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CRS Report for Congress

Copyright Law: Statutory Royalty Rates for Webcasters

Robin Jeweler
Legislative Attorney
American Law Division

Summary

This report surveys the procedures for and the results of the Copyright Arbitration Royalty Panel's (CARP's) February 20, 2002 Report making recommendations for statutory royalty rates for eligible nonsubscription webcasters. The Panel was implementing compulsory license rates for public performances by digital transmissions, 17 U.S.C. § 114, and ephemeral copies to facilitate transmission, 17 U.S.C. § 112. Among various classes of potential licensees, the CARP recommended a public performance fee of 0.14¢ per performance and an ephemeral license fee of 9% of performance fees due for Internet transmissions by qualifying webcasters. On May 21, 2002, the Librarian of Congress, upon the recommendation of the Register of Copyrights, rejected the CARP's proposed rates. On June 20, 2002, the Librarian issued a Final Regulation that sets royalty rates for Internet transmissions at 0.07¢ per performance and ephemeral licensing at 8.8% of performance fees due. Parties affected by the ruling announced their intention to appeal the Librarian's decision. On July 26, 2002, H.R. 5258 entitled the "Internet Radio Fairness Act" was introduced in the House. This bill, if enacted, would set aside the Librarian's decision and establish new rate-making standards for small businesses and eliminate certain licensing fees for ephemeral recordings.

Background. Copyright owners have exclusive control over protected material, including the right to authorize the reproduction, distribution and public performance of their work.[1] Historically, copyright owners of sound recordings did not enjoy a public performance right. Hence, when a radio broadcaster plays a song over the airwaves, it pays a public performance royalty to the music's composer, but not to the copyright owner of the sound recording. In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (DPRA),[2] which created a *limited* public performance right for sound recordings. Copyright owners of sound recordings – record companies and recording artists – now enjoy the exclusive right to control or authorize public

[1] 17 U.S.C. § 106.

[2] P.L. 104-39 (Nov. 1, 1995).

performances *by means of digital transmission.*[3] This public performance right is triggered when sound recordings are transmitted over the Internet, or "webcast."

Compulsory Licenses. The U.S. Copyright Act allows one who wishes to use copyrighted material, in certain instances, to obtain a compulsory license to do so. Ordinarily, royalties and licenses for the use of protected material are the product of direct negotiations between copyright owners and users. When a compulsory, or statutory, license is available, a permitted user need only adhere to statutory requirements, including payment of established royalty rates, to use the work.

In 1998, in the Digital Millennium Copyright Act (DMCA),[4] Congress amended several compulsory licensing statutes to provide for and clarify the treatment of different types of webcasting. Some types of digital transmissions of sound recordings are *exempt* from the public performance right, for example, a nonsubscription broadcast transmission;[5] a retransmission of a radio station's broadcast within 150 miles of its transmitter; and a transmission to a business establishment for use in the ordinary course of its business.[6] In contrast, a digital transmission by an "interactive service" does *not* qualify for *any* compulsory license, nor is it exempt from the public performance right. The owner of an interactive service – one which enables a member of the public to request or customize the music that he or she receives – must negotiate a license, including royalty rates, directly with copyright owners.

But, a category of webcasting that *does* qualify for a compulsory license is "an eligible nonsubscription transmission." A subscription service is one that is limited to paying customers. Hence, webcasters who transmit music over the Internet on a nonsubscription, noninteractive basis may qualify for the statutory license under 17 U.S.C. § 114(d).

A licensee under § 114 may also qualify for a statutory license under 17 U.S.C. § 112(e) to make multiple "ephemeral" – or temporary – copies of sound recordings solely for the purpose of transmitting the work by an entity legally entitled to publicly perform it.[7]

Establishing Statutory Royalty Rates: The Copyright Arbitration Royalty Panel (CARP). The Copyright Act creates a procedure to set royalty rates for statutory licenses. At the behest of the Librarian of Congress, upon the recommendation of the Copyright Office, a CARP may be convened to take testimony from interested

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[3] 17 U.S.C. § 106(6).

[4] P.L. 105-304 (Oct. 28, 1995).

[5] FCC- licensed radio broadcasters have argued, unsuccessfully to date, that their simultaneous streaming on the Internet of broadcast sound recordings is fully exempt from a public performance license requirement. *See, Bonneville International Corp. v. Peters,* 153 F.Supp.2d 763 (E.D.Pa. 2001), appeal pending.

[6] 17 U.S.C. § 114(d)(1).

