



# ANNOUNCEMENT

from the Copyright Office, Library of Congress,  
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

NOTICE OF PROPOSED RULEMAKING.

## COPYRIGHT ARBITRATION ROYALTY PANELS; RULES AND REGULATIONS

The following excerpt is taken from Volume 63, Number 243 of the  
*Federal Register* for Friday, December 18, 1998 (pp. 70080-70086)

### LIBRARY OF CONGRESS

#### Copyright Office

37 CFR, Part 251

[Docket No. 98-3 CARP]

#### Copyright Arbitration Royalty Panels; Rules and Regulations

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Office of the Library of Congress is proposing amendments to the regulations governing the conduct of royalty distribution and rate adjustment proceedings prescribed by the Copyright Royalty Tribunal Reform Act of 1993. These changes are designed to fill gaps in the rules that have been the subject of inquiries and to promote the efficient resolution of issues and claims.

**DATES:** Written comments are due January 19, 1999. Reply comments are due February 16, 1999.

**ADDRESSES:** If sent BY MAIL, an original and 10 copies of written comments should be addressed to Office of the General Counsel, Copyright Arbitration Royalty Panel (CARP), PO Box 70977, Southwest Station, Washington, DC 20024. If DELIVERED BY HAND, an original and 10 copies should be brought to: Office of the General Counsel, Copyright Office, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, SE, Washington, DC 20559-6000.

#### FOR FURTHER INFORMATION

**CONTACT:** David O. Carson, General Counsel, or Tanya Sandros, Attorney-Advisor. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

#### SUPPLEMENTARY INFORMATION:

The Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 17 Stat. 2304, eliminated the Copyright Royalty Tribunal (CRT) and replaced it with a system of ad hoc Copyright Arbitration Royalty Panels (CARPs) administered by the Librarian of Congress (Librarian) and the Copyright Office (Office). The CARPs adjust royalty rates and distribute royalties collected under the various compulsory licenses and statutory obligations of the Copyright Act. In 1994, the Office published final regulations for CARP proceedings. 59 FR 63025 (December 7, 1994). Eighteen months later, the Copyright Office issued a notice making non-substantive, technical changes to the rules. 61 FR 63715 (December 2, 1996). Based on the Office's experience with the rules since they were first enacted, the Office is now proposing substantive changes to these regulations. These changes are designed to fill gaps in the rules that have been the source of inquiry or contention, to promote the early and efficient resolution of issues and claims, and to resolve ambiguities that have fostered misunderstandings. Many of the changes are codifications of rulings the Office has made by order in response to discovery motions. Now the substance of these orders will become part of the rules so that the Office's policies are known in advance, and the motions upon which they were based become unnecessary.

The Office has also received two petitions requesting additional changes to the CARP regulations<sup>1</sup> from parties who have participated in previous CARP proceedings. On July 29, 1998, Program Suppliers<sup>2</sup> filed a

request for rulemaking to amend § 251.5 (Program Suppliers' Request). The purpose of the requested rulemaking is "to eliminate the requirement that copyright arbitration royalty panels ("CARPs") consist entirely of lawyers prior to assigning a CARP for the satellite carrier royalty distribution hearing." Program Suppliers' Request at 1. In addition, Mr. James Cannings<sup>3</sup> has a petition for a rulemaking pending before the Office. He seeks an amendment to § 251.44(f) (Cannings' Petition) which would require parties who join together and submit a single direct case to designate a lead counsel for purposes of future service.

The Copyright Office has incorporated the concerns of these petitioners into this proposed rulemaking proceeding. Specifics on these proposals are discussed herein. However, the Office is denying Program Suppliers' request that the Office not select a panel for the scheduled 1992-1995 satellite distribution proceeding before it completes consideration of the Program Suppliers' proposed amendment. The Office has already compiled and published the list of arbitrators for 1998 and 1999 pursuant to § 251.3, and it has scheduled the satellite distribution proceeding to begin on January 8, 1999. Under the current time constraints, it would be impossible to consider the proposed

<sup>1</sup>Copies of these documents are on file in the Copyright General Counsel's Office, Room LM-403, James Madison Building, Washington, DC.

