

Inc., Beethoven.com, LLC, All Bass Radio, Discombobulated, LLC, Wolf FM and Integrity Media Group, Inc. d/b/a Boomer Radio, collectively, requesting that the Librarian of Congress convene a CARP to adjust the rates and terms for the public performance of sound recordings by means of eligible nonsubscription transmissions and for the creation of ephemeral recordings necessary to facilitate that transmission for the license period 2003–2004.

On November 20, 2002, the Copyright Office initiated the next phase of the proceeding with the publication of a notice in the **Federal Register** calling for Notices of Intent To Participate. 67 FR 70093 (November 20, 2002). Notices of intent to participate were filed by forty-nine parties. On February 6, 2003, the Office set the precontroversy discovery schedule for the proceeding with written direct cases due to be filed on May 5, 2003. *See* Order in Docket No. 2002–1 CARP DTRA3 (February 6, 2003).

Likewise, in accordance with the time frame set forth in the law for the purpose of setting rates and terms for use of the section 114 license by new subscription services, the Library initiated a six-month voluntary negotiation period to adjust the rates and terms for new subscription services, *see* 66 FR 9881 (February 12, 2001), but again no settlement was reached by the end of the negotiation period. Consequently, Music Choice and the RIAA filed separate petitions with the Copyright Office requesting that a CARP be convened in order to set the rates and terms for the public performance of sound recordings by new subscription services. Accordingly, the Office published a notice in the **Federal Register** calling for Notices of Intent to Participate. 66 FR 70093 (November 20, 2001). Five parties filed Notices of Intent. The Office has yet to set the precontroversy discovery schedule for this proceeding.

On February 14, 2003, the Digital Media Association (“DiMA”) filed with the Office a motion to consolidate the proceedings for new subscription services and nonsubscription services. However, in light of the petition filed with the Copyright Office, a hearing may not be necessary to establish rates and terms for the use of sound recordings in eligible nonsubscription transmissions and new subscription services, other than simulcasts of AM and FM radio broadcast programming (including transmissions or retransmissions thereof by third parties) and transmissions made by certain noncommercial entities, together with related ephemeral recordings. As such,

on April 10, 2003, the Office dismissed without prejudice DiMA’s motion to consolidate. *See* Order in Docket Nos. 2002–1 CARP DTRA3 and 2001–2 CARP DTNSRA (April 10, 2003).

Joint Petition for Adjustment of Rates and Terms for Statutory Licenses Applicable to Webcasters and New Subscription Services

On April 3, 2003, SoundExchange, a division of RIAA, the American Federation of Television and Radio Artists, the American Federation of Musicians of the United States and Canada, and the Digital Media Association (collectively, “Petitioners”), each having filed a notice of intent to participate in one or both of the proceedings, filed a joint petition for adjustment of rates and terms for the statutory licenses applicable to webcasting and a request for an immediate stay of the obligation to file written direct cases in the proceeding to adjust the rates and terms for eligible nonsubscription transmissions.¹ The rates and terms set forth in the agreement are to govern the use of sound recordings in eligible nonsubscription transmissions and for the use of sound recordings in transmissions made by new subscription services, in addition to the making of ephemeral recordings necessary for the facilitation of such transmissions. The rates and terms do not pertain to the use of sound recordings in digital transmissions of simulcasts of AM and FM radio broadcast programming (including transmissions or retransmissions thereof by third parties), transmissions made by certain noncommercial entities, and small commercial webcasters who elect to operate under an agreement negotiated pursuant to the Small Webcasters Settlement Act of 2002.²

¹ The Office vacated the precontroversy discovery schedule announced in the February 6, 2003, Order in Docket No. 2002–1 CARP DTRA3, as to the parties covered by the joint proposal. *See* Order in Docket Nos. 2002–1 CARP DTRA3 and 2001–2 CARP DTNSRA (April 10, 2003). As noted above, no schedule has been set for the rate setting proceeding for new subscription services.

² On December 4, 2002, President Bush signed into law the Small Webcaster Settlement Act of 2002 (“SWSA”), Pub. L. 107–321, 116 Stat. 2780, which amends the section 112 and section 114 statutory licenses of the Copyright Act, as they relate to small webcasters and noncommercial webcasters. Among other things, the SWSA allowed SoundExchange to enter into an agreement on behalf of all copyright owners and performers to set rates, terms, and conditions for small webcasters operating under the section 112 and section 114 statutory licenses in lieu of any rates and terms set by the Librarian of Congress. Small webcasters that elect to be covered under this agreement shall not be subject to the proposed rates and terms offered in the April 14 agreement. *See* 67 FR 78510 (December 24, 2002).

However, the proposed regulations appended to the joint petition inadvertently omitted statutory royalty rates and terms applicable to new subscription services for the license period October 28, 1998, through December 31, 2002, necessitating further negotiations. Consequently, the Petitioners reconsidered the rates and terms and filed a revised version of the proposed regulations on April 14, 2003, correcting the omission and requesting that the Office publish the proposed rates and terms for public comment in lieu of convening a CARP to adjust the rates and terms for these periods.

Pursuant to § 251.63(b) of title 37 of the Code of Federal Regulations, the Librarian can adopt the parties’ proposed rates and terms without convening a CARP, provided that the proposed rates and terms are published in the **Federal Register** and no interested party with an intent to participate in the proceeding files a comment objecting to the proposed terms. In other words, unless there is an objection from a person with a significant interest in the proceeding who is prepared and eligible to participate in a CARP proceeding, the purpose of which is to adjust the rates and terms for use of sound recordings in eligible nonsubscription transmissions and new subscription services pursuant to the section 112 and section 114 statutory licenses, the Librarian can adopt the rates and terms in the proposed settlement in final regulations without convening a CARP. This procedure to adopt negotiated rates and terms in the case where an agreement has been reached has been specifically endorsed by Congress.

If an agreement as to rates and terms is reached and there is no controversy as to these matters, it would make no sense to subject the interested parties to the needless expense of an arbitration proceeding conducted under (section 114(f)(2)(1995)). Thus, it is the Committee’s intention that in such a case, as under the Copyright Office’s current regulations concerning rate adjustment proceedings, the Librarian of Congress should notify the public of the proposed agreement in a notice-and-comment proceeding and, if no opposing comment is received from a party with a substantial interest and an intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the agreement without convening an arbitration panel.

S. Rep. No. 104–128, at 29 (1995)(citations omitted).

Accordingly, the Copyright Office is granting the joint petition and is publishing for public comment the proposed rates and terms embodied in