

**COPYRIGHT ROYALTY AND DISTRIBUTION  
REFORM ACT OF 2003**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

**H.R. 1417**

APRIL 1, 2003

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## **COPYRIGHT ROYALTY AND DISTRIBUTION REFORM ACT OF 2003**

**TUESDAY, APRIL 1, 2003**

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

The Subcommittee met, pursuant to notice, at 2:02 p.m. in Room 2141, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet and Intellectual Property will come to order. The reason I'm a little anxious to start is because we're expecting a series of votes about 3:30 to 3:40 and we're hopeful—that is to say the Ranking Member and I are hopeful that if we proceed expeditiously we might be able to conclude the hearing by the time the votes are called.

I will recognize myself for an opening statement and will give a brief version of the opening statement that without objection I'll make a part of the record, as I will the Ranking Member's and other Members', as well.

The purpose of today's hearing is to discuss a bill, H.R. 1417, the Copyright Royalty and Distribution Reform Act, which reforms the rate-making and royalty distribution system for compulsory and statutory licenses currently known as the Copyright Arbitration Royalty Panel or CARP. This process distribute billions of dollars among the participants in an even-handed manner. In doing so, it helps copyright content owners and users in the digital age.

When a CARP makes a decision it directly affects the livelihoods of songwriters, artists, record labels, webcasters, broadcasters, the sports industry, the movie industry, the cable industry, and the satellite industry. In setting rates, the CARP has the responsibility of deciding the worth of a content-owner's intellectual property. The CARP decides how much of that value a person or entity is entitled to receive.

Last year the Subcommittee conducted an oversight hearing and hosted a roundtable discussion on this subject. The most frequently made comments about the CARP process included the following: CARP decisions are unpredictable and inconsistent, CARP arbitrators lack appropriate expertise to render decisions and often reflect a content or user bias, CARPs are unnecessary expensive and many CARP claims are frivolous.

Well, the bill before us today addresses these concerns. The legislation gives authority to oversee rate-making and distribution pro-

ceedings to a copyright judge who is appointed by the Librarian of Congress and assisted by two professional staffers. The Copyright Office aids the judge but only in an administrative and advisory capacity. These and other provisions in the legislation will make the system operate, we trust, more efficiently and responsively.

All the witnesses here today have personal experience dealing with these issues and we very much welcome their input and their testimony in just a minute.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

The purpose of today's hearing is to discuss a bill that reforms the rate-making and royalty distribution system for compulsory and statutory licenses currently known as the Copyright Arbitration Royalty Panel, or CARP. The CARP system consists of three member *ad hoc* arbitration panels that are selected for a particular proceeding. Each CARP delivers its recommendation for a rate adjustment or distribution to the Librarian of Congress who upon the recommendation of the Register makes a final determination.

This process distributes billions of dollars among the participants in a fair and even-handed manner. In doing so, it helps copyright content owners and users in the digital age.

When a CARP makes a decision, it directly affects the livelihoods of songwriters, artists, record labels, web-casters, broadcasters, the sports industry, the movie industry, the cable industry, and the satellite industry.

Maintaining a marketplace environment depends upon supply and demand. In setting rates, the CARP has the responsibility of deciding the worth of a content owner's intellectual property. The CARP decides how much of that value a person or entity is entitled to receive.

For more than 20 years, Congress has struggled to develop the appropriate mechanism to govern the copyright royalty rate-making and distribution process. In 1976, it created the Copyright Royalty Tribunal. Ten years ago, in response to concerns voiced by the Copyright Office and individuals affected by the work of the Tribunals, Congress abolished the CRT and created the present organization, the CARP.

Last year the Subcommittee conducted an oversight hearing and hosted a roundtable discussion on this subject. The most frequent comments about the CARP process included the following:

- CARP decisions are unpredictable and inconsistent.
- CARP arbitrators lack appropriate expertise to render decisions, and often reflect a "content" or "user" bias.
- CARPs are unnecessarily expensive.
- And many CARP claims are frivolous.

The bill before us today addresses these concerns. The legislation gives authority to oversee rate-making and distribution proceedings to a "Copyright Judge" who is appointed by the Librarian of Congress and assisted by two professional staffers. The Copyright Office aids the Judge, but only in an administrative and advisory capacity. These and other provisions in the legislation make the system operate more efficiently and responsively.

Today's witnesses have personal experience with CARPs so we look forward to their testimony.

Mr. SMITH. The Ranking Member from California, Mr. Berman, is recognized for his opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman. In order to help you expedite this process I'll skip all compliments and other comments. I can include my whole statement in the record.

Mr. SMITH. Without objection it will be included.

Mr. BERMAN. Compliments will be included there.

I think H.R. 1417 sets an excellent starting point for CARP reform. While it will likely require some significant revisions, its

basic structure is sound and as a result, I was pleased to cosponsor it with you. Introduction of this legislation demonstrates the seriousness of our intent to fix the CARP process. While we may not have achieved perfection in drafting, I believe introducing it was necessary to get the ball rolling.

Now that it has been introduced, I think we should allow a full and fair opportunity for the public to comment on it. It gets into the most complicated and arcane areas of copyright law. The public should be given some time to digest this 42-page complexity and formulate opinions.

The testimony of our witnesses today demonstrates that H.R. 1417 embodies the appropriate approach to CARP reform but will require much tinkering. Each witness has proposed a myriad of changes that after consideration, this Subcommittee may find salutary.

After giving the public an appropriate opportunity to comment, this Subcommittee should move a perfected version of H.R. 1417 with all due haste. Each passing day increases the probability of new rate-settings and distributions occurring under the current flawed process.

I want to make just one other point, Mr. Chairman, and that is it's my understanding, and I think it's our intention that in whatever form it passes, that the CARP reform bill will be limited to reformation of the CARP process. This is not being viewed, I would hope, as a vehicle for substantive changes in either compulsory license laws or other copyright changes. We're sticking in this bill with CARP reforms of the process.

If we start getting into these other issues, that will bog it all down then we'll leave an unwieldy and flawed process in existence and I think it would be a terrible mistake to do that.

So with that, Mr. Chairman, I thank you for taking on this task and yield back my time.

[The prepared statement of Mr. Berman follows:

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

Mr. Chairman:

I want to commend you for making CARP reform the subject of our first legislative hearing this Congress. As we learned at a hearing last summer, there is near unanimity that the CARP process is broken. It is this Subcommittee's responsibility to fix it, and to do so as soon as possible.

I also commend you for driving ahead with the drafting and introduction of H.R. 1417, and thank you for consulting me in the process. I believe the framework the bill sets out provides an excellent starting point for CARP reform. While H.R. 1417 will likely require significant revisions, its basic structure is sound. As a result, I was pleased to co-sponsor it with you.

Introduction of this legislation enables us to focus ourselves, our colleagues, and interested parties on the difficult work ahead. It also demonstrates the seriousness of our intent to fix the CARP process. Thus, while we may not have achieved perfection in drafting, I believe introduction of H.R. 1417 was necessary to get the ball rolling.

Now that H.R. 1417 has been introduced, I think we should allow a full and fair opportunity for the public to comment on it. This legislation delves into the most complicated and arcane areas of copyright law; in fact, I think the copyright compulsory licenses challenge the U.S. Tax Code for the title of most unreadable provisions of U.S. law. The public should be given some time to digest this 42-page complexity and formulate opinions.

The testimony of our witnesses today demonstrates, I believe, that H.R. 1417 embodies the appropriate approach to CARP reform, but will require much tinkering.

Each witness has proposed myriad changes that, after consideration, this Subcommittee may find salutary. I am sure that other members of the public, given the opportunity to comment, will have salutary suggestions of their own.

After giving the public an appropriate opportunity to comment, this Subcommittee should move a perfected version of H.R. 1417 with all due haste. Each passing day increases the probability of new rate-settings and distributions occurring under the current, flawed process.

Members of the public should be warned that, if they want their comments to be taken seriously, they should be circumspect in their breadth.

Mr. Chairman, it is my understanding that, in whatever form it passes, a CARP reform bill will be limited to reformation of the CARP process. Reformation of the CARP process is, as I stated, a near-unanimous priority for all those involved in CARPs—whether licensees, licensors, or the Copyright Office itself. The unanimity of support for reform of the CARP process gives a bill thus limited a real chance of passage in a reasonable time frame.

However, any attempt to delve into the substance of the copyright compulsory licenses will, undoubtedly, bog down a CARP reform bill. When it comes to issues relating to the substance of compulsory licenses, there is no unanimity, only fractious debate.

It would be a real pity if a bill supported by all failed to pass because some tried to use it as a vehicle for controversial amendments. Yet, I have no doubt that such failure would be the result.

In fact, I will do my best to ensure that this is the result. I will support this bill and the CARP reform effort only so long as it remains focused on process.

Mr. Chairman, let me explain my intractability on this point. I joined you in your good faith effort to craft a bill that is limited to process, reflects sound public policy, and benefits all CARP participants equally. I will interpret any attempt to add controversial, substantive amendments as an affront to this good faith effort.

Once again, I commend you for tackling this difficult and important issue.

I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Berman. And I do concur with your comments.

Let me introduce our witnesses today. Our first witness is the Honorable Marybeth Peters, Register of Copyrights for the United States. She has also served as acting general counsel of the Copyright Office and as chief of both the Examining and Information and Reference Divisions.

Ms. Peters received her undergraduate degree from Rhode Island College and her law degree with honors from the George Washington University Law Center.

Our next witness is Robert Garrett, who is a partner with the law firm of Arnold & Porter. He has represented sports leagues, the recording industry, municipal and foreign governments, programming producers and networks, and others in litigation, arbitration and administrative proceedings.

Mr. Garrett earned both his B.A. and his J.D. from Northwestern University.

The next witness is Bruce Rich, who is a senior partner with the law firm of Weil, Gotshal & Manges. He has concentrated on issues pertaining to communications, publishing, and cable and commercial broadcasting.

Mr. Rich earned his J.D. from the University of Pennsylvania and his A.B. magna cum laude from Dartmouth College. Mr. Rich also is an adjunct professor at New York Law School's Media Law Institute.

Our last witness is Michael J. Remington, a partner in the law firm of Drinker, Biddle & Reath, where he specializes in intellectual property law, court reform and Government relations. Most impressively, of course, for a total of 13 years he was chief counsel of this Subcommittee.

A former Fulbright Scholar and Peace Corps volunteer, Mr. Remington is a graduate of the University of Wisconsin, where he also received his law degree.

Again we welcome you all and we will begin with Ms. Peters. And if you will try to adhere strictly to our 5-minute limit on testimony. 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. Thank you. Mr. Chairman, Mr. Berman, Members of the Subcommittee, I appreciate the opportunity to appear before you to testify again on the important issue of reform of the Copyright Arbitration Panel system. As you know the CARPs have been operating under the auspices of the Copyright Office in the Library of Congress since Congress eliminated the Copyright Royalty Tribunal in 1993. H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003, would create a new process aimed at reducing cost and promoting stability and administrative efficiency.

In my testimony last June I discussed the existing CARP system and identified three serious shortcomings, all of which you identified, too, Mr. Chairman. First, the CARPs are very costly to the participants and to the Copyright Office and the Library of Congress.

Second, because of the ad hoc nature of the CARPs, there is lack of stability and predictability in the process. Although the Librarian attempts to select arbitrators who have performed competently 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 another. As a result, there is a lack of reliable precedent upon which the parties can base settlements.

Because of a lack of institutional expertise among the members of the CARP panels, there is a considerable burden on the Register and the Librarian, who must correct oversights and errors made by the CARPs during the course of the proceeding.

H.R. 1417 addresses these concerns. To reduce costs, the salaries of the copyright royalty judge and his staff would be paid from appropriated funds. Their fixed salaries would eliminate the large hourly fees of the arbitrators and the same judge and professional staff would handle all distributions and rate proceedings.

I do have some concerns regarding the mechanics of the bill's process for recoupment of cost to the Copyright Office and to the Library, particularly the provisions regarding collection of fees from participants. I believe the costs of the process for determining rates and terms should be paid out of appropriated funds; that is, from new funds that would have to be added to the Library of Congress budget.

The 5-year term served by the copyright royalty judge would promote institutional stability and permit participants to gain familiarity with the decision-maker, leading to reliable results and promoting settlements.

I do have a few recommendations. Many proceedings before the CARPs involve complex issues and require institutional expertise

also with regard to interpretation of copyright law. The bill vests the copyright royalty judge with the authority to resolve these complex matters and permits him to consult with the Register to assist in the decision-making process. However, in decisions involving interpretation of copyright law, it is essential that the copyright royalty judge consult with the Register. The Copyright Office has had a long history of administering that law, and I believe we have performed that task responsibly and well.

It would be unfortunate if a copyright royalty judge based in the Library of Congress did not take advantage of the expertise of the Office on matters of interpretation of copyright law. It could also create uncertainty and confusion if the Register and the royalty judge in performing their respective duties reached different conclusions on the same question.

I have four additional recommendations. First, before a decision of a copyright royalty judge is appealed, parties should have an opportunity to seek reconsideration from the royalty judge.

Second, the copyright royalty judge should be given continuing jurisdiction over copyright royalty proceedings after his decision has been rendered in order to clarify that there is authority to deal with unanticipated matters that need to be addressed immediately.

Third, when a rate adjustment proceeding is not concluded until sometime after a previous royalty rate has expired, users of the statutory license should continue to pay copyright owners at the recently expired rate, subject, of course, to adjustment once the new rate has been set.

Fourth, Mr. Garrett and Mr. Rich in their written statements recommend the inclusion of subpoena power; I concur.

Finally, there may be many complicated procedural issues involved in determining rates and terms and distributing royalties which involve careful thought and attention. This was not done in the CRT Reform Act of 1993. We would be most pleased to work with you, your staff, and the interested parties to ensure that H.R. 1417 avoids such pitfalls so that the new system is efficient, fair, and effective. Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman, Mr. Berman and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you to testify once again on the important issue of reform of the Copyright Arbitration Royalty Panel ("CARP") process. As you know, 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 late in 1993. Your bill, Mr. Chairman, H.R. 1417, the "Copyright Royalty and Distribution Act of 2003," would make significant changes to the CARP process to reduce costs, promote stability and the administrative efficiency of the copyright royalty distribution and rate adjustment system.

In my testimony before this Subcommittee on June 13 of last year I provided a history of the statutory license royalty distribution and rate adjustment process under the Copyright Royalty Tribunal and the CARPs and identified three serious shortcomings of the existing system. First, there is no question that the CARPs are very costly both to the participants in a proceeding and on an institutional scale. Arbitrators are typically compensated at between \$200 and \$400 an hour for their work which, in hotly contested proceedings that involve many parties and large amounts of testimony (such as the recent rate setting proceeding for webcasting music over the Internet), can add up to considerable sums. In the case of a royalty rate adjustment proceeding, the arbitrators must be paid by the parties out of their own pockets. There is no question that in some rate adjustment proceedings, some

interested parties conclude that they cannot afford the cost of participating. In the recent webcasting proceeding that I just mentioned, the cost of the arbitrators alone exceeded the entire annual budget of the Copyright Royalty Tribunal in its last year of existence.

Likewise, on an institutional scale, CARP proceedings are costly. They require considerable amounts of time of Copyright Office and Library personnel who must conduct various phases of the proceeding, such as discovery of the parties' cases and review of the CARP's decision.

Second, because of the *ad hoc* nature of the CARPs, there is a lack of stability and predictability in the process. 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 another panel. As a result, there is a lack of reliable precedent upon which the parties can base the settlement of their differences.

Third, there is a considerable lack of institutional expertise on the CARP panels. We have found it very difficult to find arbitrators who have sufficient familiarity with copyright law, let alone the complex statutory licenses in the law and the unique procedures for royalty distributions and rate adjustments. This lack of expertise among the arbitrators places a considerable burden on the Register and the Librarian to correct oversights and errors made by the CARPs during the course of a proceeding—a burden which is exacerbated by the short review period granted the Register and the Librarian by the statute.

The "Copyright Royalty and Distribution Act of 2003" addresses these concerns of cost, stability and institutional expertise. To reduce costs, the salaries of the Copyright Royalty Judge, along with two full-time professional staff members, would be paid for from appropriated funds. Their fixed salaries would eliminate the large per-hour arbitrator fees of the current system, and the Copyright Royalty Judge and professional staff would handle all distribution and rate adjustments, as opposed to the one-CARP-per-proceeding approach of the existing law. The Copyright Office and the Library are also permitted to recoup their administrative costs under the bill as well. I do have some concerns regarding the mechanics of the cost recoupment process provided in the bill, particularly the provisions regarding direct fee collection from the participants. Let me reemphasize what I said when I appeared before this Subcommittee last June: I believe that the costs of the process for determining rates and terms should be paid for out of appropriated funds, and not out of the pockets of the parties who participate in the rate-setting process. Someone who has a stake in the determination of rates and terms for a statutory license should not be deterred from participating simply because he or she cannot afford his or her share of the decision-maker's costs.

The five-year term served by the Copyright Royalty Judge would promote institutional stability and permit participants to gain familiarity with the decisionmaker, thereby creating reliable results and promoting settlements. The bill does not make clear the status of the two professional staff members assisting the Judge. We believe that their status should be clarified, and we recommend that these staff members not have limited term appointments.

The five-year term served by the Copyright Royalty Judge would also permit him or her to develop further his or her expertise with the copyright law in general and the statutory licenses in particular. Many proceedings before the CARPs, particularly rate adjustment proceedings, involve complex issues that require institutional expertise and interpretation of the copyright law, something that the CARPs are ill prepared to handle. The bill vests the Copyright Royalty Judge with the authority to resolve these complex matters and permits him or her to consult with the Register to assist in the decisionmaking process. I fully endorse the consultation process between the Register and the Copyright Royalty Judge when it comes to matters of statutory interpretation and copyright law policy. In fact, I believe that it is essential that in making any decisions involving interpretation of the copyright law, the Copyright Royalty Judge should consult with the Register. The Copyright Office has a long history of administering the copyright law. I believe we have performed that task responsibly and well. It would be unfortunate if a Copyright Royalty Judge based in the Library of Congress did not take advantage of the expertise of the Copyright Office on matters of interpretation of copyright law, and it could also create uncertainty and confusion if the Register and the Copyright Royalty Judge, in performing their respective responsibilities, reached different conclusions on the same questions.

Other matters that should be addressed include:

- Under the current CARP system, there is no opportunity for parties dissatisfied with the CARP's determination to ask the CARP to reconsider its deci-

sion. Instead, dissatisfied parties must raise their concerns with the Register and the Librarian. It would make sense to let the CARP, in the first instance, consider those objections—especially in cases where a party asserts the CARP has overlooked or misapprehended particular facts or points of law. The same should be true with respect to the Copyright Royalty Judge. Parties should have an opportunity to ask the Copyright Royalty Judge to reconsider some or all of his or her determination before going to the Court of Appeals. The current draft does not appear to allow for this.

- Under current law, it is unclear whether the Librarian of Congress has the power to correct errors in his rate determinations or to address unanticipated issues and problems that became apparent only after he has rendered his decision on rates and terms. Similarly, it is unclear whether the Copyright Royalty and Distribution Act of 2003 would give the Copyright Royalty Judge the power to address such issues once he or she has made a determination on rates and terms or distribution. The Copyright Royalty Judge should expressly be given continuing jurisdiction over such matters after his or her decision has been rendered, in order to clarify that there is authority to deal with unanticipated matters that ought to be addressed immediately; otherwise, the problem cannot be addressed until the next regularly scheduled proceeding five years later.
- Currently, section 802(g) of the Copyright Act provides that when a rate adjustment proceeding is not concluded until some time after a previous royalty rate has expired, the new adjusted rate is effective retroactively to the date on which the old rate expired. But there is another gap in the law that needs to be addressed: Although the new rate is effective as of the date the old rate expired, there nevertheless may be a period of several months or more pending the new rate determination during which copyright owners and licensees do not know what the new rate is. For example, last year's determination of rates and terms for webcasters covered the period from October 28, 1998 through December 31, 2002. Since January 1, we have had no statutory rate for webcasters. As a result, I understand that webcasters have taken the position that until the new rate is set, they are not required to make any payments for uses made since January 1. Serious consideration should be given to providing that in such cases, licensees should pay copyright owners at the recently expired rate. Once the new rate is set, and assuming that it is different from the old rate, adjustments can be made in the form of additional payments or refunds, as the case may be.

We have a number of additional comments relating to the bill, generally of a more technical nature. We will provide those comments to your staff.

As we have learned to our regret following enactment of the Copyright Royalty Tribunal Reform Act of 1993, reform of the system for determining rates and terms of the statutory licenses and for distributing statutory royalties is a process which requires careful thought and attention to complicated procedural issues. I look forward to working with you, your staff, and with the interested parties to ensure that the current legislation is more successful.

Thank you, Mr. Chairman.

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#### SUMMARY OF TESTIMONY

- In her testimony on June 13 of last year before this Subcommittee, the Register of Copyrights identified three serious shortcomings of the current Copyright Arbitration Royalty Panel (“CARP”) system that distributes royalties and adjusts royalty fees for the statutory licenses of the Copyright Act. The first shortcoming is the considerable cost to participants in a CARP proceeding to pay for three arbitrators, as well as the cost to the Copyright Office and the Library of Congress to prepare proceedings for hearing and for reviewing the CARPs’ decisions. The second shortcoming is the lack of stable precedent and predictable decisionmaking due to the *ad hoc* nature of the CARP system. The third shortcoming is the difficulty in obtaining arbitrators with knowledge of copyright law in general and the statutory licenses in particular.
- H.R. 1417, the “Copyright Royalty and Distribution Act of 2003” addresses these three shortcomings. A full-time Copyright Royalty Judge, and two full-time professional staff, will be paid for from appropriated funds, and the Copyright Office and the Library of Congress will be allowed to recoup their costs. The Register believes that all costs associated with the work of the Copyright Royalty Judge should be paid from from appropriated funds, and she has concerns about the

mechanism for cost recoupment but looks forward to working with the Committee to address these concerns.

- The proposed framework in the “Copyright Royalty and Distribution Act of 2003” would likely provide stability to the decisionmaking process and promote settlements.
- The Copyright Royalty Judge would make royalty distributions and rate adjustments that involve questions of copyright law interpretation and policy. To avoid inconsistent decisions and interpretations between the Copyright Royalty Judge and the Copyright Office, the Copyright Royalty Judge should be required to consult the Register on such issues.
- The Copyright Royalty Judge should be afforded the opportunity to correct, amend, and reconsider his or her determination after it is issued.
- When royalty rates for certain statutory licenses expire, users of those licenses should continue to pay copyright owners at the old rates until new rates have been determined by a decision of the Copyright Royalty Judge.

Mr. SMITH. Thank you, Ms. Peters.  
Mr. Garrett?

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

Mr. GARRETT. Thank you Mr. Chairman, Mr. Berman, Members of the Subcommittee. I very much appreciate the opportunity to testify this afternoon on H.R. 1417.

As you noted, Mr. Chairman, I have represented the professional and collegiate sports leagues in copyright royalty arbitration proceedings for a number of years. These leagues include Major League Baseball, the NBA, NFL, NHL, NCAA. My testimony today is presented on their behalf.

H.R. 1417 reflects a great deal of careful thought about the problems that confront the royalty distribution and rate-setting process. Overall, we believe that the bill provides a good vehicle for addressing these problems. The sports leagues, however, have concerns with certain aspects of the bill which are discussed more fully in my written statement. Let me focus on two principal areas of concern—structure and cost.

First as to structure, the leagues are concerned about the particular decision-making structure that the bill adopts. The bill contemplates that a single copyright royalty judge will decide all royalty distribution and rate-setting proceedings and we do not believe that any single individual should have that responsibility or authority. In our view, a significant strength of the existing system is that a panel of three individuals, rather than one single person, must decide the difficult issues that are often involved in copyright royalty proceedings. These proceedings typically generate enormous records that just as often support a wide range of results. There is a great deal of latitude that is accorded to the decision-makers in arriving in a final determination.

We believe it is beneficial to have a panel of three decision-makers who can evaluate the evidence and then reach a determination that they collectively consider to be fair and reasonable. In our judgment, the interaction of at least three decision-makers helps produce a better and more credible result. And furthermore, given the number and timing of royalty proceedings, having more than one decision-maker may be a practical necessity.

Second as to cost, sports leagues believe that a principal objective of this legislation should be to reduce the cost of copyright royalty

proceedings as much as possible. While the bill represents a positive step forward in this regard, it does not in our judgment go far enough. For example, under the current system there is in effect a presumption that the parties are entitled to formal evidentiary proceedings. These evidentiary proceedings, these hearings which have typically lasted anywhere from six to 8 weeks in distribution cases, are extremely costly to the parties.

H.R. 1417 recognizes the problems associated with having hearings in all cases and recommends the use of paper proceedings, at least in cases involving small royalty claims. The leagues certainly support that concept. However, they do not believe that paper proceedings should be limited to cases involving small claims. If there is to be any meaningful reduction in cost arising from this legislation, the rate of circumstances where paper proceedings are permitted must be broadened beyond small claims.

Another major cost of the copyright royalty proceedings is discovery. It's not clear exactly how the bill deals with the substantial issues that the sports leagues and other parties have raised regarding discovery. The language in the bill is a bit unclear and raises several questions that are discussed in my written statement.

A principal concern is that the bill may expand the scope and nature of discovery and thereby drive up the cost of the proceedings even more without bringing any significant benefit to the process.

Finally, Mr. Chairman, you should be aware that counsel representing all of the parties involved in the cable and satellite royalty distribution proceedings have met to discuss H.R. 1417. These parties include the Motion Picture Association, the National Association of Broadcasters, PBS, NPR, the performing rights organizations, copyright owners of religious programming and copyright owners of Canadian programming.

There is a broad consensus among these parties as to various provisions in the bill. For example, I believe that the parties are unanimous in their support for a decision-making body that consists of three individuals, rather than one copyright royalty judge. They also support specific measures that will help reduce costs and promote voluntary settlements, which we believe should be another principal goal of the legislation.

We expect to submit to the Subcommittee our specific recommendations before the record closes. We hope that you and the Subcommittee will take those recommendations into account during your deliberations on H.R. 1417. Thank you, Mr. Chairman.

[The prepared statement of Mr. Garrett follows:]

PREPARED STATEMENT OF ROBERT ALAN GARRETT

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify concerning H.R. 1417, the "Copyright Royalty and Distribution Act of 2003" ("CRDA"). That bill seeks to improve the system by which Copyright Arbitration Royalty Panels ("CARP") set compulsory licensing royalty rates and distribute compulsory licensing royalties.

I am submitting this statement on behalf of the Joint Sports Claimants ("JSC"), which consists of Major League Baseball, the National Basketball Association, the Women's National Basketball Association, the National Football League, the National Hockey League and the National Collegiate Athletic Association. As the representative of copyright owners of professional and collegiate sports telecasts, JSC has participated in numerous copyright royalty proceedings during the past twenty-five years before CARPs, their predecessor, the Copyright Royalty Tribunal ("CRT"), and the Copyright Office. These proceedings have involved the setting of royalty

rates and the distribution of royalties under the compulsory licenses established by Section 111 of the Copyright Act (the cable compulsory license) and Section 119 of the Copyright Act (the satellite carrier compulsory license).

Virtually all parties who have been involved in CARP proceedings, including JSC, recognize that the existing system needs improvement. The process is too costly and generally leads to results that are perceived by many as inconsistent and lacking in credibility. JSC appreciates the substantial efforts of the Subcommittee and its staff in drafting legislation that provides an excellent vehicle to address these problems. Several provisions of the CRDA, if enacted, will help establish a better and more efficient process for dividing copyright royalties and setting royalty rates. However, other provisions of the bill will not achieve that result and will, in fact, have the opposite effect.

We have had only a short time to consider the provisions in the CRDA. Our review of the bill continues as we also discuss its provisions with other affected parties who are interested in developing consensus views on CARP-reform legislation. The purpose of my testimony today is to describe JSC's principal concerns with the CRDA. I believe that several of these concerns are shared by other parties who, like JSC, have been involved for many years in the Section 111 and Section 119 royalty distribution and rate-setting proceedings. However, as noted above, I am submitting this statement solely on behalf of the professional and collegiate sports leagues that comprise the Joint Sports Claimants.

#### A. THE SINGLE COPYRIGHT ROYALTY JUDGE

Under the existing system, the Librarian of Congress (with the advice of the Copyright Office) presides over the pre-hearing process, which involves ruling on various procedural and substantive issues including those related to discovery, scheduling and the interpretation of the Copyright Act. During this pre-hearing phase, the Librarian (again with the advice of the Copyright Office) also selects two private arbitrators who in turn choose a third arbitrator. The three-person CARP panel then conducts the evidentiary hearings and submits recommended royalty allocations or royalty rates to the Librarian. The Librarian (with the advice of the Copyright Office) reviews the CARP's final report to determine whether the CARP has acted arbitrarily or contrary to law. The Librarian's final determination may be appealed to the United States Court of Appeals for the District of Columbia Circuit.

