ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

NOTICE OF CONSOLIDATION OF PROCEEDINGS, ROYALTY DISTRIBUTION, AND PUBLIC MEETING

CONSOLIDATION OF 1992, 1993 AND 1994 DIGITAL AUDIO RECORDING DISTRIBUTION PROCEEDINGS

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 94-2B CARP-DD]

Consolidation of 1992, 1993 and 1994 Digital Audio Recording Distribution Proceedings

AGENCY: Copyright Office, Library of Congress

ACTION: Notice of consolidation of proceedings, royalty distribution, and public meeting.

SUMMARY: The Copyright Office is granting a motion to consolidate the 1992, 1993, and 1994 digital audio recording (DART) distribution proceedings which will begin in 1995. In addition, the Office will make distribution of the 1992 and 1993 Nonfeatured Musicians and Nonfeatured Vocalists DART subfunds in July. The Office will hold a public meeting to discuss the best evidence for the distribution of DART royalties in September.

DATES: (1) The distribution of the royalties in the 1992 and 1993 Nonfeatured Musicians and Nonfeatured Vocalists DART subfunds will take place July 28, 1994. (2) The public meeting to discuss best evidence for distribution of royalties will take place 10 a.m., Tuesday, September 27, 1994.

ADDRESS: The public meeting will take place at the temporary CARP hearing room, Suite 921, 1825 Connecticut Avenue, N.W., Washington, D.C. 20009.

FOR FURTHER INFORMATION CONTACT: Eric Schwartz, Acting General Counsel, U.S. Copyright Office, Department 17, Library of Congress, Washington, D.C. 20540. Telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION:

I. Background

On December 17, 1993, Congress passed the Copyright Royalty Tribunal Reform Act of 1993. This legislation dissolved the Tribunal and established a new system of copyright arbitration royalty panels (CARPs) to be supported by the Library of Congress and the Copyright Office.

The first proceeding to be initiated under the new CARP system was the distribution of the 1992 and the 1993 digital audio recording technology (DART) royalties. The 1992 DART distribution proceeding was begun by the Tribunal but was suspended when the Tribunal was abolished, and needed to be started anew. The 1993 DART distribution was begun by the Copyright Office under the new authority conferred by the Copyright Royalty Tribunal Reform Act of 1993. On March 1, 1994, 59 FR 9773, we began the process of distributing DART royalties by asking the claimants to the 1992 and 1993 DART funds for comments on the following questions:

(a)Do any controversies exist concerning the distribution of 1992 and/or 1993 DART royalties?

(b)If controversies do exist, which subfunds do they exist in?

(c) If settlements have been reached, which parties have reached settlement and which have not?

(d) Do the claimants believe it would be advisable to consolidate the 1992 DART proceeding with the 1993 DART proceeding?

In addition, in the March 1, 1994, notice and in a subsequent notice appearing May 16, 1994, 59 FR 25506, the Library of Congress and the Copyright Office established the initial procedural dates that would apply to the 1992 and 1993 DART proceedings, as follows:

June 10, 1994 - comments from claimants due on whether controversies exist in the distribution of 1992 and 1993 DART funds, and whether the 1992 and 1993 DART distribution proceedings should be consolidated.

June 15, 1994 - precontroversy motions, and/or objections to any listed arbitrators due from claimants who will be participating in the 1992 and/or 1993 DART distribution proceedings.

June 30, 1994 - declaration by the Librarian of Congress to be made as to whether any controversies exist in the distribution of 1992 and 1993 DART royalties, and, if they do, a declaring of the initiation of CARP proceedings.

August 1, 1994 - authorization by the Copyright Office of the distribution of any royalties found not to be in controversy.

II. The Commentators

We received comments from the following claimants:

The Alliance of Artists and Recording Companies (AARC)
Ymistye L. White
Alicia Carolyn Evelyn
Eugene (Lambchops) Curry
James Cannings
Gear Publishing Company
Hideout Productions on behalf of Punch Enterprises, Inc. and Bob Seger
Sword and Stone Publishing, Inc.
Bopp du Wopp, Inc.
Jointly, the independent administrator of the Nonfeatured Musicians and the

Nonfeatured Vocalists subfund; the American Federation of Musicians (AFM); the American Federation of Television and Radio Artists (AFTRA); and the Recording Industry Association of America (RIAA).

