

**ORAL ARGUMENT REQUESTED**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Case No. 02-1244

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Consolidated with Case Nos.  
02-1246, 02-1247, 02-1248, 02-1249

BEETHOVEN.COM, et al.,  
*Petitioners,*

v.

THE LIBRARIAN OF CONGRESS,  
*Respondent.*

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On Petition to Review an Order of the Librarian of Congress

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**JOINT BRIEF FOR PETITIONERS  
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AMERICAN  
FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND  
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioners Recording Industry Association of America, Inc. (“RIAA”), the American Federation of Radio and Television Artists (“AFTRA”), and the American Federation of Musicians of the United States and Canada (“AFM”) (collectively “Copyright Owners and Performers”) certify as follows:

**A. PARTIES AND AMICI**

The parties that appeared before the Copyright Arbitration Royalty Panel (“CARP”) and the Librarian of Congress in the proceeding below were as follows:

RIAA, AFM, AFTRA, Association for Independent Music, BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corp., Radio Active Media Partners, Inc., RadioWave.com, Inc., Spinner Networks, Inc., XACT Radio Network, LLC, Susquehanna Radio Corp., Clear Channel Communications Inc., Entercom Communications Corp., Infinity Broadcasting Corp., Salem Communications Corp., National Religious Broadcasters Music License Committee (“NRBMLC”), National Public Radio and DMX/AEI Music Inc.<sup>1</sup>

Parties from the proceeding below appearing before this Court as Petitioners and Intervenor include RIAA, AFM, AFTRA, Live 365.com, Salem Communication Corp., and NRBMLC.

A number of entities that filed petitions for review in this consolidated appeal chose not to appear before the CARP or the Librarian of Congress (“Librarian”) in the proceeding below.

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<sup>1</sup> Parties that withdrew during the proceeding are not listed.

Those parties include: Beethoven.com, LLC, Educational Information Corp. (WCPE(FM)), Inetprogramming, Inc., Internet Radio Hawaii, and Wherever Radio.

**B. RULINGS UNDER REVIEW**

The ruling of the Librarian of Congress under review is published as Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule and Order, 67 Fed. Reg. 45239 (July 8, 2002), *aff'g in part and rev'g in part*, In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9 CARP DTRA 1 & 2 (unpublished) ([http://www.copyright.gov/carp/webcasting\\_rates.pdf](http://www.copyright.gov/carp/webcasting_rates.pdf)) (Feb. 20, 2002) (redacted version).

**C. RELATED CASES**

The ruling under review has not been considered previously by this or any other Court. Petitioners are not aware of any directly related cases currently before this or any other Court. The only case Petitioners are aware of that could have an impact on this case is *Bonneville Int'l Corp. v. Peters*, Appeal No. 01-3720, Civ. Action No. 01-408 (3d Cir.), in which a number of FCC-licensed terrestrial broadcasters who simulcast their broadcast streams over the Internet have appealed the Copyright Office's decision rejecting their claim that they are exempt from the payment of royalties under Section 114 of the Copyright Act. The Copyright Office's decision was upheld in *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001), and is now awaiting decision before the United States Court of Appeals for the Third Circuit.

**CORPORATE DISCLOSURE STATEMENTS**

The following corporate disclosure statements are submitted in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and the rules of this Court:

**The Recording Industry Association of America, Inc.**

RIAA is an incorporated, non-profit trade association whose member companies create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings produced and sold in the United States. RIAA does not have any parent company and is not publicly traded, nor does any publicly traded company have a 10 percent or greater interest in RIAA. However, several of RIAA's member companies and several of the record companies within the collective represented by RIAA are publicly traded or are affiliates of publicly traded companies. Upon request by the Court, RIAA will provide the names of those publicly traded companies.

**American Federation of Musicians of the United States and Canada**

AFM is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law of the State of California. It has no parent corporations and no stock owners.

**American Federation of Television and Radio Artists**

AFTRA is an unincorporated association. It has no parent corporation and no stock owners.

## TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
CORPORATE DISCLOSURE STATEMENTS .....	ii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	vi
GLOSSARY .....	viii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES .....	2
STATUTES INVOLVED.....	2
STANDARD OF REVIEW .....	3
STATEMENT OF THE CASE.....	4
A.    The Parties .....	5
B.    The Statutory Framework .....	7
C.    The Proceeding Below .....	8
1.    The Course of the Proceeding.....	8
2.    Benchmarks, Rates and Terms Proposed by the Parties .....	9
D.    The CARP Report.....	11
1.    CARP Decision on Benchmark .....	11
2.    CARP Decision on Rates .....	12
3.    CARP Decision on Terms.....	13
E.    The Librarian’s Decision .....	14
1.    Librarian’s Decision on Royalty Rates.....	15
2.    Librarian’s Decision on Terms .....	16
SUMMARY OF ARGUMENT .....	18

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
ARGUMENT .....	21
I. THE LIBRARIAN ARBITRARILY FAILED TO CONSIDER EVIDENCE OF AGREEMENTS AS BENCHMARKS AND CORROBORATING EVIDENCE OF RATES AGREED TO BY WILLING BUYERS AND WILLING SELLERS. ....	21
A. The Librarian Arbitrarily Accepted the CARP’s Complete Rejection of 115 Label Agreements .....	24
B. The Librarian Arbitrarily Rejected the 25 Non-Yahoo! Benchmark Agreements .....	27
II. THE LIBRARIAN ARBITRARILY UPHELD A \$500 MINIMUM FEE CONTRARY TO THE RECORD EVIDENCE. ....	31
III. THE LIBRARIAN IMPROPERLY ADOPTED A TERM CHANGING THE SCHEDULE FOR PAYMENTS IN ARREARS.....	32
A. The Term Established by the Librarian Is in Direct Conflict with the Payment Date Specified in the Copyright Act.....	33
B. The Delayed Payment Date for Past Due Royalties Has No Basis in the Evidentiary Record .....	34
CONCLUSION	
TABLE OF CONTENTS	
CERTIFICATE OF LENGTH	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES\***

<b><u>Cases:</u></b>	<b><u>Page(s)</u></b>
<i>Amusement and Music Operators Ass’n v. Copyright Royalty Tribunal</i> , 676 F.2d 1144 (7 <sup>th</sup> Cir. 1982).....	28
<i>Christian Broadcasting Network v. Copyright Royalty Tribunal</i> , 720 F.2d 1295 (D.C. Cir. 1983) .....	26
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972).....	21, 33
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992) .....	34
* <i>National Ass’n of Broadcasters v. Librarian of Congress</i> , 146 F.3d 907 (D.C. Cir. 1998) .....	<i>passim</i>
<i>National Cable Television Ass’n v. Copyright Royalty Tribunal</i> , 724 F.2d 176 (D.C. Cir. 1983) .....	30
* <i>Recording Industry Ass’n of Am., Inc. v. Librarian of Congress</i> , 176 F.3d 528 (D.C. Cir. 1999) .....	<i>passim</i>
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975) .....	33
<i>Weinstein v. Bradford</i> , 423 U.S. 147 (1975) .....	33
 <b><u>Statutes:</u></b>	
5 U.S.C. § 706.....	14
17 U.S.C. § 101.....	2, 4, 10
17 U.S.C. § 102.....	2, 4
17 U.S.C. § 106.....	2, 7
*17 U.S.C. § 112.....	<i>passim</i>
*17 U.S.C. § 114.....	<i>passim</i>
17 U.S.C. § 801.....	7
*17 U.S.C. § 802.....	<i>passim</i>

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\* Authorities upon which we chiefly rely are marked with asterisks.

**Administrative Decisions**

\*Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 63 Fed. Reg. 25394 (May 8, 1998)..... 9, 19, 22, 28

\*Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45240 (dated June 20, 2002, published July 8, 2002).....*passim*

\*In Re: Rate Setting for Digital Performance Right in Sound Recordings, and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel, No. 2000-9 CARP DTRA 1&2 (Feb. 20, 2002).....*passim*

**Other Authorities**

Digital Millennium Copyright Act, H.R. Conf. Rep. No. 105-796 (1998)..... 3

37 C.F.R. § 251 ..... 14

37 C.F.R. § 261 .....*passim*

## GLOSSARY

AFM	American Federation of Musicians of the United States and Canada
AFTRA	American Federation of Television and Radio Artists
AFIM	Association for Independent Music
Benchmark Agreements	Voluntary agreements negotiated between RIAA and 26 separate webcasters
Broadcasters	The FCC-licensed broadcasters that were parties to the CARP Proceeding: Susquehanna Radio Corp., Salem Communications Corp., Clear Channel Communications Inc., Entercom Communications Corp., Infinity Broadcasting Corp., and the stations of the National Religious Broadcasters Music License Committee
CARP	Copyright Arbitration Royalty Panel
CARP Report	In re: Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel, No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2003) (unpublished)
CRT	Copyright Royalty Tribunal
Copyright Owners and Performers	RIAA, AFM and AFTRA
DiMA	The Digital Media Association
DMCA	Digital Millennium Copyright Act
DPRA	Digital Performance Right in Sound Recordings Act of 1995
FCC	Federal Communications Commission
Librarian	Librarian of Congress
Librarian's Decision	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule and Order, 67 Fed. Reg. 45239 (dated June 20, 2002, published July 8, 2002)
Librarian's PES Decision	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings; Final Rule, 63 Fed. Reg. 45239 (May 8, 1998)
NAB	National Association of Broadcasters
NRBMLC	National Religious Broadcasters Music License Committee
Office	Copyright Office
Register	Register of Copyrights
RIAA	Recording Industry Association of America, Inc.