<sup>2</sup>Program Suppliers are a group of producers and distributors of syndicated programming. Historically, they participate in CARP proceedings that set rates for the cable and satellite compulsory licenses and in those proceedings that determine the distribution of cable and satellite royalties among the copyright owners who file an annual claim.

<sup>3</sup>Mr. Cannings is a songwriter and publisher who participates in CARP proceedings which determine the distribution of cable royalties and in those proceedings to determine the distribution of the royalties collected annually pursuant to chapter 10 of the Copyright Act, 17 United States Code.

changes, finalize the amendments, and generate a new list, assuming that the Office agreed to adopt Program Suppliers' suggestion for amending § 251.5. Furthermore, the Office is considering numerous changes to its regulations and has decided to conduct a single rulemaking proceeding to consider all substantive changes to

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the regulations governing the CARPs. For these reasons, the Office denies Program Suppliers' request to conclude its consideration of the proposed amendment before selecting the satellite distribution arbitration panel.

Interested parties may file comments on the issues outlined below, the proposed changes raised in both proposals, and on any other areas of concern.

### I. Qualifications of the Arbitrators

Section 251.5 requires that each person serving on a CARP be an attorney with at least 10 or more years of legal practice. Program Suppliers assert that the recent decision by the District of Columbia Circuit upholding the Librarian's final determination as to the distribution of the 1990-1992 cable royalties compels a reevaluation of the all-attorney requirement. See *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998). In that decision, the Court noted that the CARP system "replace[d] the Tribunal's quasi-adjudication with an arbitration undertaken by an ad hoc panel whose proposed settlement is then reviewed by final decisionmakers \* \* \*." *Id.* at 920 (citing H.R. Rep. No. 103-286, at 11 (1993)). Program Suppliers argue that because the CARP system seems to move away from the classic adjudicatory model, "individuals from disciplines other than law should be permitted to serve as arbitrators, [thereby bringing] to the process a perspective and expertise that the all-attorney requirement excludes." Program Suppliers' Request at 4. In essence, Program Suppliers believe that the all-attorney panel's lack of any experience with the technical, economic, and industry concepts central to these proceedings have impeded the process, or at the very least, "did nothing to enhance the efficiency or the quality of the hearing or decisionmaking processes." *Id.* at 5.

The current provision was considered when the Copyright Office promulgated the CARP regulations now in effect. At that time, the Office determined that arbitrators should be attorneys because of the judicial nature of the proceedings. See Notice of Proposed Rulemaking, 59 FR 2550 (January 18, 1994); Interim Regulations, 59 FR 23964 (May 9, 1994); Final Rules, 59 FR 63025 (December 7, 1994). Nevertheless, the Office invites comments on these provisions once again, in

light of the recent decision from the District of Columbia Circuit and the parties' experience with the all-attorney panels in the five concluded proceedings.

### II. Public Records

Unlike the recommendation of the Register of Copyrights and the final order of the Librarian of Congress, which are published in the Federal Register in accordance with 17 U.S.C. 802(f), the official report of the CARP is not. The Office has chosen instead to make it available to the public for inspection and copying through the Office of the Copyright General Counsel. The Office decided against publication of the panel's report in the **Federal Register** for two reasons: (1) It is fully discussed in the Register's published recommendation, and (2) it is not a final determination. The Office has also begun to post the CARPs' reports on its website. See <http://www.loc.gov/copyright/carp>.

### III. Formal Hearings

Section 251.41(b) permits a CARP to decide a controversy or rate adjustment on the basis of written pleadings, without an oral hearing, in certain circumstances. A petition to dispense with formal hearings may be granted by the Librarian during the 45-day precontroversy period if (1) there is no genuine issue of material fact to be decided or (2) all parties agree to the petition. The Office is considering whether to expand this provision to add other circumstances upon which the Librarian may grant a petition to dispense with formal hearings.