Jointly, AARC, American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI); Copyright Management, Inc. (CMI), Gospel Music Coalition (GOSPEL); The Harry Fox Agency, Inc. (HFA); SESAC, Inc. (SESAC), and the Songwriters Guild of America (SGA).

Jointly, ASCAP, BMI, CMI, GOSPEL, HFA, SESAC, and the SGA.

III. Motion to Consolidate and Stay Procedural Dates

The comments indicated that, while many settlements were reached, there still existed some unresolved controversies in each of the subfunds. Rather than requesting the immediate initiation of a CARP proceeding to resolve these controversies, a joint motion was filed by AARC, ASCAP, BMI, CMI, GOSPEL, HFA, SESAC, and SGA requesting that the Librarian of Congress and the Copyright Office consolidate the 1992 and the 1993 DART distribution proceedings with the 1994 DART distribution proceedings that will start next year, and defer all consideration of DART distributions until 1995.

As a consequence of their motion to consolidate, the joint commentators also requested that the initial DART procedural dates of June 15 (precontroversy motions and objections), June 30 (initiation of proceedings), and August 1 (authorization of distributions) be stayed until after the 1994 claims are filed in 1995.

A. Justification of Motion to Consolidate and Stay of Procedural Dates

In support of their motion to consolidate, the joint commentators noted that the 1992 and the 1993 DART funds, which are the first funds to be collected under the Audio Home Recording Act that took effect on October 28, 1992, are quite small: a little over $100,000 for 1992, and less than $500,000 for 1993. They anticipate that, because the DART fund is new, many issues of first impression will have to be resolved, but that the costs of such action will be such as to consume most, if not all, of the fund. The joint commentators observed that the costs borne by the copyright owners in a DART proceeding are not only their own costs, but the costs of the Library of Congress, the Copyright Office, and the arbitrators. In the interest of economy, therefore, the joint commentators requested that the 1992 and 1993 distribution proceedings be consolidated with the 1994 proceeding.

In addition, the joint commentators noted that the Library of Congress and the Copyright Office have endeavored to adopt regulations to govern the new CARP proceedings, but that the current regulations are interim rules. Comments on the interim rules were due June 15, 1994, and reply comments are due July 15, 1994. The joint commentators would prefer that a DART proceeding operate under the final rules that result from these latest rounds of comments, rather than proceed under the interim rules.

Last, the joint commentators stated that they will endeavor to use the time between now and 1995 to gather the best information and data relevant to a DART distribution proceeding, and to continue to work for more settlements in each of the subfunds. To the extent that more settlements are reached, fewer controversies will need to be brought before the arbitrators, and fewer royalties will have to be spent on the expense of a CARP proceeding.

B. Grant of Motion to Stay Procedural Dates and Establishment of Comment Period

On June 21, 1994, the Library of Congress and the Copyright Office issued an Order finding good cause to grant the motion to stay the procedural dates of June 15, June 30, and August 1, established in this proceeding.

Concerning the motion to consolidate the 1992, 1993, and 1994 distribution proceedings, the Order gave those persons who did not join in the joint motion until June 24, 1994, to respond to it, as provided by § 251.45 of the Copyright Office rules.[1]

C. Responses to the Motion to Consolidate Proceedings

Responses to the joint motion to consolidate proceedings were filed by James Cannings, Eugene Curry, and Alicia Carolyn Evelyn.

Mr. Cannings agreed with the consolidation of the 1992, 1993 and 1994 proceedings provided that the distribution methodology proposed by Bopp du Wopp, Inc. is considered as one possible method by the claimants. Mr. Cannings urged diligent and good faith efforts at settlement before 1995.

Mr. Curry questioned whether the proposed consolidation of 1992, 1993 and 1994 would lead to another consolidation next year, then the year after that, *ad infinitum*. Mr. Curry would agree to future years being consolidated, i.e., 1994, 1995, and 1996, but wanted an immediate distribution of 1992 and 1993 moneys this August.

Ms. Evelyn stated that she would object to the motion to consolidate so long as public performance royalty issues she has raised with BMI and ASCAP remain unresolved. She joined with Mr. Cannings in support of Bopp du Wopp, Inc.'s proposed distribution methodology.

IV. Grant of Motion to Consolidate

The Library of Congress and the Copyright Office agree with the arguments made by the joint commentators and hereby grant the motion to consolidate the 1992, 1993, and 1994 DART royalty distribution proceedings into one proceeding that will begin in 1995.