The CRDA would replace the CARP system with one where a single Copyright Royalty Judge ("CRJ"), appointed by the Librarian for a five-year term and assisted by a professional staff of two persons, decides all royalty rate setting and distribution matters. The CRJ's final decision allocating royalties or setting rates would be reviewed only by the D.C. Circuit. The bill authorizes the CRJ to "consult" with the Register of Copyrights "in making any rulings" but otherwise removes both the Librarian and the Register from the process of allocating royalties and setting rates.

JSC is concerned that the rather dramatic change in the structure of copyright royalty allocations and rate-setting, as contemplated by the CRDA, will inevitably lead to more, rather than less, litigation. Thus, it is not a change that JSC can support. While we agree that the CARP *process* requires some significant improvements, we do not believe that the CARP *structure* should be scrapped in its entirety. JSC's specific concerns with the creation of a new decision-making body are set forth in its letter to the Subcommittee dated June 28, 2002 (a copy of which is provided at Attachment A). If, however, it is determined that we must again start with an entirely new decision-making body, as we were required to do in 1993 when the CARP system replaced the CRT, we would urge that, at the very least, you not adopt a structure that authorizes a single CRJ to decide all royalty distribution and rate setting cases.

A significant strength of the existing system is that a panel of three individuals (rather than any one single person) is charged with the responsibility of receiving all the evidence and deciding the often very difficult issues of how to allocate a multi-million dollar royalty fund among many competing claimants or to set royalty rates that will impact thousands of copyright owners and users. These proceedings typically generate enormous records that just as typically support a wide range of results. It is beneficial, we believe, to have more than one individual decide such cases; the interaction of at least three decision-makers who have the opportunity to consider and to debate the many issues involved in royalty allocation and rate-setting proceedings helps produce a more reasoned, supportable and credible result.

There may be instances where a single judge is appropriate, such as in resolving discovery disputes or disputes that involve relatively small amounts of royalties. However, JSC does not believe that a single CRJ should routinely decide all copyright royalty distribution and rate setting cases. As a general matter, a panel of

three should resolve such cases—particularly if, as the CRDA contemplates, there will no longer be any intermediate review of the initial decision royalty allocation or rate-setting decision. If there is concern with maintaining a permanent body of three full-time CRJs who decide all cases, consideration might be given to the temporary appointment of two additional administrative law judges (“ALJ”), from a pool of designated ALJs, to serve with the full-time CRJ in particular cases. The parties involved in the Section 111 and 119 royalty allocation proceedings had recommended a similar approach during the debates over the Copyright Royalty Tribunal Reform Act of 1993. The Register of Copyrights also had identified a similar approach as a possible option in her February 23, 1998 report to Congress, entitled “Options to Improve Copyright Royalty Rate Setting and Distribution Decision-Making.”

#### B. ROLE OF THE COPYRIGHT OFFICE

Under the current system, the Register of Copyrights generally has the authority and responsibility to interpret the Copyright Act provisions that affect compulsory licensing proceedings. Interested parties also have the right to seek such interpretations from the Register and to have the Register’s views included in a written record. The Register’s interpretations are then subject to review by the federal courts. *See, e.g., Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of America, Inc.*, 836 F.2d 599, 602 (D.C. Cir. 1988); *Satellite Broad. and Communications Ass’n of America v. Oman*, 17 F.3d 344, 347 (11th Cir.1994), *cert. denied*, 513 U.S. 823 (1994).

The CRDA appears to contemplate that the CRJ would have the authority and responsibility to render any necessary interpretations of the Copyright Act—although the CRJ could, if he or she chose, “consult” with the Register. Given the historic familiarity of the Register with the various compulsory licenses and the Copyright Act provisions that relate to those licenses, JSC believes that consultation with the Register on issues involving the proper interpretation of the Copyright Act should be the rule rather than the exception. We recognize that in certain circumstances it may not be practical to obtain the Register’s views, such as where an issue arises close to the statutory deadline for completing a proceeding. Generally, however, the Register’s views on the proper meaning of the Copyright Act should be sought. In addition, any consultation between the CRJ and the Register on such issues should be placed on the written record so that all parties to a proceeding are aware of the advice that has been sought and rendered.

The CRDA also appears to permit consultation with the Register in connection with “rulings” that do not involve the interpretation of the Copyright Act. We question whether consultation on such matters is necessary or appropriate. In any event, if the legislation does permit the CRJ to contact the Register on issues unrelated to the proper interpretation of the Copyright Act, we believe that such contacts should be placed on the written record and disclosed to all parties.

#### C. THE COSTS OF DISCOVERY AND EVIDENTIARY HEARINGS

Under the current system, the CARPs normally conduct evidentiary hearings where witnesses present live testimony and are subject to cross-examination; two rounds of hearings are usually held—one for direct cases and one for rebuttal cases. These hearings often are quite time-consuming and represent perhaps the most significant cost to the parties. For example, the pending cable royalty distribution proceeding (involving the years 1998–99) is scheduled to have 36 direct case witnesses testify over seven weeks; the rebuttal hearing is scheduled to occupy an additional two weeks. The last litigated cable royalty distribution proceeding (involving the 1990–92 royalty funds) consumed over 300 hours of hearings and generated a record of more than 12,000 pages.

The CRDA specifically authorizes the use of paper proceedings in cases where very small amounts of royalties are at stake. JSC certainly supports that concept. However, JSC believes that paper proceedings should be utilized more frequently in *all* compulsory licensing royalty proceedings and that Congress should encourage a broadening of the circumstances where paper proceedings are appropriate. Eliminating one or both phases of evidentiary hearings from proceedings and substituting a paper proceeding—or at least reducing the instances where the decision-maker is required to hear live testimony from all witnesses—would yield substantial cost savings to all affected parties and thus help achieve what should be a primary objective of this legislation. A principal concern JSC has with the CRDA is that it not only fails to encourage the use of paper proceedings in a broad range of circumstances; as currently drafted, the CRDA appears to permit the use of paper proceedings in fewer cases than those permitted by the existing Copyright Office CARP regulations.

JSC also believes that issues concerning the use of paper proceedings are intimately related to the issues concerning the proper scope and method of discovery in copyright royalty proceedings.<sup>1</sup> If paper proceedings become more frequent, it may be appropriate to expand modestly the discovery process (in terms of the scope of discovery and the types of discovery tools). If, however, the current full-blown evidentiary hearings continue, expanding the nature and scope of discovery would drive up the costs of the proceedings even more, without bringing any significant benefit to the process.

It is not entirely clear how the CRDA deals with the substantial issues that JSC and other parties have raised regarding discovery. The bill states only that “discovery” shall be permitted “for a period of 60 days” and that “[f]inal witness lists for the proceedings shall not be required until the end of the discovery period.” This language raises several questions, including: (1) whether written testimony will continue to be filed prior to discovery or whether testimony must now be filed on the 60th day of the discovery period; (2) if the former, whether discovery is limited to obtaining documents underlying the written testimony (as is currently the rule) or whether the scope and nature of discovery would be broadened, thereby increasing the costs of the discovery process; and (3) if the latter, whether the parties may obtain discovery of any sort on the written testimony.

#### D. FUNDING OF COPYRIGHT ROYALTY PROCEEDINGS

Our understanding is that, under the current system, the Copyright Office deducts the costs of copyright royalty rate proceedings unrelated to Section 111 and 119 (such as those conducted pursuant to Sections 112, 114 and 118) from the Section 111 and 119 funds. JSC has substantial doubts as to whether the existing provisions of the Copyright Act authorize such deductions; there certainly is no policy justification for using the Section 111 and 119 royalties to pay for the administration of completely different compulsory licenses that involve an entirely distinct group of copyright owners and users. The CRDA would prohibit this practice by adding language to Section 803(e)(1)(A) of the Copyright Act which permits the Librarian to deduct the costs of a proceeding “from not more than 1 percent of the royalty fees deposited or collected under this title *that relate to that proceeding.*” JSC strongly supports the proposed Section 803(e)(1)(A) insofar as it prohibits the Librarian from using Section 111 and 119 royalties to fund proceedings involving other compulsory licenses.

#### E. ENCOURAGING PARTIAL DISTRIBUTIONS

Under the current law, the Copyright Office may distribute Section 111 and 119 royalties that are not in controversy prior to the time that distribution proceedings are final. These “partial distributions” are particularly important to copyright owners because there often is a lengthy period between the payment of the royalties by copyright users and the conclusion of the distribution proceedings. Each year JSC and other copyright owners have made a good faith effort to agree on the actual amounts that are in controversy and the amounts that may be distributed pending resolution of that controversy; those agreements have required each party to pay back any amounts in excess of its final royalty award. Increasingly, however, the Office has rejected these negotiated agreements and has authorized the distribution of far less than the amounts on which the parties have agreed. As a result, millions of dollars in Section 111 and 119 royalties that copyright owners have requested the Copyright Office to distribute will remain undistributed for several years. JSC be-

<sup>1</sup>Under the existing CARP procedures, parties are not entitled to the type and breadth of discovery normally permitted in federal civil litigation. 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; that testimony must be exchanged prior to the time that any discovery is conducted. Moreover, given the existing timetables for dealing with discovery requests, there is very limited opportunity to make productive use 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 uncertain and with that uncertainty has come increasing costs.

believes that the CRDA should encourage agreements among the parties to distribute the maximum amount of royalties possible pending the resolution of distribution proceedings. At a minimum, the Office (or the CRJ) should be required to grant requests for partial distributions where the parties agree on the amount that is in controversy and agree to return any possible overpayments.

#### F. ENCOURAGEMENT OF SETTLEMENT

The CRDA appears to incorporate the concept of the offer of judgment from Federal Rule of Civil Procedure 68, which in effect permits parties to make pre-trial offers of settlement that may be taken into account in imposing costs. JSC supports this concept. As drafted, however, the provision in the CRDA is problematic in several ways. First, the provision appears to have no force and effect. Rule 68 permits the recovery of costs if an offer of judgment is refused and the final result is not more favorable than the offer, but there is no comparable provision in the CRDA. Second, it is not clear how the offer of judgment provision would work in multi-party proceedings, which are typical in copyright royalty proceedings. Third, the language of the provision, which provides for offers to be made “up to the day on which hearings in the proceeding begin,” raises a question about whether and how parties will be permitted to settle disputes after the start of a proceeding.

JSC strongly believes that one of the goals of the copyright royalty arbitration process should be to discourage litigation and to encourage voluntary settlements among the parties to disputes. Existing policies and procedures, by raising bars to settlements at various points in the process, have had precisely the opposite effect. Examples include the policies and procedures dealing with confidentiality of negotiated agreements, the technical distinction between settlements arrived at before and after the initiation of CARP proceedings, and the Office’s practice of permitting those who fail to participate in a proceeding the opportunity to oppose settlements by proceeding participants and to require the initiation of new CARP proceedings. JSC strongly supports adding provisions to the CRDA to eliminate these barriers to settlement.

#### CONCLUSION

JSC’s principal recommendations concerning the CRDA may be summarized as follows:

- The CARP structure should not be replaced with an entirely new decision-making body. Rather than effect such dramatic structural changes, we should focus on process reforms that are necessary to reduce the costs and to help ensure the consistency and credibility of decision-making.
- If structural reform is deemed necessary, the authority to decide all copyright royalty rate-setting and royalty distribution issues should not be vested in a single Copyright Royalty Judge, as the CRDA contemplates. Such decisions should generally be made by panels consisting of the CRJ and two additional administrative law judges.
- The CRJ generally should be required to consult with the Register of Copyrights concerning the proper interpretation of the Copyright Act. Any consultation between the CRJ and the Register should be on the record and disclosed to all parties in the affected proceeding.
- Paper proceedings should not be limited to cases involving small claims, as the CRDA appears to contemplate. Rather, the range of circumstances in which full or partial paper proceedings are permitted should be increased. The nature and scope of existing discovery may be expanded somewhat but only where paper proceedings are utilized. The single provision in the CRDA dealing with discovery requires clarification.
- The CRDA provision which makes clear that the Section 111 and 119 royalty funds may not be used to defray the costs of proceedings that do not involve these funds should be retained.
- The CRDA should be amended to ensure that copyright owners receive the maximum amount of royalties as partial distributions pending the completion of copyright royalty distribution proceedings.
- The CRDA should be amended to better encourage voluntary settlements of copyright royalty proceedings. The provision in the CRDA that appears to adopt a Rule 68-type procedure requires clarification.

In addition to the matters discussed above, there are other provisions of the CRDA that JSC believes warrant further consideration and possible amendment. JSC is prepared to work with the Subcommittee and its staff as well as other par-

ties involved in copyright royalty proceedings to help ensure that the decision-making process for distributing copyright royalties and setting copyright royalty rates is as cost-efficient, credible and consistent as possible.

Thank you, Mr. Chairman and members of the Subcommittee, for your time and consideration.

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

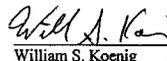
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expensive as they would be if subject to the full panoply of the Federal Rules of Civil Procedure and Federal Rules of Evidence. The focus here should be on changing procedures that lead to unacceptably high costs, and not on establishing new decision-making 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).

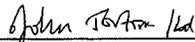
In short, we believe that the procedures followed by the CARPs and Copyright Office in royalty ratemaking and allocation proceedings should be closely examined and changed in order to reduce the substantial costs now imposed by that process. We look forward to working closely with you, your Subcommittee 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,

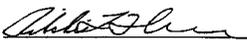
  
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Mr. SMITH. Thank you, Mr. Garrett.  
Mr. Rich?

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

Mr. RICH. Thank you. Mr. Chairman, Members of the Subcommittee, thank you for affording me the opportunity to testify before you once again on the important subject of much-needed reforms to the CARP process.

In my testimony last June I outlined what I believe are the major shortcomings of the CARP process as it exists today and made a series of recommendations for reform. I'm delighted that H.R. 1417 addresses many of those concerns. This bill reflects the commendable efforts of the Chairman of the full Committee and of this Subcommittee, of other Members who have assisted the Chairman in crafting this legislation, and of the Committee and Subcommittee staff to resolve thorny and complex issues raised by it.

I appear here in my capacity as partner in the law firm of Weil, Gotshal & Manges, LLP, which has for nearly 25 years represented many, if not most of the country's largest media with respect to copyright and music license issues. This background affords me the perspectives I offer today on H.R. 1417, although I should note that the testimony is offered personally and not on behalf of any of our clients.

In my judgment, H.R. 1417 offers a significantly improved framework in which to resolve royalty rate-setting and potentially, royalty distribution disputes. As you consider what clarifications and improvements can be made to H.R. 1417, I offer the following seven observations, which I explain further in my written direct testimony.

First, H.R. 1417 commendably eliminates the cumbersome and inefficient three-arbitrator panel approach in favor of a single copyright royalty judge appointed by the Librarian. Such a position, aided by the professional staff also afforded by H.R. 1417, will bring much-needed efficiency and continuity to these proceedings.

At the same time, I believe that the interest of finding a highly qualified individual for this position would be better served by not requiring, as H.R. 1417 currently proposes, that the individual possess copyright expertise. Such a requirement misconceives the basic issues involved in rate-setting and distribution proceedings. I would make a similar observation with respect to the proposed qualifications of the professional staff. Less may be more here in terms of preexisting subject matter expertise. Talented judges, as well as intelligent professionals, can rapidly acquire the expertise needed to perform their functions. Our Federal court system has functioned well this way for generations.

Second, H.R. 1417 appropriately confers independence in the role and decision-making of the new judge. To assure such independence, the legislation should also provide that consultations between the judge and the Register, whether on matters of procedure or substance, be on the record and disclosed to all parties to the proceeding.

Third, H.R. 1417 desirably addresses the exorbitant costs of CARPs by eliminating party underwriting of the hourly fees of the

arbitrators and placing the copyright royalty judge and the staff salaries within the appropriations for the Copyright Office. The legislation is less clear as to what types of remaining costs would be subject to assessment against the parties and how those costs should be allocated among the parties to a proceeding, matters that deserve clarification.

Fourth, the stark limitations on discovery tools and time frame that govern existing proceedings led to my earlier observation that CARP proceedings had become frenetic litigation environments in which cases are underdiscovered and overtried. H.R. 1417 helpfully proposes to extend the 45-day discovery period to 60 days. Even a 60-day period may not suffice, however, particularly in complex rate adjustment proceedings. I would urge that the copyright royalty judge be given the discretion to establish a discovery period not to exceed 120 days based on the judge's assessment of the time necessary to create a meaningful prehearing record.

The timing, sequencing and available tools of discovery also need clarification. The bill as drafted leaves unclear whether discovery is to precede or follow the filing of written direct cases. An expansion of discovery tools closely supervised by the judge would seem warranted. Discovery should not be limited to documents underlying an adversary's direct case but should be supplemented with limited use of depositions, requests to admit and/or interrogatories. As now acquiesced by the Register, we agree that the copyright royalty judge should be invested with subpoena power.

Fifth, H.R. 1417 properly recognizes the need for greater flexibility with respect to the current 180-day period from commencing of hearings to the rendering of decision. A period of up to 1 year in the discretion of the royalty judge, as proposed, seems entirely appropriate.

Six, H.R. 1417 properly streamlines the appeals process, eliminating intermediate review by the Librarian prior to review by a Federal court of appeals. I believe, however, that the proposed standard of review, based on the arbitrary and capricious standard used in relation to some Federal agency actions, is too restrictive and should be replaced with the standard governing appellate review of decisions by Federal district court judges, as found in 52(a) of the Federal Rules of Civil Procedure.

And finally seventh, H.R. 1417 commendably extends the effective period of these proceedings from in some cases 2 years to a 5-year period.

I thank the Members of the Subcommittee for their attention to these matters and I would be pleased to answer questions now or later for the record.

[The prepared statement of Mr. Rich follows:]

PREPARED STATEMENT OF R. BRUCE RICH

Mr. Chairman, Members of the Subcommittee. Thank you for affording me the opportunity to testify before you once again on the important subject of much-needed reforms to the CARP process. I appear in my capacity as senior partner in the law firm of Weil, Gotshal & Manges LLP. As outlined in detail in my earlier, June 13, 2002 testimony, our Firm has for nearly twenty-five years counseled many, if not most, of the country's largest media with respect to their copyright music license requirements, especially in relation to obtaining music performing rights from the three U.S. performing rights licensing organizations, ASCAP, BMI and SESAC, as well as negotiating the treacherous legal shoals created by the Digital Millennium

Copyright Act (and its predecessor, the Digital Performance in Sound Recordings Act). Representative clients of the Firm in this area include the ABC, CBS and NBC Television Networks, the nation's commercial local radio and television broadcast stations, the National Association of Broadcasters, cable program services such as ESPN, MTV, Showtime, USA Networks and The Disney Channel, background music entities such as Muzak LLC and DMX MUSIC INC., and new media and webcasting entities which include AOL, RealNetworks, MTVi, and Yahoo!.

In the course of our music representations, our law firm has counseled and litigated both copyright and antitrust issues; has appeared and tried leading cases in the federal courts, including in the so-called rate courts which operate under the auspices of the ASCAP and BMI antitrust consent decrees; and has litigated through trial and the appellate process two CARP rate adjustment proceedings (on behalf of the Public Broadcasting Service and National Public Radio in a 1998 proceeding under Section 118 of the Copyright Act, and on behalf of various FCC-licensed broadcasters, as well as some twenty webcasters and DMX, 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 last appellate phase).

This deep and varied exposure to the often arcane and invariably hotly-contested world of music copyright licensing—the economic implications of which can be of enormous significance for the parties involved—has provided my colleagues and me with what I believe are useful perspectives on the legislation before this subcommittee. The views I offer through this testimony reflect that experience, although I should hasten to add that they do not necessarily reflect the views of our clients. What follows also reflects our experience with a particular subset of CARP cases—the so-called rate adjustment cases involving determinations of the license fees payable by particular users to groups of copyright owners for public performances or ephemeral uses of their works. From my discussions with those more familiar than me with the other significant area of CARP litigation—involving distributions of royalty fees among competing copyright claimants—I have concluded that there may be a need for separate sets of procedures governing these distinctive types of CARP proceedings.

CARP rate adjustment proceedings under Sections 112, 114 and 118, not differently from ASCAP and BMI rate court proceedings, attempt the impossible: to come up with rates and terms for licenses which approximate those that a freely-competitive market would bring about. This delegation to courts, in the rate court setting, and to arbitrators, in the CARP setting, has been necessitated by the determination that the markets involved are not freely-competitive and would, without such judicial or arbitral mechanisms, produce unacceptable distortions in the licensing of the intellectual property rights involved. As challenging are those CARP determinations (under Sections 114(f)(1)(B), 115 and 116 of the Act) which require the weighing of the four statutory factors enumerated in Section 801(b) of the Act in arriving at rates.

Our experience in such proceedings has led us to understand just how complex and multifaceted they are, and how skillful the trier of fact and judge of the legal issues presented must be. For these determinations invariably require a facility with macroeconomics and with basic principles of antitrust law; an ability to work through often opaque statutory language, such as pervades the DMCA; the ability to assimilate facts concerning multiple media marketplaces; the ability to evaluate complex statistical and economic data put forth by the parties' experts; the ability to sift through and properly evaluate record evidence, including making judgments on issues such as witness credibility; and, ultimately, the ability to synthesize all of these elements into a cogent decision that is consistent with prior precedent (drawing distinctions or building upon it as appropriate) and that itself will offer precedential guidance.

In my previous testimony, I outlined what I believe are the major shortcomings of the CARP process as it exists today, and made a series of recommendations for reform. I am delighted that H.R. 1417, the proposed Copyright Royalty and Distribution Reform Act of 2003, addresses many of those concerns, although, as I will testify this morning, I believe that several aspects of the bill as it presently is drafted could stand clarification or improvement. I want at the outset to express my appreciation and admiration for the efforts of the Chairmen of the full Committee and of this Subcommittee, other Members who have assisted the Chairmen in crafting this legislation, and the Committee and Subcommittee staff in so thoughtfully tackling this thorny and complex issue.

*I. Elimination of Three-Arbitrator Panels.* As I previously testified, the present CARP system's reliance on three, newly-selected arbitrators for each CARP proceeding suffers serious shortcomings, among them:

- Transient expertise and lack of continuity of decision-makers.
- Lack of familiarity with prior precedents and, given the lack of probability of being chosen again to be an arbitrator, little incentive to craft meaningful precedent.
- Wasteful expenditures of time in intra-arbitrator conferences on procedural and substantive issues.
- An inevitable tendency to reach compromise decisions, reflected in the remarkable tendency of virtually every party to a CARP proceeding to appeal the arbitrators' rulings.

H.R. 1417 commendably eliminates this cumbersome and inefficient approach in favor of the use of a single Copyright Royalty Judge, to be appointed for a five-year term by the Librarian of Congress. This individual, hopefully of suitably high experience, intelligence, and independence, can bring the needed efficiency and continuity to the rate-setting and distribution process. By way of just one example, parties to a proceeding tried to this judge will have an excellent sense of what to expect were they to try a future proceeding before him. This will promote negotiated resolutions of rate-adjustment and distribution proceedings alike in lieu of repetitive litigation. Such has been the experience in the ASCAP and BMI rate court setting, where there is a similar continuity of jurists overseeing such cases.

With respect to the qualifications of the new Copyright Royalty Judge proposed in §802(a), I believe that the interests of finding a highly-qualified individual for this position would be served by eliminating “demonstrated knowledge of copyright law” as a mandated prerequisite. As I have indicated, ratesetting proceedings implicate, first and foremost, issues of economics, not copyright law. The federal judges who supervise the analogous ASCAP and BMI rate courts are not possessed of special copyright expertise, although, over time, they have certainly become familiar with those areas of copyright law at issue in the cases before these courts. To require such expertise of the Copyright Royalty Judge, coupled with other appropriate requirements, such as significant litigation experience, could well make difficult identifying a highly-qualified individual free of perceived bias. While, for example, each of the practitioners appearing before you this morning has extensive litigation experience and possesses copyright expertise, I suspect that each of us, fairly or not, has been “branded” as reflecting the biases of the clients we have come to represent in our respective practices. These problems can be alleviated by making “demonstrated knowledge of copyright law” a potential “plus factor,” but not a necessary qualification, for the Copyright Royalty Judge.

I would offer a similar suggestion respecting the proposed qualifications of the professional staff to assist the Copyright Royalty Judge, found in §802(b). Rather than limit a field of potentially strong candidates by requiring “expertise in copyright law and in the business of economics of the industries implicated,” it would, in my judgment, be preferable to cite such qualifications as desirable, but not mandatory. A suitably intelligent individual with a proven capacity to master complex subject areas could easily get “up to speed” in subject-matter expertise quickly; indeed, the entire process might well benefit from such initial open-mindedness.

2. *Alleviation of the Exorbitant Costs of Proceedings.* I also have observed, as have many others, that the costs incurred by a party to participate in a CARP proceeding have grown exorbitant. A principal factor in those costs has been the requirement that the parties pay the hourly fees of the three arbitrators—fees that can aggregate to \$1000/hour or more. The proposed legislation makes large strides in addressing this concern by covering the salaries of the Copyright Royalty Judge and her assistants under Copyright Office appropriations. At the same time, §803(e) of the bill, as drafted, is less than clear as to the types of remaining “costs” that are subject to assessment against the parties to distribution or rate-adjustment proceedings. Are the reimbursement provisions intended to apply solely to the presumably modest remaining direct costs to be incurred by the Copyright Office and the Copyright Royalty Judge and his staff in relation to a specific proceeding (e.g., photocopying, court reporters, etc)? Or is it contemplated that such costs would also include indirect costs, such as pro-rated salaries of other Copyright Office personnel devoting time to the proceeding, or even to general expenses associated with the use of government offices and hearing rooms?

Also unclear is the language of §803(e)(1)(B), which contemplates that costs remaining after deductions from not more than one percent of royalty fees “deposited or collected” are to be borne by the parties to the proceedings “in equal proportions.” Given that many rate-adjustment and distribution proceedings are Hydra-headed affairs involving multiple parties with varying interests, the concept of cost allocation in “equal proportions” lends itself to widely varying interpretation. Either the language should be clarified as to intent, or, in a similar fashion to current practice,

such allocation decisions should be left to the Copyright Royalty Judge for determination on a proceeding-by-proceeding basis.

3. *More Rational Discovery and Other Procedures.* The stark limitations on discovery that presently accompany the CARP process, coupled with the cart-before-the-horse nature of the proceeding, arising out of the fact that the parties are required simultaneously to file written direct cases from which they cannot deviate *prior* to having had the opportunity to obtain discovery or otherwise ascertain the basics of the other side's case, led me previously to observe that CARP cases are, as a result, "underdiscovered and overtried." Such underdiscovery leads to potential abuses in the form of the withholding of key impeaching materials and the blocking of access to critical evidence. Cases are, as a result, overtried because: (i) trial cross-examinations that should be crisp and based on knowledge of the witness' positions are instead transformed into labored, discovery-type fishing expeditions; and (ii) rebuttal cases, which should be of limited scope and duration, become the first opportunity for the parties—especially for their experts—to join issue.

H.R. 1417 partially addresses these concerns. On the positive side, it extends somewhat the current 45-day discovery period to 60 days. While a step in the right direction, I believe that a 60-day period for discovery is still not a meaningful one, at least in rate-adjustment proceedings of the magnitude of certain of those we have experienced. I would not advocate a protracted or unbounded discovery process. What I do recommend is that the Copyright Royalty Judge be given the discretion—in line with the discretion that judge is to be afforded with respect to the overall timetable for concluding the litigation process—to establish a discovery period not to exceed *120 days* based on the judge's assessment of the time necessary to create a meaningful pre-hearing record.

As presently drafted, the legislation is ambiguous in several important respects in terms of the timing and sequencing of discovery. Section 803(b)(3)(c)(ii) prescribes that discovery is to be permitted for a period of 60 days and that final witness lists for the proceeding "shall not be required until the end of the discovery period." What is not clear from the foregoing is when the parties' written direct cases are to be filed in relation to the 60-day discovery period. Presently, written cases precede discovery. Arguments can be made for retaining that practice, provided that written cases can be amended to benefit from the ensuing discovery. Alternatively, discovery could precede the parties committing to their positions—as occurs in traditional court cases. The worst of all worlds is to require, as the current system does, the filing of written direct cases without the opportunity to amend them following discovery.