As §251.41(b) currently is written, the provision for a CARP determination based on a written record is consistent with copyright law and the Administrative Procedure Act (APA). The Copyright Act states that a CARP "shall act on the basis of a fully documented written record" and any copyright owner or other person participating in arbitration proceedings "may submit relevant information and proposals" to the arbitration panels. 17 U.S.C. 802(c). CARP proceedings are also subject to the requirements of the Administrative Procedure Act, subchapter II of chapter 5 of title V of the United States Code. 17 U.S.C. 802(c). The APA states that an agency may "adopt procedures for the submission of all or part of the evidence in written form" so long as "a party will not be prejudiced thereby." 5 U.S.C. 556(d). Principles of due process provide guidance as to what would prejudice a party.

In *Gray Panthers v. Schweiker*, 652 F.2d 146, 164 (D.C. Cir. 1980), the U.S. Court of Appeals for the District of Columbia Circuit discussed four factors to be weighed in determining the "dictates of due process" in any assessment of whether procedural requirements afford the parties adequate protection. The factors include: the private

interest affected, the risk of an erroneous deprivation of such interest, the probable value of additional or substitute procedural safeguards, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

There are a number of factors that weigh in favor of expanding § 251.41(b). The nature of CARP proceedings and the type of issues involved heavily depend on documentary evidence. Consequently, there is often no need for the fact finder to observe the demeanor of witnesses to weigh the value of their testimony. All parties have full access to the written record that is the basis for the decision. Discovery procedures offer any party the opportunity to test the other parties' factual assertions by requiring the production of underlying facts, and therefore diminish the need for cross-examination. On the other hand, one argument in support of oral hearings is that certain parties are less sophisticated or less capable of representing themselves and an oral hearing can overcome these problems.

The Office believes, however, that most of the factors established in *Gray Panthers* favor expanding the circumstances in which a CARP may base its determination on a written record without conducting oral hearings in order to promote the public interest by reducing costs and promoting administrative efficiencies. The Office would like to receive comments from interested parties about whether there are additional circumstances upon which the Librarian could base his determination to allow the CARP to proceed solely on the basis of the written pleadings, without violating due process requirements.

In addition, the Office also welcomes comments on the procedures for waiving oral hearings. For example, should the Librarian continue to rule on petitions to waive oral hearings or should the CARP make such determinations?

### IV. Written Cases

#### A. Incorporation of Past Testimony

Section 251.43(c) states:

Each party may designate a portion of past records, including records of the Copyright Royalty Tribunal, that it wants included in its direct case. Complete testimony of each witness whose testimony is designated (i.e., direct, cross and redirect) must be referenced.

There seems to be some misunderstanding regarding this provision, since objections were filed

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when opposing parties incorporated prior testimony into their written direct case by reprinting it. The term "designate," however,

is not limited to identifying where the documents may be found. It is also permissible for a party to include the entire text of prior testimony in the direct case. Therefore, the Office proposes to amend §251.43(c) to clarify this interpretation.

The amended regulation also removes any use of the more general term "record," in favor of the more specific term, "testimony," to avoid any confusion about the nature of the past records that a party may include in his or her direct case.

The Office invites comments on whether and why it should be permissible to designate past "records" and why records other than past testimony should be included in a party's direct case. In addition, the Office is proposing a conforming amendment to §251.43(e).

#### *B. Declaration of Stated Claims or Requested Rates and Terms*

The Office proposes amending § 251.43(d) in two respects. First, the Office proposes requiring the addition of proposed terms to the direct case. With the passage of the Digital Performance Right in Sound Recordings Act, there are now a number of proceedings where the CARP is supposed to determine the terms, as well as the rates. Therefore, when a party files a written direct case in a rate setting proceeding, the Office proposes to add a requirement that the party must state its requested terms, if that is an issue in the proceeding, as well as its requested rate.

Second, the Office proposes clarifying the point at which settlement is reached. The Office has a strong policy in favor of private settlements, which it wishes to encourage at every step of the process. Therefore, the Office invites comment on two alternative proposals for reaching settlement during the final phase of the process prior to the empaneling of a CARP.

