

**COPYRIGHT ROYALTY AND DISTRIBUTION  
REFORM ACT OF 2003**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

**H.R. 1417**

APRIL 1, 2003

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## **COPYRIGHT ROYALTY AND DISTRIBUTION REFORM ACT OF 2003**

**TUESDAY, APRIL 1, 2003**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:02 p.m. in Room 2141, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet and Intellectual Property will come to order. The reason I'm a little anxious to start is because we're expecting a series of votes about 3:30 to 3:40 and we're hopeful—that is to say the Ranking Member and I are hopeful that if we proceed expeditiously we might be able to conclude the hearing by the time the votes are called.

I will recognize myself for an opening statement and will give a brief version of the opening statement that without objection I'll make a part of the record, as I will the Ranking Member's and other Members', as well.

The purpose of today's hearing is to discuss a bill, H.R. 1417, the Copyright Royalty and Distribution Reform Act, which reforms the rate-making and royalty distribution system for compulsory and statutory licenses currently known as the Copyright Arbitration Royalty Panel or CARP. This process distribute billions of dollars among the participants in an even-handed manner. In doing so, it helps copyright content owners and users in the digital age.

When a CARP makes a decision it directly affects the livelihoods of songwriters, artists, record labels, webcasters, broadcasters, the sports industry, the movie industry, the cable industry, and the satellite industry. In setting rates, the CARP has the responsibility of deciding the worth of a content-owner's intellectual property. The CARP decides how much of that value a person or entity is entitled to receive.

Last year the Subcommittee conducted an oversight hearing and hosted a roundtable discussion on this subject. The most frequently made comments about the CARP process included the following: CARP decisions are unpredictable and inconsistent, CARP arbitrators lack appropriate expertise to render decisions and often reflect a content or user bias, CARPs are unnecessary expensive and many CARP claims are frivolous.

Well, the bill before us today addresses these concerns. The legislation gives authority to oversee rate-making and distribution pro-

ceedings to a copyright judge who is appointed by the Librarian of Congress and assisted by two professional staffers. The Copyright Office aids the judge but only in an administrative and advisory capacity. These and other provisions in the legislation will make the system operate, we trust, more efficiently and responsively.

All the witnesses here today have personal experience dealing with these issues and we very much welcome their input and their testimony in just a minute.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

The purpose of today's hearing is to discuss a bill that reforms the rate-making and royalty distribution system for compulsory and statutory licenses currently known as the Copyright Arbitration Royalty Panel, or CARP. The CARP system consists of three member *ad hoc* arbitration panels that are selected for a particular proceeding. Each CARP delivers its recommendation for a rate adjustment or distribution to the Librarian of Congress who upon the recommendation of the Register makes a final determination.

This process distributes billions of dollars among the participants in a fair and even-handed manner. In doing so, it helps copyright content owners and users in the digital age.

When a CARP makes a decision, it directly affects the livelihoods of songwriters, artists, record labels, web-casters, broadcasters, the sports industry, the movie industry, the cable industry, and the satellite industry.

Maintaining a marketplace environment depends upon supply and demand. In setting rates, the CARP has the responsibility of deciding the worth of a content owner's intellectual property. The CARP decides how much of that value a person or entity is entitled to receive.

For more than 20 years, Congress has struggled to develop the appropriate mechanism to govern the copyright royalty rate-making and distribution process. In 1976, it created the Copyright Royalty Tribunal. Ten years ago, in response to concerns voiced by the Copyright Office and individuals affected by the work of the Tribunals, Congress abolished the CRT and created the present organization, the CARP.

Last year the Subcommittee conducted an oversight hearing and hosted a roundtable discussion on this subject. The most frequent comments about the CARP process included the following:

- CARP decisions are unpredictable and inconsistent.
- CARP arbitrators lack appropriate expertise to render decisions, and often reflect a "content" or "user" bias.
- CARPs are unnecessarily expensive.
- And many CARP claims are frivolous.

The bill before us today addresses these concerns. The legislation gives authority to oversee rate-making and distribution proceedings to a "Copyright Judge" who is appointed by the Librarian of Congress and assisted by two professional staffers. The Copyright Office aids the Judge, but only in an administrative and advisory capacity. These and other provisions in the legislation make the system operate more efficiently and responsively.

Today's witnesses have personal experience with CARPs so we look forward to their testimony.

Mr. SMITH. The Ranking Member from California, Mr. Berman, is recognized for his opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman. In order to help you expedite this process I'll skip all compliments and other comments. I can include my whole statement in the record.

Mr. SMITH. Without objection it will be included.

Mr. BERMAN. Compliments will be included there.

I think H.R. 1417 sets an excellent starting point for CARP reform. While it will likely require some significant revisions, its

basic structure is sound and as a result, I was pleased to cosponsor it with you. Introduction of this legislation demonstrates the seriousness of our intent to fix the CARP process. While we may not have achieved perfection in drafting, I believe introducing it was necessary to get the ball rolling.

Now that it has been introduced, I think we should allow a full and fair opportunity for the public to comment on it. It gets into the most complicated and arcane areas of copyright law. The public should be given some time to digest this 42-page complexity and formulate opinions.

The testimony of our witnesses today demonstrates that H.R. 1417 embodies the appropriate approach to CARP reform but will require much tinkering. Each witness has proposed a myriad of changes that after consideration, this Subcommittee may find salutary.

After giving the public an appropriate opportunity to comment, this Subcommittee should move a perfected version of H.R. 1417 with all due haste. Each passing day increases the probability of new rate-settings and distributions occurring under the current flawed process.

I want to make just one other point, Mr. Chairman, and that is it's my understanding, and I think it's our intention that in whatever form it passes, that the CARP reform bill will be limited to reformation of the CARP process. This is not being viewed, I would hope, as a vehicle for substantive changes in either compulsory license laws or other copyright changes. We're sticking in this bill with CARP reforms of the process.

If we start getting into these other issues, that will bog it all down then we'll leave an unwieldy and flawed process in existence and I think it would be a terrible mistake to do that.

So with that, Mr. Chairman, I thank you for taking on this task and yield back my time.

[The prepared statement of Mr. Berman follows:

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman:

I want to commend you for making CARP reform the subject of our first legislative hearing this Congress. As we learned at a hearing last summer, there is near unanimity that the CARP process is broken. It is this Subcommittee's responsibility to fix it, and to do so as soon as possible.

I also commend you for driving ahead with the drafting and introduction of H.R. 1417, and thank you for consulting me in the process. I believe the framework the bill sets out provides an excellent starting point for CARP reform. While H.R. 1417 will likely require significant revisions, its basic structure is sound. As a result, I was pleased to co-sponsor it with you.

Introduction of this legislation enables us to focus ourselves, our colleagues, and interested parties on the difficult work ahead. It also demonstrates the seriousness of our intent to fix the CARP process. Thus, while we may not have achieved perfection in drafting, I believe introduction of H.R. 1417 was necessary to get the ball rolling.

Now that H.R. 1417 has been introduced, I think we should allow a full and fair opportunity for the public to comment on it. This legislation delves into the most complicated and arcane areas of copyright law; in fact, I think the copyright compulsory licenses challenge the U.S. Tax Code for the title of most unreadable provisions of U.S. law. The public should be given some time to digest this 42-page complexity and formulate opinions.

The testimony of our witnesses today demonstrates, I believe, that H.R. 1417 embodies the appropriate approach to CARP reform, but will require much tinkering.

Each witness has proposed myriad changes that, after consideration, this Subcommittee may find salutary. I am sure that other members of the public, given the opportunity to comment, will have salutary suggestions of their own.

After giving the public an appropriate opportunity to comment, this Subcommittee should move a perfected version of H.R. 1417 with all due haste. Each passing day increases the probability of new rate-settings and distributions occurring under the current, flawed process.

Members of the public should be warned that, if they want their comments to be taken seriously, they should be circumspect in their breadth.

Mr. Chairman, it is my understanding that, in whatever form it passes, a CARP reform bill will be limited to reformation of the CARP process. Reformation of the CARP process is, as I stated, a near-unanimous priority for all those involved in CARPs—whether licensees, licensors, or the Copyright Office itself. The unanimity of support for reform of the CARP process gives a bill thus limited a real chance of passage in a reasonable time frame.

However, any attempt to delve into the substance of the copyright compulsory licenses will, undoubtedly, bog down a CARP reform bill. When it comes to issues relating to the substance of compulsory licenses, there is no unanimity, only fractious debate.

It would be a real pity if a bill supported by all failed to pass because some tried to use it as a vehicle for controversial amendments. Yet, I have no doubt that such failure would be the result.

In fact, I will do my best to ensure that this is the result. I will support this bill and the CARP reform effort only so long as it remains focused on process.

Mr. Chairman, let me explain my intractability on this point. I joined you in your good faith effort to craft a bill that is limited to process, reflects sound public policy, and benefits all CARP participants equally. I will interpret any attempt to add controversial, substantive amendments as an affront to this good faith effort.

Once again, I commend you for tackling this difficult and important issue.

I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Berman. And I do concur with your comments.

Let me introduce our witnesses today. Our first witness is the Honorable Marybeth Peters, Register of Copyrights for the United States. She has also served as acting general counsel of the Copyright Office and as chief of both the Examining and Information and Reference Divisions.

Ms. Peters received her undergraduate degree from Rhode Island College and her law degree with honors from the George Washington University Law Center.

Our next witness is Robert Garrett, who is a partner with the law firm of Arnold & Porter. He has represented sports leagues, the recording industry, municipal and foreign governments, programming producers and networks, and others in litigation, arbitration and administrative proceedings.

Mr. Garrett earned both his B.A. and his J.D. from Northwestern University.

The next witness is Bruce Rich, who is a senior partner with the law firm of Weil, Gotshal & Manges. He has concentrated on issues pertaining to communications, publishing, and cable and commercial broadcasting.

Mr. Rich earned his J.D. from the University of Pennsylvania and his A.B. magna cum laude from Dartmouth College. Mr. Rich also is an adjunct professor at New York Law School's Media Law Institute.

Our last witness is Michael J. Remington, a partner in the law firm of Drinker, Biddle & Reath, where he specializes in intellectual property law, court reform and Government relations. Most impressively, of course, for a total of 13 years he was chief counsel of this Subcommittee.

A former Fulbright Scholar and Peace Corps volunteer, Mr. Remington is a graduate of the University of Wisconsin, where he also received his law degree.

Again we welcome you all and we will begin with Ms. Peters. And if you will try to adhere strictly to our 5-minute limit on testimony. Ms. Peters?

**STATEMENT OF MARYBETH PETERS, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS**

Ms. PETERS. Thank you. Mr. Chairman, Mr. Berman, Members of the Subcommittee, I appreciate the opportunity to appear before you to testify again on the important issue of reform of the Copyright Arbitration Panel system. As you know the CARPs have been operating under the auspices of the Copyright Office in the Library of Congress since Congress eliminated the Copyright Royalty Tribunal in 1993. H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003, would create a new process aimed at reducing cost and promoting stability and administrative efficiency.

In my testimony last June I discussed the existing CARP system and identified three serious shortcomings, all of which you identified, too, Mr. Chairman. First, the CARPs are very costly to the participants and to the Copyright Office and the Library of Congress.

Second, because of the ad hoc nature of the CARPs, there is lack of stability and predictability in the process. Although the Librarian attempts to select arbitrators who have performed competently on previous panels, the individuals almost always vary from one panel to the next. Parties who are dissatisfied with one panel are tempted to return and try another. As a result, there is a lack of reliable precedent upon which the parties can base settlements.

Because of a lack of institutional expertise among the members of the CARP panels, there is a considerable burden on the Register and the Librarian, who must correct oversights and errors made by the CARPs during the course of the proceeding.

H.R. 1417 addresses these concerns. To reduce costs, the salaries of the copyright royalty judge and his staff would be paid from appropriated funds. Their fixed salaries would eliminate the large hourly fees of the arbitrators and the same judge and professional staff would handle all distributions and rate proceedings.

I do have some concerns regarding the mechanics of the bill's process for recoupment of cost to the Copyright Office and to the Library, particularly the provisions regarding collection of fees from participants. I believe the costs of the process for determining rates and terms should be paid out of appropriated funds; that is, from new funds that would have to be added to the Library of Congress budget.

The 5-year term served by the copyright royalty judge would promote institutional stability and permit participants to gain familiarity with the decision-maker, leading to reliable results and promoting settlements.

I do have a few recommendations. Many proceedings before the CARPs involve complex issues and require institutional expertise

also with regard to interpretation of copyright law. The bill vests the copyright royalty judge with the authority to resolve these complex matters and permits him to consult with the Register to assist in the decision-making process. However, in decisions involving interpretation of copyright law, it is essential that the copyright royalty judge consult with the Register. The Copyright Office has had a long history of administering that law, and I believe we have performed that task responsibly and well.

It would be unfortunate if a copyright royalty judge based in the Library of Congress did not take advantage of the expertise of the Office on matters of interpretation of copyright law. It could also create uncertainty and confusion if the Register and the royalty judge in performing their respective duties reached different conclusions on the same question.

I have four additional recommendations. First, before a decision of a copyright royalty judge is appealed, parties should have an opportunity to seek reconsideration from the royalty judge.

Second, the copyright royalty judge should be given continuing jurisdiction over copyright royalty proceedings after his decision has been rendered in order to clarify that there is authority to deal with unanticipated matters that need to be addressed immediately.

Third, when a rate adjustment proceeding is not concluded until sometime after a previous royalty rate has expired, users of the statutory license should continue to pay copyright owners at the recently expired rate, subject, of course, to adjustment once the new rate has been set.

Fourth, Mr. Garrett and Mr. Rich in their written statements recommend the inclusion of subpoena power; I concur.

Finally, there may be many complicated procedural issues involved in determining rates and terms and distributing royalties which involve careful thought and attention. This was not done in the CRT Reform Act of 1993. We would be most pleased to work with you, your staff, and the interested parties to ensure that H.R. 1417 avoids such pitfalls so that the new system is efficient, fair, and effective. Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman, Mr. Berman and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you to testify once again on the important issue of reform of the Copyright Arbitration Royalty Panel ("CARP") process. As you know, the CARPs have been operating under the auspices of the Copyright Office and the Library of Congress since the Congress eliminated the Copyright Royalty Tribunal late in 1993. Your bill, Mr. Chairman, H.R. 1417, the "Copyright Royalty and Distribution Act of 2003," would make significant changes to the CARP process to reduce costs, promote stability and the administrative efficiency of the copyright royalty distribution and rate adjustment system.

In my testimony before this Subcommittee on June 13 of last year I provided a history of the statutory license royalty distribution and rate adjustment process under the Copyright Royalty Tribunal and the CARPs and identified three serious shortcomings of the existing system. First, there is no question that the CARPs are very costly both to the participants in a proceeding and on an institutional scale. Arbitrators are typically compensated at between \$200 and \$400 an hour for their work which, in hotly contested proceedings that involve many parties and large amounts of testimony (such as the recent rate setting proceeding for webcasting music over the Internet), can add up to considerable sums. In the case of a royalty rate adjustment proceeding, the arbitrators must be paid by the parties out of their own pockets. There is no question that in some rate adjustment proceedings, some

interested parties conclude that they cannot afford the cost of participating. In the recent webcasting proceeding that I just mentioned, the cost of the arbitrators alone exceeded the entire annual budget of the Copyright Royalty Tribunal in its last year of existence.

Likewise, on an institutional scale, CARP proceedings are costly. They require considerable amounts of time of Copyright Office and Library personnel who must conduct various phases of the proceeding, such as discovery of the parties' cases and review of the CARP's decision.

Second, because of the *ad hoc* nature of the CARPs, there is a lack of stability and predictability in the process. Although the Librarian attempts to select arbitrators who have served well on previous panels, the individuals almost always vary from one panel to the next. Parties who are dissatisfied with one panel are tempted to return and try another panel. As a result, there is a lack of reliable precedent upon which the parties can base the settlement of their differences.

Third, there is a considerable lack of institutional expertise on the CARP panels. We have found it very difficult to find arbitrators who have sufficient familiarity with copyright law, let alone the complex statutory licenses in the law and the unique procedures for royalty distributions and rate adjustments. This lack of expertise among the arbitrators places a considerable burden on the Register and the Librarian to correct oversights and errors made by the CARPs during the course of a proceeding—a burden which is exacerbated by the short review period granted the Register and the Librarian by the statute.

The "Copyright Royalty and Distribution Act of 2003" addresses these concerns of cost, stability and institutional expertise. To reduce costs, the salaries of the Copyright Royalty Judge, along with two full-time professional staff members, would be paid for from appropriated funds. Their fixed salaries would eliminate the large per-hour arbitrator fees of the current system, and the Copyright Royalty Judge and professional staff would handle all distribution and rate adjustments, as opposed to the one-CARP-per-proceeding approach of the existing law. The Copyright Office and the Library are also permitted to recoup their administrative costs under the bill as well. I do have some concerns regarding the mechanics of the cost recoupment process provided in the bill, particularly the provisions regarding direct fee collection from the participants. Let me reemphasize what I said when I appeared before this Subcommittee last June: I believe that the costs of the process for determining rates and terms should be paid for out of appropriated funds, and not out of the pockets of the parties who participate in the rate-setting process. Someone who has a stake in the determination of rates and terms for a statutory license should not be deterred from participating simply because he or she cannot afford his or her share of the decision-maker's costs.

The five-year term served by the Copyright Royalty Judge would promote institutional stability and permit participants to gain familiarity with the decisionmaker, thereby creating reliable results and promoting settlements. The bill does not make clear the status of the two professional staff members assisting the Judge. We believe that their status should be clarified, and we recommend that these staff members not have limited term appointments.

The five-year term served by the Copyright Royalty Judge would also permit him or her to develop further his or her expertise with the copyright law in general and the statutory licenses in particular. Many proceedings before the CARPs, particularly rate adjustment proceedings, involve complex issues that require institutional expertise and interpretation of the copyright law, something that the CARPs are ill prepared to handle. The bill vests the Copyright Royalty Judge with the authority to resolve these complex matters and permits him or her to consult with the Register to assist in the decisionmaking process. I fully endorse the consultation process between the Register and the Copyright Royalty Judge when it comes to matters of statutory interpretation and copyright law policy. In fact, I believe that it is essential that in making any decisions involving interpretation of the copyright law, the Copyright Royalty Judge should consult with the Register. The Copyright Office has a long history of administering the copyright law. I believe we have performed that task responsibly and well. It would be unfortunate if a Copyright Royalty Judge based in the Library of Congress did not take advantage of the expertise of the Copyright Office on matters of interpretation of copyright law, and it could also create uncertainty and confusion if the Register and the Copyright Royalty Judge, in performing their respective responsibilities, reached different conclusions on the same questions.

Other matters that should be addressed include:

- Under the current CARP system, there is no opportunity for parties dissatisfied with the CARP's determination to ask the CARP to reconsider its deci-

sion. Instead, dissatisfied parties must raise their concerns with the Register and the Librarian. It would make sense to let the CARP, in the first instance, consider those objections—especially in cases where a party asserts the CARP has overlooked or misapprehended particular facts or points of law. The same should be true with respect to the Copyright Royalty Judge. Parties should have an opportunity to ask the Copyright Royalty Judge to reconsider some or all of his or her determination before going to the Court of Appeals. The current draft does not appear to allow for this.

- Under current law, it is unclear whether the Librarian of Congress has the power to correct errors in his rate determinations or to address unanticipated issues and problems that became apparent only after he has rendered his decision on rates and terms. Similarly, it is unclear whether the Copyright Royalty and Distribution Act of 2003 would give the Copyright Royalty Judge the power to address such issues once he or she has made a determination on rates and terms or distribution. The Copyright Royalty Judge should expressly be given continuing jurisdiction over such matters after his or her decision has been rendered, in order to clarify that there is authority to deal with unanticipated matters that ought to be addressed immediately; otherwise, the problem cannot be addressed until the next regularly scheduled proceeding five years later.
- Currently, section 802(g) of the Copyright Act provides that when a rate adjustment proceeding is not concluded until some time after a previous royalty rate has expired, the new adjusted rate is effective retroactively to the date on which the old rate expired. But there is another gap in the law that needs to be addressed: Although the new rate is effective as of the date the old rate expired, there nevertheless may be a period of several months or more pending the new rate determination during which copyright owners and licensees do not know what the new rate is. For example, last year's determination of rates and terms for webcasters covered the period from October 28, 1998 through December 31, 2002. Since January 1, we have had no statutory rate for webcasters. As a result, I understand that webcasters have taken the position that until the new rate is set, they are not required to make any payments for uses made since January 1. Serious consideration should be given to providing that in such cases, licensees should pay copyright owners at the recently expired rate. Once the new rate is set, and assuming that it is different from the old rate, adjustments can be made in the form of additional payments or refunds, as the case may be.

We have a number of additional comments relating to the bill, generally of a more technical nature. We will provide those comments to your staff.

As we have learned to our regret following enactment of the Copyright Royalty Tribunal Reform Act of 1993, reform of the system for determining rates and terms of the statutory licenses and for distributing statutory royalties is a process which requires careful thought and attention to complicated procedural issues. I look forward to working with you, your staff, and with the interested parties to ensure that the current legislation is more successful.

Thank you, Mr. Chairman.

