



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

NOTICE OF TECHNICAL AMENDMENTS

COPYRIGHT ARBITRATION ROYALTY PANELS; RULES AND REGULATIONS

The following excerpt is taken from Volume 61, Number 232 of the *Federal Register* for Monday, December 2, 1996 (pp. 63715-63718)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 251, 252, 257, and 259

[Docket No. RM 94-1A]

Copyright Arbitration Royalty Panels; Rules and Regulations

AGENCY: Copyright Office, Library of Congress.

ACTION: Technical amendments.

SUMMARY: On December 7, 1994, the Copyright Office of the Library of Congress published final regulations governing the administration of royalty fee distribution proceedings and royalty rate adjustment proceedings for the statutory licenses. Over the past eighteen months, the Office tested these rules and identified areas which required minor adjustments or clarification. This notice makes non-substantive technical amendments to correct the identified problems.

EFFECTIVE DATE: January 2, 1997.

FOR FURTHER INFORMATION:

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SUPPLEMENTARY INFORMATION:

The Copyright Office ("Office") of the Library of Congress issued the current regulations, see 37 CFR chapter II, subchapter B, governing the Copyright

Arbitration Royalty Panels ("CARP") after an extensive rulemaking which began with a notice of proposed rulemaking, 59 FR 2550 (January 18, 1994), and concluded with the publication of the final regulations on December 7, 1994. 59 FR 63025 (December 7, 1994). During 1995 and 1996, these rules were used to conduct a CARP proceeding to determine the distribution of the 1990, 1991, and 1992 cable royalties; to initiate a second CARP proceeding to determine the distribution of the 1992, 1993, and 1994 digital audio recording technology (DART) royalties in the Musical Works Funds; and to set the schedule for four rate setting proceedings.

In using the CARP rules to administer these proceedings, the Office identified some minor problems with the application of the current rules, which these non-substantive technical amendments correct. The amendments clarify ambiguous sections, harmonize discordant rules, and streamline the process, when possible, based on the experience gleaned over the past eighteen months.

Official address

During the course of a CARP proceeding, interested parties file pleadings with the Copyright Office and the CARP. Although many of these pleadings are filed with the Copyright Office prior to the initiation of the CARP, the regulations do not instruct the parties where to file the pleading at the Copyright Office, if hand delivered. Therefore, §251.1 is amended to address this omission by adding the official address of the Office of the Copyright General Counsel.

List of arbitrators

The Librarian of Congress selects arbitrators for a CARP from a list of names generated from the nominations submitted to him by at least three professional arbitration associations. Section 251.3(a) allows the arbitration associations to submit new names each year and §251.3(b) requires the Librarian to publish a list of qualified nominees after January 1 of each year.

The annual solicitation of new names from at least three arbitration associations and the review of the financial disclosure forms from the nominees, however, requires substantial time and effort on the part of the Librarian of Congress, the Copyright Office, and the nominating organizations. Likewise, the parties to a proceeding expend considerable time and expense in examining the background material for each potential arbitrator in preparing their objections under §251.4 to listed arbitrators. But in spite of all the preliminary work, very few individuals on the list actually will have an opportunity to serve on a panel. In 1995, three individuals from a list of 77 names were chosen to serve on a single panel; and this year, no more than six individuals from a list of 36 nominees will be chosen to serve as a CARP arbitrator.

In consideration of the relatively small probability of using more than a handful of names from the list in any given year, the Office cannot justify the disproportionate amount of time and expense expended by the nominating associations, the parties, or itself in generating and reviewing an annual list. Therefore, the rule is amended to reflect

a two year cycle for generating a new list.

Qualifications of the arbitrators

Section 251.5(c), which quotes the statutory requirements for an arbitrator under consideration for service on a CARP, mistakenly uses an "or" in place of "and". This amendment corrects the typographical error.