Under the first proposal (which is the approach adopted in these proposed amendments), a party states in its written direct case a percentage or dollar claim, or proposes a rate, which may be accepted by all the other parties to the proceeding within seven days of filing the direct case. If the other parties accept the stated claim or rate, they can so notify the Librarian. Such an acceptance may then become the basis upon which the Librarian may make the official distribution or rate adjustment without it being necessary to send the case to the CARP. This official distribution or rate adjustment can be made with or without precedential effect, according to the wishes of the parties. See proposed §251.43(d). Once the Librarian is so notified, the party whose requested claim or rate has been accepted by all other parties will not be able to revise its claim or rate, and thus thwart a resolution of the dispute. However, until and unless the other parties accept the requested claim or

rate during the specified ten day period, no party will be precluded from revising its claim or its requested rate at any time during the proceeding up to the filing of the proposed findings of facts and conclusions of law. The Office proposes to retain the parties' option to revise their claims or rates, in the absence of the other parties' agreement, to encourage realistic assessment of their cases in light of evidence that is developed during the proceeding.

Another approach to settlement after the filing of the written direct case would be to allow the Librarian to adopt a proposed claim or rate in those instances where no party files an objection to another party's proffered claim or rate. As in the preceding proposal, the party making the percentage or dollar claim, or proposed rate, would be unable to adjust the proffered claim or rate during the specified ten day period. Of course, it may occur in a particular proceeding that the sum of the parties' claims to royalties would exceed 100% of the royalty pool, in which case the Librarian would be unable to adopt any parties' proposed percentage or dollar claim to the fund in those instances where no objections were filed. Similarly, the Librarian would be unable to choose among several proposed rates offered for a similar purpose in any proceeding where more than one of the rates remained unchallenged.

In spite of these potential problems, the Office considers it worthwhile to explore these options to settlement. Therefore, the Office seeks comment from all interested parties on the two proposals for late stage settlement; or alternatively, parties may offer their own proposals for further consideration. The object of any proposal, however, is to encourage fair and equitable settlements among the parties while increasing the efficiencies of the administrative process.

#### **V. Filing and Service of Written Cases and Pleadings**

##### *A. Subscription and Verification*

The Office proposes an amendment to §251.44(e)(2), which deals with *pro se* parties, to conform it to §251.44(e)(1), which contains parallel requirements for parties represented by attorneys. At the end of §251.44(e)(2), the proposed amendment adds the requirement that the signature of a *pro se* party on a document filed in a case "constitutes certification that to the best of his or her knowledge and belief there is good ground to support the document, and that it has not been interposed for purposes of delay." This is a standard requirement for signatures on legal documents and should apply with equal force to all participants in a proceeding.

##### *B. Service*

Section 251.44(f) requires a party to serve

a copy of all filings "upon counsel of all other parties identified in the service list, or, if the party is unrepresented by counsel, upon the party itself." Mr. Cannings proposes that in those cases where parties join together and file a single direct case, service should be made to a single lead counsel to be designated by the parties to the joint case, who in turn, would be responsible for distributing the pleadings further. In support of his request for the amendment, Mr. Cannings argues that the current requirement places an undue burden on an individual party, creating an inequitable and unfair financial hardship on an individual participant. The Office seeks comment on the Cannings proposal.

#### **VI. Discovery and Prehearing Motions**

Section 251.45 is an important provision of the CARP rules. The section sets the requirements for eligibility to participate in a CARP proceeding, establishes the terms of both precontroversy discovery and discovery during a proceeding, and delineates certain pleading requirements. Section 251.45 is the mainstay for procedural and evidentiary rulings that the Librarian has made in accordance with his authority under 17 U.S.C. 801(c). As such, the section has become the subject of much interpretation by the Librarian, and certain precedents have developed during the course of its application. The Office believes that these precedents need to be reflected in the rules, in addition to the other practice points raised for consideration, in order to maximize the effectiveness of the section.

##### *A. Notices of Intent To Participate*

Paragraph (a) of §251.45 provides that parties wishing to participate in royalty distribution and rate adjustment proceedings must file a notice of intent to participate, as directed by the

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Librarian. In cable and satellite royalty distribution proceedings, there are two phases to the distribution. The first phase involves dividing the collected royalties among the various claimant categories involved in the proceeding (music, sports, etc.). The second phase resolves disputes concerning the further distribution of royalties within a category that arise between individual claimants. The Office is proposing to amend paragraph (a) to require that parties filing a notice of intent to participate in royalty distributions identify in a single notice each phase of the proceeding in which they intend to participate. Specific inclusion of this provision in the regulation will ensure efficient administration of the process and give all parties a full, fair opportunity to participate.