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#### SUMMARY OF TESTIMONY

- In her testimony on June 13 of last year before this Subcommittee, the Register of Copyrights identified three serious shortcomings of the current Copyright Arbitration Royalty Panel (“CARP”) system that distributes royalties and adjusts royalty fees for the statutory licenses of the Copyright Act. The first shortcoming is the considerable cost to participants in a CARP proceeding to pay for three arbitrators, as well as the cost to the Copyright Office and the Library of Congress to prepare proceedings for hearing and for reviewing the CARPs’ decisions. The second shortcoming is the lack of stable precedent and predictable decisionmaking due to the *ad hoc* nature of the CARP system. The third shortcoming is the difficulty in obtaining arbitrators with knowledge of copyright law in general and the statutory licenses in particular.
- H.R. 1417, the “Copyright Royalty and Distribution Act of 2003” addresses these three shortcomings. A full-time Copyright Royalty Judge, and two full-time professional staff, will be paid for from appropriated funds, and the Copyright Office and the Library of Congress will be allowed to recoup their costs. The Register believes that all costs associated with the work of the Copyright Royalty Judge should be paid from from appropriated funds, and she has concerns about the

mechanism for cost recoupment but looks forward to working with the Committee to address these concerns.

- The proposed framework in the “Copyright Royalty and Distribution Act of 2003” would likely provide stability to the decisionmaking process and promote settlements.
- The Copyright Royalty Judge would make royalty distributions and rate adjustments that involve questions of copyright law interpretation and policy. To avoid inconsistent decisions and interpretations between the Copyright Royalty Judge and the Copyright Office, the Copyright Royalty Judge should be required to consult the Register on such issues.
- The Copyright Royalty Judge should be afforded the opportunity to correct, amend, and reconsider his or her determination after it is issued.
- When royalty rates for certain statutory licenses expire, users of those licenses should continue to pay copyright owners at the old rates until new rates have been determined by a decision of the Copyright Royalty Judge.

Mr. SMITH. Thank you, Ms. Peters.  
Mr. Garrett?

**STATEMENT OF ROBERT A. GARRETT, ATTORNEY-AT-LAW  
AND PARTNER, ARNOLD & PORTER**

Mr. GARRETT. Thank you Mr. Chairman, Mr. Berman, Members of the Subcommittee. I very much appreciate the opportunity to testify this afternoon on H.R. 1417.

As you noted, Mr. Chairman, I have represented the professional and collegiate sports leagues in copyright royalty arbitration proceedings for a number of years. These leagues include Major League Baseball, the NBA, NFL, NHL, NCAA. My testimony today is presented on their behalf.

H.R. 1417 reflects a great deal of careful thought about the problems that confront the royalty distribution and rate-setting process. Overall, we believe that the bill provides a good vehicle for addressing these problems. The sports leagues, however, have concerns with certain aspects of the bill which are discussed more fully in my written statement. Let me focus on two principal areas of concern—structure and cost.

First as to structure, the leagues are concerned about the particular decision-making structure that the bill adopts. The bill contemplates that a single copyright royalty judge will decide all royalty distribution and rate-setting proceedings and we do not believe that any single individual should have that responsibility or authority. In our view, a significant strength of the existing system is that a panel of three individuals, rather than one single person, must decide the difficult issues that are often involved in copyright royalty proceedings. These proceedings typically generate enormous records that just as often support a wide range of results. There is a great deal of latitude that is accorded to the decision-makers in arriving in a final determination.

We believe it is beneficial to have a panel of three decision-makers who can evaluate the evidence and then reach a determination that they collectively consider to be fair and reasonable. In our judgment, the interaction of at least three decision-makers helps produce a better and more credible result. And furthermore, given the number and timing of royalty proceedings, having more than one decision-maker may be a practical necessity.

Second as to cost, sports leagues believe that a principal objective of this legislation should be to reduce the cost of copyright royalty

proceedings as much as possible. While the bill represents a positive step forward in this regard, it does not in our judgment go far enough. For example, under the current system there is in effect a presumption that the parties are entitled to formal evidentiary proceedings. These evidentiary proceedings, these hearings which have typically lasted anywhere from six to 8 weeks in distribution cases, are extremely costly to the parties.

H.R. 1417 recognizes the problems associated with having hearings in all cases and recommends the use of paper proceedings, at least in cases involving small royalty claims. The leagues certainly support that concept. However, they do not believe that paper proceedings should be limited to cases involving small claims. If there is to be any meaningful reduction in cost arising from this legislation, the rate of circumstances where paper proceedings are permitted must be broadened beyond small claims.

Another major cost of the copyright royalty proceedings is discovery. It's not clear exactly how the bill deals with the substantial issues that the sports leagues and other parties have raised regarding discovery. The language in the bill is a bit unclear and raises several questions that are discussed in my written statement.

A principal concern is that the bill may expand the scope and nature of discovery and thereby drive up the cost of the proceedings even more without bringing any significant benefit to the process.

Finally, Mr. Chairman, you should be aware that counsel representing all of the parties involved in the cable and satellite royalty distribution proceedings have met to discuss H.R. 1417. These parties include the Motion Picture Association, the National Association of Broadcasters, PBS, NPR, the performing rights organizations, copyright owners of religious programming and copyright owners of Canadian programming.

There is a broad consensus among these parties as to various provisions in the bill. For example, I believe that the parties are unanimous in their support for a decision-making body that consists of three individuals, rather than one copyright royalty judge. They also support specific measures that will help reduce costs and promote voluntary settlements, which we believe should be another principal goal of the legislation.

We expect to submit to the Subcommittee our specific recommendations before the record closes. We hope that you and the Subcommittee will take those recommendations into account during your deliberations on H.R. 1417. Thank you, Mr. Chairman.

[The prepared statement of Mr. Garrett follows:]

PREPARED STATEMENT OF ROBERT ALAN GARRETT

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify concerning H.R. 1417, the "Copyright Royalty and Distribution Act of 2003" ("CRDA"). That bill seeks to improve the system by which Copyright Arbitration Royalty Panels ("CARP") set compulsory licensing royalty rates and distribute compulsory licensing royalties.

I am submitting this statement on behalf of the Joint Sports Claimants ("JSC"), which consists of Major League Baseball, the National Basketball Association, the Women's National Basketball Association, the National Football League, the National Hockey League and the National Collegiate Athletic Association. As the representative of copyright owners of professional and collegiate sports telecasts, JSC has participated in numerous copyright royalty proceedings during the past twenty-five years before CARPs, their predecessor, the Copyright Royalty Tribunal ("CRT"), and the Copyright Office. These proceedings have involved the setting of royalty

rates and the distribution of royalties under the compulsory licenses established by Section 111 of the Copyright Act (the cable compulsory license) and Section 119 of the Copyright Act (the satellite carrier compulsory license).

Virtually all parties who have been involved in CARP proceedings, including JSC, recognize that the existing system needs improvement. The process is too costly and generally leads to results that are perceived by many as inconsistent and lacking in credibility. JSC appreciates the substantial efforts of the Subcommittee and its staff in drafting legislation that provides an excellent vehicle to address these problems. Several provisions of the CRDA, if enacted, will help establish a better and more efficient process for dividing copyright royalties and setting royalty rates. However, other provisions of the bill will not achieve that result and will, in fact, have the opposite effect.

We have had only a short time to consider the provisions in the CRDA. Our review of the bill continues as we also discuss its provisions with other affected parties who are interested in developing consensus views on CARP-reform legislation. The purpose of my testimony today is to describe JSC's principal concerns with the CRDA. I believe that several of these concerns are shared by other parties who, like JSC, have been involved for many years in the Section 111 and Section 119 royalty distribution and rate-setting proceedings. However, as noted above, I am submitting this statement solely on behalf of the professional and collegiate sports leagues that comprise the Joint Sports Claimants.

#### A. THE SINGLE COPYRIGHT ROYALTY JUDGE

Under the existing system, the Librarian of Congress (with the advice of the Copyright Office) presides over the pre-hearing process, which involves ruling on various procedural and substantive issues including those related to discovery, scheduling and the interpretation of the Copyright Act. During this pre-hearing phase, the Librarian (again with the advice of the Copyright Office) also selects two private arbitrators who in turn choose a third arbitrator. The three-person CARP panel then conducts the evidentiary hearings and submits recommended royalty allocations or royalty rates to the Librarian. The Librarian (with the advice of the Copyright Office) reviews the CARP's final report to determine whether the CARP has acted arbitrarily or contrary to law. The Librarian's final determination may be appealed to the United States Court of Appeals for the District of Columbia Circuit.

The CRDA would replace the CARP system with one where a single Copyright Royalty Judge ("CRJ"), appointed by the Librarian for a five-year term and assisted by a professional staff of two persons, decides all royalty rate setting and distribution matters. The CRJ's final decision allocating royalties or setting rates would be reviewed only by the D.C. Circuit. The bill authorizes the CRJ to "consult" with the Register of Copyrights "in making any rulings" but otherwise removes both the Librarian and the Register from the process of allocating royalties and setting rates.

JSC is concerned that the rather dramatic change in the structure of copyright royalty allocations and rate-setting, as contemplated by the CRDA, will inevitably lead to more, rather than less, litigation. Thus, it is not a change that JSC can support. While we agree that the CARP *process* requires some significant improvements, we do not believe that the CARP *structure* should be scrapped in its entirety. JSC's specific concerns with the creation of a new decision-making body are set forth in its letter to the Subcommittee dated June 28, 2002 (a copy of which is provided at Attachment A). If, however, it is determined that we must again start with an entirely new decision-making body, as we were required to do in 1993 when the CARP system replaced the CRT, we would urge that, at the very least, you not adopt a structure that authorizes a single CRJ to decide all royalty distribution and rate setting cases.

A significant strength of the existing system is that a panel of three individuals (rather than any one single person) is charged with the responsibility of receiving all the evidence and deciding the often very difficult issues of how to allocate a multi-million dollar royalty fund among many competing claimants or to set royalty rates that will impact thousands of copyright owners and users. These proceedings typically generate enormous records that just as typically support a wide range of results. It is beneficial, we believe, to have more than one individual decide such cases; the interaction of at least three decision-makers who have the opportunity to consider and to debate the many issues involved in royalty allocation and rate-setting proceedings helps produce a more reasoned, supportable and credible result.

There may be instances where a single judge is appropriate, such as in resolving discovery disputes or disputes that involve relatively small amounts of royalties. However, JSC does not believe that a single CRJ should routinely decide all copyright royalty distribution and rate setting cases. As a general matter, a panel of

three should resolve such cases—particularly if, as the CRDA contemplates, there will no longer be any intermediate review of the initial decision royalty allocation or rate-setting decision. If there is concern with maintaining a permanent body of three full-time CRJs who decide all cases, consideration might be given to the temporary appointment of two additional administrative law judges (“ALJ”), from a pool of designated ALJs, to serve with the full-time CRJ in particular cases. The parties involved in the Section 111 and 119 royalty allocation proceedings had recommended a similar approach during the debates over the Copyright Royalty Tribunal Reform Act of 1993. The Register of Copyrights also had identified a similar approach as a possible option in her February 23, 1998 report to Congress, entitled “Options to Improve Copyright Royalty Rate Setting and Distribution Decision-Making.”

#### B. ROLE OF THE COPYRIGHT OFFICE

Under the current system, the Register of Copyrights generally has the authority and responsibility to interpret the Copyright Act provisions that affect compulsory licensing proceedings. Interested parties also have the right to seek such interpretations from the Register and to have the Register’s views included in a written record. The Register’s interpretations are then subject to review by the federal courts. *See, e.g., Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of America, Inc.*, 836 F.2d 599, 602 (D.C. Cir. 1988); *Satellite Broad. and Communications Ass’n of America v. Oman*, 17 F.3d 344, 347 (11th Cir.1994), *cert. denied*, 513 U.S. 823 (1994).

The CRDA appears to contemplate that the CRJ would have the authority and responsibility to render any necessary interpretations of the Copyright Act—although the CRJ could, if he or she chose, “consult” with the Register. Given the historic familiarity of the Register with the various compulsory licenses and the Copyright Act provisions that relate to those licenses, JSC believes that consultation with the Register on issues involving the proper interpretation of the Copyright Act should be the rule rather than the exception. We recognize that in certain circumstances it may not be practical to obtain the Register’s views, such as where an issue arises close to the statutory deadline for completing a proceeding. Generally, however, the Register’s views on the proper meaning of the Copyright Act should be sought. In addition, any consultation between the CRJ and the Register on such issues should be placed on the written record so that all parties to a proceeding are aware of the advice that has been sought and rendered.

The CRDA also appears to permit consultation with the Register in connection with “rulings” that do not involve the interpretation of the Copyright Act. We question whether consultation on such matters is necessary or appropriate. In any event, if the legislation does permit the CRJ to contact the Register on issues unrelated to the proper interpretation of the Copyright Act, we believe that such contacts should be placed on the written record and disclosed to all parties.

#### C. THE COSTS OF DISCOVERY AND EVIDENTIARY HEARINGS

Under the current system, the CARPs normally conduct evidentiary hearings where witnesses present live testimony and are subject to cross-examination; two rounds of hearings are usually held—one for direct cases and one for rebuttal cases. These hearings often are quite time-consuming and represent perhaps the most significant cost to the parties. For example, the pending cable royalty distribution proceeding (involving the years 1998–99) is scheduled to have 36 direct case witnesses testify over seven weeks; the rebuttal hearing is scheduled to occupy an additional two weeks. The last litigated cable royalty distribution proceeding (involving the 1990–92 royalty funds) consumed over 300 hours of hearings and generated a record of more than 12,000 pages.

The CRDA specifically authorizes the use of paper proceedings in cases where very small amounts of royalties are at stake. JSC certainly supports that concept. However, JSC believes that paper proceedings should be utilized more frequently in *all* compulsory licensing royalty proceedings and that Congress should encourage a broadening of the circumstances where paper proceedings are appropriate. Eliminating one or both phases of evidentiary hearings from proceedings and substituting a paper proceeding—or at least reducing the instances where the decision-maker is required to hear live testimony from all witnesses—would yield substantial cost savings to all affected parties and thus help achieve what should be a primary objective of this legislation. A principal concern JSC has with the CRDA is that it not only fails to encourage the use of paper proceedings in a broad range of circumstances; as currently drafted, the CRDA appears to permit the use of paper proceedings in fewer cases than those permitted by the existing Copyright Office CARP regulations.

JSC also believes that issues concerning the use of paper proceedings are intimately related to the issues concerning the proper scope and method of discovery in copyright royalty proceedings.<sup>1</sup> If paper proceedings become more frequent, it may be appropriate to expand modestly the discovery process (in terms of the scope of discovery and the types of discovery tools). If, however, the current full-blown evidentiary hearings continue, expanding the nature and scope of discovery would drive up the costs of the proceedings even more, without bringing any significant benefit to the process.

It is not entirely clear how the CRDA deals with the substantial issues that JSC and other parties have raised regarding discovery. The bill states only that “discovery” shall be permitted “for a period of 60 days” and that “[f]inal witness lists for the proceedings shall not be required until the end of the discovery period.” This language raises several questions, including: (1) whether written testimony will continue to be filed prior to discovery or whether testimony must now be filed on the 60th day of the discovery period; (2) if the former, whether discovery is limited to obtaining documents underlying the written testimony (as is currently the rule) or whether the scope and nature of discovery would be broadened, thereby increasing the costs of the discovery process; and (3) if the latter, whether the parties may obtain discovery of any sort on the written testimony.

#### D. FUNDING OF COPYRIGHT ROYALTY PROCEEDINGS

Our understanding is that, under the current system, the Copyright Office deducts the costs of copyright royalty rate proceedings unrelated to Section 111 and 119 (such as those conducted pursuant to Sections 112, 114 and 118) from the Section 111 and 119 funds. JSC has substantial doubts as to whether the existing provisions of the Copyright Act authorize such deductions; there certainly is no policy justification for using the Section 111 and 119 royalties to pay for the administration of completely different compulsory licenses that involve an entirely distinct group of copyright owners and users. The CRDA would prohibit this practice by adding language to Section 803(e)(1)(A) of the Copyright Act which permits the Librarian to deduct the costs of a proceeding “from not more than 1 percent of the royalty fees deposited or collected under this title *that relate to that proceeding.*” JSC strongly supports the proposed Section 803(e)(1)(A) insofar as it prohibits the Librarian from using Section 111 and 119 royalties to fund proceedings involving other compulsory licenses.

#### E. ENCOURAGING PARTIAL DISTRIBUTIONS

Under the current law, the Copyright Office may distribute Section 111 and 119 royalties that are not in controversy prior to the time that distribution proceedings are final. These “partial distributions” are particularly important to copyright owners because there often is a lengthy period between the payment of the royalties by copyright users and the conclusion of the distribution proceedings. Each year JSC and other copyright owners have made a good faith effort to agree on the actual amounts that are in controversy and the amounts that may be distributed pending resolution of that controversy; those agreements have required each party to pay back any amounts in excess of its final royalty award. Increasingly, however, the Office has rejected these negotiated agreements and has authorized the distribution of far less than the amounts on which the parties have agreed. As a result, millions of dollars in Section 111 and 119 royalties that copyright owners have requested the Copyright Office to distribute will remain undistributed for several years. JSC be-

<sup>1</sup>Under the existing CARP procedures, parties are not entitled to the type and breadth of discovery normally permitted in federal civil litigation. There are no depositions or interrogatories and the parties are entitled only to documents “underlying” particular statements made in written testimony rather than all relevant documentation; that testimony must be exchanged prior to the time that any discovery is conducted. Moreover, given the existing timetables for dealing with discovery requests, there is very limited opportunity to make productive use of the discovery that is available. These limitations are designed to hold down costs and to expedite the proceedings.

On the other hand, the Copyright Office has gradually expanded its view of underlying documents and thus the scope of discovery. Even where the Copyright Office denies a discovery request, a CARP (which may consist of arbitrators more accustomed to the rules prevailing in federal civil court litigation) can effectively reverse that ruling and order the production of documents. While the CARPs (like the Copyright Office) have no subpoena authority, they do have the power to strike and to weigh testimony; thus, it is rare that parties do not comply with CARP orders directing additional discovery—although the CARP may have a more difficult time obtaining information from third parties. The result is that the nature of discovery in CARP proceedings has become increasingly uncertain and with that uncertainty has come increasing costs.

believes that the CRDA should encourage agreements among the parties to distribute the maximum amount of royalties possible pending the resolution of distribution proceedings. At a minimum, the Office (or the CRJ) should be required to grant requests for partial distributions where the parties agree on the amount that is in controversy and agree to return any possible overpayments.

#### F. ENCOURAGEMENT OF SETTLEMENT

The CRDA appears to incorporate the concept of the offer of judgment from Federal Rule of Civil Procedure 68, which in effect permits parties to make pre-trial offers of settlement that may be taken into account in imposing costs. JSC supports this concept. As drafted, however, the provision in the CRDA is problematic in several ways. First, the provision appears to have no force and effect. Rule 68 permits the recovery of costs if an offer of judgment is refused and the final result is not more favorable than the offer, but there is no comparable provision in the CRDA. Second, it is not clear how the offer of judgment provision would work in multi-party proceedings, which are typical in copyright royalty proceedings. Third, the language of the provision, which provides for offers to be made "up to the day on which hearings in the proceeding begin," raises a question about whether and how parties will be permitted to settle disputes after the start of a proceeding.

JSC strongly believes that one of the goals of the copyright royalty arbitration process should be to discourage litigation and to encourage voluntary settlements among the parties to disputes. Existing policies and procedures, by raising bars to settlements at various points in the process, have had precisely the opposite effect. Examples include the policies and procedures dealing with confidentiality of negotiated agreements, the technical distinction between settlements arrived at before and after the initiation of CARP proceedings, and the Office's practice of permitting those who fail to participate in a proceeding the opportunity to oppose settlements by proceeding participants and to require the initiation of new CARP proceedings. JSC strongly supports adding provisions to the CRDA to eliminate these barriers to settlement.

#### CONCLUSION

JSC's principal recommendations concerning the CRDA may be summarized as follows:

The CARP structure should not be replaced with an entirely new decision-making body. Rather than effect such dramatic structural changes, we should focus on process reforms that are necessary to reduce the costs and to help ensure the consistency and credibility of decision-making.

If structural reform is deemed necessary, the authority to decide all copyright royalty rate-setting and royalty distribution issues should not be vested in a single Copyright Royalty Judge, as the CRDA contemplates. Such decisions should generally be made by panels consisting of the CRJ and two additional administrative law judges.

The CRJ generally should be required to consult with the Register of Copyrights concerning the proper interpretation of the Copyright Act. Any con-











































Mr. Remington, if you want to comment on that, as well, I would appreciate it.

Ms. PETERS. Whatever the end result is, that's what's going to go to the appeals court. Based on our experience, we actually got some of those questions where there was an oversight or somebody really hadn't looked at something, so it really was a suggestion to avoid additional appellate litigation if, in fact, it wasn't necessary.

Mr. SMITH. Okay. Maybe there's not much more to say. Do you concur with that, Mr. Remington?

Mr. REMINGTON. I concur.

Mr. SMITH. Okay, great.

Mr. Garrett, in your testimony first of all, on page 3, you mention that the structure of copyright royalty allocations in rate-setting will inevitably lead to more rather than less litigation. I think you got into that a little bit with your oral testimony. But then you go on and make the point, as Mr. Remington did, as well, about your concern that there would be only one judge.

I have to say to both of you all that I have the same kind of concern because that's putting a lot of power in one individual's hands. You don't know if there might be some bias involved and you have someone there for the long term and just one judge. Of course, it's not unusual; we see that across the country. But nevertheless, intuitively I'd feel better if it were a panel of three, too, but you all know the problems with that. We really can't justify three judges full-time and the concurrent expenses, and so forth.

On the other hand, you did come up with the suggestion, Mr. Garrett, about having two additional administrative law judges from a pool, and so forth. The problem with that as I understand it is that these aren't copyright royalty judges. These are administrative law judges. They're not experts. Going through that process might be a real pain.

