



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

INITIATION OF ARBITRATION AND ANNOUNCEMENT OF THE SCHEDULE FOR THE PROCEEDING

DIGITAL PERFORMANCE RIGHTS IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS

The following excerpt is taken from Volume 66, Number 141 of the *Federal Register* of Monday, July 23, 2001 (pp. 38324–38326)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2000–9 CARP DTRA1&2]

Digital Performance Rights in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Initiation of arbitration and announcement of the schedule for the proceeding.

SUMMARY: The Copyright Office of the Library of Congress is announcing the initiation of and schedule for the 180-day arbitration period to set the rates and terms for two compulsory licenses. One license allows certain eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions and the other allows a transmitting organization to make an ephemeral recording of a sound recording for the purpose of making a permitted public performance.

EFFECTIVE DATE: July 23, 2001.

ADDRESSES: All hearings and meetings for the proceeding to set rates and terms for the sections 112 and 114 licenses shall take place in the James Madison Memorial Building, Room LM-414, First and Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT

David O. Carson, General Counsel, or Gina Giuffreda, CARP Specialist, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION

Background

This notice fulfills the requirement of 37 CFR 251.64 and 17 U.S.C. 803(a)(1). Section

251.64 of the CARP rules, 37 CFR provides that:

After the end of the 45-day precontroversy discovery period, and after the Librarian has ruled on all motions and objections filed under Sec. 251.45, the Librarian will determine the sufficiency of the petition, including, where appropriate, whether one or more of the petitioners' interests are "significant." If the Librarian determines that a petition is significant, he or she will cause to be published in the **Federal Register** a declaration of a controversy accompanied by a notice of initiation of an arbitration proceeding.

On November 27, 1998, the Library of Congress published a notice, pursuant to 17 U.S.C. 112(e)(4) and 114(f)(2)(A), initiating a voluntary negotiation period for the purpose of establishing rates and terms for the digital public performance of sound recordings license (as it pertains to webcasters) under section 114 and for the making of ephemeral copies in furtherance of a digital public performance under section 112 for the period beginning on October 28, 1998, and ending on December 31, 2000. 63 FR 65555 (November 27, 1998). No voluntary agreements were reached. On July 23, 1999, the Recording Industry of America, Inc. ("RIAA") filed a petition in accordance with 17 U.S.C. 112(e)(5) and 114(f)(2)(B) to convene a Copyright Arbitration Royalty Panel ("CARP") for the purpose of setting rates and terms for these licenses.

After the filing of the petition, the Library requested the filing of notices of intent to participate in the proceeding and set the schedule for the 45-day precontroversy discovery period. 64 FR 52108 (September 27, 1999). After the filing of notices of intent to participate and upon a party's request to extend the filing date for direct cases, the Library vacated the schedule set forth in the September 27, 1999, notice. See Order, Docket No. 99–6 CARP DTRA (December 22, 1999).

During the pendency of the proceeding, the Library published a notice, in accordance with 17 U.S.C. 112(e)(6) and 114(f)(2)(C)(i)(II), initiating a voluntary negotiation period for the purpose of establish-

ing rates and terms for the two licenses for the period 2001 and 2002. 65 FR 2194 (January 13, 2000). On August 8, 2000, the RIAA again filed a petition to convene a CARP to set these rates. RIAA asserted that it has a significant interest in such a proceeding because it has "established a collective that is comprised of more than 200 different recording labels and artists, including all of the major record companies in the United States * * * [and its] members own the copyrights in approximately 90% of the legitimate sound recordings sold in the United States." Petition at 2.

Prior to the establishment of a new precontroversy discovery schedule for the 1998–2000 proceeding and the establishment of a precontroversy discovery schedule for the 2001–2002 proceeding, the Library consolidated the two proceedings before a single CARP and assigned a single docket number applicable to both proceedings. Order, Docket Nos. 99–6 CARP DTRA and 2000–3 CARP DTRA2 (December 4, 2000).