Financial disclosure forms

Section 251.32(a), which allows a nominated arbitrator to file a financial disclosure form with the Librarian of Congress up to one month after the publication of the list of nominees in the *Federal Register*, is amended and now requires a nominated arbitrator to file the financial disclosure form no later than 45 days after the arbitration association submits the candidate's name to the Librarian of Congress. This amendment will allow the Librarian of Congress to compile a list for publication in the *Federal Register* that includes only those names of nominees who show a clear interest in serving on the panels through their submission of a completed financial disclosure form.

Currently, §251.32(b)(2)(ii) requires the Librarian to publish in the order establishing the precontroversy discovery schedule a list of potential financial conflicts which the listed arbitrators have agreed to disclose. This list of conflicts, however, need not be published in the *Federal Register* or even simultaneously with the order setting the precontroversy discovery schedule. Therefore, §251.32(b)(2)(ii) is amended by removing the specific reference to publication in the order establishing the period for precontroversy motions.

A typographical error exists in §251.32(d). In the third clause of the first sentence, the word "any" is a mistake; the clause should read "if there are no changes in the arbitrator's financial interests."

Written cases

Section 251.43(a) requires participants to file direct cases with the Copyright Arbitration Royalty Panel when, in fact, a panel may not have been selected at the moment in the proceeding when direct cases are due. Therefore, the amended rule requires the participants to file their direct cases with the Copyright Office.

Filing and service of written cases and pleadings

The bifurcation of the responsibilities for a CARP proceeding between the Library and the arbitration panel generated considerable confusion

concerning the number of copies to be filed with the panel and with the Copyright Office. Therefore, the current filing requirements articulated in §§251.44(a) and 251.44(b) are combined into a single regulation which addresses all the filing requirements related to a CARP proceeding. The new regulation instructs participants to deliver an original and five copies to the Copyright Office for further distribution to the CARP, unless otherwise instructed by the Librarian of Congress or the CARP. This change eliminates the confusion engendered by the two filing requirements described in the current §§251.44(a) and 251.44(b).

Additionally, a new §251.44(b) contains the information pertaining to the filing of exhibits which had been in §251.44(a). The information concerning the filing of exhibits remains the same and is moved to a separate section merely for clarification purposes.

Currently, §251.44(e)(2) requires a party not represented by counsel to sign and verify all documents filed in a proceeding. Since the party's signature constitutes certification by the signing party that to the best of his or her knowledge and belief there are good grounds to support the filing, the rule is amended to require only the party's signature.

Section 251.44(f) is amended by removing redundant references to the Library of Congress, the Copyright Office, and the CARP, since parties will file all pleadings with the Copyright Office, as required under the new §251.44(a).

Section 251.44(g) is also amended to harmonize the time for filing oppositions and replies with the filing requirements specified in §251.45(b), and now requires all oppositions be filed within seven business days of the filing of the motion. Additionally, the language referring to the date of service has been removed, because the filing date of the motion or opposition is the relevant date for determining the appropriate response date. Each party, however, must make service of all motions, petitions, objections, oppositions, and replies on the other parties or their counsel by means no slower than overnight express mail on the same day the pleading is filed.

Discovery and prehearing motions

Sections 251.45(b)(1)(i) and (b)(2)(i) are amended and will allow parties to file replies to a response within five business days of the filing of the response. Additionally, the amendment clarifies that the seven-day period specified for filing responses to a pleading refers to business days. This

correction creates a consistent time frame for filing CARP documents, and removes the distinction between a pleading cycle within a 45-day precontroversy period and a pleading cycle at any other time.

Sections 251.45(b)(1)(i) and (b)(2)(i) is amended further to state that each party must effect actual delivery of a complete copy of its written direct case on each party, no later than the first day of the 45-day precontroversy discovery period.

Consideration of petition; settlement

Historically, parties in a rate setting proceeding have engaged in a period of negotiation before the initiation of formal hearings. Section 251.63(a) continues this tradition, but refers to the 30-day negotiation period as a "period for consideration for their settlement." To avoid any confusion arising from this language, the amended section now reads "a 30-day period for negotiation of a settlement."