So that's a possible solution but I don't know if it's the best solution, so there's a quandary here. I sort of am sympathetic but I don't know if that is necessarily the best solution. Do you want to make any more comments on your idea of one judge versus three?

Mr. Garrett. I do not know that I've got the solution here, Mr. Chairman, but I do know that all of the parties, at least those who are involved in the cable royalty and satellite royalty distribution proceedings, feel very strongly that it ought to be three, rather than one judge for the reasons that you identified and that we ought to be looking for a way to make that approach work somehow.

There's just a tremendous amount of discretion that is afforded these arbitrators. As I said in my testimony, the records are enormous. They produce a wide range of possible results.

Mr. SMITH. Of course, Federal judges have a lot of discretionary power, as well.

Mr. GARRETT. No question about it and that is the way most decisions in this country are made, but most decisions involving rate-setting, royalty allocations around the world are not made by single individuals. They are made by bodies that are comprised of several individuals.

Mr. SMITH. I just want to say to you we'll be looking to see if there's not something we can do about it because I have the same

kind of reservations as you do. I don't have a perfect solution to that yet but we'll be taking a look and considering your concerns, as well as Mr. Remington's concerns, too.

Mr. Rich, in your testimony, page 8, you made the suggestion that the copyright royalty judge should have subpoena power. I think that's a good idea and I think if we overlooked it, maybe that's something that we can include. But then you proposed a standard of review based on the arbitrary and capricious standard used in relation to some Federal agency actions is too restrictive. The reason we put that in there is because the current standard is just arbitrary and there's really no other jurisdiction that uses that, so that's sort of a unique standard. The arbitrary and capricious is a little bit more common, a little bit more recognizable, and maybe it's a term of art; I don't know.

Do you have any other reservations?

Mr. RICH. In part, my reservation flows from your earlier colloquy with Mr. Garrett, Mr. Chairman, which is that while I propose fairly strongly a single jurist based on the Federal judging model, assuming this is a qualified individual, it seemed to me that an appropriate check and balance on possible distorted outcomes would be a more robust standard of review. And I again look by analogy, instead of the arbitrary or arbitrary and capricious, just to a clearly erroneous-type review standard of the Federal rules. I pulled out, because I thought it might be useful for the panel, just a clause that sort of grabs the respective concepts of arbitrary and capricious as the courts think about it versus clearly erroneous. I thought it, for me, captures the meaningful difference in the standard of review.

One court has written that the arbitrary or capricious standard, which is sometimes called the substantial evidence test, calls for such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In other words, so long as the reviewing court finds that some reasonable person could do it, it stands.

Clearly erroneous, on the other hand, the standard I would prefer and think would be more protective of the process and the appeal, means that the reviewing court "has a firm conviction from review of the record that a mistake has been committed." So you can have a reasonable outcome which is still clearly erroneous in the mind of a court. And again because I lean in favor of a single judge rather than three, I think an appropriate balance and check on a clearly wrong decision could use a better standard.

Mr. SMITH. That's something we might take a look at and we appreciate the suggestion.

Mr. Remington, my time is up. We've mentioned a couple of things in your testimony—the idea of three judges or not, just one, and so forth. I did want to call your attention and perhaps Mr. Berman's attention to one sentence that you had in your written testimony that you fortunately did not use in your oral presentation, and that is you suggested to the Ranking Member, Mr. Berman, that you "looked forward to your co-captaincy."

I didn't want you to give the minority any ideas but it did strike me that that was an interesting turn of phrase, but it also gave away which side you worked for when you were chief counsel.

Mr. REMINGTON. And I think I admitted that it might not have been the appropriate term in my written statement.

Mr. SMITH. It has its uses and I'm sure that Mr. Berman wouldn't object.

The gentleman from California, co-captain Berman, is recognized for his questions.

Mr. BERMAN. What do you mean "co"?

We did previously serve as chair and Ranking Member of a Committee that had an equal number of Democrats and Republicans but it, alas, is not the case here.

Thank you, Mr. Chairman.

First let me indicate that Ms. Lofgren apologizes to the witnesses for—an emergency came up in her district. She is very interested in this subject and wanted to both hear your testimony and ask questions but she received some information after she got here that required her to leave to attend to this problem in her district.

Why don't we just take the last issue first, this one judge versus three judges? First let me make sure I understand. I tend to think in the context of State law on these appellate review standards. You view, Mr. Rich, you view the standard in the current bill as sort of a highly deferential standard? You equated it with a substantial evidence. There's substantial evidence in the record to support what you think should be the copyright royalty judge's decision and since it's only one judge, you think that's too deferential. But are you then suggesting that an appellate court do a sort of an independent review of the record?

Mr. RICH. No. Under a clearly erroneous standard, at least if an appellate court is minding its Ps and Qs, Congressman Berman, unless it develops, as I suggested, a firm conviction that the facts which were adduced were erroneous, then it must defer. It still gives substantial discretion to the trier of fact and to judgments about witness credibility. It's far from a de novo standard—I don't advocate that at all—but it is less of an almost automatic kind of "let it pass through if there's any rationale whatsoever" or an objective standard that somebody might have reached this result. That's the standard I construe to be imbedded in H.R. 1417 or close to it. I think that's giving too much discretion, at the extreme, to a single trier of fact. I just think that in our experience as trial lawyers, an appellate court, if it senses something went off the rails factually at the trial in a plenary civil proceeding, let's say, finds enough room in rule 52(a) to find a basis for reversing.

Mr. BERMAN. Well, if I'm looking at a record of a decision made by in this case the copyright royalty judge and I'd have decided it differently, then don't I think he was clearly erroneous?

Mr. RICH. Not necessarily. I've appeared in the Second Circuit in several appeals from ASCAP-type rate-making proceedings and my experience is that those panels are quite deferential to the fact record unless they find something really seriously wrong tended to occur, and I think that rule 52(a), properly construed, on issues of fact, as opposed to law, is still a quite deferential standard but not almost completely deferential, as I think the arbitrary and capricious standard would be.

Mr. BERMAN. Tell me again, Mr. Remington, what do you think the standard should be?

Mr. REMINGTON. Well, I think the standard should be related to what kind of entity you create at the base. There is a relationship between having a solo judge who perhaps does not consult with the Copyright Office and a less deferential standard of review, but as I envision H.R. 1417, irrespective of whether it is multi-judge or single judge, with a consultation with the Copyright Office, an expert agency, it would be entitled to deference on appeal and that deference would be under section 706 of the Administrative Procedures Act, which is what we call arbitrary and capricious. It actually is agency action that is arbitrary and capricious, an abuse of discretion, or other wise not in accordance with law.

That is the standard that was used by the CRT and actually, the current standard of review that we have for appeals from the Librarian is more deferential than arbitrary and capricious. It is what we call arbitrary and capricious squared because there has already been an intermediate appeal. So you are actually downgrading the standard in H.R. 1417 and I would agree with arbitrary and capricious.

Mr. BERMAN. But you think it should be three judges.

Mr. REMINGTON. Yes.

Mr. BERMAN. And consultation with the Registrar.

Mr. REMINGTON. Yes, under appropriate circumstances.

Mr. BERMAN. Well, between the two of you, tell me what—Ms. Peters also talked about this issue of on issues of copyright law the Copyright Office should—I'm not sure if it's be consulted or make decisions. Are the two of you sort of suggesting the same thing here?

Mr. REMINGTON. I think so but I am not sure. There should be some standards for the consultation. It should be on the record. Parties should know about it. It shouldn't be like walking down the hall and getting a glass of water together and saying "How would you come out on this case?" So there should be a little bit more structure in H.R. 1417 and this is an issue that the group that Mr. Garrett alluded to will be getting back to you on in terms of how we think it should be formulated.

Mr. BERMAN. Could I just get Ms. Peters's answer to that?

Mr. SMITH. The gentleman is recognized for an additional minute.

Ms. PETERS. For the Copyright Office, I mentioned in my testimony obviously interpretation of the law and that was the key area. The other place where we think it would be appropriate is if, in fact, the copyright royalty judge was thinking about putting in place rules that affected the procedures of the Copyright Office, whether they were suggesting that a filing be with us or whatever, then it would seem appropriate before they put in place something that affected us, that they would consult with us.

Mr. BERMAN. Explain the context in which interpretation of the law comes up. I mean whether the compulsory license covers that entity? Is that what you mean?

Ms. PETERS. Well, it's come up even when the CRT was around and one of the ones was whether or not satellite carriers were entitled to the cable compulsory license. So it really had to do with who was eligible for that license.

Now it obviously affected us because we actually get the filings of the cable operators who pay the money, and the question was were satellite carriers eligible? So we actually did that ruling and the CRT was fine with it.

We recently did one with regard to whether or not broadcasters had liability and were eligible for a statutory license in the webcasting and that case is still on appeal. It's those kinds of things which we think are fairly intricate and that really need not only to look at the statutory license but the whole law that we thought was appropriate for us to be involved in some way.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Virginia, Mr. Forbes, is recognized for his questions.

Mr. FORBES. Thank you, Mr. Chairman, and I thank all the panel members for being here.

Mr. Rich, I agree with you. I think the standard of appeal should be clearly erroneous and I think that does give us a good balance. I've wrestled with the number of judges, as well, as I think everyone on the panel is wrestling with that and the Members of the Committee. I don't like the idea of a 7-year appointment, though, because I think that exacerbates perhaps our problem a little bit over the 5 years.

Does anybody on the panel have a problem with the method of appointment? Because as the Chairman mentioned here when he talked about the discretion of Federal judges, there is a check and balance at least on that appointment process; in this one there's not. Is everybody comfortable with the way a judge—if we have one judge that's going to be appointed, you don't really have too much screening process there. Anybody object to that or think we should look at that or everybody pretty comfortable with the method of appointing the judge?

Mr. RICH. I would only offer that I think there is always potential concern there and this is not to cast aspersion at all to my left.

Mr. FORBES. No, it has nothing to do with the person doing it.

Mr. RICH. But I think there is a bit, also, of a trade-off between the notion of that and the concept of independence and what true independence connotes and I think—to the recent dialogue between the panel members and the Members about how much consultation there ought to be—I think that has to be carefully controlled, on the record, for all of the reasons—to assure both the reality and the perception that the independence is not simply something which is on paper but in truth there is persuasive ability of the agency which, after all, after 5 years would have the power of reappointment.

Mr. FORBES. Everybody else pretty much concur with that?

Mr. GARRETT, you mentioned about the paper proceedings ought to be extended beyond the small claims. Can you expound on that just a little bit as to your thoughts there?

Mr. GARRETT. Yes, Mr. Forbes. I don't know that there is any detailed type of legislation that one can enact on this. I do think it ought to be the sense of the Subcommittee that the scope of paper proceedings be increased as much as possible, that this should be an issue that ought to be dealt with in greater detail in any rule-making to implement this legislation.

My concern is that as matters stand now, there's sort of a presumption that there's going to be an evidentiary hearing where all witnesses will have to testify in all of these proceedings, be subject to cross-examination. While that is often a very useful approach, it's a very costly approach. It really is the major cost of these proceedings and I think cost is a major concern for the people who participate in these proceedings. Unless one limits the number of instances or reduces to some degree the instances in which you're going to be holding these full-blown adversarial evidentiary hearings, the costs that the clients are most concerned with here are going to continue to escalate.

Mr. FORBES. And I agree with you and maybe rulemaking is where we have to do it, but if any of you have any suggestions on how we can fine-tune that, probably this is the time to get them to us in some fashion.

Everybody seems to concur with the subpoena powers; I think we all do. Any concern about abuse there or you're pretty comfortable with it?

Mr. REMINGTON. I guess I'm the lonely voice on subpoena power. I think that the more power you give a court or a judge outside the judicial branch, the more likely it is that you would run afoul of constitutional issues because article III reserves article III authority to life-time appointed Federal judges and one has to be careful not necessarily about subpoena alone but if you add contempt, subpoena, entry of final judgment, what we know of as article III powers, this court/judge in the legislative branch would be more subjected to constitutional attack.

Mr. GARRETT. Mr. Forbes, I do have some concerns about the subpoena power. The Register said that I supported subpoena power. When the Register says I support something, I feel like I should support it.

Ms. PETERS. If I made a mistake, correct it.

Mr. GARRETT. But I do have concerns because I think there are concerns that are related to the paper proceedings. When you have subpoena power you increase the cost of these proceedings. We have functioned with these proceedings for two decades without subpoena power. I can imagine circumstances under which subpoena power would be helpful, it would be useful and maybe be appropriate, but as a general matter and particularly in the cable and satellite royalty distribution proceedings that have been going on for a number of years without, I think, any serious problems as a result of lack of subpoena power, I don't know that that is the best course and certainly not in all circumstances.

Mr. FORBES. Let me just suggest I think you've given us some good ideas of how we can get balances on this appellate standard versus the number of judges and if you have any suggestions on the subpoena power issue, please get those to us, as well. Once they leave here we have very little control over them.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Forbes.

The gentleman from Virginia, Mr. Goodlatte, is recognized for his questions.

Mr. GOODLATTE. Mr. Chairman, thank you very much for holding the hearing. I don't have any questions.

Mr. SMITH. The gentleman from Florida, Mr. Keller, is recognized for his questions.

Mr. KELLER. Thank you, Mr. Chairman, and no questions.

Mr. SMITH. The gentleman from Indiana, Mr. Pence, is recognized.

Mr. PENCE. Thank you, Mr. Chairman. I just wanted to thank you for calling this hearing on the Copyright Royalty and Distribution Reform. I appreciate your leadership and I have no questions at this time.

Mr. SMITH. Thank you all for your attendance. It turned out we expedited more quickly than I'd thought today and we're not missing any votes.

If there are no other comments or questions by anybody, let me thank—oh, the gentleman from California?

Mr. BERMAN. Can I talk until the bells ring? No.

Mr. SMITH. I don't want to take a chance, Mr. Berman. Do you have a question, Mr. Berman, though?

Mr. BERMAN. Yes, I do.

Mr. SMITH. Okay, the gentleman from California's recognized for a question.

Mr. BERMAN. I'm reminded of—three judges, higher standard of review, one judge, lower standard for review—it reminds me of the story of the debate in the L.A. City Council where the councilman got up and said, "Fluoridate the water? The professor from Harvard says fluoridate. The professor from Yale says don't fluoridate. I don't know what to do." I wish there was some ideological framework in which to decide this issue.

For anyone on the panel, instead of requiring subpoenas and depositions, what if we just left very wide discretion to either the three-judge panel or the one-judge with the higher standard—lower standard of review? In other words, part of this is to get away from the costs and the time-consuming nature of these processes and why not let sort of the facts of the case—let the judge have the power to decide here what makes sense, rather than create sort of guaranteed processes in terms of discovery and subpoenas and live testimony versus paper? Leave it rather loose and let these expert judges—and maybe that's an argument for three; I don't know—make the decision case by case? Any of the panelists.

Mr. RICH. In my own experience, Congressman, I think it's an excellent suggestion. I think that part of the problem that everybody's experiencing is on the one hand, if your rules are so rigid as not to allow, you're going to say it cries out for a subpoena here, where it isn't available. On the other extreme, everybody's saying give the lawyers free reign and everybody will go insane.

The most effectively managed litigations I've participated in, whether or not the Federal Rules of Civil Procedure nominally allow X depositions or whatever, the judge or supervising magistrate judge takes control exactly as you suggest, says what's this case about, here's the time frame we're going to allot to do it, here are the discovery tools we're going to allow, make a good cause showing, if you will, on some areas where it sounds like it's excessive or harassing, and get the process going.

I don't think there is any one-size-fits-all rule that's going to fit all rate distribution proceedings and all rate adjustment pro-

ceedings. The key, I believe and I concur in, is have the flexibility and allow the experienced jurist or jurists to make a case by case judgment about the effective tools to get the best hearing record developed.

Mr. BERMAN. It's only money.

Mr. SMITH. Thank you, Mr. Berman.

We've been joined by the gentleman from Virginia, Mr. Boucher. I don't know if he has questions but if he does he'll be recognized to ask them.

Mr. BOUCHER. Mr. Chairman, I do, but can you give me just a moment to get organized here, having just arrived?

Mr. SMITH. Sure. We'll be happy to.

Mr. BOUCHER. Thank you.

Mr. SMITH. I'll tell you what. I'll give a premature thank you to our panelists today because this has been one of the most informative, most helpful hearings I think we've had on any piece of legislation. You all have offered construction suggestions. We still have a couple of things to work out, particularly the one versus three and the standard, but we'll see what can be resolved to give everybody perhaps just a little bit more comfort level, or we'll figure out some approach that is maybe more acceptable to more of us. But anyway, it's been very, very helpful, I think, to all of us.

In that regard, both Mr. Berman and I have introduced legislation together, so it's a good bipartisan effort on our part and we expect it to work. I should also say that we don't expect to mark up the legislation next week; we'll wait a few weeks and have some suggestions and try to iron out some of the kinks and come up with a good bill in several weeks' time.

If the gentleman from Virginia's ready he'll be recognized for questions.

Mr. BOUCHER. Thank you very much, Mr. Chairman. First of all, let me compliment you and Mr. Berman for assembling the bill that is the discussion of today's hearing, which I think does represent a significant step forward from the present CARP process.

The problem that I see is that it really is related to process only and it doesn't address the standard under which the royalty rate is set. The element of fairness is not made a part of the standard and the element of fairness is a part of the standard for other CARP proceedings. For satellite, for cable radio, fairness is included in the standard that is to be considered.

And I wonder if any of our witnesses have any comment about whether it would be appropriate as we are making this change to also include the element of fairness in the standard for Internet radio. Mr. Rich, do you have a view?

Mr. RICH. Thank you, Congressman. I briefly addressed at the back of my testimony, respectful of the focus of this particular piece of legislation, that very concern. I think that the process can get us only so far. Process can only animate a standard and can only generate results as equitable or inequitable as the standard provides.

In our experience representing the webcasting community in the 112, 114 CARP, significant issues were raised about the kinds of interpretations that have been afforded the willing buyer/willing seller standard and arguably, some very consequential and I would

argue negative results have occurred in terms of the vitality of webcasting as a result of the interpretations that have been given by the panel there and thus far subject to appeal.

I think that I have not heard a good rationale for distinguishing the fairness standard embodied in 801(b) that animates a number of these other compulsory license proceedings as distinct from the 112 and 114 proceedings. I think those proceedings would be measurably improved and the likelihood of equitable outcomes improved if the same standard was imported into those, as well.

Mr. BOUCHER. Well, that is a very eloquent statement and good rationale for us to change the standard while we're changing the process.

Does anyone else want to comment and would anyone like to defend having a separate standard based on willing buyer/willing seller for Internet radio, realizing that there's really only one seller in the market and that person has the ability to set the price based on the lack of any competition from the seller's standard? Mr. Garrett?

Mr. GARRETT. Thank you, Mr. Boucher. My experience has been in representing copyright owners for a number of years, so I approach your question from that perspective. And in my judgment, the fair market value standard that was applied in the webcaster proceeding that's also apparent in section 119, the satellite carrier compulsory license, is the appropriate standard.

I think that fair market value inherently captures the notion of fairness. There's nothing unfair in my judgment about having users of copyrighted works pay fair market value. I think that should be the standard that would apply to all of the compulsory licenses.

We in this country often find it necessary to appropriate real property for public uses. That's certainly accepted in our system here and when we do that, we accord the owners of that real property fair market value for what it is that has been taken in the greater public good and in my view, copyright owners should not be entitled lesser compensation. Thank you.

Mr. BOUCHER. Well, Mr. Garrett, let me ask you this. Does that standard really work, though, when you only have one seller of the product? And in this case the RIAA is the only seller of the product. There are just not a sufficient number of transactions in the market from which to derive real value based on willing buyer/willing seller. How do you respond to that?

Mr. GARRETT. I think it's a decision that has to be made on a case by case basis. That's what we devote 15,000 pages of record trying to establish. What is fair market value? What would the willing buyer, what would the willing seller be doing?

I think it's a difficult standard to apply but courts, of course, have been applying it for years and years and years in a variety of contexts. I don't think it's just a matter of what one organization is doing. There's a lot of evidence out there to show what willing buyers and what willing sellers would do in the marketplace.

Mr. BOUCHER. But not in these particularly circumstances where you have such a limited number of transactions.

Mr. Rich, briefly, would you like to respond to what Mr. Garrett has said?

Mr. RICH. I think the problem is there's an overwhelming weight placed presently on any CARP panel to give weight to supposed marketplace evidence. No matter that it's a single buyer out there represented by a powerful collective, the statute contemplates giving weight to voluntary license agreements and this is what happened in the last CARP. It became a physical impossibility for the panel to ignore the entirety of these license agreements, even though without the aid of subpoena power, it was even, we thought, reasonably evident that these were transactions profoundly affected by the weight and market power of RIAA. And I think without statutory reform, that experience unfortunately, I think in terms of market outcome, is likely to replicate itself in other CARP-type proceedings.

Mr. BOUCHER. Okay, Mr. Rich, Mr. Garrett, thank you very much.

Mr. Chairman, it just seems to me that the basis has been made for us to give serious consideration not just to changing the process but also to changing the standard under which these rates are determined and as this measure moves the mark-up, I hope we can have further discussion about that.

I see Mr. Berman is smiling. Would you like for me to yield to you, Mr. Berman?

Mr. SMITH. The gentleman from Virginia is recognized for an additional minute.

Mr. BOUCHER. Thank you.

Mr. BERMAN. I thank the Chairman and I thank the gentleman for yielding.