The discovery tools to be available to litigants are not spelled out in the bill. Under current practice, only very constricted document discovery (limited to materials that "underlie" the adversary's case) is permitted, and there is no provision for depositions, requests to admit or interrogatories. An expansion of discovery tools would seem warranted, closely supervised by the Copyright Royalty Judge. One such tool, as I have previously testified, involves investing the Copyright Royalty Judge with subpoena power. Past CARP proceedings have shown that critical evidence can lie in the hands of non-parties, such as entities that have entered into assertedly "comparable" license agreements to those in issue. Under current practice, the parties and CARP panels must rely on the voluntary cooperation of such third parties in participating in the proceedings—a state of affairs that can lead—and in the past has led—to an incomplete and distorted fact record.

Which leads to the important issue of who should prescribe the regulations governing the conduct of these proceedings. The bill is not entirely clear in this regard. Section 803(b)(3)(A) appears to contemplate that the Register of Copyright is to perform this role, while Sections 801(c) and 803(a) appear to confer relatively broad discretion in the Copyright Royalty Judge to "conduct proceedings" in accordance with the provisions of subchapter II of chapter 5 of the Administrative Procedure Act, and to "mak[e] any necessary procedural or evidentiary rulings" during and before commencement of the proceedings.

As a general matter, the interest of sound practice rules requires both a sensitivity to the policy objectives underlying these proceedings and a familiarity with litigation realities. With due respect to the Copyright Office, it would seem beneficial not to place sole responsibility for developing rules of practice in such proceedings with that Agency, but, instead, to shape those rules with input from seasoned administrative law experts, as well as judges and practitioners. One approach would be to require the Register to create an Advisory Committee comprising such expertise to promulgate the regulations. I would also suggest that two existing approaches to similar procedures be referenced as appropriate examples for regulations regarding procedures for these proceedings—the use of the Federal Rules of

Civil Procedure as the norm for proceedings conducted by administrative law judges, and the APA's formal proceeding provisions, in particular Section 556.

4. *More Rational Rules of Evidence.* Currently, what ultimately comes into the record of a CARP case is governed, not by any meaningful rules of evidence, but by the whims of the arbitrators. This can lead—and has led—to absurd and wasteful practice, especially in relation to the admission of blatant hearsay. The bill under consideration helpfully would import into hearings the hearsay rules of the Federal Rules of Evidence, which should significantly improve the quality of the evidentiary records in such cases. Whoever is charged with developing overall rules of practice could productively consider if additional aspects of the Federal Rules of Evidence should be made applicable to CARP proceedings.

5. *Relaxation of the Present 180-Day Deadline for Completion of the Hearings and Issuance of a Ruling.* I earlier testified that the existing 180-day deadline from commencement of the hearing phase of a CARP to the time the arbitrators must issue their decision is, at least in CARPs of consequential scope, inadequate. Among its deficiencies, the present system allows too little time for post-hearing briefing, and, more importantly, too little time for due deliberation by the Panel and careful exposition of its reasoning in its eventual decision. In my view, one very undesirable side effect of this condensed time frame are decisions that scarcely address key aspects of the parties' cases. The ticking deadline clock virtually forces the arbitrators to reach for simple—even simplistic—rationales for their decisions, which are justified with conclusory, at best, “reasoning” attempting to rationalize the result adopted with an often very complex hearing record.

H.R. 1417 properly recognizes the need for greater flexibility by remitting to the Copyright Royalty Judge's discretion whether to expand the 180-day period to one not exceeding one year. This proposed revision does, however, contain an ambiguity that should be resolved. Under current practice, the 180-day “clock” begins to run as of the conclusion of the so-called pre-controversy period, *i.e.*, following the submission of written direct cases and the conclusion of the 45-day discovery period and just prior to commencement of hearings. We presume the instant legislation has a similar intent. Yet, the current wording of Sections 803(c) and 804(a) leaves open an interpretation that the 180-day-to-one-year “clock” begins to run as of the date a petition requesting a determination or adjustment of a rate has been published in the Federal Register, *i.e.*, before direct cases have been filed and any discovery has been conducted. Were this interpretation to be adopted, the intended benefits of a potentially lengthened period for the hearing/decision phase of these proceedings would be eviscerated.

6. *The Appeals Process Should Be Streamlined.* Another inefficiency and needless expense associated with the current CARP process is the presence of a two-level appeals process: one to the Librarian of Congress, and a second to the United States Court of Appeals for the District of Columbia Circuit. As I previously suggested, an upgrading of the professionalism of the trial phase of the CARP should be accompanied by adoption of a single right of appeal directly to a federal court of appeals. The proposed legislation provides for precisely such an appellate process. I believe, however, that its proposed standard of review—based on the “arbitrary and capricious” standard used in relation to some federal agency actions—is too restrictive. Competence on the part of the new Copyright Judge is one thing; presumed infallibility is another. No differently than the degree of deference given to decisions by federal district judges, decisions of the Copyright Royalty Judge should be subject to the appellate review standard of Rule 52(a) of the Federal Rules of Civil Procedure.

7. *Consultative Role of the Copyright Office.* H.R. 1417 properly confers independence in the role and decision-making of the Copyright Royalty Judge. Section 801(c) of the bill at the same time provides that the Copyright Royalty Judge “may consult with the Register of Copyrights” in making any rulings—presumably, even his or her ultimate merits determination—in any proceeding. While the expertise of the Copyright Office is welcome in these proceedings, it would seem prudent to assure that any such contacts—whether on procedural or substantive issues—are on the record. For instance, the legislation could provide for the Copyright Office to file one or more briefs as *amicus curiae* or intervenor expressing the Copyright Office's views on issues pending in a given proceeding. If there are to be more informal communications between the Copyright Royalty Judge and the Copyright Office, those should be arranged on notice to the parties with a procedure for participation.

8. *Extending the Applicable Period of Rulings.* I have advocated extending the statutory periods for which the current CARP proceedings have effect, from what are as short as two-year durations to five-year periods. H.R. 1417 commendably adopts this approach, although the language of the technical amendments, as well

as of 6(b) (Transitional Provisions), which are apparently designed to accomplish this objective, may need some “tweaking.”

9. *Improved Procedures to Facilitate Settlements.* An important area of procedural reform is not addressed in H.R. 1417. This relates to facilitating negotiated settlements after a rate adjustment proceeding has begun. Current CARP procedures, as they have been interpreted by the Copyright Office, provide an unwieldy and inflexible process whereby a proposed settlement reached after initiation of the CARP process may be adopted by the Librarian of Congress in lieu of a CARP determination only after the proposal either is published for public comment and no interested party files a comment opposing the negotiated rates and terms or is otherwise submitted for scrutiny to the CARP Panel. These procedures have proven to be particularly problematic where negotiations during a CARP proceeding have yielded a potential settlement involving some, but not all, of the parties to a proceeding. The requirement of publication of the proposal and/or disclosure of its terms to the CARP Panel while proceedings with other non-settling parties are still ongoing can have—and recently has had—the effect of derailing settlements.

I would urge that H.R. 1417 include procedures that will facilitate settlement discussions during the pendency of the proceedings, as well as enable negotiated rates and terms in partial or complete settlement of a proceeding to be adopted without the kinds of crippling procedural conditions that now exist.

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I recognize that the legislation under consideration today addresses solely *procedural* CARP reform. As I indicated in my prior testimony, however, even the best available process cannot cure deficiencies in the substantive statutory standards themselves, as those standards have been interpreted to date. I think it important to say a few words on this all-important subject.

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).<sup>1</sup> 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).

My experience litigating under these standards has given me, and many users intended to benefit from the statutory licensing procedures, considerable concern. The concern centers on 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). Indeed, this concern is but a part of the larger antitrust concerns that arise out of the joint licensing activities of these collectives, matters which have triggered decades of Antitrust Division review and oversight.

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 by these owners’ collectives 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 rate-making 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,<sup>2</sup> 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.

<sup>1</sup>The standard embodied in § 112—that the CARP “establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller”—is not substantively different. See 17 U.S.C. § 112(e)(4).

<sup>2</sup>It may be that, in a given industry setting, there are no voluntary agreements that are not so tainted. To the extent that is the case, it is entirely appropriate to resort to comparable licensing benchmarks in other markets.

An alternative means of assuring that the market power of the copyright owners reflected in their marketplace dealings does not distort the proceedings is to reinstate, at least in Section 112 and 114 proceedings, the four objectives which govern § 114(f)(1)(B), 115 and 116 proceedings, as set forth in Section 801(b)(2) of the legislation. There would appear to be little rationale for affording the benefits of those statutory factors to only certain § 114 statutory license determinations and not at all to § 112 determinations.

I thank the Members of the Subcommittee for their attention to these important matters and for the opportunity to share my views on H.R. 1417 with you. I would be pleased to answer questions and elaborate further on this testimony now or later for the record.

Mr. SMITH. Thank you, Mr. Rich.  
Mr. Remington?

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

Mr. REMINGTON. Thank you, Mr. Chairman, Mr. Ranking Minority Member, Members of the Subcommittee. I appreciate the opportunity to testify on the important subject of the Copyright Royalty and Distribution Reform Act of 2003.

As was observed, I previously testified at an oversight hearing on the CARP structure and process. Today's legislative hearing is constructed on the solid foundation of that earlier hearing. If anything has changed, the need for CARP reform is exacerbated today. While I appear on my own behalf, my views do comport with those of Broadcast Music, Inc., for which I serve as Washington, D.C. counsel. I draw on my years of experience working for this Subcommittee.

To sit at the witness table with the Register of Copyrights is an honor. In the wake of last year's hearing the Register stated, "the CARP system is broken." I agree with the Register.

H.R. 1417 is a positive step toward fixing the broken system. Its basic structure is sound. However, it suffers from a number of drafting problems. Careful heed must be paid that it not ignite the law of unintended consequences. H.R. 1417 manifests Chief Justice Vanderbilt's adage, reiterated recently by Chief Justice Rehnquist, that judicial reform is no sport for the short-winded.

Any statutory reform should incorporate a multi-judge permanent structure to promote the stability and predictability of results, procedures for encouraging settlement of all claims and a mechanism for streamlining the resolution of small claims, and cost reduction measures. In large part, H.R. 1417 meets these goals.

First, H.R. 1417 creates a permanent adjudicative structure—a full-time copyright royalty judge who serves a 5-year term. Nevertheless, H.R. 1417 does not go far enough. As Bob Garrett explained, the new entity should be composed of three judges who serve a minimum of 7-year terms.

H.R. 1417 also cures serious defects in the current CARP system, some of which were just reiterated by Bruce Rich. It eliminates the office's intake role and removes the Librarian's appellate responsibilities by permitting a single appeal to the D.C. Circuit.

Second, H.R. 1417 takes affirmative steps to streamline the resolution of small claims and to facilitate the settlement of all claims. The bill creates a \$150 filing fee, identical to that required for all litigants who file civil actions in Federal district courts. Payment of a filing fee by all parties who file a notice of intent to participate

in a royalty proceeding will discourage the filing of frivolous claims and create an incentive for all parties to engage in meaningful settlement negotiations.

H.R. 1417 requires that an offer of judgment procedure, similar to that found in rule 68, be implemented regulatorily. The bill should clarify that this procedure does not apply to rate adjustment proceedings. The bill's proposed language is silent as to what happens if an offer of judgment is not accepted by a party and that party does not receive after litigation the level of the offer. The judge should at least have authority to impose costs incurred after the making of the initial offer.

H.R. 1417 provides that cases involving small claims may be subjected to a paper proceeding. This is a salutary end. The \$500 threshold is too low, however. If the paper proceeding is based on the consent of the party with the small claim, who I can assure you will not consent, it will not work. Giving a veto to a small claimant would be a step backwards. H.R. 1417 is also ambiguous about what sort of paper process is envisioned.

Finally, Congress should promote cost reduction measures. I will identify two drafting problems. The first is the discovery problem that Bob Garrett alluded to. It would be a mistake and extremely costly to allow depositions and interrogatories.

Second, H.R. 1417, and this may be a technical point, does not contain an authorization for appropriations. Funds should be authorized to be appropriated at least for the judges and the permanent staff. Support staff and necessary space and facilities in the Copyright Office should also be paid by appropriated funds.

Almost 100 years ago Roscoe Pound spoke about the causes of popular dissatisfaction with the administration of justice. He specifically mentioned that the maladies of costs, complexity, unpredictability, defective statutes and a tendency to overlitigate transform the law into a game, a sporting event, a March Madness of sorts. Much of what Pound said applies to the current CARP system. H.R. 1417 addresses Pound's maladies.

Mr. Chairman, I commend you for introducing H.R. 1417 and for holding this hearing. With several hopefully noncontroversial amendments, the Subcommittee should process this necessary piece of legislation. 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 Royalty and Distribution Reform Act of 2003" (H.R. 1417). During the last Congress (on June 13, 2002), I testified before the Subcommittee on the CARP structure and process.<sup>1</sup> Last year's hearing was the *first* oversight hearing conducted by the Committee since 1993. Today's legislative hearing is constructed on the solid foundation of that initial hearing. My statement today is entirely consistent with my previous testimony. If anything has changed, I feel more strongly about the need for reform of the CARP system.

H.R. 1417 is a positive step forward. Its basic structure is sound. However, it suffers from a small number of drafting problems and careful heed must be paid that

<sup>1</sup>See Hearing on Copyright Arbitration Royalty Panel (CARP) Structure and Process Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 107th Cong., 2d Sess. (2002) (Serial No. 78) [hereinafter "House Hearing"].

it not invoke the “law of unintended consequences” by making certain matters worse.<sup>2</sup>

As was the case last year, 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.<sup>3</sup> 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 the Copyright Revision Act of 1976 (effective January 1, 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. Annually, in the past, the PROs have participated as claimants to cable, satellite and digital audio recording technology (“DART”) royalty funds and, whenever necessary, participate in distribution proceedings. 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. Under the CARP system, the PROs have experienced four distribution controversies, one in cable (Phase I) which is ongoing, another in cable (Phase II, within the music category) regarding a single individual claimant, and two involving the distribution of DART royalties, both also involving individual claimants. The PROs have also been involved in two rate adjustment controversies: the first one being a 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 the second a 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.<sup>4</sup> 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.<sup>5</sup>

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 the Catholic University’s Columbus School of Law (where I teach legislation) and George Mason University School of Law (copyright). Except for BMI’s interests, my firm has no other client interests in the matters before the Subcommittee this morning.<sup>6</sup>

As an alumnus of this Subcommittee, Mr. Chairman, congratulations on your assumption of the Subcommittee’s chair. I look forward to serving under your able captaincy. Mr. Ranking Minority Member, I also look forward to your “co-captaincy” (which may not be the appropriate word but given this Subcommittee’s long and consistent history of bipartisanship seems appropriate). I would be remiss if I did not mention my respect for the strong leadership of Chairman Sensenbrenner and Ranking Member Conyers, and the public service contributions of the able staffs of all the Members.

<sup>2</sup>Due to the short amount of time to review the proposed legislation, I focused on the subject of CARP reform, and not the technical amendments to the various compulsory licenses. I am informed that they track current law; at least one of them does not.

<sup>3</sup>This Committee is well aware that BMI is a performing right organization representing songwriters, composers and music publishers in the licensing of the public performing right in their musical works.

<sup>4</sup>I was a counsel in 1977 when the CRT was appointed by President Jimmy Carter, in 1985 for the oversight hearing (see Copyright Royalty Tribunal and U.S. Copyright Office: Oversight Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 1st Sess. (1985)) that resulted in the resignation of the then-Chairman of the CRT (Marianne Hall), and in 1990 for the enactment of the Copyright Royalty Tribunal Reform and Miscellaneous Pay Act of 1989, Pub. L. No. 101-319, 104 Stat. 290, that reduced the size of the CRT from five commissioners to three.

<sup>5</sup>Two years ago, I testified before the Subcommittee on “the operations of federal judicial misconduct and recusal statutes” and the Committee’s leadership should be commended for its leadership in enacting recent reforms to the judicial discipline statute. See Pub. L. 107-273, § 11041 *et seq.*, 116 Stat. 1758 (the Judicial Improvements Act of 2002).

<sup>6</sup>My firm does represent the American Council on Education, a participant in section 118 rate-adjustment proceedings, but neither in those proceedings nor on other CARP matters.

## I. BACKGROUND

To sit at the witness table with the Register of Copyrights, Marybeth Peters is an honor. She and her competent and committed lawyers and staff in the General Counsel's office have a difficult task administering a flawed (and failed) statute. During the past decade, the roles of the Office, CARPs, individual arbitrators and Librarian have 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. Glaring problems and dissatisfaction of the system's participants have become apparent. In the wake of last year's oversight hearing, the

Register stated: "The CARP system is broken. We need to fix it or come up with a system that is

more equitable and responsive to the parties."<sup>7</sup> I agree with the Register that the CARP system is in dire need of reform. I so indicated last year. Conditions and circumstances relating to the CARP structure and process indicate a pressing need for the Subcommittee's intervention not only through oversight but legislatively.

History provides a backdrop. In 1993, Congress replaced the CRT, an independent agency with three 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.<sup>8</sup> 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 CARP. Administrative responsibilities prior to the declaration of a controversy are assigned to the Copyright Office.

In the legislative history that accompanies the 1993 Act, this Committee evidenced the view that "ad hoc arbitration panels are better suited to handle the functions of the Tribunal. . . ."<sup>9</sup> One court later 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."<sup>10</sup>

Unfortunately, the CARP system has not fulfilled the policy promises of informal, expeditious and inexpensive dispute resolution of royalty controversies. The CARP system has proved to be just the opposite of its legislative goals. The system is time-consuming, formal and very expensive. It has neither promoted stability and predictability of results nor does it discourage resort to the costly, formal and protracted process. Settlements are all too often hard to achieve. In retrospect, it was an error for the Congress to have abolished the CRT rather than modifying or altering it.

The system should be reformed by Congress, sooner rather than later. Key members of the legislative branch agree. Mr. Chairman, the preparation of the Copyright Royalty and Distribution Act of 2003 is a positive step forward that builds on the contributions of former Subcommittee Chairman (Howard Coble) who in 1998, shortly after issuance of the Register's Report, introduced legislation to replace the CARP system with a permanent Copyright Royalty Adjudication Board composed of a full-time chief administrative copyright judge, and such part-time administrative copyright judges as the Librarian upon the recommendation of the Register, finds necessary.<sup>11</sup> Companion legislation was introduced in the Senate by Senators Hatch, Leahy, and Kohl.<sup>12</sup> On April 12, 2002, Chairman Coble took the further step of writing a letter to interested parties soliciting views about the CARP structure and process. After last year's hearing, Chairman Coble and Ranking Member Berman also stimulated a Copyright Office Roundtable and further requested interested parties to submit lists of proposed CARP reform items. On August 2, 2002, ASCAP, BMI and SESAC submitted such a list. See Appendix A. Mr. Chairman, the baton has been passed to you and I am thankful that you have chosen to run with it.

<sup>7</sup>Luncheon Address to the Intellectual Property Section, District of Columbia Bar Association (Dec. 9, 2002), as reported in 65 BNA PTCJ 142 (Dec. 13, 2002). Previously, the Register recognize that the system has suffered from "major problems." See Options to Improve Copyright Royalty Rate Setting and Distribution Decision-Making, A Report of the Register of Copyrights (Feb. 23, 1998) ("Register's Report") at 11.

<sup>8</sup>See the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (1993); see also H.R. Rep. No. 103-286, 103rd Cong., 1st Sess. (1993). The CRT originally had five commissioners. For more background about the CRT, see Cassler, Copyright Royalty Tribunal: Balancing the Record, 41 J. Copr. Soc'y 217 (1994).

<sup>9</sup>H.R. Rep. No. 103-286, at 11 (1993).

<sup>10</sup>*National Ass'n of Broadcasters v. Librarian of Congress*, 146 F. 3d 907, 920 (D.C. Cir. 1998).

<sup>11</sup>See H.R. 3210, 105th Cong., 2d Sess. (1998).

<sup>12</sup>See S. 1720, 105th Cong., 2d Sess. (1998).

Before sharing my recommendations, permit me to describe several CARP highlights since the last hearing, manifesting a mixed bag of successes, failures, and at least one noteworthy aberration:

- The parties (composed of the PROs, acting individually, and the public broadcasting industry (PBS, NPR, ACE and religious broadcasters, also acting individually)) settled a section 118 rate-adjustment proceeding. Two other rate proceedings involving exclusive rights in sound recordings, one between the RIAA and pre-existing subscription services, and the other between the RIAA and pre-existing satellite services, recently settled.
- A decision was rendered by the Librarian in the webcasting rate proceeding—the “CARP of the century so far” (to quote from the Register of Copyrights). The Office rejected the CARP’s decision, and the Librarian issued a modified ruling. No one was happy. All the parties appealed to the D.C. Circuit. Several parties approached Congress and a statute was enacted further modifying at least part of the Librarian’s decision. Total costs for this CARP, including attorneys fees and witness costs, were in the millions of dollars (some estimates as high as \$25 million).
- The CARP process experienced an aberration with its first proven case of perjured testimony. In a cable distribution controversy in the program supplier category, a litigant was found to have committed perjury, pled guilty and is currently residing in a federal penitentiary. The Librarian vitiated the entire proceeding, and the matter is pending on appeal in the D.C. Circuit.
- The PROs and several other settling parties, in a recent DART distribution proceeding, avoided a CARP when a single *pro se* claimant who failed to file a written direct case was dismissed by the Office. The settling parties, however, were required to prepare and file their own direct case, expending in-house costs and attorneys fees in excess of \$100,000.
- A cable distribution controversy for the years 1998–99 is ongoing, with another (for the years 2000–01) to commence thereafter. A satellite distribution controversy also awaits in the wings.

Today, the CARP system is complex with a significant workload, much more than that handled by the CRT. The system, however, lacks “consumer” satisfaction, as measured by too few settlements, high costs, many appeals and frequent resort to Congress.

In my view, any legislative reform should incorporate: (1) a permanent structure to promote the stability and predictability of results; (2) procedures for encouraging settlement of claims and a mechanism for streamlining the resolution of small claims; and (3) cost-reduction measures.<sup>13</sup> In large part, H.R. 1417 meets these goals.

## II. CONGRESS SHOULD CREATE A PERMANENT MULTI-JUDGE STRUCTURE TO PROMOTE THE STABILITY AND PREDICTABILITY OF RESULTS.

H.R. 1417 is a constructive reform because it creates a permanent adjudicative entity—a full-time Copyright Royalty Judge, who, appointed by the Librarian of Congress, serves a five-year term. However, it does not go far enough. Throughout the entire history of the CRT and the CARPs, panels of three or five adjudicators have sat. Any new permanent entity should be composed of three judges who serve a minimum of seven-year terms. While more costly, a multi-judge panel is an important part of the current system that should be preserved. The work-load—which is growing, complex and economically important to authors, copyright owners, distributors and users—justifies more than a solitary judge. H.R. 1417 provides the judge(s) with two professional staff members who must meet certain statutory criteria. I would suggest that staff members be selected based on merit. That would equip the judge(s) requisite flexibility to appoint a General Counsel and an Administrative Assistant.

H.R. 1417 also cures two serious defects in the current CARP system. First, currently 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. H.R. 1417 both eliminates the Office’s intake role and removes the Librarian’s appellate responsibilities. A consultative role is appropriately preserved for the Office. The bill

<sup>13</sup>For further information, see letter to the Honorable Howard Coble from I. Fred Koenigsberg and Marvin L. Berenson (dated June 20, 2002), reprinted in House hearing at 154.

should specify that any advice rendered by the Office is limited to legal issues. Second, H.R. 1417 permits a single appeal to the U.S. Court of the Appeals for the D.C. Circuit (which has developed expertise in reviewing copyright royalty appeals). 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. By creating one appeal of right, the proposed legislation is on solid ground.<sup>14</sup>

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

As regards small claims, under the current CARP system abuses have occurred and the Office has consistently found that it lacks authority either to prevent these abuses. Arbitrator costs alone far exceed the amount-in-controversy. In my testimony last year, I identified three egregious examples.<sup>15</sup>

Permit me to add a recent experience. In a DART distribution proceeding that just terminated, the settling parties were obliged to prepare and file their written direct case, while a *pro se* individual did not file a case at all (before being dismissed). As stated above, overall costs (in-house and attorneys fees) to the settling parties was close to \$100,000.00. If the case had been litigated, the *pro se* litigant would have been shown to deserve less than \$10.00.

When transaction costs greatly exceed the amount-in-controversy, the CARP system is not an efficient and effective dispute-resolution device. 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,<sup>16</sup> 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.

The Copyright Royalty and Distribution Act of 2003 addresses these problems. It contains three salutary features that will not only cure defects, but will recognize the rights of those with small, albeit valid, claims to participate in copyright royalty proceedings: (1) a uniform filing fee for all claimants (except for those who request a paper proceeding); (2) an offer of judgment mechanism; and (3) paper proceedings for small claims matters.

**A. A Filing Fee.** The Copyright Royalty and Distribution Act of 2003 creates a filing fee (\$150.00) that is identical to that required for all litigants filing civil actions in federal district courts. See 28 U.S.C. § 1914. Because the filing fee is pegged to a "notice of intent to participate," a single fee would presumably be paid for each notice filed. Each performing right organization has always been considered to be a single joint claimant that like others (*e.g.*, settling parties, joint sports, program suppliers, music publishers, broadcasters, all with multiple members) files a single notice of intent to participate. This practice should be continued. Moreover, the Office now requires a single notice of intent for both Phase I and II proceedings with respect to cable and satellite distributions. It would be helpful if the Committee Report clarifies that only one filing fee would be paid for each proceeding.

As I testified last year, payment of a reasonable filing fee by all parties who file a notice of intent to participate in a distribution or rate adjustment proceeding will 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,

<sup>14</sup>The Act adopts an "arbitrary and capricious" standard of review by the D.C. Circuit, a return to the CRT model. If there is a three-judge panel with seven year terms, this is an appropriate standard. It, however, may not be an appropriate one for a solitary judge.

<sup>15</sup>First, 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). Second, 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). Third, 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.

<sup>16</sup>Small claimants no doubt realize that the allocation of costs is based on calculation of their awards in relation to CARP costs so that the net-cost allocated to them is infinitesimal (literally pennies or fractions of pennies). In the three matters discussed above, no costs were allocated to the individual claimants. This procedure does not encourage settlements; in fact, it encourages small claimants not to settle at reasonable amounts because these claimants realize that it will cost them nothing or very little to proceed.

who currently have little or no incentive to engage in significant settlement discussions.

Moreover, the proposed legislation specifies that the filing fee—which would be added to the relevant fund or subfund—will help defray the administrative costs incurred by the Office in connection with the respective proceedings.

**B. Offers of Judgment.** H.R. 1417 requires that an offer of judgment procedure—similar to that found in Rule 68 of the Federal Rules of Civil Procedure—be permitted. 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. Last year, I proposed that a Rule 68 process be applied to small claims (where the amount in controversy was less than \$15,000.00). H.R. 1417 goes beyond that, and appropriately so. It would be helpful, however, to clarify that it does not apply to rate adjustment proceedings. In addition, the language proposed in the bill is silent as to what happens if an offer of judgment is not accepted by a party and that party does not receive the level of the offer after litigation. The judge should at least have authority to impose costs incurred after the making of the offer.

**C. Paper Proceedings.** H.R. 1417 provides that cases involving small claims (defined statutorily to be under \$500.00) may be subjected to a paper proceeding. In my opinion, the \$500.00 threshold is too low. Last year, I suggested \$15,000.00. The Subcommittee should consider \$10,000.00 or \$5,000.00 as appropriate levels in line with small claims courts in this country's metropolitan areas. As drafted, the small claims provision is ambiguous because it appears to be based on the consent of the party with the small claim (who then will not have to pay the filing fee). Giving a veto to a small claimant (which will be exercised) would be a step backward from the current CARP system, which permits a CARP to order a paper proceeding even over the objection of a claimant. The small claims procedure should be redrafted to be mandatory for all claims under the threshold amount and so as to not waive the filing fee. H.R. 1417 is also ambiguous about what sort of process is envisioned. The paper proceeding should replicate current processes with some requirement that a small claimant make a bona fide showing. A provision should also be crafted to handle claims that are clearly inflated to avoid the designated threshold. If a claim is clearly inflated, the judge should be authorized to take remedial action such as the imposition of costs. In matters where no genuine issues of material fact exist, the judge should be statutorily authorized to make a summary judgment decision based on facts not in dispute, applicable law and precedents.

In the final analysis, the filing fee, offers of judgment and small claims process will operate to promote the fair settlement of claims.

#### IV. CONGRESS SHOULD PROMOTE OTHER COST-REDUCTION MEASURES AND SHOULD NOT UNINTENTIONALLY INFLATE COSTS.

Creation of a permanent structure with a Copyright Royalty Judge(s) and salaried employees, along with a small claims process, will save substantial costs in comparison to the current CARP system with no decrease in the quality of decision-making. Nonetheless, the Subcommittee should pay careful heed not to unintentionally increase costs.

