

## Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings

The Librarian of Congress has accepted the recommendation of the Register of Copyrights and rejected the rates and terms recommended by a Copyright Arbitration Royalty Panel (CARP) for the statutory license for eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions ("webcasting") under [17 U.S.C. §114](#) and the statutory license to make ephemeral recordings of sound recordings for use of sound recordings under [17 U.S.C. §112](#). In place of the rates recommended by the CARP (see [CARP recommendations](#)), the Librarian has adopted the following rates:

Type of DMCA – Compliant Service	Performance Fee (per performance) (Section 114)		Ephemeral License Fee (Section 112)	
	Proposed by CARP	Adopted by Librarian	Proposed by CARP	Adopted by Librarian
Simultaneous Internet retransmission of over-the-air AM or FM radio broadcasts ("Radio retransmission") (whether transmitted by a broadcaster or a webcaster).	0.07¢			
All other Internet transmissions ("Internet-only" transmissions) (whether transmitted by a broadcaster or a webcaster)	0.14¢	0.07¢		
			9% of Performance	<b>8.8% of Performance</b>

<b>Non-CPB, Non-Commercial Broadcaster</b>			Fees Due	Fees Due
<b>Simultaneous Internet retransmissions of over-the-air AM or FM broadcasts.</b>	0.02¢			
<b>Archived programming subsequently transmitted over the Internet, substituted programming and up to 2 side channels</b>	0.05¢	<b>0.02¢</b>		
<b>Transmissions on any other side channels.</b>	0.14¢	<b>0.07¢</b>		
<b>Business Establishment Service</b> (background music service) [17 U.S.C. § 114(d)(1)(C)(iv)]	<b>Statutorily Exempt</b>		<b>10% of Gross Proceeds</b>	
<b>Minimum Fee for Business Establishment Service</b> (background music service)			\$500	<b>\$10,000</b>
<b>Combined Minimum Fee for all other Services (Performance and Ephemeral)</b>	<b>\$500 for each licensee</b>			

The most significant difference between the CARP's determination and the Librarian's decision is that the Librarian has abandoned the CARP's two-tiered rate structure of 0.14¢ per performance for "Internet-only" transmissions and 0.07¢ for each retransmission of a performance in an AM/FM radio broadcast, and has decided that the rate of 0.07¢ will apply to both types of transmission. Some of the rates for noncommercial broadcasters have also been decreased,

and the fee webcasters and broadcasters must pay for the making of ephemeral recordings has been reduced from 9% of the performance fees to 8.8%. The minimum payment for business establishment services was increased to \$10,000.

## **Background**

In 1998, Congress amended [Section 114](#) of the Copyright Act to provide that eligible nonsubscription services may publicly perform copyrighted sound recordings by means of digital audio transmissions if they comply with the terms of a new statutory license. Transmissions eligible for the statutory license must be noninteractive and the primary purpose of the service must be to provide audio or other entertainment programming to the public. A number of additional requirements are set forth in Section 114. Services that have taken advantage of this statutory license have included webcasters and broadcasters who use the Internet to retransmit the over-the-air broadcasts of AM or FM radio stations or who transmit their own original programming which includes copyrighted sound recordings of musical works.

[Section 112](#) of the Copyright Act provides that a service transmitting performances of sound recordings under the Section 114 statutory license may make "ephemeral copies" of the phonorecords on which the sound recordings appear in order to facilitate their transmission. Server copies that are used by webcasters in the transmission of performances of sound recordings fall within this license. In addition to webcasters and other services operating under the Section 114 statutory license, services that transmit performances to business establishments for use on the business establishments' premises -- and whose transmissions are exempt from liability -- may take advantage of the Section 112 statutory license to make ephemeral recordings that facilitate their transmissions of sound recordings.

Sections 112 and 114 require that rates for the statutory licenses for webcasting and for ephemeral recordings must be the rates that most clearly represent the rates that would have been negotiated in the marketplace between a willing buyer and a willing seller.