Staff advises me that cable license is not a fairness standard; it's if the parties haven't negotiated it, it's a cost of living increase. My guess is there are a lot of programmers who would like to move to a fairness standard from the cost of living cap in the context of the cable compulsory license. I mean this thing works many different ways.

The only other point, this is the problem. We can get into fascinating and interesting and I think legitimate debates but the CARP process was not connected to it. If I recall correctly, it certainly wasn't connected to the most recent compulsory license that was litigated and is now on appeal. It was a process that was undertaken.

My fear is if we try to get into the substantive tests of the standard, we will end up with a very interesting discussion and probably educate ourselves on the economics. By the way, there is one competitor to the only seller and that's call the world of piracy and in music it constitutes a certain level of competition these days to people who are trying to find the right price. But that if we get into that debate in the context of this bill, we will end up with a very interesting debate and no move forward.

And even those who feel abused by the current standard can at least be abused in the future cheaper than they've been abused in the past if we can reform this process. Cheaper and quicker.

Mr. SMITH. Thank you for—

Mr. BOUCHER. Reclaiming my time just briefly, I think it is undeniable that the procedural reforms that the bill makes would be helpful to all parties concerned and would substantially reduce the

cost of engaging in the royalty determination process and that is a very good element of the measure. I support that. But it would be a very simple matter to promote the notion of fairness, which would particularly benefit the smaller webcasters, if we simply made the standard exactly the same as it is both for cable radio and satellite radio, and that is found in the statute today. It's 801(b) and fairness is clearly taken into account in both cases and I would just suggest that it should be here.

Mr. Chairman, you've been very indulgent in permitting this discussion and I thank you and apologize for being tardy for the hearing.

Mr. SMITH. No problem. Thank you, Mr. Boucher. I have a hunch we had an indication of future discussion by Members of this Subcommittee.

Ms. Peters, before we adjourn I have a couple of written questions to submit to you. If you could get me answers back within 10 days or so so we can consider them.

And also, let me ask all four witnesses today if you have any ideas on the one versus three judges and on the standards, get those ideas to us, if you will, in the next couple of weeks and we can continue to digest your suggestions.

[The material referred to follows:]

**U.S. House of Representatives**  
**Committee on the Judiciary**  
Washington, DC 20515-6216  
One Hundred Eighth Congress

April 8, 2003

Mary Beth Peters  
Register of Copyrights  
United States Copyright Office

Dear Ms. Peters:

As you will recall, at the end of the Subcommittee hearing on H.R. 1417, I indicated that I would be submitting written questions to you which I would like answered for the record. Please respond in writing by close of business Monday, April 14.

Ms Peters:

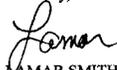
- a.) H.R. 1417 contains, a \$150 filing fee that is pegged to the notice of intent to participate in a proceeding. First, do you think that amount is correct? Second, do you think that joint claimants should be able to continue filing one notice of intent, and thus one filing fee?
- b.) An ongoing point of contention among parties interested in CARP reform, concerns the current standard to be used in determining rates for Sections 112 and 114. First, is there a historical reason why the standard for these licenses differs from the others? Second, do you think that, in the spirit of uniformity, there should be one standard?

Mary Beth Peters  
April 8, 2003  
PAGE TWO

Again, I would appreciate your written response to these questions by close of business Monday, April 14. You may e-mail your answers to the attention of Melissa McDonald of the Subcommittee at [melissa.mcdonald@mail.house.gov](mailto:melissa.mcdonald@mail.house.gov). If you have questions about this request please contact her at 202-225-5741.

Thank you for your participation at the hearing.

Sincerely,



LAMAR SMITH  
Chairman  
Subcommittee on Courts, the Internet, and  
Intellectual Property

LS/mlm

## ANSWERS TO FOLLOWUP QUESTIONS FROM THE HONORABLE MARYBETH PETERS

**a. H.R. 1417 contains, a \$150 filing fee that is pegged to the notice of intent to participate in a proceeding. First, do you think that amount is correct? Second, do you think that joint claimants should be able to continue filing one notice of intent, and thus one filing fee?**

To determine whether the \$150 filing fee is set at the correct level, one must first ascertain the purpose for the imposition of the fee. As I understand it, there are two rationales for implementing a fee: (1) to assist in paying the costs of the statutory license rate setting and distribution process; and (2) to avoid expensive distribution proceedings caused by claimants with little actual monetary stake when the cost of those proceedings far exceeds the amount in controversy.

If the purpose of the filing fee is to offset the costs of the process, the collection of a \$150 filing fee would be woefully inadequate in most cases. In a distribution proceeding, the number of participants in a proceeding ranges from 2–8 participants and would generate very limited fees (between \$300 and \$1200) for the purpose of covering costs in these proceedings. Even in a rate setting proceeding, which typically has more participants, the numbers are not high enough to generate significant revenues. To date, the largest number of notices of intention to participate filed in any single rate setting proceeding has not exceeded 81, and even in that proceeding, only 27 parties actually participated. More telling are the recent numbers for the upcoming rate setting proceeding for webcasters. At this time, we have received 49 notices of intent from parties interested in participating in that proceeding. Had these parties paid a \$150 filing fee, it would have generated only \$7350, a relatively negligible amount in comparison with the costs of the proceeding.

Under these circumstances, I do not believe that a \$150 filing fee would be a significant source of funding for rate setting or distribution proceedings. In order to serve such a function, the filing fee would have to be increased to a prohibitively high amount, which would probably deter participation by parties who ought to be able to take part in the process. Because participation in the rate setting and distribution process should not depend on one's ability to pay, I have recommended that the costs of the system be paid for out of newly appropriated funds.

On the other hand, requiring each party to a joint claim to pay the \$150 filing fee could result in substantial revenues in some distribution proceedings. [Joint claims arise only in the context of distribution proceedings.] The greatest number of joint claimants to participate in any proceeding to date is 1,184, in the cable distribution proceeding for the year 2000. Requiring each of those joint claimants to pay a \$150 filing fee would have yielded \$177,600 ( $\$150 \times 1,184$ ). However, the reasons to resort to a filing fee to defray costs are weaker in distribution proceedings than in rate setting proceedings, since there is a royalty pool from which costs can be deducted. Moreover, I believe that many of the individual claimants who are represented jointly in distribution proceedings have relatively small claims—some perhaps worth less than \$150. Requiring those claimants, who are united in interest and representation with a number of other claimants, to pay \$150 each strikes me as unfair and unnecessary.

Moreover, if one were to charge a separate fee for each joint claimant, one would have to consider the situation of performing rights societies (ASCAP, BMI and SESAC), which may have tens of thousands of members. If each member of a performing rights society were to be considered a joint claimant, imposing a filing fee of \$150 per joint claimant would be prohibitive and unfair. Under current practice, a claim filed by a performing rights society is considered a joint claim, but the society is not required to list all of its members as claimants for purposes of filing claims for the section 111 cable compulsory license or the section 119 satellite compulsory license. See 37 C.F.R. §§ 252.3(b)(2), 257.3(b)(2). If a decision were made to require a separate filing fee for each joint claimant, some special provision should be made to exempt performing rights societies or to modify that requirement as applied to them.

If the purpose of the fee is to deter small claimants from insisting on full distribution proceedings, perhaps for motives having little to do with ascertaining the appropriate distribution, when the amount in controversy is insignificant, the \$150 filing fee seems reasonably calculated to meet this objective. However, there may be better means of addressing this issue, such as permitting streamlined procedures for small claims.

**An ongoing point of contention among parties interested in CARP reform, concerns the current standard to be used in determining rates for Sections 112 and 114. First, is there a historical reason why the standard for these**

**licenses differs from the others? Second, do you think that, in the spirit of uniformity, there should be one standard?**

Over the years, Congress has created a number of statutory licenses, with various standards for determining statutory royalty rates. I believe that, in principle, the same standard should apply to the determination of royalty rates for all the statutory licenses.

The Copyright Act of 1976 included four compulsory licenses. For three of those four licenses, the statute itself set the rates, subject to adjustment. For example, Section 111 provides for a cable compulsory license and sets royalty rates based upon a proposal that was negotiated by the cable and motion picture industries, the two industries most affected by the new license. H.R. Rep. No. 94-1476, at 90 (1976). Adjustments to these rates are done in accordance with specific standards set forth in the statute, which were for the most part the product of an agreement between cable and copyright owners. *Id.* at 173. Those standards, found at 17 U.S.C. § 801(b)(2), provide for adjustment of rates “to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber.”

As originally enacted, section 115, the mechanical license for making and distributing phonorecords of musical works (expanded in 1995 to include digital phonorecord deliveries), provided for a fixed rate of 2¾ cents per musical work (or ½ cent per minute for longer recordings). Section 801(b) provided for rate adjustments by the Copyright Royalty Tribunal (CRT) based on four factors:

- (A) To maximize the availability of creative works to the public;
- (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Section 116, the jukebox compulsory license, provided for a royalty of \$8 per year, subject to adjustment by the CRT based on the same standards set forth in section 801(b).

However, with respect to Section 118, the compulsory license regarding the use of certain copyrighted works by noncommercial broadcasters, Congress took a slightly different approach, instructing the Copyright Royalty Tribunal to set “reasonable terms and rates of royalty payments.” 17 U.S.C. § 118(b) (1978). The legislative history indicated that the CRT should set “reasonable rates” that would “assure a fair return to copyright owners without unfairly burdening public broadcasters.” H.R. Rep. No. 94-1476, at 118. In doing so, the rate setting body is expected “to consider both the general public interest in encouraging the growth and development of public broadcasting, and the ‘promotion of science and the useful arts’ through the encouragement of musical and artistic creation.” *Id.*

Congress formulated yet another standard for setting rates applicable to the emerging satellite industry in 1988 with the passage of the “Satellite Home Viewer Act of 1988.” In this case, Congress instructed the arbitration panel responsible for setting the rates to consider three factors in addition to the four objectives used to determine rates for the licenses in sections 115 and 116. These three factors were the rates cable systems paid for the right to retransmit broadcast signals under the section 111 license, fees established under voluntary licenses filed with the Copyright Office, and the last fee proposed by the parties. In 1992, these criteria were used to readjust the initial rates set by Congress for use of the section 119 license, but in the case of both the superstation and the network rates, the panel apparently tied the rate to the average cable cost without due consideration of the other factors. See H.R. Rep. No. 103-703, at 7 (1994). When Congress considered the reauthorization of the Satellite Home Viewer Act in 1994, it changed the standard for setting the satellite rates, indicating that the rate was to be set based on fair market value. Moreover, it made clear that cable rates would be merely one of the considerations for setting the rates and not the benchmark for setting the rates for retransmissions by satellite carriers. While fair market value is still technically the standard (see 17 U.S.C. § 119(c)(3)(B)), the Satellite Home Viewer Improvement Act of 1999 reduced the rates by 30% to 45% following the one rate adjustment proceeding under the fair market value standard.

In 1995, Congress again adopted the criteria set forth in section 801(b)(1) of the Copyright Act as the basis for establishing rates for the newly created statutory digital performance license, 17 U.S.C. § 114(d), and the new statutory license for making digital phonorecord deliveries, 17 U.S.C. § 115. The legislative history, however, does not shed much light on Congress' rationale for adopting this standard for these licenses. Subsequently, Congress amended the section 114 license in 1998 to include eligible nonsubscription transmissions and established a different standard for setting the rates for those transmissions, namely, "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." 17 U.S.C. § 114(f)(92)(B). Again, the legislative history does not give any reasons for adopting the new standard and only states what the standard is and the factors that the panel should consider in making its determinations. See H.R. Rep. No. 105796, at 86 (1998) and the Section-by-Section Analysis of the H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, Committee Print, Serial No. 6, 105th Cong., 2d Sess., at 58-59 (1998).

Although, as indicated, Congress has established a variety of standards for setting and adjusting royalty rates for the various statutory licenses, it is difficult to glean any rationale for the differences in the standards, with the possible exception of the "reasonable rates and terms" standard of section 118, which may reflect a solicitude for public broadcasting, which has more limited resources, serves a public interest and "does warrant special treatment in certain areas." H.R. Rep. No.94-1476, at 117 (1976).

Whether rate setting for all the statutory licenses should be subject to the same standard is a question that probably would require considerable study, and I am not in a position to express a view on that question today. I will note that in 1997, in my Report to Congress entitled "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals," I recommended that the rates for the section 111 cable compulsory license and the section 119 satellite compulsory license be comparable, and that the section 111 rates, like the section 119 rates, be based on fair market value. However, I am not prepared to say at this time that I would recommend that all the other statutory licenses that are not currently based on fair market value be changed to a fair market value standard.

I believe that the debate over the standard for the section 112 and 114 statutory licenses is concerned primarily with the disparity between the rates *within* section 114. Currently, the rates for the section 114 statutory licenses for preexisting subscription services and preexisting satellite services are based on the four factors set forth in section 801(b)(1), 17 U.S.C. § 801(b)(1) (referring to "rates applicable under sections 114(f)(1)(B), 115, and 116"). In contrast, the rates for the section 114 statutory licenses for eligible nonsubscription transmissions (*i.e.*, webcasting) and new subscription services are to be the "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." 17 U.S.C. § 114(f)(2)(B). I see no reason why these rates for very similar kinds of activity should be based on different standards, and I would favor amendment of section 114 to provide that the same standard (whether it be the section 801(b)(1) standard or the fair market value standard) applies to all of the statutory licenses contained within section 114. Similarly, the standard for the section 112(e) statutory license, which is applicable to transmitting organizations entitled to transmit performances of sound recordings to the public under any of the section 114(f) statutory licenses, should be the same as the standard applicable to those statutory licenses.

With that, let me thank all Members for their presence today. We actually had eight Members here at one time or another, another good turn-out, and we stand adjourned.

[Whereupon, at 3:04 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

#### PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Last June, this panel appeared before us to voice its concerns with the current CARP system. People on both sides of the equation, that is the buyers and the owners, are in complete agreement that the current CARP system is very problematic and that a change in the process is in order. Based on that hearing, Chairman Smith, Ranking Member Berman, and I have introduced legislation would make substantial changes to the current system.

We heard the current system, the CARP, is too costly because the copyright owners and users have to pay for the arbitrators. Our bill, H.R. 1417, creates a Copyright Royalty Judge who would be paid by the government to carry out designated functions related to setting royalty rates and distributing royalty fees to copyright owners. This provision should significantly lower the costs to those who require these services.

Another complaint was that the CARP system does not have adequate rules on how to address hearsay evidence at hearings. This bill explicitly requires that the Judge treat hearsay evidence in the same manner that it is treated in federal court.

This bill also alters the terms for which certain royalty rates are in effect. Rates that are determined by the Copyright Royalty Judge will be in effect for five years. This should create some predictability and uniformity for those who rely on the Judge's determinations.

Finally, parties on both sides of the debate argued that the substantive standards that the CARP uses to set royalty rates should be changed somehow. In an effort to reach a compromise and pass a bill that does not alter any substantive rights, this bill changes only the procedure for rate settings and distributions. It does not alter the standards by which those rates are set or the funds are distributed.

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#### PREPARED STATEMENT OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION

On April 2, 2003, the Subcommittee held a hearing on H.R. 1417, the Copyright Royalty and Distribution Act of 2003 introduced by Subcommittee Chairman Smith with Mr. Berman and Mr. Conyers—the ranking Democrats on the Subcommittee and the full Judiciary Committee, respectively. The National Music Publishers' Association (NMPA) welcomes the opportunity to submit written comments in support of the Copyright Royalty and Distribution Act of 2003.

NMPA works to protect and advance the interests of the music publishing industry. With more than 800 members, NMPA represents the leading companies in the industry, from those affiliated with large media companies to the industry's largest and most influential independent music publishers. The Harry Fox Agency, NMPA's licensing affiliate, provides an information source, clearinghouse, and monitoring service for licensing music copyrights and acts as licensing agent for more than 27,000 music publisher-principals, who in turn represent the interests of more than 160,000 songwriters.

As indicated in NMPA's written comments (June 20, 2002) for the hearing record on "The Copyright Arbitration Royalty Panel (CARP) Structure and Process," NMPA supports legislative reforms that promote stability and predictability of results, encourage settlement of small claims, and reduce costs. In order to meet these objectives, NMPA believes CARPs should be replaced entirely with an adjudicative body that is comprised of dedicated professional decision makers, preferably administrative law judges, who have experience in evaluating legal significance, applying

precedent, and can provide institutional expertise. The Copyright Royalty and Distribution Act of 2003 is a significant step in the right direction.

H.R. 1417 replaces CARPs with a full-time Copyright Royalty Judge appointed for a five-year term by the Librarian of Congress and assisted by two full-time professional staff members. As indicated above, NMPA supports this type of change. Establishment of a full-time dedicated Copyright Royalty Judge will instill efficiency, consistency, and credibility to copyright royalty rate setting and distribution proceedings. Copyright law is often unique, complex, and arcane—it requires familiarity with antitrust law, statutory licenses, economics, evolving distribution channels, and ever changing technology. As such, the ability to evaluate conflicting evidence, to establish and/or apply precedent, and to ensure institutional expertise is imperative—factors that are not adequately addressed by the current CARP procedures, which lead to unpredictable and costly results. In addition to providing stability to proceedings, the five-year term set forth in the bill for the Copyright Royalty Judge will establish familiarity of legal findings among the participants, which could encourage parties to reach settlements instead of employing lengthy and unnecessary litigation strategies.

NMPA also supports the bill's efforts to reduce costs for participants, which in some cases has limited the ability of interested parties to participate. H.R. 1417 provides that the salaries of the Copyright Royalty Judge and his staff are to be paid for from appropriated funds, eliminating enormous hourly fees to arbitrators currently paid by CARP participants. Appropriated salaries coupled with administrative efficiencies of a dedicated entity will significantly reduce costs of all proceedings.

Nevertheless, NMPA believes that it would be constructive to consider expanding the number of full-time Copyright Royalty Judges to more than one Judge. Even if financial limitations require one Judge per proceeding, we are confident that current and future work will justify at least two Judges. Congress has recently created new compulsory licenses and expanded the scope of current licenses. When these licenses are combined with rapidly emerging technologies and the various statutory or regulatory deadlines in each proceeding, we believe there will be enough work to keep at least two Judges busy. At least two Judges are also necessary in the event that a conflict of interest should arise with any one Copyright Royalty Judge. The bill sets forth reasonable qualifications to eliminate financial conflicts of interest by the Copyright Royalty Judge. This goal is laudable, but could have the unintended consequence of limiting the pool of qualified candidates. Given the companies that own copyrights in the United States, it would not be unusual for the judge to be called upon to rule in a proceeding involving a party to which the judge has a disqualifying interest or conflict. Appointment of more than one judge will ensure that any conflicted proceedings could be moved to another judge, as is customary in our state and federal court systems.

NMPA also has concerns that new section 804(b)(2) of the bill could statutorily change the proceeding schedule for setting digital phonorecord delivery ("DPD") rates, postponing the current rate setting schedule until 2007. Currently, the interested parties have agreed that DPD rates are to be adjusted every two years, as allowed by section 115(c)(3)(F). NMPA believes it is unnecessary to change the current DPD rate-setting regime at this time and that doing so only disrupts commercial expectations. We request that the Subcommittee correct these provisions.

Finally, NMPA is not certain that the "small claims" provisions in new section 803(b)(2) will have their intended effect. It is important to minimize the time and expense of adjudicating small claims against royalty pools from which distributions must be made. We suggest clarifying that a "written pleadings only" mechanism may be requested by any interested party in response to a claim of \$500 or less.

NMPA appreciates the opportunity to submit written comments and looks forward to working with the Subcommittee and the full Committee, as well as other interested parties, as H.R. 1417 moves through the legislative process.

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PREPARED STATEMENT OF THOMAS F. LEE

On behalf of over 110,000 members of the American Federation of Musicians of the United States and Canada, I would like to thank the Chairman and distinguished members of this Subcommittee for tackling the problem of CARP reform. Recording artists—including well-known royalty artists and less well-known background artists—are, by statute, entitled to 50% of the net proceeds of Section 114 digital performance license fees. As a result, the AFM's professional recording musician members, both "featured" and "non-featured," have important interests in the Copyright Arbitration Royalty Panel process. In order to represent their interests,

the AFM participated in the recent webcaster CARP proceeding that garnered so much public attention and resulted in such little public or party satisfaction. My comments on the Copyright Royalty and Distribution Act of 2003 reflect the interests of recording artists and the AFM's experience of the CARP process.

The Copyright Royalty and Distribution Act of 2003 contains a number of extremely important positive changes. We believe that it would benefit from a few modifications, not to its fundamental structure but to details of its functioning. Again, I thank the Subcommittee for the thoughtfulness and hard work that is represented by this draft legislation. This Statement consists of initial comments regarding this complex initiative. It does not pretend to contain a comprehensive analysis of the bill.

#### A. COST ISSUES: FUNDS FOR THE PROCESS AND LIMITS ON THE PROCESS

As the AFM indicated at the Subcommittee and Copyright Office Roundtable on CARP reform held on July 29, 2002, the reduction and control of the costs of participation in ratesetting proceedings is a critical goal of any reform. Only the reduction and control of the costs of participation will protect the access of small parties and artists to the proceedings that affect their businesses and livelihoods.