RIAA Negotiating Committee	Committee of record company executives that oversaw RIAA statutory license negotiations
RIAA Petition to Modify	Petition of the Copyright Owners and Performers to Modify the Report of the CARP, Docket No. 2000-9 CARP DTRA 1 & 2 (March 6, 2002)
RIAA PFOF	RIAA Proposed Findings of Fact and Conclusions of Law
Services	Statutory licensees that participated in CARP proceeding
SWSA	Small Webcaster Settlement Act of 2002
Webcasters	The Webcasters that were parties to the CARP proceeding: BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corp., Radio Active Media Partners, Inc., RadioWave.com, Inc., Spinner Networks, Inc., and XACT Radio Network, LLC
115 Label Agreements	115 record industry agreements for the digital performance and reproduction of sound recordings negotiated in the marketplace between willing buyers and willing sellers

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**STATEMENT OF JURISDICTION**

This case involves a petition for review of the Final Rule and Order of the Librarian of Congress in Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240 (July 8, 2002) (“Librarian’s Decision”). The Librarian’s Decision, issued pursuant to 17 U.S.C. §§ 114(f), 112(e) & 802(f) (1998), was a final Order that disposed of all claims with respect to all parties. On August 7, 2002, RIAA, AFM and AFTRA (collectively “Copyright Owners and Performers”) timely filed petitions for review under 17 U.S.C. § 802(g), which vests this Court with exclusive jurisdiction to review the Librarian’s Decision.

## **STATEMENT OF ISSUES**

1. Whether, in establishing a benchmark to set rates for the digital performance of sound recordings and the reproduction of ephemeral copies, the Librarian of Congress (“Librarian”) arbitrarily failed to consider record evidence of a) overwhelming corroboration of RIAA’s proposed benchmark in 115 record industry agreements for the digital performance and reproduction of sound recordings negotiated in the marketplace between willing buyers and willing sellers, outside of the statutory license (“115 Label Agreements”), and b) the rates and terms of 25 licensing agreements between RIAA and a wide variety of webcasters reached during and after the voluntary negotiation period mandated by Congress (“Benchmark Agreements”), which involved the *same buyers*, the *same sellers*, the *same rights*, the *same copyrighted works*, the *same time period* and the *same medium* as the marketplace negotiation that the Copyright Arbitration Royalty Panel (“CARP”) was charged by Congress to replicate?

2. Whether, in arbitrarily upholding the CARP’s decision to set the annual minimum fee for eligible nonsubscription services at only \$500 when the typical fee in the Benchmark Agreements was at least \$5,000, the Librarian acted contrary to both record evidence and congressional policy?

3. Whether, in establishing terms, the Librarian, without record basis, arbitrarily postponed the due date for royalty payments in arrears contrary to the payment date established in 17 U.S.C. § 114(f)(4)(C)?

## **STATUTES INVOLVED**

This case involves various provisions of Sections 101, 102, 106, 112 and 114 and Chapter 8 of the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. The case also involves the regulations established by the Librarian’s Decision and found at 37 C.F.R. § 261. *See* Statutory

Appendix. This appeal involves provisions of the Digital Millennium Copyright Act, H.R. Conf. Rep. No. 105-796 (1998) (“DMCA”), which amended the Copyright Act, particularly Section 114. The DMCA became law effective October 28, 1998. It was amended by the Small Webcaster Settlement Act of 2002 (“SWSA”).

### **STANDARD OF REVIEW**

This Court may “modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner.” 17 U.S.C. § 802(g). Although the Librarian’s decision is accorded “wide” deference, *National Ass’n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 924 (D.C. Cir. 1998) (“*NAB v. Librarian*”), “this Court is required to uphold an award only when the Librarian’s final award . . . bears a rational relationship to the record evidence, is plausibly explained, and is otherwise developed in a manner that does not plainly contravene applicable statutory provisions.” *Recording Industry Ass’n of Am., Inc. v. Librarian of Congress*, 176 F.3d 528, 535 (D.C. Cir. 1999) (“*RIAA v. Librarian*”), *citing NAB v. Librarian*, 146 F.3d at 924 (internal quotations omitted).

While this Court’s review is limited to the Librarian’s Decision, it can “set aside a royalty award . . . [if] the Librarian acted in an arbitrary manner in ratifying the Panel’s action.” *NAB v. Librarian*, 146 F.3d at 923 (internal quotations omitted). The Librarian “would plainly act in an arbitrary manner if, without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award,” *id.*, or “if he approved an award proposed by the Panel that unmistakably contravened applicable provisions of title 17 or if he himself transgressed unequivocal statutory commands.” *Id.* at 924.

This Court will find terms imposed by the Librarian arbitrary if the Librarian acts “without regard to the record.” *See RIAA v. Librarian*, 176 F.3d at 536 (finding imposition of terms on RIAA arbitrary). “It is not enough for the Librarian simply to offer a plausible explanation for his actions; there must be record evidence to support the terms imposed.” *Id.* at 535. Even a decision “based principally on sound judgment . . . must be properly raised before the arbitration panel so the parties have a fair opportunity to address it, and so that the Librarian has the benefit of the parties’ view before reaching a judgment.” *Id.* at 536.

## **STATEMENT OF THE CASE**

### **Introduction**

The proceeding that resulted in the Librarian’s Decision marks the first time in the history of United States copyright law that any administrative body determined the fair market value of a sound recording performance right. Sound recordings, which result from “the fixation of a series of musical, spoken, or other sounds,” 17 U.S.C. § 101, are a category of works eligible for copyright protection. 17 U.S.C. § 102(a)(7). In Section 114 of the Copyright Act, the DMCA established that eligible nonsubscription services (“webcasters”) have a statutory license for certain digital performances of copyrighted sound recordings. The DMCA also created a compulsory license in Section 112(e) for temporary or “ephemeral” copies needed to facilitate transmissions of sound recordings. Librarian’s Decision at 45240 (J.A.\_\_\_\_).

Sections 112(e) and 114 deprive sound recording copyright owners of a fundamental right of copyright ownership – the right to negotiate rates and terms with webcasters that wish to exploit their copyrighted sound recordings for commercial gain or other purposes.

Sections 112(e) and 114 compel copyright owners to license their works to any eligible nonsubscription service that files a form with the Copyright Office (“Office”) and abides by

certain statutory conditions. Once that form is filed, the webcaster has the right, without securing consent, to transmit over the Internet any of hundreds of thousands of copyrighted sound recordings, which cost billions of dollars to produce.

As some compensation for this broad statutory license, Sections 112(e) and 114 provide copyright owners and performing artists with one very important right – the right to receive the same compensation they would have received had they been able to negotiate with webcasters in a free marketplace absent a compulsory license. Section 114(f)(2)(B) requires the CARP to establish “rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”<sup>2</sup> Thus, the CARP, and the Librarian upon review, must determine the rates and terms that willing participants in the marketplace would have negotiated absent a compulsory license.

#### **A. The Parties**

The Copyright Owners and Performers participated in the proceeding below on behalf of the royalty recipients from the Section 112 and 114 statutory licenses. The royalties paid pursuant to Section 114 are shared equally between recording companies, as copyright owners, and recording artists. The royalties allocated to recording artists include 45 percent for featured artists, 2½ percent for non-featured musicians, and 2½ percent for non-featured vocalists. *See* 17 U.S.C. § 114(g)(2). The Section 112 royalties are payable only to sound recording copyright owners.

RIAA is the trade association that represents the U.S. recording industry. RIAA’s member record companies create, manufacture and/or distribute approximately 90 percent of all

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<sup>2</sup> Section 112(e)(4) contains essentially identical provisions regarding the statutory license for ephemeral copies.

legitimate sound recordings produced and sold in the United States. SoundExchange is an unincorporated division of RIAA<sup>3</sup> that administers the Section 112 and 114 statutory licenses on behalf of the vast majority of U.S. sound recording copyright owners and performers. The CARP designated SoundExchange as the exclusive agent to receive royalties and as a non-exclusive agent to distribute them. SoundExchange's Board of Directors is evenly divided between copyright owner and artist representatives. Librarian's Decision at 45266-67 (J.A.\_\_\_\_).

AFM represents over 110,000 musicians, including approximately 10,000 musicians who work in the recording industry, either as featured artists or background musicians.

AFTRA represents over 80,000 performers and newsmen who are employed in the news, entertainment, advertising and sound recording industries. AFTRA's membership includes vocalists on sound recordings, whether they appear as featured artists or background singers.