If the services using the statutory license and the copyright owners (usually record companies) of the sound recordings cannot agree on the royalty rates for the license, the rates and some of the terms of the license are to be established by the Librarian of Congress, who is required to convene a Copyright Arbitration Royalty Panel (CARP) composed of three independent arbitrators. The arbitrators conduct hearings, reviewing testimony and evidence from copyright owners and services using the statutory license, and deliver a report to the Librarian with their recommended rates and terms. The Register of Copyrights reviews that report and recommends to the Librarian whether to adopt the rates and terms set forth in the CARP's report, or to reject those rates and terms and adopt new rates and terms based on a full examination of the record

created in the CARP proceeding.

A CARP to determine the rates and terms for these two statutory licenses commenced on July 30, 2000. The primary task of the CARP, and ultimately of the Librarian, was to determine what were the marketplace rates for the transmission of performances of sound recordings on the Internet during the relevant time period, from October 28, 1998 through December 31, 2002, and what were the marketplace rates for making ephemeral recordings of sound recordings for the same period.

## **The CARP Report**

On February 20, 2002, the CARP delivered [its report](#). It concluded that the best evidence of the marketplace rate for webcasting, including both retransmissions of radio broadcast signals and transmissions of original programming produced for Internet transmission, could be found in an agreement reached by the Recording Industry Association of America (RIAA), representing record companies that own the copyrights in the vast majority of sound recordings subject to the statutory license, and Yahoo!, Inc., a major webcaster and Internet retransmitter of broadcast radio signals. Based on the rates established in that agreement, the CARP concluded that a service transmitting original Internet programming ("Internet-only" services) should pay a royalty of 0.14¢ for each performance that it transmits, and that a service retransmitting a radio broadcast should pay a royalty of 0.07¢ for each performance that it retransmits. For purposes of paying the royalty, each transmission to each individual recipient is counted as one performance. Noncommercial broadcasters who are not affiliated with the Corporation for Public Broadcasting (which negotiated a separate royalty rate in a private agreement) would pay a royalty of 0.02¢ for each simultaneous Internet retransmission of an over-the-air AM or FM broadcast, 0.05¢ for other Internet retransmissions, including up to two side channels of programming consistent with the station's public broadcasting mission, and 0.14¢ for transmissions on any other side channels.

The CARP also concluded that for each service operating under the Section 114 performance license, the Section 112 ephemeral license royalty should be 9% of the Section 114 performance royalty fees paid by that service. For a service transmitting performances of sound recordings to business establishments (for which no performance royalty is required), the ephemeral license royalty would be 10% of the service's gross proceeds from the use of musical programs which are attributable to copyrighted recordings. The CARP also concluded that all services should be subject to a minimum fee of \$500.

## **The Register's Recommendation and the Librarian's Decision**

On the recommendation of the Register of Copyrights, the [Librarian rejected](#) the CARP's determination because significant portions of it were arbitrary or

contrary to law. Where the Librarian could not accept the CARP's recommendations, he has adopted rates and terms that are justified based on the evidence presented in the CARP proceeding and the requirements of the law. Otherwise, he has adopted the CARP's reasoning and recommendations.

The Librarian is required to accept the CARP's determination unless he concludes that the determination is arbitrary or contrary to the applicable provisions of the copyright law. When aspects of the CARP's determination are found to be arbitrary or contrary to law, the Librarian may substitute his own judgment for that of the CARP, but he will still give deference to those aspects of the CARP's determination which were not arbitrary or contrary to law. Applying those principles, the Librarian accepted the CARP's conclusion that the RIAA/Yahoo! agreement represented the best evidence of what rates would have been negotiated in the marketplace between a willing buyer and a willing seller for a license to engage in webcasting of radio retransmissions and Internet-only transmissions.

