decision based on facts not in dispute, applicable law and precedents, before the CARP is empanelled.

IV. CONGRESS SHOULD ENACT OTHER COST-REDUCTION MEASURES.

Creation of a permanent structure with salaried government employees, along with a small claims process, would inevitably save substantial costs in comparison to the current CARP system with no decrease in the quality of decision-making. Irrespective of whether Congress legislates these reforms, further cost-reduction measures can and should be adopted.

Under current law, the Library of Congress and the Office may deduct reasonable costs from royalty fees deposited or collected. Such deductions are generally made before royalties are distributed to any copyright claimants. *See* 17 U.S.C. § 802(h). These deductions, which are significant, are not readily ascertainable by the public or to the responsible appropriation and authorization committees in the legislative branch. All that is known is that costs are paid by copyright owners. The fact that no costs are at taxpayer expense does not signify the absence of a need for fiscal accountability. As in the business world, the system would benefit from transparent, sound and consistent accounting practices. Questions could be answered: Are inquiries posed to the Copyright Office by the general public deducted from royalty funds? Are congressional inquiries? Are user costs increasing or decreasing? Does the Office have a mechanism to prevent abuses on its time and resources? Let me make it clear that there is no evidence of waste or abuse in the Office's accounting practices.

However, if Congress required that the Office (or any new entity) report cost-deduction information on an annual basis to the House and Senate Judiciary Committees, good government (including cost savings) would be served. Through your oversight power, the House and Senate Judiciary Committees could then monitor the costs being shouldered by authors and copyright owners. Without cost data, your ability to assess the functioning of the CARP process is hobbled. Copyright owners should know how costly is a system for which they pay. The administrative head of the CARP process should know how important are fiscal responsibilities.

Moreover, as discussed above, to further reduce costs, the Office should be authorized to cap, by regulation, the billing rates of arbitrators. Currently, there is a wide disparity in these rates. The Office has not allowed arbitrators to be stricken on the basis of high-hourly rates. Authorization of a cap on rates, if responsibly implemented by the Office, could solve this problem. Because hourly rates (combined with the number of hours worked) could still be too costly, the Office should also be empowered to cap on a case-by-case basis the costs of an entire proceeding.

V. ADMINISTRATIVE IMPROVEMENTS COULD BE IMPLEMENTED.

Several improvements could ordinarily be made to the CARP process through amendments to Office rules and regulations. As a group for the past five years, copyright owners have made numerous proposals to the Office that have not been implemented. The Committee should either consider enactment of these proposals as legislative changes or strongly encourage the Office to take immediate regulatory action (within a designated time-period with a report back to the Congress):

A. *Public Records.* Contemporaneous notice of CARP decisions through publication in the Federal Register is necessary. The Office has made laudable improvements to its website; these improvements should be expanded to the CARP process.

B. *Settlement Period.* A formal settlement time-period (with adequate time and notice to the parties of the names and addresses or other participants) before the filing of written direct cases should be required.

C. *Precedential Rulings.* Rulings of the Librarian and the CARPs are to be accorded precedential effect in subsequent proceedings. The Office should establish a repository readily available to the public electronically and at the Library of Congress, which collects all rulings of the Librarian and the CARPs.

D. *Summary Judgment Authority.* If there are no genuine issues of material fact in dispute, the Office should be entitled to make a decision disposing of the matter prior to an adjudication by a CARP.

A final word about judicial education. The Office should avail itself of judicial education programs that are provided to administrators and judges in the judicial branch of government, and ALJs in the executive branch. Admittedly, it is rare for legislative branch officials to cross-fertilize with their counterparts in the other two branches. But, I am confident that a letter from you, Mr. Chairman, to the Director of the Federal Judicial Center, for example, would suffice to admit Copyright Office officials to appropriate educational sessions at the Center.

CONCLUSION

Mr. Chairman and Mr. Ranking Member, I again commend you for your leadership on intellectual property issues, and copyright law in general, including the process in which certain copyright royalties are distributed and royalty rates established. Despite initial optimism after the elimination of the CRT in 1993 and its replacement by the *ad hoc* CARPs, the new process has proven to be flawed and in dire need of legislative improvements. Two former Members of this Subcommittee, both of whom became judges (the Honorable Charles Wiggins and the Honorable George Danielson) often sounded the refrain: "If it ain't broke, don't fix it." I am sure that both would conclude, after these hearings, that the CARP system is broken. In sum, Congress should:

- replace the *ad hoc* nature of the CARP process with a permanent panel of salaried administrative law judges supported by a professional staff;
- create a small claims process;
- further reduce costs and add fiscal accountability to the process;
- promote various administrative improvements; and
- continue to exercise vigorous oversight.

I look forward to working with you on effectuating these improvements.

Mr. COBLE. Mr. Garrett.

**STATEMENT OF ROBERT A. GARRETT, ATTORNEY-AT-LAW AND
PARTNER, ARNOLD & PORTER**

Mr. GARRETT. Mr. Chairman, Members of the Subcommittee, let me thank you for inviting me to testify this afternoon. It is an honor to appear before you and the Subcommittee as well as to be on a panel with the Register of Copyrights and my colleagues.

Let me summarize my statement with three points. First I believe that all parties here share common objectives, and they want a system that produces consistent results, they want a system that produces credible results, but I believe most importantly they also want a system that produces results at an affordable cost. This is a concern that everyone shares regardless of whether it is a copyright owner or a copyright user, a small party or a large party.

The existing system, I believe, is too costly. It is a system that is not affordable for all parties. As you consider the different options and different alternatives before you, I ask that you put foremost in your consideration issues of cost, trying to make this process one that is more affordable, one that is less costly to all of the participants.

Secondly, Mr. Chairman, you have wisely entitled these hearings as CARP structure and process. I believe the terms "structure" and "process" encompass the principal issues that are before you. But in my view, the most important issues here are those that relate to structure and not to process, and the changes that should be made here are changes that go to process and not to structure.

When these issues have arisen in the past, the primary focus has been on structure and trying to determine which decisionmaking body is the best and most suited for resolving copyright royalty allocations or copyright royalty ratemaking. The thought is that if you simply get the right body, the right decisionmaking body, that the problems are going to go away, and I don't believe that that is the case, Mr. Chairman. I believe that the problems here, particularly the problems of cost, are ones that relate more to process. I believe that your specific focus here should be on trying to improve that process.

Thirdly, there are several different process issues that I believe should be addressed. My written statement highlights two of them, two that I consider to be the most important at least. These are the issues that concern the system of evidentiary hearings as well as discovery before the existing CARPs. I think without a doubt the two principal cost concerns, the two principal costs of the current system, are the evidentiary hearings and discovery. I believe that one should either eliminate or severely restrict the scope of the evidentiary hearings. They are not necessary, they are very costly, and I don't think that they produce markedly different results from a paper proceeding. It is frequently done by administrative agencies in the United States using a paper record, and I would recommend that example as well here.

With respect to discovery, I believe that that, too, should be eliminated. We have a very different form of discovery in the CARP proceedings, the hybrid form, and it is not the Federal Rules of Civil Procedure type of discovery. It is a limited form of discovery, which is nevertheless one that is very costly, one that breeds uncertainty, and I think that the results of the cases, the results of

the different proceedings before the CARPs, would not be materially different if one did eliminate discovery.

Let me just say in conclusion, Mr. Chairman, that there are a number of difficult issues here. I believe that you have done exactly the right thing by asking those who are affected by this process to give their views. I know that my colleagues have views that some—that they probably share generally, and some have different views. And I look forward to working with you and the Subcommittee in resolving these different issues.

Mr. COBLE. Thank you, Mr. Garrett.

[The prepared statement of Mr. Garrett follows:]

PREPARED STATEMENT OF ROBERT ALAN GARRETT

Mr. Chairman and members of the Subcommittee, my name is Bob Garrett and I am a partner in the law firm of Arnold & Porter in Washington, D.C. Thank you for inviting me to testify as part of your oversight hearing on “The CARP (Copyright Arbitration Royalty Panel) Structure and Process.” During the past twenty-five years, I have represented professional and collegiate sports interests and the recording industry in several proceedings before CARPs and their predecessor, the Copyright Royalty Tribunal (“CRT”). However, I am not testifying today on behalf of these clients. The views I express are my own and do not necessarily reflect the views of any other party. I am here to offer my perspective, based upon my experience, concerning the CARP structure and process. Before I do so, I believe it is useful to discuss briefly (1) the nature and history of the CARP system; and (2) the policy objectives that you may wish to consider in assessing that system.

1. NATURE AND HISTORY OF THE CARP SYSTEM

Twenty years ago, in November of 1982, the CRT issued a decision in which it set the royalty rate that cable systems must pay when they retransmit certain copyrighted television programming. Ted Turner of Turner Broadcasting, a vocal critic of the CRT and its rate decision, testified before Congress that “this CRT decision puts us out of business” because the rate is too high; “they have knocked us out, and I didn’t even go talk to them because I didn’t figure that they would put us out.” Cable Copyright and Signal Carriage Act of 1982: Joint Hearing on H.R. 5949 Before the Comm. on Commerce, Science, and Transp. and the Comm. on the Judiciary, 97th Cong. 114 (1982). Senator Long of Louisiana interjected, “Please excuse me, but who is this CRT?” Mr. Turner responded:

That is a good question. . . . I had never met anybody on it. It is a group. I knew they existed, but I didn’t know they did anything. . . . [Then they released their decision] on my 44th birthday, 2 ° weeks ago, and I was in shock.

Id. at 114–15.

More recently, the question being asked is, “Who is this CARP?” The simple answer is that nine years ago, in the Copyright Royalty Tribunal Reform Act of 1993, Congress chose to replace the CRT with a system that relies upon multiple ad hoc panels of arbitrators called “CARPs”—the acronym for “Copyright Arbitration Royalty Panels.” The purpose of CARPs is twofold: (1) to determine royalty rates and terms for the use of copyrighted works pursuant to compulsory licenses in Sections 111, 112, 114, 115, 116, 118 and 119 of the Copyright Act; and (2) to allocate among copyright owners compulsory licensing royalties collected pursuant to Sections 111, 116, 119 and 1003 of the Copyright Act. As you know, Mr. Chairman, these compulsory or “statutory” licensing provisions generally compel copyright owners to license certain uses of their works to different parties who pay the prescribed royalty and comply with other statutory and regulatory conditions.

Each CARP consists of three private attorneys who are nominated by professional arbitration associations and appointed by the Librarian of Congress after consultation with the Register of Copyrights and input from the affected parties. A CARP normally conducts a trial-like evidentiary hearing in which interested parties present evidence and argument and cross-examine witnesses. These hearings can be quite extensive; for example, the most recent CARP, that involving the royalty to be paid by webcasters when they transmit sound recordings over the Internet, consumed 40 days of evidentiary hearings and generated almost 15,000 pages of transcript as well as thousands of additional pages of written testimony and exhibits. Following the evidentiary hearings, the CARP issues a written report in which it

recommends, based upon the record before it and relevant precedent, a royalty rate or royalty allocation. The Register of Copyrights reviews the CARP's report and makes a recommendation as to whether the Librarian of Congress should adopt or should modify that report. If the Librarian rejects the CARP report in whole or in part, he must reach his own decision with the advice of the Register. Parties may seek judicial review of the Librarian's decision in the U.S. Court of Appeals for the District of Columbia Circuit. *See generally* 17 U.S.C. §§ 801 & 802.

As long as compulsory licenses exist, it will be necessary for either Congress or some other body, like a CARP, to determine the amount of compulsory licensing royalties that copyright owners are entitled to receive. There is, of course, nothing novel about this concept. The 1710 Statute of Anne—from which copyright law in the United States is a direct descendant—authorized several different government officials, including the Archbishop of Canterbury and the Lord Keeper of the Great Seal, to resolve disputes over whether the cost of a particular book was “too high and unreasonable” and to set prices that “according to the best of their judgments . . . shall seem just and reasonable.” 8 Anne C. 19, §4 (1710), *reprinted in* 8 Nimmer on Copyright, App. 7-7 to 7-9 (2002). Likewise, the Great State of North Carolina, following the Articles of Confederation, empowered local courts to determine the price of copyrighted books, maps and charts—in cases where the author or publisher “set an unreasonable price on the same, regard being had to the probable labour, expence, and risk of such author and publisher.” Laws of the State of North Carolina, ch. 26, sec. II (1785), *reprinted in* 8 Nimmer on Copyright, App. 7-33 (2002). *See generally* Korman & Koenigsberg, *The First Proceeding Before the Copyright Royalty Tribunal: ASCAP and the Public Broadcasters*, 1 Comm. & the Law 15, 17-18 (1979). The CARP system may thus be viewed as merely the most current mechanism by which government-set prices replace market-set prices for the right to use intellectual property in the United States.

2. POLICY OBJECTIVES

Over the years there has been considerable debate concerning the appropriate structure and process for setting copyright royalty rates and allocating copyright royalties. As discussed below, that debate has produced a number of different ideas as to the most appropriate structure and process. It also has identified the principal policy objectives that the affected parties believe should be achieved in determining that structure and process. Briefly-stated, there are three such objectives—those that relate to Cost, to Consistency and to Credibility:

- *Cost*—copyright owners and copyright users alike are understandably concerned about the costs of rate-setting and royalty allocation proceedings. These costs can be quite substantial. They take the form of, among other things, attorney fees, expert witness fees, consultant fees, arbitrator fees, Copyright Office costs, out-of-pocket expenses and time lost from running businesses and producing copyrighted works. These costs have the effect of both decreasing the compulsory licensing royalties that copyright owners receive and increasing the amounts that copyright users must pay for the compulsory license—a result that is inherently antithetical to a principal purpose of compulsory licensing, i.e., the reduction of transaction costs. The parties affected by compulsory licensing seek a system of ratemaking and royalty allocation that minimizes their costs as much as possible.
- *Consistency*—the parties also seek a system that fosters predictability and continuity. It is generally accepted that voluntary settlements among affected parties to royalty disputes are preferable to having those disputes resolved through litigation and government intervention. Procedural and substantive consistency are necessary to provide the parties with the greatest possible degree of certainty in assessing litigation risks and considering prospects for settlement. Such consistency promotes settlement and reduces cost.
- *Credibility*—the parties also seek a system with a decision-making process that they believe is legitimate; they want to feel that the decision-makers understand the issues involved in the cases being decided and that those cases are decided in a timely and professional manner. The objective here is to ensure that the system is not only fair and reasonable, but that the affected parties also perceive it as fair and reasonable.

While there may be general agreement as to the principal policy objectives, the parties do not always agree on whether or to what extent particular structures or procedures achieve those objectives. Moreover, it is not possible to achieve all these objectives equally in determining the most appropriate structure and process of copyright rate-setting and royalty allocation. When choosing among particular struc-

tural and procedural alternatives, it may be necessary to make trade-offs. A particular procedure, such as requiring full-blown federal court discovery, may enhance at least perceptions as to the credibility of the decision-making process. But that procedure may also come at a financial cost and a time-delay that is unacceptable to all or some of the parties. Each party, and ultimately the Copyright Office and Congress, must prioritize the above objectives in assessing each of the relevant structural and process options.

3. STRUCTURAL OPTIONS

When Parliament enacted the Statute of Anne in 1710, it apparently had a difficult time deciding who should be responsible for resolving disputes over the price of copyrighted books. Accordingly, it gave that responsibility to several different persons. Individuals who thought the market price was too high could choose to seek relief (1) in a judicial forum (from the Chancellor and the Lord Chief Justices); (2) in an administrative or quasi-administrative forum (from the Lord Chief Baron of the Exchequer, the Archbishop of Canterbury and the Lord Keeper of the Great Seal of Britain); or (3) from private bodies with official sanction (Vice-Chancellors of the Universities). See 8 Anne C. 19, §4 (1710); *Korman & Koenigsberg, supra* at 18. There also has been no shortage of ideas here in the United States as to the most appropriate structure for setting compulsory licensing royalty rates and allocating compulsory licensing royalties.

a. Proposals Leading to CRT Creation

The CRT had its origins in a 1969 Senate bill that comprehensively revised the Copyright Act of 1909 and provided for various compulsory licenses. That bill entrusted royalty ratemaking and distribution responsibilities to a body it named the “Copyright Royalty Tribunal.” The Tribunal, as envisioned by the Senate bill, was very different than the CRT that eventually emerged in the Copyright Act of 1976. Under the Senate version, the Tribunal consisted of ad hoc arbitration panels created by the Register of Copyrights from lists of arbitrators supplied by the American Arbitration Association or similar organizations—in short, a structure similar to the current CARP system. The Senate ultimately approved this structure, along with provisions that subjected Tribunal rate decisions to Congressional veto and limited judicial review of Tribunal decisions to cases of corruption, fraud, partiality or other prejudicial misconduct. See CRT Reform and Compulsory Licenses, 1985: Hearings on H.R. 2752 and H.R. 2784 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong. 84–85 (1985) (Statement of Donald Curran, Associate Librarian of Congress and Acting Register of Copyrights) (“Curran Statement”).

The House changed that structure, in part out of concerns over whether it was constitutional for an employee in the Legislative Branch, the Register, to appoint Tribunal members who perform executive branch functions. That concern was heightened by the then recent decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). There the Supreme Court held that persons exercising executive branch functions must be appointed in accordance with Article II, Section 2, Clause 2 of the Constitution, which requires appointments by the President, the courts or “heads of departments.”

The copyright revision bill that the House passed in 1976 established a permanent “Copyright Royalty Commission,” consisting of three members appointed by the President for staggered terms of five years. The House bill also expanded judicial review, and it eliminated the legislative veto of the Commission’s rate determinations. According to the House Report accompanying the copyright revision legislation, such determinations “were not appropriate subjects for regular review by Congress.” H. Rep. No. 94–1476 at 179 (1976).

The conferees generally acceded to the House version—except that they renamed the Commission the “Copyright Royalty Tribunal,” and they expanded the number of commissioners to five appointed by the President (and confirmed by the Senate) for staggered seven-year terms. (The number of CRT commissioners was reduced to three in 1990). The CRT became an independent agency in the legislative branch that received administrative support from the Library of Congress but had its decisions reviewed directly by the federal court of appeals. See Conf. Rep. No. 94–1733 at 81–82 (1976).

b. Proposals Leading to CRT Abolition

Although Congress considered significantly different structures for royalty rate setting and royalty allocation before creating the CRT in the 1976 Act, the affected parties apparently paid little attention to this issue. Tom Brennan, the first CRT Chairman (who also served as chief counsel to the Senate Subcommittee on Patents, Trademarks and Copyrights during its consideration of that legislation) observed:

Seldom has an entirely new agency of the federal government been created with so little study, and such limited input and analysis by the private interests most directly involved.

Brennan, *The Copyright Royalty Tribunal—An American Perspective*, 34 J. Copyright Soc’y 148 (1986). In the years following its creation, however, the CRT received considerably more attention. Upset by a 1982 CRT rate decision, the cable industry called for the abolition of the CRT. Certain CRT commissioners, as they were leaving the Tribunal, also called for its abolition. Concerns were expressed over whether the workload required several full-time commissioners and whether political appointees, particularly those with no copyright or communications industry experience, were best qualified for making decisions as to copyright rate determinations and royalty distributions.

During the 1980’s and early 1990’s Congress considered a host of different and generally conflicting proposals as to the structure that should be established for royalty rate-setting and distribution. These proposals included the following—

- Eliminate the compulsory licenses and allow market negotiations, thereby obviating the need for any ratesetting and royalty allocation mechanism;
- Place the CRT in the Copyright Office;
- Transfer the CRT’s responsibilities to the Copyright Office;
- Place the CRT in the Department of Commerce and vest authority to appoint Tribunal members in the Secretary of Commerce;
- Place the CRT in a regulatory agency such as the FCC or FTC, which would assign fact-finding responsibilities to ALJs;
- Vest authority to appoint CRT members in a federal court;
- Reconstitute the CRT as an independent agency in the executive, legislative or judicial branch;
- Reconstitute the CRT as a part-time commission of experts in communications or copyright law who oversee ad hoc arbitration panels;
- Transfer the CRT’s responsibilities to a federal court or to a newly created copyright court, which could make use of special masters (similar to the ASCAP and BMI rate courts);
- Adopt a system of private arbitration (similar to that in some European countries) where collective bargaining units would have the authority to bind all affected parties, with judicial or administrative review or compulsory arbitration only where the bargaining units are unable to agree;
- Implement a 1981 GAO suggestion of making CRT membership part-time, with Presidentially-appointed members meeting at the call of the Register of Copyrights;
- Retain the CRT with only one full-time commissioner and two part-time commissioners who would utilize ALJs to conduct fact-finding and to render initial decisions;
- Set royalty rates in the law with an objective self-adjusting mechanism;
- Require private arbitration under the rules of the American Arbitration Association before arbitrators selected for a term of three years; and
- Transfer the CRT’s responsibilities to panels of ALJs, appointed for terms of several years, that would operate within the Copyright Office.

In 1993 Congress concluded that there was insufficient work to justify a full-time agency. See H.R. Rep. No. 103–286, at 9 (1993). It thus enacted the Copyright Royalty Tribunal Reform Act of 1993, which abolished the CRT and replaced it with the CARP system. As discussed above, the CARP system is comparable to the one that the Senate had originally approved during its consideration of the Copyright Act of 1976. One major difference was that the 1993 law contemplated review of CARP decisions by the Register and Librarian prior to judicial review, while the Senate version, as also noted above, provided for legislative veto and limited judicial review.

c. Proposals For CARP Reform

The debate over the proper structure for royalty rate-setting and distribution did not end with the Copyright Royalty Tribunal Reform Act of 1993. In 1996 Senator Hatch introduced a bill that would have replaced the CARPs with single ALJs in a newly-created U.S. Intellectual Property Organization (“USIPO”). The USIPO would have consisted of the Copyright Office and the Patent and Trademark Office.

Under Senator Hatch's bill, an ALJ's decision could be appealed to the Commissioner of the USIPO and then to the U.S. Court of Appeals for the Federal Circuit.

In mid-1997 a CARP recommended a royalty rate that the satellite carrier industry considered too high. Accordingly, the satellite carriers urged Congress to reform the CARP process. In early 1998 the Copyright Office presented Congress with five options for doing so. Those options, which were comparable to some of the options that had been discussed during the debates over CRT reform, were:

- (1) Retain the CARPs but make certain improvements in the CARP system;
- (2) Replace the CARPs with ALJs;
- (3) Replace the CARPs with non-ALJ presiding judges; replace the CARPs with a Copyright Royalty Adjudication Board ("CRAB"); and replace the CARPs with a new, independent regulatory agency.

See U.S. Copyright Office, *Options to Improve Copyright Royalty Rate Setting And Distribution Decision-Making* (Feb. 23, 1998) ("1998 Register Report"); *Hearing Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 14 (1998) (Prepared Statement of Hon. Marybeth Peters, Register of Copyrights) ("1998 Register Statement").

The Register concluded that the CARP system (a) is too expensive because of the high costs of the arbitrators; (b) lacks stability and predictability of results; and (c) places a burden on the Copyright Office and the Library of Congress. 1998 Register Report at ii. "Our experience with this system over the past few years," said the Register, "has persuaded us that it is burdensome, costly, and inefficient." 1998 Register Statement at 14. The Register thus recommended that Congress replace the CARPs with CRABs.

The CRAB approach was embodied in your bill, Mr. Chairman, HR 3210, which you introduced on February 12, 1998; that bill was reported favorably by this Subcommittee on March 18, 1998. HR 3210 would have established a Copyright Royalty Adjudication Board ("CRAB") within the Copyright Office. The CRAB would consist of one full-time chief administrative copyright judge ("ACJ") and two to four part-time ACJs, all of whom would be appointed by the Librarian upon the recommendation of the Register. The chief ACJ, who would be appointed for a term of five years, would be an attorney with experience in handling administrative hearings or court trials and demonstrated knowledge of copyright law. The other ACJs, who would be appointed for different terms of up to five years, would need expertise in the business and economics of industries affected by the CRAB.

Under HR 3210, the CRABs would conduct proceedings in accordance with rules to be adopted by the Librarian upon the recommendation of the Register and in consultation with the CRAB. The final decisions of the CRAB would be subject to review by the U.S. Court of Appeals for the Federal Circuit, rather than (as is the case with the CARPs) review by the Register, Librarian and U.S. Court of Appeals for the District of Columbia Circuit. The Register, however, would have the right to submit her position to the CRAB on any matter before the CRAB, as well as to seek reconsideration of any initial decision rendered by the CRAB.

4. PROCESS PROPOSALS

As the above suggests, there have been a number of thoughtful and creative proposals over the years concerning the most appropriate structure for copyright royalty ratemaking and allocation. Each of the proposed structures has its advantages and disadvantages, as well as its supporters and detractors. While reasonable arguments can be made for choosing one structure over another, I do not believe that simply changing the structure, once again, will effectively deal with the problems that exist in the current CARP system; nor will such a change achieve the objectives that the affected parties wish to achieve in a system of copyright royalty ratemaking and allocation. The real focus, I believe, should be on process rather than structure. Simply moving from CARPs to CRABs or some other structure will not address the very serious cost issues that exist under either system; another move to an entirely new structure (nine years after abandoning the original structure) will also generate new problems of consistency and credibility.

Several of the copyright owner counsel who regularly practice before CARPs have begun discussion on how best to improve the CARP process. What has emerged from these discussions to date is that there are a variety of process issues that must be addressed. The issues involve matters such as the implementation of settlements negotiated by parties to proceedings, the treatment of confidential material in CARP proceedings, the role of the Copyright Office in providing continuity among various CARP proceedings, time limits, qualifications of decision-makers, small claims, frivo-

lous claims and offers of judgment. I would like to highlight two additional issues that I believe are among the most important issues to be addressed.

- *Evidentiary Hearings.* The single largest cost to clients involved in a CARP proceeding is, typically, the evidentiary hearing. As noted above, the most recent CARP proceeding involved 40 days of adversarial evidentiary hearings and generated almost 15,000 pages of transcript; while the issues in that case were particularly complex, the likelihood is that future royalty ratemaking and distribution proceedings also will require the significant time commitments associated with evidentiary hearings. The amount of time that must be devoted to preparing for, participating in and analyzing (for purposes of briefing) such evidentiary hearings has been and likely will continue to be enormous. It is my personal view that serious consideration must now be given either to eliminating these hearings entirely or to permitting them only in the exceptional case where good cause is shown. I further believe that the results of the copyright royalty ratemaking and allocation proceedings would not be markedly different if they were resolved entirely or primarily on the basis of written submissions.

There are alternative measures that could achieve some cost savings without eliminating evidentiary hearings altogether. For instance, arbitrators could request limited evidentiary hearings solely on issues or witness testimony that they identify after review of the written cases, or argument from counsel on a limited set of issues. Evidentiary hearings could also be confined to direct cases alone; under the current system, evidentiary hearings are conducted on rebuttal cases as well. In addition, hearing time could be reduced by eliminating oral direct testimony and only allowing cross-examination of all witnesses. While each of these proposals, if adopted, would help reduce costs and should be considered, they would not be as cost effective as eliminating evidentiary hearings altogether.

- *Discovery.* Discovery is another major cost of participation in CARP proceedings. We currently have a hybrid system that may be the worst of all worlds. On the one hand, the rules do not provide for the type and breadth of discovery normally permitted in federal civil litigation. See H.R. Rep. No. 103-286, at 13 (1993) (noting Committee's contemplation that CARPs would not strictly adhere to the Federal Rules of Civil Procedure or Evidence). There are no depositions or interrogatories and the parties are entitled only to documents "underlying" particular statements made in written testimony rather than all relevant documentation. Moreover, given the existing timetables for dealing with discovery requests, there is very limited opportunity to make productive use out of the discovery that is available. These limitations are designed to hold down costs and to expedite the proceedings.

On the other hand, the Copyright Office has gradually expanded its view of underlying documents and thus the scope of discovery. Even where the Copyright Office denies a discovery request, a CARP (which may consist of arbitrators more accustomed to the rules prevailing in federal civil court litigation) can effectively reverse that ruling and order the production of documents. While the CARPs (like the Copyright Office) have no subpoena authority, they do have the power to strike and to weigh testimony; thus, it is rare that parties do not comply with CARP orders directing additional discovery—although the CARP may have a more difficult time obtaining information from third parties. The result is that the nature of discovery in CARP proceedings has become increasingly more uncertain and with that uncertainty has come increasing costs.

In my view, this hybrid system is becoming much too costly and uncertain, and serious consideration should be given to eliminating discovery altogether. As an alternative to the current system, I believe the parties should be permitted to choose how much underlying documentation should accompany (or be produced in connection with) their written testimony, and the amount of support provided for the statements in the testimony would go to the weight afforded that testimony. If a party chooses not to provide documentation plainly relevant to particular testimony, less weight or perhaps no weight would be given to the assertions made in that testimony; conversely, the more "back-up" that is provided for particular testimony, the greater the weight that would be accorded that testimony.

To be sure, replacing the formal hybrid discovery process that currently exists with a voluntary process with incentives for full disclosure would be a significant step—and one that may be viewed as undermining to some degree the credibility of CARP proceedings. But the Government already renders major decisions, producing significant economic and personal consequences, without the benefit of the type of discovery available under the current Copyright Office/CARP rules. On balance, I do not believe that any added benefits of such discovery warrant the costs and uncertainties associated with it.

My colleagues who practice before the CARPs will surely have their own views concerning the need for evidentiary hearings and discovery. I urge you to consider

those views as well as the views that we all have concerning the other process issues. My hope is that we can reach a consensus as to how these issues should best be resolved because it is in the best interests of all of us and all of our clients to do so.

CONCLUSION

Seventeen years ago, during the debates on CRT reform, the then-Associate Librarian of Congress and Acting Register of Copyrights, Donald Curran, aptly observed: “Because the compulsory licenses represent a difficult compromise between copyright owners and copyright users, it is doubtful that any administrative body can make all parties happy.” Curran Statement at 88 n. 11. I believe that observation holds true today as well. Regardless of which body you choose to decide compulsory licensing rate and allocation issues, it is doubtful that that body will make all parties happy; indeed, the nature of the system is such that all parties will generally be unhappy. I do not believe that the overriding objectives of cost, consistency and credibility will be well-served if the structure of the decision-making body is changed each time that parties express disappointment with a particular result. At the same time, I believe it is important to continually focus on ways to improve the process of royalty rate-setting and allocation—in particular, to find ways to reduce the substantial costs of this process.

Mr. Chairman and members of the Subcommittee, thank you for your time and attention. I look forward to providing you with whatever assistance I can in addressing these difficult issues.

Mr. COBLE. Mr. Rich.

**STATEMENT OF R. BRUCE RICH, ATTORNEY-AT-LAW, WEIL,
GOTSHAL & MANGES, LLP**

Mr. RICH. Thank you, Mr. Chairman, Mr. Ranking Member, Members of the Subcommittee. Thank you for the opportunity to testify before you today. I appear in my capacity as a partner in the law firm of Weil, Gotshal & Manges LLP, two of whose principal offices are located New York City and Washington, D.C. For more than two decades my firm and I have represented a diverse array of media clients, each of whom are significant users of copyrighted music and work through the thicket of music license issues that present themselves in securing necessary copyright rights from the music performing rights organizations, ASCAP, BMI, as well as from the recording industry. I have litigated so-called rate court cases under the ASCAP and BMI consent decrees and served as counsel for a variety of media entities in two CARP rate adjustment proceedings, including the most recent Webcast proceeding.

I should make clear that the views I express today, while shaped by my experience in representing clients in these various areas, are my own and do not necessarily reflect those of my clients.

I share the concerns expressed by each of the other witnesses today that despite the efforts of the Members of this Subcommittee and of the Copyright Office to create a CARP process that facilitates informal, expeditious, inexpensive, but also fair dispute resolution, the current CARP structure suffers from serious shortcomings which have had quite the opposite effect. In particular I agree with the views expressed by Mr. Remington in his written testimony that the CARP structure is in need of radical surgery, and the goals expressed, although not the recommendations proposed, by Mr. Garrett, that any CARP reform must seek to reduce costs, foster consistency and increase credibility of the decisions.

My written testimony identifies seven procedural issues which I urge the Subcommittee and the Copyright Office to address. First, at least in rate adjustment cases, the overly formalistic rules per-

taining to case development and presentation need reform. In particular, parties should be entitled to conduct meaningful discovery, subject to supervision, to prevent abuse prior to having to commit to their trial positions. Discovery and hearings should be conducted in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

As things stand now, cases are underdiscovered and overtried. Moreover, the current lack of meaningful discovery coupled with the absence of more rigorous rules of evidence currently allow parties to withhold key impeaching documents, blockade access to critical evidence, and load the record instead with unsupportable and ordinarily inadmissible hearsay.

Second, arbitrator fees and hearing costs have grown exorbitant. The \$1.2 million in arbitrator fees charged in the recently concluded section 112, 114 Webcasting proceeding, coupled with the individual legal fees borne by each of the participants, made the process inordinately expensive and prevented many companies from participating in the proceedings. This had the not-incidental effect of forcing those companies which did participate to shoulder for entire industries standing to benefit—to shoulder the burden for entire industries standing to benefit from the statutory license.

Third, the current system tends to generate decisions that neither build meaningfully on prior precedent, nor establish the kinds of first principles that typify decisions by Federal courts. This creates a lack of predictability that serves no one's interests.

Fourth, case adjudicators must be afforded subpoena power.

Fifth, the use of three adjudicators is unnecessary and inefficient. One highly skilled and trained jurist whose decision is appealable once to an appropriate reviewing court would be far superior.

Sixth, the 180-day time limit for conducting CARP proceedings no matter what their complexity is unworkable. Deadlines are good, but they need to be sensible and extendable as necessary for good cause shown.

Finally, the time between the section 112 and 114 CARP cycles should be extended from their current 2-year cycles where they overlap ludicrously to a period of 5 years.

As explained more fully in my written testimony, I believe, consistent with Mr. Boucher, that, subject to a constitutional analysis, the identified problems can best be remedied by transferring the authority to conduct CARP ratemaking procedures to a Federal district court. Experience with the ASCAP, BMI rate courts in the Southern District of New York, which essentially entail the same search for a hypothetical willing buyer/willing seller rate as is the object of many CARP rate-setting proceedings, has shown that particularized copyright-oriented expertise, even if it did repose in the CARP panels, which it doesn't, is not as important as other skill sets. Rate determinations aiming to replicate competitive market behavior more intensively require a facility with macroeconomics and the basic principles of antitrust, the ability to assimilate facts concerning multiple media marketplaces, the ability to evaluate complex statistical and economic data put forth by the parties' experts, and the ability to sift through and properly evaluate record evidence, including making judgments about issues such as witness

credibility. Each of these functions, I would suggest to the panel, is well suited to Federal judicial determination.

In conclusion, I would like to thank the Subcommittee for its continued oversight of these important matters and offer whatever assistance you and the Copyright Office might deem appropriate in addressing these important issues.

Mr. COBLE. Thank you, Mr. Rich.

[The prepared statement of Mr. Rich follows:]

PREPARED STATEMENT OF R. BRUCE RICH

Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to testify before you today. I appear today in my capacity as a partner in the law firm of Weil, Gotshal & Manges LLP. Over the past 24 years, my Firm and I have represented a diverse array of broadcast and cable television, radio broadcasting, background music, new media and webcasting entities in their music license relationships with the music performing rights organizations and, more recently, with the recording industry. That representation has embraced antitrust counseling and litigation; the rendering of copyright advice; participation in individual and industry-wide negotiations over license fees and terms; prosecution of so-called "rate court" cases under the auspices of the ASCAP and BMI government consent decrees; and serving as counsel for various clients in two CARP rate adjustment proceedings.

That background has afforded me, as both an intellectual property and antitrust practitioner, with a broad perspective on the workings of the music licensing marketplace. Particularly in respect of performance rights licensing (whether of music works or sound recordings), I have become intimately familiar with the structure and degree of competitiveness of these music markets; the challenge facing large users of copyrighted material in procuring the necessary performance rights on fair, reasonable, and competitive terms; the operations of the various compulsory license mechanisms that have been instituted as admittedly imperfect substitutes for markets that would not function competitively without them; and the efficacy of the compulsory license procedures that implement those mechanisms.

Of particular relevance to today's hearing, in respect of music performance rights licensing, our law firm has represented the ABC and CBS Television Networks, Showtime/The Movie Channel and numerous additional cable television networks, the nation's commercial local television broadcasters, the commercial radio industry, as well as the background music entities Muzak and DMX/AEI, in rate court proceedings conducted in the Federal District Court for the Southern District of New York, as well as in appeals to the United States Court of Appeals for the Second Circuit from such proceedings. Those proceedings fundamentally have entailed the determination of "reasonable," i.e., competitive-market-approximating, license fees for public performances of musical works licensed by one or another of ASCAP and BMI, as well as, in some instances, the determination of the forms such licenses should take.