AFM and AFTRA are on the Board of Directors of SoundExchange and the Board of Trustees of the AFM and AFTRA Intellectual Property Rights Distribution Fund, which distributes statutory license proceeds to non-featured artists. *See* 17 U.S.C. §§ 114(g)(2)(B) & (C).

Several categories of eligible nonsubscription services (collectively, "Services") participated in the proceeding below. The Webcasters are Internet services that stream sound recordings and other content over the Internet, and the Broadcasters are commercial AM or FM radio stations, licensed by the Federal Communications Commission, that generally simulcast their over-the-air programming over the Internet. The Webcasters and Broadcasters that

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<sup>3</sup> It is expected that SoundExchange will be spun off into a separately incorporated entity.

participated in the proceeding below are identified above in the Certificate of Parties. *See also* CARP Report at 2-4 (J.A.\_\_\_\_).

## **B. The Statutory Framework**

The Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”) created a new exclusive right “to perform sound recordings publicly by means of a digital audio transmission.” 17 U.S.C. § 106(6). The DPRA limited this right in several respects, including by the creation of a statutory license for performances by certain subscription services. 17 U.S.C. § 114(f). Royalty fees for this statutory license are tied to policy objectives listed in Section 801(b)(1) of the Copyright Act. The DPRA also included procedures to facilitate voluntary negotiation of rates and terms for the Section 114 statutory license, and procedures for the Office to convene a CARP in the absence of voluntary agreement. CARP Report at 6-8 (J.A.\_\_\_\_).

In 1998, the DMCA amended the statutory license in Section 114, clarifying coverage of webcasters that make eligible nonsubscription transmissions. *See* 17 U.S.C. § 114(d)(2). As the *quid pro quo* for granting webcasters the privilege of statutory licensing, the DMCA mandated that webcasters pay royalty rates that meet the willing buyer/willing seller test – not rates that achieve the policy objectives set forth in Section 801(b)(1) – and thus directed the CARP to ensure that webcasters pay fair market value. The DMCA also provided that, in setting willing buyer/willing seller rates, the CARP “shall base its decision on economic . . . information presented by the parties,” and “may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated” for the statutory licenses. 17 U.S.C. § 114(f)(2)(B). The CARP is also instructed to establish a minimum fee for each type of eligible nonsubscription service. *Id.*

## C. The Proceeding Below

### 1. The Course of the Proceeding

These proceedings began on November 27, 1998, when the Librarian initiated a voluntary negotiation period for the period from October 28, 1998 through December 31, 2000. On January 13, 2000, the Librarian initiated a second six-month negotiation period covering January 1, 2001 through December 31, 2002. Librarian's Decision at 45241 (J.A.\_\_\_\_); *see* 17 U.S.C. §§ 112(e)(4) & 114(f)(2)(A).

RIAA, through its Negotiating Committee made up of record company executives with significant experience in negotiating new media and Internet deals, negotiated 26 agreements with webcasters during and subsequent to the voluntary negotiation periods. RIAA, however, was unable to negotiate an industry-wide settlement, or agreements with certain key webcasters, that likely would have avoided a CARP.<sup>4</sup> Accordingly, on July 23, 1999, RIAA petitioned the Office to commence the CARP process to determine Section 112 and 114 royalty rates and terms for the period October 28, 1998 through December 31, 2000. On August 28, 2000, RIAA filed a second petition for January 1, 2001 through December 31, 2002. CARP Report at 10-11 (J.A.\_\_\_\_).

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<sup>4</sup> This inability is not surprising, given the lack of incentive for statutory licensees to negotiate settlements. Statutory licensees could use the necessary sound recordings for their businesses and wait for the outcome of the CARP without ever having to negotiate with RIAA. In fact, by refusing to enter into voluntary agreements, statutory licensees could defer their statutory royalty payments for years, in effect receiving an interest-free loan from copyright owners and performers. Petition of the Copyright Owners and Performers to Modify the Report of the CARP, Docket No. 2000-9 CARP DTRA 1 & 2 (March 6, 2002) ("Petition to Modify") at 9 (J.A.\_\_\_\_).

Moreover, at the time RIAA was engaged in negotiations, the Digital Media Association ("DiMA"), the trade association for webcasters, began preparing for litigation and encouraging webcasters to join the DiMA "team" rather than to negotiate. Proposed Findings of Fact and Conclusions of Law ("RIAA PFOF") at ¶ 193; RIAA PFOF *citing* Exhibit Nos. 150 DP - 152 DP (J.A.\_\_\_\_).

In response, the Office directed interested parties to file notices of intent to participate in the CARP proceedings. AFM and AFTRA filed notices of intent to participate in both proceedings, as did many webcasters. On December 4, 2000, the Office consolidated the CARP proceedings for these two license periods. Librarian's Decision at 45241 (J.A.\_\_\_\_).

The parties filed written direct cases with witness statements and rate requests on April 11, 2001. The CARP conducted 41 days of direct and rebuttal case hearings, involving 75 witnesses, including seven of the 26 RIAA licensees. CARP Report at 11, 16, and 26 (J.A.\_\_\_\_).

## **2. Benchmarks, Rates and Terms Proposed by the Parties**

The Librarian has stated that the "first step" in establishing rates for a compulsory license is to consider as benchmarks "rates negotiated in comparable marketplace transactions." These benchmarks are considered "marketplace point[s] of reference, and as such need not be perfect in order to be considered in a rate setting proceeding." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 63 Fed. Reg. 25394, 25399 and 25404 (May 8, 1998) ("Librarian's PES Decision"). Thus, some differences between the market reflected in a proposed benchmark and the market being replicated can be accommodated by adjusting the rates reflected in the benchmark. However, fundamental differences between markets result in the rejection of a proposed benchmark. *Id.* at 25401-03.

Consistent with this precedent, the Copyright Owners and Performers structured their cases around establishing a marketplace benchmark that the CARP could use to set rates and terms. The Copyright Owners and Performers offered as benchmarks the voluntary agreements that RIAA negotiated with 26 webcasters (the "Benchmark Agreements") and demonstrated that

the Benchmark Agreements involved the *same buyers*, the *same sellers*, the *same rights*, the *same copyrighted works*, the *same time period* and the *same medium* as those in the marketplace negotiation that the CARP was required to replicate.

These Benchmark Agreements had annual minimum fees that ranged up to several hundred thousand dollars, and the most common minimum fee was \$5,000. *See* RIAA PFOF App. A at 16-22. RIAA agreed to an annual minimum fee of \$500 for only one small webcaster that relied primarily on non-RIAA member sound recordings.

RIAA introduced evidence corroborating the Benchmark Agreements, including 115 record label licensing agreements (the “115 Label Agreements”) that were the product of free-market negotiations (*i.e.*, negotiations unconstrained by a statutory license) between individual record companies and individual licensees (including many webcasters). These agreements licensed sound recording performance and reproduction rights for new media (*e.g.*, nonsubscription webcasting, subscription webcasting, promotional webcasting, and music videos) and traditional media (*e.g.*, compilations and soundtracks). The rates in these marketplace agreements demonstrated that the rates in the Benchmark Agreements represented the range of rates that willing buyers and willing sellers would have agreed to in the marketplace.

The Services offered as their benchmark a theoretical model prepared by an economist based on royalty payments for the over-the-air broadcast of musical works.<sup>5</sup> Librarian’s Decision at 45246. Thus, the Services’ benchmark involved a *different market*, *different copyrighted works*, *different sellers* and *different buyers* than the marketplace the CARP was

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<sup>5</sup> Musical works are the notes and lyrics of a song. They are a category of copyrighted works distinct from sound recordings. 17 U.S.C. § 101; Librarian’s Decision at 45246 n.18 (J.A. \_\_\_\_).

charged to replicate in setting rates; this model ultimately was rejected by both the CARP and the Librarian.

The rate requests of the Copyright Owners and Performers and the Services varied greatly. The proposal of the Copyright Owners and Performers included:

- A per performance royalty of 0.4 cents per transmission of a sound recording to a single listener;
- A \$5,000 per service annual minimum fee; and an
- Ephemeral license fee of 10 percent of the performance royalty per service.

The Services' proposal included:

- A per performance royalty of 0.014 cents per performance or a per hour fee of 0.021 cents;
- A \$250 per service annual minimum fee; and
- No additional license fee for ephemeral copies.

Librarian's Decision at 45241-42 (J.A.\_\_\_\_).

#### **D. The CARP Report**

The CARP submitted the CARP Report to the Librarian on February 20, 2002.

(J.A.\_\_\_\_.)

##### **1. CARP Decision on Benchmark**

Consistent with both the terms of the statute and prior precedent, the CARP found that the Benchmark Agreements reflected "the next closest approximation of the hypothetical market" that the CARP must replicate. CARP Report at 46 (J.A.\_\_\_\_). It also found that the Agreements "*generally* provide Section 114(f)(2) webcaster rates of 0.4 cents per performance." *Id.* at 47 (J.A.\_\_\_\_). Nevertheless, the CARP, by adopting an improperly narrow approach to "comparab[ility]" under Section 114(f)(2)(B), essentially refused to rely upon 25 of the

Benchmark Agreements as a benchmark, even though they contained negotiated rates for the Section 112 and 114 licenses. The CARP made no effort to adjust the rates in the 25 Benchmark Agreements to reflect perceived differences between those agreements and the market the CARP was required to replicate. Instead, the CARP essentially relied only on the agreement between RIAA and Yahoo! as a benchmark.