The Librarian also accepted much of the CARP's analysis of how the RIAA/Yahoo! agreement demonstrated the marketplace rate for webcasting rates. The RIAA/Yahoo! agreement provided for a lump sum payment of \$1.25 million for the first 1.5 billion transmissions, and the CARP calculated a "blended" per performance rate of 0.083¢ per performance by dividing the amount of the lump sum payment by the number of performances for which it was made. For transmissions after the first 1.5 billion transmissions, the RIAA/Yahoo! agreement provided for two per-performance rates: a relatively high rate for Internet-only performances and a relatively low rate for radio retransmissions. The CARP concluded that the Internet-only rates in the agreement were artificially high and the rates for radio retransmissions were artificially low, a result of RIAA's strategy to agree to a lower rate for radio retransmissions in order to obtain the higher rate for Internet-only transmissions. The CARP found that RIAA wanted the high Internet-only transmission rate in order to establish a precedent to present to the CARP in support of the rate for Internet-only transmissions that it had been seeking in negotiations with other parties and that it was seeking in the CARP proceeding. The CARP also concluded that Yahoo! was indifferent as to the disparity between the agreed-upon Internet-only and radio retransmission rates, because it was only concerned about the overall effective rate that it would pay. It concluded that in negotiating the agreement, Yahoo! perceived the high Internet-only and low radio retransmission rates "as tantamount to a blended rate of 0.065¢." The Librarian accepted these findings.

However, the Librarian concluded that the CARP misinterpreted some aspects of the RIAA/Yahoo! agreement. One of the most significant errors by the CARP was its conclusion that the parties must have agreed that radio retransmissions have a tremendous positive promotional impact on sales of phonorecords – an impact that it did not find Internet-only transmissions have – and that this promotional impact explained the decision of RIAA and Yahoo! to set a higher rate for Internet-only transmissions. In fact, both the broadcasters (who

benefitted from the CARP's conclusion regarding promotional value) and RIAA agree that there was no evidence in the record to support the conclusion that RIAA and Yahoo! considered and made adjustments for promotional value for radio retransmissions. The Librarian agreed with the Register of Copyrights that the CARP's conclusion about promotional value was arbitrary and was not supported by the evidence in the record, which provided no basis for concluding that radio retransmissions provide a promotional value that Internet-only transmissions do not provide.

The CARP recommended different rates for Internet-only transmissions and radio retransmissions, justifying the disparity in rates based on the alleged promotional value it found in radio retransmissions but not in Internet-only transmissions. Because this premise was arbitrary, the Librarian rejected the two-tiered royalty structure recommended by the CARP. In light of the CARP's conclusion that Yahoo! cared only about obtaining the lowest overall effective rate for all of its transmissions, and in light of his rejection of the CARP's rationale for setting a rate for Internet-only transmissions that was twice as high as the rate for radio retransmissions, the Librarian concluded that the evidence relating to the Yahoo! agreement leads to the conclusion that there is no basis for making any distinction between the marketplace rate for Internet-only transmissions and the marketplace rate for radio retransmissions.

The Register of Copyrights calculated that the effective (or blended) royalty rate that RIAA and Yahoo! had agreed upon for all transmissions was 0.074¢ for each performance transmitted by Yahoo! to each individual recipient (i.e., Yahoo! effectively incurred an obligation to pay 0.074¢ for each recipient of each transmission of a performance of a sound recording). This rate was arrived at by calculating the average of (1) the blended rate 0.083¢ for the first 1.5 billion transmissions, and (2) the blended rate of 0.065¢ that the CARP found Yahoo! had perceived it was paying for all subsequent transmissions. Thus, the final unitary rate of 0.074¢ captured the actual value of the performances made in the initial period and the projected value of the transmissions for the remainder of the license period, falling within the range of agreed values for those transmissions.

The Librarian accepted 0.07¢ per performance, the effective or blended rate rounded to the nearest hundredth, as the rate for Internet-only transmissions and accepted it in principle as the rate for radio retransmissions. However, the law contains an exemption for all radio retransmissions that occur within a 150-mile radius of the originating radio station's broadcast transmitter. Section 114 (d)(1)(B)(I) of the Copyright Act provides that any retransmission of a nonsubscription broadcast transmission is exempt from the sound recording copyright owner's digital performance right, provided that "the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter."