In 1998, our Firm and I represented the Public Broadcasting Service ("PBS"), National Public Radio ("NPR"), and the stations on whose behalf they sought rates in the CARP rate adjustment proceedings for the noncommercial educational broadcasting compulsory license available pursuant to Section 118 of the Copyright Act. *See* Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, CARP NCBRA. More recently, our Firm represented various FCC-licensed broadcasters, as well as some twenty webcasters, in the CARP to set rates and terms for certain uses of sound recordings pursuant to Sections 112 and 114 of the Copyright Act—a proceeding which is still in its appellate phase. In this same proceeding, we also represented DMX Music, Inc., the background music service provider, with respect to its use of ephemeral recordings subject to the § 112 license. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1&2 ("§ 112/114 Proceeding").

Although my views on issues pertinent to today's hearings clearly have been shaped by my experience in representing clients in these various fora, I appear today solely on my own behalf, and the views which I offer through this testimony are solely personal ones.

My testimony today (1) outlines the major procedural shortcomings inherent in the CARP process as it is currently constituted; (2) suggests that, subject to a Constitutional analysis, serious consideration be given to transferring the rate-setting and distribution functions currently carried out by CARP Panels to a court of law;

and (3) comments briefly upon the governing standards for rate-setting under §§ 112, 114 and 118 of the Copyright Act.

PROCEDURAL SHORTCOMINGS IN THE CARP PROCESS

Despite the commendable efforts of the Panels convened to hear these proceedings and the Copyright Office attorneys and staff who oversee and facilitate the CARP process, the CARP structure suffers from serious shortcomings which render the proceedings inordinately expensive, inefficient, and burdensome, and which frequently lead to rulings that are substantively flawed. Although a principal motivation for establishing an arbitration process to conduct rate-setting and distribution functions was to streamline the litigation process in order to achieve efficiencies over what one would expect in a courtroom context, experience has demonstrated quite the opposite effect.

Case Development and Presentation

The CARP process, as currently structured, imposes formalistic rules regarding the manner and timing of presentation of cases and the discovery that may be had, accompanied by a virtual absence of rules of evidence. In combination, these features create a frenetic litigation environment in which cases are underdiscovered and overtried.

Manner and Timing of Presentation of Cases. Parties are required, at the very outset of the proceedings, and prior to any discovery, simultaneously to submit and exchange in written form the direct testimony of each of their witnesses—lay and expert alike—together with every trial exhibit to be utilized. This places the proverbial cart before the horse—effectively locking in the parties' trial positions before anyone has knowledge of anyone else's factual, economic and legal arguments. The salutary effects of permitting discovery prior to requiring parties to commit to trial positions, in terms of narrowing and focusing what is to be tried, are thereby lost.

What is more, during the ensuing hearing phase, material deviation from the written direct cases is prohibited, so that neither side's witnesses—most notably, their experts—are permitted to respond on the stand to the other parties' written direct cases. For all of their prolixity, the parties' governing cases are like ships passing in the night. Issue is not truly joined until the rebuttal phase of the proceedings, which, instead of being devoted to those few issues that normally remain open following presentation of cases in chief, entails further voluminous filings in order to respond to the other side's direct testimony. This is followed by yet another round of hearings in which many of the same expert and fact witnesses are recalled to the stand to respond to that which they were prohibited from testifying about in their initial testimony. The inefficiency and undue expense of such a process is manifest.

Discovery and Evidence. CARP discovery, such as it is, is truncated and carried on under unrealistically short deadlines. Parties to the CARP are not subject to normal rules of discovery such as those found in the Federal Rules of Civil Procedure. The CARP process does not allow for depositions, requests for admission, interrogatories or any other means by which the parties can test the assertions made by their opponents prior to the presentation of hearing testimony. Instead, parties are required to produce solely those documents which "underlie" their written direct or rebuttal testimony or exhibits. 37 C.F.R. § 251.45. While this is, no doubt, intended to achieve the laudable goal of reducing expense and alleviating undue burdens on the parties, these constraints measurably distort and disrupt the litigation process. The truncated discovery process deprives the parties of the opportunity, prior to trial cross-examination, to test the assertions made by their opponents. Whereas the presumption underlying the Federal Rules of Civil Procedure is to shed light on the parties' respective positions and thereby reduce surprise and promote the narrowing of issues for trial, the present CARP discovery rules have the opposite—and perverse—effect of blockading access to relevant evidence, enhancing the element of surprise, and broadening the scope of what is presented (and cross-examined upon) at trial. Once again, this is, in the end, costly and wasteful—especially taking account (as I do below) of the arbitration fees incurred with each hour of hearing time.

I am of course aware of the potential for open-ended discovery to spawn abuse and itself become inordinately expensive. The solution, I would submit, is to have the supervising jurist (in my proposal below, a federal judge, or his designee) carefully control the discovery process and curtail abuse.

The CARP hearings themselves lack predictable structure and suffer from the absence of more rigorous rules of evidence. Although all witnesses proffer testimony in written form in advance of their appearances, whether a given witness will rehash his or her testimony on direct examination, merely summarize it in a few min-

utes, or proceed directly to cross-examination is generally a matter for ad hoc determination, witness by witness, by examining counsel.

More problematic is the absence of meaningful rules of evidence, such as the Federal Rules of Evidence, to control, and make predictable, exactly what evidence will be admissible. By way of example, in the 1998 PBS/NPR CARP, in which I served as counsel, hundreds of hearsay documents (website postings, newspaper articles, and the like) were admitted into the record "for what they were worth." I would suggest they were worth very little. But they occupied inordinate time, motion practice, and photocopy expense to contend with.

With generally sophisticated counsel and well-funded parties, there is little reason inordinately to relax rules of admissibility designed to create a trustworthy record. This is especially true where, as here, there is so little opportunity to engage in meaningful discovery of matters pertaining to your adversary's case. As matters now stand, key impeaching documents residing in the parties' files will safely remain there, immune from disclosure, while the parties are free to lard the record with what should be inadmissible hearsay.

Finally, the cramped discovery rules virtually require, in certain instances, seat-of-the-pants cross-examinations violating the most cardinal rule of cross-examination: don't ask any question to which you do not already know the answer. The consequence is not merely the risk of eliciting testimony your client would sooner not have; it is also a prolongation of the process in a fashion that cumulatively wears on counsel and the Panel alike. Especially in a trial of the magnitude of the just-concluded §112/114 Proceeding, the impact of such practice on the overall length of the hearings can be significant.

Costs

The arbitrator fees and hearing costs which must be borne by any party wishing to participate in a CARP proceeding can be astronomical. Although the Copyright Royalty Tribunal ("CRT") was abolished, in part, in order to reduce the expenses associated with maintaining a full-time body of adjudicators who were called upon to hear cases only on a part-time basis, the hourly fees and out of pocket costs charged by the arbitrators empanelled by the CARP process have proven to be far costlier. For example, the §112/114 Proceeding generated more than \$1.2 million in arbitrator fees. Add to this the individual legal expenses associated with a proceeding which consumed 41 hearing days, involved the testimony of 75 witnesses (49 on direct and 26 in rebuttal testimony), generated a transcript approaching 15,000 pages and many thousands of pages of exhibits and elicited the submission of over 1000 pages of post-hearing briefs by the parties, and it becomes clear that participation in the compulsory license rate-setting process is available only to the well-funded. This presents a double-edged problem. A major "free-rider" burden is placed on those companies which, for whatever reason, feel compelled to participate in the rate-setting process. These companies end up shouldering the burden for entire industries standing to benefit from the statutory licenses. From the perspective of companies which cannot, for financial or other reasons, participate in the CARP process, these entities (which are no less entitled to the statutory license) must either rely upon the records developed by the participating parties or resort to voluntary negotiations with the copyright owners on terms they may otherwise find objectionable.

Lack of Precedential Value

Because CARP panelists are chosen to participate in a particular case and, potentially, may never participate in another CARP proceeding, there is no expectation that the panelists will develop any expertise in the subject matter or rate-setting tasks at hand that will benefit future proceedings. Decisions rendered on this basis tend to focus on reaching a bottom-line result in the given proceeding rather than on explicating a thorough and complete analysis of the relevant standards and establishing (and building on existing) industry precedent. In contrast to the typical body of federal jurisprudence, where "first principles" tend to guide the resolution of cases, CARP decisions have a *sui generis* quality which deprives this growing body of decisions of coherence and affords future litigants little guidance as to the potential outcome of their cases. These consequences are further magnified by the fact that, in certain contexts, the rate-setting proceedings recur on a two-year cycle, which further promotes narrow decision-making.

No Subpoena Power

The problems associated with the lack of normal discovery rules are magnified by the fact that the Panel has no subpoena power over third parties even if those parties possess information critical to the proceeding. A case in point is the just-concluded §112/114 Proceeding, in which the linchpin of the recording industry's case

was 26 license agreements reached between the Recording Industry Association of America and various webcasters. While the Panel and the user-parties to the proceeding were interested in securing testimony from as many of these 26 entities as possible, the absence of subpoena power left the Panel with no recourse but to “invite” these parties to testify voluntarily. Not surprisingly, while a handful agreed, most did not.

Inefficiency of Proceedings

The use of three arbitrators to render decisions injects further inefficiencies into the CARP process. First, the use of multiple arbitrators exponentially increases the cost of the proceedings based on hourly fees charged alone. Much hearing time is devoted to bench conferences among Panel members deliberating on evidentiary rulings and the like. Further, the decisions a CARP Panel is tasked with rendering do not benefit from the inevitable “split-the-baby” compromise that tends to result from resort to multiple fact-finders. This is perhaps best evidenced by the fact that virtually every CARP Panel merits ruling is appealed by virtually every party. It appears that no one ever perceives that the Panels have reached fair and equitable results.

Inflexible Statutory Deadlines and Procedures

The statutorily-imposed 180-day timeframe for conducting CARP proceedings, without regard to their complexity, is wholly unrealistic. Particularly in a proceeding like the §112/114 Proceeding, which involved four separate communities of copyright users, participation of a variety of copyright owners, and required rates and terms to be set for two separate statutory licenses for two separate statutory periods, the process affords little opportunity for meaningful development of record facts, even less time for briefing, and equally little time for due deliberation by the CARP Panel. Expedience is a desirable objective—but not at the expense of adequate hearing preparation and considered decision-making. Moreover, the inflexible nature of the regulations governing the conduct of the proceeding actually prevented certain of the parties to the §112/114 Proceeding from fulfilling the terms of a voluntary settlement which would have eliminated the need to set rates for an entire class of copyright users and thus would have substantially reduced the costs and burdens imposed on the parties and the arbitrators, not to mention the Copyright Office itself.

Too Frequent Statutory Cycles for Rate-Setting

The statutorily imposed two-year cycles for setting rates and terms for the §112 and §114 licenses are too frequent. While the two-year cycle for rate-setting for these licenses may reflect solicitude for the need to readjust rates in new and rapidly-evolving industries, experience in the §112/114 Proceeding demonstrates that this cycle is too short, particularly if there is a delay in convening a CARP for a given cycle. Indeed, the delay in convening the §112/114 Proceeding resulted not only in two cycles of proceedings being arbitrated together, but also in the statutorily mandated “voluntary negotiation period” for the upcoming proceeding overlapping with a hotly-contested rate-setting proceeding for the previous cycle. The time between cycles should be extended to a five-year period.

TRANSFER OF CARP RATESETTING AND DISTRIBUTION FUNCTIONS TO A COURT

The efficacy of the operation and structure of the CARP and of the CRT which preceded it has been debated innumerable times by this Subcommittee and its predecessors since the concept of a rate-setting and distribution body to administer the compulsory licenses under the Copyright Act was first conceived. *See* Copyright Office Oversight Hearing Before the House Judiciary Subc. on Courts and Intellectual Property, 105th Cong. (July 23, 1998) (statement of Marybeth Peters, Register of Copyright, U.S. Copyright Office); Copyright Compulsory License Improvement Act, H.R. 3210, 105th Cong. § 7 (1998) (approved by Subcommittee on Courts and Intellectual Property March 18, 1998) (establishing the Copyright Royalty Adjudication Board within the Copyright Office, which would consist of administrative copyright judges); Copyright Clarifications Act of 1996, H.R. 1861, 104th Cong. § 11 (1996) (approved by Subcommittee on Courts and Intellectual Property on Dec. 13, 1995 and House Judiciary Committee on March 12, 1996) (clarifying the authority of the Librarian of Congress to make procedural and evidentiary rulings with respect to a CARP proceeding and authorizing (1) payments to arbitrators and other costs to come from the royalty pool in distribution proceedings and (2) in ratemaking proceedings, dividing such costs 50–50 between copyright owners and users unless otherwise determined by the arbitrators); Copyright Royalty Tribunal Reform Act of 1993 § 2, 17 U.S.C. §§ 801, 803 (1993) (replacing the Copyright Royalty Tribunal

with Copyright Arbitration Royalty Panels); Copyright Royalty Tribunal Reform and Miscellaneous Pay Act of 1989, Pub. L. No. 101-319 (1990) (reducing the number of commissioners on the Copyright Royalty Tribunal), *CRT Reform and Compulsory Licenses Hearings Before the House Judiciary Subc. on Courts, Civil Liberties, and the Administration of Justice*, 99th Cong. (1985) (redesignating the Copyright Royalty Tribunal as the Copyright Royalty Court and transferring such body to the control of the judicial branch).

In reviewing this legislative history in the light of my own experiences participating in the CARP process and litigating rate-setting cases before the ASCAP and BMI “rate courts” in the Southern District of New York, I have become convinced that the main responsibilities with which a CARP is tasked—namely, rate-making and distribution of royalties—do not principally involve matters which require the particularized, copyright-oriented agency expertise of the Library of Congress. Instead, these tasks require a facility with macroeconomics and with basic principles of antitrust law, the ability to assimilate facts concerning multiple media marketplaces, the ability to evaluate complex statistical and economic data put forth by the parties’ experts, and the ability to sift through and properly evaluate record evidence, including making judgments on issues such as witness credibility.

Experience in the rate court context—which essentially entails the same search for a hypothetical free market, “willing buyer/willing seller” rate as is the object of many CARP proceedings—has shown that all of these functions are well suited to federal judicial determination. Indeed, were determinations of statutory license fees reposed in the federal courts, virtually all of the procedural flaws inherent in the existing CARP process would be remedied or, at the least, ameliorated. For instance, a trained jurist (whether a district court judge, a magistrate judge or a special master), working within federal rules of discovery and evidence, would supervise discovery, receive evidence, conduct hearings and, where appropriate, invoke summary procedures such as trials on paper records or summary judgment disposition. To keep such proceedings focused and manageable, it could be stipulated that the proceedings must be concluded within a specified period of time (subject to relaxation by the court for good cause). The trial court decision would be subject to review pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Admittedly, transferring the rate-making and royalty distribution functions of CARP Panels to a federal district court requires careful consideration of Constitutional issues which are beyond the scope of this testimony. For instance, when such proposals have been considered by this Subcommittee in the past, questions have been raised, but not resolved, as to whether, because rate-making is not a judicial function, Article III judges may be tasked with conducting non-Article III functions. There is nevertheless precedent for resolving rate disputes in district courts. I have already adverted to the ASCAP and BMI rate court experience. In addition, §513 of the Copyright Act allows individual proprietors of certain categories of business establishments to resolve rate disputes with performing rights societies by bringing such matters before a district court located in the federal circuit in which the proprietor’s establishment is located. To be sure, there are consent decree structures in place that contemplate such judicial rate-setting in the ASCAP/BMI setting. Such precedents and procedures, and the experience thereunder, nevertheless provide useful starting points for consideration of how an analogous rate court could function in lieu of the present CARP procedures.

Without conducting a thorough analysis of the matter, it appears at first blush that a number of steps could be taken to limit Constitutional concerns. For instance, one might consider retaining within the Copyright Office the authority to certify the existence of a rate dispute (e.g., upon the close of the voluntary negotiation period) and allowing the Copyright Office to issue a certification of dispute notice which would allow the parties to seek resolution of the case or controversy in the federal courts when voluntary resolutions are not possible. I would encourage the Subcommittee to solicit the advice of the Congressional Research Service as to whether any potential Constitutional issues could be overcome; assuming that to be the case, I commend to the Subcommittee serious consideration of transferring dispute resolution authority in the rate-setting and royalty distribution context to the federal courts.

Alternatively, the Register of Copyrights has previously suggested establishing a permanent Board to conduct rate-making and distribution proceedings which would be housed within the Copyright Office. Under the Register’s formulation, membership on the Board would be established upon recommendation of the Register of Copyrights. Such a Board could presumably also be housed within another agency, such as the Department of Commerce, in which the Patent and Trademark Office (“PTO”) resides.

There would seem to be arguments in favor and against such an approach. As the Copyright Office noted in 1998, establishing a Board within the Copyright Office (or another agency) would raise the stature of the decision makers and would result in final agency decisions that could be appealed directly to the courts, thus removing the intermediate appellate review which currently occurs within the Copyright Office. See Copyright Office Report, *supra* note 1, at 56. Additionally, the appointment of a permanent Board could potentially reduce costs to parties participating in the rate-setting process, especially those of three expensive arbitrators, thereby encouraging wider participation and a fuller factual record on which to base decisions. Costs would further be reduced by the elimination of the review by the Register of Copyrights and the Librarian.

A major shortcoming of establishing a permanent Board within an agency is that such a Board might be viewed to be too political. Furthermore, the efficacy of such a Board would be greatly dependent upon the procedures established to govern the orderly presentation of cases. At a minimum, any such Board should be invested with subpoena power, and rate-setting disputes should be subject to the Federal Rules of Civil Procedure.

A FEW COMMENTS ON THE SUBSTANTIVE TESTS
EMBODIED IN SECTIONS 112, 114 AND 118 OF THE ACT

Insofar as the Subcommittee is interested in the proper administration of the statutory licenses available under the Copyright Act, a few comments are in order regarding the substantive statutory standards themselves. I am most familiar with the application of the standards contained in §§ 112, 114 and 118 of the Act, and therefore confine my comments to those provisions. Pursuant to § 114, CARP Panels are charged with establishing “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.” See 17 U.S.C. § 114(f)(2)(B) (2001). The § 118 standard, incorporated by reference in § 801(b) of the Act (detailing the operation of CARP Panels), calls for the determination of “reasonable terms and rates of royalty payments.” In reaching these determinations in each case the Panels “may”—but are not required to—give weight to voluntary license agreements reached in lieu of resort to the statutory license. See § 112(e)(4); § 114(f)(2)(B); § 118(b)(3).

Practice under these provisions has spawned lively controversy as to their intended meaning. This is not the forum either to relitigate the various parties’ perspectives, nor, at least for now, definitively to resolve the issue. Nevertheless, I have considerable concern over the potential misapplication of these provisions to, in effect, rubber stamp selective agreements reached by large and powerful collectives representing copyright owners (whether ASCAP or BMI, in relation to musical works performance rights, or the RIAA in relation to digital transmissions of sound recordings).

With respect to each of these statutory directives, it would seem plain that the purpose of the exercise is to determine the fees that would have resulted from dealings between willing buyers and willing sellers in a competitive market (i.e., a market undistorted by the concentration of bargaining power in the hands of a collective society or major industry trade association). Yet, strenuous arguments have been made (and rejected in the ASCAP rate court setting) that dispositive weight ought to be given to such license agreements as copyright owners’ collective agents may have been able to reach with one or more third parties. While I do not suggest that statutory ratemaking is an easy task, unless it is recognized that the core statutory objective is to approximate the value a marketplace untainted by undue market power possessed by copyright owner collectives would produce, no amount of fine-tuning or refinement of the ratemaking process will generate an economic result true to the spirit and intent of these statutory license provisions.

I thank the Members of the Subcommittee for their attention to these important matters and for the opportunity to share my views with you. I would be pleased to answer questions and elaborate further on this testimony now or later for the record.

Mr. COBLE. Ms. Peters.

STATEMENT OF MARYBETH PETERS, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS

Ms. PETERS. Mr. Chairman, Mr. Ranking Member, distinguished Members of the Subcommittee, I appreciate the opportunity to testify on the structure and process of the Copyright Arbitration Royalty Panel System. As you know, today's hearing is to consider how effective the CARP process has been and how it could be improved. We have had almost 9 years of experience in working with this process, and I think we have a little bit to add to the dialogue.

I think, as you know, ad hoc Copyright Arbitration Royalty Panel deals with statutory licenses which are exceptions to the general rule in copyright law that the owner of a copyrighted work has exclusive rights which enable him to determine how his work is to be used. A statutory license allows certain uses of certain copyrighted works under terms and conditions that are specified in the law. In 1976, the Copyright Act increased the number of statutory licenses to four, and provided for the adjustment of rates at specified times, and provided a mechanism to settle disputes about the allocation of royalties that were paid into the Copyright Office.

A new administrative body having responsibility for adjusting statutory rates and for resolving disputes among the claimants to the royalty pools for cable retransmissions and performances of music on jukeboxes was created. Initially the proposal was a three-member panel that would reside in the Copyright Office. Each time there was a controversy over a distribution of royalties or there was a need to adjust royalty rates, the Register would convene the panel.

However, the Supreme Court in its decision in *Buckley v. Valeo*, who dealt with the issue of the constitutionality of the methods of appointing members to a legislative branch agency, led to constitutional concerns over the plan to have the Register, an employee of the legislative branch, appoint the members of the new tribunal. Wishing to avoid any constitutional question, Congress basically chose to create an independent regulatory agency, the Copyright Royalty Tribunal, whose members would be appointed by the President with the advice and consent of the Senate.

CRT came into existence in November 1977. It was abolished in December 1993. During those years the role of the CRT expanded because two compulsory licenses were added to the workload. However, like the CARPs, there were criticisms almost from the beginning with regard to the tribunal. The major concerns seemed to be that there wasn't enough work to keep three senior-level Government employees busy. From time to time there was also criticism concerning the lack of expertise of some of the Commissioners.

Congress reduced the number of Commissioners from five to three in 1990, and in 1992 it established an ad hoc arbitration panel to adjust the satellite carrier rates, thereby undercutting the CRT's jurisdiction. It got rid of the CRT in 1993, and the CARP system was created, in the words of the House Judiciary Committee, because the workload of the CRT was episodic and not sufficient to justify three full-time, highly paid Commissioners.

From the beginning to the present day, the office has done its best to make the present system work. However, from the very beginning the office was aware of problems, and as the years passed, and new statutory and increasingly complex licenses were created, our list of shortcomings has grown. Of course, we have also heard the complaints of the parties to the various proceedings.

Two of the shortcomings make it clear that you simply can't fix the system. It is broken. Let me hit those two. The first is expertise. Statutory licenses are generally complex. The CARP process is complex. The amount of money in a number of these proceedings is considerable. It has been difficult to find arbitrators who have any familiarity with copyright law let alone the complex statutory licenses and the unique CARP procedures. Of the 10 CARP reports which the Librarian has reviewed, only three have been accepted. Several which were rejected required considerable effort to make a recommendation to the Librarian on which you could base a final order.

The second is lack of predictability or consistency in results. Each panel is selected for one case. Its decision is for that case. The panelists then go on to other things, and then the next case, a new panel is convened. So expertise in the adjudicator and consistency of results are crucial. That is why the system is broken.

There is another shortcoming which probably could be fixed in the present system, and that is cost. This has been an issue from the very beginning, the arbitrator's rates are high. Some of the proceedings are long, complex. Other proceedings involve only small amounts. Either end of this is a problem.

There have been a number of helpful suggestions on how to address this issue. This is a most important issue. In some cases the costs preclude people from participating in this. Others copyright owners pay substantial amounts when the amount in controversy is extremely small.

In conclusion, I believe that there should be reform, but there is no consensus on what that reform should consist of. I totally agree with Bob Garrett; it is important to first look at the process. First with the CRT and then with the CARP, the emphasis was on the system; in other words, the body that would oversee the proceedings. But Congress needs to decide the appropriate process and then determine the structure. The office would be pleased to work with the Subcommittee to achieve a system that provides the necessary expertise, produces consistent results, is efficient, fair, and basically reduces costs. Thank you.

Mr. COBLE. Thank you, Ms. Peters.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Thank you, Mr. Chairman. I am pleased to appear today before the Subcommittee and offer testimony on the structure and process of the Copyright Arbitration Royalty Panels (CARPs). As you are aware, the CARPs have been operating under the auspices of the Copyright Office and the Library of Congress since the Congress eliminated the Copyright Royalty Tribunal in 1993. Today's hearing is to consider how effective the CARP process has been to this point and, as you will hear from other members of today's witness panel, ways in which it can be improved.

I am dividing my comments into three sections. First, I will give an overview of how the statutory licenses of the Copyright Act have been administered since 1978. Second, I will discuss certain shortcomings of the existing CARP system that have

been identified since 1993, and third I will offer some suggestions as to how royalty distribution and rate adjustment proceedings could be conducted in ways that might eliminate many of the shortcomings of the current system.

OVERVIEW OF COPYRIGHT STATUTORY LICENSE ROYALTY DISTRIBUTION
AND RATEMAKING

The history of the Copyright Office's and Library of Congress's involvement in the setting and adjusting of royalty rates and making royalty distributions to copyright owners is linked to the history and evolution of the statutory licenses in the copyright law. The general rule in copyright law is that the owner of a copyrighted work has the exclusive right to determine how that work is to be used. Anyone other than the owner wishing to use a copyrighted work must either obtain the owner's permission, be eligible for a statutory license, or qualify for free use under an exception. A statutory license allows certain uses of certain copyrighted works provided that the user pays the royalties and observes the terms that are set forth in the law.

1. The 1909 Copyright Act

There was only one compulsory license in the 1909 Copyright Act. What is generally referred to as the "mechanical license" which allowed a person to make a sound recording of a song that had been recorded and copies of that recording had been distributed to the public in the United States, so long as that person paid the owner of the musical composition 2 cents per copy. The royalty rate was set by statute and was not subject to change. The 2 cents rate lasted from 1909 to 1978.

Because the rate was set by statute, and because the user paid the owner directly, there was no need for a government agency either to set the mechanical rate or to engage in a distribution of the mechanical royalties.

2. The 1976 Copyright Act

At the time it was drafting the 1976 Copyright Act, Congress realized that the mechanical license was flawed because a statutorily-set, never-changing royalty rate was inflexible and did not provide fair compensation. Furthermore, Congress was planning to add more statutory licenses to the law. These new statutory licenses would be in the areas of cable retransmissions of over-the-air broadcast signals, jukebox performances of music, and the use of published musical works and published pictorial, graphic and sculptural works by noncommercial educational broadcasters. Congress saw that there was a need for an administrative body that would be able to adjust the rates of these statutory licenses periodically. In addition, Congress saw a need for an administrative body to act as the distributor of the royalties collected from users in situations where there were many copyright owner claimants to the same funds and there were controversies as to how much each claimant was entitled to receive.

The new administrative body would have responsibility for adjusting the cable, jukebox, mechanical, and noncommercial educational broadcasting royalty rates, and for distributing the cable and jukebox royalties to the proper claimants. Cable and jukebox royalties would be deposited with the Copyright Office, subject to the distribution decisions of this new administrative body. Although the Senate and House copyright subcommittees agreed that they needed to create a new administrative body, they were not sure of the structure for the new body. At first, the Senate bill created a tribunal composed of a three-member panel that would reside within the Copyright Office. The members would be appointed by the Register of Copyrights from the membership of the American Arbitration Association or a similar organization. The Register would convene the panel each time a controversy was found to exist concerning the distribution of royalties or the adjustment of royalty rates.

While the Congress was considering the proposed Senate version for the new administrative body, the Supreme Court handed down its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court considered, *inter alia*, the constitutionality of the method of appointing members to the Federal Election Commission ("FEC"), an agency residing in the legislative branch. The law establishing the FEC provided that the President *pro tempore* of the Senate and the Speaker of the House would appoint a majority of members of the FEC. The Supreme Court ruled that this was unconstitutional because some of the FEC's functions were executive branch functions and consequently persons exercising those functions "must be appointed in accordance with article II, sec. 2, clause 2 of the Constitution, the Appointments Clause." 424 U.S. at 126. The Appointments Clause states that the President shall nominate, with the Senate's advice and consent, all "Officers of the United States," but the Congress may vest the appointment of inferior officers as it deems proper. When the *Buckley* opinion was issued, some of the members of Congress expressed constitutional concerns over the plan to have the Register of Copyrights, an em-

ployee of the legislative branch, appoint members of the new tribunal. Wishing to avoid placing the new structure under a constitutional cloud, the members of the subcommittees of both houses chose instead to create a completely independent regulatory agency, the Copyright Royalty Tribunal, whose members would be appointed by the President with the advice and consent of the Senate.

3. *The Copyright Royalty Tribunal, 1977–1993*

The Copyright Royalty Tribunal existed from November, 1977 to December, 1993. Its jurisdiction changed during those years. In 1988, Congress created a new statutory license to govern retransmission of over-the-air television signals to home satellite dish owners. Also, in 1988, Congress moved to eliminate the jukebox compulsory license in order to comply with the Berne Convention and by 1990, there were sufficient private license agreements to allow for the elimination of the jukebox compulsory license from the Copyright Act and the Tribunal's jurisdiction.¹ In 1992, Congress created a statutory royalty obligation for the manufacture and importation of digital audio recording technology (DART).

Even with these new responsibilities, critics of the Tribunal believed that there was insufficient work. In 1990, Congress reduced the number of Commissioners from five to three, after concluding that three Commissioners were sufficient to handle the workload. Copyright Royalty Tribunal Reform and Miscellaneous Pay Act of 1989, Pub.L.No. 101–319, 104 Stat. 290 (1990). Also, Congress established a procedure for adjusting the satellite carrier statutory license rates in 1992 by an *ad hoc* arbitration panel, thereby undercutting the Tribunal's otherwise exclusive jurisdiction over royalty rate adjustment and distribution proceedings.

4. *The Copyright Royalty Tribunal Reform Act of 1993*

In 1993, Congress passed the Copyright Royalty Tribunal Reform Act, observing that “with 15 years’ experience, a clear record of the Tribunal’s workload has been established. That workload is episodic and not sufficient to justify three full-time highly paid Commissioners.” H.R. Rep. No. 103–286, at 9 (1993).

The House Subcommittee recalled that the original proposal for a government body to oversee the statutory licenses was for *ad hoc* arbitration panels convened by the Register of Copyrights. *Id.* The Subcommittee noted that the one experience with arbitrators setting royalty rates, the 1992 adjustment of the satellite carrier compulsory license rates, was positive. *Id.* at 11. Therefore, the Subcommittee believed that creating what was originally proposed in 1976—*ad hoc* arbitration panels—would avoid the apparent waste of having full-time Commissioners perform part-time work. The Subcommittee also believed that placing *ad hoc* arbitration panels under the supervision of the Register of Copyrights and the Librarian of Congress made “good sense,” citing the fact that “the Copyright Office and the Library of Congress already have considerable involvement in the administration of the compulsory licenses and in the work of the Tribunal.” *Id.* This “considerable involvement” referred to the Copyright Office’s Licensing Division which receives the payment of cable, satellite and DART royalties, and the Register’s Office which, through the Register, the General Counsel and the staff of the General Counsel, promulgates regulations related to the statutory licenses.

The remaining concern was whether establishing arbitration panels in the Library of Congress was constitutional. Congressman William Hughes, the chairman of the House Subcommittee, asked the Congressional Research Service (“CRS”) for its advice. CRS stated that the panels would be constitutional if the person ultimately responsible for the panels’ decision was a presidential appointee or someone who owed his or her appointment to a presidential appointee. Therefore, the panels could be established under supervision of the Librarian of Congress, a presidential appointee, or the Register of Copyrights, a person owing his or her appointment to a presidential appointee. Letter from CRS to the Honorable William Hughes, February 17, 1993, at 9–10.

Although the House Subcommittee received CRS’ opinion that either the Register or the Librarian could be the supervising official, the House Subcommittee chose to make the Librarian the supervising official. There is no record as to why this choice was made. There is also nothing in the record to suggest that Congress saw any added value in an additional layer of review. The only concern voiced was that a presidential appointee, or someone who answers to a presidential appointee, needed to be placed at the head of the CARP system to satisfy the Supreme Court’s ruling in *Buckley v. Valeo*.

¹A contingent jurisdiction over public performances by means of jukeboxes remains if private jukebox licenses expire and no new license agreements are reached.

5. The Current CARP System

As discussed above, the current CARP system consists of *ad hoc* arbitration panels that recommend the royalty rates and distribution of royalty fees collected under certain of the statutory licenses and set some of the terms and conditions of some of the statutory licenses. Each CARP is selected for a particular proceeding (examples: a rate adjustment for the cable statutory license; a distribution of DART funds) and has up to 180 days to deliver its recommendation for the rate adjustment or distribution, as the case may be. The highlights of the CARP system are as follows:

Voluntary Negotiation Period: Once it is determined that a controversy exists as to the adjustment of royalty rates or the distribution of royalty fees, as the case may be, the Office designates a period for voluntary negotiation among the parties to resolve their differences. Those parties unable to reach an agreement during this period proceed to a CARP.

Direct Cases and Discovery: Every participant in a CARP proceeding must submit a written direct case. The written direct case is the principal piece of evidence put forward by a participating party in that it sets forth all the evidence and reasons as to what the party believes the rates or distribution should be. The Office then conducts a limited discovery period during which parties may request from each other documentation that supports the assertions they make in their written direct cases.

Selection of the Arbitrators: Once the discovery phase is concluded and the proceeding is ready for hearing, the Librarian selects two arbitrators from a list of designated arbitrators whose names are obtained from arbitration associations who then select a third arbitrator from the list to serve as their chairperson. If the two arbitrators cannot agree, then the Librarian selects the chairperson (which has never happened).

Testimony and Hearings: Once the arbitrators begin their 180 period, they consider all the testimony submitted by the parties in their written direct cases. Oral hearings of the written direct cases are typically conducted (although they are not required), and the parties often submit rebuttal testimony. At the conclusion of the hearings, the parties submit their proposed findings of fact and conclusions of law wherein they argue to the CARP how it should rule. Often, the CARP will permit oral argument on the proposed findings of fact and conclusions of law.

The CARP Report: At the conclusion of the 180-day period and after considering the evidence and testimony presented, the CARP delivers its written recommendation to the Librarian of Congress as to what the royalty rates or the distribution should be. In making the recommendation, the CARP must articulate the reasons for its recommendations and the evidence that supports its conclusions.

Review of the CARP Report: Upon receipt of the CARP report, the Librarian is given 90 days in which to either accept the determination of the CARP or to reject it. The Librarian may reject the recommendation only if he or she determines that it is arbitrary or contrary to the provisions of the Copyright Act. The Register of Copyrights is directed to advise the Librarian on his or her decision. If the Librarian rejects the CARP's recommendation, there is an additional 30 days for the Librarian to issue a final order setting forth the rate adjustment or distribution, as the case may be.

Appeal of the Librarian's Order: Any party with an interest in the royalty rates or distribution determined by the Librarian may appeal the decision within 30 days of its publication in the *Federal Register*. Appeal must be made in the United States Court of Appeals for the District of Columbia Circuit.

Since the abolition of the Copyright Royalty Tribunal in 1993, the Copyright Office and the Library have conducted nine full proceedings that have resulted in delivery of CARP reports. Numerous other proceedings have settled at various stages, and the Office has several more proceedings currently pending. Six of the Librarian's decisions were appealed and in each instance the Librarian's determination was upheld.²

²In one rate adjustment proceeding under 17 U.S.C. 114, the Court of Appeals remanded for further findings a small portion of the Librarian's decision concerning the terms of payment of royalty fees.

SHORTCOMINGS OF THE CARP SYSTEM

Mr. Chairman, you will undoubtedly hear testimony from the other witnesses on today's panel as to the shortcomings and complaints of the current CARP system. In this section, I highlight some of the difficulties we have observed in the near decade of administering the system.

1. *Costs.*

The arbitrators selected to serve on a particular CARP must, of course, be paid. Arbitrators are typically compensated at between \$200 and \$400 an hour for their work which, in a hotly contested proceeding involving many parties and large amounts of testimony, can add up to considerable sums. In the case of a royalty distribution proceeding, the arbitrators are paid from the royalty funds to be distributed. In the case of a royalty adjustment proceeding where there are no royalties collected by the Copyright Office, the participants must pay the arbitrators out of their own pockets. There is no question that in some rate adjustment proceedings, some interested parties cannot afford the cost of participating. While the Copyright Office has considered allowing these parties to participate free of charge, this would certainly draw objections from the participants in the proceeding who would foot the bill.

On an institutional scale, CARP proceedings are also very costly. They require considerable amounts of time of Copyright Office and Library personnel who must conduct various phases of the proceedings, such as discovery relating to the written direct cases and review of the CARPs' decisions. In the recent CARP rate-setting proceeding for webcasting, the cost of the arbitrators alone exceeded the entire annual budget of the Copyright Royalty Tribunal in its last year of existence.

2. *Lack of Stability and Predictability of Results*

Each panel of arbitrators is selected for one particular case. The decisions they make are for the purpose of deciding that one case and not for establishing lasting precedent. Furthermore, although the Librarian attempts to select arbitrators who have served well on previous panels, the individuals almost always vary from one panel to the next. Parties who are dissatisfied with one panel are tempted to return and try a different panel. Therefore, there is a lack of stability and predictability in the process, and a lack of reliable precedent upon which the parties can base the settlement of their differences.

