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Before the
UNITED STATES COPYRIGHT OFFICE
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Washington, D.C. 20540

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COUNSEL
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In the Matter of	)	
	)	
Adjustment of Rates and Terms for the Digital Performance Right in Sound Recordings	)	**Docket No. 2001-1**
	)	**CARP DSTRA2**
Notice and Recordkeeping for Use of Sound Recordings Under Statutory License.	)	
	)	
	)	**Docket No. RM 2002-1**
	)	

NOTIFICATION OF SETTLEMENT AND MOTION TO SUSPEND CARP PROCEEDING AND NOTICE AND RECORDKEEPING RULEMAKING APPLICABLE TO PREEXISTING SDARS

Pursuant to 17 U.S.C. §§ 112, 114 and 803, XM Satellite Radio Inc. ("XM"), Sirius Satellite Radio Inc. ("Sirius") (each a "Service"), and SoundExchange ("SoundExchange"), currently an unincorporated division of the Recording Industry Association of America, Inc., hereby notify the Copyright Office of their settlement, by private, confidential, non-precedential agreement, of the rates and terms at issue in the above-captioned Copyright Arbitration Royalty Panel ("CARP") proceeding. The American Federation of Television and Radio Artists ("AFTRA") and the American Federation of Musicians ("AFM") join in this notice and motion. (All the foregoing entities are referred to collectively herein as the "Moving Parties.") The Moving Parties constitute all the parties in the above-captioned CARP proceeding. Consistent with the public policy in favor of negotiated resolution of sound recording performance royalty rates and terms, and to avoid the costs and burdens of a lengthy CARP proceeding, the Moving

Parties hereby request that the Copyright Office suspend the CARP proceeding, subject to re-opening only in the limited circumstance described below.

In addition, the settlement agreement includes an agreement on interim notice and recordkeeping requirements applicable to the pre-existing satellite digital audio radio services ("SDARS") for the period through December 31, 2006. Given that agreement, adoption of regulations by the Copyright Office for notice and recordkeeping by SDARS should be deferred until at least January 1, 2007, when any proposed regulations can be assessed in light of experience under the agreement. Thus, the Moving Parties ask the Copyright Office to suspend its notice and recordkeeping rulemaking for SDARS at least through the period December 31, 2006, unless and until the filing of a petition to re-open the rulemaking with respect to the period after December 31, 2006 by an interested party, or unless SoundExchange petitions for the adoption of the notice and recordkeeping provisions of the Agreement for the period through December 31, 2006 in the limited circumstance described below.

Background

The Copyright Office inaugurated the above-captioned CARP proceeding in January 2001 through publication of a Federal Register Notice initiating a voluntary 6-month negotiation period to determine the rates and terms for the statutory licenses covering the preexisting satellite digital audio radio services ("SDARS"). *See* 17 U.S.C. §114(j)(10).[1] Because the 6-month

[1] Also included in that proceeding were the rates and terms for the statutory licenses applicable to the three identified preexisting subscription services defined in 17 U.S.C. § 114(j)(11). The proceeding for those services was effectively severed from this proceeding pursuant to a separate settlement agreement and Copyright Office order. *See Joint Petition for Adjustment of Rates and Terms for Statutory Licenses Applicable to Preexisting Subscription Services and Request for Immediate Stay of Obligation to File Direct Cases,* filed by the Recording Industry Association of America, Inc., *et al.*, on January 17, 2003; Notice, 68 Fed. Reg. 4,744 (Jan. 30, 2003); Copyright Office Order of March 14, 2003 (denying notice of intent to participate filed by Royalty Logic, Inc.). That agreement, and

negotiation period expired without an agreement, RIAA/SoundExchange, XM and Sirius filed petitions requesting that the Librarian convene a CARP to establish the rates and terms for the SDARS license. The only parties filing timely notices of intent to participate in this proceeding with respect to the SDARS license were the Moving Parties. Currently, by a Copyright Office Order of March 17, 2003, the filing date for written direct cases is March 24, 2003.