##### 1. Publicly Funded Process—the Decision-maker

Like the Register of Copyrights, we understand H.R. 1417 to require that the decision-maker in CARP proceedings—the Copyright Royalty Judge—as well as two professional staff members be paid out of appropriated funds. We agree with the Register and others that this is a critical and positive change from the current system, which requires the participating parties to pay large per-hour arbitrator fees for ad hoc panels of three private arbitrators.<sup>1</sup> The obligation to pay substantial arbitrators' fees imposes a significant barrier on the participation of small and/or non-profit entities who nonetheless have legitimate interests in the proceedings and whose dissatisfaction may severely undermine the credibility of CARP decisions. Thus, the change to a publicly-funded process is of the first importance.

##### 2. Publicly Funded Process—Other Costs

For the same reason that we applaud the change to a system in which the decision-maker is paid with appropriated funds, we have concerns about the way in which Section 803(e) handles other costs of rate-setting proceedings. We echo the Register's view that the costs of proceedings should be paid for out of appropriated funds. If the costs contemplated in the statute are more than minimal, they may act as a harmful barrier to participation in rate-setting proceedings on the part of small or non-profit entities that have important interests in the proceeding but do not have funds that they can put at risk to pay extensive costs they cannot control.

In this regard, we find particularly problematic the provision in Section 803(e)(1)(A) that requires costs in excess of the filing fees to be deducted from 1 percent of the royalty fees collected under the relevant license before the royalty fees are distributed to beneficiaries of the license. In rate-setting proceedings, at least, we believe that this provision creates a fundamental unfairness. If the decision-maker's costs in such proceedings must be paid by private parties rather than out of appropriated funds, then those costs should be shared relatively evenly by users of the statutory license, on the one hand, and beneficiaries of the statutory license, on the other hand. However, Section 803(e)(1)(A) does something quite different. The portion of the costs that is deducted from royalties would be paid wholly by the beneficiaries of the license, so that they bear a disproportionate share of the costs of the proceeding. For example, in a rate-setting proceeding under Section 114, the costs deducted from license revenues would be paid totally by performers and copyright owners. There is no basis for imposing that portion of the costs completely upon performers and copyright owners, and sparing licensees from sharing any part of them.

Finally, the provision in Section 803(e)(1)(B) that requires any remaining costs to be borne by the parties in rate-setting proceedings "in equal proportions" also will tend to work an injustice and discourage participation by small and non-profit parties, particularly to the extent that such costs become substantial. Assuming that the decision-maker's costs are not paid from appropriated funds, and assuming further that those costs are split relatively evenly between users and beneficiaries of

<sup>1</sup>We also agree with the Register that moving the decision-making function from ad-hoc private panels to a permanent Copyright Royalty Judge will improve the stability of the process as well as the credibility and predictability of its results. Like some other commenters, however, we wonder whether one judge is sufficient or whether, instead, decisions should be reached by panels of three judges.

a license, the further breakdown of cost distribution on each side should be proportional to each party's participation in the proceeding rather than on an equal or per capita basis. A small party may desire to participate by introducing very limited evidence on an issue of deep concern to it—and that party's participation may be extremely valuable to the proceeding (and to the public's perception of fairness in the proceeding). But if that party is at risk for paying a per capita share of costs that are run up by large parties with a propensity to keep expanding the litigation, it will be deterred from participating at all.

### 3. *Keeping the Process Limited to Keep the Costs Limited*

The kinds of expenses that appropriately can be borne by public funds—the salaries and costs of the decision-maker and staff—are only a part of what has made recent rate-setting CARPs so expensive. Each party's own attorneys' fees and costs also can be extremely significant. That certainly was the case in the recent webcasting CARP. Were pre-trial and discovery procedures to expand and become more like those in the federal district court litigation model, that would exponentially increase the parties' litigation costs, with the inevitable consequence that small parties and artists will be deterred from participating. We do not believe that full-scale, federal district court discovery rules will enhance the credibility or soundness of the decisions in rate-setting proceedings. Indeed, no decision ultimately will have much credibility with individuals, small licensees, small licensors or the general public if small but significant stakeholders cannot afford to participate. Although H.R. 1417 is not clear about which precise changes to discovery will be imposed by new rules to be established, we are very concerned that the impetus would be to move in the direction of greater complexity—and greater cost. We think that would be destructive.

Of course, settlements also reduce costs. A formal settlement period with supervised settlement conferences prior to submission of direct cases may be helpful, and procedures should be adopted to facilitate settlements even after direct cases are submitted. However, we question whether the Rule 68 offer of judgement mechanism contained in H.R. 1417 is appropriate for rate-setting proceedings with multiple parties on each side.

#### B. CONTINUING JURISDICTION TO ADDRESS UNANTICIPATED PROBLEMS

We echo the comments of the Register that the law should be clarified to firmly establish that the Copyright Royalty Judge has the power to correct errors in the determination of rates and terms, or to address unanticipated problems that arise, during the terms of the license periods covered by his or her decisions. Particularly with regard to licenses under Section 114, technology is changing, business models are evolving, and the distribution mechanisms covered by the license terms are new. The Copyright Royalty Judge should have continuing jurisdiction so that affected parties can seek resolutions to unanticipated problems in a timely fashion.

#### C. INTERIM PAYMENTS

We also agree with the Register that H.R. 1417 should include a clarification that establishes that licensees must continue to make license payments during a new license period even if the determination of the new rate for that period still is pending. It makes no sense, and Congress cannot have intended, that licensees cease payments at the beginning of a new license period—particularly in light of the fact that Section 802(g) plainly provides that any newly adjusted rate is retroactive to the beginning of the license period.

Moreover, it works a great hardship on beneficiaries of the license for payments to be suspended. In the case of licenses under Section 114, recording musicians and vocalists are entitled to 50% of the license revenue. Most of these artists have modest incomes and depend on combining many different income streams in order to make a living. They should not have to wait unduly for the license payments to which they are entitled under the statute. Nor should their collective, SoundExchange, be hampered in its ability to operate efficiently for their benefit—a disruption which is inevitable if licensees cease making license payments during interim periods while new rate determinations are pending.

#### CONCLUSION

Having a fair, expeditious and reasonably-priced mechanism for establishing license rates and distributing royalty fees is very important to recording musicians.

Again, I thank the Chairman and the Subcommittee for moving forward in this complicated area. The AFM will be happy to continue to participate in the process.

PREPARED STATEMENT OF THE AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS AND BROADCAST MUSIC, INC.

The United States performing right organizations (“PROs”)—the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”)—submit this statement for inclusion in the record of the April 1, 2003 hearing concerning H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003.

We commend the Subcommittee’s interest in, and willingness to address, the virtually universal concern for the current process by which compulsory license rates are set and royalties are distributed. We previously set out our view of the major principles of reform in a letter to the former Chairman of this Subcommittee (the Honorable Howard Coble) dated June 20, 2002.

We are pleased that the time and effort spent on the analysis of the issues that were brought to the attention of the Subcommittee culminated in H.R. 1417, which is an excellent step towards solving the major problems inherent in the current Copyright Arbitration Royalty Panel (“CARP”) process.<sup>1</sup> The bill contains a strong framework for a sound copyright royalty rate and distribution process, one that fosters predictable and consistent decisionmaking in an efficient cost-effective manner. We hope that these comments will assist the Subcommittee in furthering the objectives of the bill and welcome the opportunity to participate in this most important process.

I. INTEREST OF THE PROS.

The PROs together represent hundreds of thousands of American songwriters, composers, lyricists and music publishers, who create and own the copyrights to millions of musical works. On their behalf, we license the non-dramatic public performances of their musical works and distribute the license fees paid by users for such performances, in the form of royalties. In addition, through affiliation agreements with PROs in other countries, we license the works of hundreds of thousands of foreign writers and publishers. Accordingly, we strive to ensure that the writers and publishers we represent are fairly compensated for the use of their works.

A portion of the royalties which writers and publishers receive comes from the Copyright Act’s compulsory licenses. These royalties include fees collected pursuant to the Section 111 cable retransmission license, the Section 119 satellite retransmission license, the Section 118 noncommercial broadcasting license and the Chapter 10 Digital Audio Recording Technology (“DART”) royalty.

The PROs have had considerable experience with the compulsory license system. From the very beginnings of the 1976 Copyright Act’s compulsory license rate adjustment and distribution mechanisms, we prepared and presented cases before the Copyright Royalty Tribunal (“CRT”). We similarly prepared and presented numerous cases before CARPs when they succeeded the CRT as the law’s rate adjustment and royalty distribution mechanism. We have participated in and contributed to the legislative processes that created both the CRT in 1976 and the CARP system in 1993. And, we have been key participants in CARP reform proposals in the late 1990s which ultimately led to the Subcommittee’s introduction in 1998 of H.R. 3210. We hope that our comments will assist the Subcommittee in formulating an effective legislative response.<sup>2</sup>

II. COMMENTS ON H.R. 1417.

In our letter of June 20, 2002 to the Subcommittee, we set out our major concerns and suggestions for remedying the present CARP system. H.R. 1417 makes great strides to address effectively each of these concerns. However, we believe that certain of the bill’s provisions require refinement, as follows.

A. *Copyright Royalty Judges.*

The major deficiency of the current CARP process is its ad hoc nature. A permanent adjudicative body is essential for predictable and consistent decisionmaking.

<sup>1</sup> See Hearing on Copyright Arbitration Royalty Panel (CARP) Structure and Process Before the House Committee on the Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, 107th Cong., 2d Sess. 154 (2002).

<sup>2</sup> We adopt the testimony of Michael J. Remington, a witness at the April 1st hearing.

H.R. 1417 seeks to resolve this deficiency through the creation of a single full-time Copyright Royalty Judge (“CRJ”) appointed by the Librarian of Congress, upon the recommendation of the Register of Copyrights, for a five-year term. Under H.R. 1417, the CRJ would be an attorney with ten-plus years of administrative or litigation experience and copyright law knowledge, and would have two full-time staff members, each of whom would have expertise in copyright law and economics.

We agree that a full-time permanent decisionmaking body, with a professional staff, would provide the consistency, predictability and efficiency that the CARP lacks. Thus, we support the basic concept of the CRJ. However, we believe that a single CRJ could not achieve the intended benefits. Instead, we believe a panel of three CRJs is necessary, for several reasons.

First, a single CRJ limits the benefits of continuity. Should the CRJ for some reason need to step down, either at the end of his or her term or prematurely, the years of knowledge and expertise that the CRJ built would be lost. We would be required to start anew with the next CRJ.

This shortcoming may be cured in two ways. We believe that a longer term of seven years would achieve the maximum benefit, particularly when license periods cover at least five years and have terms staggered. More importantly, a three-judge panel, with staggered terms (initially to last three, five and seven years from the appointment of the first CRJs) would ensure continuity in decisionmaking. There would always be one judge, and usually two judges, who would retain the developed expertise and institutional memory necessary for continuity and consistency in decisionmaking for each of the rate setting and distribution proceedings.

Second, a panel of three judges obviates issues of conflict. If one CRJ has a conflict, the other two can still serve. With a single CRJ, a conflict could derail the proceeding completely. The inefficient use of interim judges would then be necessary.

Third, a panel ensures that proceedings continue uninterrupted. With recent legislation, the number of compulsory licenses has increased. A panel of three CRJs would ensure that multiple proceedings continue without delays. Indeed, with the inclusion of small-claim written proceeding procedures, multiple CRJs would permit increased efficiency. For example, a panel of three could hear a large ratemaking proceeding and simultaneously individual CRJs could decide written small-claim proceedings.

Finally, and most importantly, the checks and balances of panels with multiple decisionmakers would lessen the possibility of biased decisions, particularly where the CRJs serve in staggered terms. There is a precedent for such a multi-judge panel in the CRT staggered panel system, which existed when that body functioned and worked well.

With a larger number of CRJs, a marginally larger support staff might be necessary. However, we do not think that the entire support staff need be copyright and economic experts. We suggest that the panel rely on one general counsel, preferably one with copyright or administrative expertise, and one or two administrative assistants. Such a staff would provide the necessary legal and administrative assistance, at a very modest cost.

#### *B. Costs.*

We support the suggestion that the salaries of the CRJs and staff would be paid through appropriated funds rather than copyright royalties. This was the case in the early days of the CRT. But H.R. 1417 would require other proceeding costs to be paid first from filing fees and then from royalties (to a limit of 1%). This is unfair in rate proceedings, as there would be no cost to users.

H.R. 1417 further would have any remaining costs in distribution proceedings paid by the parties in equal proportions. This, too, is unfair, as, for example, a party which occupied 75% of the hearing time and received 75% of the royalties would pay the same amount as a party which occupied 5% of the hearing time and received 5% of the royalties.

To cure these problems, we suggest the following.

*All costs of the proceedings should be paid with appropriated funds, not from royalty funds and not by the parties. None of the parties—neither copyright owner claimants nor users—would have to pay such costs in a free market without compulsory licenses. Congress has concluded that there is a public good achieved by compulsory licenses. That being the case, the public should cover the costs of that public good.*

If the parties are to bear the costs of such proceedings, those costs should be borne equally by the sides in rate proceedings, and in proportion to allocation of royalties in distribution proceedings. But, importantly, the CRJs should be given discretion to allocate costs as the interests of justice dictate (so that, for example, a

small claimant who forces a litigated proceeding and receives a pittance does not escape cost-free).

Finally, we would clarify that joint claimants, such as ASCAP and BMI which each file a single claim on behalf of all their respective members and affiliates, file only one fee. Moreover, in distribution proceedings, one fee would cover both phases to the proceeding.

### C. Procedures.

1. *Decisionmaking.* The current system by which decisions are first made by a CARP, then either approved or rejected by the Librarian of Congress, and finally subject to judicial review, is inefficient. The reports of inexperienced CARPs are often rejected by the Librarian, at times forcing renewed arbitration at greater cost. We support H.R. 1417's grant of independence to the CRJs, eliminating the Librarian's review. For maximum efficiency, the CRJs should have sole and final decision-making power, subject only to appellate judicial review.

We also support the bill's limitation on interaction with the Copyright Office for consultations. However, H.R. 1417 should clearly limit such consultations to issues of law. Issues of fact should be within the sole jurisdiction of the CRJ. Furthermore, legal issues ripe for consultation should be further limited to those interpreting the statutory terms of the license—other legal issues should be within the jurisdiction of the CRJ. Finally, we do not support any type of formal certification procedure as it would inefficiently increase costs. We do believe, however, that all consultations with the Register should be on the record.

2. *Regulations.* We support H.R. 1417's requirement in Section 803 that the CRJ conduct proceedings in accordance with subchapter II of chapter 5 of title 5 (the "Administrative Procedures Act" or "APA"). Regulations governing proceedings should be promulgated by the Register of Copyrights pursuant to administrative rulemaking proceedings as set forth in Section 803(b)(3). Thus, authorizations such as that found in Section 803(a) whereby persons participating in proceedings "may submit relevant information and proposals to the Copyright Royalty Judge" must specifically be permissible only pursuant to the regulations promulgated for such proceedings. H.R. 1417 should clarify this requirement.

Section 803(b)(3)(C) directs the Register to promulgate certain important procedural rules. We offer the following comments on those specific requirements.

*Evidence.* The bill requires that the Federal Rules of Evidence with respect to hearsay shall apply. We disagree with this proposal. The APA is permissive with regards to evidence. Any evidence may be admitted unless it is irrelevant, immaterial or unduly repetitious. The hallmark of administrative hearings is the ability to find facts unimpeded by the stringent Federal Rules of Evidence. This practice should not change. Highly regulated evidentiary hearings will strangle and prolong what should be inexpensive, efficient proceedings. We believe that H.R. 1417 should specifically state that the APA standard should apply—evidence should be admissible unless it is irrelevant, immaterial or unduly repetitious. The CRJs will be able to accord all evidence appropriate weight, and to discount evidence that they judge unhelpful. Again, this was the standard used by the CRT, and it worked well.

Finally, we believe that the CRJ should not possess a broad subpoena right. The effect of such a subpoena power would be to increase the length and expense of a proceeding. We fear that parties would unfairly take advantage of the CRJ's ability to subpoena witnesses and evidence by frequently moving the CRJ to exercise such a right and by requesting information from non-litigating parties.

*Discovery.* Currently, discovery is quite limited, in time and scope. We support the bill's extension of the time limit for discovery to sixty days, although the Bill should clarify that discovery is limited to *not more than* sixty days. However, we do not support any expansion of the scope of discovery beyond what the current rules permit. Added discovery procedures, such as the use of depositions and interrogatories, would not only greatly increase the expense of proceedings, but would offer little in the way of fact-finding benefits in light of a party's ability to cross-examine witnesses at evidentiary hearings. Reducing costs to the parties should be a key goal of H.R. 1417. Expanding discovery will only raise those costs, with no concomitant benefit.

Further, the scope of discovery should be limited to the current practice of discovering documents underlying witnesses' written statements. Thus, the provision in Section 803(b)(3)(C)(ii) that witness lists not be required until the end of discovery is inappropriate. Permitted discovery could only be conducted of witnesses who were already named and who provided written testimony. We suggest that the current procedure is proper: parties submit their written direct or rebuttal cases (which, by definition, include witness lists), and limited discovery relevant to those cases follows.

*Offers of Judgment.* We strongly support the bill's adoption of a required offer of judgment rule as permitted by Rule 68 of the Federal Rules of Civil Procedure particularly for small claims. The purpose of this procedure is to encourage settlement. Should the non-offering party accept the offer of judgment, the claim is settled. However, if the non-offering party fails to accept the offer, that party should suffer the costs (including attorneys' fees) associated with what would be an unnecessary proceeding should that party fail to recover more in the decision on the merits than was offered. In developing an offer of judgment procedure, the Register should consider whether attorneys fees should be part of the offer process and whether conforming amendments to the Copyright Act would be necessary. This procedure creates an incentive for a party to accept an offer of judgment and settle the claim, for if the party does not it will bear the other parties' costs.

H.R. 1417 attempts to set out this rule in Section 803(b)(3)(C)(iii). But we do not believe that the bill, as drafted, quite meets the objective. As drafted, the bill merely suggests a method for accepting an offer. It does not provide remedy for a failure to accept an offer when the offer meets or exceeds the award. We suggest a reworking of H.R. 1417 to follow the procedure of Rule 68 of the Federal Rules of Civil Procedure. And, in that regard, the offering party need not offer an amount that is at least as much as the claimed amount. Otherwise, parties (particularly small claimants) would inflate their claims to force an unreasonable offer of judgment. The offering party should be able to choose the offer without regard to the actual claim. Finally, the procedure should be limited to distribution proceedings.

#### *D. Small Claims.*

Under the current CARP system, a party in a distribution proceeding need only state a dollar or percentage amount in its direct case to compel a proceeding. Because the law requires that CARP costs be allocated in a distribution proceeding in proportion to the actual funds awarded to each party, a claimant with a small claim—who typically appears pro se and so does not even incur attorneys' fees—has no incentive to settle. The cost of the case has to be borne by the larger parties who are forced to a full arbitration by a claimant with an insignificant claim. Abuses of the process by small claimants have occurred with alarming frequency. For example, in the recent 1995–1998 DART proceeding, two individual claimants refused to settle and litigated before a CARP (such claimants had previously litigated the 1992–1994 DART proceeding over the same exact issues). The other parties to the proceeding, including ASCAP and BMI, offered the individual claimants the *full* amount of their claims in settlement. The individual claimants refused, even though they were offered the *full* amount of their written claim. Of course, these litigants knew that, because their claim was negligible in amount—*less than .01% of the total fund at issue*—they would not be footing the bill for the litigation. The other parties were forced to pay tens of thousand of dollars in costs and fees (including Copyright Office costs deducted from the royalty pool) for a final award to the individual claimants totaling *six dollars* for four cumulative royalty funds! And, with the Copyright Office moving to an on-line claim filing system (currently used with DART filings), the occurrence of small claims will surely increase.

We previously proposed a number of changes in this regard that would encourage settlement and promote efficiency for all parties, including the establishment of a filing fee, requirement of settlement conferences and paper proceedings. H.R. 1417 attempts to lessen the small claimant problem by (1) the establishment of a \$150 filing fee and (2) permitting the small claimant to elect an alternative written case procedure. A small claimant (defined as one with a claim under \$500) can avoid the \$150 filing fee by agreeing to decide the controversy on the basis of written filings. We applaud the Subcommittee's efforts at resolving the small claimant problem. However, H.R. 1417 may unintentionally make matters worse.

First, we believe that H.R. 1417 sets the small claim threshold too low. We support an increase to the small claim threshold from \$500 to \$5,000. In our experience, most claims of substance fall above the \$5,000 threshold.

Second, H.R. 1417 permits the small claimant to make the decision of whether to pay the fee or have a written proceeding. In our experience, the small claimant will rarely, if ever, elect to have its case determined on written pleadings, even if a \$150 filing fee is involved. Sometimes the small claimant is motivated to file a claim to harass larger claimants for matters not associated with the arbitration. Accordingly, the election to have a written proceeding where claims are below a set threshold should be either automatic or made possible by any interested claimant.

Next, the small claims procedure should rightly be available only in distribution proceedings—it is, after all, a procedure for *claims* to royalties, not the setting of royalty rates.

Finally, should the Subcommittee decide to keep the threshold at \$500, we suggest that some consideration be given to modifying the filing fee. Because, as we suggest, H.R. 1417 should allocate costs to the parties in distribution proceedings pursuant to their shares, the small claimant could force a full-blown proceeding by expending merely \$150. The claimant need only claim an amount just over \$500 and for \$150, could force an expensive evidentiary hearing, the costs of which will be borne by the other parties. For example, the arbitrators' costs in the 1992–1994 DART proceeding which awarded a total of just over \$10 to two individual claimants were more than \$12,000. Similarly, in the 1995–1998 DART proceeding, the costs for the arbitrators exceeded \$20,000 for a total award to the same two individual claimants in the amount of \$6.06. These costs did not include Copyright Office expenses, which are deducted from the fund, and attorneys fees expended by the other claimants which can reach or exceed \$100,000, particularly when the individual claimant appeals the determination to the U.S. Court of Appeals, which has occurred in a number of past proceedings. Instead, we suggest that the Subcommittee consider, among the several options we have suggested above, increasing the filing fee to \$500 in all cases, with claims under that amount subject to election of paper proceedings. We also suggest that the Register, in exercising rulemaking authority, consider the possibility of sanctions being imposed for frivolous, or inflated, distribution claims. These measures would discourage parties from inflating their claims above \$500 to avoid written proceedings.