3. *Institutional Expertise*

Although copyright rate setting or adjustment and distribution proceedings often involve considerable amounts of money, the fact remains that the statutory licenses and the CARP system occupy an esoteric area of the law. We have found it very difficult to find arbitrators that have any familiarity with copyright law, let alone the complex statutory licenses in that law and the unique procedures of the CARPs. Those that do have some copyright law experience typically cannot be selected due to a financial or other conflict of interest. The result is that we are forced to select arbitrators that, while bright and capable, lack knowledge and understanding of the workings and details of the copyright laws and the CARP system. This lack of expertise puts a considerable burden upon the Register and the Librarian to correct errors and oversights made by CARPs during the course of the proceeding, a burden which is exacerbated by the short review period granted the Register and the Librarian by the statute. Of the nine CARP reports which the Librarian has reviewed, only three have been acceptable. Several of the rejected reports have required considerable effort in preparing a final order.

Because of the *ad hoc* nature of the CARPs, there is no institutional expertise on any given panel. As one frequent attorney participant in the CARP process recently informed the Office, the most scary day of a CARP proceeding is the first day when one encounters the level of competence of panel members that can be expected for the next six months.

RECOMMENDATIONS

Mr. Chairman, it is clear that the CARP system is far from perfect. I do believe, however, that the decision making produced by the current system is superior to that produced by the Copyright Royalty Tribunal during its tenure. I do not disparage the work of the Tribunal as they did, in most circumstances, the best they could with the resources available. But I do think that a simple return to the Tribunal system would be a mistake.

Attached to this written statement is a report prepared four years ago by the Copyright Office at the request of this Subcommittee. The report offers five different

options to improve the manner in which copyright license royalty fees and rates are resolved. The options are:

Reforming the Current System: The Copyright Office proposed eleven amendments to the Copyright Act to address the CARP's most serious flaws. They include making the Register the supervising official; lengthening the time of each proceeding; expanding the use of paper proceedings to reduce the costs of hearings; reducing the number of arbitrators for small claims or having small claims resolved by staff; and capping the arbitrators' fees.

Replacing Arbitrators with Administrative Law Judges: Under this option, administrative law judges supplied by the Office of Personnel Management would handle the royalty ratemaking and distribution cases within the Copyright Office.

Replacing Arbitrators with Presiding Officers: Under this option, arbitrators would be replaced with presiding officers who, while not administrative law judges, would perform the same functions. The precise features of this system would be established by Congress as a stand-alone system administered by the Register and not the Office of Personnel Management.

Creating a Board Within the Copyright Office: Under this option, a Board would be established within the Copyright Office that would take on more authority than presiding officers, be more autonomous, and render final agency decisions.

Creating an Independent Regulatory Agency: Under this option, a new independent regulatory agency, similar to the Copyright Royalty Tribunal but with some improvements, would be created.

The attached report discusses fully the strengths and weaknesses of each of the five options.

In 1998, Mr. Chairman, you introduced H.R. 3210, the "Copyright Compulsory License Improvement Act." The bill would have amended chapter 8 of the Copyright Act to establish a Copyright Royalty Adjudication Board ("CRAB") consisting of one full-time chief administrative copyright judge and up to four part-time administrative copyright judges selected by the Librarian of Congress. The judges would serve five year terms and be compensated at a government salary level. The Board, while within the Copyright Office, would be wholly independent and would have full authority to determine all statutory license rates and royalty distributions. The Copyright Office, however, could present formally its views to the Board on any matter, which the Board could accept or reject. Appeal of final Board decisions would be to the United States Court of Appeals for the Federal Circuit.

Although I have concerns about some aspects of the proposals contained in H.R. 3210, it was a positive first step in addressing the issues. The Copyright Office would be pleased and interested in working with the Subcommittee, and with the parties for reform of the current system to produce a better model. In reforming the CARPs, there are several key elements that need to be addressed.

First, the best way to produce well-reasoned decisions is to create a system that permits the Copyright Office and the Library to hire full-time employees who are well-versed and experienced in the copyright law, the complexities of the statutory licenses, and who are experienced at conducting administrative proceedings. As discussed above, while we have hired capable arbitrators in CARP proceedings, it has been impossible to find arbitrators who are intimate with the details of the copyright law, the statutory licenses and the distribution/rate adjustment process. Having the same full-time decision makers who adjudicate all rate adjustment and distribution proceedings will not only raise the level of institutional expertise, but will produce balanced and stable results. Placing those decision makers in the agency with expertise in copyright and the statutory licenses will ensure that their decisions are well-reasoned.

Second, although the responsibilities of rate making and royalty distribution has risen in recent years due to an increase of compulsory licenses in the Copyright Act, we recognize that there are still periods of inactivity where no proceedings are being conducted. One of the criticisms of the Copyright Royalty Tribunal was that Commissioners were still compensated during such periods thereby effectively being paid for little or no work. Consideration should be given to whether the Register should have discretion to assign additional copyright work to the Copyright Office-based decision makers during these periods of inactivity.

Third, a new system should permit the Register a substantive role during the process to address important policy and substantive matters that might arise during a rate adjustment or royalty distribution. Whether the role is one of having input into the decision, as was proposed in H.R. 3210, or one of being the final decision maker is an issue that should be explored.

Finally, there is the matter of costs. Hiring full-time employees at government salaries to serve as decision makers will certainly reduce the overall cost of proceedings to the parties, but there remains the question of the source of their funding. Under the current system, for those compulsory licenses for which the Copyright Office collects royalties, the costs of the arbitrators in distribution proceedings are paid for out of the royalty pool. This is an appropriate system that should be retained since those benefitting from the distribution are paying for the cost of the proceeding. However, in those circumstances where the Office does not collect royalties, such as the recent webcasting CARP proceeding, the parties currently pay the costs of the arbitrators. One of the objections to such a payment scheme is that it raises a bar to participation for those who cannot afford to pay the arbitrators. Therefore, I recommend that the salaries of the decision makers in rate adjustments in the new system, where no royalty fees are collected by the Office, be paid from appropriated funds. This would require an additional appropriation for that purpose.

The Copyright Office looks forward to working with the Subcommittee and the interested parties on this important matter. Thank you, Mr. Chairman.

Mr. COBLE. Thank you all for complying in the time frame. We impose the 5-minutes rule against ourselves as well. So I will start.

One criticism of the CARP system is that each panel is comprised of a new set of participants, which results in an absence of stability and predictability as well as reliable precedent. Ms. Peters, do you agree with this assessment?

Ms. PETERS. Yes.

Mr. COBLE. Does anyone disagree with their assessment?

Mr. Rich, some critics have observed that the rules of the CARP system are not comparable to the Federal Rules of Evidence, thereby producing a frenetic litigation environment there, which panelists render decisions without access to critical information. And you touched on this somewhat in your testimony. For example, panelists and the Copyright Office cannot issue subpoenas under CARP rules. How could we fix this aspect of the CARP system?

Mr. RICH. My broader recommendation, Mr. Chairman, has been that we move closer to, if not adopt totally, a model of discovery that is closer to the Federal rules. I think this came home to roost in the most recent CARP. This is not for purposes of assessing substantive outcome, but anecdotally I think it is useful in identifying the issue. One of the parties main positions in the case was dependent on agreements that the industry, the record industry, had reached with third parties, nonparties to the proceeding. They had settled voluntarily, so they were not before the CARP panel. It was obvious since this was the underpinning of the case presented by the record industry that learning everything one could learn about the circumstances of those agreements would be useful. And the panel felt it in its bones every bit as much as the other side of the case did, yet the lack of subpoena power, for example, and the lack of more robust discovery tools really made it a voluntary exercise. The panel could at most invite these 26 folks to come on into New York—come on into Washington at their own expense, be subjected to what has to be regarded as a generally unpleasant experience of being examined and cross-examined. Not surprisingly, Mr. Chairman, very few did.

That is just an example of how we don't get at the root—at issue joiner—that these complicated proceedings, I am talking about now a very large and complicated proceeding, at least, mandate.

I would be the first to suggest that you may want a scaling down of discovery and of the commensurate burden as the consequences,

as the order of magnitude of cases decline. But where you are talking industrywide important precedent, major record labels, major companies and even nascent companies hoping to get a foothold, it seems to me we ought not to spare in our use of additional tools to get to the facts and get at what we elusively call the truth.

Mr. COBLE. Mr. Garrett, I have a two-part question for you. Some of the proposals submitted to our Subcommittee would increase the scope of discovery and the length of the discovery period. Would this truly eliminate the cost of participating in a rate-setting? And, B, if these proposals were adopted, but the resulting CARP structure remained outside the jurisdiction of the Federal courts, wouldn't the resulting delays force the effective copyright owners to wait perhaps even longer to be compensated for the use of their works?

Mr. GARRETT. Mr. Chairman, I believe that expanding the scope of discovery, expanding the scope of discovery procedures and mechanisms available to parties will necessarily have the effect of increasing the cost of participation in these proceedings. I don't think that is an objective that we want to achieve here.

As a truly theoretical technical matter, I mean, I certainly understand what it says here, but let's move toward a system that is more comparable to those in the Federal courts. But I don't believe that we have that luxury for the kinds of decisions that are being made here. I don't think that that kind of luxury is one that is necessarily inherent in ratemaking proceedings.

With respect to the way I approach the issue, Mr. Chairman, I believe that the cost consideration is the most important consideration here, and if you were going to have that as your principal objective, then you cannot move toward putting these kinds of matters either within the jurisdiction of the Federal courts or else expanding the scope and types of discovery.

Mr. COBLE. Thank you, sir.

Mr. Remington I will get to you later. The red light has not appeared, but the clock did not activate. I am sure my 5 minutes have elapsed.

Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. This is not a balanced panel in the sense of people defending the present structure and process versus people criticizing it. If I wanted to have a balanced panel here today, where would I have gone to find the people who would defend the present structure and process? There is no one? Okay. All right. So something has got to change is the consensus of the people who participate in the process.

Mr. Rich, why don't you take the first shot at defending your suggestion for change; that is, moving to a rate court. Mr. Boucher has suggested that. Mr. Garrett has said if you want to cut costs and simplify the process, going to a rate court is not the way to do it. What is your response to that?

Mr. RICH. Mr. Berman, as I understand Mr. Garrett's proposal, at least at the extreme it would apparently entail putting in some untested affidavits of parties, not having any discovery beneath those, and then not having the benefit of any hearing or cross-examination to test it even at a trial setting. I think it would, frankly, make a farce—with all due respect to a lawyer I respect a lot—

I think it would make a farce of any serious effort to find—whether under a willing buyer/willing seller test or fairness or reasonable-ness standard to get at what markets that these compulsory license systems are trying to replicate would accomplish.

More directly to your question, sir, I have been through about four ASCAP rate court trial experiences now, and they have ranged from sloppy and endless and quite expensive, candidly, to extremely efficient and extremely well run. In one example, this was—

Mr. BERMAN. You have been to four.

Mr. RICH. ASCAP rate-setting processes, excuse me, representing a variety of clients.

Mr. BERMAN. You have watched the rate court work?

Mr. RICH. I have experienced it firsthand. One example is, and a favorable example that I mention to the Committee by way of structural possibility, Judge William Connor in New York, who is the supervising judge in senior status for the ASCAP consent decree, oversaw a case involving the ABC and CBS television networks involving a fee dispute covering a comparable period of years to what a typical CARP proceeding entails, from the beginning through discovery, carefully controlled by Judge Connor. He didn't let it get out of hand, brought it to trial in about a year's time, and his decision was not appealed. In other words, it went start to finish: we gave the client a budget in that case, anticipating a short track; we were kept on a short track by the judge; we kept on the budget, and it worked. We had the Federal Rules of Civil Procedure. We had the benefits of one experienced judge, very commercially savvy. There was the benefit of a developing body of precedent in terms of music performance rights, licensing traditions.

We had, again, the protections of ample discovery and subpoena power control by the court. We had Federal Rules of Evidence, so we knew what could come in and what couldn't, and we had a very efficient process, I think, with a very bright judge who got to a very sane result. And while, as usual, some people were happier with the result than others, I think there was a sense that the matter proceeded fairly.

And so as I compare that experience and contrast it with my CARP experiences where all of it just bulges at the seams, and where nothing seems to work right, you run around frenetically, as was indicated, and you don't get discovery. This seems to be a better process.

Mr. BERMAN. One short follow-up question before I—were you or your client among the people who were more happy with the final decision than others?

Mr. RICH. In that particular case, yes, although there have been other cases where the answer in the rate court has been no.

Mr. BERMAN. Now, you had a chance to defend your suggestion and attack his suggestion. Would you like to defend your suggestion, Mr. Garrett, against his attack, with all due respect for your high regard for him?

Mr. GARRETT. I have been defending myself against attacks from Mr. Rich now for 2 years; I have been accustomed to that. As a litigator, I see a great deal of merit in what Mr. Rich says.

As a litigator, one wants to have as much discovery as possible. One wants to be able to know in advance as much information as is possible. It is a very scary moment in these CARP proceedings when you walk up to a witness, an expert witness or a fact witness, and realize that is the first time that you are really going to hear anything that that witness has had to say. We don't have depositions.

But I have been doing that for 25 years in these proceedings, and it is my belief that we would be just as well off without having any of the limited form of discovery that we do have. And when you balance that against the considerations of cost—

Mr. BERMAN. What about the fact that now you are not going to hear and be able to cross-examine that witness under your suggestion; you are just going to be able to read his affidavit and file a counter-affidavit?

Mr. GARRETT. I think my suggestion goes beyond that, Congressman Berman. But I think that, first of all, it is important to understand that those rules will apply equally to both sides. Both sides are going to have as little or as much discovery, or as little or as much right to discovery. There is an equalization factor there that I think comes into play.

I also think that those who participate in these proceedings and simply do nothing but put in an affidavit and say, if you adopt this royalty rate you are going to put us out of business, that affidavits like that will be given if little credibility, little weight by the arbitrators, whoever is going to make the decision in that case. I think people—in order to put forth a compelling, credible case, they are going to have to engage in voluntary discovery. They are going to have to put in more than an affidavit saying, you are going to put me out of business. They are going to have to turn over their financial documents either as part of their direct case or testimony or some other kind of discovery.

I would use a carrot, as opposed to a stick, here; and I think it is useful because it does achieve the—what I believe to be the primary objective, which should be the primary objective of cutting costs so that all parties can participate in an affordable process.

Mr. BERMAN. Thank you, Mr. Chairman. And I think my time has expired.

Mr. COBLE. Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. And I would like to thank the panel for the very enlightening testimony we have had thus far. And while we have my favorite witness, Ms. Peters here, if you wouldn't mind, I would like to ask a question about a related matter on instrumental music and ask you to clarify two points with regard to your DMCA, section 104, report that was issued last August.

Footnote 434 of the 104 report states that you would favor repeal of section 112(e) of the Copyright Act and the adoption of an appropriately crafted, ephemeral recording exemption that would essentially permit on-line music services to make server copies of sound recordings and compositions that facilitate authorized uses of those works without permission from or obligation to the copyright owner.

After the hearing in response to my written follow-up question, you reiterated that as you stated in the report, you would favor repeal of 112(e) and adoption of an ephemeral recording exemption. Do you still favor those statutory changes and would you recommend that this Subcommittee consider them?

Ms. PETERS. With regard to the 104 report, it really wasn't in the scope of the 104 report, so it wasn't really a formal recommendation.

What we said in the footnote we do stand by. We would favor replacing the statutory license in 112(e) with an exemption.

What we said and we stand by is, we don't see any justification for the imposition of a royalty obligation under statutory license to make copies that have no independent economic value and are solely to enable another use that is permitted under a separate compulsory license. But in the 104 report, we have two recommendations of things that we believe in that don't become part of the formal recommendation, because we thought they were out of scope.

Mr. CANNON. That is that the scope of your report, but still within the scope of what this Committee probably needs to do.

The 104 report also concludes that public performances incidental to licensed music downloads shall result in no performance right liability. Again, in response to one of my written follow-up questions, you stated that it would be appropriate for Congress to enact legislation precluding any liability arising from the assertion of a copyright owner's public performance right with respect to any technical performance that may take place as a necessary byproduct of an authorized download so long as no audible performance actually takes place simultaneously with the download.

Again, for clarification, do you still support legislation that would make this statutory change as you stated in the 104 report?

Ms. PETERS. Again, it is the same thing as before. It wasn't within the scope of the report, so not part of the formal recommendations; but we stand by our analysis and what we said.

Mr. CANNON. Thank you. I understand your office is working with Chairman Coble's staff and Mr. Berman's staff to develop legislation that reflects the copyright officer's recommendations associated with the 104 report and recognizing the scope of the report and our obligations here. And I look forward to reviewing these provisions in that draft bill, and thank you very much for being here.

And Mr. Chairman, I yield back.

Mr. COBLE. Thank you. Mr. Cannon, unless I missed something, you weren't charting a CARP course, were you? What you—and I am not admonishing you for that, but was I missing something?

Mr. CANNON. No, sir. This is slightly peripheral to the testimony that has happened thus far today. But the ever-capable Ms. Peters was very much with these issues, and I appreciate that information.

Mr. COBLE. The gentleman from Virginia.

Mr. BOUCHER. Thank you, Mr. Chairman. I want to join with others in thanking this panel for illuminating our Subcommittee today on questions relating to the CARP proceedings.

I think that in response to Mr. Berman's questions, we have rather thoroughly covered the terrain of the potential of using the

U.S. District Court in the alternative to CARPs. That is a subject in which I have some interest and intend to have further discussions concerning, but I believe we have given this panel an adequate opportunity to express its views on that question.

I think we have also covered, in response to Mr. Berman's questions, rather thoroughly the potential need and the pros and cons on moving to more advanced discovery. I happen to think that that would be salutary. I understand Mr. Garrett does not think so. And that also, I think, is a fruitful subject for further conversation.

I am going to take the time of these questions today to focus on the standards. There are three standards that have come to my attention that are applied by CARPs:

Section 801 applied to music distribution services, digital music distribution services other than Webcasting, and the concept of fairness of the payment is inherent in that standard;

The section 119 standard relating to the payments that are made by cable and satellite retransmitters for terrestrial television re-broadcasting, and the concept of fairness of the payment is inherent in that standard;

Applied recently by the CARP was the section 114 standard that applies only to Webcasters, and the concept of fairness of the payment is not present in the standards that were applied in that decision.

A result was reached, which I, frankly, find very troubling. I think Mr. Billington also found it troubling. I think he took the step of setting that decision aside, and we are awaiting his decision on his more thorough consideration of the matter.

But what troubles me greatly is that in setting this rate, the consequence of the rate to the new and emerging and young and perhaps struggling Webcasters who are just getting on their feet and who measure their revenues in the tens of thousands of dollars per year was not considered. By having a one-size-fits-all approach and setting a rate of 14 cents per song played that applies to everybody, no matter what their revenues, the young companies and the small companies were severely threatened. They would have royalties alone measuring in the hundreds of thousands of dollars annually, and that strikes me as fundamentally unfair.

I think an element of what we ought to be doing as we evaluate this overall subject is to consider whether or not the standards that are being applied by the CARPs are reasonable and fair.

Now, I don't know whether you came today prepared to respond to this question or not, but I would like your opinion on the question of whether or not the standards are adequate. And specifically, do you believe that in making general revisions with regard to the CARP that we ought to be inserting the element of fairness of the payment in this section 114 standard as it is currently found in the other two standards? And who would like to respond?

Mr. Rich.

Mr. RICH. I would be glad to take a stab at it, Mr. Boucher.

First observation, and a spin on what Ms. Peters and Mr. Garrett suggested, while process is important, I think if process doesn't lead to—isn't buttressed by a substantive standard that makes sense—the process is wasteful and the efforts of this Subcommittee

therefore would be wasted; and I don't think anybody wants to see that.

I think this is a more complicated issue than the 112, 114 setting, as follows. You have a willing-buyer and willing-seller standard which is subject to various interpretations as to what it means. But one interpretation which doesn't strike me as a bad one is, it means if you had a freely competitive marketplace and you saw what even nascent Webcasters would spend in that marketplace, if you could approximate what would come out of that process and you are asking a panel to do it, it wouldn't be so bad.

I think where this has gone off the rails potentially is that there is, for example, in section 114(e) of the act an antitrust exemption which was designed to encourage negotiated resolutions by allowing collective negotiations to occur, whether through trade organizations like the RIAA or, for that matter, through collectives like ASCAP and BMI. And the result is that, acting on that statutory authority and that antitrust exemption, the collectives went out and did and tried to do what you would expect they would do, which was to obtain license fees at the best rates they could obtain from, as it turned out, a variety of generally small—with one or two exceptions—Webcasters, and then came into the CARP process and said, "Here they are; you should accept these as market approximating."

The problem is, they were the fruits of the antitrust exemption; they did reflect the product of market power. And, therefore, to assume, as I think the panel slipped into error, that simply because these were, quote, "willing buyers" and "willing sellers" in the sense that literally deals were struck, there must be some kernel of arms-length, fair result in it, I think led to the problem. And I think if you are dealing with new industries, with a particularly inherent imbalance in power, unless there is a clearer vision of what "willing buyer," "willing seller" means, than I think this panel understood, I would favor a return to something closer to the 801(b) standard—which, after all, the record industry itself benefits from in other compulsory license settings like 115, where they get the benefit of the 801(b) standard as a, quote, "user."

Why not have that as a level playing field for everyone, which explicitly recognizes the nascent nature of industries the need to encourage new players and the like, and inject back the element of fairness, if you will?

Mr. BOUCHER. Mr. Garrett, I know you want to respond to this.

Mr. COBLE. Mr. Garrett, move along quickly because the 5 minutes have elapsed and we are going to start a second round.

Mr. GARRETT. The standard that is in 114 is the same standard that is in 119. Both statutes use the term a "willing buyer, willing seller." both statutes use the term "willing buyer, willing seller."

The term "willing buyer willing seller" has historically meant in our jurisprudence a fair market value standard—119 has fair market value; 114 has fair market value. And in my view, I see no reason, no justification, for requiring the licensing of copyrighted works at anything less than fair market value. Fair market value has an inherent concept of fairness in it, and I think it was one that was considered during the recent CARP proceeding.

Mr. COBLE. We will start a second round now.

Mr. Remington, I believe that we all agree that participation should not be limited to just, quote, “the big players,” close quote. There are those who would argue that participation in CARP is cost prohibitive for individuals and small entities.

That said, I am also informed that individuals with small claims have invoked existing CARP rules to prolong proceedings and derail settlements at virtually no cost to themselves, but substantial costs to other parties. Could we correct this inequity by splitting CARP fees among parties in proportion to their participation rather than on a pro rata basis? And if not, what would you suggest?

Mr. REMINGTON. Thank you, Mr. Chairman.

I would suggest, as I stated in my written statement, that there be a much lower-cost, more expeditious system which for the \$5 or \$10 claim obviously wouldn't come in under that cost—that would be a sheer impossibility—but paper proceeding, summary judgment, aggressive pursuit of settlement not only by the parties, but by the people who—like a U.S. Magistrate would do, or a Federal district judge—by the person or entity that controls the process.

We are not arguing that individuals should not have access to this process. They should. If they are a bona fide songwriter and composer, under the DART statute they have access to that process. But it is downright silly to allow people to expend tens of thousands of dollars in pursuit of a claim under \$10 where the Copyright Office doesn't even have authority to cut a check to pay off that amount of money.

Mr. COBLE. I concur.

CARP assists in the distribution of proceeds under a compulsory license must prescribe rates and terms that are representative of those that would have been negotiated in the marketplace, again between a willing buyer and a willing seller.

Having said that, A, since the CARP represents the failure of marketplace negotiations, how do you all determine marketplace standards by which a rate may be set, A? And, B, if the same static rate is revived in subsequent CARPs, why should any CARP be convened?

Ms. Peters, why don't you start if you are comfortable starting?

Ms. PETERS. It is better that they start.

Mr. COBLE. Who wants to put their oar in the water initially?

All right, Mr. Garrett.

Mr. GARRETT. Mr. Chairman, again the notion of willing buyer, willing seller is one that is fundamentally ingrained in our system of American jurisprudence here.

The question, what is appropriate value, that is how fair market is defined; it is willing buyer, willing seller. So the issue of how you in any particular case define or come up with a willing-buyer or willing-seller rate is one that has been confronted over and over again in a wide variety of contexts. If you are talking about eminent domain cases or talking about these CARP proceedings or Government compulsory licensing of patents and copyrights, it is a standard that has been applied over and over again.

Having said that, the recent Webcaster proceedings is a good example of where one can spend hours and hours and tens of thousands of pages arguing about what does a willing-buyer, willing-seller rate mean in the context of any particular situation.

But that same kind of thing goes on in other cases, as well, when you have to determine fair market value; and I believe that that is an appropriate standard here for judging the value of copyrighted works.

If you are going to compel—and we are talking about compulsory licenses here—if you are going to compel copyright owners to license their works to different types of technologies, at the very least they should be entitled to fair market value for the use of their works.

Mr. COBLE. Does anyone want to add to that?

Mr. REMINGTON. To the extent it is obviously your prerogative to create compulsory licenses; but to the extent that you set subsidy rates at lower than fair market value, you are transferring wealth from one group of people to another in our society. And that is one of the problems in several of the compulsory licenses that do not have the willing buyer, willing seller, standard.

Now, in the political sense, many people would like those types of compulsory licenses because they get a rate that is under what they would pay in the marketplace. You just have to be careful and be knowledgeable of that fact.

Mr. COBLE. Ms. Peters, I let you off early. I am going to impose on you again.

Ms. PETERS. That is good because the terms and conditions are what we are actually really considering right now in the Webcasting proceeding, so it would be inappropriate to answer.

Mr. COBLE. That is why I was quick to recognize that.

Would eliminating all statutory licenses resolve the litany of problems which have been broached today?

Ms. PETERS. I would say hallelujah; and the answer is, yes, it would.

But my knowledge of where we are going: I think we are more likely to see more, not less; and more complex, not less complex. So it would be great because we wouldn't have to deal with what to do about the failure of the CARP system. But I think you are going to have to come and deal with it.

Mr. COBLE. I see that annoying red light looking at me now, so I recognize the gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman. Just taking off on what Mr. Rich said earlier in criticizing the willing-buyer, willing-seller standard, you talked about this example of taking some agreements between the RIAA, and I guess, what, individual DEMA members.

Mr. RICH. Individual Webcasters.

Mr. BERMAN. Individual Webcasters, and that becoming a rate. But I am told that, in fact, the CARP throughout 25 of the 26 agreements reached during that process and only left the agreement between YAHOO and—not exactly a small Webcaster—and the RIAA and then said, but even so, that rate would not be the appropriate rate and reduce that.

Mr. GARRETT, am I right about that?

Mr. GARRETT. I think you have it right, Mr. Berman.

Mr. BERMAN. So it wasn't looking at 25 unbalanced negotiations in that sense and then concluding that is the willing-buyer, willing-

seller rate derived from sort of a nonmarketplace situation because of the antitrust exemption?

Well, anyhow, I guess, Mr. Remington and Ms. Peters, you hadn't spoken yet on the issue of court versus continued administrative or arbitration process. Do you have any thoughts on that?

Mr. REMINGTON. Yes, I do.

I think, fortuitously, this is the Courts Subcommittee, so this decision could not be made in a better environment. But Bruce Rich, being a good lawyer, did recognize a deep-seated constitutional question which he said he hadn't analyzed.

I would hazard a guess that this is of very dubious constitutionality because there is no case or controversy. You would have to create a cause of action of sorts in order to invoke the litigation process and the powers of the Federal judiciary. In the BMI or ASCAP rate court context, there is a case or controversy which emanates from the administration of the consent decrees.

Second, I agree with Bob Garrett that everything that has been criticized about the defects in the CARP process, primarily costs would be exacerbated in this process; this would be more expensive and slower.

Third—and I grabbed my long-range plan for the Federal courts—the Federal judiciary from a policy perspective, as you well know, vigorously opposes the creation of specialized courts unless there is a huge societal problem at hand, something akin to maybe even to homeland security. But to create a court for copyright arbitration royalty proceedings, as a policy matter, I don't think would receive the approval of the Judicial Conference.

Ms. PETERS. I am not a constitutional scholar, so I accept Mike's questions. I really don't have a preference one way or the other. Maybe that is not true; there is a question that is raised—

Mr. BERMAN. Your life would be easier.

Ms. PETERS. Right, absolutely, and I am trying to make that happen.

A couple of countries actually have judges involved in their tribunal-type proceedings, but it is not the same as giving it to the district court. In Australia and Canada, they really have one judge who is—part of his duty for a certain period of time is to be like the equivalent of "chairman of the proceedings," if any are necessary, and then deal with stable members, who are named, whether they are from an agency like the copyright office or their equivalent of ALJs. But it does bring the adjudicator knowledge of the courts.

Now, I don't know how that kind of a system plays in with regard to our constitutional requirements. But I know that the countries that have that system seem to like that system.

Mr. BERMAN. Well, I think that does it, Mr. Chairman, for me. Thank you.

Mr. COBLE. Thank you, Mr. Berman.

Mr. Remington, I cut you off when Mr. Boucher's time expired. I will now recognize you for that comment, or have you made it?

Mr. REMINGTON. I just wanted to make a clarification. I thought I heard twice that BMI and ASCAP were part of the proceedings, and they were not. For the record, we were not part of the recent webcasting proceeding.

Mr. COBLE. Okay.

Let me put this to you, Ms. Peters, in conclusion. It has been suggested today—let me say good-bye to Howard before he leaves.

Ms. Peters, it has been suggested here today that a possible, quote, “fix,” close quote, of the CARP structure and process is going directly to the Federal court system.

How would you, as Madam Register—speaking for the copyright office, how would you feel, in essence, not having to deal with the CARP system anymore?

Ms. PETERS. Let me put it this way—

Mr. COBLE. Strike that.

How would you feel about not dealing with the CARP system, A and B? What do you think about going directly to the court system?

Ms. PETERS. I am not sure about going directly to the court system. I probably don't support that.

With regard to dealing with the CARP system, I think the system that is in place right now and the work that is done by the copyright office in the review of what the panels do is not necessary, that there is a better structure.

I am not opposing it remaining at the Copyright Office. I am just saying it has got to work better and it has got to meet the criticisms and the shortcomings that we have identified. We are not opposed to having it at the Copyright Office if that is where—when you address all of these issues, that is where the consensus seems to coalesce.

Mr. COBLE. Well, ladies and gentlemen, lady and gentlemen, we thank you all and thank those in the audience for having expressed your interest by your continued presence here. And let me conclude by thinking aloud.

If it is the consensus that we enact a bill to change the CARP system and if everyone agrees just, to some extent, to that point, it may well be helpful—again, thinking aloud—if the Copyright Office and/or our Subcommittee conducted round tables or discussions or jaw-boning with interested parties on the subject in advance of possible legislative action. I don't see that that could do any harm.

Ms. PETERS. We would be delighted to do that.

Mr. COBLE. I didn't hear you.

Ms. PETERS. We are doing very good at round tables.

Mr. COBLE. It may end up wasting time, but we always do from time to time. But you all think about that and so will I.

In conclusion, does anyone have any nagging ideas you want to bounce off before we drop the hook?

Well, again, we appreciate, folks, your testimony and your presence today. This concludes the oversight hearing on CARP, the Copyright Arbitration Royalty Panel structure and process. The record will remain open for 1 week, so if you have additional information or if anyone has additional information, the record will be open for 1 week.

Thank you again for your cooperation and attendance; and the Subcommittee stands adjourned.

[Whereupon, at 4 p.m., the Subcommittee was adjourned.]

A P P E N D I X

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA

Good afternoon. The Subcommittee will come to order.

The Founding Founders understood the importance of copyright to our nation. In keeping with this tradition, our Subcommittee has always worked to support artists by ensuring that they receive fair compensation for their creative endeavors.

Our hearing today will focus on an arcane but important component of the present system that reimburses copyright holders for their work. By way of background, and as part of the 1976 Copyright Act Amendments, Congress acknowledged the need for government to oversee the royalty rate-making and distribution process by creating the Copyright Royalty Tribunal, or CRT. The need for this entity was especially critical since the '76 Amendments also created three new compulsory licenses.

By 1993, Congress, the Copyright Office, and rate-making participants believed that greater efficiencies could be realized under a different system, which led to the development of our present construct, the Copyright Arbitration Royalty Panel, or CARP.

Unfortunately, it now appears that history is repeating itself, as the current structure and operation of the CARP system has generated great frustration among those parties required to participate within its statutory confines.

Although some critics have characterized our efforts to develop a fair and efficient rate-making and distribution process as "disappointing," I am optimistic that we will ultimately prevail in our attempt to build a better copyright mousetrap.

We have an excellent panel of witnesses today who will doubtlessly add to our individual and collective understanding of the CARP system, warts and all. I welcome them here today and thank them in advance of sharing their thoughts.

I now turn to the Ranking Member, Mr. Berman, for his statement.

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

Thank you for holding this hearing on the Copyright Arbitration Royalty Panel.

I am a strong supporter of marketplace solutions to copyright royalty disputes. Copyright owners have every economic incentive to capture additional revenue by licensing their works, and have every right to seek the highest royalties the market will bear. If they are too short-sighted to capitalize on opportunities for new revenue—or fail to act rationally, as economists would say—the marketplace will punish them. Furthermore, when copyright owners have engaged in anti-competitive conduct, the antitrust laws have, time after time, proven adequate to remedy this conduct.

Compulsory licenses and CARPs, on the other hand, have proven to be imperfect, unwieldy and costly licensing mechanisms, at best. I suspect that many CARP participants, both licensees and copyright owners, would have found a far more satisfactory outcome had they chosen to spend their money and effort negotiating a reasonable settlement in the marketplace rather than in a CARP. Furthermore, compulsory licenses tend to outlive their purpose, and thus may create marketplace dislocations rather than address them. For example, the cable compulsory license was created to help a struggling and entrepreneurial cable industry compete with the broadcast industry. Today, the cable license continues to exist in an era where the

cable industry is able to exercise market power at least comparable to that of the relevant copyright owners.

While I do not have a fondness for compulsory licenses, I recognize that we must do our best to make the ones we do have work.

The CARP process was catapulted into national awareness this year because of the controversial webcasting CARP, which determined the royalty rate for internet radio. The outcome of the webcasting CARP—which still is under consideration by the Librarian of Congress and the Copyright Office—has garnered much attention from the press and the public.

What captured our attention about the webcasting CARP was not only the royalty rate it set, however, but the process through which it occurred. While many of the rate and distribution determinations are the subject of marked disagreement among the participants, the one thing that even the strongest opponents agree upon is that the CARP process has serious flaws and warrants improvement.

In particular, the overwhelming problem that is repeatedly voiced is the expense of the proceedings. Participants in a CARP bear not only their own substantial legal fees, but also the cost of the CARP proceeding itself. This is often millions of dollars—sometimes much more expensive than the royalty claim that the CARP is addressing. For instance, I believe Mr. Remington can address particularly egregious situations in which a participant had to pay tens of thousands of dollars for a CARP to determine the distribution of around ten dollars in royalties.

In addition to the problems of cost to the participants, I know there are great concerns over the autonomy and independence of the arbitration body, the burden it places upon the Copyright Office, and the overall fairness and consistency of the outcomes. I hope these are issues we can explore today, and begin to develop strategies to improve the royalty arbitration process. Our witnesses are experienced participants in CARP proceedings, and can speak to the problems they have encountered during CARP arbitration, along with potential solutions.

The issue of CARP reform is not new to our subcommittee. In 1998, Chairman Coble introduced legislation to reform the methods through which the royalty rate is determined. Ultimately there was not enough support to enact his reform proposals. Given today's climate, however, I believe there is sufficient impetus and sufficient interest to seriously consider changes to the arbitration process. I anticipate an active discussion today to determine a model that most efficiently accomplishes the goals of the CARP process without unduly burdening the participants.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN

I agree we need to reform how licensing rates for copyrighted works are set. Everyone agrees that the current system is too expensive, time-consuming, and inefficient.

At the same time, this will be at least the third time we've changed how the rates are set. I'm all for good government, but I feel like we're playing Goldilocks here. The first system, the tribunal, was too bureaucratic. The second system, the panels we have now, are too unwieldy. So it seems like we have to find what's just right and that's what this hearing is for.

While we are discussing we should make the changes, however, it is important that any reforms made do not affect the actual rates that are set. I say this because there have been ideas—in guise of procedural reform—that really would make it harder for content owners to receive a fair price for their work.

That is something we should not do because the very incentive for the creative works that are being licensed is the financial reward promised in the copyright laws. The reforms made to the panels must be procedural in nature and no more.

PREPARED STATEMENT OF THE HONORABLE RICK BOUCHER, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF VIRGINIA

Thank you Mr. Chairman for a timely hearing on the CARP process.