The CARP summarily dismissed the extensive corroborating economic evidence proffered by RIAA, including the 115 Label Agreements, which provided critical evidence of free market negotiations for the use of sound recordings in comparable circumstances. *Id.* at 60 (J.A.\_\_\_\_).<sup>6</sup> The CARP made no effort to adjust the Benchmark Agreements to address the range of rates reflected in the 115 Label Agreements.

## **2. CARP Decision on Rates**

The CARP used the Yahoo! agreement as a benchmark to set royalty rates that are considerably lower than the rates found in the other 25 Benchmark Agreements and in the 115 Label Agreements. For Internet-only webcasters, the CARP found that the range of rates in the Yahoo! agreement was between 0.083 cents and 0.2 cents per performance; it set the rate for such performances at the midpoint of 0.14 cents per performance. For Broadcasters that simulcast their over-the-air programming over the Internet, the CARP determined that the range of rates in the Yahoo! agreement was between 0.05 cents and 0.083 cents per performance, and adopted a rate at the midpoint of 0.07 cents per performance. CARP Report at 75-78

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<sup>6</sup> The CARP also rejected the Services' musical works/broadcast radio benchmark, finding that this "theoretical model" involved, among other things, different technologies, different buyers and sellers, different copyrights, and trading in different markets. CARP Report at 39-40 (J.A.\_\_\_\_).

(J.A.\_\_\_\_).<sup>7</sup> As noted, the CARP did not adjust these rates to reflect the considerably higher rates found in the 25 Benchmark Agreements or in the 115 Label Agreements.

The CARP set the annual minimum fee at \$500, which was much lower than the typical \$5,000 minimum fee found in the Benchmark Agreements and had only been granted to a single small webcaster. The CARP assumed that RIAA would not negotiate a minimum fee that failed to cover administrative costs and the value of access to all works up to the cost of the minimum fee. CARP Report at 95 (J.A.\_\_\_\_).

### **3. CARP Decision on Terms**

On February 1, 2002, the Copyright Owners and Performers and the Services each submitted proposed terms to the CARP, which had repeatedly requested proposed joint terms. Most of the proposed terms were identical, having been agreed upon by the parties through extensive negotiation and compromise. The CARP accepted all terms on which the parties had agreed, finding that this agreement met the statutory standard of representing the terms a willing buyer and willing seller would have negotiated in the marketplace. Among other things, the CARP appointed SoundExchange as the exclusive agent to receive royalties and as a non-exclusive agent to distribute them. CARP Report at 133 and n.80 (J.A.\_\_\_\_).

The CARP resolved the only two disputed issues by adopting additional definitions needed to implement its proposed rate structure, and by appointing SoundExchange as the Designated Agent for those copyright owners who failed to designate one. On the latter point, the CARP deferred to the strong preference of the Copyright Owners and Performers; the CARP found that they, rather than the Services, have a great interest in this designation. The CARP

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<sup>7</sup> Yahoo!'s webcasting service involved both Internet-only webcasts and retransmissions of over-the-air radio stations.

also found it “more appropriate” to select a not-for-profit than a for-profit entity to serve parties who have not indicated a preference. CARP Report at 132-34 (J.A.\_\_\_\_).

#### **E. The Librarian’s Decision**

The Copyright Act directs the Librarian, on the recommendation of the Register of Copyrights (“Register”), to review the CARP decision and either adopt it, or reject it and “after full examination of the record created in the arbitration proceeding . . . issue an order setting the royalty fee.” 17 U.S.C. § 802(f). The Librarian must adopt the CARP Report “unless . . . the determination is arbitrary or contrary to the applicable provisions of this title.” *Id.* The Librarian treats this standard as equivalent to the “arbitrary” standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Librarian’s Decision at 45242 (J.A.\_\_\_\_).

Pursuant to 37 C.F.R. § 251.55, the Copyright Owners and Performers and the Services filed petitions on March 6, 2002, asking the Librarian to modify the CARP recommendations. On May 21, 2001, the Librarian issued an order rejecting the CARP Report. Order in Docket No. 2000-9 CARP DTRA 1 & 2 (May 21, 2002) (J.A.\_\_\_\_). On June 20, 2002, the Office issued, and the Librarian adopted, the recommended “Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings.” (J.A.\_\_\_\_.)<sup>8</sup> The determination was published in the Federal Register as a final rule and order on July 8, 2002. 67 Fed. Reg. 45240 (July 8, 2002) (J.A.\_\_\_\_).<sup>9</sup>

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<sup>8</sup> Most of the “Librarian’s Decision” is written in the voice of the Register. At the conclusion of the Register’s recommendations, the Librarian adopts them as his final determination.

<sup>9</sup> Except where the Copyright Owners and Performers have cited material redacted from the public version of the Librarian’s Decision published in the Federal Register on July 8, 2002, citations are to that version rather than the confidential June 20, 2002 version.

## 1. Librarian's Decision on Royalty Rates

The Register recommended that the Librarian reject several CARP determinations and set the following lower rates:

- Instead of the proposed rate of 0.14 cents per performance for Internet-only transmissions and 0.07 cents per performance for radio retransmissions under the Section 114 license, the Librarian set a unitary rate of 0.07 cents per performance, and
- In place of the proposed ephemeral license fee of 9 percent of performance royalties, the Librarian set the rate at 8.8 percent.

Librarian's Decision at 45243 (J.A.\_\_\_\_).

The Register concluded that, although on its face the Yahoo! agreement contained different rates for Internet-only and radio retransmission webcasts, the CARP's recommendation adopting this dual rate structure was arbitrary. Instead, the Register developed a unitary rate by calculating "blended" rates for both types of webcasts. She treated the blended rates as the boundaries of a "zone of reasonableness," and took the midpoint of the zone as the unitary rate for all transmissions. Although the average of these two rates is 0.074 cents per performance, the Register arbitrarily rounded that figure to the nearest hundredth to reach a unitary rate of 0.07 cents per performance, a reduction of more than 5 percent. *Id.* at 45255 (J.A.\_\_\_\_).

The Register also recommended a lower rate for the ephemeral statutory license. The CARP determined that ephemeral rates in those of the 26 Benchmark Agreements that included such a rate fell in a range between 8.8 percent and 10 percent of the performance fees paid. It relied heavily on the 8.8 percent figure, derived from the Yahoo! agreement, but gave "very modest effect" to the other Benchmark Agreements with ephemeral rates of 10 percent by rounding the ephemeral rate to 9.0 percent. Despite the CARP's step-by-step description of its methodology, CARP Report at 99-104 (J.A.\_\_\_\_), the Register found that the CARP had not

offered a clear explanation for its reliance on the ephemeral rates from the non-Yahoo! Benchmark Agreements, and that “[c]onsidering those agreements is clearly arbitrary.” The Register recommended setting the ephemeral rate for Section 114 licensees at 8.8 percent. Librarian’s Decision at 45261-62 (J.A.\_\_\_\_).

In refusing to treat any of the Benchmark Agreements other than the Yahoo! agreement as a benchmark, the Register went beyond even the CARP’s limited use of these Agreements. Contrary to prior precedent, the Register made no effort to adjust the rates in those Agreements to address any perceived flaws. Similarly, the Register, in a single paragraph, summarily approved the CARP’s refusal to consider the 115 Label Agreements, despite the Copyright Act’s instruction to consider economic evidence of marketplace negotiations.

The Register nevertheless kept the minimum fee based on the \$500 minimum fee from a rejected Benchmark Agreement, citing the CARP’s finding that RIAA “would not agree to a minimum rate that would result in a loss” and would have required a higher fee had \$500 not covered administrative costs and the value of access. Librarian’s Decision at 45263 (J.A.\_\_\_\_). The Register failed to respond to the concerns of the Copyright Owners and Performers that 1) the low minimum fee fails to take into account the broad range of rates included in the licenses negotiated in the marketplace, where a \$5,000 minimum fee is typical, and 2) using an atypical, low fee will discourage copyright owners from accommodating special circumstances by agreeing to low minimum fees. *See id.* at 45263-64; *see also* Petition to Modify at 43-45.

## **2. Librarian’s Decision on Terms**

In considering terms, the Register first reviewed the few terms that the parties addressed in their petitions to modify the CARP proposal. The Register agreed with the CARP (and the Copyright Owners and Performers) that SoundExchange should be the designated agent for

unrepresented copyright owners. The Register also clarified the definition of “gross proceeds.” *Id.* at 45267-68 (J.A.\_\_\_\_).

