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Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

APR 17 2001

**GENERAL COUNSEL
OF COPYRIGHT**

In the Matter of) Determination of Statutory License Terms) and Rates for Certain Digital Subscription) Transmissions of Sound Recordings)	Docket No. 96-5 CARP-DSTRA
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**RIAA PETITION TO ESTABLISH TERMS
GOVERNING THE RIAA COLLECTIVE
AND TO SUSPEND CARP PROCEEDINGS**

Pursuant to 17 U.S.C. § 114(f)(1), 37 C.F.R. §251.63(b) and the remand order in *Recording Industry Association of America v. Librarian of Congress*, 176 F.3d 528 (D.C. Cir. 1999) ("*RIAA v. Librarian*"), the Recording Industry Association of America, Inc. ("*RIAA*") hereby requests that the Librarian of Congress ("*Librarian*") adopt the terms set forth in Attachment A hereto. RIAA further requests that the Copyright Office suspend the Copyright Arbitration Royalty Panel ("*CARP*"), convened by Copyright Office Order dated February 13, 2001, pending consideration of this Petition. Further support for this Petition is found in the accompanying Memorandum in Support of RIAA Petition to Establish Terms Governing the RIAA Collective.

RIAA, Digital Cable Radio Associates, now known as Music Choice, DMX Music, Inc. ("*DMX*"), and Muzak, L.P. ("*Muzak*"), are the only parties that have participated in these proceedings, which concern the adoption of rates and terms for the digital performance of sound recordings by subscription audio services under Section 114(d) of the Copyright Act, 17 U.S.C. § 114. By letter to the Copyright Office dated

February 26, 2001, Music Choice expressed its intention not to participate in the instant remand proceedings and stated that it does not object to RIAA's proposed terms. (The terms set forth in Attachment A are identical in all significant respects to the terms of RIAA's September 19, 2000 proposal referenced in Music Choice's February 26 letter). DMX and Muzak have authorized RIAA to state that they consent to the proposed terms set forth in Attachment A.

As explained more fully in the accompanying Memorandum, RIAA does not believe it is necessary or appropriate for the CARP to adopt any terms governing the RIAA collective, i.e. SoundExchange. Nevertheless, RIAA is submitting this Petition in order to avoid costly and time-consuming CARP proceedings. If the terms proposed by RIAA are adopted, there will be no need for a CARP proceeding. Thus, it is appropriate to suspend the CARP proceedings pending consideration of this Petition. Should the Librarian decide to proceed with the CARP proceedings, RIAA reserves its right to withdraw this Petition, in whole or in part.

Neither RIAA nor any of the other parties shall be deemed to have accepted as precedent or approved, accepted, agreed to, or consented to any principle underlying, or which may be asserted to underlie, this Petition.

Respectfully submitted,

RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.

By: 

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ATTACHMENT A

PRIVILEGED AND CONFIDENTIAL
FOR SETTLEMENT PURPOSES ONLY

PROPOSED TERMS GOVERNING RIAA COLLECTIVE

§ 260.2 Royalty fees for the digital performance of sound recordings.

...

(d) *Delete*

§ 260.3 Terms for making payment of royalty fees.

...

- (c) The *collective* [agent] designated to receive the royalty payments and the statements of account shall have the responsibility of making further distribution of these *payments* [fees] to *copyright owners of the exclusive right under 17 U.S.C. 106(6) whose sound recordings were performed by the services making the payments. Such copyright owners shall allocate their receipts* [the parties entitled to receive such payments] according to the provisions set forth at 17 U.S.C. 114(g)(2).
- (d) *Before making the distributions specified in paragraph (c) above, the designated collective* [the agent] may deduct reasonable costs incurred in the administration of the *collection and* distribution of the *royalty payments* [royalties], so long as the reasonable costs do not exceed the actual costs incurred by the *collective* [collecting entity].
- (e) *In determining the share of each service's royalty payments to be distributed to copyright owners who are nonmembers of the designated collective, the collective shall attach the same weight to each performance of a sound recording made by that service; provided, however, that the collective may adopt a distribution methodology that weights each such performance according to its relative value. In determining relative value, the collective may consider factors such as the actual or estimated number of persons who listened to each performance by the service. The collective shall inform the Register of Copyrights of*
- (1) the methodology for distributing royalty payments to nonmembers, and any amendment thereto, within 60 days after its adoption;*

(2) any written complaint that the collective receives from a nonmember concerning the distribution of royalty payments, within 60 days of receiving such written complaint; and

(3) the final disposition by the collective of any complaint specified by subparagraph (2) above, within 60 days of such disposition.

Nothing in these rules shall deprive any persons from pursuing any remedies they may have under law against the collective.

(f) Commencing June 1, 1998, and until such time as a new designation is made, the collective established by the Recording Industry Association of America, Inc., known as "SoundExchange," shall [be the agent receiving] receive the royalty payments and statements of account under this part 260. Membership in the collective shall be open, on a nondiscriminatory basis, to all copyright owners of the exclusive right under 17 U.S.C. 106. In determining whether to make a new designation, the Register of Copyrights may consider any written complaints concerning the collective; provided, however, that the collective shall receive timely notice of, and an opportunity to respond to, any such complaints.

§ 260.4 Confidential information and statements of account.

...

§ 260.5 Verification of statements of account.

...

§ 260.6 Verification of royalty payments.

- (a) General.** This section prescribes *procedures by which interested parties, as defined in paragraph (g) below, may verify the royalty payments made by the designated collective pursuant to Section 260.3(c) above* [general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C. 114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f).].
- (b) Frequency of verification.** Interested parties may conduct a single audit of the *collective* [entity] making the royalty payment during any given calendar year.
- (c) Notice of intent to audit.** Interested parties must [submit] *file with the Copyright Office* a notice of intent to audit the *collective* [entity] making the royalty payments. [with the Copyright Office which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of

the filing of the interested parties' notice]. Such *notice of intent* [notification of interest] shall be served at the same time on the *collective* [party] to be audited. ***Within 30 days of the filing of the notice of intent, the Copyright Office shall publish in the Federal Register a notice announcing such filing.***

- (d) ***Retention of records.*** The *interested* party requesting the verification procedure shall retain the report of the verification for a period of three years.
- (e) ***Acceptable verification procedure.*** An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all *interested* parties.
- (f) ***Costs of the verification procedure.*** The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more, in which case, the *collective* [entity] which made the underpayment shall bear the costs of the verification procedure.
- (g) ***Interested parties.*** For purposes of this section, interested parties are ***(1)*** those copyright owners who are ***nonmembers of the collective*** entitled to receive royalty payments pursuant to ***Section 260.3(c) above***; and ***(2)*** those persons who are entitled to receive a share of the copyright owners' receipts [fees] pursuant to 17 U.S.C. 114(g)(2), or their designated agents.

§ 260.7 Unknown copyright owners.

If the designated [collecting agent] *collective* is unable to identify or locate a copyright owner who is entitled to receive a royalty payment under this part, the *collective* [collecting agent] shall retain the required payment in a segregated trust account for a period of three years from the date of payment. No claim to such payment shall be valid after the expiration of the three year period. After the expiration of this period, the *collective* [collecting agent] may use the unclaimed funds to offset the cost of the administration of the collection and distribution of the royalty payments [fees].

Note: Portions in bold and italics represent new language; brackets indicate deleted material.