The CARP process is badly broken. It should be replaced with a more efficient, more affordable and fairer system. In my view the functions of the CARP should be transferred to a U.S. District Court.

The problems which beset the CARP are many.

While the CARP process was designed to produce a streamlined procedure, the lack of appropriate discovery mechanisms has prolonged the proceedings, achieving the opposite of the intended outcome.

The process is too expensive. It is beyond the ability of many interested parties to afford. Having private parties pay the fees of the arbitrators is manifestly unjust to the financially less fortunate.

No body of expertise is developed by the arbitrators which could be applied in subsequent proceedings. Starting with a new arbitrator panel each time will lead to inconsistent judgements and a constant process of reinventing the wheel.

And the standards which are applied are demonstrably inadequate. In the recent webcasting decision, the concept of fairness of the payment was totally absent from the deliberation.

Fairness is the standard under Section 801 (b) (1) proceedings for royalty payments for digital music services other than webcasting.

Fairness is the standard under Section 119 (c) (3) (B) for royalties paid by cable and satellite companies to terrestrial broadcasters for terrestrial broadcast retransmissions.

But fairness is not an element of the standard under Section 114 applicable to webcasters. However we address the procedural problems, and I believe vesting this rate setting function in a U.S. District Court is the best approach. We also need to invest fairness of the payment as the governing standard under all CARP proceedings.

We must avoid a repeat of rulings like the most recent one, through which a one-size fits all approach was adopted, and small webcasters that measure annual revenues in the tens of thousands of dollars were saddled with royalty fees in the hundreds of thousands. A fairness standard would have prevented a ruling which threatened to put the young and small companies out of business.

Changes must be made, and I welcome this first hearing as we explore the problem and consider a new course.

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF UTAH

I thank the Chairman for calling this important hearing on the structure and process of CARP royalty setting panels. I will acknowledge that I was one of many Members who had serious concerns about the result produced by the latest CARP panel for webcasters.

I would like to remark for a moment on the governing standard by which the CARP determines the royalty rate. In addition to considering CARP structure and procedures, this Committee must also consider why there are separate rate-setting standards for the sound recording CARPs for webcasters, the satellite TV CARPs, and then all other CARPs (including the sound recording CARPs for industries other than webcasting)?

In particular the satellite TV and "all other" CARPs have standards that require rates based on fairness, fair market value, and balancing the interests of the participants. The webcasting CARP has only the "willing buyer - willing seller" language, which suggests that there is a functioning market that results in a fair price.

However, if the Congress and this Committee thought the market was functioning fairly, in the context of any compulsory licenses, there would not be any compulsory licenses as they are needed only when a market is dysfunctional or inherently one-sided – which this one clearly is.

Particularly with a nascent industry negotiating against powerful collectives representing content owners such as the RIAA, ASCAP, and BMI there is no leverage on the side of the webcasters, and in that case the “willing buyer-willing

seller” standard seems to require the CARP to ratify the results of a single-seller marketplace that is powered by an industry collective.

I mentioned my concern earlier over the recent CARP rate announced for webcasters which has been set aside for additional review by Mr. Billington, the Librarian of Congress.

It is clear to me that the purpose of Congress in putting in place the compulsory license for webcasters in the DMCA was to promote a nascent online industry up to the point it could flourish and add real diversity to the way consumers get content delivered. But if the mechanism we have established sets rates that would be detrimental to that goal, do we have a responsibility to re-examine the result? I think the answer is “yes” when Congress’ express purpose

Such actions are not unprecedented, in fact we did as much fairly recently when we deemed that the CARP for satellite broadcasting set a rate that was too high for satellite television distributors and took actions to overturn that rate.

Just so no one is surprised, (and I know this will be unpopular among some in this room) there ought to be an acknowledgment today that whatever structure or process we have for CARPs now or in the future - if the results produced are expressly against the intent of Congress and this Committee in establishing a compulsory license in the first place - then this Committee and Congress have a right and a duty to consider actions that might overturn such results.

I thank the Chairman, and I look forward to hearing the witnesses discuss how we might improve the CARP process and structure so as to get results that are more consistent with Congress’ goals and stated intent.

PREPARED STATEMENT OF THE HONORABLE DARRELL ISSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Chairman Coble and Ranking Member Berman, for holding this hearing on the process and structure of the CARP (Copyright Arbitration Royalty Panel).

With the existence of compulsory licenses, agreements are needed in order to determine the amount of licensing royalties copyright owners are entitled to receive. Unfortunately, Congress has created a flawed process in which royalty decisions are handed down. My specific concerns are directed at the exorbitant costs for arbitrators, the restrictive discovery process and the different standards for setting rates.

The CARP forces parties to participate in laborious proceedings that result often in disputed decisions and additional lawsuits. The existing CARP process can cost both parties a high price, with attorney fees, arbitrator fees, Copyright office fees and consultant fees listed as expenses. Without reform, the current model will continue to be costly for all sides. The discovery aspect of the CARP proceedings is restrictive, because the CARP has no subpoena powers. The scope of the discovery is limited to the written testimony, with access to official documents not available to shed more light on a particular issue, thereby ensuring the system in place remains ineffective and backwards, compared to a traditional court case.

My last area of concern involves the Copyright Act and the three different standards for setting royalty rates. I have attached to my opening statement a side-by-side display of the three standards, which are found in Sections 801, 119 and 114 of the Copyright Act. The first of these standards requires rates to be the product of a four-factor balancing test, and requires rates to be “fair” and minimally disruptive of the relevant industries. The second standard requires the rates to represent

the “fair market value” of the relevant activity. The third standard, which applies only to Internet radio services, lacks a fairness requirement, and only requires the arbitrators to ratify prices that would be negotiated by willing buyers and sellers in “the marketplace.”

I believe we should consider the feasibility of a single standard, which could lead to providing assurances that the rates the CARP set are fair and reasonable for both the copyright owners and the user, and provide the Copyright office a basis in which to set future royalty rates.

Shedding light on the problems will require greater inquiry in to what is deficient with the current system and what could be done to ensure fair decisions are rendered.

Thank you again for holding this hearing. I look forward to hearing the testimony from the panel of witnesses.

Statement of
INTERCOLLEGIATE BROADCASTING SYSTEM
on the Copyright Arbitration Royalty Panel (CARP)
submitted to the
Courts, the Internet and Intellectual Property Subcommittee
of the House Judiciary Committee
June 13, 2002

The Intercollegiate Broadcasting System (IBS), which was founded in 1940 to represent the college broadcasters, submits this statement on the Copyright Arbitration Royalty Panel (CARP)'s structure and process on behalf of over seven-hundred-fifty such member stations, all operating at domestic educational institutions.

The CARP arbitration process, as implemented under in the rules of the Copyright Office, 37 C.F.R., Part 251 (CARP Rules of Procedure), pursuant to Chapter 8 of the Copyright Act, as amended, 17 U.S.C., ch. 8, is manifestly unsuitable for determining statutory license fees for small webcasters under Sections 114 (Scope of exclusive rights in sound recordings) and 112 (Limitations on exclusive rights: Ephemeral recordings) of the Copyright Act, 17 U.S.C. §§ 114 and 112, as amended by the Digital Millennium Copyright Act of 1998, P.L. 105-304.

The unsuitability of the procedures under the Office's rules is demonstrated by Docket No. 2000-9 CARP DTRA 1&2, *In re Rate Setting for Digital Performance Right in Sounds Records and Ephemeral Recordings*, currently in progress.¹ IBS' member stations have been effectively excluded from participation in the arbitration proceeding by rulings of the Register in

¹ By order of May 5, 2002, the Librarian rejected the recommendation of the CARP. The Librarian's determination of issues is due no later than June 20, 2002.

violation of the Fifth Amendment to the U.S. Constitution and the Regulatory Flexibility Act of 1980, P.L. 96-354, as amended. Moreover, it was barred from filing a post-panel motion by Section 251.55(a) of the Rules, which limits direct appeals to “parties to the proceeding.” A two-page informational notice on “Webcasting Notice and Recordkeeping” recently posted on the Office’s website observes that “There is no provision for public comments on the CARP report.” (Attachment 1 hereto).

The proceeding violates the fundamental principles of due process in purporting to set statutory rates to be paid by small webcasters without any practical opportunity for them to submit evidence or argumentation with respect to their distinctive situations as small entities. This problem was recognized early on by the Copyright Office in its order of January 18, 2001.² The effect was palpable. In its order of February 9th the Office noted that “The Library believes that some parties will continue to formally withdraw from the proceeding, while others will ultimately be dismissed for failure to comply with CARP regulations.” *Op. cit.* at 3. The Office’s Announcement of March 2, 2001, noted that “Submission of *amicus* briefs, in lieu of written direct cases, has been proposed.” *Op. cit.* at ¶ 2 (Participation by small parties and/or nonparties); *see, e.g.*, letter from WCPE Radio, dated January 26, 2001. But, in its procedural order of March 16, 2001, the Office notes that “Many parties have filed Notices of Intent to Participate, and already a number of parties have formally withdrawn from this proceeding. The

² “Finally, a review of the list of participants in the proceeding reveals a number of smaller-sized firms and concerns that desire to make use of 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.” *Op. cit.* at 4

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.” Op. cit. at ¶ 3. In paragraph 5 the Office rejected alternative means of participation, e.g., briefs amicus, as not consistent with Section 251.43 of the CARP rules,³ even though the Office had elsewhere recognized that it is “critical that the interests of all affected ... users” be “represented in the proceeding.” Order in Docket No. RM-2000-3B, 65 Fed. Reg. 77292, 77294 (2000).

The result was just what would be expected. Notices of withdrawal were filed by Ithaca College on December 20, 2000 (attachment 3 hereto); by Anderson University on January 29, 2001 (attachment 4 hereto); by Monmouth University on February 9, 2001 (attachment 5 hereto); by the University of Southern Indiana on February 5, 2001 (attachment 6 hereto); and by WCPE Radio on March 31, 2001 (attachment 7 hereto). In gross terms, participation was reduced from “over 140 parties”⁴ to less than two dozen at the end.⁵

The Office’s ameliorative suggestion of full participation jointly in its order of March 16, 2001, was unrealistic for stations whose average annual budget is \$ 9000.⁶ The assessment on parties under Section 802(c) of the Act, Section 251.54 (a)(1) and (b) of the CARP rules was

³ “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.” Id. at 4.

⁴ Order of February 9, 2001, at 3.

⁵ Redacted Report of the Copyright Arbitration Royalty Panel, February 20, 2002, at call 2. Footnote 2 notes that additional webcaster parties withdrew or were dismissed from the arbitration proceeding after it commenced.

⁶ Comments of IBS, filed April 5, 2002, in Docket No. 2002-1 at 3. IBS’ annual dues, which are less than \$ 100, are constrained in amount by the low-end of the range of stations’ annual budgets.

reported to be \$ 1,000,000,⁷ and the Office began the hearing phase by apparently accepting the RIAA's urging that participation be limited to those who could afford full participation by counsel "for a minimum of four days per week for a period of one month." Order of January 18, 2001, at 1.

The CARP proceeding was not "arbitration" within any reasonable definition of the term in Section 801 (Copyright arbitration royalty panels: Establishment and purpose) of the Copyright Act, as amended, 17 U.S.C. § 801, where a party to be bound by the determination is effectively prevented from participating by procedural rulings. A more obvious denial of due process and stultification of the Congressional purpose is difficult to imagine.

The Regulatory Flexibility Act applies to CARP proceedings. They are rulemaking proceedings within the meaning of the Administrative Procedure Act of 1947, as amended, 5 U.S.C., Part I, ch. 5.⁸ Among other things, a final regulatory flexibility analysis is required by 5 U.S.C. § 604. Any argument that the Copyright Office does not fall within the definition of "agency" in the Regulatory Flexibility Act must be rejected for the reasons set forth under Point II in IBS' reply comments, filed in Docket No. RM 2002-1 April 26, 2002, a copy of which is attached hereto as Attachment 8. As an officer of the United States, see Eltra Corp. v. Ringer, Register, 579 F.2d 294, 300 (4th Cir. 1978), the Librarian is bound by the policy of the United

⁷ Broadcasting & Cable magazine for May 27, 2002, reported that "administrative costs alone [for the 1998-2002 period] ran more than \$ 1 million, not counting legal fees. ... This fall, the Copyright Office is supposed to hear arbitration for the next four years." (Attachment 1 hereto). See also Point VIII (Determination and Assessment of Costs) of the Redacted Report of the Copyright Arbitration Royalty Panel, dated February 20, 2002.

⁸ Section 2(c) of the APA, now 5 U.S.C. § 551(4), (5), specifically brings "the approval or prescription for the future of rates," etc., within the definition of rulemaking. The APA is made applicable to "all actions taken by the Register of Copyrights under this Act..." by Section 701(e) of the Copyright Act, as amended, 17 U.S.C. § 701(e).

States set forth in Section 2 (Congressional Findings and Declaration of Purpose) of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt.

Further, the Recording Industry Association of America (RIAA) has insisted on burdensome reports on use under statutory license in the collateral rulemaking proceeding, Docket No. 2002-1, *Notice and Recordkeeping for Use of Sound Recordings under Statutory License*, 67 Fed. Reg. 5761 (2002), currently in progress. The expense of the proposed recordkeeping requirements is manifestly disproportionate to both the size of the small, non-profit reporting entities and to the small amounts being distributed to various recording artists. The proposed rules would require recordkeeping of a magnitude that is impractical for small webcasting operations run by volunteer students to do; that burden would be imposed in order to distribute to the average artist only pennies per year per station.⁹ The Office's procedures must necessarily take into account the cumulative burden both of the fees prescribed under Chapter 8 and of the economic burden of the recordkeeping prescribed under Chapter 7.

Here again the Office has so far failed to accommodate the proceeding to the smaller entities.¹⁰ No initial regulatory flexibility analysis (IRFA) was issued by the Office as required by Regulatory Flexibility Act of 1947, as amended. Any contention that the 1947 Act does not apply to the Office as an arm of Congress excluded from the definition of "administrative agency" in Section 2(a) of the Administrative Procedure Act of 1947, now 5 U.S.C. § 551(1)(A),

⁹ The disproportion is demonstrated in the reply comments of an IBS member, the Harvard Radio Broadcasting Company, Inc., and of others in the record of Docket No. RM 2002-1.

¹⁰ To the Office's credit, it did conduct three informal roundtables in the rulemaking proceeding on May 10th, but these standing alone are not an adequate substitute for the procedures set forth in the Regulatory Flexibility Act, as amended. The informational notice recently posted on the Office's website (Attachment 1) implies that some segmentation of interim rates and recordkeeping requirements may be forthcoming later this month in the CARP and rulemaking proceedings.

should be rejected as legally unsound.¹¹ If the Office is to be part of Congress acting legislatively, it is in violation of the Presentment Clause of the Constitution, Buckley v. Valeo 424 U.S. 1 (1976), and if it is acting administratively as part of Congress, it violates the separation of powers doctrine. Bowsher v. Synar, 478 U.S. 714 (1986). The sounder analysis would be that the Office was not intended to act as part of Congress other than as specified in Section 701(b), as amended, 17 U.S.C. § 701(b)

Conclusion

Both the royalty arbitration proceeding and the recordkeeping rulemaking have gotten off to bad starts as far as the small webcasters are concerned. In neither case is the situation beyond retrieval by the Office. The royalty rates and the recordkeeping requirements must be made more proportionate. But, longer term, IBS submits that the Office must find a stable way to conduct its proceedings in the future so that small webcasters can practicably participate in CARP proceedings and so that the Regulatory Flexibility Act is fully complied with.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

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(845) 565-0003

¹¹ The legal analysis is set forth in the Joint Motion of IBS and Harvard Radio, for an IFRA, filed April 5, 2002 in Docket No. RM 2002-1 and in IBS' reply filed therein on April 26, 2002, copies of which are attached hereto as Attachments 8 and 9.

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Attachments:

- Attachment 1: Webcasting Notice and Recordkeeping (from Copyright Office Website)
- Attachment 2: Broadcasting & Cable magazine, May 27, 2002, p. 14
- Attachment 3: Withdrawal by Ithaca College, December 20, 2000
- Attachment 4: Withdrawal by Anderson University, January 29, 2001
- Attachment 5: Withdrawal by Monmouth University, February 9, 2001
- Attachment 6: Withdrawal by University of Southern Indiana, February 5, 2001
- Attachment 7: Withdrawal by WCPE Radio on March 31, 2001
- Attachment 8: IBS' reply comments in Docket No. RM 2002-1, filed April 26, 2002
- Attachment 9: Joint Motion of IBS and Harvard Radio Broadcasting Company, filed April 5, 2002

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

Background

On February 7, 2002, the U.S. Copyright Office issued a notice of a proposed rulemaking on the requirements for giving sound recording copyright owners reasonable notice of the use of their works in connection with the [section 114](#) statutory license for certain digital transmissions of public performances of sound recordings, and on the requirements for how records of such use will be kept and made available to copyright owners.

Please note that this rulemaking proceeding is not about the rates and terms for webcasters that were recommended by the Copyright Arbitration Royalty Panel ("CARP") in its February 20, 2002 report. There is no provision for public comments on the CARP report. The comments address the proposed rulemaking on the requirements for giving sound recording copyright owners reasonable notice of the use of their works in connection with the section 114 statutory license.

Comments

Interested parties submitted [comments](#) on the rulemaking by April 5. [Reply comments](#) were due April 26. For more details, please see *Federal Register* notice [67 FR 5761](#).

Public Roundtable

The Copyright Office conducted a public roundtable on the proposed regulations on May 10. Details of the roundtable may be found in *Federal Register* notice [67 FR 18148](#). Follow this link for a [list](#) of the three panels conducted at the roundtable and the participants in each panel.

[TVWorldwide.com](#), in cooperation with the International Webcasting Association, webcast the roundtable discussion, and an archived copy is available for viewing. Although the Copyright Office did not officially sponsor this webcast, we are pleased that it is available to viewers on the Internet.

An unedited transcript of the roundtable is also available. Read:

- [Panel I: Royalty Allocation](#)
- [Panel II: Compliance with Terms of License](#)
- [Panel III: Small Businesses](#)

Interim Regulations

The Copyright Office expects to announce interim notice and recordkeeping regulations around the time that rates and terms for the section 114 and section 112 statutory licenses are announced. The interim regulations will establish transitional reporting requirements for services using the section 114 statutory license to perform sound recordings publicly by means of digital audio transmissions and the section 112 statutory license to make ephemeral recordings of sound recordings. After several months, these transitional reporting requirements will be replaced by final requirements that are likely to include more comprehensive reporting.

The interim requirements are likely to require each service to report the following information for a certain period of time during each calendar quarter:

1. the name of the service submitting the report
2. the transmission category of the service [*i.e.*, a single letter code identifying the nature of the service transmitting the performance, *e.g.*, Eligible nonsubscription transmission by webcaster of over-the-air AM or FM radio broadcast, other eligible nonsubscription transmission by a webcaster, eligible nonsubscription transmission by commercial broadcaster of over-the-air AM or FM radio broadcast, eligible nonsubscription transmission by non-CPB, noncommercial broadcaster, etc.]
3. for each sound recording transmitted by the service during the relevant period:
 - A. the featured recording artist
 - B. the sound recording title
 - C. the name of the record album containing the sound recording, if in the possession of the service, or supplied to the service, at or before the time of the performance
 - D. the marketing label of the sound recording, if in the possession of the service, or supplied to the service, at or before the time of the performance; and
 - E. the total number of performances of the sound recording during the relevant reporting period.

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07-Jun-2002

TOP OF THE WEEK

Music biz asks for radio probe

Groups say consolidation's leading to payola-like tactics that hurt listeners

By Paige Albiniak

Groups representing recording artists, record companies, songwriters, merchandisers and consumer advocates want the government to take a hard look at radio consolidation, hinting that some practices by large group owners smack of payola.

In a statement delivered to Congress and the FCC Friday, 10 independent industry groups urged "the government to revise the payola laws to cover independent promotion to radio, to investigate the impact of radio consolidation on the music community and citizens, and to work to protect non-commercial space on both the terrestrial radio bandwidth and the emerging Webcasting models."

Sen. Russell Feingold (D-Wis.) is work-

ing on legislation to reform radio, a staffer confirmed.

The wide-ranging groups include the Recording Industry Association of America, American Federation of Musicians, American Federation of Television and Radio Artists, Association for Independent Music, Future of Music Coalition, Just Plain Folks, Nashville Songwriters Association International, National Association of Recording Merchandisers, National Federation of Community Broadcasters, and the Recording Academy, a part of the National Academy of Recording Arts and Sciences.

"Today, for the contemporary-hit radio/top-40 formats, only four radio station groups—Chancellor, Clear Channel, Infinity and Capstar—control access to 63% of the format's 41 million listeners nationwide,"



Sen. Russell Feingold (D-Wis.) is working on a legislative proposal to reform radio.

the statement says. "For the country format, the same four groups control access to 56% of the format's 28 million listeners."

The petitioning groups are upset by payola-like practices in which artists and record companies pay for radio-station promotions in return for airtime for

favored artists. They also want the FCC to investigate how vertical integration in radio has forced up concert-ticket prices and made it difficult for non-affiliated artists to book tours. Clear Channel runs a concert-promotion company, SFX Entertainment.

"Artists, songwriters, labels and retailers," says Mike Bracy, of the Future of Music Coalition, "are united in opposition to large broadcasters' claim that consolidation has improved commercial radio." ■

CARP is thrown back

Library of Congress won't accept radio streaming royalty rate

By Paige Albiniak

Radio broadcasters will get another chance at reducing the fees they will pay to stream their signals over the Internet. That's after the Library of Congress refused to adopt the rate agreed to last February by the Copyright Arbitration Royalty Panel (CARP).

Since February, radio broadcasters and Internet-only Webcasters have been lobbying fiercely against the rate, which CARP said should be 0.07 cents per song per listener for traditional radio broadcasters and

0.14 cents per song per listener for Internet-only radio stations.

The fees would be paid to record companies and artists, who initially wanted more but then accepted the suggested rates. Radio broadcasters already pay fees to music publishers ASCAP and BMI but much less than those CARP says should be paid to record companies.

CARP is managed by the U.S. Copyright Office, part of the Library of Congress. Librarian of Congress James Billington rejected the rate based on the recommendation of Mary Beth

Peters, registrar of copyrights.

By law, Billington must issue a final decision by June 20; it is possible that decision will include new rates. But Billington also could remand the whole process back to a new CARP. That would be expensive, sources say. Administrative costs alone last time ran more than \$1 million, not counting legal fees.

This proceeding covers 1998-2002. This fall, the Copyright Office is supposed to hear arbitration for the next four years.

While sources say inter-industry negotiations aren't going on

yet, the June 20 date gives the industries an opportunity to hash out a rate on their own, which Congress would prefer. Two weeks ago, Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and ranking member Orrin Hatch (R-Utah) pushed the industries to negotiate an independent settlement or possibly face legislation.

The House is also getting into the act. The House Courts and Intellectual Property Subcommittee has penciled in a June 13 hearing to examine the CARP process; in April, House Judiciary Committee Chairman James Sensenbrenner (R-Wis.) collected comments from involved parties in order to begin writing reform legislation. ■

December 14, 2000

Ms. Gina Giuffreda
Copyright Arbitration Royalty Panel
PO Box 70977
South West Station
Washington, DC 20024

Re: Docket 2000-9 CARP DTRA 1 & 2

RECEIVED

DEC 20 2000

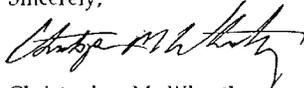
GENERAL COUNSEL
OF COPYRIGHT

Dear Ms. Giuffreda,

I am confirming the discussion we had by telephone regarding my desire to be removed from the service list.

Thank you.

Sincerely,



Christopher M. Wheatley
Manager, Radio Operations
326 Roy H. Park Hall
Ithaca College
Ithaca, NY 14850

(607) 274-3142

e-mail: <wheatley@ithaca.edu>

wheatley@ithaca.edu, 10:45 AM 12/21/00, Docket No. 2000-9 CARP DTRA1 &

To: wheatley@ithaca.edu
From: Gina Giuffreda <ggiu@loc.gov>
Subject: Docket No. 2000-9 CARP DTRA1 & 2
Cc:
Bcc:
Attached:

Mr. Wheatley:

I am in receipt of your letter confirming our discussion that you would like to be removed from the service list for the reference proceeding. I have taken your name off the service list. Also, per our conversation, I sent to you a new service list via regular mail. Please remember that you are to serve a copy of this letter on every party listed on that service list. Otherwise, you will continue to receive copies of anything filed in this case.

If you have any questions, please feel free to e-mail me or call me at 202-707-2699.

Sincerely,

Gina Giuffreda
CARP Specialist

ANN BAVENDER*
 ANNE GOODWIN CRUMP
 VINCENT J. CURTIS, JR.
 PAUL J. FELDMAN
 FRANK R. JAZZO
 ANDREW S. KERSTING
 EUGENE W. LAWSON, JR.
 MITCHELL LAZARUS
 SUSAN A. MARSHALL*
 HARRY C. MARTIN
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 LEONARD R. RAISH
 JAMES P. RILEY
 ALISON J. SHAPIRO
 KATHLEEN VICTORY
 JENNIFER DINE WAGNER*
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January 29, 2001

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FEB 2 2001

GENERAL COUNSEL (703) 812-0478
 OF COPYRIGHT shapiro@fhh-telcomlaw.com

BY CERTIFIED MAIL

Copyright Arbitration Royalty Panel (CARP)
 P.O. Box 70977, Southwest Station
 Washington, D.C. 20024

Re: **Docket No. 2000-9, CARP DTRA 1 & 2**
Withdrawal from Proceeding

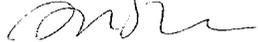
Dear Sir/Madam:

On behalf of Anderson University/WQME 98.7 FM I hereby respectfully withdraw its *Notice of Intent to Participate in CARP Proceeding*, Docket No. 2000-9 CARP DTRA 1 & 2.

Please date-stamp the attached confirmation copy, marked 'Please Stamp and Return this Copy to Fletcher, Heald & Hildreth,' and return it in the self-addressed, stamped envelope provided.

Should any questions arise concerning this matter, please contact this office.

Very truly yours,
 FLETCHER, HEALD & HILDRETH, P.L.C.



Alison J. Shapiro
 Counsel for Anderson University/WQME 98.7 FM

cc: All Parties on Service List
 Ms. Gina Giuffreda, Copyright Office (by fax 202-252-3423)

IRWIN, CAMPBELL & TANNENWALD, P.C.

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FEB 12 2001

GENERAL COUNSEL
OF COPYRIGHT

February 9, 2001

Copyright Arbitration Royalty Panel (CARP)
P.O. Box 70977, Southwest Station
Washington, DC 200024

Re: Docket No. 2000-9, CARP DTRA 1 & 2
Withdrawal from Proceeding

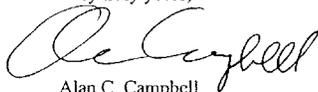
Dear Sir or Madam:

On behalf of Monmouth University, I hereby respectfully withdraw its Notice of Intent to Participate in CARP Proceeding, Docket No. 2000-9, CARP DTRA 1 & 2.

Please date-stamp the attached File Copy and return it on the self-addressed stamped envelope provided.

Should you have any questions regarding this matter, please do not hesitate to call.

Very truly yours,



Alan C. Campbell
Counsel for Monmouth University

CERTIFICATE OF SERVICE

I, Jennifer N. Reyes, hereby certify that on this 5th day of February, 2001, copies of the foregoing Withdrawal Notice have been served by first-class United States mail, postage pre-paid upon the following:



Jennifer N. Reyes

Seth D. Greenstein
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600 Thirteenth Street, N.W.
Washington, DC 20005

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Vancouver, B.C.
V6B2B4

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Musicplex.com, Inc.
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Culver City, CA 90232

Russell R. Hauth
4880 Santa Rosa Road
Suite 300
Camarillo, CA 93012

Michael A. Kahn
Folger Levin & Kahn
Embarcadero Center West
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San Francisco, CA 84111

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American Federation of Television and
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Suite 1100
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Washington, DC 20005-1272

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Shaw Pittman
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Washington, DC 20037

Douglas A. Kaplan
Sirius Satellite Radio Inc.
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New York, NY 10020

Irv Goldstein
198 Main Street
Danbury, CT 06810

Walter F. McDonough
Future of Music Coalition
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Suite 900 South
Washington, DC 20005

William A. O'Brien
WJLS-FM
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Beckley, WV 25801

David W. Rahn
c/o SBR Creative Media, Inc.
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Boulder, CO 80303

Will Spears
KWUF AM & FM
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Pagosa Springs, CO 81147

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Paradis Broadcasting of Alexandria,
Inc. (dba KXRA-KX92-Z99)
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Alexandria, MN 56308

Jim East
WOLC/Maranatha, Inc.
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11890 Crisfield Lane
Princess Anne, MD 21853

Jo Ann Juliano
Dead-Air Broadcasting Co., Inc
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Dillon, MT 59725

Tom Atena
WMET
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Black Mountain, NC 28711

Earl Metzger
WITZ AM/FM
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Jasper, IN 47546

Richard Trautschold
319 "B" East Battlefiled
Springfield, MO 65807

Joel Hanson
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Kelso, WA 98626

Michael Costanzo
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Sioux Falls, SD 57104

Donald F. Littman
Educational Community Radio, Inc.
T/A WOBO
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Owensville, OH 45160

Alison J. Shapiro
Fletcher, Heald & Hildreth, P.L.C.
11th Floor, 1300 North 17th Street
Arlington, VA 22209-3801

Kimberly Henrie
KMTS
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Glenwood Springs, CO 81602

Larry Roberts
Fisher Radio Regional Group, Inc.
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Spokane, WA 99201

Jerry D. Sokolosky
2143 H/W 64N, Box 1756
Guymon, OK 73942

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Seguin, TX 78155

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wsmonline.com
Gaylord Entertainment Company
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Nashville, TN 37214

Carl Gardner
Journal Broadcast Group, Inc.
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Milwaukee, WI 53212

Eugene J. Manning
WARX Radio
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John Morris
WSWI/University of Southern Indiana
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Evansville, IN 47712

Charles H. Sullivan, Jr.
 Ocean Broadcasting, LLC
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 Wilmington, NC 28405

Terry Dismore
 WCVO Radio
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 New Albany, OH 43054

Maggie Martin
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 WGFA FM 94.1
 Watseka, IL 60970

Robert J. Hughes
 KXST (Sets 102)
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 San Diego, CA 92112

Edward A. Schumacher
 WTUZ Webcast
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 New Philadelphia, OH 44663

Laurence Rutter
 Radio Station KNGT-FM
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Thomas J. Spics
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 Sioux City, IA 51104

Frank Hanzel, Jr.
 Wild West Radio, Inc.
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 Craig, CO 81625

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 Queensbury, NY 12804

Eric Pietras
 WVVC Galesburg
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 2 E South St.
 Knox College
 Galesburg, IL 61401-4999

David M. Winchester
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 (dba KWIL and/or KHPE and/or
 KEED)
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 Wake Forest, NC 27588

Charles B. Cooper
 WHLC FM 104.5 (Charisma Radio
 Corp.)
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 Highlands, NC 28741

Joseph E. Jindra
 KNCK Radio
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 1390 W. 11th Street
 Concordia, KS 66901

Michael Mitchel
101 Centre, Suite R
Woodward, OK 73801



RECEIVED

FEB 13 2001

GENERAL COUNSEL
OF COPYRIGHT

February 5, 2001

BY CERTIFIED MAIL
Copyright Arbitration Royalty Panel (CARP)
P.O. Box 70977 Southwest Station
Washington, D.C. 20024

Re: **Docket No. 2000-9, CARP DTRA 1 & 2**
Withdrawal from Proceeding

Dear Sir/Madam:

On behalf of WSWI/University of Southern Indiana (a non-commercial, not-for-profit college radio station), I hereby respectfully withdraw our *Notice of Intent to Participate in CARP Proceeding*, Docket No. 2000-9 CARP DTRA 1 & 2.

Please date-stamp the attached confirmation copy, marked "Please Stamp and Return this Copy to WSWI" and return in the self-addressed, stamped envelope provided.

Should any questions arise concerning this matter, please contact this office.

A handwritten signature in black ink, appearing to read 'John M. Morris', written over a horizontal line.

John M. Morris
WSWI General Manager

Cc: All parties on service list

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

WITHDRAWAL OF
NOTICE OF INTENT TO PARTICIPATE

GENERAL COUNSEL
OF COPYRIGHT

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
General Manager, WCPE
President, Educational
Information Corporation
PO Box 828
Wake Forest, NC 27588

7

In the
COPYRIGHT OFFICE
Washington, D.C. 20540

RECEIVED

APR 26 2002

GENERAL COUNSEL
OF COPYRIGHT

In re
NOTICE AND RECORDKEEPING FOR
USE OF SOUND RECORDINGS UNDER
STATUTORY LICENSE

Docket No. RM 2002-1

**REPLY COMMENTS OF
INTERCOLLEGIATE BROADCASTING SYSTEM**

1. INTRODUCTORY STATEMENT

The comments of others filed April 5, 2002, only confirm the Intercollegiate Broadcasting System's ("IBS") opening comments showing that in practice the Copyright Office's ("Office") published proposal would unjustifiably and discriminatorily burden small webcasters affiliated with educational institutions. The proposal should either be rejected or modified to exclude webcasters affiliated with educational institutions.

The "slightly revised" proposal¹ offered by the Recording Industry Association of America ("RIAA"), standing alone, does not materially reduce the direct and disproportionate burden on such webcasters. This recordkeeping burden is exacerbated by the Office's conscious and deliberate exclusion of small entities from the setting of compulsory license fees by the Copyright Arbitration Royalty Panel ("CARP") in Docket No. 2000-9 CARP DTRA 1 & 2. See Order of the Register, dated March 16, 2001. The Office is required to consider the cumulative

¹ RIAA Comments at 32.

impact on small entities of the proposed rules and the minimum rates arrived at in the concurrent CARP proceeding.

The adverse impact of the proposed rules on webcasters' use of small record labels will result in a diminution of the diversity of music available to the public, by denying the labels the public exposure necessary for the viability of such labels because of the disincentive to webcast performances created by the recordkeeping requirements.

To the extent the surviving webcasters could practicably continue to play such small labels and report such use, RIAA's comments fail to demonstrate that its so-called SoundExchange could practicably process reports of such plays and cost-effectively distribute the small per-label amounts of royalties to the large number of entities entitled to royalties from small-label performances.

Neither the proposal published by the Office nor the "slight" modification thereof proposed by RIAA in its comments comports with the purposes of the Regulatory Flexibility Act of 1980, 5 U.S.C. ch. 6, as amended, ("RFA"), as set forth in Section 2 thereof, 5 U.S.C. § 601 nt, nor would the record in this proceeding support the adoption of either in compliance with Section 604(a) of the RFA, 5 U.S.C. § 604(a). The argument that the instant rulemaking proceeding is not subject to the RFA, is unsound as a matter of statutory construction. Congress did not intend to exclude Office rules from application of the RFA. If the Office, in its rulemaking capacity, were to fall within the Congressional exemption in Section 2(a) of the Administrative Procedure Act ("APA"), its exercise of rulemaking powers would conflict either with the presentation clause of the Constitution or with the Constitutional requirement for separation of powers.

**II. THE RECORDKEEPING PROPOSAL WOULD
UNLAWFULLY BURDEN SMALL WEBCASTERS.**

For the reasons described in the opening comments of IBS and others, the published proposal violates the public policy concerning the impact of Federal rules on small entities, as set down by Congress in Section 2 of the RFA, as amended, 5 U.S.C. § 601 nt. Such violation is in no way attenuated by the RIAA's "slight revision" of its original proposal. RIAA Comments at 32. The record in this proceeding simply provides an inadequate basis for the Office's adopting the recordkeeping rules, as proposed, because Section 604(a) of the RFA, 5 U.S.C. § 604(a), requires an agency

promulgat[ing] a final rule under section 553 of this title [APA Section 4 (Rule making)], after being required ... to publish a general notice of proposed rulemaking ..., the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain --

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rules and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

It is clear as a textual matter that Congress intended rulemakings in the Office to be subject to the RFA. Section 701(d) of the 1976 Copyrights Act ("1976 Act"), now 17 U.S.C. § 701(e), specifically provides that

all actions taken by the Register of Copyrights under this act are subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, Chapter 5, Subchapter II and Chapter 7).

The Office's instant proposal to impose a recordkeeping requirement is clearly an action within the recordkeeping requirements provisions added to Sections 601(8) and 604(4) by Congress in P.L. 104-121 in 1996.