**A. Discovery.** The Copyright Royalty and Distribution Act of 2003 extends the period for discovery from the current 45 days to 60 days. This reform is probably not necessary but, in complex cases, is supportable. H.R. 1417 should provide that “discovery shall be permitted for no more than a period of 60 days” so that the extended time-period does not become the norm in all cases. Further, any discovery should occur only after the filing of direct cases, as is the procedure today, and should be limited to documents underlying a direct case. The exchange of final witness lists, after discovery, as is contemplated in the proposed legislation, seems to suggest a radical change from the current procedure. H.R. 1417 also authorizes the Register of Copyrights to promulgate discovery regulations specifically to incorporate hearsay rules, but is drafted in an open-ended manner to potentially authorize the Register to promulgate regulations allowing depositions and interrogatories. If depositions and interrogatories are permitted, the new procedure will become akin to a “federal” court case which the new system is supposed to obviate. Make no mistake: a full-scale discovery model would be “gamed” by small and large claimants alike. In the spirit of reducing costs and complexity, the bill should not textually invite radical reform to current discovery rules.

**B. Length of proceedings.** The current length of proceedings—one year from the declaration of a controversy to completion—should not be extended.

**C. Salaries of the permanent copyright judge(s) and permanent staff.** H.R. 1417 does not contain an authorization for appropriations, and therefore is not clear about whether the judge(s) and permanent employees will be compensated out of ap-

propriated funds; or whether space, and facilities, and administrative staff provided by the Office to them would be supported by the taxpayer. I firmly believe that funds should be appropriated for the judge(s) and permanent staff. The appropriation, which will be reduced by the filing fees, will be minimal. This is the model used by the federal courts and previously by the CRT. In brief, this model should be replicated: public servants who engage in judging activities should be compensated by public monies.

To the extent that Copyright Office continues to deduct reasonable costs from royalty fees deposited or collected, the Office should report cost-deduction information on an annual basis to the House and Senate Judiciary Committees, and perhaps the Appropriations Committee. With this information, the Committees could then monitor the costs being shouldered by authors and copyright owners.

**D. Partial distributions.** H.R. 1417 authorizes the partial distribution of royalties not in controversy prior to a proceeding. However, H.R. 1417 indicates that partial distributions are “discretionary.” Partial distributions are an essential part of the current system, and are an important tool for putting royalties in the hands of copyright owners and authors. If funds are not in controversy, pursuant to motion, those funds should be distributed.

#### V. ADMINISTRATIVE IMPROVEMENTS SHOULD BE IMPLEMENTED.

Several improvements could ordinarily be made through amendments to Office regulations. The Copyright Royalty and Distribution Act of 2003 authorizes the Register to issue such regulations, including interim regulations to bridge from the current to the new system. Thereafter, the Copyright Royalty Judge(s) should be authorized to make, or amend, rules upon sufficient notice and public comment.

**A. Public Records.** H.R. 1417 recognizes that contemporaneous notice of CARP decisions through publication in the Federal Register is necessary. This is a salutary reform. By regulation, the Office should establish a repository readily available to the public electronically and at the Library of Congress, which collects all rulings under the new system .

**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. During this period, settlement conferences supervised by the Copyright Royalty Judge(s) or full-time staff would encourage settlements and reduce costs to the satisfaction of the parties.

**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, as well as the CRT.

**D. Judicial Education.** One of the salutary aspects of a permanent entity is that the Copyright Royalty Judge(s) will be able to participate in judicial education programs that are provided to administrators and judges in the judicial branch of government, and to ALJs in the executive branch.

#### CONCLUSION

Mr. Chairman and Mr. Ranking Member, I thank you for your leadership on intellectual property issues, and copyright law in general. Despite initial optimism after the elimination of the CRT in 1993 and its replacement by the *ad hoc* CARPs, the new process has not stood the test of time. After a decade, systemic flaws—rooted in its statutory structure—have become evident. I make this conclusion with great respect for the Register, her able staff, and the individual arbitrators who operate under the CARP statute. Almost one hundred years ago, the highly-respected Roscoe Pound, who later became the Dean of the Harvard Law School, addressed the American Bar Association on “The Causes of Popular Dissatisfaction with the Administration of Justice.”<sup>17</sup> He specifically mentioned that the maladies of costs, complexity, unpredictability, defective statutes, and a tendency to over-litigate, transform the law into a game—a sporting event. Much of what Pound said applies to the current CARP system. H.R. 1417 addresses these maladies. But it needs several curative amendments to establish a multi-judge panel and to prevent the system from becoming more complex and costly before moving forward. Thereafter, the Subcommittee should process this necessary piece of legislation to the President’s desk. Thank you.

<sup>17</sup>35 F.R.D. 241 (1906).

## APPENDIX A

LIST OF CARP REFORM ITEMS OF ASCAP, BMI and SESAC  
(in order of priority)

Dated August 2, 2002

1. **Permanent Adjudicative Body.** Permanency is essential for predictable and consistent decisionmaking. Permanency fosters settlement. Decisions should be made by a body of three. The creation of this body and its staff would have to comport with constitutional requirements (e.g. no creation of a specialized Article III court, and no delegation of responsibilities to an Article III judge as no "case and controversy" would exist).
2. **Small Claim Procedures.** Special statutory procedures for claims that are small in amount (such as \$10,000 or less). Such procedures would include (a) offer of judgment (akin to F.R.C.P Rule 68); (b) mandatory paper proceedings; (c) filing fees (note filing fees would be applicable to all claimants, not just small claimants); and (d) mandatory settlement conferences with adjudicators.
3. **Qualification of Adjudicators.** Appointment of adjudicators should not be politically motivated and should be based on merit. Adjudicators should have prior judicial experience. Use of ALJs is recommended. Economists and other expert non-jurists would not qualify.
4. **Consolidation of Duties.** The adjudicators and its staff should have responsibility for all post controversy issues and decisions, including discovery. The Copyright Office should have responsibility only for pre-controversy issues and may retain an advisory role with regard to interpretation of copyright law.
5. **Filing Procedures/Promotion of Settlements.** In ratemaking proceedings, filing fees should be paid by all parties filing notices of intent to participate. In distribution proceedings, filing fees shall be paid by all claimants to the fund. Only one filing fee would be required for parties participating in both Phase I and Phase II portions of a distribution. There would only be one filing fee for entities that represent multiple claimants such as performing rights organizations, unions, program suppliers, joint sports, broadcasters, etc. Filing fees should be required that would be the same as the filing fee required for the filing of a civil action in a federal district court. Claimants should have to meet formalities associated with controversies. Untimely filing of claims should not be excused without a showing of good cause. A statutory settlement period should be established and respected for all proceedings with active monitoring by the permanent adjudication body.
6. **Timing.** The current 180-day timeframe is unworkable, except possibly in small claim paper proceedings. A year from the date of filing a case in non-small claim proceedings is necessary.
7. **Discovery.** Discovery should not be expanded, particularly in distribution proceedings. Expenses would increase dramatically for what will essentially be fishing expeditions. There have been instances in the past where a small claimant desired discovery that would have cost many multiples of the claim made. Likewise, we are concerned that large claimants should not be permitted to use expanded discovery as a means of "brow beating" small claimants into settlements because the cost of discovery would become financially burdensome when compared to the amount of the claim. One of the policy goals underlying any reform proposal should be cost reduction.
8. **Appeal.** Appeal should be made directly to the U.S. Court of Appeals for the D.C. Circuit. No intervening level of review by the Librarian of Congress is necessary.
9. **Public Funding.** Governmental appropriation should fund core governmental functions of what is essentially a public good.
10. **Transparency.** The parties should have the ability to understand the operations and funding of the adjudicatory process and the Copyright Office's relationship to the process and royalty funds. All decisions and orders of all proceedings should be easily accessible to all parties.

Mr. SMITH. Thank you, Mr. Remington. You had me worried because you had four more pieces of paper in your hands. I'm glad you concluded in exactly the right time.

Ms. Peters, in your testimony you say that the copyright royalty judge should be afforded the opportunity to correct, amend and reconsider his or her determination after it is issued. Why is that and

Mr. Remington, if you want to comment on that, as well, I would appreciate it.

Ms. PETERS. Whatever the end result is, that's what's going to go to the appeals court. Based on our experience, we actually got some of those questions where there was an oversight or somebody really hadn't looked at something, so it really was a suggestion to avoid additional appellate litigation if, in fact, it wasn't necessary.

Mr. SMITH. Okay. Maybe there's not much more to say. Do you concur with that, Mr. Remington?

Mr. REMINGTON. I concur.

Mr. SMITH. Okay, great.

Mr. Garrett, in your testimony first of all, on page 3, you mention that the structure of copyright royalty allocations in rate-setting will inevitably lead to more rather than less litigation. I think you got into that a little bit with your oral testimony. But then you go on and make the point, as Mr. Remington did, as well, about your concern that there would be only one judge.

I have to say to both of you all that I have the same kind of concern because that's putting a lot of power in one individual's hands. You don't know if there might be some bias involved and you have someone there for the long term and just one judge. Of course, it's not unusual; we see that across the country. But nevertheless, intuitively I'd feel better if it were a panel of three, too, but you all know the problems with that. We really can't justify three judges full-time and the concurrent expenses, and so forth.

On the other hand, you did come up with the suggestion, Mr. Garrett, about having two additional administrative law judges from a pool, and so forth. The problem with that as I understand it is that these aren't copyright royalty judges. These are administrative law judges. They're not experts. Going through that process might be a real pain.

So that's a possible solution but I don't know if it's the best solution, so there's a quandary here. I sort of am sympathetic but I don't know if that is necessarily the best solution. Do you want to make any more comments on your idea of one judge versus three?

Mr. Garrett. I do not know that I've got the solution here, Mr. Chairman, but I do know that all of the parties, at least those who are involved in the cable royalty and satellite royalty distribution proceedings, feel very strongly that it ought to be three, rather than one judge for the reasons that you identified and that we ought to be looking for a way to make that approach work somehow.

There's just a tremendous amount of discretion that is afforded these arbitrators. As I said in my testimony, the records are enormous. They produce a wide range of possible results.

Mr. SMITH. Of course, Federal judges have a lot of discretionary power, as well.

Mr. GARRETT. No question about it and that is the way most decisions in this country are made, but most decisions involving rate-setting, royalty allocations around the world are not made by single individuals. They are made by bodies that are comprised of several individuals.

Mr. SMITH. I just want to say to you we'll be looking to see if there's not something we can do about it because I have the same

kind of reservations as you do. I don't have a perfect solution to that yet but we'll be taking a look and considering your concerns, as well as Mr. Remington's concerns, too.

Mr. Rich, in your testimony, page 8, you made the suggestion that the copyright royalty judge should have subpoena power. I think that's a good idea and I think if we overlooked it, maybe that's something that we can include. But then you proposed a standard of review based on the arbitrary and capricious standard used in relation to some Federal agency actions is too restrictive. The reason we put that in there is because the current standard is just arbitrary and there's really no other jurisdiction that uses that, so that's sort of a unique standard. The arbitrary and capricious is a little bit more common, a little bit more recognizable, and maybe it's a term of art; I don't know.

Do you have any other reservations?

Mr. RICH. In part, my reservation flows from your earlier colloquy with Mr. Garrett, Mr. Chairman, which is that while I propose fairly strongly a single jurist based on the Federal judging model, assuming this is a qualified individual, it seemed to me that an appropriate check and balance on possible distorted outcomes would be a more robust standard of review. And I again look by analogy, instead of the arbitrary or arbitrary and capricious, just to a clearly erroneous-type review standard of the Federal rules. I pulled out, because I thought it might be useful for the panel, just a clause that sort of grabs the respective concepts of arbitrary and capricious as the courts think about it versus clearly erroneous. I thought it, for me, captures the meaningful difference in the standard of review.

One court has written that the arbitrary or capricious standard, which is sometimes called the substantial evidence test, calls for such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In other words, so long as the reviewing court finds that some reasonable person could do it, it stands.

Clearly erroneous, on the other hand, the standard I would prefer and think would be more protective of the process and the appeal, means that the reviewing court "has a firm conviction from review of the record that a mistake has been committed." So you can have a reasonable outcome which is still clearly erroneous in the mind of a court. And again because I lean in favor of a single judge rather than three, I think an appropriate balance and check on a clearly wrong decision could use a better standard.

Mr. SMITH. That's something we might take a look at and we appreciate the suggestion.

Mr. Remington, my time is up. We've mentioned a couple of things in your testimony—the idea of three judges or not, just one, and so forth. I did want to call your attention and perhaps Mr. Berman's attention to one sentence that you had in your written testimony that you fortunately did not use in your oral presentation, and that is you suggested to the Ranking Member, Mr. Berman, that you "looked forward to your co-captaincy."

I didn't want you to give the minority any ideas but it did strike me that that was an interesting turn of phrase, but it also gave away which side you worked for when you were chief counsel.

Mr. REMINGTON. And I think I admitted that it might not have been the appropriate term in my written statement.

Mr. SMITH. It has its uses and I'm sure that Mr. Berman wouldn't object.

The gentleman from California, co-captain Berman, is recognized for his questions.

Mr. BERMAN. What do you mean "co"?

We did previously serve as chair and Ranking Member of a Committee that had an equal number of Democrats and Republicans but it, alas, is not the case here.

Thank you, Mr. Chairman.

First let me indicate that Ms. Lofgren apologizes to the witnesses for—an emergency came up in her district. She is very interested in this subject and wanted to both hear your testimony and ask questions but she received some information after she got here that required her to leave to attend to this problem in her district.

Why don't we just take the last issue first, this one judge versus three judges? First let me make sure I understand. I tend to think in the context of State law on these appellate review standards. You view, Mr. Rich, you view the standard in the current bill as sort of a highly deferential standard? You equated it with a substantial evidence. There's substantial evidence in the record to support what you think should be the copyright royalty judge's decision and since it's only one judge, you think that's too deferential. But are you then suggesting that an appellate court do a sort of an independent review of the record?

Mr. RICH. No. Under a clearly erroneous standard, at least if an appellate court is minding its Ps and Qs, Congressman Berman, unless it develops, as I suggested, a firm conviction that the facts which were adduced were erroneous, then it must defer. It still gives substantial discretion to the trier of fact and to judgments about witness credibility. It's far from a de novo standard—I don't advocate that at all—but it is less of an almost automatic kind of "let it pass through if there's any rationale whatsoever" or an objective standard that somebody might have reached this result. That's the standard I construe to be imbedded in H.R. 1417 or close to it. I think that's giving too much discretion, at the extreme, to a single trier of fact. I just think that in our experience as trial lawyers, an appellate court, if it senses something went off the rails factually at the trial in a plenary civil proceeding, let's say, finds enough room in rule 52(a) to find a basis for reversing.

Mr. BERMAN. Well, if I'm looking at a record of a decision made by in this case the copyright royalty judge and I'd have decided it differently, then don't I think he was clearly erroneous?

Mr. RICH. Not necessarily. I've appeared in the Second Circuit in several appeals from ASCAP-type rate-making proceedings and my experience is that those panels are quite deferential to the fact record unless they find something really seriously wrong tended to occur, and I think that rule 52(a), properly construed, on issues of fact, as opposed to law, is still a quite deferential standard but not almost completely deferential, as I think the arbitrary and capricious standard would be.

Mr. BERMAN. Tell me again, Mr. Remington, what do you think the standard should be?

Mr. REMINGTON. Well, I think the standard should be related to what kind of entity you create at the base. There is a relationship between having a solo judge who perhaps does not consult with the Copyright Office and a less deferential standard of review, but as I envision H.R. 1417, irrespective of whether it is multi-judge or single judge, with a consultation with the Copyright Office, an expert agency, it would be entitled to deference on appeal and that deference would be under section 706 of the Administrative Procedures Act, which is what we call arbitrary and capricious. It actually is agency action that is arbitrary and capricious, an abuse of discretion, or other wise not in accordance with law.

That is the standard that was used by the CRT and actually, the current standard of review that we have for appeals from the Librarian is more deferential than arbitrary and capricious. It is what we call arbitrary and capricious squared because there has already been an intermediate appeal. So you are actually downgrading the standard in H.R. 1417 and I would agree with arbitrary and capricious.

Mr. BERMAN. But you think it should be three judges.

Mr. REMINGTON. Yes.

Mr. BERMAN. And consultation with the Registrar.

Mr. REMINGTON. Yes, under appropriate circumstances.

Mr. BERMAN. Well, between the two of you, tell me what—Ms. Peters also talked about this issue of on issues of copyright law the Copyright Office should—I'm not sure if it's be consulted or make decisions. Are the two of you sort of suggesting the same thing here?

Mr. REMINGTON. I think so but I am not sure. There should be some standards for the consultation. It should be on the record. Parties should know about it. It shouldn't be like walking down the hall and getting a glass of water together and saying "How would you come out on this case?" So there should be a little bit more structure in H.R. 1417 and this is an issue that the group that Mr. Garrett alluded to will be getting back to you on in terms of how we think it should be formulated.

Mr. BERMAN. Could I just get Ms. Peters's answer to that?

Mr. SMITH. The gentleman is recognized for an additional minute.

Ms. PETERS. For the Copyright Office, I mentioned in my testimony obviously interpretation of the law and that was the key area. The other place where we think it would be appropriate is if, in fact, the copyright royalty judge was thinking about putting in place rules that affected the procedures of the Copyright Office, whether they were suggesting that a filing be with us or whatever, then it would seem appropriate before they put in place something that affected us, that they would consult with us.

Mr. BERMAN. Explain the context in which interpretation of the law comes up. I mean whether the compulsory license covers that entity? Is that what you mean?

Ms. PETERS. Well, it's come up even when the CRT was around and one of the ones was whether or not satellite carriers were entitled to the cable compulsory license. So it really had to do with who was eligible for that license.

Now it obviously affected us because we actually get the filings of the cable operators who pay the money, and the question was were satellite carriers eligible? So we actually did that ruling and the CRT was fine with it.

We recently did one with regard to whether or not broadcasters had liability and were eligible for a statutory license in the webcasting and that case is still on appeal. It's those kinds of things which we think are fairly intricate and that really need not only to look at the statutory license but the whole law that we thought was appropriate for us to be involved in some way.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Virginia, Mr. Forbes, is recognized for his questions.

Mr. FORBES. Thank you, Mr. Chairman, and I thank all the panel members for being here.

Mr. Rich, I agree with you. I think the standard of appeal should be clearly erroneous and I think that does give us a good balance. I've wrestled with the number of judges, as well, as I think everyone on the panel is wrestling with that and the Members of the Committee. I don't like the idea of a 7-year appointment, though, because I think that exacerbates perhaps our problem a little bit over the 5 years.

Does anybody on the panel have a problem with the method of appointment? Because as the Chairman mentioned here when he talked about the discretion of Federal judges, there is a check and balance at least on that appointment process; in this one there's not. Is everybody comfortable with the way a judge—if we have one judge that's going to be appointed, you don't really have too much screening process there. Anybody object to that or think we should look at that or everybody pretty comfortable with the method of appointing the judge?

Mr. RICH. I would only offer that I think there is always potential concern there and this is not to cast aspersion at all to my left.

Mr. FORBES. No, it has nothing to do with the person doing it.

Mr. RICH. But I think there is a bit, also, of a trade-off between the notion of that and the concept of independence and what true independence connotes and I think—to the recent dialogue between the panel members and the Members about how much consultation there ought to be—I think that has to be carefully controlled, on the record, for all of the reasons—to assure both the reality and the perception that the independence is not simply something which is on paper but in truth there is persuasive ability of the agency which, after all, after 5 years would have the power of reappointment.

Mr. FORBES. Everybody else pretty much concur with that?

Mr. GARRETT, you mentioned about the paper proceedings ought to be extended beyond the small claims. Can you expound on that just a little bit as to your thoughts there?

Mr. GARRETT. Yes, Mr. Forbes. I don't know that there is any detailed type of legislation that one can enact on this. I do think it ought to be the sense of the Subcommittee that the scope of paper proceedings be increased as much as possible, that this should be an issue that ought to be dealt with in greater detail in any rule-making to implement this legislation.

My concern is that as matters stand now, there's sort of a presumption that there's going to be an evidentiary hearing where all witnesses will have to testify in all of these proceedings, be subject to cross-examination. While that is often a very useful approach, it's a very costly approach. It really is the major cost of these proceedings and I think cost is a major concern for the people who participate in these proceedings. Unless one limits the number of instances or reduces to some degree the instances in which you're going to be holding these full-blown adversarial evidentiary hearings, the costs that the clients are most concerned with here are going to continue to escalate.

Mr. FORBES. And I agree with you and maybe rulemaking is where we have to do it, but if any of you have any suggestions on how we can fine-tune that, probably this is the time to get them to us in some fashion.

Everybody seems to concur with the subpoena powers; I think we all do. Any concern about abuse there or you're pretty comfortable with it?

Mr. REMINGTON. I guess I'm the lonely voice on subpoena power. I think that the more power you give a court or a judge outside the judicial branch, the more likely it is that you would run afoul of constitutional issues because article III reserves article III authority to life-time appointed Federal judges and one has to be careful not necessarily about subpoena alone but if you add contempt, subpoena, entry of final judgment, what we know of as article III powers, this court/judge in the legislative branch would be more subjected to constitutional attack.

Mr. GARRETT. Mr. Forbes, I do have some concerns about the subpoena power. The Register said that I supported subpoena power. When the Register says I support something, I feel like I should support it.

Ms. PETERS. If I made a mistake, correct it.

Mr. GARRETT. But I do have concerns because I think there are concerns that are related to the paper proceedings. When you have subpoena power you increase the cost of these proceedings. We have functioned with these proceedings for two decades without subpoena power. I can imagine circumstances under which subpoena power would be helpful, it would be useful and maybe be appropriate, but as a general matter and particularly in the cable and satellite royalty distribution proceedings that have been going on for a number of years without, I think, any serious problems as a result of lack of subpoena power, I don't know that that is the best course and certainly not in all circumstances.

Mr. FORBES. Let me just suggest I think you've given us some good ideas of how we can get balances on this appellate standard versus the number of judges and if you have any suggestions on the subpoena power issue, please get those to us, as well. Once they leave here we have very little control over them.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Forbes.

The gentleman from Virginia, Mr. Goodlatte, is recognized for his questions.

Mr. GOODLATTE. Mr. Chairman, thank you very much for holding the hearing. I don't have any questions.

Mr. SMITH. The gentleman from Florida, Mr. Keller, is recognized for his questions.

Mr. KELLER. Thank you, Mr. Chairman, and no questions.

Mr. SMITH. The gentleman from Indiana, Mr. Pence, is recognized.

Mr. PENCE. Thank you, Mr. Chairman. I just wanted to thank you for calling this hearing on the Copyright Royalty and Distribution Reform. I appreciate your leadership and I have no questions at this time.

Mr. SMITH. Thank you all for your attendance. It turned out we expedited more quickly than I'd thought today and we're not missing any votes.

If there are no other comments or questions by anybody, let me thank—oh, the gentleman from California?

Mr. BERMAN. Can I talk until the bells ring? No.

Mr. SMITH. I don't want to take a chance, Mr. Berman. Do you have a question, Mr. Berman, though?

Mr. BERMAN. Yes, I do.

Mr. SMITH. Okay, the gentleman from California's recognized for a question.

Mr. BERMAN. I'm reminded of—three judges, higher standard of review, one judge, lower standard for review—it reminds me of the story of the debate in the L.A. City Council where the councilman got up and said, "Fluoridate the water? The professor from Harvard says fluoridate. The professor from Yale says don't fluoridate. I don't know what to do." I wish there was some ideological framework in which to decide this issue.

For anyone on the panel, instead of requiring subpoenas and depositions, what if we just left very wide discretion to either the three-judge panel or the one-judge with the higher standard—lower standard of review? In other words, part of this is to get away from the costs and the time-consuming nature of these processes and why not let sort of the facts of the case—let the judge have the power to decide here what makes sense, rather than create sort of guaranteed processes in terms of discovery and subpoenas and live testimony versus paper? Leave it rather loose and let these expert judges—and maybe that's an argument for three; I don't know—make the decision case by case? Any of the panelists.

Mr. RICH. In my own experience, Congressman, I think it's an excellent suggestion. I think that part of the problem that everybody's experiencing is on the one hand, if your rules are so rigid as not to allow, you're going to say it cries out for a subpoena here, where it isn't available. On the other extreme, everybody's saying give the lawyers free reign and everybody will go insane.

The most effectively managed litigations I've participated in, whether or not the Federal Rules of Civil Procedure nominally allow X depositions or whatever, the judge or supervising magistrate judge takes control exactly as you suggest, says what's this case about, here's the time frame we're going to allot to do it, here are the discovery tools we're going to allow, make a good cause showing, if you will, on some areas where it sounds like it's excessive or harassing, and get the process going.

I don't think there is any one-size-fits-all rule that's going to fit all rate distribution proceedings and all rate adjustment pro-

ceedings. The key, I believe and I concur in, is have the flexibility and allow the experienced jurist or jurists to make a case by case judgment about the effective tools to get the best hearing record developed.

Mr. BERMAN. It's only money.

Mr. SMITH. Thank you, Mr. Berman.

We've been joined by the gentleman from Virginia, Mr. Boucher. I don't know if he has questions but if he does he'll be recognized to ask them.

Mr. BOUCHER. Mr. Chairman, I do, but can you give me just a moment to get organized here, having just arrived?

Mr. SMITH. Sure. We'll be happy to.

Mr. BOUCHER. Thank you.

Mr. SMITH. I'll tell you what. I'll give a premature thank you to our panelists today because this has been one of the most informative, most helpful hearings I think we've had on any piece of legislation. You all have offered construction suggestions. We still have a couple of things to work out, particularly the one versus three and the standard, but we'll see what can be resolved to give everybody perhaps just a little bit more comfort level, or we'll figure out some approach that is maybe more acceptable to more of us. But anyway, it's been very, very helpful, I think, to all of us.

In that regard, both Mr. Berman and I have introduced legislation together, so it's a good bipartisan effort on our part and we expect it to work. I should also say that we don't expect to mark up the legislation next week; we'll wait a few weeks and have some suggestions and try to iron out some of the kinks and come up with a good bill in several weeks' time.

If the gentleman from Virginia's ready he'll be recognized for questions.

Mr. BOUCHER. Thank you very much, Mr. Chairman. First of all, let me compliment you and Mr. Berman for assembling the bill that is the discussion of today's hearing, which I think does represent a significant step forward from the present CARP process.

The problem that I see is that it really is related to process only and it doesn't address the standard under which the royalty rate is set. The element of fairness is not made a part of the standard and the element of fairness is a part of the standard for other CARP proceedings. For satellite, for cable radio, fairness is included in the standard that is to be considered.

And I wonder if any of our witnesses have any comment about whether it would be appropriate as we are making this change to also include the element of fairness in the standard for Internet radio. Mr. Rich, do you have a view?

Mr. RICH. Thank you, Congressman. I briefly addressed at the back of my testimony, respectful of the focus of this particular piece of legislation, that very concern. I think that the process can get us only so far. Process can only animate a standard and can only generate results as equitable or inequitable as the standard provides.

In our experience representing the webcasting community in the 112, 114 CARP, significant issues were raised about the kinds of interpretations that have been afforded the willing buyer/willing seller standard and arguably, some very consequential and I would

argue negative results have occurred in terms of the vitality of webcasting as a result of the interpretations that have been given by the panel there and thus far subject to appeal.

I think that I have not heard a good rationale for distinguishing the fairness standard embodied in 801(b) that animates a number of these other compulsory license proceedings as distinct from the 112 and 114 proceedings. I think those proceedings would be measurably improved and the likelihood of equitable outcomes improved if the same standard was imported into those, as well.

Mr. BOUCHER. Well, that is a very eloquent statement and good rationale for us to change the standard while we're changing the process.

Does anyone else want to comment and would anyone like to defend having a separate standard based on willing buyer/willing seller for Internet radio, realizing that there's really only one seller in the market and that person has the ability to set the price based on the lack of any competition from the seller's standard? Mr. Garrett?

Mr. GARRETT. Thank you, Mr. Boucher. My experience has been in representing copyright owners for a number of years, so I approach your question from that perspective. And in my judgment, the fair market value standard that was applied in the webcaster proceeding that's also apparent in section 119, the satellite carrier compulsory license, is the appropriate standard.

I think that fair market value inherently captures the notion of fairness. There's nothing unfair in my judgment about having users of copyrighted works pay fair market value. I think that should be the standard that would apply to all of the compulsory licenses.

We in this country often find it necessary to appropriate real property for public uses. That's certainly accepted in our system here and when we do that, we accord the owners of that real property fair market value for what it is that has been taken in the greater public good and in my view, copyright owners should not be entitled lesser compensation. Thank you.