As we discussed in our notice of March 1, 1994, the Audio Home Recording Act established certain statutory deadlines for the commencement of DART distribution proceedings which, as the agency delegated the responsibility, we were prepared to meet. However, as observed by the Administrative Conference of the United States, 1 C.F.R. 305.78-3, there are special circumstances when the meeting of a statutory deadline would not serve the public interest. Here, the majority of the claimants themselves have asked for a waiving of the statutory dates so that they might realize the economies that would accrue from a consolidation of proceedings, and so that they might continue settlement talks that could potentially avoid the cost of a CARP proceeding altogether. Under these circumstances, to initiate a CARP proceeding immediately will only serve to spend the claimants' royalties needlessly, and will likely result in the claimants receiving fewer royalties today than if they waited until 1995.[2] In addition, we see no financial harm in waiting until 1995. The claimants' royalties will remain invested in United States Treasury securities, and will continue to earn interest.

The objection of Mr. Curry to consolidation is based on a concern that consolidations will happen every year, and no moneys will ever be distributed. We do not see that occurring. Our goal,

[1] Section 251.45 provides that the comment period for precontroversy motions is two weeks from the filing of the motion.

[2] When confronted with the question of whether to nullify the Copyright Royalty Tribunal's cable rate adjustment because the Tribunal missed its statutory deadline by 28 days, the Court of Appeals for the District of Columbia stated that "Statutes that, for guidance of a government official's discharge of duties, propose to secure order, system, and dispatch in proceedings, are usually construed as directory, whether or not worded in the imperative, especially when the alternative is harshness or absurdity." The Court also noted that "agencies rigidly tied to a deadline . . . would become Penelopes, forever engaged in unraveling the webs they wove." *National Cable Television Association v. Copyright Royalty Tribunal*, 724 F. 2d 176, 189, fn. 23 (D.C. Cir. 1983).

and, we believe that of the moving parties, is economy, not delay. The moving parties do not want to see their royalties remaining with the government and neither do we.

The objection of Ms. Evelyn is tied to her other issues with ASCAP and BMI, and are not relevant to our consideration here.

As stated earlier, in our Order, dated June 21, 1994, we granted the joint commentators' motion to stay all previously announced procedural dates intended to govern a 1992 and 1993 DART royalty distribution proceeding.[3] Consistent with our ruling today to consolidate the 1992, 1993, and 1994 proceedings, new procedural dates will be established in 1995, in accordance with our yearly statutory obligation under Chapter 10 of the Copyright Code to ascertain DART controversies and to initiate DART proceedings.

V. Inquiry into Best Evidence

The concerns expressed by the commentators about the potential for the costs of a DART proceeding to use up most or all of the DART royalties available for distribution are valid, and are very much shared by the Library and the Copyright Office. Two scenarios especially concern us. One, there is the possibility of holding extensive hearings for controversies where the amounts in dispute are ultimately determined to be quite small. Two, even if the amounts in controversy are sizable, there is the possibility of holding months-long hearings about the validity of the evidence offered by the parties, which again would ultimately use up the bulk of the royalties in the DART funds, and the time allotted for arbitration. This is especially likely because DART proceedings have never been held, and there is no precedent concerning what is the most relevant evidence. We note that at a similar stage in its regulatory history, the issue of the best evidence for distributing jukebox royalties was the subject of a full evidentiary hearing at the Copyright Royalty Tribunal, but, nevertheless, resulted in the Tribunal deciding that no distribution determination could be reached without further efforts at producing better evidence.[4] This is a situation we should like to avoid.

Consequently, the Library of Congress and the Copyright Office will hold a public meeting at 10 a.m., Tuesday, September 27, 1994 at the temporary CARP hearing room, Suite 921, 1825 Connecticut Avenue, N.W., Washington, D.C. 20009. The purpose of the meeting is to discuss what would be the best evidence for distribution of the Sound Recordings Fund and the Musical Works Fund.

We note that section 1006(c) of the Copyright Code states that the allocation of the Sound Recordings Fund shall be made according to the extent sound recordings were distributed, and that the allocation of the Musical Works Fund shall be made according to the extent musical works were distributed or disseminated to the public in transmissions. We should like, therefore, to know:

(a) Do industry data exist, or can industry data be produced, that will demonstrate validly the distribution of sound recordings in the United States?

(b) Do industry data exist, or can industry data be produced, that will demonstrate validly the dissemination of musical works to the public in transmissions in the United States?