Any argument that the RFA should not apply to the Office because it is not an "agency" within the meaning of Section 2(a) (agency) of the APA, which is incorporated by reference in Section 601(1) (agency) of the RFA, 5 U.S.C. § 601(1), must be rejected. The exclusion of "the Congress" from the definition of "agency" in the APA has the intent and effect only to exempt Congress as a governmental authority from the APA. In Section 701(d) of the 1976 Act, Congress very explicitly and deliberately intended the Office to be subject to the APA, thereby limiting *pro tanto* the effect of the Congressional exemption. Moreover, Section 701(d) of the 1976 Act also specifies that Section 10 (Judicial review of agency action) of the APA, now 5 U.S.C., ch. 7 (Judicial review), shall apply to "all actions taken by the Register of Copyrights" under the 1976 Act. The exclusion of "the Congress" from the definition of agency for the purpose of Chapter 7 in 5 U.S.C. § 701(b)(1)(A), is essentially identical with that in Section 2(a) of the APA, now 5 U.S.C. § 551(1). Again in Section 701(d) of the RFA, Congress made it plain that the Office was not exempt from "judicial review of agency action," so the Office is included within the term "agency" throughout the APA.

The omission of any reference to the RFA (The Analysis of Regulatory Functions), in Section 701(d) of the 1976 Act does not of itself imply that Congress did not intend the Office to

be subject to the RFA. When Section 701(d) was enacted, the RFA had not yet even been enacted and could not have been referred to as Chapter 6 of Title 5.

Congress cannot be taken to have intended to exempt the rulemaking function of the Office under Section 701(d) of the 1976 Act from the RFA. Otherwise, the exercise of that quasi-legislative function by a part of "Congress" within the meaning of Section 2(a) of the APA, would violate the presentment clause of the Constitution, Art. I, § 7, Cl. 2. See INS v. Chadha, 462 U.S. 919 (1983). Alternatively, if deemed non-legislative, then the exercise of that function by a part of "Congress" within the meaning of Section 2(a) of the APA, would violate the separation of powers.

Congress, in enacting Section 701 of the 1976 Act and later amending it in 1998 by P.L. 105-304, did not intend to so disregard the Constitutional issue. This is a case where "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.). Section 701(d) of the 1976 Act was inserted in response to the challenge to the Constitutionality of what became the 1976 Act in the course of the House hearings on H.R. 2223. In testimony before the House subcommittee on June 5, 1975,² Professor Brylawski previewed his law journal article arguing that Constitutionally the Office "must either be transferred to the executive branch or reestablished as an independent regulatory agency under the direction of a Register appointed by the President." See E. Fulton Brylawski: *The Copyright Office: A Constitutional Confrontation*, 44 Geo.Wash. L. Rev. 1, 47 (1975). In addition, chapter XV(7) of the Second Supplementary Report of the Register of Copyrights on the General Revision of the

² "Copyright Law Revision," Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, on H.R. 2223 (Serial No. 36, Part 1) at 459-67 (1975).

U.S. Copyright Law: 1975 Revision Bill (1975) relies on a legal memorandum of Kent Dunlap, a staff attorney, "The Effect of the Constitutional Principle of Separation of Powers on the Copyright Revision Bill," printed in the third volume of the 1975 House hearings, *supra*, at 2160-72. Mr. Dunlap's legal analysis obviously relied only on cases prior to August, 1975, in concluding that the separation of powers limited the placement outside the executive branch of only executive functions reserved to the President. Moreover, his memorandum was focussed on, if not limited to, quasi-judicial or adjudicatory functions.

The courts have adopted a functional analysis, rather than a formal analysis, so that the fact that the Office is part of the Library of Congress is not determinative of the classification of the Office to the legislative department of government. In rejecting Professor Brylawski's argument under the Appointments Clause, Art. III, § 2, cl. 2, in Eltra Corp. v. Ringer, Register, 579 F.2d 294 (1978), the Fourth Circuit adopted a functional analysis in reaching that result. It observed that

it would appear indisputable that the operations of the Office of Copyright are executive. * * * It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislation appropriation. The Librarian performs certain functions which may be regarded as legislative (i.e., Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped code-wise under either the legislative or executive department[s]. But such code-grouping cannot determine whether a given function is executive or legislative. * * * The Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office * * *.

Id. at 301. Thus, whether the Library of Congress or the Copyright Office is part of Congress for the purposes of the APA Section 2(a) exemption cannot be determine *en grosse*, but must be determined function-by-function. Under the functional analysis, court decisions on the applicability of the Library of Congress at large are irrelevant to specific functions of the Office.

The Fourth Circuit's decision appeared to quiet the controversy until Bowsher, Comptroller v. Synar, 478 U.S. 714 (1986). That case returned the dialogue to the fundamental underpinnings of the separation of powers doctrine represented in the fear of "congressional usurpation of Executive Branch functions", i.e., "the fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Id. at 727, quoting Buckley v. Valeo, 424 U.S. 1 (1976). See Madison: 1 Annals of the Constitutional Congress 380 (1789), oft-quoted by the Supreme Court.

Upon the next legislative revisitation to the 1976 Act, this separation-of-powers concern seems to have led to the Leahy amendment,³ inserting new subsection in Section 107 of the 1976 Act, which became 17 U.S.C. § 701(b). The legislative rationale is described in House Conference Report No. 105-796 (1998) at 77 thusly:

The new subsection to be added to 17 U.S.C. Sec. 701 sets forth in express statutory language the functions presently performed by the Register of Copyrights under her general administrative authority under subsection 701(a). Like the Library of Congress, its parent agency, the Copyright Office is a hybrid entity that historically has performed both legislative and executive or administrative functions. *Eltra Corp v. Ringer*, 579 F.2d 294 (4th Cir. 1978). Existing subsection 701(a) addresses some of the latter functions. New subsection 701(b) is intended to codify the other traditional roles of the Copyright Office and to confirm the Register's existing areas of jurisdiction.

New subsection (b) seems designed to explicitly establish the "hybrid character" of the Office, Eltra Corp., supra, at 301, by "beefing up" the nominal legislative functions of the Office, thereby attempting to rationalize the Office's formal placement in the legislative department of government. Such attempted rationalization is thoroughly inconsistent with the functional approach utilized by the Fourth Circuit and should be rejected. In light of "the command of the

³ 144 Cong. Rec. S8389, S8397 (daily ed. July 16, 1998).

Constitution that the Congress play no direct role in the execution of the laws”, Bowsher, supra, at 736, it is difficult to conceive that Congress meant to exclude the Office’s rulemaking function from the RFA.

The inclusion of the Office in the Section 2(a) exemption for Congress would lead to the logically inescapable conclusion that if the Office’s rule-making function is considered an act of “the Congress,” then it violates the presentment clause, and if it is considered as an executive or administrative function it violates the separation of powers. See, generally, Jiles: “Copyright Protection in the New Millennium: Amending the Digital Millennium Copyrighted Act to Prevent Constitutional Challenges,” 52 Admin. L. Rev. 443 (Winter 2000). While the Office, under jurisprudential principles, lacks the power to decide the Constitutionality of its own statute in this proceeding, it may avoid deciding the question by applying the RFA, as, we submit, Congress intended, including Section 603 (Initial regulatory flexibility analysis).

In applying the RFA in this proceeding, the Office is obliged to considered the cumulative impact of the recordkeeping requirements and the minimum fee schedule that was imposed by the discriminatory, one-size-fits-all, procedural rules imposed by the Office in Docket No. 2000-9 CARP DTRA 1&2. In the Register’s order of March 16, 2001, the Register expressly and deliberately rejected the attempts by numerous small entities for a participatory role proportionate to their size. The Office began the hearing phase by apparently accepting the RIAA’s urging that participation be limited to those who could participate fully “for a minimum of four days per week for a period of one month.” Order of the Register, dated January 18, 2001, at 1, quoting RIAA Reply at 4. That order recognized the problem of small entities:

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 costs 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, or 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.

Id. at 4. But the Office did nothing to accommodate these concerns. In the March 16th order the Register declined any accommodation to small entities:

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 provision. 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.

The exclusionary effect of the Office's ruling in practice was acknowledged in the March 16th order, where the Office admitted that

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.

Id. at 2. Copies of the January 18 and March 10, 2001, orders are appended hereto.

This sort of procedural inflexibility contradicts the spirit, if not the letter, of the RFA. Whether the procedural rules that were originally adopted for broadcast licensees are legally defensible with respect to that class or not, they are clearly not defensible as to small webcasters. The practical exclusion of a class of payors from the proceeding to determine the amount of their payments is plainly inconsistent with the Fifth Amendment to the Constitution. To add insult to injury, upon inquiry, interested small entities were informed by the Office that appeals to the Librarian were limited to parties fully participating in the arbitration proceeding. Small entities are excluded from appeals to the Librarian by Section 251.55 (post-panel motions) of C.F.R., Title 37, which limits appeals to "parties" to the proceeding. As a result no direct attack on the procedural rulings is contemplated or permitted by the Office.

Be that as it may, the Office is required in this proceeding to consider the cumulative burden of the recordkeeping requirements and the disproportionately high minimum fee on small webcasters.

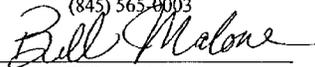
III. CONCLUSION

For the reasons stated in the opening comments by IBS and other small webcasters, the Office should not adopt the one-size-fits-all recordkeeping requirements proposed, unless webcasters affiliated with educational institutions are excluded therefrom.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

367 Windsor Highway
New Windsor, New York 12553
(845) 565-0003

by 
William Malone

Miller and Van Eaton, P.L.L.C.
1155 Connecticut Avenue, # 1000
Washington, D.C. 20036-4320
(202) 785-0600
Its Attorney

April 26, 2002

Attachments --

Orders in Docket No. 2000-9 CARP DTRA 1&2
-- January 18, 2001
-- March 16, 2001

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In the Matter of	}	
Digital Performance Right in Sound	}	Docket No. 2000-9 CARP DTRA 1&2
Recordings and Ephemeral Recordings	}	

LIBRARY OF CONGRESS

ORDER

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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.

Copyright Arbitration Royalty Panels

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.

P O Box 70977
West
n
Washington
D.C. 20024

New Schedule

Telephone:
(202)707-8380

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.

Facsimile:
(202)252-3423

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 fee¹, 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.

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).

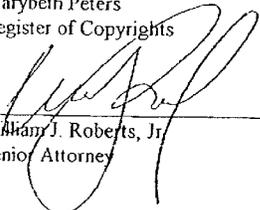
Finally, a review of the list of participants in this proceeding reveals a number of smaller-sized firms and concerns that desire to make use of the section 114 and 112 licenses. The Library has been contacted by several of these parties expressing concern over the costs associated with filing a written 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



In the Matter of }
 }
 Digital performance Right in Sound } Docket No. 2000-9 CARP DTRA 1&2
 Recordings and Ephemeral Recordings }
 _____ }

LIBRARY
 OF
 CONGRESS

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.

COPYRIGHT
 OFFICE

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.

Copyright
 Arbitration
 Royalty
 Panels

	ACTION	DATE
P.O. Box 70977 West Washington D.C. 20024	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
Telephone: (202)707-8380	Completion of Document Production	April 27, 2001
Facsimile: (202)252-3423	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

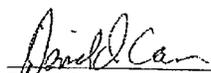
CARP proceedings, the merits should be first explored through the rulemaking process.

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
General Counsel

DATED: March 16, 2001

In the
COPYRIGHT OFFICE
Washington, D.C. 20540

RECEIVED

APR 5 2002

GENERAL COUNCIL
OF COPYRIGHT

In re)
NOTICE AND RECORDKEEPING FOR)
USE OF SOUND RECORDINGS UNDER)
STATUTORY LICENSE)
_____)

Docket No. 2002-1

**JOINT MOTION FOR ISSUANCE OF AN
INITIAL REGULATORY FLEXIBILITY ANALYSIS**

Harvard Radio Broadcasting Co., Inc., and the Intercollegiate Broadcasting System, Inc., respectfully move the Register to issue an Initial Regulatory Flexibility Analysis (IRFA) under the Regulatory Flexibility Act, P.L. 95-354, as amended by the Debt Limit Act, P.L. 104-121, Title II of which is known as the Small Business Regulatory Enforcement Fairness Act of 1996, enacted into positive law as 5 U.S.C., ch. 6.

The public policy of the United States government, as declared by Congress in Section 2 (Congressional Findings and Declaration of Purpose) of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt, is to require that both governmental regulations and “informational requirements” differentiate in a meaningful way between large entities and small entities, so as “to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.”¹ Section 2(b) then “establish[es] as a principle of regulatory

¹ In Section 2(a) Congress “finds and declares that --
“(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

issuance that agencies shall endeavor . . . to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions” subject thereto.

Continuing, Section 2(b) declares that “to achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.”

Here, where there is such a gross disparity in the sizes of the reporting entities, a one-size-fits-all proposal no more comports with the Congressional policy than it does with the letter of the Regulatory Flexibility Act.

“(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

“(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

“(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

“(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

“(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

“(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

“(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.”

I. THE RULES AS PROPOSED WOULD SERIOUSLY IMPACT SMALL BUSINESSES.

Comments filed concurrently with this motion establish at least *prima facie* that the record-keeping rules proposed in the Office's NPRM would differentially impact small business entities. See, e.g., comments of the undersigned movants filed herein. As demonstrated in the comments of Movant Harvard Radio Broadcasting Company, the reporting requirements as proposed are "not well-suited for a large number of small entities" and are disproportionately burdensome on small entities. Op. cit. at 1.

II. AN IRFA IS REQUIRED BY STATUTE.

Section 603 (Initial regulatory flexibility analysis) of the Regulatory Flexibility Act, as amended, 5 U.S.C. § 603, requires that whenever an agency issues a notice of proposed rulemaking such as that published by the Office on February 7th, "the agency shall prepare and make available for public comment an initial regulatory flexibility analysis."² Section 601 (Definitions) of the 1980 Act, 5 U.S.C. § 601, applies the requirements of the Act to all government "authorities" falling within the scope of Section 2(a) ("agency") of the Administrative Procedure Act of 1947, now 5 U.S.C. § 551(1). While Section 2(a) of the APA excepted "Congress" from the applicability of the APA,³ Congress has since provided affirmatively that rulemaking proceedings in the Copyright Office shall be subject to the APA. Section 101(d) of the 1976 Act, P.L. 94-553, 17 U.S.C. § 701(d), unequivocally provides:

² Such IFRA "shall describe the impact of the proposed rule on small entities" and shall be published in the Federal Register and transmitted to the Chief Counsel for Advocacy of the Small Business Administration.

³ The D.C. Circuit has held that the APA does not apply to labor relations of the Library of Congress. See Ethnic Employees of Library of Congress v. Boorstin, 243 U.S.App.D.C. 186, 751 F.2d 1405 (1985).

(d) Except as provided by section 706(b) [copies of deposits] and the regulations issued thereunder, all actions taken by the Register of Copyrights under this title *are subject to the provisions of the Administrative Procedure Act*....

(emphasis supplied). The intent of Congress to protect small businesses against undifferentiated government regulations is clear. To the extent that any inconsistency might be read into the 1946 and 1976 enactments, the latter in time would control. Otherwise the specific exception for the Office in Section 701(d) to the copying provisions of the Freedom of Information Act, 5 U.S.C. §§ 552 and 552a, would not have been necessary.

III. PUBLIC POLICY REQUIRES THE ISSUANCE OF AN IFRA.

Even if the Office were textually exempt from the Regulatory Flexibility Act by reason of being part of Congress, it should act here consistently therewith in accordance with the public policy declared in Section 2 by that Congress. At the time of its adoption of interim rules in Docket No. 96-3 in 1998, the Office stated that while it was

not an “agency” subject to the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Register of Copyrights has considered the effect of these interim regulations on small businesses. The Register has determined that the interim regulations would not have a significant economic impact on a substantial number of small entities that would require provision of special relief for small entities in the regulations, and that the interim regulations are, to the extent consistent with the stated objectives of applicable statutes, designed to minimize any significant economic impact on small entities.

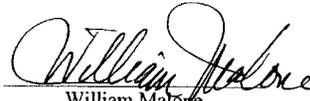
63 Fed. Reg. 34, 289, 34,295 (June 24, 1998). The 1998 statement is not a substitute under Section 605(c) of the 1980 Act for an IFRA here, because the interim rules, which were the subject of the 1998 order, did not read on “eligible nonsubscription transmission services” added by the Digital Millennium Copyright Act, P.L. 105-304 (1998), which enlarged Section 114 subsequent to the 1996 and 1997 notices in Docket No. 93-6, 61 Fed. Reg. 22004 (May 13,

1996) and 62 Fed. Reg. 34035 (June 24, 1997), and the only commenters had no foreknowledge of the interests or practices of small webcasters in the year 2002. The Office itself expressly recognized in the instant notice the time-bound nature of the record in the Docket 96-3 proceeding, when it observed that "the industry was young" in 1996-98. 67 Fed. Reg. at 5764. The more current comments in Docket No. 2002-1 demonstrate that the rules as proposed do threaten to place significant, disproportional, and unnecessary economic burdens on small business entities.

Prayer

WHEREFORE, before acting on the NPRM published February 7, 2002, the Register should publish, and solicit comments on, an Initial Regulatory Flexibility Analysis and should provide Movants with such further and different relief as may be warranted.

Respectfully submitted,


William Malow

Miller and Van Eaton, P.L.L.C.
1155 Connecticut Avenue, # 1000
Washington, D.C. 20036-4320
(202) 785-0600

Attorney for
Harvard Radio Broadcasting Co., Inc.
Intercollegiate Broadcasting System, Inc.

April 5, 2002

RATE SCHEDULE "A"

**REPORT FORM
ASCAP EXPERIMENTAL LICENSE AGREEMENT
FOR INTERNET SITES & SERVICES – RELEASE 4.0**

PART I. ACCOUNT INFORMATION

REPORT PERIOD: _____ THRU 12/31/ _____

LICENSEE NAME: _____

POSTAL ADDRESS: _____

INTERNET SITE URL: http:// _____ E-MAIL: _____

PHONE NUMBER: _____ FACSIMILE NUMBER: _____

PART II. DEFINITIONS

- (a) The terms "Internet Site or Service," "Internet Transmissions" and "Users" are defined in subparagraphs 3(a), (b) and (c) of the license agreement.
- (b) "Sponsor Revenue" means all payments made by or on behalf of sponsors, advertisers, program suppliers, content providers, or others for use of the facilities of your Internet Site or Service including, but not limited to, payments associated with syndicated selling, on-line franchising and associates programs. "Sponsor Revenue" also means all payments from whatever source derived upon your sale or other disposition of goods or services you received as barter for use of the facilities of your Internet Site or Service including, but not limited to, payments for the sale of advertising time or space.
- (c) "Adjustment to Sponsor Revenue" means advertising agency commissions not to exceed 15% actually allowed to an advertising agency that has no direct or indirect ownership or managerial connection with you or your Internet Site or Service.
- (d) "User Revenue" means all payments made by or on behalf of Users to access Internet Transmissions including, but not limited to, subscriber fees, connect time charges, and any other access fees.
- (e) "Internet Site/Service Revenue" includes all specified payments and expenditures whether made directly to you or to any entity under the same or substantially the same ownership, management or control as you, or to any other person, firm or corporation including, but not limited to, any partner or co-publisher of your Internet Site or Service, pursuant to an agreement or as directed or authorized by you or any of your agents or employees.

(f) "Session Value" is the value derived from the number of "Internet Site/Service Sessions" that an Internet Site or Service generates.

(g) "Internet Site/Service Session" is an individual visit and/or access to your Internet Site or Service by a User. If any such visit or access exceeds one hour in duration, each period of one hour, or portion in excess thereof, shall be treated as a single "Internet Site/Service Session." For example, if a User visits or accesses your Site or Service twice in one day, once for 15 minutes and a second time for 40 minutes, that User has generated two "Internet Site/Service Sessions." If a User visits or accesses your Site or Service for an uninterrupted period of two and a half hours, that User has generated three "Internet Site/Service Sessions."

**PART III. REVENUE BASED
LICENSE FEE CALCULATION FOR RATE SCHEDULE "A"**

NET SPONSOR REVENUE

1.	Sponsor Revenue	\$ _____
2.	Adjustment to Sponsor Revenue	\$ _____
3.	Net Sponsor Revenue (subtract line 2 from line 1)	\$ _____

INTERNET SITE/SERVICE REVENUE

4.	User Revenue	\$ _____
5.	Net Sponsor Revenue (from line 3)	\$ _____
6.	Internet Site/Service Revenue (add lines 4 and 5)	\$ _____
7.	Rate Based on Revenue	x .01615
8.	Revenue Based License Fee (multiply line 6 by line 7)	\$ _____

**PART IV. SESSION BASED
LICENSE FEE CALCULATION FOR RATE SCHEDULE "A"**

SESSION VALUE

9.	Number of Internet Site/Service Sessions	_____
10.	Rate Based on Internet Site/Service Sessions	x \$.00048
11.	Session Based License Fee (multiply line 9 by line 10)	\$ _____

PART V. LICENSE FEE CALCULATION FOR RATE SCHEDULE "A"

12.	Licensee Fee (enter line 8 or line 11, whichever is greater)	\$ _____
13.	Minimum License Fee	\$ 264.00
14.	LICENSE FEE DUE (enter amount from line 12 or line 13, whichever is greater)	\$ _____

PART VI. CERTIFICATION

We certify that this report is true and correct and that all books and records necessary to verify this report are now and will continue to be available for your examination in accordance with the terms of the license agreement.

Signature

Date

Print Name and Title

RATE SCHEDULE "B"

**REPORT FORM
ASCAP EXPERIMENTAL LICENSE AGREEMENT
FOR INTERNET SITES & SERVICES – RELEASE 4.0**

PART I. ACCOUNT INFORMATION

REPORT PERIOD: _____ THRU 12/31/_____

LICENSEE NAME: _____

POSTAL ADDRESS: _____

INTERNET SITE URL: http://_____ E-MAIL: _____

PHONE NUMBER: _____ FACSIMILE NUMBER: _____

PART II. DEFINITIONS

- (a) The terms "**Internet Site or Service**," "**Internet Transmissions**" and "**Users**" are defined in subparagraphs 3(a), (b) and (c) of the license agreement.
- (b) "**Sponsor Revenue**" means all payments made by or on behalf of sponsors, advertisers, program suppliers, content providers, or others for use of the facilities of your Internet Site or Service including, but not limited to, payments associated with syndicated selling, on-line franchising and associates programs. "**Sponsor Revenue**" also means all payments from whatever source derived upon your sale or other disposition of goods or services you received as barter for use of the facilities of your Internet Site or Service including, but not limited to, payments for the sale of advertising time or space.
- (c) "**Adjustment to Sponsor Revenue**" means advertising agency commissions not to exceed 15% actually allowed to an advertising agency that has no direct or indirect ownership or managerial connection with you or your Internet Site or Service.
- (d) "**User Revenue**" means all payments made by or on behalf of Users to access Internet Transmissions including, but not limited to, subscriber fees, connect time charges, and any other access fees.
- (e) "**Internet Site/Service Revenue**" includes all specified payments and expenditures whether made directly to you or to any entity under the same or substantially the same ownership, management or control as you, or to any other person, firm or corporation including, but not limited to, any partner or co-publisher of your Internet Site or Service, pursuant to an agreement or as directed or authorized by you or any of your agents or employees.
- (f) "**Session Value**" is the value derived from the number of "Internet Site/Service Sessions" that an Internet Site or Service generates.

(g) "Internet Site/Service Session" is an individual visit and/or access to your Internet Site or Service by a User. If any such visit or access exceeds one hour in duration, each period of one hour, or portion in excess thereof, shall be treated as a single "Internet Site/Service Session." For example, if a User visits or accesses your Site or Service twice in one day, once for 15 minutes and a second time for 40 minutes, that User has generated two "Internet Site/Service Sessions." If a User visits or accesses your Site or Service for an uninterrupted period of two and a half hours, that User has generated three "Internet Site/Service Sessions."

(h) "Music Session" is an "Internet Site/Service Session" in which a User receives any "Internet Transmission" that includes any performance(s) of music.

**PART III. REVENUE BASED
LICENSE FEE CALCULATION FOR RATE SCHEDULE "B"**

NET SPONSOR REVENUE	
1. Sponsor Revenue	\$ _____
2. Adjustment to Sponsor Revenue	\$ _____
3. Net Sponsor Revenue (subtract line 2 from line 1)	\$ _____
INTERNET SITE/SERVICE REVENUE	
4. User Revenue	\$ _____
5. Net Sponsor Revenue (from line 3)	\$ _____
6. Internet Site/Service Revenue (add lines 4 and 5)	\$ _____
VALUE ATTRIBUTABLE TO PERFORMANCES OF MUSIC	
7. Number of Internet Site/Service Sessions	_____
8. Number of Music Sessions	_____
9. Ratio (divide line 8 by line 7) (to 3 decimals).....	_____
10. Internet Site/Service Revenue (from line 6).....	\$ _____
11. Value Attributable to Performances of Music (multiply line 9 by line 10)	\$ _____
12. Rate Based on Revenue.....	x _____ .0242
13. Revenue Based License Fee (multiply line 11 by line 12).....	\$ _____

**PART IV. SESSION BASED
LICENSE FEE CALCULATION FOR RATE SCHEDULE "B"**

SESSION VALUE	
14. Number of Internet Site/Service Sessions (from line 7).....	_____
15. Number of Music Sessions (from line 8)	_____
16. Rate Based on Music Sessions.....	x \$ _____ .00073
17. Session Based License Fee (multiply line 15 by line 16)	\$ _____

PART V. LICENSE FEE CALCULATION FOR RATE SCHEDULE "B"

18. **Licensee Fee** (enter line 13 or line 17, whichever is greater) \$ _____
19. **Minimum License Fee** \$ 264.00
20. **LICENSE FEE DUE** (enter amount from line 18 or line 19, whichever is
greater) \$ _____

PART VI. CERTIFICATION

We certify that this report is true and correct and that all books and records necessary to verify this report are now and will continue to be available for your examination in accordance with the terms of the license agreement.

Signature Date

Print Name and Title

RATE SCHEDULE "C"

**REPORT FORM
ASCAP EXPERIMENTAL LICENSE AGREEMENT
FOR INTERNET SITES & SERVICES – RELEASE 4.0**

PART I. ACCOUNT INFORMATION

REPORT PERIOD: _____ THRU 12/31/ _____

LICENSEE NAME: _____

POSTAL ADDRESS: _____

INTERNET SITE URL: http:// _____ E-MAIL: _____

PHONE NUMBER: _____ FACSIMILE NUMBER: _____

PART II. DEFINITIONS

- (a) The terms **"Internet Site or Service," "Internet Transmissions"** and **"Users"** are defined in subparagraphs 3(a), (b) and (c) of the license agreement.
- (b) **"Sponsor Revenue"** means all payments made by or on behalf of sponsors, advertisers, program suppliers, content providers, or others for use of the facilities of your Internet Site or Service including, but not limited to, payments associated with syndicated selling, on-line franchising and associates programs. **"Sponsor Revenue"** also means all payments from whatever source derived upon your sale or other disposition of goods or services you received as barter for use of the facilities of your Internet Site or Service including, but not limited to, payments for the sale of advertising time or space.
- (c) **"Adjustment to Sponsor Revenue"** means advertising agency commissions not to exceed 15% actually allowed to an advertising agency that has no direct or indirect ownership or managerial connection with you or your Internet Site or Service.
- (d) **"User Revenue"** means all payments made by or on behalf of Users to access Internet Transmissions including, but not limited to, subscriber fees, connect time charges, and any other access fees.
- (e) **"Internet Site/Service Revenue"** includes all specified payments and expenditures whether made directly to you or to any entity under the same or substantially the same ownership, management or control as you, or to any other person, firm or corporation including, but not limited to, any partner or copublisher of your Internet Site or Service, pursuant to an agreement or as directed or authorized by you or any of your agents or employees.
- (f) **"Session Value"** is the value derived from the number of "Internet Site/Service Sessions" that an Internet Site or Service generates.

(g) "Internet Site/Service Session" is an individual visit and/or access to your Internet Site or Service by a User. If any such visit or access exceeds one hour in duration, each period of one hour, or portion in excess thereof, shall be treated as a single "Internet Site/Service Session." For example, if a User visits or accesses your Site or Service twice in one day, once for 15 minutes and a second time for 40 minutes, that User has generated two "Internet Site/Service Sessions." If a User visits or accesses your Site or Service for an uninterrupted period of two and a half hours, that User has generated three "Internet Site/Service Sessions."

(h) "Music Session" is an Internet Site/Service Session in which a User receives any Internet Transmission that includes any performance(s) of music.

(i) "Performance of Music" is any performance of music contained in any Internet Transmission.

(j) "Performance of ASCAP Music" is any Performance of Music that is of a musical work in the ASCAP repertory not otherwise licensed.

**PART III. REVENUE BASED
LICENSE FEE CALCULATION FOR RATE SCHEDULE "C"**

NET SPONSOR REVENUE

1.	Sponsor Revenue	\$	_____
2.	Adjustment to Sponsor Revenue	\$	_____
3.	Net Sponsor Revenue (subtract line 2 from line 1)	\$	_____

INTERNET SITE/SERVICE REVENUE

4.	User Revenue	\$	_____
5.	Net Sponsor Revenue (from line 3)	\$	_____
6.	Internet Site/Service Revenue (add lines 4 and 5)	\$	_____

VALUE ATTRIBUTABLE TO PERFORMANCES OF MUSIC

7.	Number of Internet Site/Service Sessions	_____	
8.	Number of Music Sessions	_____	
9.	Ratio (divide line 8 by line 7) (to 3 decimals).....	_____	
10.	Internet Site/Service Revenue (from line 6).....	\$	_____
11.	Value Attributable to Performances of Music (multiply line 9 by line 10)	\$	_____

VALUE ATTRIBUTED TO PERFORMANCES OF ASCAP MUSIC

12.	Number of Performances of Music	_____	
13.	Number of Performances of ASCAP Music	_____	
14.	Ratio (divide line 13 by line 12) (to 3 decimals).....	_____	
15.	Value Attributable to Performances of Music (from line 11).....	\$	_____
16.	Value Attributable to Performances of ASCAP Music (multiply line 14 by line 15)	\$	_____
17.	Rate Based on Revenue.....	x	0446
18.	Revenue Based License Fee (multiply line 16 by line 17).....	\$	_____

**PART IV. SESSION BASED
LICENSE FEE CALCULATION FOR RATE SCHEDULE "C"**

SESSION VALUE

19.	Number of Internet Site/Service Sessions (from line 7).....	_____
20.	Number of Music Sessions (from line 8)	_____
21.	Number of Performances of Music (from line 12)	_____
22.	Number of Performances of ASCAP Music (from line 13).....	_____
23.	Ratio (divide line 22 by line 21) (to 3 decimals).....	_____
24.	Sessions Attributable to Performances of ASCAP Music (multiply line 20 by line 23)	_____
25.	Rate Based on Performances of ASCAP Music	x \$ <u>0.00134</u>
26.	Session Based License Fee (multiply line 24 by line 25)	\$ _____

PART V. LICENSE FEE CALCULATION FOR RATE SCHEDULE "C"

27.	License Fee (enter line 18 or line 26, whichever is greater)	\$ _____
28.	Minimum License Fee	\$ <u>264.00</u>
29.	LICENSE FEE DUE (enter amount from line 27 or line 28, whichever is greater)	\$ _____

PART VI. CERTIFICATION

We certify that this report is true and correct and that all books and records necessary to verify this report are now and will continue to be available for your examination in accordance with the terms of the license agreement.

Signature

Date

Print Name and Title

**ASCAP MUSIC USE REPORT FORMAT
FOR INTERNET SITES & SERVICES**

FIELD #	PERFORMANCE RECORD FIELD DESCRIPTION	FORMAT
1	Name of a Song, or Performance Title, or Recording, or the name of a Product or First Line of Text about the product. If blank, assumed to be unidentified.	Text; 60 characters
2*	Name(s) of Featured Artist(s) or Band(s)	Text; 60 characters
3*	Album title (optional)	Text; 60 characters
4	Identification of Broadcaster / Webcaster or Uniform Resource Locator (URL); or fully Qualified Internet Address; or Internet Service. Note: This field may be moved into a header.	Text; 80 characters
5	ASCAP Account Number	Numeric; 11 digits
6	Channel Type Code Use IT for Interactive — a direct choice/selection (listening or downloading activity) of a particular song. Use NI for Non-Interactive — a choice/selection (listening or downloading activity) not specific to a particular song.	Text; 2 characters
7	Format Code For Interactive: Format Code of Song. For Non-Interactive Multi-channel Internet sites or services: Format Code of Channel For Non-Interactive Single-Channel Internet sites or services: Format Code of Internet site Format Code Full Format Name C Country CL Classical E Ethnic JZ Jazz RE Religious, Black Gospel, Contemporary Christian S Spanish UC Urban Contemporary POP Oldies, Alternative, Classic Rock, Hot AC, Standards, Contemporary Hit Radio, Easy Listening, Hot AC, Adult Contemporary	Text; 3 characters
8	Usage Code for Song Usage Code Description F Feature LT Logo T Theme BG Background J Jingle (commercial use) Default is F	Text; 2 characters
9	Number of Requests for This Song	Numeric; 9 digits
10*	Server Date of Performance	Numeric; 8 digits; YYYYMMDD
11*	Server Time of Performance Default for Interactive Sites is 120000	Numeric; 6 digits; HHMMSS based on a 24 hour clock
12*	Duration of Performance	Numeric; 6 digits; HHMMSS
13	Country of Origin of Server (Default is US)	Text; 2 characters

* If the song has more than one value for any of these fields, a separate performance record is necessary for each new value.

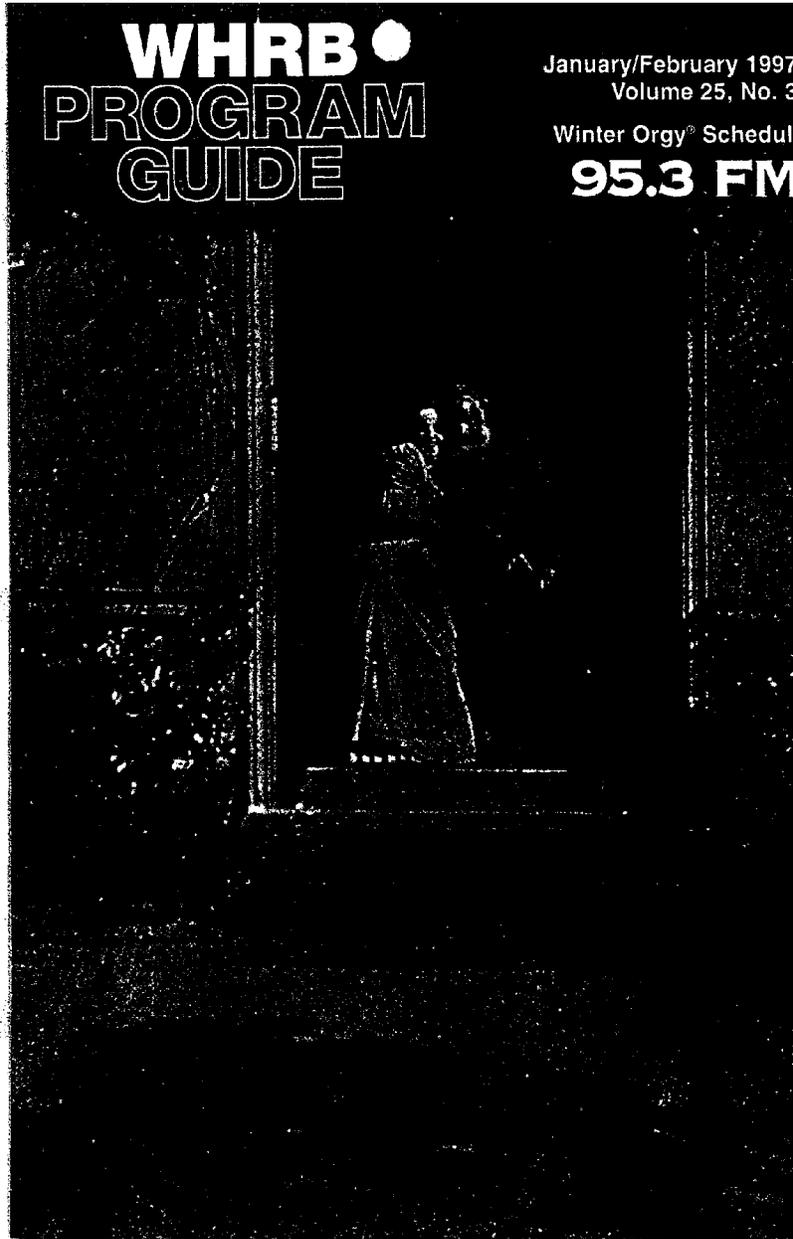
ATTACHMENT III

WHRB ●
PROGRAM
GUIDE

January/February 1997
Volume 25, No. 3

Winter Orgy® Schedule

95.3 FM



Thursday, February 13

5:00 pm JAZZ SPECTRUM
6:00 pm AFTERNOON CONCERT
7:00 pm RECORD HOSPITAL
8:00 pm MONDAY MORNING STRIKE

Monday, February 17

5:00 pm JAZZ SPECTRUM
6:00 pm AFTERNOON CONCERT
7:00 pm RECORD HOSPITAL
8:00 pm MONDAY MORNING STRIKE

Thursday, February 20

5:00 pm JAZZ SPECTRUM
6:00 pm AFTERNOON CONCERT
7:00 pm RECORD HOSPITAL
8:00 pm MONDAY MORNING STRIKE

Sunday, February 23

10:00 am RELAX
11:00 am MEMORIAL CHURCH SERVICE
1:00 pm SUNDAE CONCERT
2:00 pm SUNDAE CONCERT
3:00 pm SUNDAE CONCERT
4:00 pm SUNDAE CONCERT
5:00 pm SUNDAE CONCERT
6:00 pm SUNDAE CONCERT
7:00 pm SUNDAE CONCERT
8:00 pm SUNDAE CONCERT
9:00 pm SUNDAE CONCERT
10:00 pm SUNDAE CONCERT

Monday, February 24

5:00 am JAZZ SPECTRUM
6:00 am AFTERNOON CONCERT
7:00 am RECORD HOSPITAL
8:00 am MONDAY MORNING STRIKE

Saturday, February 15

5:00 am JAZZ SPECTRUM
6:00 am AFTERNOON CONCERT
7:00 am RECORD HOSPITAL
8:00 am MONDAY MORNING STRIKE

Tuesday, February 18

5:00 am JAZZ SPECTRUM
6:00 am AFTERNOON CONCERT
7:00 am RECORD HOSPITAL
8:00 am MONDAY MORNING STRIKE

Friday, February 21

5:00 am JAZZ SPECTRUM
6:00 am AFTERNOON CONCERT
7:00 am RECORD HOSPITAL
8:00 am MONDAY MORNING STRIKE

Tuesday, February 25

5:00 am JAZZ SPECTRUM
6:00 am AFTERNOON CONCERT
7:00 am RECORD HOSPITAL
8:00 am MONDAY MORNING STRIKE

WHRR is one of your favorite stations!