Filing of claims

Each year, the Copyright Office receives claims for cable compulsory license fees, for compulsory license fees for secondary transmissions by satellite carriers, and for statutory license fees for digital audio recording technology and media distributed in the United States. The Copyright Act defines the filing period for each license, see 17 U.S.C. 111(d)(4)(A), 119(b)(4)(A) and 1007(a)(1), but the regulations define the parameters for compliance with the statutory dates. See 37 CFR 252.4(e), 257.4(e), and 259.5(e).

Specifically, the rules allow a party to provide a receipt from the U.S. Postal Service which shows that the claim was properly mailed, and therefore, properly filed. Properly mailed, however, means both that a claim has a correct address and that it is mailed during the appropriate time period. The only acceptable proof of a timely filing, however, is the certified mail return receipt bearing a U.S. Postal Service mark demonstrating that the mailing occurred during the relevant time period to the appropriate address. Therefore, the word "mailed" in the phrase, "a claimant may nonetheless prove that the claim was properly mailed," is being replaced with the word "filed" as a means of clarifying the language in all the regulatory sections which discuss proof of a timely filing. Additionally, the amended rule states specifically that the receipt must bear a July date stamp of the U. S. Postal Service, except where paragraph (b) of the section applies, when the claim is filed under §§252.4(e) or 257.4(e), or a January or February date stamp of the U.S. Postal Service, except where paragraph (b) of the section

applies, when the claim is filed under §259.5(e), before the Office will accept the receipt as proof of a timely filed claim.

Authorizations for DART claimants

On December 1, 1995, the Office published a final rule which specified the nature of the authorization which an organization acting as a common agent must obtain before making a claim for DART fees on behalf of its members and affiliates. 60 FR 61657 (December 1, 1995). The rule also included two limited exceptions to the rule requiring separate, specific, and written authorization. These exceptions were available to all organizations acting as a common agent on behalf of its members.

On December 19, 1995, and again on February 1, 1996, in letters to the Copyright Office, the Alliance of Artists and Recording Companies ("AARC") voiced its concern that the new rule could create confusion, rather than reduce it, where a claimant, whose interests were represented by different organizations, asserted a claim in both the Sound Recordings Fund and the Musical Works Fund. Initially, the performance rights organizations strongly opposed AARC's proposal to change the rule. Joint Letter from ASCAP, BMI, Inc. and SESAC, Inc. dated January 24, 1995. These parties, however, pursued further discussions concerning the potential problems associated with the exceptions in §259.2(c); and on June 4, 1996, AARC and the performance rights organizations announced that they had reached agreement upon a proposed change that would address AARC's concerns. As all known parties affected by the proposed limitation on the exceptions agree to the proposed change, §259.2(c) is amended accordingly. Under the amended rule, an organization acting as a common agent can take advantage of the exceptions to the rule requiring written, separate, and specific authorization only when it files a claim to the Musical Works Fund.

List of Subjects

37 CFR Part 251

Administrative practice and procedure, Hearing and appeal procedures.

37 CFR Part 252

Cable television, Claims, Copyright.

37 CFR Part 257

Claims, Copyright, Satellite.

37 CFR Part 259

Claims, Copyright, Digital audio recordings devices and media.

Accordingly, 37 CFR Chapter II is

corrected by making the following corrections and amendments.

PART 251-COPYRIGHT ARBITRATION ROYALTY PANEL RULES AND PROCEDURE

1. The authority citation for part 251 continues to read as follows:

Authority: 17 U.S.C. 801-803.

2. Section 251.1 is revised to read as follows:

§251.1 Official addresses.

Claims, pleadings, and general correspondence should be addressed to:

Copyright Arbitration Royalty Panel
(CARP)

P.O. Box 70977
Southwest Station
Washington, D.C. 20024

or, hand-delivered to:

Office of the Copyright General
Counsel
Room 403, James Madison Building
101 Independence Avenue, S.E.
Washington, D.C. 20540

§251.3 Arbitration Lists. [Amended]

3. In §251.3(a), the phrase "of each year" is removed and the phrase ",1998, and every two years thereafter" is added after the phrase "before January 1".

