

reproductions to facilitate the digital transmission of the sound recording under a second license set forth in section 112(e) of the Copyright Act.

The procedure for setting the rates and terms for these two statutory licenses is a two-step process. 17 U.S.C. 112(e)(3),(4) and (6) and 17 U.S.C. 114(f)(1). The first step requires the Librarian of Congress to initiate a voluntary negotiation period to give interested parties an opportunity to determine the applicable rates and terms through a less formal process. However, if the parties are unable to reach an agreement during this period, sections 112(e)(4) and 114(f)(1)(B) directs the Librarian of Congress to convene a three-person Copyright Arbitration Royalty Panel ("CARP") for the purpose of determining the rates and terms for the compulsory license upon receipt of a petition filed in accordance with 17 U.S.C. 803(a)(1).

The first proceeding to set rates and terms for the section 114 license for preexisting subscription services began in 1995 and concluded with the issuance of a final rule and order by the Librarian of Congress on May 8, 1998. See 63 FR 25394 (May 8, 1998). The parties in that proceeding numbered four: the Recording Industry Association of America ("RIAA"); Digital Cable Radio Associates, now known as Music Choice; DMX Music, Inc. ("DMX"); and Muzak, L.P. ("Muzak").

Later that same year, Congress passed the Digital Millennium Copyright Act ("DMCA"), amending the section 114 statutory license to cover additional transmission services and extending the term of the existing section 114 license rate as it applies to preexisting subscription services¹ through December 31, 2001. The DMCA also created a new statutory license to allow for the making of ephemeral reproductions for the purpose of facilitating certain digital audio transmissions, including those made by preexisting subscription services.

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 preexisting services, the Copyright Office published a notice in the **Federal Register** on January 9, 2001. 66 FR 1700 (January 9, 2001). This notice initiated a six-month

negotiation period the purpose of which was to provide an opportunity for interested parties to set rates and terms for use of the section 114 license as it applied to both the preexisting subscription services and the preexisting satellite digital audio radio services. Unfortunately, no agreement was reached by the end of that period. Consequently, Music Choice and RIAA filed separate petitions with the Copyright Office, requesting that the Librarian of Congress convene a CARP to determine the rates and terms for both categories of preexisting services.

On November 13, 2001, the Copyright Office initiated the next phase of the rate adjustment proceeding with the publication of a notice in the **Federal Register** calling for Notices of Intent to Participate. 66 FR 58180 (November 13, 2001). Music Choice, DMX, Muzak, RIAA, the American Federation of Television and Radio Artists ("AFTRA"), the American Federation of Musicians of the United States and Canada ("AFM"), XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc. filed the requisite notices with the Office, and the Office scheduled the 45-day precontroversy discovery period. Initially, it set the date for the filing of direct cases for December 2, 2002. Order in Docket No. 2001-1 CARP DSTRA2, dated September 12, 2002. However, at the request of the parties, the Office readjusted the schedule and set February 24, 2003, as the new date for the filing of direct cases. Order in Docket No. 2001-1 CARP DSTRA2, dated December 16, 2003. However, in light of a petition filed with the Copyright Office, a hearing may not be necessary to establish rates and terms for the use of sound recordings by the preexisting services.

Joint Petition for Adjustment of Rates and Terms Applicable to Preexisting Subscription Services

On January 17, 2003, RIAA, AFTRA, AFM, Music Choice, DMX Music, Inc. and Muzak, LLC (collectively, "Petitioners") filed a joint petition for adjustment of rates and terms for statutory licenses applicable to preexisting subscription services and a request for an immediate stay of the obligation to file direct cases on February 24, 2002.² Having reached agreement on the rates and terms for the use of sound recordings by preexisting services for the period January 1, 2002, through December 31, 2007, the

petitioners request that the Office publish the proposed rates and terms for public comment in lieu of convening a CARP to determine the rates and terms for this period.

Pursuant to § 251.63(b) of title 37 of the Code of Federal Regulations, the Librarian can adopt the parties' proposed terms without convening a CARP, provided that the proposed 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 adopt rates and terms for preexisting subscription services that use sound recordings to make digital audio transmissions 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 the January 17, 2003, joint petition. Any party who objects to the proposed rates and terms set forth herein must file a written objection with the Copyright Office and an accompanying Notice of Intent to Participate, if the party has not already done so. The content of the written challenge should describe the party's interest in the proceeding, the proposed rule the party finds objectionable, and the reasons for the challenge. If no comments are received, the regulations shall become final upon

¹ In the DMCA, Congress recognized two types of subscription services that were either in operation on or before July 31, 1998, or licensed by the Federal Communications Commission pursuant to a satellite digital audio radio service license on or before July 31, 1998. The former were designated as "preexisting subscription services" and the latter were termed a "preexisting satellite digital audio radio service." See 17 U.S.C. 114(j)(10) and (11).

² The request for an immediate stay of the petitioners' obligation to file direct cases on February 24, 2002, will be addressed in a separate order.