Many thanks to all who returned the WHRR survey. They're being carefully read to determine how we can serve you better. We'll be in touch with you again soon. Thank you for your input.

Wednesday, February 26

5:00 am **JAZZ SPECTRUM**
 1:00 pm **AFTERNOON CONCERT**
 Paganini: Twenty-Four Caprices: Accardo (DG)
 Taverner: Missa Mater Christi Sanctissima, Christophers, The Sixteen (Hyperion)
 Rachmaninov: Thirteen Preludes, Op. 32; Zilberstein (DG)
 Lutoslawski: Cello Concerto; Schiff, Lutoslawski, Bavarian Radio Symphony Orchestra (Philips)
 Koechlin: Sonata for Oboe and Piano, Op. 58; Lencsis, Rudiakov (audite)
 Monteverdi: Il Combattimento di Tancredi e Clorinda; Loehrer, Società Cameristica di Lugano (Accord)
 Haydn: String Quartet in A, Op. 20, No. 6, Quatuor Mosaïque (Astrée)
 Fauré: Violin Concerto; Bonucci, Bätz, Philharmonic Orchestra (ASV)
 Scarlatti: Sonata No. 1 in d for Cello and Organ; Geringas, Krapp (Eurodisc)
 Mendelssohn: String Symphony No. 7 in d, Poppe, London Festival Orchestra (Hyperion)
 6:00 pm **NEW RELEASES**
 8:00 pm **THE RECORDED RECORDER**
 Vivaldi: Concerto in c (Telefunken LP)
 Unknown: Si Fortune (TFD LP)
 Sarumartini: Sonata in g, Op. 13, No. 4 (Philips)
 Beadusi: Cortesano padovano (Desto LP)
 Handel: Sonata in g, Op. 1, No. 1 (Philips)
 Martini: Aye with Divisions (Nonesuch LP)
 Purcell: Fantasia No. 8, Z. 739 (Oiseau-Lyre)
 Fevin: Fors Solemant (TFD LP)
 Bononcini: Divertimento da camera No. 6 (Philips)
 9:00 pm **INSTRUMENTAL INNOVATIONS**
 Nonwestern Instruments and Influences, Part 1
 Harrison: Music for Violin with Various Instruments, European, Asian, African, Halpm (Desto LP)
 Tahmizyan: A Cool Wind is Blowing; Gasparian, Kronos Quartet (Nonesuch)
 R. Shankar: Concerto for Sitar and Orchestra; Shankar, Fevin, London Symphony Orchestra (Angel LP)
 10:00 pm **RECORD HOSPITAL**

Thursday, February 27

5:00 am **JAZZ SPECTRUM**
 1:00 pm **AFTERNOON CONCERT**
 Tubin: Simfonietta on Estonian Motifs; Järvi, Gothenburg Symphony Orchestra (BIS)
 Bach, W. F.: Duet in F, Falck 57; W. Kuijken, Hantai (Accent)
 Graupner: Concerto in G for Bassoon, Strings, and Continuo; Smith, Ledger, English Chamber Orchestra (ASV)
 Liszt: Consolations; Barenboim (DG LP)
 Kulechka: Concerto for Recorder and Small Orchestra; Peuri, Karmu, English Chamber Orchestra (RCA)
 Reges: Trio for Violin, Viola, and Cello in a, Op. 77b, Vienna String Trio
 Tallis: Missa Salve Intemerata Virgo; Guest, St. John's College Choir (ASV)
 Beiro: Open Number Zoo; Westwood Wind Quintet (Crystal LP)
 Dusik: Concerto in B-flat for Two Pianos and Orchestra; Duo Grünschlag, Angerer, Orchestra of the Vienna Volkoper (Turnabout LP)

Ives: Sonata No. 3 for Violin and Piano; Fulkerson, Shannon (Bridge)
 Grieg: Norwegian Dances, Op. 35; Barbirolli, Hallé Orchestra (Angel LP)
 Telemann: Paris Quartet II in a, Tindemans, Concerto Amabile (Wildboar)
 Debussy: Three Nocturnes; van Beunum, Concertgebouw Orchestra, Woman's Voices of Collegium Musicum Amstelodamense (Philips LP)
 6:00 pm **NIGHT MUSIC**
 Fauré: Nocturnes Op. 33 Nos. 1-3, in e-flat, B, and A-flat; Nocturne in E-flat, Op. 36, No. 4, Crossley (CRD)
 6:30 pm **SCOTTISH ECHOES**
 Beethoven: Scottish Folk Songs WoO 156
 7:00 pm **TWENTIETH CENTURY CELLO**
 Music by Enescu, Ligeti, and Sculthorpe.
 8:00 pm **CHICAGO SYMPHONY ORCHESTRA IN CONCERT**
 Christophe Eichenbach conducts, with Aprille Milla, soprano
 Wagner: Tannhäuser, Overture, "Dich, teure Halle"
 Wagner: Lobengrin, Prelude to Act I
 Dvorak: Rusalka, "Song to the Moon"
 Verdi: Les vêpres siciliennes, Overture
 Catalani: La Wally, "Ebben? Ne andrò lontano"
 Puccini: Manon Lescaut, Intermezzo
 Puccini: Suor Angelica, "Senza mamma"
 Bolko: Mephistofele, "L'altra notte"
 Verdi: La forza del destino, Overture
 Giordano: Andrea Chenier, "La Mamma Morta"
 10:00 pm **RECORD HOSPITAL**

Friday, February 28

5:00 am **JAZZ SPECTRUM**
 11:00 am **WHAT'S HAPPENIN'**
 1:00 pm **AFTERNOON CONCERT**
 Penderecki: Cello Concerto No. 2; Moughetti, Wit, Polish Radio National Symphony Orchestra (Polski Nagrania)
 Schubert: String Quartet No. 4 in C, D. 46; Tokyo Quartet (RCA)
 Tallis: Spem in alium; Phillips, Tallis Scholars (Gimell)
 Beethoven: Piano Quintet in E-Flat, Op. 16; Serkin, Vrsky, Stoltzman, Rostch, Heller (Sony)
 Rodrigo: Concerto de Aranjuez; Bream, Gardiner, Monteverdi Orchestra
 Biber: Parita No. 3 from "Harmonia Artificiosa"; Leonhardt, Ensemble Baroque de Maastricht (Canal Grande)
 Elgar: Falstaff, Symphonic Study in c, Op. 68; Barbirolli, Hallé Orchestra
 Pärt: Fratres; Kremer, Jarrett (ECM)
 Alfonso X: Cantiga de Santa Maria No. 34; Ensemble Alcatraz (Nonesuch)
 Prokofiev: Piano Sonata No. 2 in d, Op. 14; Chiu (Harmonia Mundi)
 Vivaldi: Oboe Concerto in C, RV 447; Messier, Salter, Guildhall String Ensemble (RCA)
 Fauré: Improromptu for Solo Harp, Op. 86; Robles (Boston Skyline)
 Paestrina: Magnificat Primi Toni; Herreweghe, Ensemble Vocal Européen de la Chapelle Royale, Ensemble Organum (Harmonia Mundi)
 Chadwick: Piano Quintet in E-Flat; Eskin, Portland String Quartet (Northeastern)
 7:00 pm **HARVARD HOCKEY**
 Harvard vs. Dartmouth.
 10:00 pm **RECORD HOSPITAL**

HARVARD RADIO BROADCASTING CO., INC.

389 Harvard Street, Cambridge, Massachusetts 02138

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WHRB PROGRAM GUIDE

May/June 2000
Volume 28, No. 4

Spring Orgy® Schedule

95.3 FM



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WHRB's Summer Schedule

Important announcement: WHRB does not publish the Program Guide during the summer. The Guide returns in mid-September. Our schedule for the summer is jazz from early morning to 1 pm, classical music till 10pm, then rock.

PLEASE let your friends know about our summer schedule and our special summer programming.

Sunday evenings at 8 pm. **CHICAGO LYRIC OPERA:**

- June 11: Verdi: *Pakiaff*, Bryn Terfel, Kallen Egerian, Lucio Gallo, Bernadette Manca di Nissa, Jova Mida, Gwyn Hughes Jones, Patricia Baskley, Brad Creswell, Antonio Pappano
 - June 18: William Bolcom: *A View from the Bridge*, Kim Josephson, Catherine Malfano, Juliana Kambelli, Gregory May, Timothy Nolan, Dennis Russell, Eugene
 - July 2: Adams Street, Jr.: *Die Fledermaus*; Dame Felicity Lott, Sr. Thomas Allen, Rebecca Evans, Timothy Nolan, Bona Ventura Bonino, Joyce Castle, John Del Carlo, Leopold Hager
 - July 9: Verdi: *Madama Butterfly*; Catherine Malfano, Roberto Armata, Raymond Aceto, Albert Fisch
 - July 16: Handel: *Alcina*; Renée Fleming, Jennifer Larmore, Natalie Dessay, Kathleen Kuhlman, Rockwell Blake, Robin Blitch Wiper, Stephen Moscovick, John Nelson
 - July 23: Donizetti: *Cristero d'Amore*; Frank Lopardo, Elizabeth Futral, Paul Plishka, Manuel Lanza, Maria Karyova, Yves Abel
 - July 30: Wagner: *Tristan und Isolde*; Ben Heppner, Jane Eaglen, Michelle De Young, Alan Held, Kent Pope, James Crumpton, Semjon Bychkov
- Plus two live-by-tape concert series, Tuesdays and Thursdays at 8 pm and two Wednesday broadcasts of New York Philharmonic Orchestra concerts conducted by Kurt Masur
- July 19 at 8 pm: *Mid-Century*, including the Claret Concerto August 16 at 8 pm: *Ronde Flingue* in final scene from Strauss's *Salome* and Barber's *Andromache* & *Farewell*

Please join us each day for our summer broadcasts. Sign out or photocopy this schedule and save it as a reminder.

Monday, May 1 11:30 PM THE WARRIORS ONLY 1:00 PM A LOVE SUPREME: THE JOHN COLTRANE ORGY®

Coltrane has been described as the greatest jazz musician to ever live. He was a pioneer, a trail blazer, an innovator. He has been a powerful influence on the music of the past 30 years. He was a man of great vision and a man of great talent. He was a man who was always looking for new ways to express himself. He was a man who was always looking for new ways to express himself. He was a man who was always looking for new ways to express himself.

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Tuesday, May 2

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THE FELIX MENDELSSOHN ORGUY

For Mendelssohn (Op. 147) was among the most beautiful of his early masterpieces. It is a fine, light, and cheerful work, and the first of a series of three which are so characteristic of his style. The first movement is a fine example of his early style, and the second and third are equally good. The first movement is a fine example of his early style, and the second and third are equally good. The first movement is a fine example of his early style, and the second and third are equally good.

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Mendelssohn's complete works

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Saturday, May 20

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Sunday, May 28

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- 1877: Song, "The Lost Chord" (Percy); White, Hough (Hyperion)
 1877: Incidental Music to Henry VIII (Shakespeare); Lawler, Penny, RTE Concert Orchestra (Marco Polo)
 1878: Song, "I would I were a king" (A. Cockburn); Keyte, Partridge (Argo LP)
 1879: Song, "St. Agnes' Eve" (Tennyson); Ommerlé, Wedow (Northeastern)
 1880: The Martyr of Antioch (Mifflin) (excerpt); Knight, Steadman, National Symphony Orchestra (Jay)
 1886: Ode for the opening of the Colonial and Indian Exhibition (Tennyson); Roddy, Smedley, Oxford Pro Musica Singers, Oxford Company of Musicians (Symposium)
 1886: The Golden Legend (Bennett, after Longfellow); Lakin, Allen, St. Mark's Church Choir; Austral, Barbirolli, Covent Garden Orchestra and Chorus (Gramophone Co., Parlophone, HMV 78s — Pearl)
 1887: Ode for the laying of the Imperial Institute foundation stone; Smedley, Oxford Pro Musica Singers and Company of Musicians (Symposium) 9:00 pm
 1888 (Oct. 5): Sullivan's voice recorded for Edison
 1888: Incidental Music to Macbeth (Shakespeare); Henry Irving's production; Penny, RTE Concert Orchestra (Marco Polo)
 1891: Ivanhoe (Sturgis, after Scott); Bispham, Henderson, Evans, Teale (188-Pearl); Eaves, Round, Carter, Dams, Murray, Gilbert and Sullivan Orchestra (Pearl LP); performance by the Boston Academy of Music
 1892: Haddon Hall (Grundy) (excerpt); Broadbent, Reed, Caldwell, Leech, David Harding, Cheam Operatic Society (Pearl LPs)
 1894: The Chieftain (Burnand) (excerpt); Masterson, Davies, Steadman, National Symphony Orchestra (Jay)
 1895: Incidental Music to King Arthur (Irving production) (Cart); Penny, RTE Concert Orchestra, RTE Concert Choir (Marco Polo)
 1897: Victoria and Merrie England, ballet (highlight); Penny, RTE Orch.
 1898: The Beauty Stone (Piner, Cart) (excerpt); Masterson, Suart, Steadman, National Symphony Orchestra (Jay), Lyle, Gilbert and Sullivan Society of Edinburgh, Concert Orchestra (Pearl LPs)
 1899: Song, "The Absent-minded Beggar" (Kipling); Colquhoun (Daily Mail 78 — Pearl LP), Sylvan, Wedow or Adams (Northeastern)
 1899: The Rose of Persia (Hood) (excerpt); Morrison, Suart, Sharpe, Veira, Caddy, Edgar-Wilson, Black, Harrison, Roddy, Henry, Smith, Higgins, Southwark Voices, Hanover Band (BBC Music Magazine)
 1900: Te Deum; Smedley, Oxford Pro Musica Singers, Kidlington Concert Brass, Oxford Company of Musicians (Symposium)
 1900: The Emerald Isle (Hood) (text incomplete) (excerpt); Davies, Suart, Jones, McCafferty, Steadman, National Symphony Orchestra (Jay)

Monday, June 5

- midnight RECORD HOSPITAL**
6:00 am AMERICA IN THE DEPRESSION: THE THIRTIES
 It was an age of poverty and loss, an age of hope undimmed, a time of grim faces and determined hearts, of "keep your sunny side up" and "brother, can you spare a dime?" It was an era when a President told a bewildered and despairing nation that "the only thing we have to fear is fear itself." It was a decade of longing, striving, energy, and idealism—in John Steinbeck's words, "the temble, troubled, triumphant, surging Thirties." Though the 1930s slip ever into the past, their culture—art, entertainment, film, and song—remains to touch and haunt us today. Even at the millennium begins, we pay tribute to the Thirties with every reference to the Lone Ranger, Fred Astaire, or *The Wizard of Oz*. And thanks to the wealth of transcription records and celluloid film, we can still hear and witness the great performers and talents of the age. From Jack Benny to Amos and Andy, from Duke Ellington to Billie Holiday, from *Duck Soup* to *Snow White* and *The Seven Dwarfs*, and from Rodgers and Hart to Cole Porter and the Gershwins—all have left their legacy to divert, enthral, and inspire. The Thirties Orgy will be a documentary, a history, and a nostalgic appreciation. For sixteen hours we will hear the original music and voices of the 1930s, including radio and records, stage and screen. Our survey will attempt to recapture, chronologically and topically, the life and culture of America in the Great Depression.
10:00 pm THE TOP TWENTY ORGY: 1996
 Thirty-second, hurky-jerky, frenetic, yet "danceable" sounds of Xerobot alongside the Peeches, The Armitage Shanks, and Cap'n Jazz during 1996.

HARVARD RADIO BROADCASTING CO., INC.
 389 Harvard Street Cambridge, Massachusetts 02138

ADDRESS SERVICE REQUESTED

Tuesday, June 6

- midnight THE TOP TWENTY ORGY CONTINUES**
7:00 am 1997
 With records by the Yummy Fur, Red Monkey, and Salty Skull, 1997 was the Year of Glasgow and the recently defunct Stamp record label. Stevie Nicks and the Cold Cold Hearts, along with Eis, marked a revitalization of Riot Grrr, with a world-wide audience.
11:00 am PHI BETA KAPPA (time approx.)
 Live from Sanders Theatre, the Phi Beta Kappa Literary Exercises, with poet Heather McHugh, '69, and an orator not announced at press time.
12:30 pm MUSIC INTERLUDE (time approx.)
2:00 pm BACCALAUREATE (time approx.)
 Live from the Memorial Church in Harvard Yard, the last time the graduating class will be addressed at length as undergraduates by Harvard President Neil L. Rudenstine and Radcliffe President Linda S. Wilson.
4:30 pm TOP TWENTY 1997 resumes (time approx.)
8:00 pm 1998
 Leading a rare used hardcore movement, Locust "will prevail," we thought, "shattering the flimsy Japanese vinyl and consuming us all in a fiery blaze!" In the wake of the great purge, nothing will be left but the [bloody-mouthed cover decorating] demon and a few gibbering DJs." Fin-Flon, Trevor Holland, and The Need fought off the onslaught.

Wednesday, June 7

- midnight THE TOP TWENTY ORGY 1998 CONTINUES**
5:00 am 1999
 The Bright Eyes "Every Day and Every Night" fused DC emo and mid-western love-rock to defy classification and excite us about the future. The Rondelles, !!!, and Holgar Czukay pushed programming in new directions.
1:00 pm 2000
 2000 has already seen astounding genre-bending releases—the electronic/fusion of Broadcast, the emergence of the Mr. Lady record label, and the continued innovation of My Dad Is Dead, Men's Recovery Project, and Meli-Banana. Our DJs will track future paths.
2:00 pm CLASS DAY
 Live from Tercentenary Theatre, Harvard Yard, addresses by members of the Class of 2000, deans, alumni, and guest speaker Cowan O'Brien, '85.
5:00 pm ELECTRONIC MUSIC ORGY (time approx.)
 From Stockhausen to Squarepusher, Kraftwerk to DJ Krush, a look at the history and range of electronic technology and instrumentation in music tracing the development of electronic music from early recorded classical works to live performances by "electronica" DJs and producers. Look for more details and information on the WHRB website. This Orgy continues tonight, Friday afternoon and evening, Saturday and Sunday.

Thursday, June 8

- midnight THE ELECTRONIC MUSIC ORGY CONTINUES**
8:00 am MUSIC FROM HARVARD
 Music Performed by Harvard and Radcliffe musicians.
9:15 am HARVARD COMMENCEMENT
 Live from Tercentenary Theatre, Harvard Yard. For the 349th time, Harvard assembles for the conferring of degrees by its President, with addresses (including one in Latin) by students.
11:30 am INTERMISSION (time approx.)
 Music appropriate to the day.
1:50 am HARVARD ALUMNI ASSOCIATION MEETING
 Live from Tercentenary Theatre, Harvard Yard. Harvard saves its major Commencement addresses for this event, which begins with the alumni parade. Harvard President Neil L. Rudenstine and guest speaker Amartya K. Sen, Nobel Laureate economist and Lamont University Professor Emeritus, will address the assembly, as will various alumni responsible for elections, fundraising, and awards.
5:00 pm THE 9:30 CLUB ORGY (time approx.)

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ATTACHMENT IV

Radio orgy of Poulenc, Schoenberg

By Richard Dyer
GLOBE STAFF

The winter schedule of Harvard radio's seasonal "orgies" of special programming (WHRB-FM, 95.3) arrived late this year, and after some interesting broadcasts in this extraordinary and beloved semi-annual series had already taken place, including a three-day survey of the complete works of Chopin.

Fortunately two major anniversary orgies are still to come. Jan. 26 and 27 bring a 100th-birthday party for Francis Poulenc, a broadcast survey of his complete works, supplemented, as usual, by a selection of historic recordings. The other birthday boy is Arnold Schoenberg, whose 125th will be marked by a two-day survey of his complete works (from 4 p.m. Thursday to midnight Friday) — a project one can hardly imagine being undertaken by any other radio station in the world.

Other orgies of special interest include a tribute to forgotten Russian composer Paul Juon tomorrow, a Keith Jarrett Orgy (classical music segments come Monday and Tuesday at 2 p.m.), and a tribute to the distinguished Hungarian violinist Joseph Szigeti (Jan. 23). There will also be an orgy devoted to Frank Sinatra (Jan. 27 beginning at 8 p.m. and continuing through midnight Jan. 29) and a Noel Coward orgy (Jan. 24). An orgy of Donizetti operas, already underway, has been spaced throughout the schedule: Wednesday, Thursday and Jan. 31 installments provide opportunities to hear 16 more of the indefatigable composer's 65 operas.

New York Times May 31, 1998

Anthony Tommasini

In Boston, a Last Broadcast Bastion Falls

FOR classical-music lovers in the United States, FM radio used to be the last bastion of progressive, informative, wonderfully quirky programming. The concerts by your local symphony or orchestra may have been begrudgingly bound to 50 favorite pieces from Mozart to Mahler. But at least on the radio you might hear a birthday tribute to Shostakovich, an opera buff hour with a voice fanatic as host, competing live separates in the same axis, or interviews with composers and live performances of their works.

But classical-music radio has been dumbed down now for a long time, and not just at commercial stations beholden to the bottom line but also at public stations, which were intended to operate without the drag of commercial interests. Across the country, scores of stations both private and public offer virtually identical, soothingly familiar programs. Brahms chamber music, Mozart concertos, Dvorak symphonies, Baroque snippets and an occasional something like Lalo's "Symphony for Esplanade" become high-class music by which to work, cook, read and exercise. Complacent listeners share some blame for the situation. But most at fault are the programmers who placate owners in commercial radio, where maximizing profits is paramount, or who pander to executives in public radio, where the effort to prove that the most listeners possible are being reached is a driving pressure. And now Ron Jones, the director of programming at WGBH in Boston, an earnest, 45-year-old professional who speaks of public radio with devotion, is feeling the heat and dumbing down the programming at even that long-respected station.

WGBH, which reaches 340,000 listeners weekly, offers classical music from 8 A.M. to 4 P.M., followed by four hours of news features, then jazz at night. Its main competition for classical listeners comes from WCRB, a commercial station based in Waltham, Mass., which plays only classical music and reaches twice as many listeners. But except for certain services,

like carrying the Saturday afternoon broadcasts of the Metropolitan Opera, WCRB long ago adopted an easy-listening approach to classical programming, with lots of standard repertoire and talk-show patter. WGBH, on the other hand, has been valued for its commitment to musicians from the Boston area, presenting their work regularly in live broadcasts, and to more unusual and adventurous music.

That commitment is now in question. In a memorandum obtained by The New York Times, which was signed by Carl Watanabe, who coordinates classical programming, but spearheaded by Mr. Jones, the station's staff has been given new guidelines.

"Beginning immediately," the memo states, "three-quarters of every hour's music should be chosen from the Classical, Romantic and Baroque eras, with heavy emphasis on orchestral selections." During each four-hour shift, it continues, only one vocal piece, 10 to 15 minutes in length, will be allowed. Programmers are further urged to avoid putting two chamber works back to back, and to submit each day's playlist to his watanabe for clearance.

Such memos have become common at radio stations everywhere. What is shocking in this, this one scribbled at a respected public station in a city with a renowned intellectual culture, why?

MR. JONES'S goal, he said recently, is to provide a more "consistent classical-music service." Consistency, apparently, means the tried and true. "When people tune into WGBH, we want them to have a pretty good idea of what they are going to get," he explained. "We don't want to be exactly predictable, and we want to provide a wide range of music. But we want them to be able to hear the great hits of classical music, which are classics for a reason. These are the tunes people have hummed for decades."

WGBH will still present live performances by musicians from the studio, though only during the slow noon-to-1 hour, as

In a city with a renowned intellectual culture, WGBH is dumbing down. Why?

well as live broadcasts of the Boston Symphony, which WCRB also carries. WGBH will continue to offer music that other stations do not. Mr. Jones emphasized, though when asked for examples, he could cite only recent broadcasts of Mozart's "Don Giovanni" and of Mahler symphonies. The station will also continue to program "the best 20th-century music," he added, meaning "not academic atonal music."

Such assessments of listeners' preferences, though pervasive in the field, are based on debatable assumptions. For example, opera in America is enjoying its biggest boom in decades, so why should vocal music be amate more on the radio? And if anything, radio has been valued less for its consistency of repertoire than for its penchant for surprise: you never know what you might hear next. So on what basis have Mr. Jones and his colleagues elsewhere arrived at such guidelines?

"Audience research," he replied. "Over the years, we have worked with focus groups of core listeners and fringe listeners, and drawn from national bodies of research." The studies, he reports, suggest that opera is popular with only a subset of listeners, and that there is an aversion to contemporary music that is impossible to ignore.

Pollsters, demographers. Who are these pseudoscientists who study us, predict our shifting tastes and report their findings to union corporate publishers, Hollywood studio heads, newspaper editors, politicians? More often than not, they're wrong. President Bush was going to be unbeatable in 1992, paying Jim Carrey \$25 million to

star in "The Cable Guy" was deemed a sure bet.

It's a short step from placating listeners to patronizing them. The mission of public radio, as stated in its charter, is to inform, entertain and educate the public. What about the education part? And why is it assumed that education cannot be entertaining? I can imagine programs in which an engaging, informed announcer might explore the marvels of late Stravinsky or make a case that the 12-tone piano works of Milton Babbitt, though immensely complex, are also rhythmically funky and filled with sass from the streets of New York. True, I am not the station accountant who has to worry about paying the bills. But I am convinced there is an untapped pool of listeners who want to hear their Beethoven but who, if given the chance and a little help, would also be fascinated by Alfred Schnittke, Roger Sessions, John Adams and Luciano Berio.

Mr. Jones laments that listeners today use radio as a "background service," "tuning in and out." A lot of people are lost in an extended examination of say, "Dad," he said.

Don't tell that to the students who run WGBH, the college station at Harvard. Twice a year, during exam periods, the station offers popular-music presentations of virtually all the works of, say, Alban Berg (12 1/2-hour hours), Max Regener (two full days), Claude Monet (two) or John Zorn. The WGBH organists represent a triumph of musical research, imagination and passion. Not surprisingly, many WGBH veterans have continued prominently in music, including the critic Alex Ross and the fortepianist Robert Levin.

But the WGBH organists are not like college courses. Listeners tune in and out, and have fun. Of course, at an unabashedly nonprofit college station, programmers are free to be idealistic and interesting. They have no bottom line to worry about and can't afford to do audience surveys. But that's what public radio was supposed to be. College stations will have to pick up the slack.

THE BOSTON GLOBE • FRIDAY, JANUARY 6, 1995

By Richard Dyer
GLOBE STAFF

Harvard radio station WHRB-FM (95.3) is in its annual winter "Orgy Period." Among the orgies of special interest are a survey of the music of Paul Dukas beginning tomorrow afternoon at 1, a celebration of the 40 seasons of the Beaux Arts Trio beginning Jan. 10 at 1 (and including many highlights from performances broadcast live from Sanders Theatre over a period of 15 years), a celebration of the centennial of pianist Clara Haskil (beginning Jan. 11 at 1), an immense two-day commemoration of the centennial of Paul Hindemith (beginning at 6 a.m. on Jan. 18) and orgies devoted to Dietrich Buxtehude, Samuel Barber, Bela Bartok, Antonin Dvorak and, of all people one would not expect to turn up at an orgy, Dame Janet Baker (Jan. 15, beginning at 7 a.m.).

WHRB is now broadcasting from its new studios, from which it has launched a fund-raising appeal; the station would like to install a new \$250,000 antenna that will improve the quality of its signal and enlarge its listening area. In an era when other FM classical-music stations have resigned all pretensions to quality in their desperate search for ratings, WHRB retains unswerving commitment to individual and adventurous programming.

PREPARED STATEMENT OF DAVID MANDELBROT

Yahoo is a leading provider of comprehensive online products and services to consumers and businesses worldwide. Yahoo reaches more than 237 million individuals worldwide each month.

Between March 2000 and August 2000, I was personally responsible on behalf of Yahoo for the negotiation and execution with representatives of the Recording Industry Association of America of the voluntary "Webcasting Performance and Ephemeral License Agreement" for Yahoo's public performance of sound recordings by noninteractive nonsubscription webcasting.

In July 1999, Yahoo had acquired broadcast.com inc., a publicly traded company specializing in broadcasting audio and video over the Web. Broadcast.com was a leading aggregator of streaming audio and video, making available from its Website thousands of special events, several hundred local radio stations, local television stations and video networks, concerts, and Internet-only music channels. Over the two years following the acquisition of broadcast.com, Yahoo integrated the broadcast.com services into the Yahoo network.

With the acquisition of broadcast.com, Yahoo also became an aggregator of music programming created by third parties. Specifically, Yahoo offered its audience the opportunity to listen to music performances in two ways. First, radio stations transmitted their signals by phone line to Yahoo servers, which servers then originated the retransmission of those radio station signals to the Internet. Second, programmers created Internet-only channels or Internet-only programming, which was not transmitted over ordinary radio station signals and which Yahoo also made available to the public. At that time, radio retransmissions constituted approximately 90 percent of Yahoo's performances that were covered by the statutory license; Yahoo's Internet-only performances constituted the remaining 10 percent.

As of the time when Yahoo completed its acquisition of broadcast.com, Yahoo had several reasons for considering a voluntary license rather than taking advantage of the statutory license available following arbitration:

First, it would enable Yahoo to offer certainty of a negotiated RIAA license to Yahoo customers. By entering into a license agreement with the RIAA, Yahoo could offer a service to our radio station and third party music programming entities by saving them the expense and burden of arbitration or independent negotiation with the RIAA.

Second, Yahoo would avoid the costs of arbitration. As one of the largest Internet webcast transmission services, we would incur very high litigation costs if we were to participate in the arbitration. In addition, litigation would drain time and resources from Yahoo personnel whose efforts would bring much greater value if directed toward development and execution of our site-wide streaming media implementation. Moreover, Yahoo was aware that these arbitrations could repeat every two years. In light of these factors, Yahoo was willing to enter into a voluntary license in order to avoid these litigation burdens and costs. Yahoo ultimately decided that we would much rather invest fewer resources settling than invest more resources arbitrating.

Third, Yahoo would avoid the uncertainty of the CARP rate. By negotiating a voluntary license, Yahoo could potentially quantify and control its costs. We were concerned that an unacceptably high royalty rate arrived at by the CARP could force us to stop offering particular types of content. Negotiating the fee reduced the risk of an adverse judgment inherent in any arbitration or litigation. In addition, given that radio retransmissions constituted approximately 90 percent of Yahoo's music performances, we believed that our interests were different from the other participants in the CARP; and we wanted to establish a separate and lower rate for radio retransmissions.

Fourth, Yahoo wanted to build goodwill with the record labels. We believed that by settling early, we would engender goodwill with RIAA member recording companies. We hoped that this goodwill would lead to better revenue opportunities in the future.

In light of these factors, our primary concern was the overall cost of the license, that is, the "effective rate" that we would pay for all performances based on our mix of radio retransmissions and Internet-only performances. Based on what we projected as the ratio of retransmissions to Internet-only transmissions, the radio retransmission fee was a much more significant factor to us.

Although we were aware that our license could be used as a precedent prospectively, our main interest was in striking a deal that had an acceptable bottom line impact for the term of the agreement. To the extent that an arbitration resulted in lower fees going forward, we would be able to avail ourselves of that lower rate in

the renewal periods or following the expiration of our Agreement with RIAA. If our license was deemed to be an industry precedent and the arbitration resulted in the same rates, we would be on an even plane with our competitors, and the Internet-only rate was not of great concern to us at that time. Either way, we looked to the costs we would save by not participating in the arbitration in agreeing to our license.

Not surprisingly, our interest was in doing what was best for our business and our business model. At that time, because of our mix of 90 percent radio retransmissions and 10 percent Internet-only transmissions, we were hoping to achieve a lower rate for radio retransmissions which would produce a lower effective rate and have a far greater financial impact on our business than the rate for Internet-only transmissions.

The fees ultimately set by the CARP in its recent report were considerably higher than any fair market outcome or any reasonable construction of the economics of the Yahoo-RIAA Agreement. The Panel did not appropriately address the unique facts and circumstances surrounding the Yahoo-RIAA Agreement, yet the Panel explicitly used certain terms of that Agreement as a benchmark for industry rate-setting. The result is that a single specific agreement based upon the unique situation of an individual company whose business model was atypical of Internet webcasters in general, has been misapplied to set excessive rates for an entire industry.

MATERIAL SUBMITTED FOR THE HEARING RECORD



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June 21, 2002

The Honorable Howard Coble
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property
House Committee on the Judiciary
B-351 A Rayburn House Office Building
Washington, D.C. 20515

Re: CARP Reform Proposals

Dear Mr. Chairman:

In response to your invitation at the close of the Subcommittee hearing on June 13, 2002, entitled "*The CARP (Copyright Arbitration Royalty Panel) Structure and Process*," the National Association of Broadcasters (NAB) provides these brief supplemental comments regarding potential reform of the Copyright Arbitration Royalty Panel (CARP) system. NAB has actively participated in all cable rate adjustment and cable royalty distribution proceedings before the CARPs and the predecessor Copyright Royalty Tribunal (CRT) since the inception of the cable compulsory license in 1978. As a service to the U.S. commercial broadcasting industry, NAB has represented the interests of television stations as copyright owners in receiving royalties for the retransmission of their programs by cable operators under the Section 111 statutory license. Commercial broadcasters were awarded the third highest share of the cable royalties in the most recent CARP distribution proceeding.

NAB also participated actively in the work on accomplishing the transition from the CRT to the CARP system, as well as in subsequent Copyright Office proceedings to improve CARP procedures. The broadcast industry has a strong interest in helping to develop a smoother and more efficient dispute resolution process that will allow the more expeditious flow of cable royalties to the copyright owners.

We have reviewed the statements submitted on behalf of the Copyright Office and MPAA, and the testimony presented by witnesses appearing at the June 13 Subcommittee hearing. NAB generally agrees with the position stated by all other commenting parties: the CARP system needs to be improved. Based now on practical experience with the CARPs since 1993, NAB believes that the cost and unpredictability of the process prevent the system from satisfactorily serving its original purposes.

NAB agrees that a number of the specific proposals commenters have put forth would be useful in reducing the cost and improving the predictability of the process. We look forward to

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working with the Subcommittee and other interested parties to help develop a workable set of statutory improvements. At this preliminary stage, we wish to bring to the Subcommittee's attention an important flaw in the current system, which has not been sufficiently addressed by other commenting parties.

In NAB's view, one of the greatest contributors to the cost and unpredictability of the CARP process relates to the current statutory standards governing the scope and nature of review of CARP decisions by the Librarian of Congress/Copyright Office and the court. Many factors have conspired to make the cost of litigation before the CARPs higher than before the CRT, including the increased levels of arbitrator compensation and an expanding CARP discovery practice. But the cost and delay of the process is multiplied far more dramatically in cases where a long and costly CARP hearing results in a decision that is thrown out in its entirety.

