Joshua S. Wattles
2945 Nichols Canyon Road Los Angeles CA 90046
323 656 6174 joshs@pacbell.net

DOCKET NO.
RM 2002.1
COMMENT NO. 5

RECEIVED

MAR 8 2002

GENERAL COUNSEL
OF COPYRIGHT

March 4, 2002

David O. Carson, General Counsel
Copyright Arbitration Royalty Panel (CARP)
P.O. Box 70977, Southwest Station
Washington, DC 20024-0977

Dear Mr. Carson,

I am writing to submit comments on the proposed rulemaking for web-casting rates.

I write as an individual without any current "industry" affiliations. Nonetheless, I have an extensive background in copyright matters and in the music industry. My legal career began at ASCAP where I helped argue the first Copyright Royalty Tribunal on jukebox compulsory license rates. Later on, I ran the largest music publishing company not affiliated with a record company, The Famous Music Publishing Companies, and I served as intellectual property counsel to Paramount Pictures as well as being quite active in industry groups representing copyright interests. Before law school, I was a founder of Bay Area Lawyers For the Arts, which was the model for Volunteer Lawyers For The Arts.

I believe very strongly that compulsory licensing is an unartful solution: the predicates for the rates are defined rights with little relevance to an otherwise organic market; those charged with establishing rates, though objective, must do so on a record developed without all of the "parties in interest" before them and those before them do not have equal resources available for argument; and, once a rate is established, it becomes an object foreign to the marketplace around which the entire economic balance must adjust by distortion - - much like a tree grows around a spike.

With all respect, the object of any party before a CARP must be to distort the outcome in its favor rather than to create a fair substitute to the balances of a free and open negotiation. While I find the rate decided by the CARP to be rich

(it is extraordinary that the minor rights of sound-recordings should be compensated at a much, much higher rate than parallel rights in underlying copyrights of songwriters and composers), the rate ended-up where the interested parties permitted it to go.

My objection is borne of deep concern for the privacy of every American to enjoy cultural and intellectual materials without the intervention or supervision of the government or those acting on its behalf or at its direction. The rate set for web-casting is based on a per capita count of the connections made to the web-cast when each work is used. All the parties before the CARP may have suggested this structure in gross form. I admit I have not reviewed the full record to the extent it may be available. Nonethess, it represents an important and potentially dangerous precedent. To count the connections, the RIAA has proposed rules that would require web-casters to report identification information on every such connection. The proposed level of information would permit someone to backtrack to the identity of the listener and would create a publicly available source to do so.

So, who cares? Every cable company has a list of its subscribers. Every magazine has a subscription list. This is just another list. **No.**

- Because it is a list based on actual listening;
- it is a list compiled in a context where the listener has an expectation of privacy;
- knowing when and what a person listens to at the degree of granularity required by the proposed rules is invasive and serves ulterior marketing and data collection interests of both sound-recording owners and web-casters without any regard to the interests of their consumers;
- it is wholly unnecessary information which could be adequately compiled by sample rather than by survey;
- although there are elegant, technologically simple ways to gather the information, it will create a market mandating such technology thus creating extraneous barriers to entry;
- it runs contrary to the integrity of compulsory licensing which is to benefit the public in regulating a market that would otherwise be constrained by the private sector.

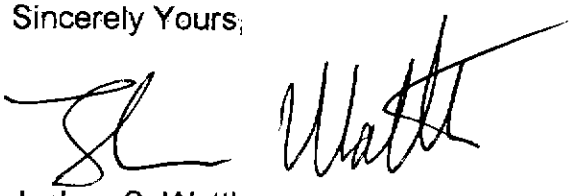
The legislation that created the CARP or the compulsory licensing schema for these very limited forms of web-casts never suggested that the public would pay a privacy price for its implementation or that the industries involved could use the process to backdoor themselves into gathering information about listeners without their knowledge.

I suggest from my own experience obtaining changes in the U.S. and overseas copyright laws, that either one of these factors would have sunk the expanded rights obtained in sound-recordings by the record companies.

I know the CARP panel and, I trust, the Copyright Office are innocently seconded to industry designs in the circumstances of a process lacking public input.

I ask that you take a hard look at the privacy interests of the public and do what you can to protect them.

Sincerely Yours,



Joshua S. Wattles
Private Citizen