## *B. Service of Pleadings During Precontroversy Discovery*

Section 251.45 (b)(1)(i) and (b)(2)(i) provide that all motions, petitions, objections, oppositions, and replies filed during the precontroversy discovery period must be served by means no slower than overnight express mail. The Office seeks comment as to whether the requirement that pleadings be served by overnight express mail is unduly costly and, if so, given the limited precontroversy discovery period, how might service be otherwise permitted.

## *C. Discovery Practice by the CARP*

Under current practice, the Librarian of Congress oversees discovery on the written direct cases, and the CARP oversees discovery on the rebuttal cases, although the Librarian has the discretion to designate discovery matters to the CARP for its resolution. Section 251.45(c)(1) of the rules, however, currently states that the CARP shall designate a period of discovery on both the written direct cases and the rebuttal cases, which suggests that there are two rounds of discovery on the written cases: one conducted by the Librarian and the other by the CARP. Therefore, the Office is deleting the reference to the written direct cases to make clear that the CARP oversees only discovery on the rebuttal cases and not on the written direct cases, unless otherwise directed by the Librarian.

## *D. Objections to Written Direct Cases*

Currently, § 251.45(c)(2) provides that “[a]fter the filing of the written cases with a CARP, any party may file with a CARP objections to any portion of another party’s written case on any proper ground including, without limitation, relevance, competency, and failure to provide underlying documents.” The Office is proposing to clarify this sentence so that parties make evidentiary objections to the CARP during the course of the proceeding and not to the Librarian during the precontroversy discovery period.

## *E. Precontroversy Discovery*

Section 251.45(b) and (c) currently govern the establishment of a precontroversy discovery period, motions practice, and the limitations on discovery. The Librarian has extensively applied these provisions in each of the CARP proceedings he has conducted, and certain shortcomings of these rules have been identified. The greatest difficulties have surrounded the rather terse description in paragraph (c) of what types and categories of documents are subject to discovery in CARP proceedings. The Librarian has been called upon to resolve numerous discovery disputes and has fashioned certain principles to better

articulate the boundaries of discovery. The Office believes that these principles should be included in the rules.

Consequently, the Office is recommending creation of a new paragraph (d), entitled “Limitations on discovery,” and redesignation of the current paragraph (d) as paragraph (f). The provisions of this new paragraph are intended to apply to both precontroversy discovery and any discovery that is directed by the CARPs.

### 1. Underlying Documents

Proposed § 251.45(d)(1) provides that parties “may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.” This is the current standard for discovery enunciated in current paragraph (c), and remains the standard governing discovery under the proposed changes. New paragraphs (1), (2), and (3) expand on the basic standard. Paragraph (1) provides that underlying documents include only those documents that underlie a witness’ factual assertions and do not include documents which are intended to augment the record with what the witness might have said or put forward, or explore the boundaries of what the witness said. They are also not documents which underlie a witness’ opinion testimony, since that testimony is not, by definition, a factual assertion.

Documents that underlie a witness’ factual assertions are those documents that the witness relied upon in making his or her assertion. Documents “relied upon” by a witness is a somewhat elusive concept, because these are not necessarily just the documents that a witness looked at and considered in making his or her factual assertion. For example, a witness may make a statement based upon a summary fact sheet of a statistical survey. The facts asserted by the witness actually come from the statistical survey, even though the witness never actually examined, or perhaps even had access to the survey. In circumstances where the asserted facts are the essential part of the witness’ testimony, or are the crux of a claimant’s case, production of the statistical survey is appropriate. At the same time, however, the Library must balance the costs associated with production of the survey against the evidentiary benefits derived from the production. The Librarian must make these determinations on a case by case basis, and it would be inappropriate, if not impossible, to attempt to resolve these cases by codified rules. The Office, therefore, believes that a requirement for production of documents relied upon by a witness in making his or her factual assertions is a sufficient principle to announce in the rules, with specific applications of the principle left to the determination of the Librarian or the CARP as the circumstances warrant.