4. In §251.3(b), the phrase "of each year," is removed and the phrase ",1998, and every two years thereafter" is added after the phrase "after January 1".

§251.5 Qualifications of the arbitrators. [Corrected]

5. In §251.5(c), the word "or" is removed and the word "and" is added before the word "facilitating".

6. In §251.32, paragraphs (a) and (b)(2)(ii) are revised to read as follows:

§251.32 Financial disclosure statement.

(a) Within 45 days of their nomination, each nominated arbitrator shall file with the Librarian of Congress a confidential financial disclosure statement as provided by the Library of Congress, which statement shall be reviewed by the Librarian and designated Library staff to determine what conflicts of interest, if any, exist according to §251.31.

(b) * * *

(2) * * *

(ii) Such list shall be included in an order issued no later than the commencement of the 45-day precontroversy discovery period;

* * * * *

7. Section 251.32(d) is corrected by removing the word "any" in the phrase "if there are any changes in the

arbitrator's financial interests," and adding the word "no" before the word "changes" in the same phrase.

§251.43 Written cases. [Amended]

8. Section 251.43(a) is amended by removing the phrase "Copyright Arbitration Royalty Panel" and adding "Copyright Office" in its place.

9. In §251.44, paragraphs (a), (b), (e)(2), (f) and (g) are revised to read as follows:

§251.44 Filing and service of written cases and pleadings.

(a) Filing of pleadings. In a royalty fee distribution proceeding or in a rate adjustment proceeding, the submitting party shall deliver an original and five copies of all filings to the Copyright Office at the address listed in §251.1, unless otherwise instructed by the Librarian of Congress or the CARP. The Copyright Office will make further distribution to the CARP, as necessary. In no case shall a party tender any written case or pleading by facsimile transmission.

(b) Exhibits. All exhibits must be included with a party's case; however, in the case of exhibits whose bulk or whose cost of reproduction would unnecessarily encumber the record or burden the party, the Librarian of Congress or the CARP may reduce the number of required copies. Nevertheless, a complete copy must still be submitted to the Copyright Office.

* * * * *

(2) The original of all documents filed by a party not represented by counsel shall be signed by that party and list that party's address and telephone number.

* * * * *

(f) The Librarian of Congress shall compile and distribute to those parties who have filed a notice of intent to participate, the official service list of the proceeding, which shall be composed of the names and addresses of the representatives of all the parties to the proceeding. In all filings, a copy shall be served upon counsel of all other parties identified in the service list, or, if the party is unrepresented by counsel, upon the party itself. Proof of service shall accompany the filing. Parties shall notify the Librarian of any change in the name or address to which service shall be made, and shall serve a copy of such notification on all parties and the CARP.

(g) Oppositions and replies. Except as otherwise provided in these rules or by the Librarian of Congress or a CARP, oppositions to motions shall be filed within seven business days of the filing of the motion, and replies to oppositions shall be filed within five business days of the filing of the opposition. Each party must serve all motions, petitions,

objections, oppositions, and replies on the other parties or their counsel by means no slower than overnight express mail on the same day the pleading is filed.

10. In § 251.45, paragraphs (b)(1)(i) and (b)(2)(i) are revised to read as follows:

§251.45 Discovery and prehearing motions.

* * * * *

(b) ***

(1)(i) In the case of a royalty fee distribution proceeding, the Librarian of Congress shall, after the filing of comments and notices described in paragraph (a) of this section, designate a 45-day period for precontroversy discovery and exchange of documents. The period will begin with the exchange of written direct cases among the parties to the proceeding. Each party to the proceeding must effect actual delivery of a complete copy of its written direct case on each of the other parties to the proceeding no later than the first day of the 45-day period. At any time during the 45-day period, any party to the proceeding may file with the Librarian prehearing motions and objections, including petitions to dispense with formal hearings under §251.41(b) and objections to arbitrators appearing on the arbitrator list under §251.4. Responses to motions, petitions, and objections must be filed with the Librarian within seven business days from the filing of such motions, petitions, and objections. Replies to the responses shall be filed within five business days from the filing of such responses with the Librarian. Each party must serve all motions, petitions, objections, oppositions, and replies on the other parties or their counsel by means no slower than overnight express mail on the same day the pleading is filed.

