



ANNOUNCEMENT

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

NOTICE OF PROPOSED RULEMAKING

COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS, INCLUDING DIGITAL PHONORECORD DELIVERIES

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LIBRARY OF CONGRESS

Copyright Office
37 CFR Part 201
[Docket No. RM 2001–6]

Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is seeking comment on proposed amendments to the regulations governing the content and service of certain notices on the copyright owner of a musical work. The notice is served or filed by a person who intends to use the work to make and distribute phonorecords, including by means of digital phonorecord deliveries, under a compulsory license.

DATES: Comments are due no later than September 27, 2001.

ADDRESSES: An original and ten copies of any comment shall be delivered to: Office of the General Counsel, Copyright Office, James Madison Building, Room LM–403, First and Independence Avenue, SE, Washington, DC; or mailed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024–0977.

FOR FURTHER INFORMATION CONTACT
David O. Carson, General Counsel, or Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024–0977. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION

Background

Section 115 of the Copyright Act, 17 U.S.C., provides that “[w]hen phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person * * * may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.” 17 U.S.C. 115(a)(1). The compulsory license set forth in section 115 permits the use of a nondramatic musical work without the consent of the copyright owner if certain conditions are met and royalties are paid. It does not, however, allow for the reproduction and distribution of a sound recording. These are the exclusive rights of the copyright owner of the sound recording and must [[Page 45242]] be cleared through a separate transaction.

On November 1, 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”), Public Law 104–39 (1995). Among other things, this law clarified that the compulsory license for making and distributing phonorecords includes the distribution of a phonorecord of a nondramatic musical work by means of a digital phonorecord delivery (“DPD”). See 17 U.S.C. 115(c)(3)(A). A digital phonorecord delivery is

each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

17 U.S.C. 115(d). However, the right to make and distribute the sound recording embodied in the DPD is not covered under the section 115 license. Therefore, the law clarifies that the making of a DPD constitutes an act of infringement under section 501 unless: (1) The copyright owner of the sound recording authorizes the making of the DPD, and (2) the owner of the copyright in sound recording or the entity making the digital

phonorecord delivery has obtained a compulsory license under section 115 or has otherwise been authorized to distribute, by means of a digital phonorecord delivery, each musical work embodied in the sound recording. See 17 U.S.C. 115(c)(3)(H).

In addition, the person intending to use the section 115 license must provide notice to the copyright owner of a musical work of his or her intent to use the copyright owner's work under the statutory license. Pursuant to section 115(b), the Register of Copyrights has issued regulations prescribing the form, content, and manner of service of the Notice of Intention to obtain the license. Final regulations governing the content and service of the notice were adopted on November 28, 1980. 45 FR 79038 (November 28, 1980). These rules were amended to accommodate the making and distribution of phonorecords by means of a digital phonorecord delivery. See 64 FR 41286 (July 30, 1999).

The current rules, however, make it difficult for new digital music services such as PressPlay and MusicNet, who intend to develop libraries of music with hundreds of thousands of titles and to offer these recordings to their subscribers for a fee, to use the compulsory license. See Brad King, *Writers Song Sung Blue, Wired* (July 25, 2001) <http://www.wired.com/news/print/0,1294,45510,00.html>. For instance, under the current rules, a music service has to serve a separate notice on the copyright owner for each work it intends to use even when the intent is to use multiple works owned by the same copyright owner. This requires useless duplication of certain information that could be readily included in a single notice. For this reason and others discussed herein, the Copyright Office is proposing amendments to its regulations in the following areas to improve the efficiencies associated with the service and filing of a Notice of Intention to use the section 115 license.¹

¹This rulemaking does not, nor is it meant to, address the issues raised in an earlier Notice of Inquiry, concerning incidental DPDs, temporary copies, limited downloads, and on-demand streams. See 66 FR 14099 (March 9, 2001). Those issues will be addressed in a future **Federal Register** notice.

1. *Service.* Section 115(b)(1) requires the compulsory licensee to serve the required Notice of Intention on the copyright owner. Under the current regulations, the notice must be sent by certified mail or registered mail to the copyright owner identified in the registration records or other public records of the Copyright Office at the last address listed for such owner. However, these records may not accurately reflect current information concerning the name and/or the address of the copyright owner of the work. Thus, the Office is proposing to amend its rules in two ways.