NAB believes that such a scenario, which has occurred in connection with recent cable distribution proceedings, can result in part because of the lack of a sufficiently focused and circumscribed statutory review standard. The Section 802(f) requirement that the Librarian adopt the CARP's decision unless he finds it "arbitrary or contrary to the applicable provisions of [Title 17]" has been understood to require a top-to-bottom review of the decision by the Copyright Office, not limited to the specific points as to which parties expressly request review. This leaves the Office and the Librarian, who do not participate in the hearing itself and who have no necessary expertise on the factual questions of, for example, the accuracy of television viewing measures or the marketplace value of various television programs, in the position of feeling compelled to make a close analysis of the entire decision in less time and with less information than the CARP Panel had to do the original job. The burden on the Office of trying to fulfill what it sees as its responsibility under the vague "arbitrariness" standard is substantial, and the possibility that the parties will end up having to start a completed proceeding over from scratch is hugely wasteful.

At the same time, the statutory standard for judicial review has been interpreted in a way that provides little if any check on aberrant CARP decisions. The D.C. Circuit, noting the "unusual character" of the statutory scheme, concluded that its review, unlike conventional "arbitrary and capricious" review under the Administrative Procedure Act, was "significantly more circumscribed" and "exceptionally deferential." NAB v. Librarian of Congress, 146 F.3d 907, 918, 924 (D.C. Cir. 1998).

NAB believes that there is ultimately no need to burden the Copyright Office with the job of scouring CARP decisions to discover arbitrary aspects and then to engage in substitute decisionmaking on the basis of a paper record in a truncated time period. Particularly in the area of cable distribution proceedings, which have been litigated for more than twenty years now, there are few occasions on which matters of unresolved copyright policy require the Copyright Office's expert input. Instead, the Court of Appeals should be given the primary review task, under the same conventional standards it has applied in many other types of cases rather than a unique standard found only in Section 802 of the Copyright Act.

Amendment of the current standards in Sections 802(f) and (g) to provide more specific guidance for Copyright Office review and to limit its responsibility to resolving just those

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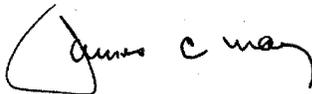
questions presented by the parties, coupled with traditional APA-type review by the Court of Appeals, would make the process more expeditious and more conventional. The risk of the very substantial delay and cost associated with redoing the proceeding from scratch would be greatly reduced. Regularizing the review process to conform more closely to a traditional administrative agency adjudicatory proceeding should also produce more predictable results from the panels in the first place. NAB believes this effect would be further heightened by an amendment of Section 802(c) that makes the requirement that CARPs follow prior precedent more explicit.

A number of the reform proposals presented by commenting parties involve structural changes that would necessarily result in different standards of administrative and/or judicial review. But to the extent a form of the current CARP structure is retained, a revision of the statutory review standards is greatly needed.

As to other proposals that have been made by commenting parties, NAB particularly supports measures that would promote continuity. For example, a system in which the decisionmakers served staggered multi-year terms would allow the parties not to have to start from scratch in each proceeding and would more likely produce consistent decisions from case to case, but would ultimately permit the termination of biased or incompetent members. Such a system would have the potential to reduce costs, improve decisional predictability, and promote settlements. By the same token, NAB strongly opposes any "expertise" criterion for members other than demonstrated experience or competence in adjudicative decisionmaking. In NAB's view, substantive expertise in the copyright field is too likely to be associated with industry experience, which raises too great a risk of bias or prejudgment. Although a "balanced" panel of experienced party arbitrators may work well in situations involving only two sides to a dispute, the cable distribution proceedings typically involve multiple parties. Introducing the risk of predisposition in favor of only one or two out of the five or six claimant parties by requiring substantive expertise is, in NAB's view, both dangerous and unnecessary. Nor would it be appropriate to make expertise in copyright law or economics a qualification criterion. The parties can and should undertake the burden of explaining copyright and economics principles in terms that are understandable and persuasive to decisionmakers who have no prior training in those fields.

We would be pleased to provide further information about our additional perspective on the CARP reform issue. We look forward to working with the Subcommittee Staff to improve the cable royalty process.

Sincerely,



James C. May



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JAMES J. POPHAM
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STATUTORY LICENSE COUNSEL

June 13, 2002

The Honorable Howard Coble
Chairman
Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
United States House of Representatives
Washington, D.C.

Dear Mr. Chairman:

We write in response to your request for our views concerning the current Copyright Arbitration Royalty Panel (CARP) process for resolving controversies over the setting and adjustment of rates and the distribution of royalties under the statutory licenses in the Copyright Act. We are deeply grateful for this opportunity to express our views and respectfully request that our letter be included in the record of your hearings today on the CARP process.

The Motion Picture Association of America (MPAA), as you know, has considerable experience with the CARP process. Since the statutory licenses for secondary transmissions of broadcast station signals by cable television systems and satellite carriers were enacted in 1976 and 1984, respectively, MPAA has represented the interests of copyright owners of television series and motion pictures in cable and satellite royalty adjustment and distribution proceedings before the old Copyright Royalty Tribunal and the more recent CARPs. In 1994, MPAA supported the dissolution of the CRT and the shift to the CARP regime.

MPAA applauds and supports your efforts to review and overhaul the CARP process. Regrettably, the CARP process has been a source of continuing frustration. Despite optimism that the CARPs would improve upon the disappointing record of the Copyright Royalty Tribunal, the CARP process also has shown itself to be flawed and inefficient. The process is costly, ambiguous, unpredictable, and open to abuse. Settlement is discouraged. Enforcement of substantive rights is frustrated by lack of information. Therefore, MPAA urges the subcommittee to devise and advance a new statutory approach to resolution of royalty rate setting and distribution issues.

We offer the following reflections and insights to provide guidance to the subcommittee as it pursues revision and reform of the CARP process. With the benefit of hindsight, we now can see the hidden

defects that have emerged in the crucible of actual experience. In our view, the problems that have arisen because *ad hoc* CARPs lack expertise and experience, not only in the law and subject matter, but also in the conduct of adjudicatory proceedings. The problems are compounded by the confusion of roles between the CARPs and the Copyright Office, and by ambiguity in the scope of review at the administrative and judicial levels.

We see the lack of expertise and continuity as the dominant shortcomings of the CARP process. Although CARPs invariably are composed of bright, capable, and well-intentioned arbitrators, their backgrounds and understanding of the statutory license mechanism, the interrelated rules of the Federal Communications Commission in the case of cable and satellite proceedings, and the affected industries typically is minimal at best. This concern casts no aspersions on the arbitrators. The statutory license mechanisms are arcane. The FCC's rules are complex. And the cable, satellite, broadcast, and program supply industries are unique and dynamic. Outside the handful of lawyers involved in CARP proceedings on behalf of copyright owners and users, several staff members at the Copyright Office, and, of course, the staff and members of committees of jurisdiction in the Congress, few individuals have the slightest reason to develop any knowledge or expertise in these areas.

This lack of expertise not only adds to the time and expense of CARP proceedings, but also breeds decisions that are unsound and inconsistent. Every party to a CARP proceeding must present considerable testimony about the relevant statutory framework, applicable FCC rules, and the basic workings of the industries involved. Only after laying this extensive groundwork can a party proceed to present evidence directly pertinent to the seminal issues in the proceeding. And they can even then only hope – vainly in most instances – that the arbitrators have been able to grasp and retain sufficient knowledge to evaluate the evidence in the proper statutory, regulatory, and marketplace context. The result has been a number of CARP decisions that have suffered remand or rejection by the Copyright Office.

Lack of continuity similarly contributes to the weakness of the CARP process. With a new panel convened for every proceeding, consistency is elusive. Arbitrators forced to make a decision based on a snapshot of evidence from a single proceeding lack the perspective and insight necessary to make sound, well-informed decisions. Furthermore, arbitrators' preconceived notions and particular piques of interest often inform not only their decisions, but also their conduct of the proceedings. The same issues (and typically similar arrays of evidence) will be viewed through different prisms of preconception and limited knowledge.

The want of expertise and continuity affects not only the substantive aspects of CARP decisions, but also the sound conduct of proceedings. With little or no experience or expertise in presiding over evidentiary proceedings, and CARP hearings in particular, arbitrators' control over proceedings is uneven and inconsistent. Discovery practice and rules of evidence become unpredictable to parties and their counsel. And because a CARP hardly qualifies as an "expert agency," proceedings before a CARP more resemble a jury trial with the CARP serving as judge and jury. Thus, procedural inconsistency and irregularity plague the CARP practice.

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The problems faced by *ad hoc* CARPs are compounded by the confusion of roles between the CARPs and the Copyright Office, and by ambiguity in the scope of review at the administrative and judicial levels. Many preliminary matters are handled by the Copyright Office staff. Or the Copyright Office may leave issues involving discovery or admission of evidence to the CARP. Later the same Copyright Office staff is responsible for reviewing the CARP decision, including issues previously decided by the Copyright Office and/or issues passed on to the CARP. Indeed, the Copyright Office may completely reject a CARP decision – as it has done on several recent occasions – and make its own decision based on the record compiled by the CARP. CARP proceedings are neither fish nor fowl. They are neither true binding arbitrations subject to great deference, nor true administrative hearings, subject to more limited deference.

All of this lack of potential for sound, consistent decision making and procedures only discourages settlement. Whereas settlements ought be encouraged, they should not be motivated by the fear of an enormously costly process that portends an arbitrary decision. Indeed, parties looking forward to a proceeding that promises a sound result will be more likely to settle on reasonable terms. However, a CARP process that offers the prospect that less reasonable positions might be embraced is an open invitation to litigate for parties with demands that assault the boundaries of a just and reasonable result.

Another major, but unforeseeable disappointment in the CARP process is high cost. In our experience, CARPs offer little value for the substantial expense burden placed on parties to CARP proceedings. Parties incur enormous legal and expert witness fees and bear the cost of the CARP itself. Costs routinely run into the millions of dollars in major distribution proceedings and amount to little less even in more limited proceedings. In light of the inability of the CARP process to deliver sound, consistent decisions, the value of the CARP process is far from commensurate with the costs borne by the parties.

Finally, as MPAA has discovered recently, abuse of the process invites no sanction. In a recent case, the Copyright Office granted a waiver of the rules to a party that failed to list the individual claimants that comprised its joint claim, as specifically required by the rules. The waiver permitted a party *claiming* to represent over 60 programs from 16 copyright owners to participate in a CARP proceeding. After the CARP made its decision, the Copyright Office then ruled that the party legitimately represented only one of the 16 individual claimants and for only eight to 10 programs. This led to an otherwise unnecessary CARP proceeding that cost copyright owners well over a half million dollars and thereby denied them full compensation for the use of their works. Because CARP costs are apportioned *pro rata* based on the share of royalties received, MPAA, not the party with the overstated, but ultimately *de minimis* claim, likely will bear over 99 per cent of the cost of the CARP.

Similarly, gaps in information collection from licensees further frustrate the goals of fair, efficient decision making and adequate enforcement of substantive rights. For example, current cable statement of account forms do not include information on ultimate ownership or on contiguous systems. In this age of consolidation, such information might be especially helpful in monitoring compliance with the cable statutory license.

Thus, MPAA respectfully submits that the CARP process suffers now demonstrable flaws that commend its demise.

In devising a new process to replace the CARPs, the subcommittee ought focus on solutions to the particular deficiencies in the CARP process. Generally speaking, decision-makers should have expertise (or ability to acquire expertise) in applicable law and subject matter and experience in conducting adjudicatory proceedings. Continuity among decision-makers and staff also is essential. The procedures must be unambiguous and efficient with clearly defined roles and scope of review. An efficient, expedited process for small claims is desirable, as are procedures enabling prompt dismissal of frivolous claims and imposing penalties for abuse. Finally, they should provide for enhanced collection and availability of information from statutory licensees.

Many means exist to achieve these goals. We offer some illustrations:

- **Expertise and Continuity.** CARPs should be replaced by a permanent decision making body. Alternatives include an independent agency like the CRT or a division or board in the Copyright Office. In either case, expert professional staff (*e.g.*, law, economics, statistics, and technology) should be retained to assure continuity and expertise. This would be especially desirable if the ultimate decision-makers were appointed for limited terms. For example, a new regime might include a professionally staffed statutory license division in the Copyright Office with authority to conduct and review proceedings and make a recommendation to the Librarian of Congress (“Librarian”).
- **Procedural Regularity.** If the new regime includes evidentiary hearings, administrative law judges (ALJs) should be employed to conduct the hearings. Thus, once the Copyright Office determined that a controversy existed, the matter could be handed over to an ALJ. The ALJ would establish a hearing schedule, supervise discovery, rule on preliminary motions, conduct a hearing (if necessary), and prepare written findings and conclusions, including a recommended decision on all pertinent issues. The ALJ's decision would replace the CARP recommendation and like the CARP recommendation would be subject to review and revision by the Librarian. The ALJ could be given authority to conduct pre-hearing conferences to narrow the issues, limit the presentation of live testimony to material matters in dispute, and promote settlement. This would work well with an experienced and knowledgeable ALJ charged with compiling a record and an expert review panel that would not need a baseline education for every proceeding.
- **Reduced Burdens:** Actual hearings also might be limited to cross-examination on written direct cases. This would pare hearing time and costs considerably. It also locks parties into their cases from the outset. Similarly, presentation of evidence could be limited to prescribed issues based on the relevant criteria for decision. Presentation of evidence on extraneous matters might be permitted only upon some type of *prima facie* showing of relevance. Similarly, discovery rules could be revised to allow more extensive supervision by the ALJ. Discovery outside the normal range of issues would have to be justified by the party seeking to adduce the additional evidence. Additionally, the ALJ might be granted some very limited subpoena power to compel testimony and

document production in exceptional circumstances. Such subpoena power must be accompanied by limitations designed to assure that it is not used to engage in fishing expeditions or gratuitous quests for sensitive proprietary information. The major benefits of more extensive discovery include promotion of settlements before hearing and more efficient conduct of hearings (*e.g.*, cross-examination does not become a high-risk, time-consuming fishing expedition). Enhanced discovery also might permit submission of "summary judgment motions." It also might enable an ALJ to refine and limit the issues to be tried at a hearing (as is done in federal court).

In the alternative, the entire adjudicatory process could be replaced with a paper proceeding more akin to a rule making. Cases would be submitted in writing. No oral or evidentiary proceedings would be required. No discovery would be allowed. Assuming that the Copyright Office would remain the forum for the proceeding, the register and professional staff might be empowered to call for oral arguments or evidentiary proceedings if needed to illuminate material, contested issues more fully. For example, the least burdensome alternative in the case of royalty distribution proceedings would involve setting the distribution shares by statute or rule, subject to adjustments every few (*i.e.*, 3 - 5) years via paper rulemaking proceedings. *The desire to reduce costs and maximize the flow of royalties to copyright owners highly recommends this approach.*

- **Costs.** The costs of a permanent agency or staff could be deducted from the overall royalty pool. These costs would be ongoing instead of sporadic and would be incurred even if no controversies were litigated. However, costs could be shifted to actual litigants via a hearing fee that would be assessed against parties to litigated controversies. The hearing fee could be an *ante* that must be paid in advance as a condition of prosecuting a claim through a hearing. Such fees could vary according to the dimensions of the controversy. For example, fees for a full-blown Phase I hearing would be set quite high, while fees for Phase II proceedings would be less. Nonetheless, the fees should be set high enough to deter frivolous claims. Of course, such a fee – imposed only after parties failed to resolve the controversy on their own – also would promote settlements. *This also assures that the costs fall fully on the beneficiaries of the royalties and any litigation they elect to pursue, rather than on the U.S. Treasury.*
- **Small Claims.** Some sort of "small claims" process might be established (with even lower fees) just to assure that legitimate small claimants in Phase II proceedings are not frozen out of the process – and to lower the cost to major claimants faced with litigating against very small claimants. Thus, for example, any claim valued by the claimant at less than, for example, \$100,000.00 would be eligible for a summary small claims process that might consist of a paper only proceeding or some other abbreviated hearing process.
- **Prevention of Abuse.** Fraudulent or other claims that could not be substantiated would be subject to dismissal.
- **Enhanced Information.** Some useful, but minor modifications to current information collection requirements may be in order. For example, statements of account submitted by cable systems and satellite carriers should be enhanced to provide adequate information for enforcement purposes. Cable systems and satellite carriers should file multiple copies (or electronically) to permit

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immediate public access. Furthermore, for cable systems, additional information should be required, including head-end location, listing of all communities served by the head-end, full ownership (parent-subsidiary) information, listing of co-owned facilities in contiguous communities, and FCC ID number.

These are only examples of fresh approaches to resolving the rate adjustment and royalty distribution issues that arise under the current statutory licenses. MPAA looks forward to working the subcommittee and subcommittee staff to flesh out more specific proposals for replacement or reform of the CARP process. We, of course, would be happy to respond to any questions you may have and provide any additional information you may require.

Once, again, we thank you for this opportunity to offer our views.

Very truly yours,

A handwritten signature in black ink, appearing to be "J. J. J.", is written above a horizontal line.

June 7, 2002

The Honorable Howard Coble
Chairman
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
B351-A Rayburn House Office Building
Washington, D.C. 20515

Re: CARP Reform

Dear Mr. Chairman:

Thank you for inviting us to comment on your review of the Copyright Arbitration Royalty Panel (“CARP”) process. We appreciate the opportunity to participate in a process that has significant ramifications for the rights of sound recording copyright owners.

As a participant in numerous CARP proceedings (and the predecessor proceedings of the Copyright Royalty Tribunal (“CRT”)) for more than three decades, the Recording Industry Association of America (“RIAA”) and its member companies are intimately familiar with arbitration proceedings that establish royalty rates to be paid by entities availing themselves of a statutory license. RIAA’s member companies both receive statutory royalties established through CARP proceedings (under Sections 112 and 114 of the Copyright Act) and pay statutory royalties established through such proceedings (under Section 115 of the Copyright Act).

The rules governing CARP proceedings differ significantly from litigation in federal and state courts. CARP proceedings combine fundamental parts of our adversarial system such as cross-examination with what were intended to be more streamlined procedures. These procedures attempt to balance concerns such as limiting time and costs while ensuring that parties have an adequate opportunity to present their case and challenge the cases of opposing parties. The recent “Webcaster CARP” highlighted the tension in achieving these objectives and raised a number of questions generally about how CARP proceedings should be conducted in the future. It is safe to say that none of the parties expected the proceeding to be as costly and resource-consuming as it turned out to be. The parties spent \$1.3 million in arbitrators fees alone, and incurred substantially more costs for counsel and expert witnesses.

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RIAA believes that any discussion about reforming the CARP process should focus first on whether regulatory fixes may be implemented to the existing process that address the concerns of interested parties. As discussed in detail below, a number of issues regarding the scope and conduct of the proceedings have arisen in recent years. These issues include whether CARP proceedings can be streamlined to save costs, the scope of discovery, the resolution of pre-hearing legal and other matters, procedures for encouraging settlement among the parties, and many others. These are complex issues that require considered discussion and analysis. In our view, only after interested parties have the opportunity to address these issues can we turn to addressing what changes, if any, are necessary to the structure of the current system.

We suggest that the Copyright Office conduct a rulemaking proceeding to permit interested parties to discuss the myriad issues that have been raised, with the goal of resolving as many of those issues as possible through regulation. We believe that many of these issues can and should be resolved through regulations governing the nature of CARP proceedings, thereby narrowing any issues that may require legislative consideration and action. It would be premature to discuss legislative remedies on structural reform without a complete understanding of how CARP proceedings should be conducted, especially where legislation may ultimately be unnecessary.

Below we highlight some of the issues that should be considered. These issues are meant to be examples, and not exhaustive of those we believe should be discussed. We also have not taken a position on a number of these issues as we believe further consideration is required. These examples underscore the complexity of issues facing all of us in determining appropriate changes or reform to the CARP process.

I. Division of Responsibilities

As a threshold matter, RIAA recommends that the Copyright Office investigate the appropriate division of responsibilities between arbitrators and the Copyright Office and/or the Librarian. The current allocation of responsibilities between the Copyright Office and the arbitration panels results in parties frequently having to incur expenses to argue issues in two forums. This increases the costs to the parties and causes inconsistent rulings to be issued in the different forums. The questions to be asked in determining the appropriate division of responsibilities should include the following:

First, should the Copyright Office narrow matters in dispute among the parties to an arbitration and present only disputed issues to the arbitral body? Because parties to an arbitration do not necessarily know all of the issues that may be raised during a proceeding, they are forced to prepare comprehensive written direct cases involving numerous witnesses and hundreds of pages of filings that fill multiple volumes. This is all done in an effort to anticipate the myriad number of issues that may be raised during

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the proceeding. Parties will also frequently submit with their direct cases extensive background information to educate arbitrators.

Only following the submission of direct cases are parties able to discern the material issues in the arbitration. But because of the requirement that parties are bound by the filings in their direct cases and must make the authors of written direct testimony available for cross-examination, all parties to the arbitration are required to incur the time and expense of presenting live witness testimony when such testimony may not be relevant for a final determination. This increases the fees paid to the arbitrators, outside counsel and expert witnesses.

One possible solution to this problem that should be considered is to have the Copyright Office review the initial filings of the parties and then determine, through consultation with the parties, the material issues in dispute. Only those issues in dispute would then be presented to the arbitrators saving all parties significant time and expense. Although CARPs are currently given the authority to limit the number of witnesses to preclude the presentation of cumulative evidence, 37 C.F.R. § 251.47(i), the Copyright Office could seek to limit initially the number of issues presented to the CARP while still granting the arbitrators the right to further limit the presentation of evidence.

Second, should the Librarian of Congress/Copyright Office oversee all discovery motions and motions involving legal issues rather than have some of these issues resolved by the arbitrators? The resolution of discovery and legal motions is currently handled in a bifurcated manner. Parties are initially given the opportunity to file prehearing motions on discovery and objections with the Librarian of Congress as well as other motions on questions of law. Id. § 251.45(b)(2)(i). Parties are then given an opportunity to raise discovery issues with the arbitration panel or to raise separate legal arguments before the arbitrators. See id. § 251.45(c). This bifurcated process occasionally results in parties receiving a ruling from the Copyright Office that is then overturned by the arbitration panel, which causes uncertainty in the arbitration and increases the costs of litigation, as there is an incentive for parties to re-litigate before the arbitrators issues previously decided by the Copyright Office.

For example, in the Webcaster CARP proceeding the Copyright Office ruled on certain discovery motions of the parties that were then re-litigated before the arbitrators. Whereas the Copyright Office's rulings were consistent with extant regulations and prior precedent (of both the Office and preceding CARPs and the CRT), the arbitrators reversed certain decisions of the Copyright Office and granted an unprecedented amount of new discovery. This decision increased by hundreds of thousands of dollars the costs to the parties and created uncertainty for future CARP proceedings.

The inconsistent discovery rulings in the Webcaster CARP proceeding have increased the uncertainty for participants in CARP proceedings and may have a

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significant, negative impact on the way royalty fee distribution proceedings and rate adjustment proceedings are litigated in the future. In fact, parties in all future CARP proceedings will now have an incentive to re-litigate every discovery matter decided by the Copyright Office if there is a belief that a more favorable ruling may be obtained from the arbitrators.

There are also occasions where the Copyright Office has refused to rule on a discovery issue that has been raised by a party, instead leaving the issue for resolution by the arbitrators. This situation creates uncertainty for the parties due to the *ad hoc* nature of the arbitration panels. Rather than having institutional knowledge of how CARP discovery issues have been handled in the past, arbitrators, more accustomed to the practices in federal court, may expand CARP discovery rulings (as happened in the Webcaster CARP) under traditional notions of civil procedure. But this expansion of discovery creates uncertainty and increases costs.

By conducting a rulemaking on the proper division of issues to be resolved by the Copyright Office on the one hand and an arbitration panel on the other hand, regulations should be implemented that give parties more consistent rulings on issues at reasonable costs. For example, the Copyright Office should seek public comment on whether all discovery issues should be handled solely by the Copyright Office in order to provide clear and consistent rulings to all parties across all proceedings. The arbitrators would then sit solely as a body to weigh the evidence presented by the parties, much as a jury hears cases without generally having an opportunity to require parties to present additional evidence.

II. Scope of Discovery

A related issue is the appropriate scope of discovery in CARP proceedings. As noted above, CARP proceedings are not governed by the Federal Rules of Civil Procedure or similar rules. Rather, discovery was intentionally limited to save the litigants time and money by requiring parties to only disclose documents that “underlie” specific statements. While there is ample Copyright Office precedent on what documents are subject to discovery under this standard, parties unfamiliar with CARP proceedings are frequently frustrated by their inability to discover information that would normally be available in federal court litigation.

The Copyright Office should determine whether the parties involved in CARP proceedings believe it is appropriate to expand the scope of discovery. For example, should additional discovery be permitted? Might depositions of witnesses be appropriate? Should such depositions be limited in number and time? Should additional documents be produced? Should interrogatories be required?

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On the one hand, additional discovery will provide the parties more information for their own cases as well as to test opposing witnesses on cross-examination. But while such a change would provide parties with access to more information, it would come at a substantial cost. Legal fees would likely increase significantly as well as the cost for producing discoverable documents, which could number in the hundreds of thousands of pages. Moreover, these costs could be incurred even if there is little money at issue in a rate adjustment or royalty distribution proceeding.

III. Facilitation of Voluntary Settlements

One of the significant problems with current CARP regulations is the disincentive for voluntary settlements and the obstacles that exist in those instances when some – but not all – of the parties to a multi-party arbitration reach a settlement after the commencement of an arbitration proceeding. The Copyright Office should explore reforms that would provide incentives for parties to settle disputes short of arbitration, thus implementing Congressional intent that negotiated agreements be encouraged and litigation be a last resort. Some of the issues that could be investigated by the Copyright Office include the following:

First, should the Copyright Office implement regulations that require statutory licensees to pay royalties pending the final determination of a rate adjustment proceeding? In the case of eligible nonsubscription services and new subscription services operating under the Section 114 statutory license, 17 U.S.C. § 114, no payments to copyright owners are required to be made until the Librarian of Congress finally determines a rate or copyright owners and users negotiate a rate. Therefore, services are and have been able to operate with, what is in effect, an interest free loan from copyright owners and performers. Webcasters, for example, have been able to operate since October 1998 without having to pay any royalties while they have had to pay for all other inputs for their business (e.g., rent, salaries, bandwidth, taxes, etc.). In fact, many webcasters operated for several years and then closed down before paying any royalties, thus denying copyright owners and artists any compensation for the use of their recordings.

As webcasters were permitted to develop business models that did not take account of the cost for their businesses' principal input – the cost of sound recordings – a mindset has developed that copyright owners and performers should be last in line to be compensated. This mindset skews the market, and further leads to the misperception that businesses cannot be sustained once royalties become due.¹ In fact, there is no reason

¹ As financial information distributed by webcasters lobbying on Capitol Hill indicated, webcasters' total expenses – exclusive of sound recording royalties – are already frequently multiples of their revenues.

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why sound recording copyright owners and performers should be paid only after all other business inputs have been paid for.

Because services may operate without paying any statutory royalties until after a CARP proceeding has been completed – which can take several years – there is a tremendous incentive for services to await the outcome of a CARP proceeding. This is particularly true where the alternative is to negotiate a voluntary settlement that would accelerate the date for the commencement of payment of statutory royalties. The Copyright Office should explore adopting regulations that require the payment of interim royalties or the posting of a bond to operate under a statutory license pending a final determination on statutory rates. By requiring some payments or the posting of a bond as of the commencement of operation, there would no longer be as strong an incentive for services to refuse to negotiate and await the outcome of arbitration.

Second, what regulations need to be implemented to give effect to negotiated settlements that are entered into following the commencement of an arbitration proceeding? There are currently no Copyright Office regulations that address how settlements can be implemented following the commencement of an arbitration.

In fact, the absence of such regulations posed an obstacle to certain parties in the Webcaster CARP that were negotiating a settlement after the close of hearings. That settlement did not take place because procedures were not in place to address such an event. While the Copyright Office did an admirable job trying to accommodate the parties' request to implement the settlement under existing rules, it concluded that the parties' request had to be rejected because "existing regulations make . . . [no] express provision for negotiation and settlement of generally applicable royalty rates after a CARP has been empanelled. Although the Office agreed that it would be desirable to implement a mechanism that would permit adoption of a settlement after the CARP has convened, it expressed a reluctance to engage in ad hoc decisionmaking that would depart from existing procedures in the midst of a CARP to address the unique circumstances of the parties' request to implement their partial settlement." See Copyright Office Order in Docket No. 2000-9 CARP DTRA 1&2 (Jan. 7, 2002).

If Copyright Office regulations had been in effect at the time the contingent settlement agreement in the Webcaster CARP had been negotiated, then certain parties in that proceeding might have voluntarily settled their dispute and removed contentious issues from the arbitration. In the absence of procedural safeguards that were satisfactory to all parties, however, that contingent settlement agreement could not be implemented and the settling parties incurred substantial additional fees (including legal fees and arbitrators' fees) in having their dispute resolved by the arbitrators.

The Copyright Office should adopt regulations that would facilitate voluntary settlements reached after the commencement of an arbitration. The rulemaking should

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not be undertaken contemporaneously with and under the pressure of an ongoing proceeding, but should give parties sufficient time to explore the numerous safeguards that may be required to permit the settlement of some issues with some, but not all, parties involved in a multi-party arbitration without such settlement being used against a settling party on any remaining issues.

Third, should the Copyright Office adopt regulations similar to the provisions of Rule 68 of the Federal Rules of Civil Procedure? Rule 68 provides in part that where a party defending against a claim makes an offer of settlement that is rejected by an adverse party and where the judgment finally obtained by the adverse party is not more favorable than the offer of settlement, then the adverse party must pay the costs incurred by the offering party after the making of the offer.

With respect to CARP proceedings, the adoption of a Rule 68-type regulation could provide a powerful incentive for parties to both make and accept good faith offers of settlement. In most arbitration proceedings, the arbitrators seek to enter a decision that falls between the proposals of adverse parties. Rarely does either side receive all that it seeks. In rate adjustment proceedings, statutory licensees seek to establish as low a royalty rate as possible while statutory licensors seek to establish the highest royalty rate possible. Both sides understand that arbitrators are likely to establish a rate somewhere between these two positions. If, however, parties could make offers of settlement that, if rejected, would not be admissible in the proceeding but which could save a party substantial legal costs if more favorable than a final determination, then parties would have a tremendous incentive to make concessions in their rate requests.

The mechanics of how one would determine whether an offer of settlement was more favorable than a final determination could require extensive investigation. For example, a party could propose a settlement based upon one metric (e.g., a percentage of revenues) and a CARP could adopt a final rate decision based upon another metric (e.g., a per performance rate). In such an instance, either the Copyright Office or the CARP would need to determine whether an offer of settlement was more favorable than the final determination, as a straight-up comparison between the offer and the final determination might not be possible. The regulations for comparing rates based upon different metrics would need to be addressed in a rulemaking.

IV. Cost Control Mechanisms

Numerous parties are concerned with the escalating costs of CARP proceedings. As parties to the proceedings pay for the arbitrators, experts and outside counsel generally on an hourly basis, the costs to the parties climb as arbitrations become more complex and contentious. As has been widely reported, the Webcaster CARP sat for over 40 days of hearings and heard from more than 50 witnesses. Each day the three arbitrators were paid their hourly rates and multiple attorneys attended the hearings for

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each side. Lawyers were also working back in their offices during hearing days drafting briefs, reviewing documents or preparing witnesses. The total cost for the arbitrators' time exceeded one million dollars while each sides' costs for its own counsel and experts amounted to several million dollars more in expenses. The Copyright Office should explore avenues that might bring these costs under control, such as:

First, is it possible to hire arbitrators on a contract basis that pays them a fixed wage for the duration of the proceeding regardless of the hours worked? Many of the arbitrators that have been recommended over the past few years have hourly billing rates that exceed \$300 per hour, with more experienced arbitrators billing at hourly rates closer to \$400. At these rates, and with a complex proceeding occupying numerous hearing days with a voluminous record, the costs for the arbitration panel alone easily exceed one million dollars for six months work – more than the salary of the Chief Justice of the United States Supreme Court.

Second, do all arbitration proceedings need to involve live witness testimony? Copyright Office regulations do permit paper proceedings but only in limited circumstances. See 37 C.F.R. § 251.41(b). The Copyright Office should explore whether certain proceedings should always be conducted through paper pleadings (e.g., royalty distribution proceedings for less than a set amount) or whether there are mechanisms that can be implemented that encourage paper proceedings in other situations. Likewise, there may be more limited mechanisms, such as the waiver of direct oral testimony, that would be appropriate under certain circumstances.

Third, does the Copyright Office need to adopt special regulations that permit small entities to participate in an arbitration proceeding in some limited way, such as through the use of *amicus* briefs? This issue has taken on greater significance following the panel's decision in the Webcaster CARP, when numerous small webcasters complained that they were excluded from the arbitration process by the RIAA. This claim is false.

Shortly before the filing of direct cases in the Webcaster CARP proceeding there was the possibility that the Copyright Office might permit some parties to participate in a manner inconsistent with existing regulations. Copyright Office regulations in effect at the commencement of the Webcaster CARP proceeding and still in effect today require all parties participating in a CARP proceeding to file a written direct case that contains testimony sponsored by a witness or witnesses, and where such witnesses are required to testify under an oath or affirmation and be subject to cross examination. See 37 C.F.R. § 251.47. Some parties sought to participate in the proceeding without submitting written testimony sponsored by a witness who would be subject to cross examination. Concerns were raised that if some parties were permitted to participate in the Webcaster CARP through the filing of *amicus* briefs without filing a direct case that contained the testimony sponsored by a witness that was made available for cross examination, then

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there was the possibility that such participation could give rise to appeals that would prejudice the entire proceeding after the expenditure of millions of dollars. The Copyright Office recognized this problem when it ruled that:

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.

Copyright Office Order in Docket No. 2000-9 CARP DTRA 1&2 (Mar. 16, 2001). As such, it was the lack of procedural regulations that precluded independent record companies, performers and small webcasters from participating in the proceedings as *amicus* participants.²

V. Confidential Material

The greater complexity of the proceedings, combined with the increasing trend toward voluntary or compelled production of confidential information, has led to questions about how much information should be made available on the public record. Providing detailed information generally permits arbitrators to better understand the businesses and markets at issue in CARP proceedings, and therefore results in more informed decisions. However, the increase in the amount of materials marked confidential appears to be in conflict with the Copyright Office's preference for having as much information available on the public record. The Copyright Office has required parties to engage in cumbersome and costly procedures that will inevitably deter the submission of confidential materials in future proceedings. We believe the Copyright

² Smaller webcasters could have participated in the Webcaster CARP proceeding in larger webcasters would have agreed. At the commencement of the Webcaster CARP proceeding, the parties to the proceeding had to agree on how the three arbitrators would be paid for their services. All the parties agreed that copyright owners and performers would pay 50% of the arbitrators' fees and the webcasters and broadcasters would pay 50% of the arbitrators' fees. Therefore, for any service (be it a webcaster or a broadcaster) that wanted to participate in the CARP proceeding, it would only have to pay some portion of the 50% that was allocated to the services. (Record labels and performers were responsible for allocating their own share of arbitrator expenses). The larger services, such as Clear Channel, MTV and AOL, could have permitted smaller webcasters to participate in the CARP proceeding without being liable for any portion of the services' 50% share of arbitrators' fees or to have limited their liability to some *de minimus* amount. We do not know whether smaller webcasters and broadcasters that did not participate in the Webcaster CARP proceeding ever discussed with the Digital Media Association ("DiMA") or the services participating in the arbitration the possibility of smaller webcasters participating without liability for the arbitrators' fees. But such non-participation could not be attributed to the actions of the record industry.

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Office should review the rules governing the treatment of materials designated as confidential in light of these competing concerns.

Conclusion

Rather than seeking legislative fixes at the present time, RIAA encourages the Subcommittee on Courts, the Internet, and Intellectual Property to invite the Copyright Office to conduct a rulemaking in order to resolve the above and other issues. Once these difficult issues have been resolved, structural reform of the CARP process, if necessary, can be reviewed. Thank you again for the opportunity to comment on this important issue. Please do not hesitate to contact us if you have any questions.

Sincerely,

Hilary Rosen

Chairman & Chief Executive Officer

cc: The Honorable Howard Berman
Marybeth Peters, Register of Copyrights

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June 20, 2002

The Honorable Howard Coble
Chairman
Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
United States House of Representatives
Washington, D.C.

Re: CARP Reform Comments of ASCAP and BMI

Dear Mr. Chairman:

The United States performing right organizations ("PROs"), The American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") write in response to your request for our views with regard to the Copyright Arbitration Royalty Panel ("CARP") system for rate setting and royalty distribution pursuant to the Copyright Act's compulsory licenses.

We appreciate your expression of interest and willingness to address these issues and welcome the opportunity to participate in this most important process.

I. Introduction.

A. Standing.

ASCAP and BMI together represent hundreds of thousands of American songwriters, composers, lyricists and music publishers who create and own the copyrights to millions of musical works. On their behalf, we license the non-dramatic public performances of their musical works and distribute the license fees paid by the users for such performances in the form of royalties. In addition, through affiliation agreements with PROs in other countries, we license the works of thousands of foreign writers and publishers. Accordingly, we strive to ensure that the writers and publishers we represent are fairly compensated for the use of their works.