Surprisingly, the Register then recommended multiple changes to terms that none of the parties to the proceeding had sought to have modified or added, in some cases disrupting aspects of the agreed terms that had been the subject of difficult negotiations and compromises among the parties. Among other actions, the Register recommended these terms, without citing any record support:

- That the deadline for making royalty payments in arrears covering the period from October 28, 1998 through September 1, 2002 (instead of July 8, 2002) be delayed for two months beyond the payment deadline provided in Section 114(f)(4)(C) of 45 days after the royalty rates were set; and
- That the effective date for the new royalty rates be delayed to September 1, 2002.

Librarian’s Decision at 45271 (J.A.\_\_\_\_).

In explaining her actions, the Register said the delayed payments would be useful to licensees who needed time to arrange royalty payments, *id.*, without acknowledging the glaring unfairness of forcing Copyright Owners and Performers, who do not receive interest on royalty payments in arrears, to wait an additional two months to get the royalty payments that they had in some cases been owed since October 28, 1998.

## SUMMARY OF ARGUMENT

1. The Copyright Act provides that, in setting 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,” the CARP must consider the economic and competitive information presented by the parties and may consider comparable “voluntary license agreements” for the statutory licenses at issue in this case. 17 U.S.C. §§ 112(e)(4) and 114(f)(2); CARP Report at 43. The central issue in this appeal is whether the extremely high standards the Librarian set for consideration of such evidence effectively reads these provisions out of the Copyright Act.

In this instance, the Librarian arbitrarily rejected the vast majority of the Benchmark Agreements that the RIAA introduced, together with all corroborating evidence, including 115 Label Agreements demonstrating that the rates reflected in the rejected Benchmark Agreements were an accurate reflection of rates that a willing buyer and a willing seller would negotiate in a free marketplace. The Librarian’s arbitrary action led him to adopt a range of so-called reasonable rates that was much lower than it would have been had the full complement of Benchmark Agreements and corroborating evidence been taken into account. As a result, he set royalty rates that were significantly lower than those that would have been negotiated in a marketplace not constrained by a statutory license.

The Librarian’s statement, in a footnote, summarily rejecting the 115 Label Agreements was particularly glaring, because the Librarian provided no substantive basis for his action. RIAA offered the 115 Label Agreements to show the rates that result when record labels – the “willing seller” in the hypothetical marketplace the CARP must replicate – enter into negotiations with individual licensees (including various webcasters) for the use of sound

recordings in marketplaces not constrained by a statutory license. The Librarian provided no rationale for rejecting this evidence out of hand. The CARP's explanation – in a single paragraph – that these agreements are not “useful benchmarks” because they involved “different rights” reflects a fundamental misunderstanding of RIAA's purpose in introducing this evidence. RIAA never suggested that these agreements encompassed the precise rights at issue in this case – although many involve the performance of sound recordings – or that they themselves should be viewed as benchmarks. Instead, the 115 Label Agreements are corroborating evidence of the rates in the Benchmark Agreements and thus support those rates as a benchmark. This is precisely the type of “economic [and] competitive . . . information” that the Copyright Act requires the CARP to consider.

Similarly, in rejecting 25 of the 26 Benchmark Agreements as benchmarks, the Librarian set a standard for “comparability” so high that it essentially closes the door on congressionally mandated voluntary negotiations with all but the largest webcasters who are part of billion-dollar companies. These 25 Agreements involved the same rights, negotiated in the same market. Consistent with prior precedent, *see* Librarian's PES Decision at 25409-10, the Librarian should have considered the rates in these comparable agreements as benchmarks, and adjusted those rates to reflect any significant disparities.

By selecting a single agreement out of RIAA's proposed benchmarks, while ignoring the entire range of rates and terms from comparable agreements, the Librarian arbitrarily read out of Section 114 both the congressional instruction for the parties to attempt to resolve disputes by negotiation and Congress's explicit reference to the use of voluntary agreements negotiated under the statutory license in establishing rates and terms. No party will have an incentive to

negotiate and make concessions to reach agreement if the only result is to have the lowest rates and least favorable terms selectively used against it in a CARP proceeding.

Had the Librarian considered both the 115 Label Agreements and all of the Benchmark Agreements, the resulting “zone of reasonableness” used to set the rates would have better reflected what “would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 114(f)(2)(B). Because the Librarian’s failure to consider this evidence was arbitrary, his decision must be reversed.

2. The Librarian arbitrarily upheld the CARP’s establishment of an annual minimum fee of \$500 for eligible nonsubscription services based on an atypically low fee in a single Benchmark Agreement (that the Librarian rejected as a benchmark for establishing performance royalties) when the evidence demonstrated that \$5,000 was the typical minimum fee over the range of such fees established in the Benchmark Agreements. This decision was contrary to past precedent on the selection of a rate within a range, as well as contrary to congressional policy encouraging voluntary negotiations. Copyright owners will be unwilling to tailor voluntary agreements to fit the needs of a particular licensee if such arrangements will be used against them in setting rates for the entire industry.

3. The Librarian arbitrarily adopted a term that delayed the date for licensees to make royalty payments in arrears, thus extending the period since October 28, 1998 during which licensees were permitted to exploit copyrighted sound recordings without paying royalties. This term, which amounts to a statutorily imposed interest-free loan, is improper for two reasons. First, it is contrary to an explicit statutory provision setting the date for payment of these royalties “on or before the twentieth day of the month next succeeding the month in which the

royalty fees are set.” 17 U.S.C. § 114(f)(4)(C).<sup>10</sup> Second, there is absolutely no mention of this term in the lengthy evidentiary record of the proceeding, let alone any evidence supporting its adoption. The term thus fails to meet the fundamental standard of “bear[ing] a rational relationship to the record evidence,” *NAB v. Librarian*, 146 F.3d at 924, and must be rejected.<sup>11</sup>

4. The Copyright Owners and Performers request that this Court (1) vacate the Librarian’s Decision insofar as it establishes royalty rates for eligible nonsubscription services, and remand that rate determination with instructions to give full consideration to the evidence in the record, including the Benchmark Agreements and the 115 Label Agreements; (2) vacate the Librarian’s \$500 annual minimum fee determination for eligible nonsubscription services and enter its own determination setting an annual minimum fee of \$5,000; and (3) issue a determination that the Librarian does not have the authority to delay royalty payments in arrears pursuant to 37 C.F.R. § 261.4(e).

## ARGUMENT

### **I. THE LIBRARIAN ARBITRARILY FAILED TO CONSIDER EVIDENCE OF AGREEMENTS AS BENCHMARKS AND CORROBORATING EVIDENCE OF RATES AGREED TO BY WILLING BUYERS AND WILLING SELLERS.**

Sections 114 and 112 direct the CARP to “establish 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.” In establishing rates and terms, the CARP “shall base its decision on economic, competitive and programming information presented by the parties” and

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<sup>10</sup> The fees were set when the Librarian’s Decision was published in the *Federal Register* on July 8, 2002. The payment date would therefore have been August 20. The Librarian extended that date to October 20, 2002.

<sup>11</sup> Although the delayed date for making royalty payments in arrears has now passed, this issue is “capable of repetition, yet evading review.” *See Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

“may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements,” which may be negotiated during a six-month voluntary negotiation period that must occur before any party may file a petition for a CARP. Section 114(f)(2)(A) & (B); *see also* Section 112 (e)(3) & (4) (containing similar language).

The Copyright Owners and Performers structured their cases to meet these requirements. In particular, they presented comparable marketplace agreements as benchmarks for the CARP to use in setting rates and terms. As the Librarian has said, benchmarks are “marketplace analogies” and “are the starting point for establishing an appropriate rate.” A benchmark “is a marketplace point of reference, and . . . need not be perfect to be considered in a rate setting proceeding . . . .” Although some proposed benchmarks may be so different that they must be rejected, it is appropriate to adjust an analogous proposed benchmark to reflect differences between the benchmark and the market for which the rate is being set. *See* Librarian’s PES Decision, at 25404.

Consistent with the statutory requirement for a voluntary negotiation period, 17 U.S.C. § 114(f)(2)(A), RIAA participated in negotiations with webcasters who were eligible for the statutory license and who chose to negotiate rather than wait for the CARP to set a rate. RIAA introduced the resulting agreements as its benchmark: 26 Benchmark Agreements for comparable services in comparable circumstances, as provided in Section 114(f)(1)(B). As corroborating evidence, RIAA introduced 115 Label Agreements, negotiated by individual record labels with various licensees, that shared many characteristics of the CARP’s hypothetical marketplace – negotiations in the free market for the same category of works being licensed

(sound recordings), the same licensors (record companies) and many of the same licensees (webcasters).

The CARP arbitrarily dismissed the 115 Label Agreements in a single paragraph that erroneously characterized those agreements as similar to the Service's theoretical benchmark model, which the CARP properly rejected as entirely different from the marketplace under consideration. The CARP chose to use as the benchmark only one of the 26 Benchmark Agreements, the Yahoo! agreement, and gave the others only very modest weight for limited purposes. The CARP made no effort to account for or adjust the 25 non-Yahoo! Benchmark Agreements in establishing the "zone of reasonableness" within which it set performance rates. The effect of this arbitrary disregard of 25 of the 26 Benchmark Agreements, and all 115 Label Agreements, was to depress the range of the zone of reasonableness by basing it on the single agreement that had the lowest rates, without adjustment to reflect the numerous agreements that demonstrated significantly higher marketplace rates.