Because the applicability of this provision to radio retransmissions made over

the Internet might necessitate a further adjustment to the unitary rate, it was imperative that a determination be made regarding the applicability of the exemption to radio retransmissions. If a radio retransmission over the internet is exempt as long as the recipient is no further than 150 miles from the radio broadcast transmitter, then the 0.07¢ per performance royalty would have to be reduced to 0.02 ¢ per performance for radio retransmissions, in order to take into account the evidence in the record that approximately 70% of radio retransmissions are made to recipients within the 150-mile radius. Consequently, the Register issued an Order on June 5, 2002, asking the parties to brief the legal question. After carefully considering the statutory language in section 114(d)(1)(B)(I), its relationship to the section 112 of the Copyright Act, and the parties' submissions, the Register concluded that the exemption does not apply to radio retransmissions over the Internet, and the Librarian accepted the Register's conclusion.

Section 112(e) provides a statutory license for the making of ephemeral recordings only to Licensees operating under the section 114 license or to Business Service Establishments entitled to transmit to the public a performance of a sound recording under an express statutory exemption. Had Congress meant the exemption for radio retransmissions made within a 150-mile radius of the radio station's broadcast transmitter to extend to radio retransmissions over the Internet, it undoubtedly would have extended the section 112(e) license to cover a Service making these transmissions, since it is impractical to make those transmissions without making ephemeral recordings. Congress did not do so. Consequently, the better reading of the section 114(d)(1)(B)(I) is that the exemption does not apply to radio retransmissions made over the Internet. Having found no basis to make an adjustment to the unitary rate for radio retransmissions, the Register recommended no change to the unitary rate for radio retransmissions, and the Librarian accepted that recommendation.

Webcasters and broadcasters asked that the Librarian reject the CARP's approach and provide them with an option to pay a rate based on a percentage of their revenues, rather than a per-performance rate. However, the Panel concluded that a percentage of revenue approach was less desirable for a number of reasons. Those reasons included the CARP's conclusion that a per-performance rate is directly tied to the right being licensed (i.e., the right of public performance). The CARP also observed that due to varying business models among webcasters, some of which offer features unrelated to music, identifying the relevant revenue base against which a percentage should be applied consistently would be complex and difficult. Finally, the CARP noted that because many webcasters are currently generating very little revenue, a percentage of revenue rate would require copyright owners to allow extensive use of their property with little or no compensation. The Librarian found these conclusions reasonable and saw no reason to abandon the CARP's per performance approach.

The Librarian also accepted the CARP's conclusion that business-to-business

webcasters should pay the same rate as business-to-consumer webcasters, the CARP's decision not to set a separate, higher rate for listener-influenced webcasting services, and the CARP's conclusion that the rate for archived radio programming, side channels and substituted programming should be the same as the rate for Internet-only programming.

Noncommercial broadcast stations not affiliated with the Corporation for Public Broadcasting asked the CARP to set a reduced statutory rate applicable to their transmissions. The CARP agreed that there should be reduced rates for transmissions made by non-CPB, noncommercial stations to reflect their unique funding structure, noting that noncommercial stations depend upon funding from the government, business and viewers whereas commercial broadcasters generate a revenue stream through advertising. The CARP was persuaded in part by precedent from prior CARP proceedings involving the statutory license for use of certain works in connection with noncommercial broadcasting (Section 118 of the Copyright Act) which had already established that a noncommercial station should pay a lower rate than a commercial broadcast station for similar use of a copyrighted work. Noting that RIAA had proposed a two-thirds discount from the commercial broadcaster rate for non-CPB, noncommercial broadcasters based on prior CARP precedent under Section 118, the CARP set the rate at one-third the commercial broadcaster rate. However, non-CPB, noncommercial broadcasters did not get unfettered discretion to make all transmissions at the reduced rate. In order to avoid the possibility of a noncommercial broadcaster gaining a competitive advantage over commercial broadcasters and webcasters who initiate Internet-only programs and do so at a higher cost, the CARP limited the non-CPB, noncommercial broadcasters' ability to make unlimited transmissions over the Internet at the reduced rate. The Librarian accepted the Panel's approach to adjusting the rates for the non-CPB, noncommercial rates and made the necessary adjustments to reflect the new base rate for transmissions of sound recordings over the Internet.

