Copyright Arbitration Royalty Panels · United States Copyright Office
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September 23, 2004

Dear Ms. Woods and Mr. Malone:

On August 26, 2004, Intercollegiate Broadcasting System and SoundExchange, Inc. filed a petition advising the Copyright Office that they had reached an agreement setting proposed rates and terms for the use of sound recordings in eligible nonsubscription transmissions and the making of related ephemeral recordings pursuant to statutory licenses for the license period beginning on January 1, 2005 and ending on December 31, 2006. The petition also asks the Office to publish the proposed rates and terms for public comment pursuant to 37 C.F.R. § 251.63(b) in lieu of convening a Copyright Arbitration Royalty Panel for the purpose of setting these rates and terms.

Under the authority of section 251.63(b), the Librarian of Congress may submit the agreed upon settlement to the public in a notice and comment proceeding and adopt the proposal embodied in the settlement without convening an arbitration panel, provided that no party with an intent to participate opposes the settlement. In accordance with this provision, the Office has reviewed the proposed settlement and it has identified certain provisions that appear to exceed statutory authority and the scope of this proceeding. Consequently, the Office has decided not to publish the proposed settlement as submitted unless the parties can provide adequate justification for the inclusion of the following provisions:

- Section 263.4(d) Payment in lieu of providing reports of use for Noncommercial Webcaster electing under 263.3(b), and
- Section 263.11 Default.

In both cases, the subject matter of these provisions would appear to fall outside the scope of the authority granted to the CARP or the Librarian in their roles to establish rates and terms of payment for the making of digital transmissions of sound recordings and the relevant ephemeral recordings under the section 112 and 114 statutory licenses.

Proposed section 263.4(d) contains three provisions, each of which concerns the obligation to provide reports of use to the copyright owners of the sound recordings utilized by those making digital transmissions and ephemeral recordings of sound recordings under the sections 112 and 114 statutory licenses. Regulations governing reports of use, however, are not part of the negotiation and arbitration process. Rather section 114(f)(4)(A) expressly grants to the Librarian of Congress the authority to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings."

Pursuant to section 114(f)(4)(A), the Copyright Office is currently conducting a notice and comment proceeding for the purpose of promulgating regulations specifying notice and

recordkeeping requirements for use of sound recordings under the section 112 and 114 licenses. See 69 FR 11515 (March 11, 2004);68 FR 58054 (October 8, 2003); 67 FR 59573 (September 23, 2002); and 67 FR 5761 (February 7, 2002). *Notice and Recordkeeping for Use of Sound Recordings under Statutory Licenses*, Docket No. RM 2002-1. Rules adopted under this process may only be amended under the notice and comment process. They are not subject to modification through the negotiation and arbitration process adopted by Congress for setting terms and rates of royalty fees for the sections 112 and 114 licenses. Hence, proposed section 263.4(d) would appear to be beyond the scope of this rate adjustment proceeding since neither the CARP nor the parties have authority to propose rules as part of a settlement agreement that supercede regulations adopted by the Librarian of Congress under his exclusive authority to promulgate regulations concerning notice and recordkeeping. Consequently, section 263.4(d) cannot be considered as a term of the settlement agreement unless petitioners can provide a satisfactory explanation identifying the basis for the parties' authority to negotiate terms governing notice and recordkeeping requirements within the scope of a CARP proceeding.

As representatives of the parties to the settlement, you have also proposed another rule that would appear to fall outside the jurisdiction of a CARP proceeding, section 263.11. This provision would terminate a Noncommercial Webcaster's[1] right to make transmissions or ephemeral recordings under the statutory licenses in the case where the licensee fails to comply with the terms and conditions of the statutory license or the applicable regulations within 30 days from the date of the written notice of the breach. Moreover, the proposed rule would automatically terminate the Licensee's right to operate under the statutory license were the same violation to be repeated, and it would allow a copyright owner to sue the Licensee for copyright infringement under 17 U.S.C. 501 and fully subject any public performance or ephemeral reproduction associated with the breach to the remedies provided by 17 U.S.C. 502-506 and 509 to the remedies provided by 17 U.S.C. 502-506 and 509.

However, the purpose of a CARP proceeding is to set rates and terms of royalty payments. "Terms" within the context of a CARP proceeding has a limited meaning and has been understood to refer only to those provisions that govern the administration of the license. See, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 FR at 25411-25412 (May 8, 1998). This understanding is based upon the legislative history for the Digital Performance Right in Sound Recordings Act of 1995 which discussed specifically the types of terms Congress expected the CARP to consider and made clear that "by terms, the Committee means generally such details as how payments are to be made, when, and other accounting matters (such as are prescribed in section 115)." S. Rep. No. 104-128, at 30 (1995). Terms which purport to define the circumstances that constitute copyright infringement go well beyond the authority Congress granted to a CARP or the Librarian in the context of a rate adjustment proceeding. Rather, Congress reserved unto itself the right to define which actions constitute an act of infringement, subject to the full panoply of remedies provided by sections 502 through 506 and 509. See, *e.g.*, 17 U.S.C. §§ 111 (c)(2),(3) and (4), and (e)(1),(2); 17 U.S.C. §§ 115(b)(2) and (c)(6); 17 U.S.C. §§ 119(a)(3),(4),(5) and (6); and 17 U.S.C. §§ 122 (d),(e) and (f). In doing so, Congress considered the impact of its decision on the user and, in some instances, chose not to impose strict liability on the user for an inadvertent violation of a statutory term, requiring instead that the action be willful or

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[1] For purposes of the proposed settlement, a "Noncommercial Webcaster" is defined in proposed section 263.2(i).

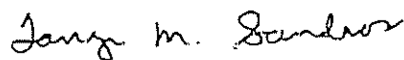
repeated before invoking the full power of the law. See, *e.g.*, 17 U.S.C. §§ 111 (c)(2) and 119 (a)(3),(4),(5) and (6).

Consequently, unless the proponents of the settlement can identify the statutory provisions in the Copyright Act that authorize interested parties to negotiate terms which impose strict liability upon users of the sections 112 and 114 statutory licenses or define actions which constitute copyright infringement, section 263.11 cannot be considered as part of a settlement agreement which purports to set rates and terms for use of these statutory licenses.

The Office also questions your request that a **Federal Register** notice set forth that the proposed rates and terms are non-precedential and may not be considered in future rate adjustment proceedings. We do so because the proposed rates and terms for use of the sections 112 and 114 statutory licenses after December 31, 2004, have been negotiated pursuant to sections 114(f)(2)(A) and 112(e)(3) and not pursuant to the Small Webcasters Settlement Act of 2002 - the Act under which the initial rates and terms were negotiated and which precluded any administrative, judicial or government agency from considering this information during the establishment of subsequent royalty rates and terms governing notice and recordkeeping requirements. Sections 114(f)(2)(B) and 112(e)(4) expressly state that a Copyright Arbitration Royalty Panel may consider the rates and terms negotiated as provided in sections 114(f)(2)(A) and 112(e)(3) when establishing rates and terms for subsequent license periods.

In light of the concerns expressed herein, the Office will not act on the petitioners' request to publish the proposed rates and terms until it has received a response that either withdraws the provisions addressed in this letter or provides a satisfactory explanation why the Librarian may adopt those provisions pursuant to 37 CFR § 251.63(b). Please provide your response no later than October 4, 2004.

Sincerely,



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