Paragraph (1) also provides that a party seeking discovery must identify, in its

discovery requests, the specific factual assertion of a witness for which documents are sought. This includes identifying the witness by name, the page number on which the assertions appear, and the assertions themselves.

### 2. Supporting Documents for Bottom-Line Figures

Proposed §251.45(d)(2) involves the principle of verification of bottom-line numbers. Both royalty distribution and rate adjustment proceedings are number-intensive, and many witnesses testify as to what, for example, a royalty rate should be, or why the royalty rate submitted by another party is the incorrect amount. Witnesses submitting this type of testimony must be prepared to exchange the documents that assisted them in offering their figures. Like underlying facts described in paragraph (1), however, a balance must be struck between the quality of the testimony produced by obtaining the supporting documents and the cost of producing the documents. It is not the goal of the CARP discovery process always to trace a bottom-line figure to its origins, for such a practice will often drive the cost of discovery well beyond the benefits of obtaining the documentation. The Librarian must balance the relevance of the testimony with the cost of obtaining supporting documentation and make individual determinations.

The purpose

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of paragraph (2) is, therefore, to state the principle rather than its application to particular circumstances.

Another sometimes elusive matter is what constitutes a “bottom-line figure.” Many numbers may be offered as means of arriving at a specific distribution percentage or royalty rate, some of which can be considered bottom-line figures and others which are explanatory or elucidative. Again, the rule states the principle, not the application.

### 3. Confidential Material

Proposed §251.45(d)(3) provides that where discovery may result in production of confidential materials, the parties may negotiate in good faith the terms of a protective order, subject to the approval of the Librarian. The parties are free and encouraged to negotiate a protective order on their own for submission to and approval by the Librarian.

### 4. Penalty for Lack of Responsive Discovery

To facilitate the precontroversy discovery schedule, proposed §251.45(d)(4) states that all parties must be prepared to cooperate in the exchange of discovery material. A party may not withhold identified documents which it has said that it will produce simply

because it is displeased with the response to its discovery requests by other parties. Document production is to take place on time, as directed in the discovery schedule. A party aggrieved by another's response or failure to respond to its discovery request currently has only the remedy of submitting a motion to compel production with the Librarian. Under the proposed rule, failure to comply with the production dates without a showing of good cause would result in the striking of the testimony which the documents underlie upon the motion of another party.

#### 5. Organized Discovery Response

All parties must furnish the opposing sides with the underlying documents in as organized and usable a form as possible, whether in hard copy or digital format. Therefore, §251.45(d)(5) requires the party producing documents to label each document corresponding to the request for which it is responsive. Production of undifferentiated documents, or the practice of "dumping" documents, is not acceptable.

#### F. Precedential Rulings

Section 802(c) of the Copyright Act, 17 U.S.C., states that "[t]he arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration royalty panel determinations, and rulings by the Librarian of Congress under section 801(c)." The procedural rules of part 251 of 37 CFR are rules of general applicability to CARP proceedings, and interpretations of those rules made in the context of such proceedings apply with equal force to all subsequent CARP proceedings. This means that the Librarian's precontroversy discovery rulings serve as precedents for subsequent CARP proceedings as well. To make this clear, the Office proposes to add a new paragraph (e), entitled "Precedential rulings."

#### VII. Written Orders

The Copyright Office proposes amending §251.50 to require that a CARP's substantive rulings be issued in written form along with a brief statement explaining the CARP's rationale. Currently, §251.50 states that the CARP may issue rulings or orders that are necessary to resolve issues in the proceedings. This authority is based on the requirements contained in the Administrative Procedure Act at 5 U.S.C., subchapter II.

Currently, the only record of oral decisions is in the transcripts of the proceedings and one has to review the hearing transcript to find any reference to them. The proposed amendment has several benefits. It will provide a more structured approach to the decision making process and preserve orders in a more accessible form.