* * * * *

(2)(i) In the case of a rate adjustment proceeding, the Librarian of Congress shall, after the filing of comments and notices described in paragraph (a) of this section, designate a 45-day period for precontroversy discovery and exchange of documents. The period will begin with the exchange of written direct cases among the parties to the proceeding. Each party to the proceeding must effect actual delivery of a complete copy of its written direct case on each of the other parties to the proceeding no later than the first day of the 45-day period. At any time during the 45-day period, any party to the proceeding may file with the Librarian prehearing motions and objections, including petitions to dispense with formal hearings under §251.41(b) and objections to arbitrators

appearing on the arbitrator list under §251.4. Responses to motions, petitions, and objections must be filed with the Librarian within seven business days from the filing of such motions, petitions, and objections. Replies to the responses shall be filed within five business days from the filing of such responses with the Librarian. Each party must serve all motions, petitions, objections, oppositions, and replies on the other parties or their counsel by means no slower than overnight express mail on the same day the pleading is filed.

* * * * *

§251.63 Consideration of petition; settlements. [Amended]

11. Section 251.63(a) is amended by removing the phrase "consideration of their settlement." and adding the phrase "negotiation of a settlement." after the phrase "designate a 30-day period for".

PART 252-FILING OF CLAIMS TO CABLE ROYALTY FEES

12. The authority citation for part 252 continues to read as follows:

Authority: 17 U.S.C. 111(d)(4), 801, 803.

13. In § 252.4, paragraph (e) is revised to read as follows:

§252.4 Compliance with statutory dates.

* * * * *

(e) In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove that the claim was properly filed if it was sent by certified mail return receipt requested, and the claimant can provide a receipt bearing a July date stamp of the U.S. Postal Service, except where paragraph (b) of this section applies. No affidavit of an officer or employee of the claimant, or of a U.S. postal worker will be accepted in lieu of the receipt.

PART 257-FILING OF CLAIMS TO SATELLITE ROYALTY FEES

14. The authority citation for part 257 continues to read as follows:

Authority: 17 U.S.C. 119(b)(4).

15. In §257.4, paragraph (e) is revised to read as follows:

§257.4 Compliance with statutory dates.

* * * * *

(e) In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove that the claim was properly filed if it was sent by certified mail return receipt requested, and the claimant can provide a receipt bearing a July date stamp of the U.S. Postal Service, except where paragraph (b) of this section applies. No affidavit of

an officer or employee of the claimant, or of a U.S. postal worker will be accepted in lieu of the receipt.

PART 259-FILING OF CLAIMS TO DIGITAL AUDIO RECORDING DEVICES AND MEDIA ROYALTY PAYMENTS

16. The authority citation for part 259 continues to read as follows:

Authority: 17 U.S.C. 1007(a)(1)

§259.2 Time of filing. [Amended]

17. In § 259.2, the last sentence in paragraph (c) is amended by removing the phrase "in cases" and adding the phrase "for claimants to the Musical Works Fund" after the word "required".

18. In § 259.5, paragraph (e) is revised to read as follows:

§259.5 Compliance with statutory dates.

* * * * *

(e) In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove that the claim was properly filed if it was sent by certified mail return receipt requested, and the claimant can provide a receipt bearing a January or February date stamp of the U.S. Postal Service, except where paragraph (b) of this section applies. No affidavit of an officer or employee of the claimant, or of a U.S. postal worker will be accepted in lieu of the receipt.

Dated: November 12, 1996

Marybeth Peters
Register of Copyrights
So Adopted:

James H. Billington,
The Librarian of Congress.
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Billing Code 1410-33-P