Finally, settlement conferences should be required for all proceedings.

#### *E. Review.*

We fully support the bill's requirement that appeals of the CRJs' decisions be made directly to the U.S. Court of Appeals for the District of Columbia. We, however, have an issue with regard to the standard of review. H.R. 1417 tracks current language in the Copyright Act. However, the current "arbitrary manner" standard applies to a two-level review setting. Currently, the Librarian reviews the CARP report and must adopt the determination unless it is "arbitrary or contrary [to law]." The U.S. Court of Appeals for the District of Columbia Circuit then reviews the Librarian's decision only if it finds that the Librarian acted in an "arbitrary manner." The confusion of this double-arbitrary standard was discussed by the D.C. Circuit in *NAB v. Librarian of Congress*, 146 F. 3d 907 (D.C. Cir. 1998). There, the court found that while the Librarian's standard of review tracks that of the Administrative Procedures Act, 5 U.S.C. 706(2)(A), the court's standard of review was much more circumscribed. Accordingly, because H.R. 1417 drops the Librarian's review, it appropriately changes the standard of review given the U.S. Court of Appeals to the standard that the Librarian currently maintains—the "arbitrary and capricious" standard of the APA. Indeed, this was the standard of review given the Court of Appeals when it was the only level of review of CRT decisions prior to 1993.

We support the "arbitrary and capricious" standard over less deferential standards such as that found in appeals to Federal courts of appeal under the Federal Rules of Civil Procedure. First, the conferred decision of a three-judge panel, which we support, would lend to more sound decisions that should be given increased deference over decisions made by a single judge. Second, higher deference is appropriate when the CRJ can consult with the Copyright Office, the expert agency, on certain issues, as discussed above.

### III. CRITERION FOR RATEMAKING.

At the very conclusion of the April 1, 2003 hearing, Congressman Boucher suggested that scope of H.R. 1417 should be expanded to deal not only with the process and procedure of compulsory license ratemaking, but the substance of it as well. He suggested that the criterion to be applied in ratemaking proceedings be one of "fairness." It was unclear whether he was speaking of all ratemaking proceedings or only those under sections 112 and 114 for webcasters. He particularly objected to the "willing buyer/willing seller" criterion of the current law in those sections.

With all due respect, we believe this suggestion is both a bad idea on the merits and a sure way to derail any CARP reform. Congress very carefully considered the criteria it adopted in each of the compulsory licenses and, as pointed out by the Ranking Minority Member, Howard Berman, at the hearing, those criteria vary among the different compulsory licenses. As both the Chairman and Ranking Member noted, if H.R. 1417 is not limited to process and procedure, the result will be an interesting discussion, but no legislation.

IV. CONCLUSION.

Mr. Chairman, we applaud you and the sponsors of H.R. 1417, the Subcommittee, and its staff, for the excellent first effort at CARP Reform. With further improvements along the lines we suggest, this is legislation we can enthusiastically support.

LETTERS FROM JOHN S. ORLANDO ON BEHALF OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

April 8, 2003

The Honorable Lamar Smith  
Chairman  
Subcommittee on Courts, the Internet  
and Intellectual Property  
B-351A Rayburn House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Smith:

On behalf of the National Association of Broadcasters, I am pleased to submit our testimony regarding H.R. 1417, The "Copyright Royalty and Distribution Reform Act of 2003," and thank you for holding the record open.

NAB looks forward to continue working with you and the entire Committee on this very important piece of legislation. We appreciate your leadership on the issue of CARP reform.

Sincerely,

John S. Orlando

cc: Congressman Howard Berman

April 8, 2003

The Honorable Howard Berman  
Ranking Member  
Subcommittee on Courts, the Internet  
and Intellectual Property  
B-336 Rayburn House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Berman:

On behalf of the National Association of Broadcasters, I am pleased to submit our testimony regarding H.R. 1417, The "Copyright Royalty and Distribution Reform Act of 2003," and thank you for holding the record open.

NAB looks forward to continue working with you and the entire Committee on this very important piece of legislation. We appreciate your leadership on the issue of CARP reform.

Sincerely,

John S. Orlando

cc: Congressman Lamar Smith

## LETTER FROM BENJAMIN F.P. IVINS, ESQ.

The Honorable Lamar Smith, Chairman  
The Honorable Howard Berman, Ranking Minority Member  
House Subcommittee on Courts, the Internet and Intellectual Property

Dear Sirs:

We were pleased to attend the hearing your Subcommittee held on April 1, 2003, concerning H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003. We applaud your efforts to obtain the views of the Register of Copyrights and other witnesses experienced in proceedings involving the Copyright Arbitration Royalty Panels ("CARPs") on the bill, and we greatly appreciate your having offered the opportunity to interested parties to supplement the record of the hearing. NAB, on behalf of America's broadcasters, who participate in a significant majority of CARP proceedings, supports your intention to address CARP concerns through legislation. We believe that H.R. 1417 is a strong step in the right direction, and we look forward to working with you and your Staff to improve the bill and move it towards passage.

As a starting point, we agree on the need for CARP reform. Specifically, CARP proceedings are too costly, the dual role of the Copyright Office in the CARP process introduces unnecessary complication and duplication of effort, and many structural and procedural aspects of the CARP process create uncertainty rather than predictability. Contrary to its original intent, this framework inhibits voluntary resolution of disputes, and promotes costly and excessive litigation.

NAB has participated on behalf of U.S. commercial broadcasters, as copyright owner claimants, in all Phase I cable royalty distribution proceedings before the CARPs and their predecessor, the Copyright Royalty Tribunal, beginning with the 1978 case. We are currently engaged in the latest of these cases, covering the 1998-1999 cable royalties, in which hearings are scheduled to commence before a CARP on April 24, 2004. Despite the fact that the Phase I copyright claimant parties are thus locked in a dispute with each other over substantial royalty funds, we all have participated in a series of meetings attempting to develop consensus positions with respect to numerous aspects of H.R. 1417. The copyright owner parties believe it is critical that the provisions of the bill reflect the collective experience of the parties who have participated for so many years in these distribution proceedings, and hope that our consensus views will prove helpful in improving the bill and moving it forward.

Those distribution-party consensus positions are being submitted separately. We will not repeat the same points here, although they are among the most important issues regarding the provisions of the bill. In these supplemental comments, NAB wishes to point out several additional aspects of the bill that it strongly believes should also be modified.

Before addressing our specific points, we note in general that the bill appears to make no distinction between royalty distribution and royalty ratemaking procedures.

There are substantial differences, however, between the purposes, potential impact (in terms of affected parties), and history and precedent of the two types of proceedings. These important differences suggest that certain processes and procedures appropriate for one may not be at all suitable for the other. For example, there has been a 25-year-plus history of cable royalty distribution proceedings among essentially the same participants, in which a substantial body of precedent and practice has been established. This experience contrasts sharply with the recent Section 114 proceedings designed to establish for the first time a rate for a new compulsory license, affecting potentially thousands of parties who were unable to participate in the proceeding. The scope of discovery procedures that might be appropriate for the latter type of proceeding might be neither necessary nor appropriate for the former.

Following are NAB's supplemental specific comments on the bill:

1. It is unnecessary to provide for the appointment of two full-time professional staff members to assist the Copyright Judges, as is currently provided in Section 802(b) of the bill. NAB strongly supports the distribution-party consensus proposal to appoint three Copyright Judges rather than one, and the savings resulting from the elimination of the professional staff may substantially offset the additional appropriations necessary to add two judges.

Moreover, there is no need for professional staff with substantive expertise. The Judges will be more than capable of understanding the economic and business issues presented in a royalty distribution case. Just like countless other judges in courts and agencies across the land, they will be provided by the parties with expert testimony and evidence that will help them understand any scientific or analytical issues in the particular case. It will be in the parties' strong interest to present evidence that is completely comprehensible. And the Judges will have no need for independent experts to help them test evidence they have received, since in a contested distribution case the opposing parties will do a thorough job of exposing any flaws in the testimony through their own expert witnesses and evidence. (This is unlike the situation in some administrative agencies, where the agency may be responsible, for example, for vindicating the interests of the public, who may not be represented other than through the agency's own economists or professional staff.) Especially because the bill would replace the current ad hoc panel system with Judges appointed for multi-year terms, any perceived initial expertise gaps would soon dissipate, without the need for additional permanent staff. It is far more important to have two additional Judges than to have two full-time staff.

In any event, the current language of Section 802(b) regarding the required qualifications of the proposed staff appointees is highly problematic. Requiring expertise in "copyright law and in the business and economics of industries affected by the actions taken by the Copyright Royalty Judge" would invite inevitable conflicts of interest, given the wide range of industries whose interests are affected by CARP decisions. Moreover, the expertise literally required is not

legal expertise or expertise in the science of economics, but actual experience in the industries as to which the Judge would be making decisions involving substantial sums of money. These distribution cases often pit one "industry" against another. The perceived bias in a system in which the Judge's staff member was effectively required to come out of one of the industries affected by a significant decision would seriously undermine the credibility of the process.

2. The current language of Section 803(c), which potentially extends the time within which a decision must be rendered, also raises a concern. The parties generally have an interest in a definite deadline for the completion of a case, both to limit the time spent in expensive hearings and to expedite the final decision that will result in the distribution of their royalty funds. Section 803(c) would retain the 6-month period within which cases are currently resolved (presumably measured, as currently, from the commencement of the hearing rather than the filing of direct cases), but would also allow the Judge, in the alternative, to extend the time period to a full year. There is no apparent reason, even if the Judge finds an extension "necessary," why the time should automatically be doubled rather than merely extended only as much as is actually necessary.

Moreover, it seems likely that there will be far fewer occasions in which the Judges would feel an extension is necessary than may be the case under the CARP system. The Copyright Judges will be experienced in the particular proceedings, they will have become familiar with the parties' cases in advance of the hearing by managing discovery, and the three-judge structure will provide them some flexibility to share decision-writing responsibilities. If there is some perceived need nonetheless to extend the time, NAB suggests, instead of the current Section 803(c), that the bill set a new single time period of 7 months rather than the quantum leap from 6 months to 12 months. Alternatively, the time periods might be set in segments, such as requiring that the record must be closed within 4 months or 5 months after the hearing commences, and that the decision must be issued within 2 months after the close of the record. Limited extensions could be granted, but only upon "good cause shown" or even upon a showing of "unusual or extraordinary circumstances." In any event, the bill should not double the time it already takes to receive an initial decision in a distribution case.

3. The change proposed in Section 803(e)(1)(B) of the bill, modifying the current system of sharing costs in distribution proceedings, would create serious inequities. Currently, the statute provides that in ratemaking proceedings, the parties bear costs "in such manner and proportion as the arbitration panels shall direct," and that in distribution proceedings, the parties bear costs "in direct proportion to their share of the distribution." 17 U.S.C. § 802(c). This cost-sharing system, which NAB believes was agreed to by all parties at the time it was adopted, has worked equitably for a number of years. The change in the bill, to require that excess costs of distribution proceedings be borne "by the parties to the proceedings in equal proportions," introduces a substantial and unjustified potential inequity.

For example, in the current cable royalty distribution proceeding, MPAA, the party historically awarded the largest single share of royalties, has proffered ten witnesses and two substantial quantitative studies, and is scheduled to consume seven days of hearings. By contrast, the Canadian Claimants, who have previously been awarded the second-smallest share (less than one percent), will present half as many witnesses and are scheduled to complete their direct case in only three hearing days. The splitting of any significant costs in equal shares would work a substantial inequity on the Canadian Claimants group, for which an equal dollar amount represents a much larger share of their potential royalty award. For the entire history of the cable distribution proceedings, over 25 years, any costs of the CARPs and the Copyright Royalty Tribunal assessed against the parties have either been shared directly in proportion to royalty shares or been paid "off the top" and thus indirectly in proportion to royalty shares. There is no reason to change that system now. Our serious concern is that the proposed change would result in a windfall to the largest cable royalty share awardees at the expense of the smallest. NAB believes the current statutory scheme should be retained.

4. Settlements reached by some or all of the parties to a properly instituted proceeding -- as to which due process considerations have been met -- should be implemented, not thwarted. Recently, a number of broadcasters expended considerable time and effort on a proposed settlement that would have resolved a substantial portion of a CARP ratemaking proceeding, only to see those efforts evaporate because of the perceived need to prematurely divulge details of the settlement. H.R. 1417 should provide expressly for the adoption and approval of settlements among the parties in such circumstances.

Thank you again for providing us with the opportunity to present our views on this important bill. We look forward to working closely with your Staff on H.R. 1417.

Respectfully submitted,

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Benjamin F.P. Ivins, Esq.  
Senior Associate General Counsel  
Intellectual Property and International Legal  
Affairs  
National Association of Broadcasters  
1771 N Street, N.W.  
Washington, DC 20036-2891

LETTER FROM PATRICK COLLINS AND JOHN C. BEITER, ESQ.



*years*

PATRICK COLLINS  
SENIOR VICE PRESIDENT  
LICENSING

April 8, 2003

**VIA EMAIL**

The Honorable Lamar Smith  
Chairman  
Subcommittee on Courts, the Internet and  
Intellectual Property  
Committee of the Judiciary  
United States House of Representatives  
Washington D.C. 20515

Re: Statement of SESAC, Inc. on H.R. 1417, the Copyright Royalty and  
Distribution Reform Act of 2003

Dear Mr. Chairman:

The United States performing rights organization SESAC, Inc. ("SESAC") submits this statement for inclusion in the record of the April 1, 2003 hearing concerning H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003. SESAC appreciates the opportunity to provide its thoughts and opinions about the bill.

SESAC was founded in 1930 and is the second oldest of the United States performing rights organizations ("PROs"). SESAC represents thousands of American songwriters, composers, lyricists and music publishers and more than a quarter million musical compositions. Similar to the other two United States PROs, the American Society of Authors, Composers and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), SESAC licenses the non-dramatic public performance of such copyrighted compositions within its repertory and distributes to its affiliates the license fees paid by music users.

Like the other PROs, SESAC has had considerable experience with the compulsory license system from the inception of the 1976 Copyright Act's compulsory license provisions, having participated in proceedings before the Copyright Royalty Tribunal ("CRT") and before CARPs. SESAC also has participated in the legislative process that initially created the CRT and subsequently created the CARP system, and has been a key participant in previously submitted CARP reform proposals.

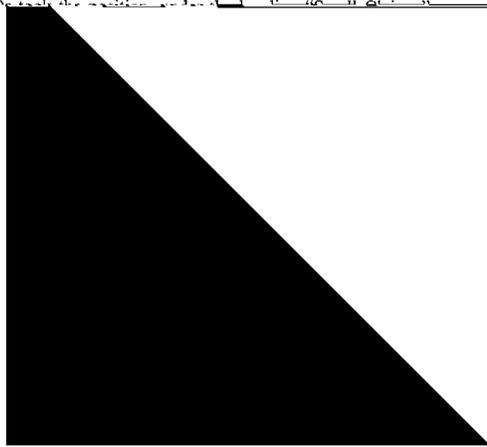
The Honorable Lamar Smith  
April 8, 2003  
Page 2

SESAC agrees, to a significant degree, with the comments contemporaneously submitted to you by ASCAP and BMI in their Joint Statement on H.R. 1417 (as well as many of the contemporaneous Consensus Comments of Parties to Royalty Distribution Proceedings on H.R. 1417). Specifically, SESAC agrees with the other two PROs discussion concerning (1) Copyright Royalty Judges ("CRJs"), (2) the decisionmaking process, (3) the applicability of the Administrative Procedures Act, (4) the treatment of evidence, (5) the discovery process, (6) a \$5,000 small claim threshold, (7) a \$500 filing fee, (8) the appropriation of funds to pay costs and, alternatively, the allocation of costs in proportion to royalty allocations in distribution proceedings, (9) judicial review of the CRJs' decisions, and (10) the criterion for ratemaking.

SESAC, however, submits the following additional comments, which it believes are extremely important to any reform of the present procedures"

(1) Offers of judgment. Although SESAC agrees that the bill's offer of judgment rule should include a fee-shifting provision, SESAC strongly believes that such a rule should apply only to so-called "small claims." This had been the position of all three PROs from the outset. For example, in a letter to the Subcommittee dated ~~May 20, 2002~~ ~~all three PROs took the position that the bill's offer of judgment rule should~~

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## PREPARED STATEMENT OF ANN E. CHAITOVITZ

I would like to thank the Chairman, the Ranking Minority Member, and the Members of the Subcommittee for introducing this important legislation to reform the CARP structure and process. The American Federation of Television and Radio Artists ("AFTRA") is a national labor organization representing over 75,000 performers and newsmen that are employed in the news, entertainment, advertising and sound recording industries. AFTRA's membership includes approximately 14,000 singers, including more than 5,000 singers who have a royalty contract with a record label ("featured artists") and roughly 8,000 singers who are not signed to a royalty contract ("non-featured artists"). Under § 114(f) of the Copyright Act, recording artists are entitled to receive 50% of the digital performance license fees, and in order to protect their interests, AFTRA participated in the recent webcaster CARP proceeding.

As everyone has acknowledged, the current CARP structure does not function efficiently. H.R. 1417 is a positive step to try to address many of the problems with the current CARP structure and contains numerous important positive changes. We believe there are still a few areas which need to be modified to insure that the new procedure sufficiently addresses all parties' concerns and permits the participation of small and/or non-profit organizations.

I thank the Subcommittee again for its efforts to reform the CARP process. I submit here some initial comments on H.R. 1417.

## A. COST

As AFTRA has advised the Subcommittee and the Copyright Office, the reduction and control of the costs of participating in both the rate setting and distribution processes must be a critical goal of any reform. Small parties, non-profit organizations and artists will only have access to these proceedings if they can afford to participate.

We commend the decision to have the Copyright Royalty Judge and staff members paid out of appropriated funds. The current obligation to pay the arbitrators' fees could preclude participation of small and/or non-profit entities with legitimate interests in the proceedings, and we believe the change to a publicly funded process is critical. As we have just seen after the recent webcaster proceeding, the preclusion of small interested parties has the potential to undermine the credibility of the CARP proceeding.

We believe that all of the cost of the proceedings for determining rates and terms for statutory licenses must be paid out of appropriated funds, not by the participants. Each party must bear its own attorneys' fees and costs, which can be quite significant, and any additional cost, other than a small filing fee, could have the effect of excluding the participation of small and/or non-profit organizations.

Importantly, small parties, non-profit organizations and artists will also be barred from participating if they cannot control their costs and must pay for the costs resulting from larger parties' more active and litigious participation. Section 803(e)(1)(B) of H.R. 1417 requires that all additional costs be borne by the parties in equal proportions in rate setting procedures. This provision is unfair and could prevent the participation of small and non-profit parties. Even if the decision-maker's costs are paid from appropriated funds, unless all costs are paid from appropriated funds, the other costs have the potential to become substantial and could prohibit a small party's participation if the costs are split equally between the parties regardless of their participation. A party may wish to participate on only one or two issues or to save costs by submitting a streamlined and minimal case. If that party must then share equally all costs, including costs which it does not control and which could be increased by larger parties with a different and more expansive litigation plan, it will be foreclosed from participating. For example, if the participants must pay for the decision-maker's transcripts (costs which could be substantial for a small or non-profit party in a large complicated proceeding) and those costs are split evenly among the parties rather than proportionately based on their participation, a party whose witnesses only use 200 pages of transcript would have to pay the same transcript costs as those parties whose witnesses use up 10,000 pages of transcript. Smaller parties would, thereby, be forced to subsidize the larger parties, a result which is both unfair and poses a significant barrier to participation. Any non-appropriated costs should be split among the parties according to each party's proportional participation in the proceeding rather than on an equal or per capita basis.

Section 803(e)(1)(A) requires that the excess costs may be deducted from not more than 1% of the fees collected. In a rate setting proceeding, the entire burden of that 1% then falls on the copyright owners and performers and none of the cost is borne

by the users/licensees, so that the copyright owners and performers pay a disproportionate share of the costs. If there are any costs that must be borne by the parties, those costs should be shared by the users of the statutory license and the recipients of the license fees.

#### B. SETTLEMENTS

The underlying legislation providing for the compulsory licenses is intended to encourage negotiated settlements. Settlements also reduce costs. Unfortunately, the current CARP system sometimes hinders the ability of the parties to settle a proceeding. Thus, to encourage settlements, we believe that a formal settlement period with supervised settlement conferences prior to the filing of direct cases should be required. In addition, we believe that the legislation must adopt procedures to facilitate settlements after direct cases are submitted.

#### C. CONTINUING JURISDICTION

Like the Register of Copyrights, we believe that the law must clearly grant continuing jurisdiction with the Copyright Royalty Judge to correct errors in his rate and term determinations and to address unanticipated issues and problems that arise during the license period covered by his or her decision. This is particularly appropriate as the legislation extends the 2-year §114(f) license terms to 5-year terms, and circumstances may change and unforeseen problems arise during the 5-year term period.