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A portion of the royalties to which writers and publishers receive come from the copyright law's compulsory licenses. These royalties include fees collected pursuant to the Section 111 cable retransmission license, the Section 119 satellite retransmission license, the Section 118 noncommercial broadcasting license and the Section 1001 et seq., Digital Audio Home Recording ("DART") royalty.

ASCAP and BMI have both had considerable experience with the compulsory license system. From the very beginnings of the 1976 Copyright Act's compulsory license rate adjustment and distribution mechanisms, we prepared and presented cases before the Copyright Royalty Tribunal ("CRT"). We similarly prepared and presented numerous cases before CARPs when they succeeded the CRT as the law's rate adjustment and royalty distribution mechanism. We have participated in and contributed to the legislative processes that created both the CRT in 1976 and the CARP system in 1993. And, we have been key participants in CARP reform proposals in the late 1990s, which ultimately led to your introduction in 1998 of H.R. 3210. Accordingly, we hope that our views will assist your Subcommittee in reforming the CARP structure and process.

B. Background.

Finding an acceptable process by which the rates for these compulsory licenses are set, and royalties distributed, has been a challenge. The 1976 Copyright Act, which established many of the compulsory licenses, created the CRT to set rates and distribute royalties. The CRT consisted of five members (reduced to three in 1990) appointed by the President, and acted as an independent agency in the legislative branch, receiving some administrative support from the Librarian of Congress. Its decisions constituted final agency action and were appealable directly to the D.C. Circuit.

In 1993 Congress abolished the CRT, determining that the compulsory license proceeding workload was insufficient to maintain a separate agency with three full-time commissioners. See H.R. Rep. No. 103-286 (1993). The Copyright Royalty Tribunal Reform Act of 1993 replaced the CRT with the CARPs, *ad hoc* arbitration panels convened by the Register of Copyrights upon the commencement of a compulsory license controversy. The CARPs acted under the supervision of the Register and Librarian of Congress. The CARPs did not have final agency authority; rather, upon conducting an arbitration, their decision would be merely a "recommendation" given to the Librarian of Congress (within a prescribed 180 day period), in whom final decisionmaking power rested. The Librarian's ultimate decision could be appealed to the D.C. Circuit.

The CARP process has been severely criticized nearly since its inception. Despite the assumption that *ad hoc* bodies comprised of arbitrators that charge per hour would lower costs, the CARP system has been inefficient and costly, draining the royalties from the pockets of creators and copyright owners. Moreover, due to the *ad hoc* nature of the CARPs, the parties are left without any decisional consistency or institutional memory. There is no stability and predictability of results. Each CARP enters a proceeding without any experience in the matters

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before it. While the law, facts, and economic and business terms and principles associated with compulsory licenses repeat, for the most part, from proceeding to proceeding, each CARP is required to be educated from the start in many of these, sometimes basic, matters. This not only increases the costs to the creators and copyright owners who bear the burden of reeducating each inexperienced panel, but leaves the parties without any ability to predict rationally how a future CARP will decide a matter, thus impeding settlement of controversies.

In 1998, the Copyright Office recommended the CARP's demise in its Report and testimony before your Subcommittee. See U.S. Copyright Office, *Options to Improve Copyright Royalty Rate Setting and Distribution Decision-Making* (Feb. 23, 1998); Statement of Hon. Marybeth Peters, *Hearing Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary*, 105th Cong. 14 (1998). In its stead, the Copyright Office and interested parties, including ASCAP and BMI, recommended the establishment of a permanent Copyright Royalty Adjudication Board ("CRAB") within the Copyright Office. The CRAB would consist of one full-time administrative judge, an attorney with experience in handling administrative hearings and copyright law, and two to four part-time administrative judges, each of whom would have experience in the areas affected by compulsory licenses. All judges would be appointed by the Librarian upon the Register's recommendation.

We agree in principle with (although not necessarily with the specific details of) the recommendation of the Register. As will be discussed in greater detail below, we believe that the myriad of problems inherent in the current CARP process will best be remedied by the creation of a permanent body of experienced decisionmakers, acting independently from the Copyright Office. This approach reestablishes the benefits of the CRT – that of a permanent experienced body, affording a stable, consistent and predictable process. Indeed, in our opinion the most consistently sound and predictable ratemaking and royalty distribution decisions that have been handed down to date came from the CRT that sat during the 1980s. During this period, parties appeared before a permanent decisionmaking body that was experienced in the details surrounding the compulsory licenses and used what was learned in past proceedings to establish continuity in future proceedings. Not surprisingly, during such period, because of the reliability of CRT precedent, the parties were able to settle many controversies. As a result, the cost benefits and speed of resolving compulsory license controversies were at their highest.

II. Principles of Reform.

Below, we set out our major concerns and suggestions for remedy of the present CARP system. These include issues of (A) Cost; (B); Consistency, Continuity and Transparency; (C) Procedural Efficiency; and (D) Small Claims.

A. Cost.

Despite hopes that the CARP system would serve as a more efficient system, it has in fact increased costs to the parties to the detriment of hundreds of thousands of creators and copyright owners. First, CARP arbitrator fees are astronomical. Each arbitrator charges upwards of \$400

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per hour, plus expenses, which in a complex proceeding involving many parties (as in the case for many compulsory proceedings) can total over \$1,000,000. In a distribution proceeding the fees are paid out of the royalty fund itself. In a ratemaking proceeding, the parties must pay the fees directly. In either event, fees come from the pockets of the creators and copyright owners.

Moreover, as the Copyright Office administers the CARP system, institutional administrative costs run high. Creators and copyright owners pay for time spent by Copyright Office personnel on compulsory license matters. Much like a law firm, time spent by Copyright Office personnel is logged and charged to the funds to be distributed. Such time includes prehearing and discovery motion practice, research, CARP report review and any other matters involving the proceeding at hand. However, unlike CARP arbitrator fees that are easily accountable, it is difficult for creators and copyright owners to get a full accounting of costs charged to the royalty funds by the Copyright Office. We are aware, however, that such costs can be quite high.

Finally, long, complex and contentious proceedings require participating parties to expend great sums on attorneys fees, expert fees and other litigation expenses. This is particularly so in an *ad hoc* system where each successive CARP must be re-schooled in the basics of the applicable laws and industries.

These extraordinary costs and fees are, for the most part, borne by the parties on a pro rata basis, which leads to abuse of the process by both deep pocketed parties and small individual claimants alike. Large parties in \$100 million plus distribution proceedings can better bear the costs of such proceedings, and use the arbitrary, inconsistent nature of the *ad hoc* process against smaller claimant groups. Small individual claimants with claims to a negligible percentage of the royalty pool (as discussed below, often for less than .01%) trap larger claimants into an arbitration for which the larger parties bear the entire cost. In both cases, settlement is rarely reached, and parties are forced to bear an unnecessary significant litigation cost.

We believe that a permanent salaried adjudicating body with full responsibility for the entire compulsory license controversy process – duties now split between the Copyright Office and the CARP – would mitigate the costs to creators and copyright owners. It is clear that the “unnecessary” expenses attributed to the CRT were not “unnecessary” at all; to the contrary, they were quite fair and reasonable compared to the costs associated with current CARP practice. Arguments that paying a salary to full-time members for “part-time” work is inefficient are misplaced. Members of a permanent adjudicating body are paid a salary for being available for assigned work. Reasonable payment for such availability is a bargain. Indeed, such a body – whether a group of full-time judges with staff, or one full-time judge with part-time judges available as needed with staff – would replace the current dual CARP/Copyright Office functioning at a bargain price. While costs related to distribution proceedings could be deducted from the royalty pool and costs related to ratemaking proceedings could be paid directly by the claimants, the amount would be far less than what is deducted from copyright owners today. This would be more so when purely administrative costs unrelated to actual proceedings are paid through appropriation.

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B. Consistency, Continuity and Transparency.

Perhaps the greatest flaw of the current CARP model is the inherent lack of stability and predictability in what is an *ad hoc* process. Each panel is brought in with little or no knowledge or understanding of the basic principles of the compulsory licenses, the basics of copyright law or the basic economic and business principles involved in ratemaking and distribution proceedings. The parties are forced to educate each CARP, at significant expense, before they can even begin to present their substantive cases.

Moreover, as each CARP convenes anew, there is no continuity with past proceedings. Compulsory license proceedings generally present similar, if not identical, issues, with similar evidence. A CARP without benefit of past experience looks at its proceeding in a vacuum. Previous CARP decisions are, for the most part, available to the arbitrators, but they lack value for an inexperienced panel without any understanding of the evidence.

Similarly, parties are forced to present their cases unsure as to what each new CARP will find relevant. The breadth of permitted discovery is cloudy at best, and each new CARP decides discovery issues differently. As a result, parties spend an inordinate amount of time and money preparing cases with often extraneous documents and evidence. Additionally, past decisions of the CARP and the Copyright Office are frequently unavailable to parties. Only those parties who have spent years before the CRT and CARP, and have managed to create a collection of orders, have any idea as to the general nature of compulsory license practice and precedent. It is of utmost importance that all decisions and orders be readily available to future parties.

This leaves claimant parties in a precarious position. Parties cannot predict how any future CARP will view or decide an issue. The manner by which one CARP looks to value a particular license rate or distribution share will have little or no bearing on how the next panel will make what is substantially the same valuation. Indeed, the inexperience of the CARP leads to poorly reasoned and drafted reports, evidencing a lack of understanding of the issues at hand. That, in turn, leads, in many cases, to the Librarian of Congress' rejection of the CARP report. As a result, parties have difficulties negotiating settlements when they have no means by which to measure their cases.

A permanent adjudicative body, such as the CRT or CRAB, would remedy this problem. Indeed, as mentioned above, during the tenure of the CRT in the 1980s, parties were able to settle many of their controversies. This no doubt was due, in large part, to the parties' ability to predict the course of the CRT's decisionmaking. Controversies that necessitated the resolution of exact issues with nearly exact evidence were simply not relitigated. That, we believe, would be the case with a permanent body. Settlements would be encouraged. And, to the extent that a case would be litigated, parties would have an understanding of the type of case, including the approach and evidence, that would find favor with the decisionmakers.

The adjudicative body should be one that has an understanding of copyright law and the basic functioning and principles of the industries affected by the compulsory licenses. The chief

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adjudicator should have experience as a judge. The rest of the adjudicators should preferably be judges. At the minimum they should be attorneys. The appointment or selection process should be immune from political interference as much as possible. In this way, the parties can have the confidence of stability and predictability that is currently lacking.

C. Procedural Efficiency.

While the CARP was created to “promote efficiencies,” it has done just the opposite. Compulsory license claims and controversies are handled by a patchwork of Copyright Office, as “administrator,” and CARP functions. Claims are initially filed with the Copyright Office and the Office resolves all precontroversy issues. Once a controversy is announced, and a CARP is convened, the Copyright Office is responsible for receipt and determination of issues surrounding the submissions of direct cases. The Copyright Office has jurisdiction over discovery. Parties are given the opportunity to file prehearing motions on discovery and on questions of law regarding the case at hand. See 37 C.F.R. §251.45(b)(2)(i). In many cases, the Office defers resolution of these motions to the CARP. The CARP hears all witnesses and rules on motions concerning evidence admission. Parties, however, may also raise discovery issues or questions of law before the CARP. See 37 C.F.R. §251.45(c). The same bifurcation exists with regard to rebuttal cases. Finally, the CARP writes its report, but the report is ultimately reviewed by the Copyright Office and Librarian of Congress.

This bifurcated process causes confusion, inefficiency and unpredictability. The Copyright Office, which in essence acts as the first level of appeal, often bumps issues it should decide to the CARP, perhaps for fear of impropriety or the belief that it does not have the requisite authority to decide the issues raised. Sometimes, after the Office decides an issue, a CARP will then overturn the decision with a contrary ruling, creating uncertainty for the parties. This leads to unnecessary and duplicative motion practice, increasing costs to the litigants.

More importantly, as the CARP lacks the experience of the Copyright Office on copyright and compulsory license matters, it is the Office and Librarian of Congress that actually acts as arbitrator of fact and law in many cases. The CARP report is, in essence, merely a recommendation that the Librarian can approve, modify or reject. Due to the lack of sophistication and experience of most CARPs, that report is frequently modified or, as has occurred recently, flatly rejected. When the report is rejected and sent back for further CARP proceedings (before an entirely new CARP!), the cost spiral of a CARP proceeding exceeds the most aggressive of cost projections.

Our recommendation is to require the permanent body to handle all aspects of the compulsory license process. Direct cases should be submitted to the adjudicative body. All discovery and prehearing motions should likewise be resolved by the judges. From start to finish, one permanent adjudicative body will hear and resolve every aspect of the proceeding. The Copyright Office will be removed from the process. The adjudicative body’s opinion should be appealable directly to the D.C. Circuit, which has a history of and experience in hearing such appeals. In this way, parties will be comfortable with the decisionmaking process, which will be simplified. Duplicative and uncertain resolution of issues will be a relic of the past. An active,

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experienced adjudicative body with the power to control the entire litigation will create a more efficient docket. Settlements between the parties will be encouraged. Indeed, we would recommend that, unlike past practice, the judges call for settlement discussions before, and during, the course of the proceeding. Such encouragement of settlement is severely lacking.

Efficiencies should be likewise built into the new system. While a permanent adjudicative body, including staff, should handle the entire process, it should be done in an efficient manner. Staff may be used to resolve and handle much, if not, all administrative matters. (When the CRT functioned efficiently, administrative matters were efficiently handled by its single general counsel.) While it is imperative that a full three-adjudicator body resolve all legal decisions, it may be that pretrial issues and settlement conferences may only require the efforts of one judge.

D. Small Claims.

Any copyright owner who meets the statutory requirements has the right to file a claim for compulsory license royalties. The filing of a claim, however, does not mean that the claimant has a substantive claim to any funds. Under the CARP system, a party need only state a dollar or percentage amount in its direct case to compel a proceeding. Because the law requires that CARP costs be allocated in a distribution proceeding in proportion to the actual funds awarded to each party, a claimant with a small claim has no incentive to settle. The cost of the case will be borne by the larger parties who are forced to CARP arbitration by a claimant with an insignificant claim. Abuses of the process by small claimants have occurred and are not rare.

For example, in the recent 1995-1998 DART proceeding, two individual claimants refused to settle and litigated before a CARP (such claimants had previously litigated the 1992-1994 DART proceeding over the same exact issues). The other parties to the proceeding, including ASCAP and BMI, offered the individual claimants the *full* amount of their claims in settlement. The individual claimants refused, even though they were offered the *full* amount of their written claim, citing nothing more than general injustice in the world as an excuse to litigate. Of course, these litigants knew that, because their claim was negligible in amount – *less than .01% of the total fund at issue* -- they would not be footing the bill for the litigation. The other parties were forced to pay tens of thousand of dollars in costs and fees for a final award to the individual claimants totaling *six dollars* for four cumulative royalty funds! The total expense to the copyright owners became magnified when time spent by the Copyright Office personnel on matters, such as prehearing motions, was added and billed directly to DART royalty pool.

This example only highlights the difficulties posed by small claimants. Individuals with insignificant claims have cost ASCAP and BMI – and the creators and copyright owners we represent – an inordinate amount in fees and expenses over the years, for the determination of awards amounting to dollars, and sometimes only pennies (which the Copyright Office will not even pay due to the small size of the award). Claimants with insignificant claims refuse to settle on “principle,” at times appealing the decision of the Librarian to the Court of Appeals and once even to the Supreme Court, of course unsuccessfully. All the while, the creators and copyright owners we represent, are picking up the tab.

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These problems have been communicated to the Copyright Office for years. Indeed, the Register's Report discusses many reforms related to small claims that would foster settling claims at the administrative level, minimizing costs to other parties. However, these changes must be made through Congressional action; the Copyright Office has not been able to implement changes on the regulatory level.

We have proposed a number of changes in this regard that would encourage settlement and promote efficiency for all parties. Our proposals are merely examples; we are confident that numerous procedures are available to improve efficiencies and reduce costs. Those reforms include:

- (1) *Establishment of a Filing Fee.* All claimants who file a notice of intent to participate would be required to file a fee, such as currently done in federal district court (entities that represent many individual claimants would pay only one filing fee). The fee would ensure that all claimants share in the basic burden of a proceeding. Frivolous claims would be discouraged and settlements would be encouraged.
- (2) *Offers of Judgment.* An offer of judgment procedure for small amounts in controversy, such as Rule 68 of the Federal Rules of Civil Procedure, would encourage settlements.
- (3) *Written Cases.* Current CARP practice permits the resolution of cases on written pleading alone, but only upon motion and under narrow circumstances. We suggest the requirement of paper proceedings in small claims cases.
- (4) *Settlement Conferences.* Required settlement conferences supervised by full-time salaried staff would further encourage settlement and reduce costs to the parties.

III. Comments on Other Proposals.

We have read with interest the testimony of Robert Alan Garrett and R. Bruce Rich, witnesses who appeared before your Subcommittee at the June 13th hearing.¹ We have only a few comments to make.

First, as to Mr. Garrett's testimony, we note at the outset that we have worked with Mr. Garrett for many years – indeed, since the establishment of the CRT – and hold him in the highest esteem. We cannot, however, agree with his suggestion that discovery be curtailed. To do so would leave the parties with no way to test the claims of other claimants before the actual hearing. Similarly, we cannot agree that virtually all proceedings should be on paper. These

¹ We adopt the testimony of Michael J. Remington, a witness at the June 13th hearing.

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matters involve significant sums of money, and our experience is that triers of fact benefit from live testimony (both direct and on cross-examination) in assessing claims.

Mr. Rich's suggestion that full-blown federal court proceedings analogous to the ASCAP and BMI "rate courts" which operate under the consent decrees which govern those PROs is, we think, misplaced. His desire for full-blown discovery (the other side of the coin from Mr. Garrett's suggestion) is, to us, a desire for a "Lawyers' Full Employment Act."

IV. Conclusion.

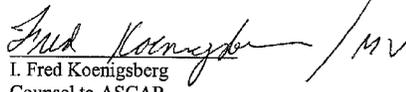
The CARP system has failed. It is inefficient and costly. The *ad hoc* nature has left parties without the confidence of stability and predictability. Settlements are discouraged. In our opinion, a new system is required: a system that takes the positive from CRT days past; that employs a continuous permanent body that builds on its expertise; and that has full control of the entire process.

Mr. Chairman, we are grateful for this opportunity to submit our thoughts on these issues. We hope to work with you, your Subcommittee, the Copyright Office and all other interested parties to create a system that works.

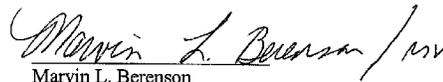
Please do not hesitate to contact us if you have any questions.

Sincerely,

On behalf of ASCAP


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June 20, 2002

The Honorable Howard Coble, Chairman
Subcommittee on Courts
The Internet and Intellectual Property
Committee on The Judiciary
United States House of Representatives
B-351A Rayburn House Office Building
Washington, D.C. 20515

RE: CARP Reform Comments of SESAC, Inc.

Dear Mr. Chairman:

United States performing rights organization SESAC, Inc. ("SESAC") is writing to respond to your recent request for its views concerning the Copyright Arbitration Royalty Panel ("CARP") process in respect to the compulsory license provisions of the Copyright Act. SESAC appreciates the opportunity to provide its thoughts and opinions about the process.

SESAC was founded in 1930 and is the second oldest of the United States performing rights organizations ("PROs"). SESAC represents thousands of American songwriters, composers, lyricists and music publishers and more than a quarter million musical compositions. As do the other two United States PROs, the American Society of Authors, Composers and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), SESAC licenses the non-dramatic public performance of such compositions and distributes to its affiliates the license fees paid by music users.

Like the other PROs, SESAC has had considerable experience with the compulsory license system from the inception of the 1976 Copyright Act's compulsory license provisions, having participated in proceedings before the Copyright Royalty Tribunal ("CRT") and before CARPs. SESAC also has participated in the legislative process that initially created the CRT and subsequently created the CARP system, and has been a key participant in previous CARP reform proposals.

SESAC agrees, to a significant degree, with the comments contemporaneously submitted to you by ASCAP and BMI, and incorporates them by reference here. Specifically, SESAC agrees that (1) the present CARP system

is inefficient and costly, and should be reformed; (2) such reform should address the major concerns of cost; consistency, continuity and transparency in decision making; and procedural efficiency; and (3) the present CARP panels should be replaced by a permanent salaried adjudicating body within the Copyright Office, with full responsibility for the entire compulsory license dispute resolution process and an understanding of the functioning of affected industries and copyright law generally.

SESAC also is in agreement with ASCAP and BMI concerning the inefficiency of the present CARP system in dealing with resolution of de minimis claims. SESAC, however, believes that it is important to clarify what is meant by the term "small claims" in this discussion. Although a claim by SESAC to participate in any given Phase I or Phase 2 proceeding might be viewed as "small" relative to those of ASCAP, BMI, or other claimants, given their respective sizes, SESAC's claims on behalf of its thousands of affiliated songwriters and music publishers invariably represents substantial sums of money and are unrelated to the de minimis claims (referred to as "small claim") concerns expressed by ASCAP and BMI for which they propose procedural remedies. In this regard, the examples set forth in the comments of ASCAP and BMI, noting awards of a *few dollars* or even pennies to individual claimants in light of the expenditure of tens of thousands of dollars to litigate such claims, are more instructive than discussing a given percentage of royalty funds at issue to identify what constitutes a de minimis claim. Moreover, SESAC believes that the specific procedural remedies recommended by others concerning (1) an offer of judgment procedure similar to Rule 68 of the Federal Rules of Civil Procedure, and (2) mandatory paper proceedings, should be limited strictly to de minimis claims. In sum, we agree that truly de minimis claimants should not be permitted to hold hostage the process of distributing millions of dollars in compulsory license fees; however, parties having claims for substantial dollars, which may be characterized by others as "small claims" or "smaller claims" relative to those of significantly larger dollar claimants, should not be disadvantaged in the dispute resolution process to the benefit of, and subordinate to, those of larger claimants.

SESAC greatly appreciates the opportunity to submit these comments with an end toward creating a compulsory license dispute resolution system that is effective and cost efficient. Please do not hesitate to contact us if we can answer any questions for you.

Sincerely,

s/Patrick Collins
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Senior Vice President - Licensing
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s/John C. Beiter
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June 19, 2002



The Honorable Howard Coble
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Coble:

I am writing in response to your request for NPR's views on the Copyright Arbitration Royalty Panel ("CARP") structure and process. I am submitting these comments on behalf of National Public Radio, Inc. ("NPR") and its member station licensees. Please include this statement in the record of the hearing concerning CARP structure and process that you chaired on June 13, 2002.

Interest of NPR and Its Member Stations

NPR is a non-profit corporation that produces and distributes noncommercial educational programming through more than 600 public radio stations nationwide. In addition to producing and distributing award winning programming, including *All Things Considered*[®], *Morning Edition*[®], *Talk Of The Nation*[®], and *Performance Today*[®], NPR is a membership organization comprised of approximately 280 noncommercial educational radio station licensees, which, in turn, are significant producers of news, informational, and cultural programming.

NPR and its members participate in the current CARP process in three ways. First, Section 118 of the Copyright Act (the "Act") provides for the compulsory licensing of nondramatic musical works, among other designated categories of copyrighted works, in the event public broadcasting entities and the performing rights societies are unable to negotiate voluntary agreements. Second, Section 111 of the Act provides for the compulsory licensing of broadcast retransmissions, including of public radio station transmissions, by cable systems. Third, NPR and its members participated in the recent CARP to determine the rates and terms for the distribution of sound recordings over the internet. Thus, NPR and its members participate in rate setting procedures as users of copyrighted works in the case of Sections 118 and 114 of the Act and in cable royalty distribution proceedings as copyright owners in the case of Section 111 of the Act.

Congress adopted the compulsory license set forth in Section 118 in recognition of the important role that public broadcasters play, the unique aspects of their use of copyrighted works, and the limited financial and administrative resources available to negotiate individual

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licenses with copyright owners. As explained in the legislative history to the 1976 Copyright Act:

[The House Judiciary Committee] is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 117 (1976). Section 118 addressed public broadcasters' need for access to "copyrighted materials at reasonable royalties and without administratively cumbersome and costly 'clearance,' problems that would impair the vitality of their operations." *Id.*

Section 114 provides a statutory license for a certain kinds of digital transmissions of sound recordings, although it is not exclusive to public radio. After participating in the direct and rebuttal phases of the proceeding, NPR reached a private settlement with the RIAA and Soundexchange. While not currently before the Committee, there are elements of Section 114 itself that might benefit from legislative attention. For instance, the statutory term for Section 114 licenses is two years; the statutory term for Section 118 licenses is five years. The relatively short term of rights under Section 114 poses a particular hardship for public radio in light of the large financial costs, discussed *infra*.

With respect to Section 111, NPR and its participating member stations have filed and successfully litigated or settled a joint claim for cable royalties each year since the compulsory license was first established. Although it is not the primary source of distribution for public radio, the availability of public radio stations on cable television serves the public interest. Cable is an important source of distribution of public radio programming to (a) audiences within the local service area of a public radio station who, because of difficult terrain or other conditions, cannot receive the local public radio station's signal or receive a better quality signal from cable than over the air, and (b) audiences in primarily rural areas which receive service from a nearby public radio station, but which are outside of the station's local service area.

Among the categories of copyrighted works used in the course of distant cable retransmissions of broadcast signals, public radio programming traditionally has garnered a relatively small award -- approximately \$200,000 to \$300,000 -- each claim year. In an under-resourced industry like public radio, however, every dollar is critical to maintaining and improving the services we provide to the American people. At the same time, NPR's claim is far from *de minimis*, and copyright owners should be compensated for the use of their works.

Problems with the Current System

National Public Radio (NPR) agrees with the Copyright Office's assessment of the problems associated with the current copyright arbitration royalty panel (CARP) process set forth

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in its report entitled *OPTIONS TO IMPROVE COPYRIGHT ROYALTY RATE SETTING AND DISTRIBUTION DECISION-MAKING*, published February 23, 1998, and has additional observations.

Excessive Cost. A given rate-setting or royalty distribution proceeding can take years to reach its conclusion, and each proceeding involves discovery, fact finding, briefing, and the empanelling of three arbitrators, each compensated at a rate of several hundred dollars per hour. In the current system, the cost of a proceeding is borne entirely by the participants. For smaller claimants, such as NPR in the case of the Section 111 cable compulsory license, litigating a given year's claim proceeding can substantially erode, if not exceed, the claimant's award. Likewise, a rate setting proceeding, such as the Section 118 and 114 compulsory licenses for musical and certain other works can increase the cost of the license fees by double digit percentages. Moreover, arbitrators often lack basic knowledge of both underlying copyright law and the industries involved in the proceeding. The parties can spend substantial amounts of time educating panel members on undisputed matters.

Lack of Predictability. Each panel of arbitrators is chosen for a particular case, and, as noted above, the arbitrators for a particular proceeding typically have no copyright or other relevant experience with the affected industries. As a result, each CARP decision is unique and may not be reconcilable with other CARP decisions. Nor is it necessarily reflective of the underlying conditions in the affected industries. Because of the lack of predictability, interested parties are more likely to litigate than to settle claims.

Presentation of Cases, Discovery and Standards of Evidence. Unlike any other legal proceeding NPR has participated in, parties in a CARP must present fully developed cases simultaneously, without benefit of discovery, and are not allowed to refine theories or exhibits as the case proceeds through the direct case phase. There are myriad ways parties may compute fair market value for the rights at issue, and without the benefit of prior discovery, positions are staked out without reference to another party's starting point. The lack of a substantive discovery process further frustrates the task of determining the proper rate. Parties simply produce the documents they say support their case. Whether the data or materials produced to support a party's case are actually relevant to the facts at issue in the CARP proceeding – relevant market, similarly situated parties, etc. – can be quite difficult to glean from the available documents. Moreover, documents that undercut a party's case are not subject to disclosure through a meaningful discovery process. There is no use of interrogatories, depositions, or requests for admissions, which could help streamline the number of issues in contention and provide meaningful testing of an opponent's case, prior to cross examination. Properly managed and meaningful discovery would assist, not hinder, the fact finder's task. It should also reduce the costs of participation.

The problems inherent in the current scope of discovery are magnified by the lack of rigorous rules of evidence such as the Federal Rules of Evidence. In two recent proceedings in which public radio was a participant, the record in the case was littered with hearsay evidence. In a proceeding in which each party controls the record it presents to the Panel, a strict application of the rules of evidence is sorely needed.

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The Need for a Permanent Rate-Setting and Claims Distribution Body

To provide a rate-setting and claims distribution mechanism that produces reasonably predictable results without excessive cost and in a timely and transparent fashion, NPR supports the creation of a permanent professional body as an independent agency. NPR is considering the merits of a rate court-like mechanism but requires additional time to study the issue.

The advantages of an independent agency include the establishment of a professional staff that can develop the expertise in copyright as it pertains to the industries affected by existing and any new compulsory licenses and create and refine appropriate and transparent administrative procedures. The ability to render final agency decisions, combined with a permanent existence and a professional staff, should also result in more predictable, rational decisions. Just as important, because voluntary settlements depend on an alignment of expectations regarding the probable outcome of a given proceeding, predictable and rational decision making will significantly improve the prospects for voluntary settlements, thereby reducing the costs to the parties and to the decision maker.

NPR also believes that Congress should fund the cost of any new rate-setting and claims distribution body through a federal appropriation. NPR and its member stations are non-profit or state supported organizations. Many of our member stations are affiliated with educational institutions and serve the dual purpose of educating students and providing free high quality educational programming. Public radio programming is unlike programming found in the commercial sphere because it is highly produced and much of it appeals to smaller audiences. The administrative costs of CARP proceedings divert needed funds from programming

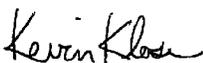
A rationale and predictable decision making process is particularly important to newly emerging media such as the Internet. A single CARP decision, such as the Panel's decision in the Section 114 proceeding, could significantly disrupt Web based activities. Similarly, an existing industry can be disrupted by unpredictable or irrational decisions. Given the importance of the content industries to the domestic United States economy and the balance of United States trade worldwide, establishing and maintaining a mechanism to assure the rational and predictable licensing of content subject to compulsory licensing is very much in the public interest.

Congress should also explicitly recognize the special burdens borne by smaller copyright claimants, for whom the cost of litigating a royalty claim may make it difficult or prohibitive to collect compensation they are rightfully due. The legislation should contain a provision directing the Copyright Office to develop procedures to allow small claimants to recover copyright royalties in a cost-effective manner, while protecting against abuses. Procedures to be developed by the Copyright Office for royalty distribution proceedings could include such measures as summary judgment provisions, offers of judgment, required settlement conferences, or other measures developed by the Office with the input of the affected parties and the copyright community.

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In conclusion, thank you for inviting NPR to submit its views and those of its member stations on the important subject of CARP reform. As you pursue your oversight responsibilities in this matter and consider possible legislative reform, NPR would appreciate the opportunity to work with you and your staff.

Best regards,



Kevin Klose
President and Chief Executive Officer

cc: Congressman Howard Berman
Ranking Member

June 28, 2002

The Honorable Howard Coble
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515-6216

Re: CARP Structure and Process

Dear Mr. Chairman:

Thank you for requesting our views concerning the existing system for setting copyright royalty rates and allocating copyright royalties pursuant to the compulsory licensing provisions of the Copyright Act. We respectfully request that you include this letter in the record of your oversight hearing on the "CARP (Copyright Arbitration Royalty Panel) Structure and Process."

We represent the copyright owners of sports programming presented by teams from Major League Baseball, the National Basketball Association, the National Hockey League, the National Football League and the National Collegiate Athletic Association. During the past twenty-five years, we have participated in numerous copyright ratemaking and royalty allocation proceedings before the Copyright Arbitration Royalty Panels ("CARP"), Copyright Office and Copyright Royalty Tribunal ("CRT") involving the Section 111 cable television compulsory license and the Section 119 satellite carrier compulsory license.

We agree with the view expressed by several parties that the current system for setting copyright royalty rates and allocating copyright royalties should be improved and strengthened. In particular, we agree that that system has become much too costly – thereby frustrating one Congressional objective underlying the Section 111 and 119 compulsory licenses, namely, that of minimizing transaction costs. The costs are not limited to CARP arbitrator fees; they include attorney fees, fees of testifying experts and other witnesses, consultant fees, and Copyright Office fees and disbursements that routinely total millions of dollars for a single proceeding. The most recent CARP proceeding, involving Internet transmissions of sound recordings under the Section 114 license, consumed over 40 days of evidentiary hearings and generated a record that consists of more than 15,000 pages of transcripts, thousands of pages of exhibits and more than 1,000 pages of post-hearing briefs. Although we were not involved in that

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proceeding, it demonstrated that unless steps are taken to simplify the existing process, the substantial costs associated with CARP proceedings of this nature will become the norm rather than the exception.

There are several aspects of the current CARP system that generate substantial costs – including the nature and scope of discovery, the routine use of full-blown evidentiary hearings, and various other policies and practices of the Copyright Office and the CARPs. While we agree that CARP procedures must be changed to reduce costs, we disagree with the position, espoused by some, that the CARPs should be abolished in favor of a new decision-making body. In particular, we strongly oppose transferring the copyright ratemaking and royalty allocation responsibilities now shared by CARPs and the Register of Copyrights to a federal court comparable to the ASCAP “Rate Court.” We have three principal concerns with the proposals to create a new decision-making body.

First, the creation of a new decision-making body would stand as a substantial obstacle to the continued voluntary settlement of Section 111 and 119 proceedings and would serve only to encourage litigation of disputes that are now being resolved outside the CARP process. In 1995 the major copyright owner groups litigated before the first CARP the allocation of the 1990-92 cable royalties. After a lengthy and costly proceeding, the CARP issued its recommended allocations, which were affirmed in all material respects by the Copyright Office, Librarian of Congress and the U.S. Court of Appeals. None of the parties, including the sports interests, fully agreed with the CARP allocations and the reasoning that supported those allocations. However, in the seven years since the CARP decision was released, no party has chosen to re-litigate those allocations. The major claimant groups have, in fact, voluntarily agreed to settle not only the 1993, 1994, 1995, 1996 and 1997 cable royalty allocations; they also have agreed to settle all of the satellite royalty allocation proceedings through the year 1998. While controversies currently exist for subsequent years, a change to a new decision-making body will almost certainly guarantee costly and protracted litigation over some or all of these years. Uncertainty as to whether or to what extent a new administrative body or a court might alter the CARP’s past approach to decision-making – which was perceived, rightly or wrongly, as being criticized by Congress – will only encourage disappointed parties to relitigate issues that previously were regarded as settled and thereby impose new litigation costs on all parties.

Second, the creation of a new decision-making body would eliminate the costs of hiring private arbitrators, but it would not address the other aspects of the current system that lead to unacceptably high costs – such as the nature and scope of discovery in CARP proceedings, the routine use of full-blown evidentiary hearings and various other policies and practices of the Copyright Office and the CARPs. To the contrary, vesting a federal court with jurisdiction over copyright ratemaking and royalty allocations will only serve to exacerbate those costs. As expensive as CARP proceedings are, they are not as

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expensive as they would be if subject to the full panoply of the Federal Rules of Civil Procedure and Federal Rules of Evidence. The focus here should be on changing procedures that lead to unacceptably high costs, and not on establishing new decision-making bodies that will increase costs.

Third, the creation of a new decision-making body would cause further delays in resolving disputes. Resolution would need to await not only the selection of the new decisionmakers but also the completion of proceedings to implement authorizing legislation. If ratemaking and royalty allocation responsibilities were transferred to a federal court, additional delays would likely follow. The ASCAP Rate Court, for example, has routinely issued rate determinations many years after the years in which use was made of the copyrighted works. *See, e.g., United States v. ASCAP (In re Capital Cities/ABC Inc.)*, 831 F. Supp. 137 (S.D.N.Y. 1993) (setting fees in 1993 for a period extending back to 1986); *United States v. ASCAP (In re Buffalo Broadcasting Co.)*, 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993) (setting fees in 1993 for a period extending back to 1978); *United States v. ASCAP (In re Fox Broadcasting Co.)*, 870 F. Supp. 1211 (S.D.N.Y. 1995) (resolving fee dispute in 1995 for a period extending back to 1986); *United States v. ASCAP (In re Salem Media of California, Inc.)*, 981 F. Supp. 199 (S.D.N.Y. 1997) (setting fees in 1997 for a period extending back to 1983).

In short, we believe that the procedures followed by the CARPs and Copyright Office in royalty ratemaking and allocation proceedings should be closely examined and changed in order to reduce the substantial costs now imposed by that process. We look forward to working closely with you, your Subcommittee and staff and the Copyright Office to achieve this objective. However, we do not believe that the CARPs should be abolished and replaced with a new decision-making body. In particular, we strongly oppose vesting a federal court with jurisdiction to set copyright royalty rates and to allocate copyright royalties under the Section 111 and 119 compulsory licenses.

Sincerely,

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