The Library has conducted a precontroversy discovery period under Sec. 251.45 of the rules. See 65 FR 77394 (December 11, 2000); Orders, Docket No. 2000–9 CARP DTRA1&2 (January 18, 2001, and March 16, 2001). While the 45-day precontroversy discovery period is complete, a few motions are pending before the Library. However, the disposition of these motions will in no way affect the Librarian's determination regarding the sufficiency of the petitions filed in this proceeding; and the motions will be ruled upon in advance of July 30, 2001, the beginning of the 180-day arbitration period. Consequently, the Librarian is announcing the initiation of this proceeding at this time so that the schedule of the proceeding may be published in the **Federal Register** within seven calendar days of the first meeting as required by Sec. 251.11(b) of the rules. [[Page 38325]]

Determination of Petitioner's Significant Interest in Proceeding

The Librarian has considered the petitions of the RIAA and determines that RIAA has a significant interest in the CARP proceedings to establish the rates and terms of the section 112 and 114 licenses for the periods 1998–2000 and 2001–2002. RIAA has set up a collective comprised of more than 200 different recording labels and artists, including all of the major record companies in the United States, and its members own the copyrights in approximately 90% of the legitimate sound recordings sold in the United States. Petition at 2 (August 8, 2000). Further, the former Copyright Royalty Tribunal recognized that RIAA had a significant interest in copyright compulsory license rate proceedings affecting the recording industry. See *Recording Industry Association of America v. Copyright Royalty Tribunal*, 662 F.2d 1 (D.C. 1981) (17 U.S.C. 115 license). Consequently, the Librarian determines that RIAA has a significant interest in this proceeding within the meaning of 17 U.S.C. 803(a)(1).

Selection of Arbitrators

In accordance with Sec. 251.6 of the CARP rules, the arbitrators have been selected for this proceeding. They are:

The Honorable Eric E. Van Loon (Chairperson)
The Honorable Jeffrey S. Gulin
The Honorable Curtis E. von Kann

Initiation of the Proceeding

Pursuant to Sec. 251.64 of the CARP rules, the Librarian is formally announcing the existence of a controversy as to the establishment of rates and terms for the digital public performance of sound recordings license (as it pertains to webcasters) under 17 U.S.C. 114 and for the making of ephemeral copies in furtherance of a digital public performance under 17 U.S.C. 112 and is initiating an arbitration proceeding under chapter 8 of title 17 of the United States Code to set the rates and terms for these licenses. The arbitration proceeding commences on July 30, 2001, and runs for a period of 180 days. The arbitrators shall file their written report with the Librarian by January 28, 2002, the end of the 180-day period, in accordance with Sec. 251.53 of the rules.

Schedule for Proceeding

Section 251.11(b) of the regulations governing the Copyright Arbitration Royalty Panels ("CARPs"), 37 CFR subchapter B, provides that:

At the beginning of each proceeding, the CARP shall develop the original schedule of the proceeding which shall be published in the **Federal Register** at least seven calendar days in

advance of the first meeting. Such announcement shall state the times, dates, and place of the meetings, the testimony to be heard, whether any of the meetings, or any portion of a meeting, is to be closed, and if so, which ones, and the name and telephone number of the person to contact for further information.

This notice fulfills the requirements of Sec. 251.11(b) for the proceeding to set rates and terms for the digital public performance of sound recordings license (as it pertains to webcasters) under 17 U.S.C. 114 and for the making of ephemeral copies in furtherance of a digital public performance under 17 U.S.C. 112.

On June 25, 2001, the parties to this proceeding met with the arbitrators for the purposes of discussing the mechanism for payment of the arbitrators and of setting a schedule for this proceeding. At that meeting, the parties and the arbitrators agreed to the following schedule:

Opening Statements: July 30, 2001.

Presentation of Direct Cases: July 31–September 13, 2001.

Witnesses for the Copyright Owners and Performers:¹

July 31–August 2, 2001: Cary Sherman, Hilary Rosen, David Altschul, Linda McLaughlin, Paul Katz, Charles Ciongoli.