RIAA sought a surcharge for performances of music that last more than 5 minutes, and webcasters sought an exemption from royalties for performances that last less than 30 seconds. The CARP rejected these requests, and the Librarian accepted those rulings.

Because not all webcasters have kept detailed records of the performances they have transmitted up to now, the CARP concluded that for all transmissions up to 30 days after the effective date of the rates and terms announced by the Librarian, services would be permitted to estimate the number of their performances at 15 per hour (or 1 per hour in the case of radio retransmissions of news, business, talk or sports stations, and 12 performances per hour in the case of other radio retransmissions). The Librarian found this reasonable, but concluded that the estimation methodology should be available to services using the statutory license for the remainder of the current rate period (i.e., through December 31, 2002). The CARP's 30-day cutoff for estimation was arbitrary in light of the fact that rules for services' reporting on use of sound

recordings have not yet been established, and many services are not currently equipped to track or accurately account for each performance. In the long run, services will be expected to provide more detailed information.

## **Section 112 Rates**

**a. Webcasters.** The CARP also recommended rates for the Section 112 license for “ephemeral” recordings used to facilitate the transmission of performances of sound recordings. The CARP was required to set a rate based on the willing buyer/willing seller standard, and therefore examined agreements between RIAA and several webcasters to determine what rates were actually negotiated in the marketplace. The Librarian found that the CARP’s approach was fundamentally sound, but that the CARP erred in relying, in part, on 25 agreements that it had found unreliable as bases for determining the rate for transmissions of performances. Setting aside those agreements, the RIAA/ Yahoo! agreement remained as the sole evidence of a marketplace rate for ephemeral copies. The CARP calculated that the royalty paid by Yahoo! resulted in an effective rate of 8.8% of the performance royalties paid by Yahoo! It then adjusted the 8.8% royalty upward to 9% to take into account somewhat higher royalties paid pursuant to some of the other agreements. Because the CARP’s reliance on those other agreements was arbitrary, the Librarian reduced the ephemeral royalty to 8.8% of the performance fees due from a service.

Webcasters argued that ephemeral recordings have no economic value, relying on a 2001 report by the Copyright Office that was critical of the Section 112 statutory license and concluded that there was no rationale for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate license. But the Register could not recommend that the Librarian follow this approach, observing that the Librarian’s obligation in this proceeding is to apply the law as it is, rather than disregard the law in favor of the Register’s policy preference.

For each of the licenses discussed thus far, the Librarian accepted the CARP’s proposed minimum fee of \$500, which covers both the Section 112 and Section 114 licenses.

**b. Business Establishment Services.** The CARP set a different rate for business establishment services, which enjoy an exemption for their transmissions of performances of sound recordings for use on the premises of businesses, but are subject to the Section 112 statutory license for making ephemeral recordings used to facilitate those transmissions. The Librarian found that the CARP’s rate of 10% of gross proceeds, based upon the CARP’s review of actual agreements in the marketplace, was not arbitrary, and in fact was at the low end of the range of rates set forth in agreements between major record labels and business establishment services. However, the Librarian concluded that the minimum fee of \$500 set by the CARP was arbitrarily low. The Librarian

adopted a minimum fee of \$10,000, noting that the business establishment services participating in the CARP proceeding had proposed that their royalty for ephemeral recordings be a flat fee of \$10,000. The Librarian also modified the CARP's definition of gross proceeds due to practical difficulties with the definition recommended by the CARP.

## **Effective Date**

The Librarian established September 1, 2002, as the effective date of the rates. That does not mean that no royalties are due for webcasters' activities prior to September 1. Webcasters and others using the statutory licenses will have to pay royalties for all of their activities under the licenses since October 28, 1998. However, the September 1 effective date determines when the royalty payments will have to be made. Full payment of royalties for all pre-September 1 licensed activities must be made by October 20, 2002 (because the law provides that payments of arrears shall be made by the 20th day of the month following the month in which the royalty rate is set). Payment for the month of September shall be due on or before November 14, 2002, and payments for subsequent months will be due the 45th day after the end of each month for which royalties are owed.

(Read the [final rule and order](#) as published in the Federal Register, July 8, 2002.)

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