In reviewing the CARP's already unduly restrictive benchmark analysis and refusing to rely on the 25 non-Yahoo! agreements even to the limited extent that the CARP had done so,<sup>12</sup> the Librarian adopted a standard of comparability so strict that it effectively eliminates from Section 114 the provision that permits consideration of comparable licensing agreements, including those negotiated during the voluntary negotiation period. Similarly, contrary to the statutory requirement to consider economic and competitive information related to the willing buyer/willing seller marketplace, the Librarian arbitrarily dismissed the 115 Label Agreements in

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<sup>12</sup> As discussed more fully below, the Librarian, although he rejected all of the 25 non-Yahoo! Benchmark Agreements for setting rates, relied upon one of those rejected agreements to establish the \$500 annual minimum fee for all Section 114 statutory licensees.

a brief, inaccurate footnote suggesting that all 115 Label Agreements were of a single type that is in fact one small subset of those agreements. The application of these extremely restrictive evidentiary standards depressed the upper end of the zone of reasonableness even below the already-low upper boundary of the zones established by the CARP. The rates adopted by the Librarian were well outside of any zone that could have been established through full consideration of the 115 Label Agreements and the 26 Benchmark Agreements.

While the CARP and the Librarian have discretion in weighing the evidence before them, that discretion is not without bounds, particularly when their actions have the effect of nullifying various provisions of the Copyright Act. This Court must send a clear message that the CARP and Librarian cannot eviscerate the rate-setting provisions of Section 112 and 114 established by Congress. The rate determination must be remanded so rates and minimum fees can be set at a level that accounts for *all* the record evidence, including the 115 Label Agreements and the 26 Benchmark Agreements.

**A. The Librarian Arbitrarily Accepted the CARP's Complete Rejection of 115 Label Agreements.**

In a single paragraph, with no analysis or discussion, the CARP rejected the 115 Label Agreements that RIAA offered as evidence of what comparable willing buyers and willing sellers would agree to as royalty rates for comparable rights in comparable markets. Although the Copyright Owners and Performers demonstrated the error in the CARP's treatment of these agreements in their petition to modify the CARP report, Petition to Modify at 36 (J.A.\_\_\_\_), the Librarian adopted the CARP's decision on this point in a single footnote, without substantive analysis. *See* Librarian's Decision at 45248 n.20 (J.A.\_\_\_\_) and June 20 Restricted version at 25 n.20 (J.A.\_\_\_\_) (contains unredacted version of footnote). In rejecting this critical evidence

“without explanation,” the Librarian “acted in an arbitrary manner in ratifying the Panel’s action.” *National Ass’n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (D.C. Cir. 1998) (internal quotations omitted).

This action is rendered more arbitrary because the Librarian appears to have misunderstood the scope and nature of the 115 Label Agreements. These agreements were by no means limited to the single type of agreement mentioned in his footnote – there are only 11 agreements of this type in the 115 Label Agreements.<sup>13</sup> Instead, as noted in the Petition to Modify, the Agreements involved various types of comparable streaming services on the Internet, including both nonsubscription and subscription webcasting, co-branded and promotional webcasting, music videos, audio clips, music lockers, digital jukeboxes, and concert streaming. *See* Petition to Modify at 35 (J.A.\_\_\_\_); RIAA PFOF at Exhibit A (chart of all industry licensing agreements in the record) and pp. 169 A&B (Figures 5 and 6) (J.A.\_\_\_\_). The Librarian’s mischaracterization of the 115 Label Agreements renders arbitrary his summary rejection of those Agreements, and his rate determinations should be remanded for consideration based on the true nature of the 115 Label Agreements.

The CARP’s dismissal of the 115 Label Agreements in a single paragraph, CARP Report at 71 (J.A.\_\_\_\_), is no better than the Librarian’s treatment of the question, and does not provide the Librarian with a basis to ignore this significant category of evidence. Perhaps most egregiously, the CARP opines with no further analysis that, “[f]or reasons similar to those enunciated in our critique of the Webcasters’ benchmark, the Panel rejects these agreements as

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<sup>13</sup> The Librarian also appears to have misunderstood the rights granted in this limited subset of agreements. Contrary to the statement in the footnote, the agreements in the subset do not involve making works, which the Librarian could understandably view as not comparable, but streaming works of that type on the Internet – an activity directly comparable to that covered by the statutory license.

useful benchmarks for the Section 114 rights at issue here.” The CARP goes on to say that the 115 Label Agreements involve “different rights” not subject to the statutory license. CARP Report at 71 (J.A.\_\_\_\_). The CARP is required to provide a rational analysis setting forth “specific reasons for its determinations,” *Christian Broadcasting Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1319 (D.C. Cir. 1983), yet the CARP failed to provide even a minimal explication of its puzzling comparison between the Services’ rejected musical works benchmark and the 115 Label Agreements. Its cursory treatment of a major category of evidence was improper, and acceptance of that treatment by the Librarian was arbitrary.

The CARP’s own analysis of the Services’ “theoretical construct” based on fees paid for over-the-air broadcasts of musical works demonstrates that the comparison with the 115 Label Agreements is thoroughly mistaken. The CARP identified a dozen differences between the Services’ theoretical model and the marketplace that the CARP must replicate. CARP Report at 39-40 (J.A.\_\_\_\_). These differences included different technologies (analog vs. digital); different copyrights (musical works vs. sound recordings); different sellers (musical works performing rights organizations vs. record companies); and different buyers (radio stations vs. webcasters). The CARP concluded that “this theoretical construct suffers serious deficiencies.” CARP Report at 40 (J.A.\_\_\_\_).<sup>14</sup>

None of these flaws applies to the 115 Label Agreements. Nor is there anything theoretical about them – the 115 Label Agreements are directly comparable to the agreements that would be reached in the hypothetical marketplace because they all involve the licensing for

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<sup>14</sup> Even the creator of the theoretical construct testified that “comparable marketplace agreements, if available, provide the best evidence of the prices to which willing buyers and willing sellers actually agree.” CARP Report at 43, *quoting* Tr. 6618 (Jaffe) (J.A.\_\_\_\_).

*digital* use of *sound recording* performance or reproduction rights by the *record companies* – the actual willing sellers in the CARP’s hypothetical marketplace. They also generally involve licensees who operate relatively new *Internet* services, including many webcasters.<sup>15</sup> While the CARP is correct that the 115 Label Agreements are not subject to the statutory license, that is exactly the point. These Agreements provide corroboration for RIAA’s benchmark analysis from rates reached in the actual marketplace, unconstrained by the statutory license.

By failing to consider the 115 Label Agreements, the Librarian arbitrarily neglected a tremendous amount of economic and competitive information that would have permitted him to make a far more informed decision on rates for use of copyrighted sound recordings. The rates in the 115 Label Agreements are significantly higher than those adopted by the Librarian based on the Yahoo! benchmark alone. Had the Librarian given proper consideration to the range of rates found in these Agreements, he would have established the “zone of reasonableness” at a higher level and set higher royalty rates.

**B. The Librarian Arbitrarily Rejected the 25 Non-Yahoo! Benchmark Agreements.**

The Librarian’s refusal to rely on any of the 25 non-Yahoo! Benchmark Agreements to establish the rate benchmark is contrary to explicit statutory language permitting consideration of precisely these types of voluntary agreements. 17 U.S.C. §§ 112 (e)(4) & 114(f)(2)(A). It is also

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<sup>15</sup> The 115 Label Agreements also provide verifiable examples of the substantial experience in negotiating comparable marketplace agreements that members of the RIAA Negotiating Committee (a committee comprised of record company executives that oversaw RIAA statutory license negotiations referred to as “RIAA Negotiating Committee”) brought to negotiation of the Benchmark Agreements. Contrary to the CARP’s assertion that the rates the Negotiating Committee wanted to achieve had “no economic validity,” CARP Report at 48 n.28 (J.A.\_\_\_\_), the record contains extensive, uncontroverted testimony from members of the RIAA Negotiating Committee demonstrating that those rates were based on years of experience negotiating licensing agreements for the use of sound recordings in new and traditional media, including webcasting. RIAA PFOF ¶¶ 117-23, 140 & 194-95 (J.A.\_\_\_\_).

contrary to the Librarian's past treatment of benchmarks from comparable marketplace transactions, which if found to be less than "perfect" have been adjusted, not rejected. *See* Librarian's PES Decision at 25396, 25399 (J.A.\_\_\_\_); *see also Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1157 (7th Cir. 1982) ("[t]he Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences").

Affirmance of the Librarian's refusal to consider these Benchmark Agreements would set such a high bar for comparability, and would make the requirements for a valid benchmark so narrow and arduous, that the provisions cited above would effectively be written out of the statute. The Agreements were rejected for various reasons that were typical of the webcasting industry as a whole, and the webcasters who participated in the proceeding in particular.<sup>16</sup> Librarian's Decision at 45248-49 (J.A.\_\_\_\_).

