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July 9, 2003

Our File Number 21068-00103-43

**By Hand Delivery**

Office of the Register of Copyrights  
ATTN: CARP Specialist  
(Tel: 202-707-8380)  
James Madison Memorial Building, Room LM-403  
101 Independence Avenue, SE  
Washington, DC 20540


Re: DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS  
**Docket No. 2002-1 CARP DTRA3**

Ladies and Gentlemen:

On behalf of National Federation of Community Broadcasters ("NFCB"), we hereby transmit an original and five copies of the "FINAL NFCB COMMENTS" in the above-referenced proceeding.

Should you have any questions regarding this matter, kindly communicate directly with this office.

Very truly yours,



John Crigler

Attachments  
JC/sdt  
DC\_DOCS:609356.1

Before the  
**United States Copyright Office**  
Library of Congress

In the Matter of )  
 )  
DIGITAL PERFORMANCE RIGHT IN SOUND ) Docket No. 2002-1 CARP DTRA3  
RECORDINGS AND EPHEMERAL RECORDINGS )

To: Copyright Office

**FINAL NFCB COMMENTS**

These Comments explain why the National Federation of Community Broadcasters (“NFCB”)<sup>1</sup> is not a party to the Settlement Agreement for sound recording royalties to be paid by small noncommercial webcasters.

On May 31, 2003 , Recording Industry Association of America, Inc. (“RIAA”), and its agent Sound Exchange, entered into a settlement agreement with American Council on Education, Collegiate Broadcasters, Inc., Intercollegiate Broadcasting System, Inc., Harvard Radio Broadcasting Co., Inc., and National Religious Broadcasters Music License Committee (the “SWSA Agreement”), which was published by the Copyright Office (the “Office”) in the Federal Register, 68 FED. REG. 35008-12 (June 11, 2003). Although NFCB participated in the negotiations, NFCB decided that it could not sign on to the SWSA Agreement, for reasons that it believes should be stated for the record.

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<sup>1</sup> NFCB’s members are noncommercial, educational, public radio stations as well as independent producers, Low Power FM stations, and other noncommercial organizations such as American Indian Radio on Satellite (“AIROS”) and Radio Bilingüe Satélite (“RBS”). Its members operate throughout the United States, from Alaska to Florida, from major markets to the smallest Native American reservation. Nearly half of its members are minority-owned, and 41% of its members serve rural communities.

## DISCUSSION

The Copyright Arbitration Royalty Panel (“CARP”) process does not work and must be scrapped or radically reformed. The current process raises barriers of complexity and cost that are insurmountable for small noncommercial entities. A CARP proceeding is funded by the participants. Because the proceedings involve an open-ended, highly contentious legal process, one who contemplates participation has no idea what fees will be incurred. For non-profit entities operating with marginal revenues raised largely by charitable donations, the prospect of becoming a party to such a proceeding is terrifying.

The process pits Davids against Goliaths, with entirely non-Biblical results. The negotiating parties are unequal in size, resources and ability to fund the costs of the proceeding. RIAA represents the record companies that dominate the music industry. As one of the most powerful of Washington trade associations, RIAA is able to pursue its legal interests with aggressive zeal. To RIAA, the cost of a CARP is simply a cost of doing business. Whatever those costs may be, they can be recovered through the rates established in the proceeding.<sup>2</sup>

By contrast, the noncommercial entities that must ultimately pay the royalties occupy no ramparts of political power, are not in the business of litigating intellectual property rights, and have no means of recouping the cost of a CARP proceeding. CARP proceedings are thus based on a legal process that discourages - and in many cases precludes - participation by the parties in interest.

No one speaks for the public. CARP proceedings are essentially private affairs among those with a financial stake in the music business. CARP proceedings are not designed to

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<sup>2</sup> Small Webcasters Settlement Act of 2002, 17 U.S.C. § 114(g)(3).

address any public interest, and no one advocates the needs of those most affected by the outcomes of any CARP, the listening public.

Can a legal process dominated by a single party, to the exclusion of those most affected by the outcome of the process, produce a fair result? Because NFCB believes the answer to that question is “NO!” NFCB did not become a party to the SWSA Agreement.

The principle of paying royalties for streaming music on the Internet is important both for artists and for webcasters. NFCB favors a royalty system that fairly compensates artists for their work. Without such a system, web sites and broadcast stations would have no musical content, and artists could not reach a mass audience. A royalty system that encourages the widest possible distribution of music on the Internet thus reflects a mutually beneficial relationship long recognized in terrestrial broadcasting. *See Digital Performance Right in Sound Recordings Act*, 17 U.S.C. § 114(d)(1)(A)&(B). NFCB also understands that the law currently requires broadcasters to pay royalties for the use of digital sound recordings on the Internet.<sup>3</sup>

NFCB nevertheless believes that the current process for determining what royalties should be paid is detrimental both to noncommercial webcasters and to artists. As the National Religious Broadcasters Music License Committee noted in the Clarifying Comments submitted June 30, 2003, the rates incorporated in the SWSA Agreement do not, “in any way, shape or form represent rates and terms that willing buyers and willing sellers would agree to in a freely competitive market.” The rates and terms were accepted by the parties to the SWSA Agreement not because the rates and terms were fairly negotiated, but because a CARP proceeding was not a realistic alternative. Shotgun weddings of this sort do not make happy marriages or good public policy.