[7] The statutory license for ephemeral copies is based upon the copyright owners right to control reproduction of a protected work.

parties and recommend a statutory royalty rate. A CARP is made up of three professional arbitrators. At the conclusion of its proceedings, it issues a report to the Librarian. The Librarian, upon the recommendation of the Copyright Office, will adopt the fees proposed by the CARP unless, based on the record, its determinations are found to be arbitrary or contrary to copyright law. If the Librarian rejects the proposed fees, he may, after an examination of the record and an additional 30 days, issue an order setting them. An aggrieved party who is bound by the Librarian's decision may appeal to the U.S. Court of Appeals for the D.C. Circuit.[8]

In the case of statutory licenses under § 114, the Librarian initiated voluntary negotiation proceedings to determine "reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services[.]"[9] Voluntary negotiations take place for a six month period. After that, a party may petition the Librarian to appoint a CARP to establish a schedule of rates and terms binding upon all parties. The Recording Industry Assoc. of America (RIAA) did so. The CARP is directed to determine rates based, in part, upon the following criteria:

> Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including--
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> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
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> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
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> In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements...[.][10]

In short, the CARP is statutorily directed to determine a royalty rate that approximates the value a "willing buyer and willing seller" would assign to digital public performance and ephemeral copy rights. To do so, the panel may consider such factors as the impact of the

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[8] 17 U.S.C. § 802.

[9] 17 U.S.C § 114(f)(2)(A).

[10] 17 U.S.C. 114(f)(2)(B).

public performance upon the copyright owner's commercial interests, the nature of the webcasting service, and market rates established by voluntarily negotiated licenses.

The CARP'S Recommendation. The Report of the Copyright Arbitration Royalty Panel entitled *"In re rate setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings"* was issued on February 20, 2002.[11] It considers proposed rates for two time periods, October 28, 1998 - December 31, 2000 and January 1, 2001 to December 31, 2002.

In a lengthy opinion based upon thousands of pages of testimony and evidence, the CARP recommended a public performance fee of 0.14¢ per performance and an ephemeral license fee of 9% of performance fees due for Internet transmissions by qualifying webcasters and commercial broadcasters. For simultaneous Internet retransmission of over-the-air AM or FM radio broadcasts, the proposed performance fee was 0.07¢ per performance and an ephemeral license fee of 9% of performance fees due. Fees for noncommercial broadcasters who webcast (*i.e.,* those not affiliated with the Corp. for Public Broadcasting) were proposed as 0.02¢ per performance and an ephemeral license fee of 9% of performance fees due for simultaneous retransmission of over-the-air AM or FM broadcasts. Other Internet transmissions for noncommercial broadcasters were 0.05¢ and 9% of performance fees (Other side channels transmissions were proposed at 0.14¢ and 9% of performance fees due.) The CARP also recommended a minimum fee of $500 per year for each license, which would cover both the performance and ephemeral licenses.[12]

The CARP's findings are reported in detail and highlight the evidence and testimony found by it to be significant or of little persuasiveness. A sampling of its findings include:

- the net impact of Internet webcasting on record sales is indeterminate;[13]

- a "per performance" royalty metric is preferable to a percentage of revenue option because, in part, many webcasters are currently generating very little revenue. Basing royalties on percentage of revenue could result in an undesirable situation where copyright owners are forced to allow extensive use of their property with little or no compensation; and[14]

- although previously negotiated licenses are a valuable benchmark for market value, it was difficult to rely upon them in the case before it because the preexisting agreements were all recently negotiated in the context of a newly emerged webcasting industry involving newly-created rights. Thus the new licenses were negotiated without benefit of

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[11] The report, in its entirety, is posted online at the U.S. Copyright Office's website at [http://www.loc.gov/copyright/carp/webcasting_rates.pdf].

[12] A chart setting forth the proposed royalties appears in Appendix A to the CARP Report at [http://www.loc.gov/copyright/carp/webcasting_rates_a.pdf].

[13] CARP Report at 34.

[14] *Id.* at 37.

established historical standards.[15] The RIAA's negotiation and license agreement with a sophisticated business user, Yahoo, was more persuasive to it than RIAA licenses with minor services.