#### D. CONTINUING PAYMENTS

As the Register of Copyrights also notes, potential problems may arise when there is a period after the expiration of the old royalty rate and before the new rate has been determined. Even though the new rate is effective retroactively to the date on which the old rate expired, H.R. 1417 must provide that licensees continue to pay copyright owners at the recently expired rate until the new rate is set. Once the new rate is set, adjustments can be made in the form of additional payments or refunds.

#### CONCLUSION

The creation of an affordable, fair and expeditious procedure, where a party can control its own costs, is very important to recording artists. We thank the Chairman and the Subcommittee for moving forward in this thorny area and look forward to working with the Subcommittee on the legislation.

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#### PREPARED STATEMENT OF INTERCOLLEGIATE BROADCASTING SYSTEM, INC., AND HARVARD RADIO BROADCASTING CO., INC. STATEMENT OF

This statement is submitted on behalf of small, non-commercial webcasters who need relief from the compulsory license provisions of the Digital Millennium Copyright Act of 1998 and from the inappropriate rules and procedures for Copyright Arbitration Royalty Panel (CARP) pursuant to Title 8 of the Copyright Act of 1977, as amended, 17 U.S.C., ch. 8.

This statement is being filed by the Intercollegiate Broadcasting System, Inc., and Harvard Radio Broadcasting Co., Inc. (WHRB [FM]), parties to the appeal from the Librarian's 1998–2002 CARP decision of June 8, 2002, *IBS, et al. v. James H. Billington*, Librarian, D.C. Circuit No. 02–1220. IBS was founded in 1940 as a non-profit association of college broadcasters, and today its membership includes nearly eight hundred college stations and webcasting operations. Harvard Radio Broadcasting Company is an eleemosynary corporation, whose undergraduate staff operates Station WHRB (FM), a commercial FM station licensed to Cambridge, Massachusetts, by the Federal Communications Commission. WHRB (FM) and other non-profit stations are members of IBS. These stations are by-and-large staffed by students; and many are operated by their respective parent, educational institutions as part of the curriculum for academic credit. IBS members report median annual budgets of \$ 9,000, and the annual budgets of many stations are much less.

The 1998–2002 CARP clearly demonstrates the weaknesses of the Copyright Office's in-for-a-penny-in-for-a-pound approach to running a CARP. The Office took no prisoners in setting up the 1998–2002 CARP. It refused to apply its rules in a way that would permit the small, non-commercial webcasters to participate in an arbitration proceeding intended to set the compulsory license royalties by which they would be bound. The small webcasters pointed out that they could not pay a *pro*

*rata* share of the arbitration costs taxed against participating parties and could not satisfy the requirements for legal counsel for participation in the evidentiary phase of the arbitration proceeding. The Office acknowledged these points in the Register's order of March 16, 2001, but declined to tailor its procedures to the size and financial ability of the small entities—even to the extent of allowing them to participate in the CARP proceeding by the filing of briefs amicus. As a result the small non-commercial webcasters were forced to withdraw their notices of intent to participate.

On appeal, the Librarian has attempted to deflect the non-commercial webcasters' charge that the Librarian has proceeded on a one-size-all basis by arguing that two sizes fit all. But even webcasters classified "small" under the 2002 Act include those that have gross annual revenues of hundreds of times the small annual budgets of many academically affiliated webcasters.

In the 2003–04 CARP the small webcasters, and collaterally Music Choice, attempted to anticipate the Register's prior objection of inconsistency with the Office's rules by filing petitions for rulemaking with the Register. These petitions have now been denied by the Register's order of February 6th, a copy of which is attached, in which she takes the position that having a voice in a CARP proceeding is "an all or nothing proposition." *Id.* at 2–3. The effect of the Register's ruling is that small webcasters are bound by a compulsory arbitration proceeding in which they were effectively denied a fair opportunity to participate. This result is in accord neither with the policy of the United States, as set forth in Section 2 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 nt, and the implementing executive orders thereunder nor with due process, as recognized by the courts in *Devlin v. Scaradelletti*, 122 S.Ct. 2005 (2002); *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978). The Register's recent order recognizes that "many entities affected by the outcome of the . . . [1998–2000] CARP proceeding felt that they did not get to tell their story. . ." and supports a legislative correction. *Id.* at 8–10. However, her support for a legislative solution seems to be limited substantially at 12 n.5.

There is some urgency to this matter, as the small, non-commercial webcasters are required to make retroactive payments under the 2002 Act that are beyond the financial means of many by June 20, 2003. The Small Webcasters Relief Act of 2002, P.L. 107–321, 116 Stat. 2780, is simply not well-tailored to the needs of the small, non-commercial webcasters, although the definition of "non-commercial webcaster" adapted from the Internal Revenue Code and added to Section 114(f)(5)(e), is appropriately drafted and need not be amended.

Among the immediate problems that the small, academically affiliated webcasters face are paying the usage-based rates and the annual, non-refundable minima associated therewith.<sup>1</sup> But in addition the interim and prospective final record-keeping requirements are impractical for small, student-staffed stations to comply with, are unduly burdensome on small entities, and are disproportionate to the relatively small amounts of royalties that would be distributed in on the basis of the elaborate record-keeping requirements imposed and sought to be imposed. These record-keeping requirements contemplated by the Librarian are far in excess of those applicable to IBS<sup>5</sup> members for performance rights under other sections of Title I of the 1977 Act.

The underlying deficiency in the Library's one-size-fits-all approach is its failure to apply the provisions of the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C., ch. 6 (The Analysis of Regulatory Functions), and the implementing executive orders. Its pretext is that the Copyright Office falls within the Congressional exemption in Section 2(a) (definition of "agency") of the Administrative Procedure Act of 1946, now 5 U.S.C. § 551(1), even though that Sections 701(e) and 802(c) of the Copyright Act of 1976, as amended, 17 U.S.C. §§ 701(e) and 802(c), specifically provide that the APA shall be applicable to the Office and to the CARP. In any event the Office has refused to implement the small-entity policy of the United States as enacted by Congress in Section 2 of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt. You will recall that Congress attempted to resolve the Appointments Clause problem by making the Librarian a Presidential appointee. As such, he is subject to the President's constitutional duty to take care that such policies be implemented and to a duty to implement the President's executive orders. If, consistent with the Librarian's litigating position, he were considered a Congressional officer in respect of copyright matters, a serious violation of the constitutionally mandated separation of powers would result.

<sup>1</sup>The recently announced agreement between RIAA and DiMA is no help to the smaller webcasters in either regard. It would oppose a \$2500 minimum on webcasters who cannot reasonably afford even the five-hundred-dollar annual fee specified by the Librarian, and the percentage figure is disproportionate to the performance royalties negotiated under Section 118.

IBS and WHRB (FM) urge the Subcommittee to step in legislatively via H.R. 1417 to make it clear that the Office and the Librarian act in copyright matters fully subject to the Regulatory Flexibility Act as to their procedures and their prescription of compulsory license fees for non-commercial webcasters, as defined in Section 4 of the 2002 Act, and to block any attempt to enforce the rates prescribed by the Librarian in the 1998–2002 CARP against such non-commercial webcasters. This could be accomplished through amendments to chapters 7 and 8 of the 1976 Act, rather than to chapter 1, amendment of which we infer the subcommittee leadership seeks to avoid in H.R. 1417, leaving the needed and more comprehensive and substantive changes in the Copyright Act to the next legislative vehicle.

CONSENSUS COMMENTS OF PARTIES TO CABLE AND  
SATELLITE ROYALTY DISTRIBUTION PROCEEDINGS





<p><b>Section 803(a) – Proceedings of Copyright Royalty Judges</b> (page 13, lines 8-11). Issue: Persons entitled to submit relevant information and proposals.</p>	<p>Parties should be entitled to submit relevant information and proposals only in accordance with regulations promulgated pursuant to the CRDA. Those regulations should preserve the current practices with regard to participation in CARP proceedings.</p>
<p><b>Section 803(b)(2) – Procedures – Small Claims Proceedings</b> (page 13, lines 13-22). Issue: Amount in controversy for small claims procedures.</p>	<ul style="list-style-type: none"> <li>• The amount in controversy leading to the use of small claims procedures should be increased to \$5000.</li> <li>• Claims made pursuant to the small claims procedures should be accompanied by an evidentiary showing supported by affidavit.</li> </ul>
<p><b>Section 803(b)(3)(C) - Proceedings of Copyright Royalty Judges – Procedures – Regulations – Requirements</b> (page 15, lines 1-3). Issue: Resolution of proceedings without conducting full-blown evidentiary hearings.</p>	<p>The Register of Copyrights should issue regulations that specify the circumstances under which proceedings may be resolved on a paper record rather than through full-blown evidentiary hearings. These circumstances should include, at a minimum: (a) proceedings where only a small amount of royalties is at issue; and (b) the circumstances identified in the Copyright Office’s current regulations.</p>
<p><b>Section 803(b)(3)(C) - Proceedings of Copyright Royalty Judges – Procedures – Regulations – Requirements</b> (page 15, lines 1-3). Issue: Provision for reconsideration of determination.</p>	<p>A provision for reconsideration like the one suggested by the Register of Copyrights in her testimony on April 1, 2003 should be added to the procedural requirements.</p>
<p><b>Section 803(b)(3)(C)(i) and (ii) – Procedures – Regulations – Requirements</b> (page 15, lines 4-11). Issues: Evidence and Discovery.</p>	<p>With respect to distribution proceedings, the parties arrived at the following consensus:</p> <ul style="list-style-type: none"> <li>• These two subsections should be stricken in favor of requiring the adoption of regulations that meet the following objectives: 1) Encourage settlement; 2) Encourage efficiency and decrease costs; and 3) Ensure the orderly conduct of objective, equitable proceedings.</li> </ul>

	<ul style="list-style-type: none"> <li>• There should be no statutory restrictions on the use of hearsay evidence in the context of a royalty distribution proceeding. Additional restrictions will likely increase the costs of proceedings without any resulting benefits.</li> <li>• The provisions for discovery appear to contemplate a change in the procedures for conducting distribution proceedings that will likely increase costs without leading to any measurable improvements in efficiency.</li> </ul>
<p><b>Section 803(b)(3)(C)(iii) – Procedures – Regulations – Requirements</b> (page 15, lines 12-25). Issue: The Offer of Judgment procedure and settlement procedures generally.</p>	<ul style="list-style-type: none"> <li>• It is unclear how the procedure established by § 803(b)(3)(C)(iii) would apply in the context of a Phase I multi-party proceeding such as a cable royalty distribution proceeding, as opposed to a two-party Phase II distribution case. The Librarian should be directed to define the circumstances, if any, under which such offers could be made in a multi-party proceeding.</li> <li>• The procedure set forth in § 803(b)(3)(C)(iii) is problematic because it lacks an enforcement mechanism. The rejection of such an “offer of judgment” should result in some amount of cost-shifting if the party rejecting the offer ultimately receives an award lower than what is offered, such as in Federal Rule of Civil Procedure 68. The provision should be made more consistent with the provisions of Rule 68.</li> <li>• As it is currently drafted, § 803(b)(3)(C) may imply that it is the sole vehicle by which parties to a proceeding may settle that proceeding, and that settlement is only appropriate before the date on which the hearings begin. Accordingly, § 803(b)(3)(C) should be clarified to indicate that it is</li> </ul>

	<p>not the sole vehicle for settlement and that settlement may be reached at any time.</p> <ul style="list-style-type: none"> <li>• Finally, in the interest of encouraging settlement before parties have had to expend significant time and resources preparing their cases, the regulations should provide for a formal settlement period in advance of the preparation and filing of cases and at the conclusion of which the parties shall report to the decision-makers on the status of such discussions.</li> </ul>
<p><b>Section 803(c) – Decision of Copyright Royalty Judge</b> (page 16, lines 1-9). Issue: Duration of proceedings (including period for settlement discussions).</p>	<p>The parties to distribution proceedings agree that some time limits on proceedings are useful in order to decrease costs and provide for more rapid distribution of royalties.</p> <p>The current provision of § 803(c) regarding the duration of a proceeding needs to be examined more closely in light of current practices. For instance, the provision for submitting final witness lists at the completion of the discovery period is inconsistent with the current practice of identifying all witnesses before the discovery period begins in the context of the filing of a direct case. Although the current version of § 803(e) provides that CARPs shall have a 180-day period to issue their determination, that period does not include pre-hearing discovery and settlement periods. Any provision establishing the length of a proceeding should address the various phases of the rate-setting and distribution process comprehensively. As drafted, the current version also limits the Copyright Royalty Judge to the choice of either a six-month proceeding or a one-year proceeding, rather than providing for proceedings to fall in the range between six months and one year.</p>

<p><b>Section 803(c) – Decision of Copyright Royalty Judge</b> (page 16, lines 17-19). Issue: Availability of record to the public.</p>	<p>Section 803(c) should exclude from the record made available to the public by the Librarian the portions containing confidential information subject to a duly issued protective order.</p>
<p><b>Section 803(d) – Judicial Review</b> (page 16, lines 20-25). Issue: Appeals by “any aggrieved party.”</p>	<p>Section 803(d) should be clarified to provide that only the <i>parties</i> to a rate-setting or distribution proceeding should have the right to appeal the decision-making body’s determination to the D.C. Circuit.</p>
<p><b>Section 803(d) – Judicial Review</b> (page 17, lines 18-22). Issue: Standard of review to be applied by the DC Circuit.</p>	<p>The standard of review applied to determinations made by the decision-making body should be identical to that applied to the determinations made by federal agencies under 5 U.S.C. § 706.</p>
<p><b>Section 803(e) (1) – Administrative Matters - Deduction of Costs of Library of Congress and Copyright Office from Royalty Fees – Deduction from Filing Fees and Royalty Fees</b> (page 18, line 12 – page 19, line 6). Issue: Funding of royalty rate setting and distribution processes.</p>	<p>All the costs associated with royalty rate and distribution determinations should be paid for with appropriated funds. The use of appropriated funds should not be limited to the salaries of the decision-makers and their staff.</p> <p>In any event, it should be made clear that the Librarian shall not deduct the costs associated with other compulsory licenses from the § 111, § 119 or § 1003 funds.</p> <p>The group notes that HR 1417 provides no authorization for an appropriation of funds for the payment of the decision-makers or the costs associated with ratemakings and distributions.</p>

## PREPARED STATEMENT OF COLLEGIATE BROADCASTERS, INC.

Collegiate Broadcasters, Inc. (CBI) is a national organization representing students and educational broadcasters involved in radio, television, webcasting and other related media ventures. These comments are submitted to supplement the record of the hearings held on April 1, 2003 concerning H.R. 1417.

## I. INTRODUCTION

When Congress enacted the Copyright Royalty Tribunal Reform Act of 1993, 17 U.S.C. §§ 801–803, the goal was to create a procedure for determining royalty distributions that would be both fair and efficient. Unfortunately, the resulting Copyright Arbitration Royalty Panel (CARP) system has proven in practice to be neither fair nor efficient. CARP has particularly harmed the interests of small, non-commercial broadcasters and webcasters. Collegiate Broadcasters, Inc. strongly welcomes H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003. While the bill is not perfect, with the amendments suggested in these comments H.R. 1417 offers a sensible alternative to the present, flawed, CARP system.

## II. REPLACING THE COPYRIGHT ARBITRATION ROYALTY PANELS WITH A COPYRIGHT JUDGE WILL ALLOW DUE PROCESS BY GIVING MORE ENTITIES AN OPPORTUNITY TO BE HEARD.

A. *Costs*

The recent arbitration setting digital transmission royalties for the period from 1998–2002, CARP DTRA 1 & 2, highlights the deficiencies of the CARP system. CBI was in the process of forming when CARP DTRA 1 started. Because the arbitrators' substantial fees were to be apportioned among all those who participated, small educational broadcasters/webcasters such as those now represented by CBI could not afford to participate, although they are bound by the Copyright Office and Librarian of Congress's determination of rates and minimum fees. The cost to participate in the webcasting CARP was at least \$300,000 and, for many entities, much higher. This cost is far beyond the resources of the average educational or community station. Most CBI member college radio stations, unlike public radio stations funded by CPB, have to pay their operating costs from student fees or from their meager academic budgets. According to Intercollegiate Broadcast System's surveys, the average college station budget is about \$9,000. As a result, college stations that are not funded by CPB were simply not represented in the CARP proceeding at all. This lack of representation and inability to present relevant evidence on the issue of market rate resulted in a royalty rate completely insensitive to the needs of educational broadcasters.

At present, the extraordinary costs of CARP participation violate small and non-commercial entities' right to due process. Due process includes an opportunity to be heard. Courts have held, with respect to private arbitration, that if the cost of participating in an arbitration is so high that a party loses the opportunity to be heard, the arbitration is procedurally invalid. H.R. 1417's provision for the Copyright Royalty Judge to be paid by the government addresses this problem. As noted below, CBI suggests amendments to further address the problem of unreasonable and unpredictable costs. Without the exorbitant cost of paying a portion of the arbitrators' hourly legal fees, educational and other noncommercial broadcasters ought to be able to participate in the ratemakings that affect them. The cost of the proceedings should be predictable.

B. *Discovery Powers Should Be Expanded*

In general, CBI's view is that the Copyright Royalty Judge should have substantial discretion to authorize appropriate discovery, being mindful of the potential for abuse and with the goal of controlling discovery costs imposed on small and non-commercial entities. Expanded discovery powers will promote transparency and in turn more accurate and fairer royalty rates.

In the recent webcasting CARP, the Recording Industry Association of America (RIAA) and the Corporation for Public Broadcasting (CPB) reached a royalty settlement agreement during the CARP process. The terms of this agreement would have been compelling evidence of the royalty rates and terms on which a willing buyer and willing seller would agree. The Panel noted that it had almost no evidence relating to noncommercial entities. However, the arbitrators did not consider the RIAA-CPB agreement because the parties agreed to keep these terms confidential. It is quite possible that other agreements that could have been relevant evidence of rates agreed to by other buyers similarly escaped the Panel's consideration because of insufficient discovery. The Panel was left with only one agreement, between

Yahoo!, one of the wealthiest webcasters in the entire fledgling industry during the relevant period, and RIAA. The Panel then based its willing buyer/willing seller determination on this single Yahoo! agreement. In this way, the CARP process took on the characteristics of an auction, with the digital transmission royalty rate being set by the highest bidder. As long as the copyright statute requires decisions based on the willing buyer/willing seller standard, the will of Congress cannot be realized without discovery of those rates and terms that have been actually agreed upon in the digital transmission license market and other, analogous markets. CBI recognizes that making all such agreements discoverable and admissible, regardless of the the parties' intent, could discourage amicable settlements. Were Congress to amend the standard as proposed below, however, agreements might become critical as evidence, though still useful.

*C. Section 803(d), Providing Direct Appeal to the Court of Appeals, Eliminates A Costly and Time-consuming Intermediate Review.*

In CBI's view, the current system of two-tiered review is inefficient and needlessly increases expense for the petitioning parties and for the Copyright Office. The proposed legislation properly provides for appeal directly to the Court of Appeals for the District of Columbia Circuit.

### III. PROPOSED AMENDMENTS

As written, H.R. 1417 provides many needed improvements over the CARP system. However, certain changes could be made to improve the quality of the proceedings and to better protect small, educational and community broadcasters/webcasters.

*A. The "Willing Buyer/Willing Seller" Standard in Section 112 (2) and 114(f)(2) Must Be Changed*

Most importantly, Congress should change the standard under which the Copyright Royalty Judge will determine reasonable terms and rates of royalty payments to a fairness standard. Under H.R. 1417's present language, the Copyright Royalty Judge will set royalty terms and rates pursuant to sections 112(e), 114, 115, 116, and 118 of the Copyright Act.

Sections 112(e) and 114(f) (2) (B) of the Copyright Act presently provide that the rates and terms chosen are to "represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller." CBI contends the standard should make clear that rates to be set should bear some relation to those paid for use of musical works by terrestrial radio stations, and that those rates properly could be used as a benchmark. The standard should also make it clear that the Copyright Royalty Judge should not turn the process into an auction by setting the royalty based on the highest rate acceptable to any webcaster, but instead should adopt rates that will allow the maximum availability of diverse works to the public. The rates selected must recognize and support the public good and First Amendment interests served by educational and community broadcasters/webcasters.

"Willing-buyer-willing seller" has been shown to be a poor standard by which to set rates because the market for the right to digitally transmit copyrighted works is a fundamentally imperfect market. Because the compulsory license avoids the need for each copyright owner to negotiate with each copyright user, the rate cannot reflect what any one copyright owner and any one buyer would agree upon for a specific work. The compulsory license covers a wide range of different recorded works, with a correspondingly wide range of values. Recordings by artists who are already well-known and popular may command high royalty rates because these artists relying less than emerging artists on airplay to bring their work to the attention of consumers. Popular, commercial music has a high potential for supporting advertising that brings in revenue. For copyright owners who are unknown artists, or work in special genres, the promotional value of airplay warrants setting the price for the right to digitally transmit the works at close to zero. Educational and community broadcasters/webcasters significantly emphasize the work of such artists and genres. The one-size-fits-all rate does not recognize this phenomenon.

Instead, the last CARP set the price for all recordings at the rate paid by a commercial webcaster intending to transmit primarily very popular music. This rate harms not only copyright users, but copyright owners who believe that webcasting has promotional value that is worth more to them than royalties. This is evidenced by the numerous artists and labels who send unsolicited tapes and CDs to college and community radio stations, seeking airplay. CBI would welcome the opportunity to present witnesses with evidence that webcasting promotes sales of their recordings. Many artists and labels have signed royalty waivers or royalty-free webcasting

licenses or simply donated their works to the public domain since the results of the webcasting CARP were announced. But the same transactional costs that the 114(f)(1) statutory license avoids make it inefficient for owners to negotiate separate licenses with each station. And in many cases, the artists on a recording do not own the copyrights, but still rely on Internet radio airplay to attract new listeners who buy tickets to their concerts.