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<sup>3</sup> *Public Performance of Sound Recordings: Definition of a Service*, 65 Fed. Reg. 77292 (December 11, 2000); *Bonneville International Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001), *appeal pending*, Case No. 01-3720 (3<sup>rd</sup> Cir.).

This is not to say that some aspects of the SWSA Agreement will not serve noncommercial webcasters, including many NFCB members, well. In particular, NFCB applauds the SWSA for providing an opportunity to opt out of the recordkeeping requirements for a fee of \$50 in 2003 and \$25 in 2004. At least for the immediate future, these provisions will significantly reduce the burden on small non-profit webcasters. SWSA Agreement at 3(d). Having flat fees available retroactively for the years 1998 to 2002, for the year 2003, and for the year 2004 (providing the licensee has fewer than 146,000 monthly Aggregate Tuning Hours (“ATH”)), is also beneficial. SWSA Agreement at 3.

But even the most beneficial aspects of the SWSA Agreement betray its arbitrariness. The SWS Agreement excuses noncommercial webcasters from recordkeeping requirements in exchange for the payment of a fee. In theory, those fees allow RIAA to conduct research that would approximate the information that would otherwise be provided by onerous recordkeeping requirements. Tellingly, however, the SWSA Agreement does not compel RIAA to spend the fees for such a purpose, or indeed for any purpose whatsoever. The fees are simply an arbitrary surcharge.

The SWSA Agreement has no termination date. If statutory rates and terms for noncommercial webcasters are not established by December 31, 2004, the rates and terms contained in the SWSA Agreement continue indefinitely, subject to “retroactive adjustment based on the final successor rates.” In short, RIAA is never seriously required to negotiate a successor agreement. It can continue to collect the rates set forth in the SWSA Agreement while demanding even higher rates in a future settlement agreement. The only alternatives available to noncommercial webcasters are not alternatives at all: noncommercial webcasters can accept what RIAA proposes or fund a CARP proceeding.

A serious problem arises when a webcaster has more than 200 average on-line listeners per hour in the year 2004. Under the SWSA Agreement, the flat rate in 2004 for webcasters with fewer than 200 average on-line listeners per hour (the hourly equivalent of 146,000 ATH per month), is \$500. For every performance over that threshold, the licensee must pay either (a) \$0.0002176 per performance, or (b) \$0.00251 per ATH for a music-formatted channel, or (c) \$0.0002 ATH for a news-talk-formatted channel. If a music station has an average hourly web listenership of 2500, that station could see its royalties increase from \$400 for the year 2003 flat rate to an exorbitant \$51,071.48 in the year 2004.<sup>4</sup> The implication is clear: noncommercial webcasting will be tolerated only as long as it does not attract a significant audience.

NFCB favors a tiered, flat rate system in which rates increase as listenership increases – within certain reasonable and predictable limits. By contrast, the system embodied in the SWSA Agreement substitutes a punitive, incremental rate for a flat rate once the 146,000 ATA threshold is crossed. Such a system cost punishes success by subjecting more highly trafficked web sites to open-ended liability. In such a system, the only way to control costs is to limit access to the web site.

The model embraced by RIAA and SoundExchange – where each additional listener comes at a cost – is detrimental to the growth of Internet radio. Noncommercial webcasters approaching the magic threshold of 146,000 ATH will be deterred from adding bandwidth to accommodate additional listeners, or from developing additional channels, for fear of incurring

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<sup>4</sup> Section 4 of the Noncommercial Agreement requires that in any month in 2004 that a Noncommercial Webcaster exceeds 146,000 ATH, it will pay the additional fees 45 days following the month in which the liability accrued. In the above example, \$4,214.29 extra would be due for just one month. The fees for listenership over the threshold are in addition to the annual minimum fee, which covers the 146,000 monthly ATH. An Assumed 2500 ATH times 24 hours, times 365 days, divided by 12 months, yields 1,825,000 monthly ATHs; subtracting 146,000 ATH and multiplying by \$0.00251 per ATH, equals \$4,214.29 per month; times 12 months, equals \$50,571.48, the \$500 minimum annual fee for 2004, brings the total to \$51,071.48 for the year.

exorbitant liability. The rate structure thus artificially restrains noncommercial broadcasting, so that higher returns can be reaped from commercial sites.

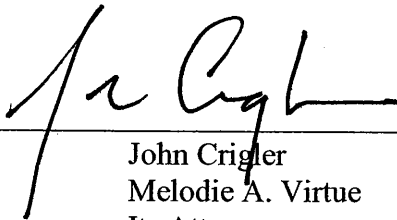
The same rate structure harms artists and the public. Noncommercial webcasting, like noncommercial broadcasting, promotes new talent and musicians not aired on commercial media. If noncommercial entities must restrict access to their web sites to avoid fees they cannot afford, the amount and diversity of music available to the public will be diminished.

For these reasons, NFCB could not in good conscience join in the SWSA Agreement, nor participate in a CARP proceeding. Accordingly, NFCB hereby withdraws its Notice of Intent to Participate from this case.

Respectfully submitted,

NATIONAL FEDERATION OF COMMUNITY BROADCASTERS

By:



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July 9, 2003

## CERTIFICATE OF SERVICE

The undersigned, an employee of Garvey, Schubert & Barer, hereby certifies that on July 9, 2003, the foregoing **FINAL NFCB COMMENTS** was served by Fedex overnight delivery unless otherwise indicated, to the following:

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