August 6–10, 2001: James Griffin, Ronald Wilcox, Paul Vidich, LaVerne Evans, Jay Samit, Lawrence Kenswil, Anthony Pipitone, Gregory Hessinger, Gary Himelfarb.

August 13–16, 2001: Jennifer Warnes, Kevin Dorsey, Harold Bradley, Steven Marks, Thomas Nagle, Robert Yerman, Steven Wildman.

Witnesses for Broadcasters/Webcasters;² DMX Music, Inc.; AEI Music Network; and National Public Radio ("NPR"):

For Broadcasters: Dan Halyburton (Susquehanna Radio Corp.), Stephen F. Fisher (Entercom Communication Corp.), Dan Mason (Infinity Broadcasting Corp.), James Patrick Donahue (Clear Channel Radio Group), Joe Davis (Salem).

For Webcasters: Scott Mills (BET Interactive), Joe Lyons (Comedy Central), Michael Peterson (Coolink Broadcast Network), Tuhin Roy (Echo Networks, Inc.), Robert D. Roback (Launch Media, Inc.), David Goldberg (Launch Media, Inc.), Rob Reid (Listen.com, Inc.), John O. Jeffrey (Live365, Inc.), Brad Porteus (MTVi Radio of the

¹"Copyright Owners and Performers" consist of the Recording Industry Association of America, the American Federation of Television and Radio Artists, the American Federation of Musicians of the United States and Canada, and the Association for Independent Music.

²"Broadcasters/Webcasters" consist of Clear Channel Communications, Inc.; the National Religious Broadcasters Music License Committee; Salem Communications Corp.; Bet.com; Comedy Central; Infinity Broadcasting Corp.; Launch Media, Inc.; Listen.com; Live365.com; the MTVi Group LLC; MusicMatch, Inc.; Myplay, Inc.; Netradio Corp.; RadioActive Media Partners, Inc.; Radiowave.com, Inc.; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind; and XACT Radio Network, LLC.

MTVi Group, Inc.), Quincy McCoy (MTVi Group), Robert Ohlweiler (MusicMatch, Inc.), David Bean (MusicMatch, Inc.), David Pakman (Myplay, Inc.), Michael Wiese (NetRadio Corp.), Charlie Moore (RadioActive Media Partners, Inc.), Nathan W. Pearson, Jr. (RadioWave.com, Inc.), Fred McIntyre (AOL Music/ Spinner), Diego Ruiz (Univision Online, Inc.), Clifton Gardiner (Westwind Media.com, Inc.), David Juris (XACT Radio LLC), David Fagin (singer, songwriter, recording and performing artist), Alanis Morissette (singer, songwriter, recording and performing artist).

*For Background Music:*³ Barry Knittel (AEI Music Network, Inc.)

Experts: William W. Fisher III, Jonathan Zittrain, Adam B. Jaffe, Michael Fine, Paul William Kempton, Michael Mazis.

For NPR: Kenneth P. Stern (NPR), Dr. Jane Murdoch (Charles River Associates), Dr. John Woodbury (Charles River Associates).

Filing of Written Rebuttal Testimony: October 4, 2001.

Presentation of Rebuttal Cases: October 15–20, 22–25, 2001.

Filing of Proposed Findings of Fact and Conclusions of Law: November 14, 2001.

Filing of Replies to Proposed Findings of Fact and Conclusions of Law: December 3, 2001.

Oral Argument: December 7, 2001.

Close of 180-day period: January 28, 2002.

Opening statements will begin at 1 p.m. on July 30. Thereafter, all hearings will begin at 9:00 a.m.

At this time, the parties have not moved to close any portion of the proceeding to the public. Further refinements to the schedule will be announced in open meetings and issued as orders to the parties participating in the proceeding. All changes will be noted in the docket file of the proceeding, as required by the Copyright Office regulations governing the administration of CARP proceedings. 37 CFR 251.11(c). [[Page 38326]]

Dated: July 18, 2001

Marilyn J. Kretsinger
Assistant General Counsel

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³"Background Music" consist of AEI Music Network, Inc. and DMX Music, Inc.