The first proposed change gives the potential licensee an option to refrain from searching or relying on the Copyright Office's records to determine the identity and/or address of the copyright owner and, instead, to serve the copyright owner at his or her current address when the person seeking the license knows the identity and the current address of the copyright owner of the reproduction and distribution rights. This alternative method of service will benefit those potential licensees who know the identity of the copyright owner and wish to avoid the time and expense associated with searching the registration and other public records in the Copyright Office, but it is not risk-free. In the event the person or entity seeking to obtain the license chooses this option and mistakenly sends the notice to a person or entity who is not the actual copyright owner or to an incorrect address, this person bears all risk associated with the misdirected filing, including the likelihood that the compulsory license will not cover any activity taken by this person or entity under a mistaken assumption that the notice was properly served. Moreover, the proposed change does not, nor can it, alter the statutory requirement that notice be served on the copyright owner "before or within thirty days after making, and before distributing any phonorecords of the work." 17 U.S.C. 115(b)(1). If the actual copyright owner or the copyright owner's lawful agent has not been served within that time frame, digital phonorecord deliveries of the work identified in the notice cannot fall within the scope of the compulsory license. See 17 U.S.C. 115(b)(2).

Second, the Office is proposing amendments which would allow service of a Notice of Intention upon either the copyright owner or upon an agent authorized by the copyright owner to receive such notices. If a potential licensee chooses to serve a duly authorized agent of the copyright owner for purposes of complying with the notice requirements of this license, the agent must be specifically authorized to grant or administer the particular rights that are being licensed. In other words, an agent authorized to grant or administer the mechanical rights but not the DPD rights may accept notice on behalf of the copyright owner only from a licensee that intends to make and distribute physical phonorecords. Notice for the making of

DPDs under the section 115 license would have to be served on a second agent who is authorized to grant or administer the DPD rights or, alternatively, on the copyright owner in accordance with the regulations governing proper notice.

The Office is also proposing similar changes to the rules governing the service and filing of the statements of account for the limited purpose of allowing service upon a duly authorized agent of the copyright owner. These changes are being proposed merely to harmonize the service requirements in Sec. 201.19 with the proposed amendments to Sec. 201.18. No further changes to Sec. 201.19 are being considered at this time.

Of course, there is no requirement that a copyright owner authorize an agent to grant or administer rights subject to the section 115 compulsory license. Moreover, a person or entity who serves someone whom he or she believes to be an authorized agent bears the risk that he or she has not correctly identified the copyright owner's agent.

2. *Multiple Works.* Another way to increase the efficiencies associated with the filing of Notices of Intention is to allow the listing of multiple works on a single notice in the case where the works are owned by the same copyright owner. For this reason, the Office is proposing to amend its rules to [[Page 45243]] eliminate the requirement that a separate Notice of Intention be served or filed for each nondramatic musical work embodied, or intended to be embodied, in phonorecords made under the compulsory license. See 37 CFR 201.18(a)(2). The new rules will allow a licensee to list multiple titles on a single composite Notice of Intention so long as there is a common copyright owner for each work, who shall be so identified in the Notice itself, and the licensee pays the \$12 filing fee for each title. The filing fee will cover the administrative costs associated with separately processing the information for each title in the notice. The proposed change should result in efficiencies for both the copyright owner and the licensee because it will eliminate the need to send multiple notices to the same copyright owner in cases where much of the information in the notices (i.e., the information required by 37 CFR 201.18(c)(1)(i)-(iv)) would be identical.

3. *Content.* The Copyright Office is proposing to amend its rules to require the identification of the copyright owner. This information will be particularly useful in those instances where the notice is sent to a duly authorized agent who may be receiving notices on behalf of multiple copyright owners.

The Office is also proposing to add a requirement that, in the case where a person plans to file the Notice of Intention with the Copyright Office pursuant to Sec. 201.18(e)(1), the notice include an affirmative statement that the registration records or other public records of the Copyright Office have been searched and that the

name and address of the copyright owner is not listed in these records.² This requirement will serve as a reminder to the potential licensee that he or she has an obligation to search the public records of the Copyright Office before filing the required notice with this Office.