The Copyright Office also is currently considering comments filed by SoundExchange, AFM, AFTRA and the Services in connection with its notice and recordkeeping rulemaking in Docket RM 2002-1.

The Agreement

On March 18, 2003, XM, Sirius and SoundExchange executed an SDARS Performance and Ephemeral License Agreement ("Agreement") establishing the rates and terms under which SoundExchange grants to each of XM and Sirius a nonexclusive license to:

- Perform publicly the sound recordings with respect to which SoundExchange has the right to license performances, within the scope of the statutory license under 17 U.S.C. §114, by means of digital audio transmission through each licensee's service; and

- Reproduce ephemeral phonorecords of the sound recordings with respect to which SoundExchange has the right to license reproductions, within the scope of the statutory license under 17 U.S.C. §112(e), but such license is granted solely in order to facilitate digital audio transmissions through each licensee's service.

These licenses are granted for the period commencing with each Service's launch of a commercial SDARS and continuing through December 31, 2006.

The parties to the Agreement intend that it shall be non-precedential, and shall not be admissible as evidence or otherwise taken into account in any administrative, judicial, or other

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those services, are not involved in this motion, which relates to the settlement of the remaining controversy in this proceeding.

government proceeding, except that it may be taken into account to a limited degree in one circumstance relating to the bankruptcy of a Service, as described below. The parties would not have entered into the Agreement but for this understanding.

Nonmembers

While SoundExchange cannot bind copyright owners that are not members of SoundExchange, the parties recognized that no nonmember has previously expressed any intention of participating in a CARP proceeding with the SDARS, and there is no basis in the regulations of the Copyright Office for them to do so now. In addition, such copyright owners likely would find it cost prohibitive to participate in a CARP proceeding now even if they were permitted to do so.

Notwithstanding this, the parties wished to provide a mechanism for nonmembers to receive payment to the extent that the Services may use their works. Toward that end, SoundExchange has voluntarily agreed, and the Agreement requires SoundExchange, to use commercially reasonable efforts to pay the applicable share of the royalties it receives to copyright owners and performers that are not members of SoundExchange who identify themselves to SoundExchange and provide the necessary payment information. Payments to nonmembers will be based upon SoundExchange's generally applicable distribution procedures and the performance information reported by the Services, and will be in accordance with the percentages set forth in 17 U.S.C. § 114(g)(2). SoundExchange's distribution methodology does not discriminate between members and nonmembers, and SoundExchange has agreed that its methodology will not discriminate between members and nonmembers under the Agreement. The Services would not have entered into the Agreement but for this payment understanding.

Acceptance of Settlement and Suspension of CARP

Sections 114 (f)(3) and 112(e)(5) of the Copyright Act expressly provide that voluntarily negotiated license agreements between copyright owners of sound recordings and entities performing sound recordings take precedence over any corresponding determination by a CARP or the Librarian. 17 U.S.C. §§112(e)(5), 114(f)(3). In conjunction with the voluntary negotiation periods mandated by the statute, *see* 17 U.S.C. §§112(e)(3), 114(f)(1)(A) and 114(f)(2)(A), these sections are evidence of a public policy in support of settlements between interested parties in lieu of lengthy and costly administrative proceedings. Settlements provide timely certainty in business arrangements and conserve the resources of both the interested parties and the Copyright Office by removing the need to incur the costs, delays and other burdens attendant to a CARP proceeding.

All parties to the CARP have settled all issues between them concerning the rates and terms for the 2001-2006 statutory license for preexisting SDARS, so there is no remaining controversy. Accordingly, the Moving Parties request that the Copyright Office suspend Docket No. 2001-1 CARP DSTRA2, subject to re-opening that proceeding only in the one circumstance described below. Requiring the continuation of the CARP in light of the Agreement would be wasteful and unnecessary, especially given that the Agreement will, by statute, control as against any prescribed rates or terms. 17 U.S.C. § 114(f)(3). It would also be impracticable, since there would be no parties to litigate or to pay the fees of the arbitration panel.