The Librarian went beyond even the CARP in limiting the types of agreements that could be used as benchmarks, acting arbitrarily in at least three separate ways. First, the Librarian ignored the CARP's decision about how much weight to give to these Benchmark Agreements in setting performance royalty rates. Librarian's Decision at 45255 (rejecting dual rate structure adopted by CARP and setting unitary rate with no use or even mention of the 25 non-Yahoo!

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<sup>16</sup> By a variety of measures the licensees in the 26 Benchmark Agreements looked very much like the group of webcasters who litigated in the proceeding. Both groups had members who 1) went out of business; 2) incurred relatively small amounts of royalty obligations; 3) were adjuncts to larger businesses that did more than webcasting; 4) wanted certainty over rates and terms; and 5) wanted favorable publicity from a relationship with record companies. RIAA PFOF at ¶¶ 268-309 (J.A.\_\_\_\_). Rejecting agreements for these reasons discards a large majority of the webcasting industry as irrelevant, will make copyright owners hesitate before negotiating with a company that might fail for fear of having the negotiated rates discredited or worse, used against them, and places too much emphasis on the fortuity of the facts that happen to exist at the time a proceeding takes place, despite rapid changes in a fluid, emerging industry. Petition to Modify at 33-34 (J.A.\_\_\_\_).

Benchmark Agreements) (J.A.\_\_\_\_). The CARP determined that the 25 non-Yahoo! Benchmark Agreements should be given “very little weight” in determining the rate that would be negotiated by a willing buyer and willing seller.<sup>17</sup> CARP Report at 47-60 (J.A.\_\_\_\_). This “minimal weight” was given effect in the selection of .083 cents, rather than a lower rate, as the lower boundary of the range of the rates the CARP established for Internet-only webcasters. CARP Report at 77 (J.A.\_\_\_\_). Although the CARP articulated a rationale for its award, CARP Report at 75-78, the Librarian ignored that rationale and arbitrarily failed to accord even the minimal weight given by the CARP to the higher rates in the 25 non-Yahoo! Benchmark Agreements. As a result, the Librarian established the “zone of reasonableness” for all Services at far too low a level and selected a rate at far too low a midpoint. Appropriate consideration of these Agreements, which generally had rates in the range of 0.4 cents per performance, would have resulted in a unitary rate that was at least at the level of the rate the CARP adopted for Internet-only webcasters.

Second, the Librarian mistakenly charged the CARP with a lack of “clear explanation,” and rejected as arbitrary the CARP’s decision to use the higher ephemeral rates found in eight of the 25 non-Yahoo! Benchmark Agreements to establish an ephemeral rate of 9 percent. In fact, the CARP’s detailed explanation of its process for reaching the ephemeral rate was arbitrarily

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<sup>17</sup> The Copyright Owners and Performers do not mean to suggest that they agree with the minimal weight the CARP gave to the 25 non-Yahoo! Benchmark Agreements or to the bifurcated rate structure that it adopted. As stated in their Petition to Modify (J.A.\_\_\_\_), the Copyright Owners and Performers believe that all of those agreements, negotiated pursuant to an express congressional directive, deserve more weight and support a significantly higher royalty rate for all Section 114 statutory licensees and all types of transmissions. But the level of consideration the CARP gave to those agreements stands in marked contrast to the Librarian’s failure to consider them.

ignored by the Librarian, who reduced the rate from 9 percent to 8.8 percent, the effective ephemeral rate from the Yahoo! agreement. Librarian’s Decision at 45262 (J.A.\_\_\_\_).

The CARP used the Yahoo! ephemeral rate of 8.8 percent and the rate of 10 percent from the other Benchmark Agreements to establish a “range” for the “rate most representative of that negotiated between willing buyers and willing sellers.” It relied principally on the Yahoo! ephemeral rate, but gave “modest effect” to eight other Benchmark Agreements to round the 8.8 percent Yahoo! rate up to 9 percent. CARP Report at 104 (J.A.\_\_\_\_). Establishing such a range or “zone of reasonableness” is consistent with this Court’s past decisions. *See, e.g., NAB v. Librarian*, 146 F.3d at 932-33 (affirming CARP rate set within “zone of reasonableness”); *see also National Cable Television Ass’n. v. Copyright Royalty Tribunal*, 724 F.2d 176, 187 (D.C. Cir. 1983) (using APA standard of review to affirm CRT decision selecting rate in “zone of reasonableness.”).

Third, the Librarian’s application of rounding was arbitrary. The Librarian rejected the CARP’s rounding of the ephemeral rate, Librarian’s Decision at 45262 (J.A.\_\_\_\_), reducing the ephemeral rate from 9 percent to 8.8 percent. At the same time, he rounded .074 to the nearest hundredth to adopt a rate of .07 at the midpoint of the “zone of reasonableness” for the performance of sound recordings. Librarian’s Decision at 45255 (J.A.\_\_\_\_). This “rounding” resulted in a reduction in the royalty rate paid to copyright owners and performers of more than 5 percent. The result of the decision on whether or not to round each rate is consistent only in setting the lower royalty rate for the Copyright Owners and Performers in each case.

**Conclusion:**

While the Librarian was correct to use the Yahoo! rates as benchmarks, the arbitrary manner in which he treated the remaining 25 Benchmark Agreements and the 115 Label

Agreements was reversible error. As a result of ignoring the extensive, additional, relevant record evidence of voluntary agreements, the Librarian adopted the artificially low rate of .07 cents per performance for transmission of copyrighted sound recordings. Librarian's Decision at 45255 (J.A.\_\_\_\_\_).

The Librarian's arbitrary decision to rely on this narrow benchmark must be vacated and remanded with instructions to consider 1) all the record evidence related to the Benchmark Agreements in establishing a rate benchmark and 2) all the corroborating evidence from the 115 Label Agreements negotiated in comparable marketplaces between willing buyers and willing sellers.

## **II. THE LIBRARIAN ARBITRARILY UPHELD A \$500 MINIMUM FEE CONTRARY TO THE RECORD EVIDENCE.**

Section 114 provides that the CARP shall set a minimum fee for each type of eligible nonsubscription service. 17 U.S.C. § 114(f)(2)(B). The Librarian, however, arbitrarily upheld the CARP's decision to set the annual minimum fee for all eligible nonsubscription services at \$500, despite extensive record support for an annual minimum fee of \$5,000. As set forth more fully in the Petition to Modify of Copyright Owners and Performers at 43-45 (J.A.\_\_\_\_\_) and RIAA PFOF at ¶¶ 230-234, the most typical minimum fee in the Benchmark Agreements was \$5,000. With the exception of one \$500 fee for a small webcaster in unique circumstances, the annual minimum fees ranged from \$5,000 to several hundred thousand dollars. *See* RIAA PFOF App. A. at 16-22 (listing minimum fees for Benchmark Agreements). The minimum fee should have been set within the range established by the evidence, or based on the fee in the Yahoo! agreement. Instead, the Librarian never addressed the evidence supporting a \$5,000 minimum fee or the CARP's failure to consider the entire range of fees. He simply accepted the CARP's

reliance on a single non-Yahoo! agreement for the \$500 annual minimum, although he concluded that it was arbitrary for the CARP to rely on the non-Yahoo! Benchmark Agreements to set performance rates. Librarian's Decision at 45262-63 (J.A.\_\_\_\_).

Setting the fee at the lowest of the minimum fees negotiated by RIAA, when the evidence demonstrates that the data point used to set the low fee is an outlier, is contrary to congressional policy encouraging voluntary agreements. Copyright owners and performers will be extremely reluctant to take the individual circumstances of a particular webcaster into account if any resulting low rate will be used to set fees or rates for the entire industry.

In accordance with the record evidence and the statutory authority of the Court, this Court should modify the decision of the Librarian and enter its own determination setting the annual minimum fee for eligible nonsubscription services at \$5,000. *See* 17 U.S.C. § 802(g).

### **III. THE LIBRARIAN IMPROPERLY ADOPTED A TERM CHANGING THE SCHEDULE FOR PAYMENTS IN ARREARS.**

Sections 112(e)(4) and 114(f)(2)(B) provide that the CARP shall determine reasonable terms to administer the statutory licenses for the performance and ephemeral reproduction of copyrighted sound recordings.<sup>18</sup> The Librarian, however, arbitrarily adopted a term that delayed the date on which royalty payments in arrears had to be paid. As adopted by the Librarian, 37 C.F.R. § 261.4 (e) states that “[a] licensee shall make any payments due under § 261.3 [which sets forth royalty fees] for transmissions made between October 28, 1998 and August 31, 2002, to the Receiving Agent by October 20, 2002.” Librarian's Decision at 45274 (J.A.\_\_\_\_). This provision, which was not contained in the terms adopted by the CARP (J.A.\_\_\_\_), both

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<sup>18</sup> This responsibility of the CARP is distinguished from the Librarian's responsibility to establish notice and recordkeeping requirements for the use of sound recordings. *Id.*

contradicts a specific statutory requirement in Section 114 of the Copyright Act and bears no relationship whatsoever to any record evidence.