Given that each copyright owner has a monopoly on certain nonfungible works and there are no available substitutes for a given work, the rate set through negotiation will always favor the copyright owner. Furthermore, with the consolidation in the content and distribution industries, large copyright owners are often running their own distribution businesses, which directly compete with the small broadcasters/webcasters seeking to use the compulsory license. The advantages to the copyright owner mean that even where there is a negotiated deal, the copyright owner is still exacting a rent. If Congress' goal is to maximize technological development and the growth of educational broadcasting, royalty rates should be based on a consideration of fairness. A fairness standard rather than a willing-buyer-and-seller standard will preclude the sort of rent extraction that has forced small broadcasters to labor under rates which are completely unsustainable.

*B. Congress Should Amend Section 114 to Eliminate or Modify Content Restrictions*

The DMCA extends a number of restrictions on the performance of licensed works to broadcasters who retransmit their programming over the Internet. Content limitations imposed on Internet digital performances by extension also significantly impinge on the content of the original broadcast performance to be retransmitted. Particularly in the context of educational and cultural programming, these restrictions (e.g. 17 USC §114(d)(2)(C)(i)) seriously impair the non-commercial educational broadcasters' ability to serve the public good.

Applying these restrictions to a broadcast station effectively precludes a program exploring the musical and historical legacy of a single specific artist. The radio programmer's artistic and scholarly pursuits, and the audience's social and educational experiences, are therefore chilled. A program highlighting a single artist is intended to place an individual composition within the context of the artist's greater body of work. The streaming of such an artistic and informative presentation via the Internet, however, violates the current statute, despite the public interest served by the nature of this program. Likewise, the creation of a retrospective program at the time of an artist's passing would violate the law.

The common broadcast practice of announcing upcoming musical selections is also outlawed for Internet retransmissions as a result of the DPRA and the DMCA. The current statute requires that "the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists. . . ." 17 USC §114(d)(2)(C)(ii). Programming practices perfected over decades of broadcast history by radio legends such as Alan Freed, Bill Randle, Robert W. Morgan, Don Steele, and Dick Purtan are now prohibited for retransmitted programming under the statute. Lawmakers have, hopefully unwittingly, removed from the Internet an element that is part of the very essence of radio—a feature that audiences have come to expect from all radio broadcasts. Other content restrictions similarly offend broadcasters' first amendment rights, to the detriment of the listening public.

The content restrictions on the Internet retransmissions of radio stations are presumably intended to protect copyright owners from unauthorized copying. But Internet retransmissions are not a significant threat the recording companies' retail sales because permanent copies of streamed music cannot be saved by an online listener. Therefore, these draconian measures create protections much more restrictive than are necessary, and in the process gravely impinge on legitimate artistic, educational, and cultural applications of the available technologies. Congress should amend these provisions so they will not obliterate the ability of non-commercial educational radio stations to effectively expand their public service to the Internet.

*C. Sections 801(c) and 802(f)(1)—Consultation with Register of Copyrights Should Be Documented and Voluntary.*

These sections provide that the Copyright Royalty Judge may consult with the Register of Copyrights in making rulings. CBI recognizes the expertise of the Register, particularly with regard to rulings that would implicate copyright office procedures, responsibilities and obligations. Such consultations, however, should be voluntary, as set out in the draft bill, not mandatory, as some have proposed. It would be appropriate, to ensure the Judge's independence and to provide full and open dis-

course, that such communications be formal and on the record, perhaps in the nature of an amicus brief, or that they provide for parties to be present or to comment on the Copyright Office's statements.

*D. Section 803(e)(1)(B)—Remaining Costs Should Not Be Assessed To Participants.*

CBI shares the concern of R. Bruce Rich that the language of Section 803(e)(1)(B) is unclear as to what kinds of costs remaining after deductions from royalty fees are to be borne by the parties in equal proportions. As noted above, college broadcasters and groups representing them, such as CBI, have extremely limited resources and must be able to predict, when they undertake to participate in rate-setting proceedings, what their costs will be. Any provision that raises the risk of unexpected costs, out of the parties' control, being assessed against them at the end of the proceeding seriously chills their ability to participate in the process. Chilling participation, in turn, deprives the fact-finder of valuable evidence. The language should be changed to clarify what costs are intended and how they are to be apportioned in multiparty proceedings, or, better yet, all costs should be borne by the copyright office, defrayed by the filing fees.

*E. Section 803 Should Be Amended To Make Small Claims Proceedings Available To All Non-commercial Entities Who Elect to Use Them.*

In addition to amending H.R. 1417 to eliminate the "willing buyer/willing seller" standard and make fairness the standard for rate setting, Congress should also expand the ability of non-commercial broadcasters to take advantage of non-adversarial systems for resolving royalty disputes. Congress should allow any non-commercial broadcaster who elects to do so to use the small claims proceedings set out in §803(b)(2).

As written, H.R. 1417 seems to allow the use of the small claims proceedings only in certain proceedings and when a party to the proceeding asserts that the royalties in dispute are \$500 or less. Basing eligibility for the small claims proceeding on a dollar amount will breed inefficiency as parties engage in pre-hearing gamesmanship to get in or out of the small claims system. Non-commercial broadcasters will reap significant savings if they are always allowed to invoke the paper-only, small claims procedure. CBI would be willing to propose specific language if the committee is receptive to this general approach.

*F. Congress Should Mandate Separate Proceedings For Noncommercial Entities.*

CBI suggests that regardless of how Congress chooses to give non-commercial broadcasters/webcasters alternative methods for dispute resolution, it should amend H.R. 1417 to instruct the Office of Copyright to bifurcate or stage rate proceedings that set rates for both commercial and non-commercial broadcasters. Commercial broadcasters and non-commercial broadcasters are differently situated in everything from their social mission to their level of funding. The large, multi-party, multi-class proceedings that include parties ranging from very large publicly-held entertainment companies to one-person startups needlessly multiply the costs for all participants, disproportionately harming noncommercial entities such as educational and community broadcasters/webcasters. If commercial and non-commercial rates are set simultaneously, uncertainty among all parties will increase and the likelihood of settlement will decrease. Unified proceedings lead to this an inefficient outcome because the commercial broadcasters will seek to extend negotiations so as to get a deal closer to the non-commercial rate.

In the Small Webcaster Settlement Act of 2002 (SWSA), Congress implicitly recognized that the compulsory license rate for commercial broadcast must be set before the non-commercial license rate is established. SWSA empowered SoundExchange, the Receiving Agent designated by the CARP, to enter into royalty rate agreements with small commercial and all noncommercial webcasters. Properly, SWSA staggered the dates by which commercial and noncommercial had to enter into any such agreements. The deadline for agreement with commercial websites was December 15, 2002. The deadline for agreement with noncommercial webcasters is May 31, 2003. As with the SWSA, Congress should amend H.R. 1417 to provide for that the Copyright Office regularly hold bifurcated proceedings, with the commercial proceedings going first. The Copyright Office, however, in its haste to begin CARP DTRA 3, to expeditiously set the rates for webcasting for 2003–2004, set a schedule requiring all parties to inform the office whether or not a settlement had been reached by March 31, 2003 and requiring written direct cases by May 5, 2003. CBI had to bring this conflict to the Copyright Office's attention in a Motion to Bifurcate or Stage Proceedings. The Copyright Office and Library then recognized that "requiring submission of written direct cases before May 31, 2003 will compromise non-commercial webcasters' ability to take advantage of the period provided in the Act" and amended the precontroversy discovery schedule for noncommercial webcasters.

Order in Docket No. 2002-1 CARP DTRA 3, April 10, 2003 (provided with these comments). However, the Register of Copyrights found that “the Library does not have the authority to instruct the CARP as to how it will hear and consider the evidence presented by noncommercial webcasters.” Nevertheless, the Copyright Office encouraged the CARP “to schedule hearings and proceedings in this docket in such a manner as to minimize, as much as possible, the costs of participation that will be borne by noncommercial webcasters.” Congress could forestall such difficulties and improve fairness and efficiency by expressly mandating bifurcated, staged, or completely separate proceedings.

CBI notes that this staggered approach is already taken with respect to the licenses for musical works, in 17 U.S.C. 118. Congress has recognized, in that context, the unique characteristics of non-commercial entities. These characteristics are equally important in the digital transmission context. Separating the proceedings for commercial and noncommercial entities in the musical works copyright context has also had the salutary result of encouraging settlement. CBI would be pleased to provide draft language upon the request of the Subcommittee.

*G. Congress Should Change The Standard of Review to “Clearly Erroneous.”*

Congress should amend H.R. 1417 to change the standard of review of Copyright Royalty Judge decisions from “arbitrary and capricious” to a “clearly erroneous” standard. An arbitrary and capricious standard gives little room for judges to correct faulty rulings because royalty disputes produce such a large evidentiary record that there will almost invariably be the iota of evidence necessary to prevent a decision from being arbitrary and capricious, even if the reviewing court has the conviction that a mistake has been made and that the rate set is plainly wrong. Supporters of the arbitrary and capricious standard may claim that having a high standard of review is necessary to give gravitas to the Copyright Royalty Judge process. However, changing the standard of review will not diminish copyright users’ and copyright holders’ willingness to fully engage in the procedures outlined by H.R. 1417. Pragmatically, small webcasters and educational broadcasters/webcasters such as the ones represented by CBI barely have the wherewithal to participate in CARP under the small claims provisions, let alone pursue expensive appellate litigation. Consequently, setting a “clearly erroneous” standard of review will not cause our parties to seek an appeal of every copyright judge’s decision. Furthermore, H.R. 1417 already increases the independence and finality of Copyright Royalty Judge decisions by removing the intermediate review currently assigned to the Librarian of Congress. Because H.R. 1417 removes a layer of oversight, Congress has an obligation to enhance aggrieved parties’ ability to obtain redress from harmful erroneous decisions. Therefore, CBI requests that H.R. 1417 be amended to allow judicial review of Copyright Royalty Judge decisions on a clearly erroneous basis.

*H. Congress Should Limit The Recordkeeping and Reporting Requirements That The Copyright Office Can Impose on Statutory Licensees.*

As of this writing, the Copyright Office has still not issued final regulations on the recordkeeping and reporting requirements for licensees under 112(e) and 114 for the period from 1998–2002. Proposed and interim regulations, however, threaten to cost licensees more to comply with the regulations than they will owe in royalties. These threatened regulations disproportionately affect educational and community stations, which play more diverse and often older recordings, for which less information is often available. Burdensome recordkeeping requirements threaten to drive non-commercial educational broadcasters from the Internet.

Collection of some information sought to be reported is technologically impossible. Some of the information proposed to be included in the “Report of Use of Sound Recordings under Statutory License” is not available to streaming services, is not consistently available, or is redundant within the report itself. The proposed recordkeeping requirements are monumental when compared with the level of utilization. The cost of complying with these rules is unmistakably disproportionate to the royalty fees to be assessed.

The contrast is also striking between the burden imposed by the proposed recordkeeping regulations and existing Copyright Office recordkeeping requirements applied to royalties paid by educational broadcasters to performance rights organizations (PROs). Present recordkeeping requirements for performances by educational broadcasters are based on a sampling model, whereas the proposed Internet regulations are based on a census model.

Complying with the proposed recordkeeping requirements is not a simple matter of mining the requested information from an already-existing data set. Much of the information for each musical selection would need to be specifically collected in order to comply with these proposed rules. Educational stations programming typi-

cally represents wide ranges of musical genres. Many do not restrict playlists to a comparatively small selection of artists and styles of music, as is common practice with our commercial counterparts, but instead explore compositions from vast, diverse music libraries. Music libraries of educational radio stations are frequently comprised of literally tens of thousands of compositions on a variety of media. This programming diversity creates an additional demand, under proposed recordkeeping rules, that would discourage, if not eradicate, the ability of educational broadcasters to provide this non-subscription service through Internet retransmissions. Much of the massive recordkeeping required by these rules would have to be generated manually by a small staff of volunteer personnel, by most educational stations. Amending the statute to exempt all non-commercial educational broadcasters and webcasters or to limit the requirements would ensure equal, fair consideration under the law.

#### IV. CONCLUSION

H.R. 1417 goes a long way to improve the fairness and accuracy of determinations concerning statutory copyright royalties and licenses. The suggested amendments would improve this reform legislation, or in the alternative, could be the basis for related legislation to address defects in the current copyright act. CBI thanks the Members of the Subcommittee for their attention and would be pleased to provide additional views or proposed language now or later.



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In the Matter of	}	Docket No. 2002-1 CARP DTTRA3
Digital Performance Right in Sound	}	
Recordings and Ephemeral Recordings	}	Docket No. 2001-2 CARP DTNSRA

**ORDER**

This Order addresses four matters in the above-captioned proceeding. First, the Order addresses a joint motion filed by certain parties proposing rates and terms for the section 112 and 114 statutory licenses for certain services and requesting that the proposal be published by the Library under section 251.63(b) of the CARP rules, 37 C.F.R. Second, the Order addresses a motion filed by certain parties to consolidate this proceeding with a new proceeding to set rates and terms under the section 112 and 114 licenses for new subscription services. Third, the Order sets forth a new precontroversy discovery schedule for certain parties in this proceeding not covered by the joint proposal mentioned above. And fourth, the Order addresses a motion filed by Collegiate Broadcasters, Inc. to bifurcate this proceeding as between commercial and non-commercial entities making use of the section 112 and 114 licenses for eligible nonsubscription services.

**Joint Proposal**

On April 3, 2003, the Library of Congress received a joint proposal to set rates and terms for the section 112 and 114 statutory licenses for eligible nonsubscription and new subscription transmissions, other than simulcasts of AM and FM radio broadcast programming and transmissions made by certain noncommercial entities as identified in the joint proposal, from the Recording Industry Association of America, the American Federation of Musicians of the United States and Canada, the American Federation of Television and Radio Artists, and the Digital Media Association. The Library will soon publish in the Federal Register the terms of the joint proposal pursuant to section 251.63(b) of the CARP rules, which allows the Librarian to propose for adoption settled royalty rates and terms. Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTTRA3 (February 6, 2003) **IS VACATED** for services covered by the joint proposal.

**Motion to Consolidate**

On February 24, 2003, the Digital Media Association, America Online, Inc., Listen.com, Inc., MusicMatch, Inc., and Yahoo, Inc. filed a motion requesting the Library consolidate this proceeding with the CARP proceeding to establish section 112 and section 114 rates and terms for new subscription services, Docket No. 2001-2 CARP DTNSRA. The joint proposal, described above, covers both nonsubscription and new subscription services. If the proposal is adopted, the motion to consolidate is moot. Wherefore, **IT IS ORDERED** that the motion to consolidate **IS DISMISSED WITHOUT PREJUDICE** and may be refilled in the event that the joint proposal is not adopted and a CARP becomes necessary.

**New Precontroversy Discovery Schedule**

The Small Webcaster Settlement Act of 2002, Public Law No. 107-321, amended section 114(f) of the Copyright Act to provide, among other things, that noncommercial webcasters have until May 31, 2003, to negotiate settlements of rates and terms for the section 112 and 114 licenses for nonsubscription transmissions. The Small Webcaster Settlement Act defines a "noncommercial webcaster" as a webcaster that is:

- (I) exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

17 U.S.C. § 114(f)(5)(E)(i). The Library recognizes that requiring the submission of written direct cases before May 31 will compromise noncommercial webcasters' ability to take full advantage of the period provided in the Act.

Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS VACATED** for rates and terms for the use of sound recordings in eligible nonsubscription transmissions (17 U.S.C. §§ 112 & 114) for noncommercial webcasters.

**IT IS FURTHER ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS AMENDED** for noncommercial webcasters as follows:

<b>ACTION</b>	<b>DATE</b>
Filing of Written Direct Cases	June 30, 2003
Requests for Underlying Documents Related to Written Direct Cases	July 10, 2003
Responses to Requests for Underlying Documents	July 15, 2003
Completion of Document Production	July 21, 2003
Follow-up Requests for Underlying Documents	July 25, 2003
Responses to Follow-up Requests	July 30, 2003

Motions Related to Document Production	August 4, 2003
Production of Documents in Response to Follow-up Requests	August 7, 2003
All Other Motions, Petitions and Objections	August 13, 2003

The precontroversy discovery schedule announced in the February 6, 2003, Order remains unchanged for those parties who are not covered by the joint proposal and who are not noncommercial webcasters as defined in the Small Webcaster Settlement Act.

**Motion to Bifurcate**

On March 3, 2003, Collegiate Broadcasters, Inc. ("CBI") filed a motion to bifurcate this proceeding to permit noncommercial webcasters to present their written direct cases at a later date than other parties in this proceeding and to permit them to present their evidence and have it considered by the CARP separately from the other parties. CBI points out that allowing noncommercial webcasters to file later (they propose August 5, 2003) will allow such webcasters to fully negotiate settlements under the terms of the Small Webcaster Settlement Act.

Wherefore, **IT IS ORDERED** that the motion to bifurcate **IS GRANTED IN PART AND DENIED IN PART**. The motion is granted in that the Library has amended the precontroversy discovery schedule for noncommercial webcasters and is permitting them to submit their written direct cases at a later date (see above). This also means that precontroversy discovery on their written direct cases will be conducted separately from the other parties in this proceeding. However, the Library does not have the authority to instruct the CARP as to how it will hear and consider the evidence presented by noncommercial webcasters. Consequently, the Library is denying this aspect of CBI's motion. Nevertheless, we encourage the CARP to schedule hearings and proceedings in this docket in such a manner as to minimize, as much as possible, the costs of participation that will be borne by noncommercial webcasters.

**SO ORDERED**

Marybeth Peters  
Register of Copyrights

BY: \_\_\_\_\_

William J. Roberts, Jr.  
Senior Attorney

DATED: April 10, 2003

LETTER FROM JAMES CANNINGS



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**Our Own Performance Society, Inc. (OOPS)**

April 8, 2003

H.R. 1417

107<sup>th</sup> Congress  
Subcommittee on Courts, the Internet  
and Intellectual Property  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington D.C. 20515-6216

Dear Ms. McDonald:



On Tuesday April 1, 2003 the subcommittee on the Judiciary held a hearing in reference to H.R. 1417 ("Copyright Royalty Distribution Reform Act of 2003"). The said BILL is introduced to amend title 17 United States Code, to replace the Copyright Arbitration Royalty Panels with a Copyright Royalty Judge, and for other purposes. James Canning made a request to file his comments concerning the said BILL. You directed him to file his comments within a week.

At the above referenced hearing there were two debated issues which I will comment on. They are: -

1. The issue of number of Judges to the Copyright Arbitration Royalty Panels.
2. What the standard of judicial review should be for the Court of Appeals for the District of Columbia Circuit.

COMMENTS ON H.R.1417

I do support the point made by Mr. Remington who suggested that the BILL should allow for a panel of three Judges. One reason is that the introduced amendment seeks to replace the Copyright Arbitration Royalty Panels, which appointed three arbitrators. Except for costs this system has worked. The other reason is that three Judges will create a necessary balance of power necessary for fair hearings and as

such can minimize the added expense of appeals.

In reference to the second raised herein, it is my opinion the standard of judicial review of arbitrary and capricious should be the Administrative Procedure Act ("APA"). Because the APA specifies the standard of "arbitrary and capricious," it is troubling should this po



be so. Precedent has shown that absent a clear statutory directive to the court of review; the court becomes very creative in arriving at a standard of review. See National Association of Broadcasters v. the Librarian et al., 146 F.3d 907, 922 (D.C. Cir. 1998). The court states,

Where Congress has not prescribed the degrees of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an Administrative proceeding, **this court has felt at liberty to prescribe the standard.** \* \* \*  
(Emphasis added)

Moreover, an important general purpose of the APA was to “supplant a variety of pre-existing methods for obtaining review that differed from one agency to another.” See Cousins v. Dept. of Transportation, 880 F.2d 603, 606 (1<sup>st</sup> Cir.1989) (en Banc) (Breyer, J) See also Cousins, 880 F.2d at 606, quoting S. Rep. No. 442 76<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9-10 (1939) (relating to an earlier version of the legislation that became the APA) (“‘unfortunately,’ existing statutes d[id] not provide for a uniform method and scope of judicial review”); *cf.* H.R. Rep. No. 1980 79<sup>th</sup> Cong., 2d Sess. 16 (1946) (“the bill is meant to operate’ across the board’ in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See [the definitional provision now particular operation at 5 U.S.C. 551(1)]. Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment.”).

There is no doubt that H.R. 1417 embrace the APA for procedural purposes. The APA introduces the notion of agency. Section 803(a) specifically states: “The Copyright Judge shall conduct proceedings in accordance with subchapter 11 of chapter 5 of title 5, for the purpose of making determinations in carrying out the purpose set forth in section 801.” If the Copyright Judge determination is appealed the standard of judicial review of that determination must be based on whether or not according to subchapter 11 of chapter of 5 title 5 the Copyright Judge’s determination is “arbitrary and capricious.”

Therefore, the APA does apply to the standard of judicial review.

Therefore, it is respectfully requested that the language of H.R. 1417 be amended to specifically state that the standard of judicial review of “arbitrary and capricious” be that of the APA.

Thanking you for your cooperation in this matter.

Respectfully submitted

James Cannings  
Copyright Owner, Publisher, Songwriter  
Founder of OOPS