4. *Signature.* The Office is further amending its rule to allow a duly authorized agent of the intended licensee to sign the notice of intention. An agent who signs on behalf of the licensee must be specifically authorized to execute the Notice of Intention on behalf of the licensee. A concise statement of authorization to that effect must be included in the Notice of Intention.

5. *Harmless errors.* The statute requires that a person or entity who intends to use the compulsory license give notice to the copyright owner of the nondramatic musical work before or within thirty days after making, and before distributing any phonorecords of the work. The rules outline specific elements that are to be included in each notice. This information helps the copyright owner identify which of his or her works are being used under the license. Errors may occur in the preparation of these notices. However, potential licensees should not be denied the use of the license if such errors do not affect the legal sufficiency of the notice. For this reason, the Office is proposing to add a new section to clarify that such errors will be considered harmless and will not affect the validity of the notice. The Office does not anticipate that it will have any role in resolving disputes about whether an error in a notice is harmless. Such disputes will have to be adjudicated in the courts.

6. *Fee for filing Notices of Intention.* 37 CFR 201.18(e)(3) provides, in pertinent part, that when a Notice of Intention is filed with the Office because the copyright owner is no longer at the last address indicated in the Copyright Office's records or has refused to accept delivery, no filing fee will be required. The Office proposes to amend Sec. 201.18(e)(3) to remove this provision. The fee charged for the filing of a Notice of Intention, like most other Copyright Office fees, is based upon full recovery of the Office's costs in performing the service. See Fees and Registration of Claims to Copyright, 64 FR 29518 (June 1, 1999). The cost to the Office of processing the filing of a Notice of Intention is the same whether the copyright owner is not identified in the records of the Office or the copyright owner is no longer located at the address shown in the records of the Office or has refused to accept delivery. The Office believes that the filing fee should be charged in both cases.

7. *Certificate of Filing.* 37 CFR 201.18(e)(1) provides, in pertinent part, that

²Section 201.18(e)(1) provides that if the registration records or other public records of the Copyright Office do not identify the name and address of the copyright owner of a particular work, a Notice of Intention with respect to that work may be filed with the Copyright Office.

“[u]pon request and payment of the fee specified in Sec. 201.3(e), a Certificate of filing [of a Notice of Intention] will be provided to the sender.” This Certificate of Filing is in addition to a written acknowledgment of receipt and filing that the Office routinely provides to a person who files a Notice of Intention.

Currently, the Certificate of filing states the date the Notice of Intention was filed, the name and address of the person or entity intending to obtain the compulsory license, and the title of the nondramatic musical work named in the Notice of Intention. However, under the proposed amendments to Sec. 201.18, Notices of Intention may list multiple titles. Hypothetically, a Notice of Intention could list the titles of hundreds or even thousands of works, if the works have a common copyright owner. The current Certificate of filing is ill-suited for such Notices of Intention.

Moreover, there is some question whether the Certificate of filing serves any purpose, given that the Office routinely provides a written acknowledgment of receipt and filing. If a person wishes to obtain official certification of the filing of a Notice of Intention, perhaps a more appropriate means of certification would be for the Office to provide a certified copy of the Notice of Intention pursuant to the existing regulations governing certified copies of Copyright Office records. See 37 CFR 201.2(d).

Accordingly, the Office proposes to delete the provision in Sec. 201.18(e)(1) that provides for a Certificate of filing.

Comments on the proposed changes shall be filed with the Copyright Office no later than 30 days after publication of this notice in the **Federal Register**.

List of Subjects in 37 CFR Part 201

Copyright.

Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes amending part 201 of 37 CFR as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Section 201.18 is amended as follows:
- by revising paragraph (a)(1);
 - by revising paragraph (a)(2);
 - by revising paragraph (a)(3);
 - by redesignating paragraph (a)(4) as paragraph (a)(5);
 - by adding a new paragraph (a)(4);
 - by revising paragraph (c)(1)(ii);
 - by revising paragraph (c)(1)(v);
 - by removing paragraphs (c)(1)(vi)

through (c)(1)(x);

- by adding a new paragraph (c)(1)(vi);
- by revising paragraph (d);
- by revising paragraph (e); and
- by adding a new paragraph (f).

The revisions and additions to Sec. 201.18 read as follows: [[Page 45244]]

Sec. 201.18 Notice of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works.