**A. The Term Established by the Librarian Is in Direct Conflict with the Payment Date Specified in the Copyright Act.**

Section 114(f)(4)(C) states that “[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.” In this case, the royalty fees were set when the Librarian’s decision was published in the Federal Register on July 8, 2002. *See* 17 U.S.C. § 802(f) (“If the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of an additional 30-day period . . . issue an order *setting* the royalty fee.”) (emphasis added).

Thus, according to the explicit language of the statute, payment of all amounts due for transmissions made between October 28, 1998 and July 8, 2002 – the date the rates were set – was due on or before August 20, 2002. Instead, the Librarian arbitrarily ignored this express statutory provision and delayed the deadline for payments of amounts in arrears to October 20, 2002.<sup>19</sup> The Copyright Owners and Performers, who had been waiting to receive payment since 1998 and receive no interest on delayed payments, were forced to wait yet again.

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<sup>19</sup> The Copyright Owners and Performers recognize that the date for making these payments in arrears has passed. They nevertheless seek a ruling on this issue, which clearly is “capable of repetition, yet evading review.” *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972). Indeed, the same circumstances could recur for the 2003-04 royalty rate period. Because certain statutory licensees take the position that no rates are in place for 2003-04, royalty payments in arrears may have to be paid. When rates are set for the period (either by published agreement or in a CARP proceeding), the Librarian might choose once again to delay the deadline for those payments. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 400 (1975) (Review permitted where “the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.”); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (Review available when “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again”).

The Librarian appears to believe that he may delay the payment date established in Section 114 by setting a later effective date for his decision pursuant to Section 802(g) of the Copyright Act. However, Congress has established an explicit timetable for the provision on royalty payments in arrears to take effect, and the Librarian may not set an effective date that conflicts with this specific statutory provision. Even if the Register is correct in her view that the Librarian generally has discretion to set effective dates – and that is far from clear<sup>20</sup> – the more specific statutory provision setting the timetable for payments in arrears must take precedence when it applies, so that the Librarian can only set effective dates that are consistent with specific statutory payment dates. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“it is a commonplace of statutory construction that the specific governs the general”).

This postponement of the due date for payments in arrears “plainly contravene[s] applicable statutory provisions.” *Recording Indus. Ass’n of Am. v. Librarian of Congress*, 176 F.3d 528, 535 (D.C. Cir. 1999) (“*RIAA v. Librarian*”). This Court should direct the Librarian not to repeat this arbitrary action.

**B. The Delayed Payment Date for Past Due Royalties Has No Basis in the Evidentiary Record.**

The Librarian’s decision must “bear[] a rational relationship to the record evidence.” *NAB v. Librarian*, 146 F.3d at 924. Yet in this instance, the Librarian extended the due date for

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<sup>20</sup> The Copyright Owners and Performers believe that the Register is mistaken in her interpretation of Section 802(g), which provides that if no one appeals the Librarian’s decision to this Court within 30 days after publication in the Federal Register, the royalty fee “shall take effect as set forth in the decision.” This provision has nothing to do with setting an effective date, but follows from the statement in Section 802(f) that if the determination of the CARP is not adopted, the Librarian shall “issue an order setting the royalty fee” and cause “the decision of the Librarian (including [such] an order . . .)” to be published in the Federal Register. Thus, the better reading of 802(g) in the context of 802(f) is that fees *as set forth in the Librarian’s decision* shall be definitely established, and cannot be changed, upon the expiration of a thirty-day period if no party petitions this Court for review.

payments in arrears by two months, despite the fact that the record was devoid of *any* evidence on the subject.<sup>21</sup> In fact, the Librarian cites no record evidence to support his ruling on royalty payments in arrears. Librarian’s Decision at 45271 (J.A.\_\_\_\_\_).

Adopting a term without record support, no matter what type of explanation is offered, ignores this Court’s admonition to the Librarian in *RIAA v. Librarian*, 176 F.3d at 535, that “[i]t is not enough for the Librarian simply to offer a plausible explanation for his actions; there must be record evidence to support the terms imposed.” In that case, this Court found arbitrary the imposition of terms on RIAA that had not been considered by the CARP and were not supported by record evidence. *Id.* at 536. Yet despite that warning, the Librarian has once again proposed a term unsupported by record evidence.

Given this Court’s clear instruction to the Librarian that terms cannot be adopted without consideration by the CARP, the Register’s attempts to explain her recommendation to delay the full payment of arrears for two months are unavailing. In any event, that explanation – that the Librarian has delayed the effective date for past decisions – is flawed because it confuses the issues of the establishment of an effective date for the rates and the issue of payment of royalty fees in arrears. After an initial citation to the Section 114 provision for payments in arrears, the Register’s entire discussion leading to the postponement of the date for that payment involves a

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<sup>21</sup> The only mention during the proceeding of a possible term for royalty payments in arrears was made prior to the start of the 180-day arbitration period, when the Copyright Owners and Performers moved to strike a provision changing the schedule for the royalty payments in arrears from the proposed terms of the Webcasters and Broadcasters because it conflicted with 37 C.F.R. § 261.4(e). Motion to Strike Provisions From Rate Request of Broadcasters and Webcasters in Docket No. 2000-9 CARP DTRA 1 & 2 (May 25, 2001) (J.A.\_\_\_\_\_). The Office granted the motion to strike, reiterating that “the statute requires payment of arrears to take place by the twentieth day of the month following the month in which the royalty fees are set.” Order in Docket No. 2000-9 CARP DTRA 1 & 2 (June 25, 2001) (J.A.\_\_\_\_\_). It is inexplicable that the Register subsequently advised the Librarian to establish a term that conflicts with the exact same statutory provision.

description of the Librarian's asserted ability to set an effective date for payment of royalties pursuant to 17 U.S.C. § 802(g), an entirely different statutory provision. Librarian's Decision at 45271 (J.A.\_\_\_\_). As noted above, any such imputed authority, if it exists in this case, gives way before the specific statutory provision setting a deadline for the royalty payments in arrears.

The Register's explanation has a flaw that goes to fundamental fairness. It considers "the impact of the rate on the Licensees and the administrative burden on the Office,"<sup>22</sup> Librarian's Decision at 45271 (J.A.\_\_\_\_), but completely fails to consider the impact of the provision on copyright owners and performers. In giving the Licensees "additional time to make the initial payment and any necessary adjustments in their business operations to meet their copyright obligation," the Register and Librarian failed to consider that the Licensees had been on notice of their obligations since 1998 – almost *four years* before the Librarian's Decision was published – and had been able to build their businesses by performing copyrighted sound recordings for that entire period without paying a cent in royalties. Copyright owners and performers have in effect provided the Licensees with an interest-free loan for years, and in many cases never received payment from entities that went out of business. Yet the Librarian failed to acknowledge their pressing need to obtain payment in order to support their creative efforts to make more music available to the public. The Register's analysis justifying a delay of payments in arrears fails to rise to the level of a "plausible explanation," although as this Court has said, even that would not

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<sup>22</sup> Beyond the stated need for time to develop and issue notice and recordkeeping regulations before the effective date, Librarian's Decision at 45271 (J.A.\_\_\_\_), the nature of this burden on the Office is unclear. And the delay in the deadline for payment of royalties in arrears was unavailing in allowing the Office to issue regulations; in fact, the Office has not yet issued those regulations even though the notice and recordkeeping proceeding started on February 7, 2002.

be enough to justify the adoption of this term in the absence of any record evidence or opportunity for the parties to offer their views. *RIAA v. Librarian*, 176 F.3d at 535.

This Court should order the Librarian to refrain in the future from adopting terms that delay royalty payments in arrears beyond the period specified in Section 114.

### **CONCLUSION**

For the reasons set forth above, the Copyright Owners and Performers ask this Court to (1) vacate the Librarian's Decision insofar as it establishes royalty rates for eligible nonsubscription services, and remand that rate determination with instructions to give full consideration to the evidence in the record, including the Benchmark Agreements and the 115 Label Agreements; (2) vacate the Librarian's \$500 annual minimum fee determination for eligible nonsubscription services and enter its own determination setting an annual minimum fee of \$5,000; and (3) issue a determination that the Librarian does not have the authority to delay royalty payments in arrears pursuant to 37 C.F.R. § 261.4 (e).

Respectfully submitted,

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# **STATUTORY ADDENDUM**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
17 U.S.C. § 112.....	002
17 U.S.C. § 114.....	009
17 U.S.C. § 802.....	028

**17 U.S.C. § 112**

**17 U.S.C. § 114**

**17 U.S.C. § 802**

**CERTIFICATE OF LENGTH**

In accordance with D.C. Circuit Rule 28(d)(1) and this Court's Order of April 4, 2003, I hereby certify that this brief (exclusive of Certificate as to Parties, Rulings, and Related Cases, Table of Contents, Table of Authorities, Glossary, Appendix and Certificate of Service) does not exceed 10,000 words.

\_\_\_\_\_  
Michele J. Woods

**CERTIFICATE OF SERVICE**

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\* Due to problems with U.S. mail delivery to government offices, the brief has been served on June 20 by email, and two copies will be hand-delivered on June 23.