Mr. BOUCHER. Well, Mr. Garrett, let me ask you this. Does that standard really work, though, when you only have one seller of the product? And in this case the RIAA is the only seller of the product. There are just not a sufficient number of transactions in the market from which to derive real value based on willing buyer/willing seller. How do you respond to that?

Mr. GARRETT. I think it's a decision that has to be made on a case by case basis. That's what we devote 15,000 pages of record trying to establish. What is fair market value? What would the willing buyer, what would the willing seller be doing?

I think it's a difficult standard to apply but courts, of course, have been applying it for years and years and years in a variety of contexts. I don't think it's just a matter of what one organization is doing. There's a lot of evidence out there to show what willing buyers and what willing sellers would do in the marketplace.

Mr. BOUCHER. But not in these particularly circumstances where you have such a limited number of transactions.

Mr. Rich, briefly, would you like to respond to what Mr. Garrett has said?

Mr. RICH. I think the problem is there's an overwhelming weight placed presently on any CARP panel to give weight to supposed marketplace evidence. No matter that it's a single buyer out there represented by a powerful collective, the statute contemplates giving weight to voluntary license agreements and this is what happened in the last CARP. It became a physical impossibility for the panel to ignore the entirety of these license agreements, even though without the aid of subpoena power, it was even, we thought, reasonably evident that these were transactions profoundly affected by the weight and market power of RIAA. And I think without statutory reform, that experience unfortunately, I think in terms of market outcome, is likely to replicate itself in other CARP-type proceedings.

Mr. BOUCHER. Okay, Mr. Rich, Mr. Garrett, thank you very much.

Mr. Chairman, it just seems to me that the basis has been made for us to give serious consideration not just to changing the process but also to changing the standard under which these rates are determined and as this measure moves the mark-up, I hope we can have further discussion about that.

I see Mr. Berman is smiling. Would you like for me to yield to you, Mr. Berman?

Mr. SMITH. The gentleman from Virginia is recognized for an additional minute.

Mr. BOUCHER. Thank you.

Mr. BERMAN. I thank the Chairman and I thank the gentleman for yielding.

Staff advises me that cable license is not a fairness standard; it's if the parties haven't negotiated it, it's a cost of living increase. My guess is there are a lot of programmers who would like to move to a fairness standard from the cost of living cap in the context of the cable compulsory license. I mean this thing works many different ways.

The only other point, this is the problem. We can get into fascinating and interesting and I think legitimate debates but the CARP process was not connected to it. If I recall correctly, it certainly wasn't connected to the most recent compulsory license that was litigated and is now on appeal. It was a process that was undertaken.

My fear is if we try to get into the substantive tests of the standard, we will end up with a very interesting discussion and probably educate ourselves on the economics. By the way, there is one competitor to the only seller and that's call the world of piracy and in music it constitutes a certain level of competition these days to people who are trying to find the right price. But that if we get into that debate in the context of this bill, we will end up with a very interesting debate and no move forward.

And even those who feel abused by the current standard can at least be abused in the future cheaper than they've been abused in the past if we can reform this process. Cheaper and quicker.

Mr. SMITH. Thank you for—

Mr. BOUCHER. Reclaiming my time just briefly, I think it is undeniable that the procedural reforms that the bill makes would be helpful to all parties concerned and would substantially reduce the

cost of engaging in the royalty determination process and that is a very good element of the measure. I support that. But it would be a very simple matter to promote the notion of fairness, which would particularly benefit the smaller webcasters, if we simply made the standard exactly the same as it is both for cable radio and satellite radio, and that is found in the statute today. It's 801(b) and fairness is clearly taken into account in both cases and I would just suggest that it should be here.

Mr. Chairman, you've been very indulgent in permitting this discussion and I thank you and apologize for being tardy for the hearing.

Mr. SMITH. No problem. Thank you, Mr. Boucher. I have a hunch we had an indication of future discussion by Members of this Subcommittee.

Ms. Peters, before we adjourn I have a couple of written questions to submit to you. If you could get me answers back within 10 days or so so we can consider them.

And also, let me ask all four witnesses today if you have any ideas on the one versus three judges and on the standards, get those ideas to us, if you will, in the next couple of weeks and we can continue to digest your suggestions.

[The material referred to follows:]

**U.S. House of Representatives**  
**Committee on the Judiciary**  
Washington, DC 20515-6216  
One Hundred Eighth Congress

April 8, 2003

Mary Beth Peters  
Register of Copyrights  
United States Copyright Office

Dear Ms. Peters:

As you will recall, at the end of the Subcommittee hearing on H.R. 1417, I indicated that I would be submitting written questions to you which I would like answered for the record. Please respond in writing by close of business Monday, April 14.

Ms Peters:

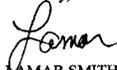
- a.) H.R. 1417 contains, a \$150 filing fee that is pegged to the notice of intent to participate in a proceeding. First, do you think that amount is correct? Second, do you think that joint claimants should be able to continue filing one notice of intent, and thus one filing fee?
- b.) An ongoing point of contention among parties interested in CARP reform, concerns the current standard to be used in determining rates for Sections 112 and 114. First, is there a historical reason why the standard for these licenses differs from the others? Second, do you think that, in the spirit of uniformity, there should be one standard?

Mary Beth Peters  
April 8, 2003  
PAGE TWO

Again, I would appreciate your written response to these questions by close of business Monday, April 14. You may e-mail your answers to the attention of Melissa McDonald of the Subcommittee at [melissa.mcdonald@mail.house.gov](mailto:melissa.mcdonald@mail.house.gov). If you have questions about this request please contact her at 202-225-5741.

Thank you for your participation at the hearing.

Sincerely,



LAMAR SMITH  
Chairman  
Subcommittee on Courts, the Internet, and  
Intellectual Property

LS/mlm

## ANSWERS TO FOLLOWUP QUESTIONS FROM THE HONORABLE MARYBETH PETERS

**a. H.R. 1417 contains, a \$150 filing fee that is pegged to the notice of intent to participate in a proceeding. First, do you think that amount is correct? Second, do you think that joint claimants should be able to continue filing one notice of intent, and thus one filing fee?**

To determine whether the \$150 filing fee is set at the correct level, one must first ascertain the purpose for the imposition of the fee. As I understand it, there are two rationales for implementing a fee: (1) to assist in paying the costs of the statutory license rate setting and distribution process; and (2) to avoid expensive distribution proceedings caused by claimants with little actual monetary stake when the cost of those proceedings far exceeds the amount in controversy.

If the purpose of the filing fee is to offset the costs of the process, the collection of a \$150 filing fee would be woefully inadequate in most cases. In a distribution proceeding, the number of participants in a proceeding ranges from 2–8 participants and would generate very limited fees (between \$300 and \$1200) for the purpose of covering costs in these proceedings. Even in a rate setting proceeding, which typically has more participants, the numbers are not high enough to generate significant revenues. To date, the largest number of notices of intention to participate filed in any single rate setting proceeding has not exceeded 81, and even in that proceeding, only 27 parties actually participated. More telling are the recent numbers for the upcoming rate setting proceeding for webcasters. At this time, we have received 49 notices of intent from parties interested in participating in that proceeding. Had these parties paid a \$150 filing fee, it would have generated only \$7350, a relatively negligible amount in comparison with the costs of the proceeding.

Under these circumstances, I do not believe that a \$150 filing fee would be a significant source of funding for rate setting or distribution proceedings. In order to serve such a function, the filing fee would have to be increased to a prohibitively high amount, which would probably deter participation by parties who ought to be able to take part in the process. Because participation in the rate setting and distribution process should not depend on one's ability to pay, I have recommended that the costs of the system be paid for out of newly appropriated funds.

On the other hand, requiring each party to a joint claim to pay the \$150 filing fee could result in substantial revenues in some distribution proceedings. [Joint claims arise only in the context of distribution proceedings.] The greatest number of joint claimants to participate in any proceeding to date is 1,184, in the cable distribution proceeding for the year 2000. Requiring each of those joint claimants to pay a \$150 filing fee would have yielded \$177,600 ( $\$150 \times 1,184$ ). However, the reasons to resort to a filing fee to defray costs are weaker in distribution proceedings than in rate setting proceedings, since there is a royalty pool from which costs can be deducted. Moreover, I believe that many of the individual claimants who are represented jointly in distribution proceedings have relatively small claims—some perhaps worth less than \$150. Requiring those claimants, who are united in interest and representation with a number of other claimants, to pay \$150 each strikes me as unfair and unnecessary.

Moreover, if one were to charge a separate fee for each joint claimant, one would have to consider the situation of performing rights societies (ASCAP, BMI and SESAC), which may have tens of thousands of members. If each member of a performing rights society were to be considered a joint claimant, imposing a filing fee of \$150 per joint claimant would be prohibitive and unfair. Under current practice, a claim filed by a performing rights society is considered a joint claim, but the society is not required to list all of its members as claimants for purposes of filing claims for the section 111 cable compulsory license or the section 119 satellite compulsory license. See 37 C.F.R. §§ 252.3(b)(2), 257.3(b)(2). If a decision were made to require a separate filing fee for each joint claimant, some special provision should be made to exempt performing rights societies or to modify that requirement as applied to them.

If the purpose of the fee is to deter small claimants from insisting on full distribution proceedings, perhaps for motives having little to do with ascertaining the appropriate distribution, when the amount in controversy is insignificant, the \$150 filing fee seems reasonably calculated to meet this objective. However, there may be better means of addressing this issue, such as permitting streamlined procedures for small claims.

**An ongoing point of contention among parties interested in CARP reform, concerns the current standard to be used in determining rates for Sections 112 and 114. First, is there a historical reason why the standard for these**

**licenses differs from the others? Second, do you think that, in the spirit of uniformity, there should be one standard?**

Over the years, Congress has created a number of statutory licenses, with various standards for determining statutory royalty rates. I believe that, in principle, the same standard should apply to the determination of royalty rates for all the statutory licenses.

The Copyright Act of 1976 included four compulsory licenses. For three of those four licenses, the statute itself set the rates, subject to adjustment. For example, Section 111 provides for a cable compulsory license and sets royalty rates based upon a proposal that was negotiated by the cable and motion picture industries, the two industries most affected by the new license. H.R. Rep. No. 94-1476, at 90 (1976). Adjustments to these rates are done in accordance with specific standards set forth in the statute, which were for the most part the product of an agreement between cable and copyright owners. *Id.* at 173. Those standards, found at 17 U.S.C. § 801(b)(2), provide for adjustment of rates “to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber.”

As originally enacted, section 115, the mechanical license for making and distributing phonorecords of musical works (expanded in 1995 to include digital phonorecord deliveries), provided for a fixed rate of 2¾ cents per musical work (or ½ cent per minute for longer recordings). Section 801(b) provided for rate adjustments by the Copyright Royalty Tribunal (CRT) based on four factors:

- (A) To maximize the availability of creative works to the public;
- (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Section 116, the jukebox compulsory license, provided for a royalty of \$8 per year, subject to adjustment by the CRT based on the same standards set forth in section 801(b).

However, with respect to Section 118, the compulsory license regarding the use of certain copyrighted works by noncommercial broadcasters, Congress took a slightly different approach, instructing the Copyright Royalty Tribunal to set “reasonable terms and rates of royalty payments.” 17 U.S.C. § 118(b) (1978). The legislative history indicated that the CRT should set “reasonable rates” that would “assure a fair return to copyright owners without unfairly burdening public broadcasters.” H.R. Rep. No. 94-1476, at 118. In doing so, the rate setting body is expected “to consider both the general public interest in encouraging the growth and development of public broadcasting, and the ‘promotion of science and the useful arts’ through the encouragement of musical and artistic creation.” *Id.*

Congress formulated yet another standard for setting rates applicable to the emerging satellite industry in 1988 with the passage of the “Satellite Home Viewer Act of 1988.” In this case, Congress instructed the arbitration panel responsible for setting the rates to consider three factors in addition to the four objectives used to determine rates for the licenses in sections 115 and 116. These three factors were the rates cable systems paid for the right to retransmit broadcast signals under the section 111 license, fees established under voluntary licenses filed with the Copyright Office, and the last fee proposed by the parties. In 1992, these criteria were used to readjust the initial rates set by Congress for use of the section 119 license, but in the case of both the superstation and the network rates, the panel apparently tied the rate to the average cable cost without due consideration of the other factors. See H.R. Rep. No. 103-703, at 7 (1994). When Congress considered the reauthorization of the Satellite Home Viewer Act in 1994, it changed the standard for setting the satellite rates, indicating that the rate was to be set based on fair market value. Moreover, it made clear that cable rates would be merely one of the considerations for setting the rates and not the benchmark for setting the rates for retransmissions by satellite carriers. While fair market value is still technically the standard (see 17 U.S.C. § 119(c)(3)(B)), the Satellite Home Viewer Improvement Act of 1999 reduced the rates by 30% to 45% following the one rate adjustment proceeding under the fair market value standard.

In 1995, Congress again adopted the criteria set forth in section 801(b)(1) of the Copyright Act as the basis for establishing rates for the newly created statutory digital performance license, 17 U.S.C. § 114(d), and the new statutory license for making digital phonorecord deliveries, 17 U.S.C. § 115. The legislative history, however, does not shed much light on Congress' rationale for adopting this standard for these licenses. Subsequently, Congress amended the section 114 license in 1998 to include eligible nonsubscription transmissions and established a different standard for setting the rates for those transmissions, namely, "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." 17 U.S.C. § 114(f)(92)(B). Again, the legislative history does not give any reasons for adopting the new standard and only states what the standard is and the factors that the panel should consider in making its determinations. See H.R. Rep. No. 105796, at 86 (1998) and the Section-by-Section Analysis of the H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, Committee Print, Serial No. 6, 105th Cong., 2d Sess., at 58-59 (1998).

Although, as indicated, Congress has established a variety of standards for setting and adjusting royalty rates for the various statutory licenses, it is difficult to glean any rationale for the differences in the standards, with the possible exception of the "reasonable rates and terms" standard of section 118, which may reflect a solicitude for public broadcasting, which has more limited resources, serves a public interest and "does warrant special treatment in certain areas." H.R. Rep. No.94-1476, at 117 (1976).

Whether rate setting for all the statutory licenses should be subject to the same standard is a question that probably would require considerable study, and I am not in a position to express a view on that question today. I will note that in 1997, in my Report to Congress entitled "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals," I recommended that the rates for the section 111 cable compulsory license and the section 119 satellite compulsory license be comparable, and that the section 111 rates, like the section 119 rates, be based on fair market value. However, I am not prepared to say at this time that I would recommend that all the other statutory licenses that are not currently based on fair market value be changed to a fair market value standard.

I believe that the debate over the standard for the section 112 and 114 statutory licenses is concerned primarily with the disparity between the rates *within* section 114. Currently, the rates for the section 114 statutory licenses for preexisting subscription services and preexisting satellite services are based on the four factors set forth in section 801(b)(1), 17 U.S.C. § 801(b)(1) (referring to "rates applicable under sections 114(f)(1)(B), 115, and 116"). In contrast, the rates for the section 114 statutory licenses for eligible nonsubscription transmissions (*i.e.*, webcasting) and new subscription services are to be the "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." 17 U.S.C. § 114(f)(2)(B). I see no reason why these rates for very similar kinds of activity should be based on different standards, and I would favor amendment of section 114 to provide that the same standard (whether it be the section 801(b)(1) standard or the fair market value standard) applies to all of the statutory licenses contained within section 114. Similarly, the standard for the section 112(e) statutory license, which is applicable to transmitting organizations entitled to transmit performances of sound recordings to the public under any of the section 114(f) statutory licenses, should be the same as the standard applicable to those statutory licenses.

With that, let me thank all Members for their presence today. We actually had eight Members here at one time or another, another good turn-out, and we stand adjourned.

[Whereupon, at 3:04 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

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

Last June, this panel appeared before us to voice its concerns with the current CARP system. People on both sides of the equation, that is the buyers and the owners, are in complete agreement that the current CARP system is very problematic and that a change in the process is in order. Based on that hearing, Chairman Smith, Ranking Member Berman, and I have introduced legislation would make substantial changes to the current system.

We heard the current system, the CARP, is too costly because the copyright owners and users have to pay for the arbitrators. Our bill, H.R. 1417, creates a Copyright Royalty Judge who would be paid by the government to carry out designated functions related to setting royalty rates and distributing royalty fees to copyright owners. This provision should significantly lower the costs to those who require these services.

Another complaint was that the CARP system does not have adequate rules on how to address hearsay evidence at hearings. This bill explicitly requires that the Judge treat hearsay evidence in the same manner that it is treated in federal court.

This bill also alters the terms for which certain royalty rates are in effect. Rates that are determined by the Copyright Royalty Judge will be in effect for five years. This should create some predictability and uniformity for those who rely on the Judge's determinations.

Finally, parties on both sides of the debate argued that the substantive standards that the CARP uses to set royalty rates should be changed somehow. In an effort to reach a compromise and pass a bill that does not alter any substantive rights, this bill changes only the procedure for rate settings and distributions. It does not alter the standards by which those rates are set or the funds are distributed.

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#### PREPARED STATEMENT OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION

On April 2, 2003, the Subcommittee held a hearing on H.R. 1417, the Copyright Royalty and Distribution Act of 2003 introduced by Subcommittee Chairman Smith with Mr. Berman and Mr. Conyers—the ranking Democrats on the Subcommittee and the full Judiciary Committee, respectively. The National Music Publishers' Association (NMPA) welcomes the opportunity to submit written comments in support of the Copyright Royalty and Distribution Act of 2003.

NMPA works to protect and advance the interests of the music publishing industry. With more than 800 members, NMPA represents the leading companies in the industry, from those affiliated with large media companies to the industry's largest and most influential independent music publishers. The Harry Fox Agency, NMPA's licensing affiliate, provides an information source, clearinghouse, and monitoring service for licensing music copyrights and acts as licensing agent for more than 27,000 music publisher-principals, who in turn represent the interests of more than 160,000 songwriters.

As indicated in NMPA's written comments (June 20, 2002) for the hearing record on "The Copyright Arbitration Royalty Panel (CARP) Structure and Process," NMPA supports legislative reforms that promote stability and predictability of results, encourage settlement of small claims, and reduce costs. In order to meet these objectives, NMPA believes CARPs should be replaced entirely with an adjudicative body that is comprised of dedicated professional decision makers, preferably administrative law judges, who have experience in evaluating legal significance, applying

precedent, and can provide institutional expertise. The Copyright Royalty and Distribution Act of 2003 is a significant step in the right direction.

H.R. 1417 replaces CARPs with a full-time Copyright Royalty Judge appointed for a five-year term by the Librarian of Congress and assisted by two full-time professional staff members. As indicated above, NMPA supports this type of change. Establishment of a full-time dedicated Copyright Royalty Judge will instill efficiency, consistency, and credibility to copyright royalty rate setting and distribution proceedings. Copyright law is often unique, complex, and arcane—it requires familiarity with antitrust law, statutory licenses, economics, evolving distribution channels, and ever changing technology. As such, the ability to evaluate conflicting evidence, to establish and/or apply precedent, and to ensure institutional expertise is imperative—factors that are not adequately addressed by the current CARP procedures, which lead to unpredictable and costly results. In addition to providing stability to proceedings, the five-year term set forth in the bill for the Copyright Royalty Judge will establish familiarity of legal findings among the participants, which could encourage parties to reach settlements instead of employing lengthy and unnecessary litigation strategies.

NMPA also supports the bill's efforts to reduce costs for participants, which in some cases has limited the ability of interested parties to participate. H.R. 1417 provides that the salaries of the Copyright Royalty Judge and his staff are to be paid for from appropriated funds, eliminating enormous hourly fees to arbitrators currently paid by CARP participants. Appropriated salaries coupled with administrative efficiencies of a dedicated entity will significantly reduce costs of all proceedings.

Nevertheless, NMPA believes that it would be constructive to consider expanding the number of full-time Copyright Royalty Judges to more than one Judge. Even if financial limitations require one Judge per proceeding, we are confident that current and future work will justify at least two Judges. Congress has recently created new compulsory licenses and expanded the scope of current licenses. When these licenses are combined with rapidly emerging technologies and the various statutory or regulatory deadlines in each proceeding, we believe there will be enough work to keep at least two Judges busy. At least two Judges are also necessary in the event that a conflict of interest should arise with any one Copyright Royalty Judge. The bill sets forth reasonable qualifications to eliminate financial conflicts of interest by the Copyright Royalty Judge. This goal is laudable, but could have the unintended consequence of limiting the pool of qualified candidates. Given the companies that own copyrights in the United States, it would not be unusual for the judge to be called upon to rule in a proceeding involving a party to which the judge has a disqualifying interest or conflict. Appointment of more than one judge will ensure that any conflicted proceedings could be moved to another judge, as is customary in our state and federal court systems.

NMPA also has concerns that new section 804(b)(2) of the bill could statutorily change the proceeding schedule for setting digital phonorecord delivery ("DPD") rates, postponing the current rate setting schedule until 2007. Currently, the interested parties have agreed that DPD rates are to be adjusted every two years, as allowed by section 115(c)(3)(F). NMPA believes it is unnecessary to change the current DPD rate-setting regime at this time and that doing so only disrupts commercial expectations. We request that the Subcommittee correct these provisions.

Finally, NMPA is not certain that the "small claims" provisions in new section 803(b)(2) will have their intended effect. It is important to minimize the time and expense of adjudicating small claims against royalty pools from which distributions must be made. We suggest clarifying that a "written pleadings only" mechanism may be requested by any interested party in response to a claim of \$500 or less.

NMPA appreciates the opportunity to submit written comments and looks forward to working with the Subcommittee and the full Committee, as well as other interested parties, as H.R. 1417 moves through the legislative process.

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PREPARED STATEMENT OF THOMAS F. LEE

On behalf of over 110,000 members of the American Federation of Musicians of the United States and Canada, I would like to thank the Chairman and distinguished members of this Subcommittee for tackling the problem of CARP reform. Recording artists—including well-known royalty artists and less well-known background artists—are, by statute, entitled to 50% of the net proceeds of Section 114 digital performance license fees. As a result, the AFM's professional recording musician members, both "featured" and "non-featured," have important interests in the Copyright Arbitration Royalty Panel process. In order to represent their interests,

the AFM participated in the recent webcaster CARP proceeding that garnered so much public attention and resulted in such little public or party satisfaction. My comments on the Copyright Royalty and Distribution Act of 2003 reflect the interests of recording artists and the AFM's experience of the CARP process.

The Copyright Royalty and Distribution Act of 2003 contains a number of extremely important positive changes. We believe that it would benefit from a few modifications, not to its fundamental structure but to details of its functioning. Again, I thank the Subcommittee for the thoughtfulness and hard work that is represented by this draft legislation. This Statement consists of initial comments regarding this complex initiative. It does not pretend to contain a comprehensive analysis of the bill.

#### A. COST ISSUES: FUNDS FOR THE PROCESS AND LIMITS ON THE PROCESS

As the AFM indicated at the Subcommittee and Copyright Office Roundtable on CARP reform held on July 29, 2002, the reduction and control of the costs of participation in ratesetting proceedings is a critical goal of any reform. Only the reduction and control of the costs of participation will protect the access of small parties and artists to the proceedings that affect their businesses and livelihoods.

##### 1. Publicly Funded Process—the Decision-maker

Like the Register of Copyrights, we understand H.R. 1417 to require that the decision-maker in CARP proceedings—the Copyright Royalty Judge—as well as two professional staff members be paid out of appropriated funds. We agree with the Register and others that this is a critical and positive change from the current system, which requires the participating parties to pay large per-hour arbitrator fees for ad hoc panels of three private arbitrators.<sup>1</sup> The obligation to pay substantial arbitrators' fees imposes a significant barrier on the participation of small and/or non-profit entities who nonetheless have legitimate interests in the proceedings and whose dissatisfaction may severely undermine the credibility of CARP decisions. Thus, the change to a publicly-funded process is of the first importance.

##### 2. Publicly Funded Process—Other Costs

For the same reason that we applaud the change to a system in which the decision-maker is paid with appropriated funds, we have concerns about the way in which Section 803(e) handles other costs of rate-setting proceedings. We echo the Register's view that the costs of proceedings should be paid for out of appropriated funds. If the costs contemplated in the statute are more than minimal, they may act as a harmful barrier to participation in rate-setting proceedings on the part of small or non-profit entities that have important interests in the proceeding but do not have funds that they can put at risk to pay extensive costs they cannot control.

In this regard, we find particularly problematic the provision in Section 803(e)(1)(A) that requires costs in excess of the filing fees to be deducted from 1 percent of the royalty fees collected under the relevant license before the royalty fees are distributed to beneficiaries of the license. In rate-setting proceedings, at least, we believe that this provision creates a fundamental unfairness. If the decision-maker's costs in such proceedings must be paid by private parties rather than out of appropriated funds, then those costs should be shared relatively evenly by users of the statutory license, on the one hand, and beneficiaries of the statutory license, on the other hand. However, Section 803(e)(1)(A) does something quite different. The portion of the costs that is deducted from royalties would be paid wholly by the beneficiaries of the license, so that they bear a disproportionate share of the costs of the proceeding. For example, in a rate-setting proceeding under Section 114, the costs deducted from license revenues would be paid totally by performers and copyright owners. There is no basis for imposing that portion of the costs completely upon performers and copyright owners, and sparing licensees from sharing any part of them.

Finally, the provision in Section 803(e)(1)(B) that requires any remaining costs to be borne by the parties in rate-setting proceedings "in equal proportions" also will tend to work an injustice and discourage participation by small and non-profit parties, particularly to the extent that such costs become substantial. Assuming that the decision-maker's costs are not paid from appropriated funds, and assuming further that those costs are split relatively evenly between users and beneficiaries of

<sup>1</sup>We also agree with the Register that moving the decision-making function from ad-hoc private panels to a permanent Copyright Royalty Judge will improve the stability of the process as well as the credibility and predictability of its results. Like some other commenters, however, we wonder whether one judge is sufficient or whether, instead, decisions should be reached by panels of three judges.

a license, the further breakdown of cost distribution on each side should be proportional to each party's participation in the proceeding rather than on an equal or per capita basis. A small party may desire to participate by introducing very limited evidence on an issue of deep concern to it—and that party's participation may be extremely valuable to the proceeding (and to the public's perception of fairness in the proceeding). But if that party is at risk for paying a per capita share of costs that are run up by large parties with a propensity to keep expanding the litigation, it will be deterred from participating at all.

### 3. *Keeping the Process Limited to Keep the Costs Limited*

The kinds of expenses that appropriately can be borne by public funds—the salaries and costs of the decision-maker and staff—are only a part of what has made recent rate-setting CARPs so expensive. Each party's own attorneys' fees and costs also can be extremely significant. That certainly was the case in the recent webcasting CARP. Were pre-trial and discovery procedures to expand and become more like those in the federal district court litigation model, that would exponentially increase the parties' litigation costs, with the inevitable consequence that small parties and artists will be deterred from participating. We do not believe that full-scale, federal district court discovery rules will enhance the credibility or soundness of the decisions in rate-setting proceedings. Indeed, no decision ultimately will have much credibility with individuals, small licensees, small licensors or the general public if small but significant stakeholders cannot afford to participate. Although H.R. 1417 is not clear about which precise changes to discovery will be imposed by new rules to be established, we are very concerned that the impetus would be to move in the direction of greater complexity—and greater cost. We think that would be destructive.

Of course, settlements also reduce costs. A formal settlement period with supervised settlement conferences prior to submission of direct cases may be helpful, and procedures should be adopted to facilitate settlements even after direct cases are submitted. However, we question whether the Rule 68 offer of judgement mechanism contained in H.R. 1417 is appropriate for rate-setting proceedings with multiple parties on each side.

#### B. CONTINUING JURISDICTION TO ADDRESS UNANTICIPATED PROBLEMS

We echo the comments of the Register that the law should be clarified to firmly establish that the Copyright Royalty Judge has the power to correct errors in the determination of rates and terms, or to address unanticipated problems that arise, during the terms of the license periods covered by his or her decisions. Particularly with regard to licenses under Section 114, technology is changing, business models are evolving, and the distribution mechanisms covered by the license terms are new. The Copyright Royalty Judge should have continuing jurisdiction so that affected parties can seek resolutions to unanticipated problems in a timely fashion.

#### C. INTERIM PAYMENTS

We also agree with the Register that H.R. 1417 should include a clarification that establishes that licensees must continue to make license payments during a new license period even if the determination of the new rate for that period still is pending. It makes no sense, and Congress cannot have intended, that licensees cease payments at the beginning of a new license period—particularly in light of the fact that Section 802(g) plainly provides that any newly adjusted rate is retroactive to the beginning of the license period.