Section 555(e) of the Administrative Procedure Act already requires that denials of written applications, petitions or other requests be accompanied by a brief statement of the grounds for denial. The Copyright Office requests comments about this proposed change, in particular whether it should be limited to denials or whether it should apply to other types of orders.

#### VIII. Review of the CARP Report

The CARP must conclude its work and submit its determination within 180 days from publication of the notice of commencement of a CARP proceeding in the Federal Register. The statute also requires that "[s]uch report shall be accompanied by the written record, and shall set forth the facts that the arbitration panel found relevant to its determination." 17 U.S.C. 802(e). The Register of Copyrights then reviews the CARP's report and makes a recommendation to the Librarian of Congress whether to accept or reject it. If the Librarian rejects the Panel's determination, he or she issues an order setting the rate or distribution of royalty fees. *Id.*

Currently, §251.55 allows any party to file with the Librarian of Congress a petition to modify or set aside the determination of the CARP during the first 14 days of the Librarian's review. 37 CFR 251.55(a). The regulations also allow an additional 14 days for replies to such petitions. 37 CFR 251.55(b). The petitions have proven extremely useful to the Librarian and the Register of Copyrights in their review of the CARP's report. The CARP itself, however, has no opportunity to review the petitions and replies to consider the arguments made therein. The Copyright Office believes that there have been occasions in past CARP proceedings when a Panel might well have modified its own decision if it had had the opportunity to consider the petitions that were filed with the Librarian. Thus, it might well increase the efficiency of the review process and the quality of the decisionmaking to give the CARP itself an opportunity to do so. Therefore, the Office seeks comment from interested parties on whether the CARP should have an opportunity to consider the petitions and to revise its report before the Register and the Librarian engage in their review.

Alternatively, the Office seeks comment on the possibility of remanding a determination of a CARP for further consideration in light of a determination by the Librarian that the report is arbitrary or contrary to law, or in those instances where the Librarian cannot determine whether there exist sufficient facts to support a conclusion that the Panel did not act arbitrarily. Cases might also occur where the record might indicate that the Panel acted arbitrarily, but there are insufficient facts on the record to allow the Librarian to substitute his or her

own determination.

At this time, the Copyright Office is not proposing specific regulations which would require the parties to submit the petitions to modify directly to the CARP or provide for the possibility of a remand to the Panel under the circumstances outlined above. Instead, the Office invites comment from the interested parties on the advantages and disadvantages of instituting changes to the CARP system along the lines proposed herein.

#### IX. Other Suggestions Welcome

The Copyright Office welcomes any additional comments and suggestions from interested parties on other

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substantive or procedural matters not covered by these proposed changes.

#### List of Subjects in 37 CFR Part 251

Administrative practice and procedure, Hearing and appeal procedures.

#### Proposed Rules

For the reasons set out in the Preamble, Chapter II of Title 37 of the Code of Federal Regulations is proposed to be amended as follows:

#### PART 251--COPYRIGHT ARBITRATION ROYALTY PANEL RULES OF PROCEDURES

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

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

2. Section 251.21 is amended by revising paragraph (a) to read as follows:

#### §251.21 Public records.

(a) All official reports of a Copyright Arbitration Royalty Panel are available for inspection and copying at the address provided in §251.1.

\* \* \* \* \*

3. Section 251.43 is amended by revising paragraphs (c), (d) and (e) to read as follows:

#### §251.43 Written cases.

\* \* \* \* \*

(c) Each party may include in its direct case designated portions of past testimony from prior Copyright Arbitration Royalty Panel or the Copyright Royalty Tribunal proceedings, including any exhibits associated with the designated testimony. Such designation may be done by reference to the appropriate proceeding or by including the text of the past testimony in the direct case. Complete testimony of each witness

whose testimony is designated (i.e., direct, cross and redirect) must be referenced.

(d) In the case of a royalty fee distribution proceeding, each party must state in the written direct case its percentage or dollar claim to the fund. In the case of a rate adjustment proceeding, each party must state its requested rate and, if applicable, terms. If, within ten days of the filing of the direct case, all the other parties to the proceeding accept the proffered claim or rate and terms as the basis for a distribution or rate adjustment, they may so notify the Librarian. The Librarian may make the distribution or rate adjustment on that basis. The distribution or rate adjustment will have no precedential effect on future proceedings, unless all the parties to the proceeding request otherwise. Until and unless all the other parties to the proceeding accept the proffered claim or rate, no party will be precluded from revising its claim or its requested rate at any time during the proceeding up to the filing of the proposed findings of fact and conclusions of law.