(c) How should "distributed" be defined given the practice of allowable returns? Should the arbitrators employ the rule adopted by the Copyright Office with respect to section 115?[5]

(d) If methodologies exist for the production of data relating to (a) and (b), what are the drawbacks of such methodologies?

(e) If methodologies exist for the production of data relating to (a) and (b), would the data cover all distributions and all public disseminations so that even the smallest or most specialized claimant can be compared mathematically to the larger claimants?

(f) If the methodologies cannot cover the smaller claimants, what measurements can be proposed to cover them?

(g) If conflicting methodologies exist, how do the parties propose to resolve the conflicts?

We emphasize that we are not asking these questions to decide distribution issues. Distribution issues are properly for the CARP arbitrators. But if we can in any way help to focus and sharpen the proceedings, the savings in time and expense before a CARP panel will far outweigh the cost of this one public meeting. The public meeting will give the parties an opportunity to explore the positions of each claimant, facilitate concentrating on solving the evidentiary problems, and reveal what further steps need to be taken. A public record of the meeting will be made for those who do not attend, and for the benefit of the CARP panel, if one is ultimately convened.

VI. The Nonfeatured Musicians and the Nonfeatured Vocalists Subfunds

A. Background—1993

The Audio Home Recording Act established two funds: the Sound Recordings Fund and the Musical Works Fund. Within the Sound Recordings Fund, the Act further established four subfunds: the Copyright Owners Subfund, the Featured Artists Subfund, the Nonfeatured Musicians Subfund, and the Nonfeatured Vocalists Subfund.

With regard to the Nonfeatured Musicians Subfund and the Nonfeatured Vocalists Subfund, the Act outlined certain specific procedures. It required that "2 5/8 percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians or any successor entity) who have performed on sound recordings distributed in the United States." Similarly, "1 3/8 percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation [of] Television and Radio Artists or any successor entity) who have performed on sound recordings distributed in the United States." 17 U.S.C. 1006.

In 1993, the Copyright Royalty Tribunal adopted a regulation, ultimately reissued by the Library of Congress and the Copyright Office when the Tribunal was abolished, that required the independent administrator to give notice

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[3] As discussed below, in part VI, we are making a full distribution of the Nonfeatured Musicians Subfund and the Nonfeatured Vocalists Subfund on July 28, 1994. See, discussion below, at VI.

[4] "The Tribunal considers that the record of the current proceeding is insufficient as a basis on which we can make a distribution of the 1979 jukebox royalties. . . . The Tribunal, therefore, has elected not to make a distribution in this proceeding." *1979 Jukebox Royalty Distribution*, 46 FR 58139, 58142 (Nov. 30, 1981).

[5] With respect to the 17 U.S.C. 115 mechanical license, "distributed" is defined as occurring when "the person exercising the compulsory license has voluntarily and permanently parted" with possession of the phonorecord. The Copyright Office has taken the position that permanent distribution of phonorecords occurs one year from the date that the compulsory licensee parts with possession, or at the time when a sale of the phonorecord is recognized in accordance with generally accepted accounting principles, or according to the IRS' practices, whichever of these events comes earlier. 42 FR 64889, 64892 (Dec. 29, 1977).

to the government of his or her selection by March 31 of each year. 37 C.F.R. 311.4; 58 FR 53822 (1993).

In the same rulemaking, the Tribunal determined that it did not have the jurisdiction to decide controversies within the two subfunds that were administered by an independent administrator. The Tribunal reasoned that, according to the wording of section 1006(a), its authority over the distribution of royalties extended only to "interested copyright parties" and that nonfeatured performers, whether musicians or vocalists, were not defined under the Audio Home Recording Act as "interested copyright parties." 58 FR 53822, 53824 (Oct. 18, 1993).

Therefore, the Tribunal concluded that its role in handling the moneys for the two nonfeatured performer subfunds was simply a ministerial task of distributing the royalties to the independent administrator when a distribution was ready to be made. *Id.*

B. Background—1994

After the Tribunal's abolition, the Copyright Office began to receive claims for 1993 DART royalties during January-February, 1994. One claimant, Eugene Curry, filed a claim for the Nonfeatured Musicians Subfund. Subsequently, the Office was informed that Edward Peters had been appointed the independent administrator for both the Nonfeatured Musicians Subfund and the Nonfeatured Vocalists Subfund.