The Librarian Rejects the CARP Recommendations. Shortly after the release of the CARP report, many webcasting groups predicted that the proposed royalty rates, if adopted, would "kill" the development of webcasting, including simultaneous streaming of radio broadcasts.[16] Others defend the rates or argue that such predictions are premature. On May 15, 2002, the Senate Judiciary Committee held a hearing to allow parties to air concerns over the proposals.[17] On May 21, 2002, the Librarian, upon the recommendation of the Copyright Office, issued an order rejecting the proposed rates.[18]

The Librarian's Decision. On June 20, 2002, the Librarian issued a Final Regulation establishing new rates.[19] The major differences between the CARP recommendations and the new rates are as follows:

- Performance fees (per performance, per listener) for Internet transmission rates for eligible nonsubscription services was reduced from 0.14¢ to 0.07¢ (which is the same rate as that set for simultaneous Internet retransmission of over-the-air AM or FM radio broadcasts);

- Ephemeral license fees were reduced from 9% of performance fees due to 8.8%.

The CARP had recommended different rates for Internet-only transmission (0.14¢) and retransmission of over-the-air broadcasts (0.07¢) because it concluded that retransmission of radio broadcasts has a substantial promotional value in the sales of sound recordings. The Copyright Office and the Librarian found this reasoning to be arbitrary and unsupported by evidence before the CARP. Reexamining the RIAA's licensing agreement with YAHOO, the Librarian found that 0.07¢ per performance per listener more accurately represents the blended contract rate for all transmissions under the RIAA/YAHOO licensing agreement.

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[15] *Id.* at 47.

[16] *See, e.g.,* [http://www.saveinternetradio.org/]. This website urges visitors to write their Congressmen.

[17] Hearing before the Senate Judiciary Committee, *Copyright Royalties: Where is the Right Spot On The Dial For Webcasting,* 107th Cong., 2d Sess. (May 15, 2002) at [http://judiciary.senate.gov/hearing.cfm?id=258].

[18] In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, available online at the U.S. Copyright Office website, [http://www.copyright.gov/carp/webcasting-rates-order.html].

[19] Rates and Terms for Eligible Nonsubscription Transmissions and the Making of Ephemeral Reproductions to be codified at 37 C.F.R. Part 261. *See,* Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings at [http://www.copyright.gov/carp/webcasting_rates_final.html].

Likewise, the Copyright Office and the Librarian found that the ephemeral recording license fee under the RIAA/YAHOO agreement was effectively 8.8% of performance fees due. The CARP had factored in higher rates from other agreements to set a rate of 9% of performance fees. Finding those agreements unpersuasive, the Librarian rolled back the rate to 8.8%.

The Librarian's Final Regulation makes additional adjustments to the CARP recommendations. For example, fees for noncommercial broadcasters who webcast (*i.e.,* those not affiliated with the Corp. for Public Broadcasting) were proposed by the CARP as 0.02¢ per performance and an ephemeral license fee of 9% of performance fees due for simultaneous retransmission of over-the-air AM or FM broadcasts. The Librarian accepted the 0.02¢ performance fee but adjusted the ephemeral license fee to 8.8%. Other Internet transmission fees for noncommercial broadcasters, including archived programming, substituted programing and up to two side channels, were adjusted downwards from 0.05¢ to 0.02¢ per performance and 8.8% of performance fees (Other side channels transmissions were adjusted from 0.14¢ to 0.07¢ per performance and 8.8% of performance fees due.) The Regulation adopts the CARP-recommended minimum fee of $500 per year for each license, which would cover both the performance and ephemeral licenses. But, it adds a new minimum fee of $10,000 to make ephemeral recordings for business establishment service exempt from the performance royalty.

The Final Regulation establishes September 1, 2002 as the effective date for payment of rates due for activities dating back to October 28, 1998. Webcasters using the statutory licenses will have until October 20, 2002 to make full payment for pre-September 1 activities.

To date, both the RIAA and a coalition of Internet radio stations have announced their intention to appeal the rates set by the Librarian.

Legislative Intervention. On July 26, 2002, Representatives Inslee introduced H.R. 5285 entitled the "Internet Radio Fairness Act." Among other things, this bill, if enacted, would make the royalty fees inapplicable to a "small entity"as defined by the Small Business Administration. The "willing buyer/willing seller" standard would be abandoned and a new rate structure, which would cover the time periods discussed above, would be created for "small entities." The applicable standard, set forth at 17 U.S.C. § 801, would require a CARP to set rates to achieve expressed objectives including: maximizing the availability of creative works to the public; affording copyright owners a fair return and copyright users a fair income; reflecting the relative roles of copyright owners and users in creative contribution, capital investment, cost, risk, and contribution to the opening of new markets; and minimizing disruptive impact on the structure of the industries involved.

The bill would exempt webcasters, including radio broadcasters transmitting digital sound recordings on a nonsubscription basis, from ephemeral licensing fees under § 112 if the copy of the recording is used solely for the purpose of transmitting, or for archival preservation or security.