

there have been and may continue to be more than one Designated Agent also does not mean that this is a necessary or even a desirable outcome. On the other hand, it could be that when Congress, in the Small Webcaster Settlement Act, amended the law to permit SoundExchange to deduct costs incurred in licensing rights under section 114 or to deduct costs incurred as a participant in a CARP proceeding from the royalties that it distributes to copyright owners and performers,³ it also included the provision denying SoundExchange that right with respect to "copyright owners and performers who have elected to receive royalties from another designated agent," 17 U.S.C. 114(g)(3), in order to give copyright owners and performers a means to avoid being subject to recoupment of SoundExchange's litigation and other costs. Such a provision may have been intended to deter SoundExchange from making excessive deductions, in light of the fact that copyright owners and performers could elect to receive their royalties from an alternative Designated Agent if they were dissatisfied with the extent of SoundExchange's deductions. But even if that is so, it would not give RLI standing to participate on its own behalf in a CARP in order to seek designation as an agent. Instead, it would give a copyright owner or performer entitled to participate in the CARP the power to seek the designation of RLI or some other entity as an alternative Designated Agent.⁴

³ SoundExchange had sought the power to make such deductions in the previous CARP proceeding setting rates and terms for eligible nonsubscription services, but the Librarian, on the recommendation of the Register, rejected the CARP's terms that would have permitted such deductions. See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 FR 45239, 45269 (July 8, 2003) (noting that "[s]uch activity is beyond the scope of collection and distribution of royalties.").

⁴ In fact, it is not clear that RLI needs to participate in a CARP proceeding or be named in a negotiated settlement in order to act as a designated agent for purposes of collecting royalty fees on behalf of copyright owners and performers who are entitled to receive funds collected pursuant to the section 112 and section 114 licenses. Section 112(e)(2) and section 114(e) of the Copyright Act both expressly provide that a copyright owner of a sound recording may designate common agents to negotiate, agree to, pay, or receive royalty payments. Under these provisions, it is plausible that a copyright owner or performer could designate any agent of his or her choosing (including RLI)—whether or not that agent had been formally designated in the CARP proceeding—to receive royalties from the licensing of digital transmissions and, by doing so, limit the costs of such agents to those specified in section 114(g)(4), as amended by the Small Webcaster Settlement Act of 2002.

3. Determination

For the reasons stated above, the Librarian of Congress determines that RLI does not have a specific interest in the rates and terms proposed in this NPRM and consequently does not have standing to require the convocation of a CARP. RLI's objection is therefore dismissed. Since there were no other objections filed, the Librarian is adopting the proposed rates and terms announced in the NPRM as final.

The following rates and terms for the use of sound recordings by preexisting subscription services under the section 112(e) and section 114 licenses of the Copyright Act shall be effective for the period January 1, 2002 through December 31, 2007.

List of Subjects in 37 CFR Part 260

Copyright, Digital Audio Transmissions, Performance Right, Sound Recordings.

Final Regulation

■ In consideration of the foregoing, the Copyright Office amends part 260 of 37 CFR as follows:

PART 260—RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES' DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND MAKING OF EPHEMERAL PHONORECORDS

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 17 U.S.C. 114, 801(b)(1)

■ 2. The heading of Part 260 is revised to read as set forth above.

■ 3. Section 260.1 is revised to read as follows:

§ 260.1 General

(a) This part 260 establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114(d)(2), and the making of ephemeral phonorecords in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this part, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this part, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e)

without limit to the number of ephemeral phonorecords made.

(d) For purposes of this part, Licensee means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

■ 4. Section 260.2 is amended as follows:

■ a. By revising the section heading;

■ b. By revising paragraphs (a) and (b);

■ c. By redesignating paragraph (c) as paragraph (e), and adding a new paragraph (c);

■ d. By adding a new paragraph (d);

■ e. In redesignated paragraph (e)(1)(ii) by adding "a" before "recognized advertising agency";

■ f. In redesignated paragraphs (e)(1)(iii) and (vi), by removing "Programming Service" and adding "programming service" in its place;

■ g. In redesignated paragraphs (e)(1)(viii) and (e)(2), by removing "(c)" and adding "(e)" in its place; and

■ h. By adding a new paragraph (f).

The additions and revisions to § 260.2 read as follows:

§ 260.2 Royalty fees for the digital performance of sound recordings and the making of ephemeral phonorecords by preexisting subscription services.

(a) Commencing January 1, 2002 and continuing through December 31, 2003, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.0% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(b) Commencing January 1, 2004 and continuing through December 31, 2007, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.25% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(c) Commencing in the year 2003 and continuing through the year 2007, each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114(d)(2) and ephemeral phonorecords pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year; Provided, however, that for 2003, the annual advance payment shall be due on August 20, 2003. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraphs (a) and (b) of this section shall be recoupable