Moreover, it works a great hardship on beneficiaries of the license for payments to be suspended. In the case of licenses under Section 114, recording musicians and vocalists are entitled to 50% of the license revenue. Most of these artists have modest incomes and depend on combining many different income streams in order to make a living. They should not have to wait unduly for the license payments to which they are entitled under the statute. Nor should their collective, SoundExchange, be hampered in its ability to operate efficiently for their benefit—a disruption which is inevitable if licensees cease making license payments during interim periods while new rate determinations are pending.

#### CONCLUSION

Having a fair, expeditious and reasonably-priced mechanism for establishing license rates and distributing royalty fees is very important to recording musicians.

Again, I thank the Chairman and the Subcommittee for moving forward in this complicated area. The AFM will be happy to continue to participate in the process.

PREPARED STATEMENT OF THE AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS AND BROADCAST MUSIC, INC.

The United States performing right organizations (“PROs”)—the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”)—submit this statement for inclusion in the record of the April 1, 2003 hearing concerning H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003.

We commend the Subcommittee’s interest in, and willingness to address, the virtually universal concern for the current process by which compulsory license rates are set and royalties are distributed. We previously set out our view of the major principles of reform in a letter to the former Chairman of this Subcommittee (the Honorable Howard Coble) dated June 20, 2002.

We are pleased that the time and effort spent on the analysis of the issues that were brought to the attention of the Subcommittee culminated in H.R. 1417, which is an excellent step towards solving the major problems inherent in the current Copyright Arbitration Royalty Panel (“CARP”) process.<sup>1</sup> The bill contains a strong framework for a sound copyright royalty rate and distribution process, one that fosters predictable and consistent decisionmaking in an efficient cost-effective manner. We hope that these comments will assist the Subcommittee in furthering the objectives of the bill and welcome the opportunity to participate in this most important process.

I. INTEREST OF THE PROS.

The PROs 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 users for such performances, in the form of royalties. In addition, through affiliation agreements with PROs in other countries, we license the works of hundreds 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.

A portion of the royalties which writers and publishers receive comes from the Copyright Act’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 Chapter 10 Digital Audio Recording Technology (“DART”) royalty.

The PROs have 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 the Subcommittee’s introduction in 1998 of H.R. 3210. We hope that our comments will assist the Subcommittee in formulating an effective legislative response.<sup>2</sup>

II. COMMENTS ON H.R. 1417.

In our letter of June 20, 2002 to the Subcommittee, we set out our major concerns and suggestions for remedying the present CARP system. H.R. 1417 makes great strides to address effectively each of these concerns. However, we believe that certain of the bill’s provisions require refinement, as follows.

A. *Copyright Royalty Judges.*

The major deficiency of the current CARP process is its ad hoc nature. A permanent adjudicative body is essential for predictable and consistent decisionmaking.

<sup>1</sup> See Hearing on Copyright Arbitration Royalty Panel (CARP) Structure and Process Before the House Committee on the Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, 107th Cong., 2d Sess. 154 (2002).

<sup>2</sup> We adopt the testimony of Michael J. Remington, a witness at the April 1st hearing.

H.R. 1417 seeks to resolve this deficiency through the creation of a single full-time Copyright Royalty Judge (“CRJ”) appointed by the Librarian of Congress, upon the recommendation of the Register of Copyrights, for a five-year term. Under H.R. 1417, the CRJ would be an attorney with ten-plus years of administrative or litigation experience and copyright law knowledge, and would have two full-time staff members, each of whom would have expertise in copyright law and economics.

We agree that a full-time permanent decisionmaking body, with a professional staff, would provide the consistency, predictability and efficiency that the CARP lacks. Thus, we support the basic concept of the CRJ. However, we believe that a single CRJ could not achieve the intended benefits. Instead, we believe a panel of three CRJs is necessary, for several reasons.

First, a single CRJ limits the benefits of continuity. Should the CRJ for some reason need to step down, either at the end of his or her term or prematurely, the years of knowledge and expertise that the CRJ built would be lost. We would be required to start anew with the next CRJ.

This shortcoming may be cured in two ways. We believe that a longer term of seven years would achieve the maximum benefit, particularly when license periods cover at least five years and have terms staggered. More importantly, a three-judge panel, with staggered terms (initially to last three, five and seven years from the appointment of the first CRJs) would ensure continuity in decisionmaking. There would always be one judge, and usually two judges, who would retain the developed expertise and institutional memory necessary for continuity and consistency in decisionmaking for each of the rate setting and distribution proceedings.

Second, a panel of three judges obviates issues of conflict. If one CRJ has a conflict, the other two can still serve. With a single CRJ, a conflict could derail the proceeding completely. The inefficient use of interim judges would then be necessary.

Third, a panel ensures that proceedings continue uninterrupted. With recent legislation, the number of compulsory licenses has increased. A panel of three CRJs would ensure that multiple proceedings continue without delays. Indeed, with the inclusion of small-claim written proceeding procedures, multiple CRJs would permit increased efficiency. For example, a panel of three could hear a large ratemaking proceeding and simultaneously individual CRJs could decide written small-claim proceedings.

Finally, and most importantly, the checks and balances of panels with multiple decisionmakers would lessen the possibility of biased decisions, particularly where the CRJs serve in staggered terms. There is a precedent for such a multi-judge panel in the CRT staggered panel system, which existed when that body functioned and worked well.

With a larger number of CRJs, a marginally larger support staff might be necessary. However, we do not think that the entire support staff need be copyright and economic experts. We suggest that the panel rely on one general counsel, preferably one with copyright or administrative expertise, and one or two administrative assistants. Such a staff would provide the necessary legal and administrative assistance, at a very modest cost.

#### *B. Costs.*

We support the suggestion that the salaries of the CRJs and staff would be paid through appropriated funds rather than copyright royalties. This was the case in the early days of the CRT. But H.R. 1417 would require other proceeding costs to be paid first from filing fees and then from royalties (to a limit of 1%). This is unfair in rate proceedings, as there would be no cost to users.

H.R. 1417 further would have any remaining costs in distribution proceedings paid by the parties in equal proportions. This, too, is unfair, as, for example, a party which occupied 75% of the hearing time and received 75% of the royalties would pay the same amount as a party which occupied 5% of the hearing time and received 5% of the royalties.

To cure these problems, we suggest the following.

*All costs of the proceedings should be paid with appropriated funds, not from royalty funds and not by the parties. None of the parties—neither copyright owner claimants nor users—would have to pay such costs in a free market without compulsory licenses. Congress has concluded that there is a public good achieved by compulsory licenses. That being the case, the public should cover the costs of that public good.*

If the parties are to bear the costs of such proceedings, those costs should be borne equally by the sides in rate proceedings, and in proportion to allocation of royalties in distribution proceedings. But, importantly, the CRJs should be given discretion to allocate costs as the interests of justice dictate (so that, for example, a

small claimant who forces a litigated proceeding and receives a pittance does not escape cost-free).

Finally, we would clarify that joint claimants, such as ASCAP and BMI which each file a single claim on behalf of all their respective members and affiliates, file only one fee. Moreover, in distribution proceedings, one fee would cover both phases to the proceeding.

### C. Procedures.

1. *Decisionmaking.* The current system by which decisions are first made by a CARP, then either approved or rejected by the Librarian of Congress, and finally subject to judicial review, is inefficient. The reports of inexperienced CARPs are often rejected by the Librarian, at times forcing renewed arbitration at greater cost. We support H.R. 1417's grant of independence to the CRJs, eliminating the Librarian's review. For maximum efficiency, the CRJs should have sole and final decision-making power, subject only to appellate judicial review.

We also support the bill's limitation on interaction with the Copyright Office for consultations. However, H.R. 1417 should clearly limit such consultations to issues of law. Issues of fact should be within the sole jurisdiction of the CRJ. Furthermore, legal issues ripe for consultation should be further limited to those interpreting the statutory terms of the license—other legal issues should be within the jurisdiction of the CRJ. Finally, we do not support any type of formal certification procedure as it would inefficiently increase costs. We do believe, however, that all consultations with the Register should be on the record.

2. *Regulations.* We support H.R. 1417's requirement in Section 803 that the CRJ conduct proceedings in accordance with subchapter II of chapter 5 of title 5 (the "Administrative Procedures Act" or "APA"). Regulations governing proceedings should be promulgated by the Register of Copyrights pursuant to administrative rulemaking proceedings as set forth in Section 803(b)(3). Thus, authorizations such as that found in Section 803(a) whereby persons participating in proceedings "may submit relevant information and proposals to the Copyright Royalty Judge" must specifically be permissible only pursuant to the regulations promulgated for such proceedings. H.R. 1417 should clarify this requirement.

Section 803(b)(3)(C) directs the Register to promulgate certain important procedural rules. We offer the following comments on those specific requirements.

*Evidence.* The bill requires that the Federal Rules of Evidence with respect to hearsay shall apply. We disagree with this proposal. The APA is permissive with regards to evidence. Any evidence may be admitted unless it is irrelevant, immaterial or unduly repetitious. The hallmark of administrative hearings is the ability to find facts unimpeded by the stringent Federal Rules of Evidence. This practice should not change. Highly regulated evidentiary hearings will strangle and prolong what should be inexpensive, efficient proceedings. We believe that H.R. 1417 should specifically state that the APA standard should apply—evidence should be admissible unless it is irrelevant, immaterial or unduly repetitious. The CRJs will be able to accord all evidence appropriate weight, and to discount evidence that they judge unhelpful. Again, this was the standard used by the CRT, and it worked well.

Finally, we believe that the CRJ should not possess a broad subpoena right. The effect of such a subpoena power would be to increase the length and expense of a proceeding. We fear that parties would unfairly take advantage of the CRJ's ability to subpoena witnesses and evidence by frequently moving the CRJ to exercise such a right and by requesting information from non-litigating parties.

*Discovery.* Currently, discovery is quite limited, in time and scope. We support the bill's extension of the time limit for discovery to sixty days, although the Bill should clarify that discovery is limited to *not more than* sixty days. However, we do not support any expansion of the scope of discovery beyond what the current rules permit. Added discovery procedures, such as the use of depositions and interrogatories, would not only greatly increase the expense of proceedings, but would offer little in the way of fact-finding benefits in light of a party's ability to cross-examine witnesses at evidentiary hearings. Reducing costs to the parties should be a key goal of H.R. 1417. Expanding discovery will only raise those costs, with no concomitant benefit.

Further, the scope of discovery should be limited to the current practice of discovering documents underlying witnesses' written statements. Thus, the provision in Section 803(b)(3)(C)(ii) that witness lists not be required until the end of discovery is inappropriate. Permitted discovery could only be conducted of witnesses who were already named and who provided written testimony. We suggest that the current procedure is proper: parties submit their written direct or rebuttal cases (which, by definition, include witness lists), and limited discovery relevant to those cases follows.

*Offers of Judgment.* We strongly support the bill's adoption of a required offer of judgment rule as permitted by Rule 68 of the Federal Rules of Civil Procedure particularly for small claims. The purpose of this procedure is to encourage settlement. Should the non-offering party accept the offer of judgment, the claim is settled. However, if the non-offering party fails to accept the offer, that party should suffer the costs (including attorneys' fees) associated with what would be an unnecessary proceeding should that party fail to recover more in the decision on the merits than was offered. In developing an offer of judgment procedure, the Register should consider whether attorneys fees should be part of the offer process and whether conforming amendments to the Copyright Act would be necessary. This procedure creates an incentive for a party to accept an offer of judgment and settle the claim, for if the party does not it will bear the other parties' costs.

H.R. 1417 attempts to set out this rule in Section 803(b)(3)(C)(iii). But we do not believe that the bill, as drafted, quite meets the objective. As drafted, the bill merely suggests a method for accepting an offer. It does not provide remedy for a failure to accept an offer when the offer meets or exceeds the award. We suggest a reworking of H.R. 1417 to follow the procedure of Rule 68 of the Federal Rules of Civil Procedure. And, in that regard, the offering party need not offer an amount that is at least as much as the claimed amount. Otherwise, parties (particularly small claimants) would inflate their claims to force an unreasonable offer of judgment. The offering party should be able to choose the offer without regard to the actual claim. Finally, the procedure should be limited to distribution proceedings.

#### *D. Small Claims.*

Under the current CARP system, a party in a distribution proceeding 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—who typically appears pro se and so does not even incur attorneys' fees—has no incentive to settle. The cost of the case has to be borne by the larger parties who are forced to a full arbitration by a claimant with an insignificant claim. Abuses of the process by small claimants have occurred with alarming frequency. 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. 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 (including Copyright Office costs deducted from the royalty pool) for a final award to the individual claimants totaling *six dollars* for four cumulative royalty funds! And, with the Copyright Office moving to an on-line claim filing system (currently used with DART filings), the occurrence of small claims will surely increase.

We previously proposed a number of changes in this regard that would encourage settlement and promote efficiency for all parties, including the establishment of a filing fee, requirement of settlement conferences and paper proceedings. H.R. 1417 attempts to lessen the small claimant problem by (1) the establishment of a \$150 filing fee and (2) permitting the small claimant to elect an alternative written case procedure. A small claimant (defined as one with a claim under \$500) can avoid the \$150 filing fee by agreeing to decide the controversy on the basis of written filings. We applaud the Subcommittee's efforts at resolving the small claimant problem. However, H.R. 1417 may unintentionally make matters worse.

First, we believe that H.R. 1417 sets the small claim threshold too low. We support an increase to the small claim threshold from \$500 to \$5,000. In our experience, most claims of substance fall above the \$5,000 threshold.

Second, H.R. 1417 permits the small claimant to make the decision of whether to pay the fee or have a written proceeding. In our experience, the small claimant will rarely, if ever, elect to have its case determined on written pleadings, even if a \$150 filing fee is involved. Sometimes the small claimant is motivated to file a claim to harass larger claimants for matters not associated with the arbitration. Accordingly, the election to have a written proceeding where claims are below a set threshold should be either automatic or made possible by any interested claimant.

Next, the small claims procedure should rightly be available only in distribution proceedings—it is, after all, a procedure for *claims* to royalties, not the setting of royalty rates.

Finally, should the Subcommittee decide to keep the threshold at \$500, we suggest that some consideration be given to modifying the filing fee. Because, as we suggest, H.R. 1417 should allocate costs to the parties in distribution proceedings pursuant to their shares, the small claimant could force a full-blown proceeding by expending merely \$150. The claimant need only claim an amount just over \$500 and for \$150, could force an expensive evidentiary hearing, the costs of which will be borne by the other parties. For example, the arbitrators' costs in the 1992–1994 DART proceeding which awarded a total of just over \$10 to two individual claimants were more than \$12,000. Similarly, in the 1995–1998 DART proceeding, the costs for the arbitrators exceeded \$20,000 for a total award to the same two individual claimants in the amount of \$6.06. These costs did not include Copyright Office expenses, which are deducted from the fund, and attorneys fees expended by the other claimants which can reach or exceed \$100,000, particularly when the individual claimant appeals the determination to the U.S. Court of Appeals, which has occurred in a number of past proceedings. Instead, we suggest that the Subcommittee consider, among the several options we have suggested above, increasing the filing fee to \$500 in all cases, with claims under that amount subject to election of paper proceedings. We also suggest that the Register, in exercising rulemaking authority, consider the possibility of sanctions being imposed for frivolous, or inflated, distribution claims. These measures would discourage parties from inflating their claims above \$500 to avoid written proceedings.

Finally, settlement conferences should be required for all proceedings.

#### *E. Review.*

We fully support the bill's requirement that appeals of the CRJs' decisions be made directly to the U.S. Court of Appeals for the District of Columbia. We, however, have an issue with regard to the standard of review. H.R. 1417 tracks current language in the Copyright Act. However, the current "arbitrary manner" standard applies to a two-level review setting. Currently, the Librarian reviews the CARP report and must adopt the determination unless it is "arbitrary or contrary [to law]." The U.S. Court of Appeals for the District of Columbia Circuit then reviews the Librarian's decision only if it finds that the Librarian acted in an "arbitrary manner." The confusion of this double-arbitrary standard was discussed by the D.C. Circuit in *NAB v. Librarian of Congress*, 146 F. 3d 907 (D.C. Cir. 1998). There, the court found that while the Librarian's standard of review tracks that of the Administrative Procedures Act, 5 U.S.C. 706(2)(A), the court's standard of review was much more circumscribed. Accordingly, because H.R. 1417 drops the Librarian's review, it appropriately changes the standard of review given the U.S. Court of Appeals to the standard that the Librarian currently maintains—the "arbitrary and capricious" standard of the APA. Indeed, this was the standard of review given the Court of Appeals when it was the only level of review of CRT decisions prior to 1993.

We support the "arbitrary and capricious" standard over less deferential standards such as that found in appeals to Federal courts of appeal under the Federal Rules of Civil Procedure. First, the conferred decision of a three-judge panel, which we support, would lend to more sound decisions that should be given increased deference over decisions made by a single judge. Second, higher deference is appropriate when the CRJ can consult with the Copyright Office, the expert agency, on certain issues, as discussed above.

### III. CRITERION FOR RATEMAKING.

At the very conclusion of the April 1, 2003 hearing, Congressman Boucher suggested that scope of H.R. 1417 should be expanded to deal not only with the process and procedure of compulsory license ratemaking, but the substance of it as well. He suggested that the criterion to be applied in ratemaking proceedings be one of "fairness." It was unclear whether he was speaking of all ratemaking proceedings or only those under sections 112 and 114 for webcasters. He particularly objected to the "willing buyer/willing seller" criterion of the current law in those sections.

With all due respect, we believe this suggestion is both a bad idea on the merits and a sure way to derail any CARP reform. Congress very carefully considered the criteria it adopted in each of the compulsory licenses and, as pointed out by the Ranking Minority Member, Howard Berman, at the hearing, those criteria vary among the different compulsory licenses. As both the Chairman and Ranking Member noted, if H.R. 1417 is not limited to process and procedure, the result will be an interesting discussion, but no legislation.

IV. CONCLUSION.

Mr. Chairman, we applaud you and the sponsors of H.R. 1417, the Subcommittee, and its staff, for the excellent first effort at CARP Reform. With further improvements along the lines we suggest, this is legislation we can enthusiastically support.

LETTERS FROM JOHN S. ORLANDO ON BEHALF OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

April 8, 2003

The Honorable Lamar Smith  
Chairman  
Subcommittee on Courts, the Internet  
and Intellectual Property  
B-351A Rayburn House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Smith:

On behalf of the National Association of Broadcasters, I am pleased to submit our testimony regarding H.R. 1417, The "Copyright Royalty and Distribution Reform Act of 2003," and thank you for holding the record open.

NAB looks forward to continue working with you and the entire Committee on this very important piece of legislation. We appreciate your leadership on the issue of CARP reform.

Sincerely,

John S. Orlando

cc: Congressman Howard Berman

April 8, 2003

The Honorable Howard Berman  
Ranking Member  
Subcommittee on Courts, the Internet  
and Intellectual Property  
B-336 Rayburn House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Berman:

On behalf of the National Association of Broadcasters, I am pleased to submit our testimony regarding H.R. 1417, The "Copyright Royalty and Distribution Reform Act of 2003," and thank you for holding the record open.

NAB looks forward to continue working with you and the entire Committee on this very important piece of legislation. We appreciate your leadership on the issue of CARP reform.

Sincerely,

John S. Orlando

cc: Congressman Lamar Smith

## LETTER FROM BENJAMIN F.P. IVINS, ESQ.

The Honorable Lamar Smith, Chairman  
The Honorable Howard Berman, Ranking Minority Member  
House Subcommittee on Courts, the Internet and Intellectual Property

Dear Sirs:

We were pleased to attend the hearing your Subcommittee held on April 1, 2003, concerning H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003. We applaud your efforts to obtain the views of the Register of Copyrights and other witnesses experienced in proceedings involving the Copyright Arbitration Royalty Panels ("CARPs") on the bill, and we greatly appreciate your having offered the opportunity to interested parties to supplement the record of the hearing. NAB, on behalf of America's broadcasters, who participate in a significant majority of CARP proceedings, supports your intention to address CARP concerns through legislation. We believe that H.R. 1417 is a strong step in the right direction, and we look forward to working with you and your Staff to improve the bill and move it towards passage.

As a starting point, we agree on the need for CARP reform. Specifically, CARP proceedings are too costly, the dual role of the Copyright Office in the CARP process introduces unnecessary complication and duplication of effort, and many structural and procedural aspects of the CARP process create uncertainty rather than predictability. Contrary to its original intent, this framework inhibits voluntary resolution of disputes, and promotes costly and excessive litigation.

NAB has participated on behalf of U.S. commercial broadcasters, as copyright owner claimants, in all Phase I cable royalty distribution proceedings before the CARPs and their predecessor, the Copyright Royalty Tribunal, beginning with the 1978 case. We are currently engaged in the latest of these cases, covering the 1998-1999 cable royalties, in which hearings are scheduled to commence before a CARP on April 24, 2004. Despite the fact that the Phase I copyright claimant parties are thus locked in a dispute with each other over substantial royalty funds, we all have participated in a series of meetings attempting to develop consensus positions with respect to numerous aspects of H.R. 1417. The copyright owner parties believe it is critical that the provisions of the bill reflect the collective experience of the parties who have participated for so many years in these distribution proceedings, and hope that our consensus views will prove helpful in improving the bill and moving it forward.

Those distribution-party consensus positions are being submitted separately. We will not repeat the same points here, although they are among the most important issues regarding the provisions of the bill. In these supplemental comments, NAB wishes to point out several additional aspects of the bill that it strongly believes should also be modified.

Before addressing our specific points, we note in general that the bill appears to make no distinction between royalty distribution and royalty ratemaking procedures.

There are substantial differences, however, between the purposes, potential impact (in terms of affected parties), and history and precedent of the two types of proceedings. These important differences suggest that certain processes and procedures appropriate for one may not be at all suitable for the other. For example, there has been a 25-year-plus history of cable royalty distribution proceedings among essentially the same participants, in which a substantial body of precedent and practice has been established. This experience contrasts sharply with the recent Section 114 proceedings designed to establish for the first time a rate for a new compulsory license, affecting potentially thousands of parties who were unable to participate in the proceeding. The scope of discovery procedures that might be appropriate for the latter type of proceeding might be neither necessary nor appropriate for the former.

Following are NAB's supplemental specific comments on the bill:

1. It is unnecessary to provide for the appointment of two full-time professional staff members to assist the Copyright Judges, as is currently provided in Section 802(b) of the bill. NAB strongly supports the distribution-party consensus proposal to appoint three Copyright Judges rather than one, and the savings resulting from the elimination of the professional staff may substantially offset the additional appropriations necessary to add two judges.

Moreover, there is no need for professional staff with substantive expertise. The Judges will be more than capable of understanding the economic and business issues presented in a royalty distribution case. Just like countless other judges in courts and agencies across the land, they will be provided by the parties with expert testimony and evidence that will help them understand any scientific or analytical issues in the particular case. It will be in the parties' strong interest to present evidence that is completely comprehensible. And the Judges will have no need for independent experts to help them test evidence they have received, since in a contested distribution case the opposing parties will do a thorough job of exposing any flaws in the testimony through their own expert witnesses and evidence. (This is unlike the situation in some administrative agencies, where the agency may be responsible, for example, for vindicating the interests of the public, who may not be represented other than through the agency's own economists or professional staff.) Especially because the bill would replace the current ad hoc panel system with Judges appointed for multi-year terms, any perceived initial expertise gaps would soon dissipate, without the need for additional permanent staff. It is far more important to have two additional Judges than to have two full-time staff.

In any event, the current language of Section 802(b) regarding the required qualifications of the proposed staff appointees is highly problematic. Requiring expertise in "copyright law and in the business and economics of industries affected by the actions taken by the Copyright Royalty Judge" would invite inevitable conflicts of interest, given the wide range of industries whose interests are affected by CARP decisions. Moreover, the expertise literally required is not

legal expertise or expertise in the science of economics, but actual experience in the industries as to which the Judge would be making decisions involving substantial sums of money. These distribution cases often pit one "industry" against another. The perceived bias in a system in which the Judge's staff member was effectively required to come out of one of the industries affected by a significant decision would seriously undermine the credibility of the process.

2. The current language of Section 803(c), which potentially extends the time within which a decision must be rendered, also raises a concern. The parties generally have an interest in a definite deadline for the completion of a case, both to limit the time spent in expensive hearings and to expedite the final decision that will result in the distribution of their royalty funds. Section 803(c) would retain the 6-month period within which cases are currently resolved (presumably measured, as currently, from the commencement of the hearing rather than the filing of direct cases), but would also allow the Judge, in the alternative, to extend the time period to a full year. There is no apparent reason, even if the Judge finds an extension "necessary," why the time should automatically be doubled rather than merely extended only as much as is actually necessary.

Moreover, it seems likely that there will be far fewer occasions in which the Judges would feel an extension is necessary than may be the case under the CARP system. The Copyright Judges will be experienced in the particular proceedings, they will have become familiar with the parties' cases in advance of the hearing by managing discovery, and the three-judge structure will provide them some flexibility to share decision-writing responsibilities. If there is some perceived need nonetheless to extend the time, NAB suggests, instead of the current Section 803(c), that the bill set a new single time period of 7 months rather than the quantum leap from 6 months to 12 months. Alternatively, the time periods might be set in segments, such as requiring that the record must be closed within 4 months or 5 months after the hearing commences, and that the decision must be issued within 2 months after the close of the record. Limited extensions could be granted, but only upon "good cause shown" or even upon a showing of "unusual or extraordinary circumstances." In any event, the bill should not double the time it already takes to receive an initial decision in a distribution case.

3. The change proposed in Section 803(e)(1)(B) of the bill, modifying the current system of sharing costs in distribution proceedings, would create serious inequities. Currently, the statute provides that in ratemaking proceedings, the parties bear costs "in such manner and proportion as the arbitration panels shall direct," and that in distribution proceedings, the parties bear costs "in direct proportion to their share of the distribution." 17 U.S.C. § 802(c). This cost-sharing system, which NAB believes was agreed to by all parties at the time it was adopted, has worked equitably for a number of years. The change in the bill, to require that excess costs of distribution proceedings be borne "by the parties to the proceedings in equal proportions," introduces a substantial and unjustified potential inequity.

For example, in the current cable royalty distribution proceeding, MPAA, the party historically awarded the largest single share of royalties, has proffered ten witnesses and two substantial quantitative studies, and is scheduled to consume seven days of hearings. By contrast, the Canadian Claimants, who have previously been awarded the second-smallest share (less than one percent), will present half as many witnesses and are scheduled to complete their direct case in only three hearing days. The splitting of any significant costs in equal shares would work a substantial inequity on the Canadian Claimants group, for which an equal dollar amount represents a much larger share of their potential royalty award. For the entire history of the cable distribution proceedings, over 25 years, any costs of the CARPs and the Copyright Royalty Tribunal assessed against the parties have either been shared directly in proportion to royalty shares or been paid "off the top" and thus indirectly in proportion to royalty shares. There is no reason to change that system now. Our serious concern is that the proposed change would result in a windfall to the largest cable royalty share awardees at the expense of the smallest. NAB believes the current statutory scheme should be retained.

4. Settlements reached by some or all of the parties to a properly instituted proceeding -- as to which due process considerations have been met -- should be implemented, not thwarted. Recently, a number of broadcasters expended considerable time and effort on a proposed settlement that would have resolved a substantial portion of a CARP ratemaking proceeding, only to see those efforts evaporate because of the perceived need to prematurely divulge details of the settlement. H.R. 1417 should provide expressly for the adoption and approval of settlements among the parties in such circumstances.

Thank you again for providing us with the opportunity to present our views on this important bill. We look forward to working closely with your Staff on H.R. 1417.

Respectfully submitted,

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Benjamin F.P. Ivins, Esq.  
Senior Associate General Counsel  
Intellectual Property and International Legal  
Affairs  
National Association of Broadcasters  
1771 N Street, N.W.  
Washington, DC 20036-2891

LETTER FROM PATRICK COLLINS AND JOHN C. BEITER, ESQ.



*years*

PATRICK COLLINS  
SENIOR VICE PRESIDENT  
LICENSING

April 8, 2003

**VIA EMAIL**

The Honorable Lamar Smith  
Chairman  
Subcommittee on Courts, the Internet and  
Intellectual Property  
Committee of the Judiciary  
United States House of Representatives  
Washington D.C. 20515

Re: Statement of SESAC, Inc. on H.R. 1417, the Copyright Royalty and  
Distribution Reform Act of 2003

Dear Mr. Chairman:

The United States performing rights organization SESAC, Inc. ("SESAC") submits this statement for inclusion in the record of the April 1, 2003 hearing concerning H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003. SESAC appreciates the opportunity to provide its thoughts and opinions about the bill.