The Copyright Office sent a letter to Mr. Curry and Mr. Peters asking three questions: (a) who were the interested copyright parties that participated in the selection of the independent administrator?; (b) is there any controversy between Mr. Curry and Mr. Peters about the distribution of Nonfeatured Musicians Subfund?; and (c) if there is a controversy, how would Mr. Curry and Mr. Peters recommend the resolution of the controversy? Letter, dated May 4, 1994.

Mr. Curry responded that there was a controversy between him and Mr. Peters on the distribution of the subfund.

Mr. Peters responded that he was selected by RIAA and AFM[6]; that, according to the Copyright Code and Tribunal precedent, the Copyright Office has no authority to resolve disputes in the nonfeatured subfunds; that, because the Copyright Office has no authority, Mr. Curry should not have filed a claim with the Copyright Office nor should the Office have processed his claim; that Mr. Curry will be treated properly by Mr. Peters; and the fact of his non-union membership will have no relevance whatever in the ultimate distribution of the subfund.

Separately, the Copyright Office received a joint comment from Mr. Peters, AFM, AFTRA, and the RIAA arguing in greater detail that the Audio Home Recording Act and the Tribunal's decision in 1993 support the conclusion that the independent administrator is to receive the allocated royalties for the two nonfeatured-performers subfunds directly, and is not subject to the authority of the Copyright Office or the CARP panel in resolving disputes in those subfunds.

C. Discussion

The Library of Congress and the Copyright Office have reviewed the Audio Home Recording Act and the Tribunal's 1993 decision, and agree with the joint commentators, AFM, AFTRA, RIAA and Mr. Peters, that the independent administrator is to receive the royalties from the two nonfeatured performers subfunds directly from the Copyright Office, and that disputes as to his (or her) distribution of those funds are not subject to the jurisdiction of a CARP panel.

Our purpose in sending the May 4 letter to Mr. Curry and Mr. Peters was to facilitate a settlement. The provisions of the Audio Home Recording Act are unique among other provisions governing statutory royalties in that they open up the possibility of a dispute in a royalty fund without offering an administrative remedy. How to handle such a dispute was not a question that was faced by the Tribunal in 1993, because in that year, there were no claims filed at all in the nonfeatured performers subfunds. This year, Mr. Curry's claim, and his subsequent notice that he is in controversy, presents the issue foresquare.

Recognizing the plain meaning of the statute, we agree that the royalties in the two nonfeatured performers subfunds are to be distributed directly to the independent administrator. We also recognize that claimants to those two subfunds do not file claims with the Copyright Office. They need to contact the independent administrator directly.

But we believe there is a function for the Copyright Office to perform. Each year, to the extent that the Copyright Office receives expressions of interest to receive royalties from those two subfunds, we will forward the names to the independent administrator.[7] In addition, the Copyright Office will maintain a public file that will consist of (a) the names of those expressing interest in the subfunds; (b) the notice of the independent administrator; (c) any correspondence concerning the two subfunds; and (d) any notification of the final disposition of any dispute within the subfunds. The notification is not required, but is being requested to complete the public record. It is also noted that we are not asking for a notification of the disposition of all moneys in the subfunds, just those in dispute. We recognize and will continue the Tribunal's policy of not inquiring into the distribution of *settled* claims.

D. Distribution notice

In light of the above discussion, we are ordering a full distribution of the royalties available in the 1992 and 1993 Nonfeatured Musicians and Nonfeatured Vocalists Subfunds to Mr. Edward Peters, the independent administrator, on July 28, 1994. This distribution will constitute the final distribution in those subfunds, except (a) in the event that there are any late payments, a subsequent distribution will be made to the independent administrator that represents those subfunds' share of the late payment; and (b) in the event that any refund is ultimately found to be required, the independent administrator will need to repay the Office the subfunds' share of the refund.

Dated: July 7, 1994.

Barbara Ringer,

Acting Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

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[6] RIAA, as a representative of copyright owners in sound recordings, is entitled to participate in the selection of the independent administrator. Other claimants to the Copyright Owners Subfund of the Sound Recordings Fund are also entitled to participate.

[7] This year, in addition to Mr. Curry, James Cannings filed a claim for the Nonfeatured Musicians Subfund and the Nonfeatured Vocalists Subfund. Mr. Cannings' claims were filed after the February 28, 1994 deadline, and would have been returned as untimely filed if they were claims subject to the Copyright Office's jurisdiction. However, in light of our ruling today, the statutory deadline in 17 U.S.C. 1007(a)(1) does not apply to claims beyond the Copyright Office's jurisdiction. Therefore, his claims are also being forwarded to the independent administrator for resolution.