(e) No evidence, including exhibits, may be submitted in the written direct case without a sponsoring witness, except where the CARP has taken official notice, or in the case of incorporation by reference of past testimony, or for good cause shown.

\* \* \* \* \*

4. Section 251.44 is amended by adding a sentence at the end of paragraph (e)(2) to read as follows:

**§251.44 Filing and service of written cases and pleadings.**

\* \* \* \* \*

(e) Subscription and verification. (1) \* \* \*

(2) \* \* \* A party's signature constitutes certification that to the best of his or her knowledge and belief there is good ground to support the document, and that it has not been interposed for purposes of delay.

\* \* \* \* \*

5. Section 251.45 is amended by adding a sentence at the end of paragraph (a), revising paragraph (c), redesignating current paragraph (d) as paragraph (f), and adding new paragraphs (d) and (e) to read as follows:

**§251.45 Discovery and prehearing motions.**

(a) \* \* \* All parties who file a notice of intention to participate shall identify any and all controversies in which they have an interest and intend to pursue that interest.

(b) \* \* \*

(c) Discovery and motions filed with a Copyright Arbitration Royalty Panel. (1) A Copyright Arbitration Royalty Panel shall designate a period following the filing of rebuttal cases in which parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.

(2) After the initiation of a CARP

proceeding, any party may file with a CARP objections to any portion of another party's written case on any proper ground including, without limitation, relevance, competency, and failure to provide underlying documents. If an objection is apparent from the face of a written case, that objection must be raised with the CARP before the closing of the record, or the party may thereafter be precluded from raising such an objection.

(d) Limitations on discovery. The following requirements apply to all proceedings conducted pursuant to this section:

(1) Parties may request of an opposing party nonprivileged documents that underlie a witness' factual assertions. In order to discover the documents that underlie a witness' factual assertions, the requesting party must identify the witness by name and specify the factual assertions of that witness for which supporting documents are sought. Documents that underlie a witness' factual assertions are those documents that the witness relied upon to make his or her assertion.

(2) Parties who offer total numeric or financial figures in a CARP proceeding without supporting documentation must be prepared to share underlying data that contributed to those totals so that the figures may be verified, notwithstanding any assertions of confidentiality.

(3) The parties may negotiate, under good faith, protective orders, subject to approval by the Librarian, so that the underlying data can be revealed and confidentiality can be protected.

(4) All parties to a proceeding must continue to comply with the discovery schedule for the exchange of any noncontroversial evidence, even when motions relating to discovery have been filed with the Librarian or the Copyright Arbitration Royalty Panel and are pending decision. Failure to show good cause as to why responsive documents were not produced by the deadlines established in a precontroversy discovery schedule shall result in the striking of testimony that the dilatory documents support.

(5) All documents offered in response must be furnished in as organized and usable a form as possible. Produced documents must be labeled to correspond with the categories in the request.

(e) Precedential rulings. The procedural rules of Subchapter B of 37 CFR are rules of general applicability to CARP proceedings. Interpretations of those rules by the Librarian of Congress or the CARP that are made in the context of such proceedings apply with equal force to all subsequent proceedings.

(f) \* \* \*

\* \* \* \* \*

**§251.50 Rulings and orders.**

6. Section 251.50 is amended by removing the words "contained in this subchapter" and in their place, adding the words "of the Copyright Office", and by adding a new sentence to the end of the paragraph to read, "Any such

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rulings or orders must be issued in writing, accompanied by a brief statement in support of the ruling."

\* \* \* \* \*

Dated: November 23, 1998.

**Marybeth Peters,**  
*Register of Copyrights.*

Approved by:  
**James H. Billington,**  
*The Librarian of Congress.*

[FR Doc. 98-33607 Filed 12-17-98; 8:45 am]

**BILLING CODE 1410-33-P**