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. Similar to 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 copyrighted compositions within its repertory 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 previously submitted CARP reform proposals.

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April 8, 2003  
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SESAC agrees, to a significant degree, with the comments contemporaneously submitted to you by ASCAP and BMI in their Joint Statement on H.R. 1417 (as well as many of the contemporaneous Consensus Comments of Parties to Royalty Distribution Proceedings on H.R. 1417). Specifically, SESAC agrees with the other two PROs discussion concerning (1) Copyright Royalty Judges ("CRJs"), (2) the decisionmaking process, (3) the applicability of the Administrative Procedures Act, (4) the treatment of evidence, (5) the discovery process, (6) a \$5,000 small claim threshold, (7) a \$500 filing fee, (8) the appropriation of funds to pay costs and, alternatively, the allocation of costs in proportion to royalty allocations in distribution proceedings, (9) judicial review of the CRJs' decisions, and (10) the criterion for ratemaking.

SESAC, however, submits the following additional comments, which it believes are extremely important to any reform of the present procedures"

(1) Offers of judgment. Although SESAC agrees that the bill's offer of judgment rule should include a fee-shifting provision, SESAC strongly believes that such a rule should apply only to so-called "small claims." This had been the position of all three PROs from the outset. For example, in a letter to the Subcommittee dated June 20, 2002, all three PROs took the position, under the heading "Small Claims," that "[a]n offer of judgment procedure for small amounts in controversy, such as Rule 68 of the Federal Rules of Civil Procedure, would encourage settlements." (Emphasis added.) Moreover, on August 2, 2002, all three PROs submitted a List of CARP Reform Items in order of priority, item 2 of which, entitled "Small Claim Procedures," called for procedures such as an offer of judgment "for claims that are small in amount ...." (Emphasis added.) That list is attached as Appendix A to the Statement of Michael J. Remington before this Subcommittee dated March 27, 2003. (To the extent that ASCAP and BMI now have adopted Mr. Remington's statement, SESAC notes Mr. Remington's acknowledgement that "[l]ast year, I proposed that a Rule 68 process be applied to small claims ....") (Emphasis added.)

Others, including ASCAP and BMI, now appear to take the position that all claims, no matter how substantial, be subject to a fee-shifting offer of judgment rule, stating that "[t]he purpose of this procedure is to encourage settlement." Except for truly de minimus claimants who have held up the process in the past, ASCAP and BMI do not suggest why the settlement process among substantial claimants is in need of additional procedural "fixes." The examples set forth in the Statement of ASCAP and BMI, about which all three PROs have concerns, involve claims of a few dollars requiring expenditures of tens of thousands of dollars to litigate. By contrast, the

The Honorable Lamar Smith  
April 8, 2003  
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history of CARP proceedings indicates that substantial claims among the Phase I and Phase II claimants are often settled, despite the absence of a fee-shifting rule. Indeed, it is entirely unclear how or whether such a rule would work in the context of a Phase I multi-party royalty distribution proceeding.

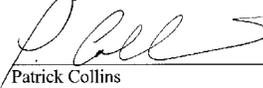
SESAC agrees that truly de minimus claimants should not be permitted to hold hostage the process of distributing millions of dollars in compulsory license fees in Phase II distribution proceedings; however, parties having claims for substantial dollars, which may be characterized by others as “small 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, or subordinate to, those of larger claimants. While ASCAP and BMI cite the legitimate concern of parties inflating their claims, the comments to Rule 68 of the Federal Rules of Civil Procedure also address an equally serious problem: “bad faith attempts to ‘lowball’ opposing parties with nominal offers of judgment, thus triggering the fee-shifting provisions of Rule 68.” Except in the small claim context, there is no suggestion that the settlement process is “broken” and requires a fee-shifting rule. If the offer of judgment provision of the bill is to be amended to provide for fee-shifting, it should apply only to small claims (under \$5,000), which have been the concern of the parties from the outset.

(2) Costs. SESAC agrees with ASCAP and BMI that, to the extent not paid with appropriated funds, costs should be allocated in proportion to royalty distributions. SESAC, however, believes that giving CRJs discretion to allocate costs “as the interests of justice dictate” again should be limited to small claims, which are the subject of the specific concerns addressed in the Statement of ASCAP and BMI.

In sum, SESAC believes that concepts of fairness and due process to claimants who are substantial but might be viewed as “small” relative to others in their claimant group should not be sacrificed in the name of efficiency. SESAC appreciates the opportunity to submit this statement with an end toward creating a compulsory license dispute resolution system that is both fair and efficient.

The Honorable Lamar Smith  
April 8, 2003  
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Sincerely,



Patrick Collins  
Senior Vice President - Licensing  
SESAC, Inc.  
55 Music Square East  
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## PREPARED STATEMENT OF ANN E. CHAITOVITZ

I would like to thank the Chairman, the Ranking Minority Member, and the Members of the Subcommittee for introducing this important legislation to reform the CARP structure and process. The American Federation of Television and Radio Artists ("AFTRA") is a national labor organization representing over 75,000 performers and newsmen that are employed in the news, entertainment, advertising and sound recording industries. AFTRA's membership includes approximately 14,000 singers, including more than 5,000 singers who have a royalty contract with a record label ("featured artists") and roughly 8,000 singers who are not signed to a royalty contract ("non-featured artists"). Under § 114(f) of the Copyright Act, recording artists are entitled to receive 50% of the digital performance license fees, and in order to protect their interests, AFTRA participated in the recent webcaster CARP proceeding.

As everyone has acknowledged, the current CARP structure does not function efficiently. H.R. 1417 is a positive step to try to address many of the problems with the current CARP structure and contains numerous important positive changes. We believe there are still a few areas which need to be modified to insure that the new procedure sufficiently addresses all parties' concerns and permits the participation of small and/or non-profit organizations.

I thank the Subcommittee again for its efforts to reform the CARP process. I submit here some initial comments on H.R. 1417.

## A. COST

As AFTRA has advised the Subcommittee and the Copyright Office, the reduction and control of the costs of participating in both the rate setting and distribution processes must be a critical goal of any reform. Small parties, non-profit organizations and artists will only have access to these proceedings if they can afford to participate.

We commend the decision to have the Copyright Royalty Judge and staff members paid out of appropriated funds. The current obligation to pay the arbitrators' fees could preclude participation of small and/or non-profit entities with legitimate interests in the proceedings, and we believe the change to a publicly funded process is critical. As we have just seen after the recent webcaster proceeding, the preclusion of small interested parties has the potential to undermine the credibility of the CARP proceeding.

We believe that all of the cost of the proceedings for determining rates and terms for statutory licenses must be paid out of appropriated funds, not by the participants. Each party must bear its own attorneys' fees and costs, which can be quite significant, and any additional cost, other than a small filing fee, could have the effect of excluding the participation of small and/or non-profit organizations.

Importantly, small parties, non-profit organizations and artists will also be barred from participating if they cannot control their costs and must pay for the costs resulting from larger parties' more active and litigious participation. Section 803(e)(1)(B) of H.R. 1417 requires that all additional costs be borne by the parties in equal proportions in rate setting procedures. This provision is unfair and could prevent the participation of small and non-profit parties. Even if the decision-maker's costs are paid from appropriated funds, unless all costs are paid from appropriated funds, the other costs have the potential to become substantial and could prohibit a small party's participation if the costs are split equally between the parties regardless of their participation. A party may wish to participate on only one or two issues or to save costs by submitting a streamlined and minimal case. If that party must then share equally all costs, including costs which it does not control and which could be increased by larger parties with a different and more expansive litigation plan, it will be foreclosed from participating. For example, if the participants must pay for the decision-maker's transcripts (costs which could be substantial for a small or non-profit party in a large complicated proceeding) and those costs are split evenly among the parties rather than proportionately based on their participation, a party whose witnesses only use 200 pages of transcript would have to pay the same transcript costs as those parties whose witnesses use up 10,000 pages of transcript. Smaller parties would, thereby, be forced to subsidize the larger parties, a result which is both unfair and poses a significant barrier to participation. Any non-appropriated costs should be split among the parties according to each party's proportional participation in the proceeding rather than on an equal or per capita basis.

Section 803(e)(1)(A) requires that the excess costs may be deducted from not more than 1% of the fees collected. In a rate setting proceeding, the entire burden of that 1% then falls on the copyright owners and performers and none of the cost is borne

by the users/licensees, so that the copyright owners and performers pay a disproportionate share of the costs. If there are any costs that must be borne by the parties, those costs should be shared by the users of the statutory license and the recipients of the license fees.

#### B. SETTLEMENTS

The underlying legislation providing for the compulsory licenses is intended to encourage negotiated settlements. Settlements also reduce costs. Unfortunately, the current CARP system sometimes hinders the ability of the parties to settle a proceeding. Thus, to encourage settlements, we believe that a formal settlement period with supervised settlement conferences prior to the filing of direct cases should be required. In addition, we believe that the legislation must adopt procedures to facilitate settlements after direct cases are submitted.

#### C. CONTINUING JURISDICTION

Like the Register of Copyrights, we believe that the law must clearly grant continuing jurisdiction with the Copyright Royalty Judge to correct errors in his rate and term determinations and to address unanticipated issues and problems that arise during the license period covered by his or her decision. This is particularly appropriate as the legislation extends the 2-year §114(f) license terms to 5-year terms, and circumstances may change and unforeseen problems arise during the 5-year term period.

#### D. CONTINUING PAYMENTS

As the Register of Copyrights also notes, potential problems may arise when there is a period after the expiration of the old royalty rate and before the new rate has been determined. Even though the new rate is effective retroactively to the date on which the old rate expired, H.R. 1417 must provide that licensees continue to pay copyright owners at the recently expired rate until the new rate is set. Once the new rate is set, adjustments can be made in the form of additional payments or refunds.

#### CONCLUSION

The creation of an affordable, fair and expeditious procedure, where a party can control its own costs, is very important to recording artists. We thank the Chairman and the Subcommittee for moving forward in this thorny area and look forward to working with the Subcommittee on the legislation.

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#### PREPARED STATEMENT OF INTERCOLLEGIATE BROADCASTING SYSTEM, INC., AND HARVARD RADIO BROADCASTING CO., INC. STATEMENT OF

This statement is submitted on behalf of small, non-commercial webcasters who need relief from the compulsory license provisions of the Digital Millennium Copyright Act of 1998 and from the inappropriate rules and procedures for Copyright Arbitration Royalty Panel (CARP) pursuant to Title 8 of the Copyright Act of 1977, as amended, 17 U.S.C., ch. 8.

This statement is being filed by the Intercollegiate Broadcasting System, Inc., and Harvard Radio Broadcasting Co., Inc. (WHRB [FM]), parties to the appeal from the Librarian's 1998–2002 CARP decision of June 8, 2002, *IBS, et al. v. James H. Billington*, Librarian, D.C. Circuit No. 02–1220. IBS was founded in 1940 as a non-profit association of college broadcasters, and today its membership includes nearly eight hundred college stations and webcasting operations. Harvard Radio Broadcasting Company is an eleemosynary corporation, whose undergraduate staff operates Station WHRB (FM), a commercial FM station licensed to Cambridge, Massachusetts, by the Federal Communications Commission. WHRB (FM) and other non-profit stations are members of IBS. These stations are by-and-large staffed by students; and many are operated by their respective parent, educational institutions as part of the curriculum for academic credit. IBS members report median annual budgets of \$ 9,000, and the annual budgets of many stations are much less.

The 1998–2002 CARP clearly demonstrates the weaknesses of the Copyright Office's in-for-a-penny-in-for-a-pound approach to running a CARP. The Office took no prisoners in setting up the 1998–2002 CARP. It refused to apply its rules in a way that would permit the small, non-commercial webcasters to participate in an arbitration proceeding intended to set the compulsory license royalties by which they would be bound. The small webcasters pointed out that they could not pay a *pro*

*rata* share of the arbitration costs taxed against participating parties and could not satisfy the requirements for legal counsel for participation in the evidentiary phase of the arbitration proceeding. The Office acknowledged these points in the Register's order of March 16, 2001, but declined to tailor its procedures to the size and financial ability of the small entities—even to the extent of allowing them to participate in the CARP proceeding by the filing of briefs amicus. As a result the small non-commercial webcasters were forced to withdraw their notices of intent to participate.

On appeal, the Librarian has attempted to deflect the non-commercial webcasters' charge that the Librarian has proceeded on a one-size-all basis by arguing that two sizes fit all. But even webcasters classified "small" under the 2002 Act include those that have gross annual revenues of hundreds of times the small annual budgets of many academically affiliated webcasters.

In the 2003–04 CARP the small webcasters, and collaterally Music Choice, attempted to anticipate the Register's prior objection of inconsistency with the Office's rules by filing petitions for rulemaking with the Register. These petitions have now been denied by the Register's order of February 6th, a copy of which is attached, in which she takes the position that having a voice in a CARP proceeding is "an all or nothing proposition." *Id.* at 2–3. The effect of the Register's ruling is that small webcasters are bound by a compulsory arbitration proceeding in which they were effectively denied a fair opportunity to participate. This result is in accord neither with the policy of the United States, as set forth in Section 2 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 nt, and the implementing executive orders thereunder nor with due process, as recognized by the courts in *Devlin v. Scaradelletti*, 122 S.Ct. 2005 (2002); *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978). The Register's recent order recognizes that "many entities affected by the outcome of the . . . [1998–2000] CARP proceeding felt that they did not get to tell their story. . ." and supports a legislative correction. *Id.* at 8–10. However, her support for a legislative solution seems to be limited substantially at 12 n.5.

There is some urgency to this matter, as the small, non-commercial webcasters are required to make retroactive payments under the 2002 Act that are beyond the financial means of many by June 20, 2003. The Small Webcasters Relief Act of 2002, P.L. 107–321, 116 Stat. 2780, is simply not well-tailored to the needs of the small, non-commercial webcasters, although the definition of "non-commercial webcaster" adapted from the Internal Revenue Code and added to Section 114(f)(5)(e), is appropriately drafted and need not be amended.

Among the immediate problems that the small, academically affiliated webcasters face are paying the usage-based rates and the annual, non-refundable minima associated therewith.<sup>1</sup> But in addition the interim and prospective final record-keeping requirements are impractical for small, student-staffed stations to comply with, are unduly burdensome on small entities, and are disproportionate to the relatively small amounts of royalties that would be distributed in on the basis of the elaborate record-keeping requirements imposed and sought to be imposed. These record-keeping requirements contemplated by the Librarian are far in excess of those applicable to IBS<sup>5</sup> members for performance rights under other sections of Title I of the 1977 Act.

The underlying deficiency in the Library's one-size-fits-all approach is its failure to apply the provisions of the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C., ch. 6 (The Analysis of Regulatory Functions), and the implementing executive orders. Its pretext is that the Copyright Office falls within the Congressional exemption in Section 2(a) (definition of "agency") of the Administrative Procedure Act of 1946, now 5 U.S.C. § 551(1), even though that Sections 701(e) and 802(c) of the Copyright Act of 1976, as amended, 17 U.S.C. §§ 701(e) and 802(c), specifically provide that the APA shall be applicable to the Office and to the CARP. In any event the Office has refused to implement the small-entity policy of the United States as enacted by Congress in Section 2 of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt. You will recall that Congress attempted to resolve the Appointments Clause problem by making the Librarian a Presidential appointee. As such, he is subject to the President's constitutional duty to take care that such policies be implemented and to a duty to implement the President's executive orders. If, consistent with the Librarian's litigating position, he were considered a Congressional officer in respect of copyright matters, a serious violation of the constitutionally mandated separation of powers would result.

<sup>1</sup>The recently announced agreement between RIAA and DiMA is no help to the smaller webcasters in either regard. It would oppose a \$2500 minimum on webcasters who cannot reasonably afford even the five-hundred-dollar annual fee specified by the Librarian, and the percentage figure is disproportionate to the performance royalties negotiated under Section 118.

IBS and WHRB (FM) urge the Subcommittee to step in legislatively via H.R. 1417 to make it clear that the Office and the Librarian act in copyright matters fully subject to the Regulatory Flexibility Act as to their procedures and their prescription of compulsory license fees for non-commercial webcasters, as defined in Section 4 of the 2002 Act, and to block any attempt to enforce the rates prescribed by the Librarian in the 1998–2002 CARP against such non-commercial webcasters. This could be accomplished through amendments to chapters 7 and 8 of the 1976 Act, rather than to chapter 1, amendment of which we infer the subcommittee leadership seeks to avoid in H.R. 1417, leaving the needed and more comprehensive and substantive changes in the Copyright Act to the next legislative vehicle.

CONSENSUS COMMENTS OF PARTIES TO CABLE AND  
SATELLITE ROYALTY DISTRIBUTION PROCEEDINGS

**CONSENSUS COMMENTS OF PARTIES TO CABLE AND  
SATELLITE ROYALTY DISTRIBUTION PROCEEDINGS ON H.R. 1417:  
THE COPYRIGHT ROYALTY AND DISTRIBUTION REFORM ACT OF 2003**

This document provides comments on H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003 ("CRDA"), from the following claimant groups to copyright compulsory license royalty distribution proceedings conducted pursuant to Sections 111 and 119:

- Canadian Claimants: Represents Canadian copyright owners of programming on Canadian signals.
- Commercial Television Claimants: Represents United States commercial television stations, through the National Association of Broadcasters in Section 111 proceedings and the Broadcaster Claimants Group in Section 119 proceedings.
- Devotional Claimants: Represents copyright owners of certain religious programming and programming produced by religious entities.
- Joint Sports Claimants: Represents Major League Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, the National Hockey League, and the Women's National Basketball Association.
- Music Claimants: Represents the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.
- National Public Radio: Represents NPR affiliated noncommercial educational radio stations.
- Program Suppliers: Represents Motion Picture Association of America, Inc. (MPAA) member companies and other producers and syndicators of movies, series and specials broadcast by television stations.
- Public Television Claimants: Represents all PBS member stations and all other copyright owners of programming broadcast on distantly carried public television stations.

As a group, these parties have had over 25 years of experience in litigating copyright royalty distribution proceedings before the Copyright Royalty Tribunal ("CRT"), the Copyright Arbitration Royalty Panels ("CARPs") and the Copyright Office. The comments provided here are those to which all parties identified above have agreed. Certain individual claimant groups plan to provide the Subcommittee with additional comments. The parties submitting these joint comments look forward to working with the Subcommittee during the mark-up process.

**CRDA SECTION:****COMMENTS:**

<p><b>Section 801(a) – Copyright Royalty Judge; appointment and functions</b> (page 2, lines 14-17).<sup>1</sup> Issue: Composition of the decision-making body.</p>	<p>With regard to the composition of the body making determinations:</p> <ul style="list-style-type: none"> <li>• There should be three decision-makers, rather than one Copyright Royalty Judge, appointed by the Librarian; and</li> <li>• One of the three decision-makers should be designated as a Chief Judge, and such designation should rotate among the judges.</li> </ul>
<p><b>Section 801(b)(4) – Copyright Royalty Judge; appointment and functions</b> (page 7, lines 20-23). Issue: Partial distributions.</p>	<p>The decision-makers should be authorized to make partial distributions of royalty funds prior to the final resolution of a proceeding. In any event, the decision-makers should be directed to make partial distributions in the amounts requested by the parties where all parties to the proceeding 1) join in the request, and 2) agree to reimburse with interest any partial payments that prove to be in excess of their final adjudicated royalty share.</p>
<p><b>Section 801(c) – Rulings</b> (page 8, lines 12-19); <b>Section 802(f)(1) – Independence of Copyright Royalty Judge, In General</b> (page 11, lines 1-10). Issue: Consultations of decision-making body with Register of Copyrights.</p>	<p>Any consultation by the decision-making body with the Register of Copyrights should be:</p> <ul style="list-style-type: none"> <li>• On the record and disclosed to all parties to the proceeding with an opportunity for the parties to comment on the issue raised;</li> <li>• Limited to issues raised in connection with a proceeding and involving interpretation of the Copyright Act or the Copyright Office’s rules;</li> <li>• Structured so that it does not unduly delay or interfere with the conduct of the proceedings; and</li> </ul>

<sup>1</sup> Page and line number references refer to H.R. 1417, as introduced on March 25, 2003, which was the subject of the hearing held on April 1, 2003.

	<ul style="list-style-type: none"> <li>Limited to circumstances in which the decision-making body requests such consultation, after giving the parties the opportunity to comment on the request for consultation.</li> </ul>
<p><b>Section 802(a) – Qualifications of Copyright Royalty Judge</b> (page 9, lines 3-9) and <b>Section 802(h) – Standards of Conduct</b> (page 12, lines 7-12). Issue: Conflicts of interest of decision-makers and qualifications of decision-makers.</p>	<ul style="list-style-type: none"> <li>The decision-makers should be free from all conflicts of interest, rather than only financial conflicts.</li> <li>The decision-makers should have demonstrated experience in <i>conducting</i> hearings.</li> <li>The demonstrated experience in conducting hearings should be broadened to include “other evidentiary hearings” to allow for the selection of attorneys with experience conducting private arbitrations.</li> <li>A demonstrated knowledge of copyright law should not be a requirement.</li> </ul>
<p><b>Section 802(c) – Terms</b> (page 9, lines 18-25). Issue: Length of term of office for decision-makers.</p>	<p>The term of office for the three decision-makers should be 7 years, with the initial terms staggered to end after the third year, fifth year and seventh year.</p>
<p><b>Section 803(a) – Proceedings of Copyright Royalty Judges</b> (page 13, lines 3-8). Issue: Treatment of prior decisions of the CRT, Copyright Office and CARPs.</p>	<ul style="list-style-type: none"> <li>As § 803(a) implies, prior decisions of the CRT and of the CARPs should be accorded precedential value.</li> <li>The additional reference should be specifically to the “decisions of the Librarian of Congress issued pursuant to 17 U.S.C. §§ 801(c) and 802(f) before the effective date of the Copyright Royalty and Distribution Reform Act of 2003.”</li> </ul>

<p><b>Section 803(a) – Proceedings of Copyright Royalty Judges</b> (page 13, lines 8-11). Issue: Persons entitled to submit relevant information and proposals.</p>	<p>Parties should be entitled to submit relevant information and proposals only in accordance with regulations promulgated pursuant to the CRDA. Those regulations should preserve the current practices with regard to participation in CARP proceedings.</p>
<p><b>Section 803(b)(2) – Procedures – Small Claims Proceedings</b> (page 13, lines 13-22). Issue: Amount in controversy for small claims procedures.</p>	<ul style="list-style-type: none"> <li>• The amount in controversy leading to the use of small claims procedures should be increased to \$5000.</li> <li>• Claims made pursuant to the small claims procedures should be accompanied by an evidentiary showing supported by affidavit.</li> </ul>
<p><b>Section 803(b)(3)(C) - Proceedings of Copyright Royalty Judges – Procedures – Regulations – Requirements</b> (page 15, lines 1-3). Issue: Resolution of proceedings without conducting full-blown evidentiary hearings.</p>	<p>The Register of Copyrights should issue regulations that specify the circumstances under which proceedings may be resolved on a paper record rather than through full-blown evidentiary hearings. These circumstances should include, at a minimum: (a) proceedings where only a small amount of royalties is at issue; and (b) the circumstances identified in the Copyright Office’s current regulations.</p>
<p><b>Section 803(b)(3)(C) - Proceedings of Copyright Royalty Judges – Procedures – Regulations – Requirements</b> (page 15, lines 1-3). Issue: Provision for reconsideration of determination.</p>	<p>A provision for reconsideration like the one suggested by the Register of Copyrights in her testimony on April 1, 2003 should be added to the procedural requirements.</p>
<p><b>Section 803(b)(3)(C)(i) and (ii) – Procedures – Regulations – Requirements</b> (page 15, lines 4-11). Issues: Evidence and Discovery.</p>	<p>With respect to distribution proceedings, the parties arrived at the following consensus:</p> <ul style="list-style-type: none"> <li>• These two subsections should be stricken in favor of requiring the adoption of regulations that meet the following objectives: 1) Encourage settlement; 2) Encourage efficiency and decrease costs; and 3) Ensure the orderly conduct of objective, equitable proceedings.</li> </ul>

	<ul style="list-style-type: none"> <li>• There should be no statutory restrictions on the use of hearsay evidence in the context of a royalty distribution proceeding. Additional restrictions will likely increase the costs of proceedings without any resulting benefits.</li> <li>• The provisions for discovery appear to contemplate a change in the procedures for conducting distribution proceedings that will likely increase costs without leading to any measurable improvements in efficiency.</li> </ul>
<p><b>Section 803(b)(3)(C)(iii) – Procedures – Regulations – Requirements</b> (page 15, lines 12-25). Issue: The Offer of Judgment procedure and settlement procedures generally.</p>	<ul style="list-style-type: none"> <li>• It is unclear how the procedure established by § 803(b)(3)(C)(iii) would apply in the context of a Phase I multi-party proceeding such as a cable royalty distribution proceeding, as opposed to a two-party Phase II distribution case. The Librarian should be directed to define the circumstances, if any, under which such offers could be made in a multi-party proceeding.</li> <li>• The procedure set forth in § 803(b)(3)(C)(iii) is problematic because it lacks an enforcement mechanism. The rejection of such an “offer of judgment” should result in some amount of cost-shifting if the party rejecting the offer ultimately receives an award lower than what is offered, such as in Federal Rule of Civil Procedure 68. The provision should be made more consistent with the provisions of Rule 68.</li> <li>• As it is currently drafted, § 803(b)(3)(C) may imply that it is the sole vehicle by which parties to a proceeding may settle that proceeding, and that settlement is only appropriate before the date on which the hearings begin. Accordingly, § 803(b)(3)(C) should be clarified to indicate that it is</li> </ul>

	<p>not the sole vehicle for settlement and that settlement may be reached at any time.</p> <ul style="list-style-type: none"> <li>• Finally, in the interest of encouraging settlement before parties have had to expend significant time and resources preparing their cases, the regulations should provide for a formal settlement period in advance of the preparation and filing of cases and at the conclusion of which the parties shall report to the decision-makers on the status of such discussions.</li> </ul>
<p><b>Section 803(c) – Decision of Copyright Royalty Judge</b> (page 16, lines 1-9). Issue: Duration of proceedings (including period for settlement discussions).</p>	<p>The parties to distribution proceedings agree that some time limits on proceedings are useful in order to decrease costs and provide for more rapid distribution of royalties.</p> <p>The current provision of § 803(c) regarding the duration of a proceeding needs to be examined more closely in light of current practices. For instance, the provision for submitting final witness lists at the completion of the discovery period is inconsistent with the current practice of identifying all witnesses before the discovery period begins in the context of the filing of a direct case. Although the current version of § 803(e) provides that CARPs shall have a 180-day period to issue their determination, that period does not include pre-hearing discovery and settlement periods. Any provision establishing the length of a proceeding should address the various phases of the rate-setting and distribution process comprehensively. As drafted, the current version also limits the Copyright Royalty Judge to the choice of either a six-month proceeding or a one-year proceeding, rather than providing for proceedings to fall in the range between six months and one year.</p>

<p><b>Section 803(c) – Decision of Copyright Royalty Judge</b> (page 16, lines 17-19). Issue: Availability of record to the public.</p>	<p>Section 803(c) should exclude from the record made available to the public by the Librarian the portions containing confidential information subject to a duly issued protective order.</p>
<p><b>Section 803(d) – Judicial Review</b> (page 16, lines 20-25). Issue: Appeals by “any aggrieved party.”</p>	<p>Section 803(d) should be clarified to provide that only the <i>parties</i> to a rate-setting or distribution proceeding should have the right to appeal the decision-making body’s determination to the D.C. Circuit.</p>
<p><b>Section 803(d) – Judicial Review</b> (page 17, lines 18-22). Issue: Standard of review to be applied by the DC Circuit.</p>	<p>The standard of review applied to determinations made by the decision-making body should be identical to that applied to the determinations made by federal agencies under 5 U.S.C. § 706.</p>
<p><b>Section 803(e) (1) – Administrative Matters - Deduction of Costs of Library of Congress and Copyright Office from Royalty Fees – Deduction from Filing Fees and Royalty Fees</b> (page 18, line 12 – page 19, line 6). Issue: Funding of royalty rate setting and distribution processes.</p>	<p>All the costs associated with royalty rate and distribution determinations should be paid for with appropriated funds. The use of appropriated funds should not be limited to the salaries of the decision-makers and their staff.</p> <p>In any event, it should be made clear that the Librarian shall not deduct the costs associated with other compulsory licenses from the § 111, § 119 or § 1003 funds.</p> <p>The group notes that HR 1417 provides no authorization for an appropriation of funds for the payment of the decision-makers or the costs associated with ratemakings and distributions.</p>

## PREPARED STATEMENT OF COLLEGIATE BROADCASTERS, INC.

Collegiate Broadcasters, Inc. (CBI) is a national organization representing students and educational broadcasters involved in radio, television, webcasting and other related media ventures. These comments are submitted to supplement the record of the hearings held on April 1, 2003 concerning H.R. 1417.