Conditional Re-Opening of CARP

SoundExchange and the Services have discussed the possibility that, in the event a Service files for protection under the Bankruptcy Code, the Service might seek to reject the Agreement pursuant to that Code and, instead rely upon the statutory licenses of 17 U.S.C.

§§112(e) and 114 in the absence of an applicable statutory rate. The Moving Parties take no position on whether a Service could in fact do so, and do not mean to imply that such an event is likely. However, the Moving Parties agree that, if a Licensee rejects this Agreement in bankruptcy, certain payments to be made under the Agreement, and the related terms of the Agreement, should be the statutory rates and terms for the period 2001 through 2006. The Moving Parties also agree that those rates and terms should continue in effect on an interim basis, subject to retroactive adjustment for the period commencing January 1, 2007, until rates and terms are adopted for the post 2006 period. Accordingly, the Moving Parties hereby request that, if a Service rejects this Agreement in bankruptcy, upon the entry of the bankruptcy court's rejection order, the Librarian of Congress re-open Docket No. 2001 CARP DSTRA2 for the limited purpose of adopting these rates and terms by regulation pursuant to 37 C.F.R. § 251.63(b). The Moving Parties request that such adoption, like the Agreement itself, be on a non-precedential basis. To facilitate the Librarian's adoption of these rates and terms, if a Service rejects this Agreement in bankruptcy, SoundExchange will deliver to the Copyright Office a copy of the bankruptcy court's rejection order and a copy of an agreed-upon document setting forth the proposed rates and terms. The Parties hereby waive any objection to the adoption of the proposed rates and terms in this circumstance.

Notice and Recordkeeping

As noted above, the Agreement includes agreement, on a non-precedential interim basis, concerning notice and recordkeeping requirements for the preexisting SDARS for the period through December 31, 2006. Given that agreement, adoption of regulations by the Copyright Office for SDARS notice and recordkeeping should be deferred until any proposed regulations can be assessed in light of experience under the agreement. A decision by the Copyright Office

in Docket No. RM 2002-1 adopting different requirements for SDARS before January 1, 2007 would either be pointless – in that the parties have already agreed to the necessary reporting between them – or cause substantial hardship to the parties if it imposed duplicative or inconsistent reporting obligations. Accordingly, the Moving Parties request that the Copyright Office suspend its rulemaking proceeding in Docket No. RM 2002-1 to the extent applicable to the preexisting SDARS, at least through December 31, 2006, unless SoundExchange petitions for the adoption of the notice and recordkeeping provisions of the Agreement for the period through December 31, 2006 in the case of a bankruptcy rejection as described above. We respectfully suggest that the Copyright Office can revisit the issues in that proceeding for the period after December 31, 2006 if it is appropriate at that time upon the petition of one of the Services, SoundExchange or any other party in interest. Nothing in the Agreement is intended to prejudice the rights of any person or entity to propose that the Office adopt different rules applicable after December 31, 2006.

Conclusion

For the foregoing reasons, the Moving Parties respectfully request that the Copyright Office suspend the above-captioned CARP docket and suspend the above-captioned rulemaking to the extent applicable to SDARS, both subject to re-opening for the conditions described herein.

Respectfully submitted,

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March 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notification of Settlement and Motion to Suspend CARP Proceeding and Notice and Recordkeeping Rulemaking Applicable to Preexisting SDARS was served on March 19, 2003 by facsimile transmission and first class U.S. Mail, postage-prepaid, on the following individuals named in the Service List for Docket No. 2001-1 CARP DSTRA-2 published by the Copyright Office on January 8, 2002:

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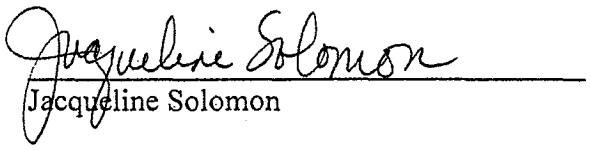

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