## I. INTRODUCTION

When Congress enacted the Copyright Royalty Tribunal Reform Act of 1993, 17 U.S.C. §§ 801–803, the goal was to create a procedure for determining royalty distributions that would be both fair and efficient. Unfortunately, the resulting Copyright Arbitration Royalty Panel (CARP) system has proven in practice to be neither fair nor efficient. CARP has particularly harmed the interests of small, non-commercial broadcasters and webcasters. Collegiate Broadcasters, Inc. strongly welcomes H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003. While the bill is not perfect, with the amendments suggested in these comments H.R. 1417 offers a sensible alternative to the present, flawed, CARP system.

## II. REPLACING THE COPYRIGHT ARBITRATION ROYALTY PANELS WITH A COPYRIGHT JUDGE WILL ALLOW DUE PROCESS BY GIVING MORE ENTITIES AN OPPORTUNITY TO BE HEARD.

A. *Costs*

The recent arbitration setting digital transmission royalties for the period from 1998–2002, CARP DTRA 1 & 2, highlights the deficiencies of the CARP system. CBI was in the process of forming when CARP DTRA 1 started. Because the arbitrators' substantial fees were to be apportioned among all those who participated, small educational broadcasters/webcasters such as those now represented by CBI could not afford to participate, although they are bound by the Copyright Office and Librarian of Congress's determination of rates and minimum fees. The cost to participate in the webcasting CARP was at least \$300,000 and, for many entities, much higher. This cost is far beyond the resources of the average educational or community station. Most CBI member college radio stations, unlike public radio stations funded by CPB, have to pay their operating costs from student fees or from their meager academic budgets. According to Intercollegiate Broadcast System's surveys, the average college station budget is about \$9,000. As a result, college stations that are not funded by CPB were simply not represented in the CARP proceeding at all. This lack of representation and inability to present relevant evidence on the issue of market rate resulted in a royalty rate completely insensitive to the needs of educational broadcasters.

At present, the extraordinary costs of CARP participation violate small and non-commercial entities' right to due process. Due process includes an opportunity to be heard. Courts have held, with respect to private arbitration, that if the cost of participating in an arbitration is so high that a party loses the opportunity to be heard, the arbitration is procedurally invalid. H.R. 1417's provision for the Copyright Royalty Judge to be paid by the government addresses this problem. As noted below, CBI suggests amendments to further address the problem of unreasonable and unpredictable costs. Without the exorbitant cost of paying a portion of the arbitrators' hourly legal fees, educational and other noncommercial broadcasters ought to be able to participate in the ratemakings that affect them. The cost of the proceedings should be predictable.

B. *Discovery Powers Should Be Expanded*

In general, CBI's view is that the Copyright Royalty Judge should have substantial discretion to authorize appropriate discovery, being mindful of the potential for abuse and with the goal of controlling discovery costs imposed on small and non-commercial entities. Expanded discovery powers will promote transparency and in turn more accurate and fairer royalty rates.

In the recent webcasting CARP, the Recording Industry Association of America (RIAA) and the Corporation for Public Broadcasting (CPB) reached a royalty settlement agreement during the CARP process. The terms of this agreement would have been compelling evidence of the royalty rates and terms on which a willing buyer and willing seller would agree. The Panel noted that it had almost no evidence relating to noncommercial entities. However, the arbitrators did not consider the RIAA-CPB agreement because the parties agreed to keep these terms confidential. It is quite possible that other agreements that could have been relevant evidence of rates agreed to by other buyers similarly escaped the Panel's consideration because of insufficient discovery. The Panel was left with only one agreement, between

Yahoo!, one of the wealthiest webcasters in the entire fledgling industry during the relevant period, and RIAA. The Panel then based its willing buyer/willing seller determination on this single Yahoo! agreement. In this way, the CARP process took on the characteristics of an auction, with the digital transmission royalty rate being set by the highest bidder. As long as the copyright statute requires decisions based on the willing buyer/willing seller standard, the will of Congress cannot be realized without discovery of those rates and terms that have been actually agreed upon in the digital transmission license market and other, analogous markets. CBI recognizes that making all such agreements discoverable and admissible, regardless of the the parties' intent, could discourage amicable settlements. Were Congress to amend the standard as proposed below, however, agreements might become critical as evidence, though still useful.

*C. Section 803(d), Providing Direct Appeal to the Court of Appeals, Eliminates A Costly and Time-consuming Intermediate Review.*

In CBI's view, the current system of two-tiered review is inefficient and needlessly increases expense for the petitioning parties and for the Copyright Office. The proposed legislation properly provides for appeal directly to the Court of Appeals for the District of Columbia Circuit.

### III. PROPOSED AMENDMENTS

As written, H.R. 1417 provides many needed improvements over the CARP system. However, certain changes could be made to improve the quality of the proceedings and to better protect small, educational and community broadcasters/webcasters.

*A. The "Willing Buyer/Willing Seller" Standard in Section 112 (2) and 114(f)(2) Must Be Changed*

Most importantly, Congress should change the standard under which the Copyright Royalty Judge will determine reasonable terms and rates of royalty payments to a fairness standard. Under H.R. 1417's present language, the Copyright Royalty Judge will set royalty terms and rates pursuant to sections 112(e), 114, 115, 116, and 118 of the Copyright Act.

Sections 112(e) and 114(f) (2) (B) of the Copyright Act presently provide that the rates and terms chosen are to "represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller." CBI contends the standard should make clear that rates to be set should bear some relation to those paid for use of musical works by terrestrial radio stations, and that those rates properly could be used as a benchmark. The standard should also make it clear that the Copyright Royalty Judge should not turn the process into an auction by setting the royalty based on the highest rate acceptable to any webcaster, but instead should adopt rates that will allow the maximum availability of diverse works to the public. The rates selected must recognize and support the public good and First Amendment interests served by educational and community broadcasters/webcasters.

"Willing-buyer-willing seller" has been shown to be a poor standard by which to set rates because the market for the right to digitally transmit copyrighted works is a fundamentally imperfect market. Because the compulsory license avoids the need for each copyright owner to negotiate with each copyright user, the rate cannot reflect what any one copyright owner and any one buyer would agree upon for a specific work. The compulsory license covers a wide range of different recorded works, with a correspondingly wide range of values. Recordings by artists who are already well-known and popular may command high royalty rates because these artists relying less than emerging artists on airplay to bring their work to the attention of consumers. Popular, commercial music has a high potential for supporting advertising that brings in revenue. For copyright owners who are unknown artists, or work in special genres, the promotional value of airplay warrants setting the price for the right to digitally transmit the works at close to zero. Educational and community broadcasters/webcasters significantly emphasize the work of such artists and genres. The one-size-fits-all rate does not recognize this phenomenon.

Instead, the last CARP set the price for all recordings at the rate paid by a commercial webcaster intending to transmit primarily very popular music. This rate harms not only copyright users, but copyright owners who believe that webcasting has promotional value that is worth more to them than royalties. This is evidenced by the numerous artists and labels who send unsolicited tapes and CDs to college and community radio stations, seeking airplay. CBI would welcome the opportunity to present witnesses with evidence that webcasting promotes sales of their recordings. Many artists and labels have signed royalty waivers or royalty-free webcasting

licenses or simply donated their works to the public domain since the results of the webcasting CARP were announced. But the same transactional costs that the 114(f)(1) statutory license avoids make it inefficient for owners to negotiate separate licenses with each station. And in many cases, the artists on a recording do not own the copyrights, but still rely on Internet radio airplay to attract new listeners who buy tickets to their concerts.

Given that each copyright owner has a monopoly on certain nonfungible works and there are no available substitutes for a given work, the rate set through negotiation will always favor the copyright owner. Furthermore, with the consolidation in the content and distribution industries, large copyright owners are often running their own distribution businesses, which directly compete with the small broadcasters/webcasters seeking to use the compulsory license. The advantages to the copyright owner mean that even where there is a negotiated deal, the copyright owner is still exacting a rent. If Congress' goal is to maximize technological development and the growth of educational broadcasting, royalty rates should be based on a consideration of fairness. A fairness standard rather than a willing-buyer-and-seller standard will preclude the sort of rent extraction that has forced small broadcasters to labor under rates which are completely unsustainable.

*B. Congress Should Amend Section 114 to Eliminate or Modify Content Restrictions*

The DMCA extends a number of restrictions on the performance of licensed works to broadcasters who retransmit their programming over the Internet. Content limitations imposed on Internet digital performances by extension also significantly impinge on the content of the original broadcast performance to be retransmitted. Particularly in the context of educational and cultural programming, these restrictions (e.g. 17 USC §114(d)(2)(C)(i)) seriously impair the non-commercial educational broadcasters' ability to serve the public good.

Applying these restrictions to a broadcast station effectively precludes a program exploring the musical and historical legacy of a single specific artist. The radio programmer's artistic and scholarly pursuits, and the audience's social and educational experiences, are therefore chilled. A program highlighting a single artist is intended to place an individual composition within the context of the artist's greater body of work. The streaming of such an artistic and informative presentation via the Internet, however, violates the current statute, despite the public interest served by the nature of this program. Likewise, the creation of a retrospective program at the time of an artist's passing would violate the law.

The common broadcast practice of announcing upcoming musical selections is also outlawed for Internet retransmissions as a result of the DPRA and the DMCA. The current statute requires that "the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists. . . ." 17 USC §114(d)(2)(C)(ii). Programming practices perfected over decades of broadcast history by radio legends such as Alan Freed, Bill Randle, Robert W. Morgan, Don Steele, and Dick Purtan are now prohibited for retransmitted programming under the statute. Lawmakers have, hopefully unwittingly, removed from the Internet an element that is part of the very essence of radio—a feature that audiences have come to expect from all radio broadcasts. Other content restrictions similarly offend broadcasters' first amendment rights, to the detriment of the listening public.

The content restrictions on the Internet retransmissions of radio stations are presumably intended to protect copyright owners from unauthorized copying. But Internet retransmissions are not a significant threat the recording companies' retail sales because permanent copies of streamed music cannot be saved by an online listener. Therefore, these draconian measures create protections much more restrictive than are necessary, and in the process gravely impinge on legitimate artistic, educational, and cultural applications of the available technologies. Congress should amend these provisions so they will not obliterate the ability of non-commercial educational radio stations to effectively expand their public service to the Internet.

*C. Sections 801(c) and 802(f)(1)—Consultation with Register of Copyrights Should Be Documented and Voluntary.*

These sections provide that the Copyright Royalty Judge may consult with the Register of Copyrights in making rulings. CBI recognizes the expertise of the Register, particularly with regard to rulings that would implicate copyright office procedures, responsibilities and obligations. Such consultations, however, should be voluntary, as set out in the draft bill, not mandatory, as some have proposed. It would be appropriate, to ensure the Judge's independence and to provide full and open dis-

course, that such communications be formal and on the record, perhaps in the nature of an amicus brief, or that they provide for parties to be present or to comment on the Copyright Office's statements.

*D. Section 803(e)(1)(B)—Remaining Costs Should Not Be Assessed To Participants.*

CBI shares the concern of R. Bruce Rich that the language of Section 803(e)(1)(B) is unclear as to what kinds of costs remaining after deductions from royalty fees are to be borne by the parties in equal proportions. As noted above, college broadcasters and groups representing them, such as CBI, have extremely limited resources and must be able to predict, when they undertake to participate in rate-setting proceedings, what their costs will be. Any provision that raises the risk of unexpected costs, out of the parties' control, being assessed against them at the end of the proceeding seriously chills their ability to participate in the process. Chilling participation, in turn, deprives the fact-finder of valuable evidence. The language should be changed to clarify what costs are intended and how they are to be apportioned in multiparty proceedings, or, better yet, all costs should be borne by the copyright office, defrayed by the filing fees.

*E. Section 803 Should Be Amended To Make Small Claims Proceedings Available To All Non-commercial Entities Who Elect to Use Them.*

In addition to amending H.R. 1417 to eliminate the "willing buyer/willing seller" standard and make fairness the standard for rate setting, Congress should also expand the ability of non-commercial broadcasters to take advantage of non-adversarial systems for resolving royalty disputes. Congress should allow any non-commercial broadcaster who elects to do so to use the small claims proceedings set out in §803(b)(2).

As written, H.R. 1417 seems to allow the use of the small claims proceedings only in certain proceedings and when a party to the proceeding asserts that the royalties in dispute are \$500 or less. Basing eligibility for the small claims proceeding on a dollar amount will breed inefficiency as parties engage in pre-hearing gamesmanship to get in or out of the small claims system. Non-commercial broadcasters will reap significant savings if they are always allowed to invoke the paper-only, small claims procedure. CBI would be willing to propose specific language if the committee is receptive to this general approach.

*F. Congress Should Mandate Separate Proceedings For Noncommercial Entities.*

CBI suggests that regardless of how Congress chooses to give non-commercial broadcasters/webcasters alternative methods for dispute resolution, it should amend H.R. 1417 to instruct the Office of Copyright to bifurcate or stage rate proceedings that set rates for both commercial and non-commercial broadcasters. Commercial broadcasters and non-commercial broadcasters are differently situated in everything from their social mission to their level of funding. The large, multi-party, multi-class proceedings that include parties ranging from very large publicly-held entertainment companies to one-person startups needlessly multiply the costs for all participants, disproportionately harming noncommercial entities such as educational and community broadcasters/webcasters. If commercial and non-commercial rates are set simultaneously, uncertainty among all parties will increase and the likelihood of settlement will decrease. Unified proceedings lead to this an inefficient outcome because the commercial broadcasters will seek to extend negotiations so as to get a deal closer to the non-commercial rate.

In the Small Webcaster Settlement Act of 2002 (SWSA), Congress implicitly recognized that the compulsory license rate for commercial broadcast must be set before the non-commercial license rate is established. SWSA empowered SoundExchange, the Receiving Agent designated by the CARP, to enter into royalty rate agreements with small commercial and all noncommercial webcasters. Properly, SWSA staggered the dates by which commercial and noncommercial had to enter into any such agreements. The deadline for agreement with commercial websites was December 15, 2002. The deadline for agreement with noncommercial webcasters is May 31, 2003. As with the SWSA, Congress should amend H.R. 1417 to provide for that the Copyright Office regularly hold bifurcated proceedings, with the commercial proceedings going first. The Copyright Office, however, in its haste to begin CARP DTRA 3, to expeditiously set the rates for webcasting for 2003–2004, set a schedule requiring all parties to inform the office whether or not a settlement had been reached by March 31, 2003 and requiring written direct cases by May 5, 2003. CBI had to bring this conflict to the Copyright Office's attention in a Motion to Bifurcate or Stage Proceedings. The Copyright Office and Library then recognized that "requiring submission of written direct cases before May 31, 2003 will compromise non-commercial webcasters' ability to take advantage of the period provided in the Act" and amended the precontroversy discovery schedule for noncommercial webcasters.

Order in Docket No. 2002-1 CARP DTRA 3, April 10, 2003 (provided with these comments). However, the Register of Copyrights found that “the Library does not have the authority to instruct the CARP as to how it will hear and consider the evidence presented by noncommercial webcasters.” Nevertheless, the Copyright Office encouraged the CARP “to schedule hearings and proceedings in this docket in such a manner as to minimize, as much as possible, the costs of participation that will be borne by noncommercial webcasters.” Congress could forestall such difficulties and improve fairness and efficiency by expressly mandating bifurcated, staged, or completely separate proceedings.

CBI notes that this staggered approach is already taken with respect to the licenses for musical works, in 17 U.S.C. 118. Congress has recognized, in that context, the unique characteristics of non-commercial entities. These characteristics are equally important in the digital transmission context. Separating the proceedings for commercial and noncommercial entities in the musical works copyright context has also had the salutary result of encouraging settlement. CBI would be pleased to provide draft language upon the request of the Subcommittee.

*G. Congress Should Change The Standard of Review to “Clearly Erroneous.”*

Congress should amend H.R. 1417 to change the standard of review of Copyright Royalty Judge decisions from “arbitrary and capricious” to a “clearly erroneous” standard. An arbitrary and capricious standard gives little room for judges to correct faulty rulings because royalty disputes produce such a large evidentiary record that there will almost invariably be the iota of evidence necessary to prevent a decision from being arbitrary and capricious, even if the reviewing court has the conviction that a mistake has been made and that the rate set is plainly wrong. Supporters of the arbitrary and capricious standard may claim that having a high standard of review is necessary to give gravitas to the Copyright Royalty Judge process. However, changing the standard of review will not diminish copyright users’ and copyright holders’ willingness to fully engage in the procedures outlined by H.R. 1417. Pragmatically, small webcasters and educational broadcasters/webcasters such as the ones represented by CBI barely have the wherewithal to participate in CARP under the small claims provisions, let alone pursue expensive appellate litigation. Consequently, setting a “clearly erroneous” standard of review will not cause our parties to seek an appeal of every copyright judge’s decision. Furthermore, H.R. 1417 already increases the independence and finality of Copyright Royalty Judge decisions by removing the intermediate review currently assigned to the Librarian of Congress. Because H.R. 1417 removes a layer of oversight, Congress has an obligation to enhance aggrieved parties’ ability to obtain redress from harmful erroneous decisions. Therefore, CBI requests that H.R. 1417 be amended to allow judicial review of Copyright Royalty Judge decisions on a clearly erroneous basis.

*H. Congress Should Limit The Recordkeeping and Reporting Requirements That The Copyright Office Can Impose on Statutory Licensees.*

As of this writing, the Copyright Office has still not issued final regulations on the recordkeeping and reporting requirements for licensees under 112(e) and 114 for the period from 1998–2002. Proposed and interim regulations, however, threaten to cost licensees more to comply with the regulations than they will owe in royalties. These threatened regulations disproportionately affect educational and community stations, which play more diverse and often older recordings, for which less information is often available. Burdensome recordkeeping requirements threaten to drive non-commercial educational broadcasters from the Internet.

Collection of some information sought to be reported is technologically impossible. Some of the information proposed to be included in the “Report of Use of Sound Recordings under Statutory License” is not available to streaming services, is not consistently available, or is redundant within the report itself. The proposed recordkeeping requirements are monumental when compared with the level of utilization. The cost of complying with these rules is unmistakably disproportionate to the royalty fees to be assessed.

The contrast is also striking between the burden imposed by the proposed recordkeeping regulations and existing Copyright Office recordkeeping requirements applied to royalties paid by educational broadcasters to performance rights organizations (PROs). Present recordkeeping requirements for performances by educational broadcasters are based on a sampling model, whereas the proposed Internet regulations are based on a census model.

Complying with the proposed recordkeeping requirements is not a simple matter of mining the requested information from an already-existing data set. Much of the information for each musical selection would need to be specifically collected in order to comply with these proposed rules. Educational stations programming typi-

cally represents wide ranges of musical genres. Many do not restrict playlists to a comparatively small selection of artists and styles of music, as is common practice with our commercial counterparts, but instead explore compositions from vast, diverse music libraries. Music libraries of educational radio stations are frequently comprised of literally tens of thousands of compositions on a variety of media. This programming diversity creates an additional demand, under proposed recordkeeping rules, that would discourage, if not eradicate, the ability of educational broadcasters to provide this non-subscription service through Internet retransmissions. Much of the massive recordkeeping required by these rules would have to be generated manually by a small staff of volunteer personnel, by most educational stations. Amending the statute to exempt all non-commercial educational broadcasters and webcasters or to limit the requirements would ensure equal, fair consideration under the law.

#### IV. CONCLUSION

H.R. 1417 goes a long way to improve the fairness and accuracy of determinations concerning statutory copyright royalties and licenses. The suggested amendments would improve this reform legislation, or in the alternative, could be the basis for related legislation to address defects in the current copyright act. CBI thanks the Members of the Subcommittee for their attention and would be pleased to provide additional views or proposed language now or later.



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In the Matter of	}	Docket No. 2002-1 CARP DTTRA3
Digital Performance Right in Sound	}	
Recordings and Ephemeral Recordings	}	Docket No. 2001-2 CARP DTNSRA

**ORDER**

This Order addresses four matters in the above-captioned proceeding. First, the Order addresses a joint motion filed by certain parties proposing rates and terms for the section 112 and 114 statutory licenses for certain services and requesting that the proposal be published by the Library under section 251.63(b) of the CARP rules, 37 C.F.R. Second, the Order addresses a motion filed by certain parties to consolidate this proceeding with a new proceeding to set rates and terms under the section 112 and 114 licenses for new subscription services. Third, the Order sets forth a new precontroversy discovery schedule for certain parties in this proceeding not covered by the joint proposal mentioned above. And fourth, the Order addresses a motion filed by Collegiate Broadcasters, Inc. to bifurcate this proceeding as between commercial and non-commercial entities making use of the section 112 and 114 licenses for eligible nonsubscription services.

**Joint Proposal**

On April 3, 2003, the Library of Congress received a joint proposal to set rates and terms for the section 112 and 114 statutory licenses for eligible nonsubscription and new subscription transmissions, other than simulcasts of AM and FM radio broadcast programming and transmissions made by certain noncommercial entities as identified in the joint proposal, from the Recording Industry Association of America, the American Federation of Musicians of the United States and Canada, the American Federation of Television and Radio Artists, and the Digital Media Association. The Library will soon publish in the Federal Register the terms of the joint proposal pursuant to section 251.63(b) of the CARP rules, which allows the Librarian to propose for adoption settled royalty rates and terms. Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTTRA3 (February 6, 2003) **IS VACATED** for services covered by the joint proposal.

**Motion to Consolidate**

On February 24, 2003, the Digital Media Association, America Online, Inc., Listen.com, Inc., MusicMatch, Inc., and Yahoo, Inc. filed a motion requesting the Library consolidate this proceeding with the CARP proceeding to establish section 112 and section 114 rates and terms for new subscription services, Docket No. 2001-2 CARP DTNSRA. The joint proposal, described above, covers both nonsubscription and new subscription services. If the proposal is adopted, the motion to consolidate is moot. Wherefore, **IT IS ORDERED** that the motion to consolidate **IS DISMISSED WITHOUT PREJUDICE** and may be refilled in the event that the joint proposal is not adopted and a CARP becomes necessary.

**New Precontroversy Discovery Schedule**

The Small Webcaster Settlement Act of 2002, Public Law No. 107-321, amended section 114(f) of the Copyright Act to provide, among other things, that noncommercial webcasters have until May 31, 2003, to negotiate settlements of rates and terms for the section 112 and 114 licenses for nonsubscription transmissions. The Small Webcaster Settlement Act defines a "noncommercial webcaster" as a webcaster that is:

(I) exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

17 U.S.C. § 114(f)(5)(E)(i). The Library recognizes that requiring the submission of written direct cases before May 31 will compromise noncommercial webcasters' ability to take full advantage of the period provided in the Act.

Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS VACATED** for rates and terms for the use of sound recordings in eligible nonsubscription transmissions (17 U.S.C. §§ 112 & 114) for noncommercial webcasters.

**IT IS FURTHER ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS AMENDED** for noncommercial webcasters as follows:

<b>ACTION</b>	<b>DATE</b>
Filing of Written Direct Cases	June 30, 2003
Requests for Underlying Documents Related to Written Direct Cases	July 10, 2003
Responses to Requests for Underlying Documents	July 15, 2003
Completion of Document Production	July 21, 2003
Follow-up Requests for Underlying Documents	July 25, 2003
Responses to Follow-up Requests	July 30, 2003

Motions Related to Document Production	August 4, 2003
Production of Documents in Response to Follow-up Requests	August 7, 2003
All Other Motions, Petitions and Objections	August 13, 2003

The precontroversy discovery schedule announced in the February 6, 2003, Order remains unchanged for those parties who are not covered by the joint proposal and who are not noncommercial webcasters as defined in the Small Webcaster Settlement Act.

**Motion to Bifurcate**

On March 3, 2003, Collegiate Broadcasters, Inc. ("CBI") filed a motion to bifurcate this proceeding to permit noncommercial webcasters to present their written direct cases at a later date than other parties in this proceeding and to permit them to present their evidence and have it considered by the CARP separately from the other parties. CBI points out that allowing noncommercial webcasters to file later (they propose August 5, 2003) will allow such webcasters to fully negotiate settlements under the terms of the Small Webcaster Settlement Act.

Wherefore, **IT IS ORDERED** that the motion to bifurcate **IS GRANTED IN PART AND DENIED IN PART**. The motion is granted in that the Library has amended the precontroversy discovery schedule for noncommercial webcasters and is permitting them to submit their written direct cases at a later date (see above). This also means that precontroversy discovery on their written direct cases will be conducted separately from the other parties in this proceeding. However, the Library does not have the authority to instruct the CARP as to how it will hear and consider the evidence presented by noncommercial webcasters. Consequently, the Library is denying this aspect of CBI's motion. Nevertheless, we encourage the CARP to schedule hearings and proceedings in this docket in such a manner as to minimize, as much as possible, the costs of participation that will be borne by noncommercial webcasters.

**SO ORDERED**

Marybeth Peters  
Register of Copyrights

BY: \_\_\_\_\_

William J. Roberts, Jr.  
Senior Attorney

DATED: April 10, 2003

LETTER FROM JAMES CANNINGS



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**Our Own Performance Society, Inc. (OOPS)**

April 8, 2003

H.R. 1417

107<sup>th</sup> Congress  
Subcommittee on Courts, the Internet  
and Intellectual Property  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington D.C. 20515-6216

Dear Ms. McDonald:



On Tuesday April 1, 2003 the subcommittee on the Judiciary held a hearing in reference to H.R. 1417 ("Copyright Royalty Distribution Reform Act of 2003"). The said BILL is introduced to amend title 17 United States Code, to replace the Copyright Arbitration Royalty Panels with a Copyright Royalty Judge, and for other purposes. James Canning made a request to file his comments concerning the said BILL. You directed him to file his comments within a week.

At the above referenced hearing there were two debated issues which I will comment on. They are: -

1. The issue of number of Judges to the Copyright Arbitration Royalty Panels.
2. What the standard of judicial review should be for the Court of Appeals for the District of Columbia Circuit.

COMMENTS ON H.R.1417

I do support the point made by Mr. Remington who suggested that the BILL should allow for a panel of three Judges. One reason is that the introduced amendment seeks to replace the Copyright Arbitration Royalty Panels, which appointed three arbitrators. Except for costs this system has worked. The other reason is that three Judges will create a necessary balance of power necessary for fair hearings and as

such can minimize the added expense of appeals.

In reference to the second raised herein, it is my opinion the standard of judicial review of arbitrary and capricious should be the Administrative Procedure Act ("APA"). Because the APA specifies the standard of "arbitrary and capricious," it is troubling should this po



be so. Precedent has shown that absent a clear statutory directive to the court of review; the court becomes very creative in arriving at a standard of review. See National Association of Broadcasters v. the Librarian et al., 146 F.3d 907, 922 (D.C. Cir. 1998). The court states,

Where Congress has not prescribed the degrees of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an Administrative proceeding, **this court has felt at liberty to prescribe the standard.** \* \* \*  
(Emphasis added)

Moreover, an important general purpose of the APA was to “supplant a variety of pre-existing methods for obtaining review that differed from one agency to another.” See Cousins v. Dept. of Transportation, 880 F.2d 603, 606 (1<sup>st</sup> Cir.1989) (en Banc) (Breyer, J) See also Cousins, 880 F.2d at 606, quoting S. Rep. No. 442 76<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9-10 (1939) (relating to an earlier version of the legislation that became the APA) (“‘unfortunately,’ existing statutes d[id] not provide for a uniform method and scope of judicial review”); cf. H.R. Rep. No. 1980 79<sup>th</sup> Cong., 2d Sess. 16 (1946) (“the bill is meant to operate’ across the board’ in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See [the definitional provision now particular operation at 5 U.S.C. 551(1)].) Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment.”).

There is no doubt that H.R. 1417 embrace the APA for procedural purposes. The APA introduces the notion of agency. Section 803(a) specifically states: “The Copyright Judge shall conduct proceedings in accordance with subchapter 11 of chapter 5 of title 5, for the purpose of making determinations in carrying out the purpose set forth in section 801.” If the Copyright Judge determination is appealed the standard of judicial review of that determination must be based on whether or not according to subchapter 11 of chapter of 5 title 5 the Copyright Judge’s determination is “arbitrary and capricious.”

Therefore, the APA does apply to the standard of judicial review.

Therefore, it is respectfully requested that the language of H.R. 1417 be amended to specifically state that the standard of judicial review of “arbitrary and capricious” be that of the APA.

Thanking you for your cooperation in this matter.

Respectfully submitted

James Cannings  
Copyright Owner, Publisher, Songwriter  
Founder of OOPS