(a) *General.* (1) A “Notice of Intention” is a notice identified in section 115(b) of title 17 of the United States Code, and required by that section to be served on a copyright owner or, in certain cases, to be filed in the Copyright Office, before or within thirty days after making, and before distributing any phonorecords of the work, in order to obtain a compulsory license to make and distribute phonorecords of nondramatic musical works.

(2) A Notice of Intention shall be served or filed for nondramatic musical works embodied, or intended to be embodied, in phonorecords made under the compulsory license. A Notice of Intention may designate any number of nondramatic musical works, provided that the copyright owner of each designated work or, in the case of any work having more than one copyright owner, any one of the copyright owners is the same and that the information required under paragraphs (c)(1)(i)–(iv) of this section does not vary for any musical work listed on the Notice of Intention. For purposes of this section, a notice which lists multiple works shall be considered a composite filing of multiple notices and fees shall be paid accordingly if filed in the Copyright Office under paragraph (e) of this section.

(3) For the purposes of this section, the term copyright owner, in the case of any work having more than one copyright owner, means any one of the co-owners.

(4) For the purposes of this section, service of a Notice of Intention on a copyright owner shall include service of the Notice on either the copyright owner or a duly authorized agent of the copyright owner, provided that the agent is authorized to grant or administer the particular rights that are being licensed. In the case where the work has more than one copyright owner, the service of the Notice on any one of the co-owners of the nondramatic musical work or upon a duly authorized agent of one of the co-owners shall be sufficient with respect to all co-owners.

* * * * *

(c) *Content.*

(1) * * *

(ii) The telephone number, the full address, including a specific number and street name or rural route, of the place of business, and an e-mail address, if available, of the person or entity intending to obtain the compulsory license. A post office box or similar designation will not be sufficient for this pur-

pose except where it is the only address that can be used in that geographic location.

* * * * *

(v) For each nondramatic musical work embodied or intended to be embodied in phonorecords made under the compulsory license:

(A) The title of the nondramatic musical work;

(B) The name of the author or authors, if known;

(C) A copyright owner of the work, if known;

(D) The types of all phonorecord configurations already made (if any) and expected to be made under the compulsory license (for example: Single disk, long-playing disk, cassette, cartridge, reel-to-reel, a digital phonorecord delivery, or a combination of them);

(E) The expected date of initial distribution of phonorecords already made (if any) or expected to be made under the compulsory license;

(F) The name of the principal recording artist or group actually engaged or expected to be engaged in rendering the performances fixed on phonorecords already made (if any) or expected to be made under the compulsory license;

(G) The catalog number or numbers, and label name or names, used or expected to be used on phonorecords already made (if any) or expected to be made under the compulsory license; and

(H) In the case of phonorecords already made (if any) under the compulsory license, the date or dates of such manufacture.

(vi) In the case where the notice will be filed with the Copyright Office pursuant to paragraph (e)(1) of this section, an affirmative statement that with respect to the nondramatic musical work named in the Notice of Intention, the registration records or other public records of the Copyright Office have been searched and do not identify the name and address of the copyright owner of such work.

* * * * *

(d) *Signature.* The Notice shall be signed by the person or entity intending to obtain the compulsory license or by a duly authorized agent of such person or entity.

(1) If the person or entity intending to obtain the compulsory license is a corporation, the signature shall be that of a duly authorized officer or agent of the corporation.

(2) If the person or entity intending to obtain the compulsory license is a partnership, the signature shall be that of a partner or of a duly authorized agent of the partnership.

(3) If the Notice is signed by a duly authorized agent for the person or entity intending to obtain the compulsory license, the agent must be specifically authorized to execute the Notice of Intention on behalf of the licensee and the Notice must include a concise statement of authorization to that effect.

(e) *Filing and service.*

(1) If, with respect to the nondramatic musical works named in the Notice of Intention, the registration records or other public records of the Copyright Office do not identify the copyright owner of such work and include an address for such owner, the Notice may be filed in the Copyright Office. Notices of Intention submitted for filing shall be accompanied by the fee specified in Sec.

201.3(e). A separate fee shall be assessed for each title listed in the Notice. Notices of Intention will be filed by being placed in the appropriate public records of the Licensing Division of the Copyright Office. The date of filing will be the date when the Notice and fee are both received in the Copyright Office. An acknowledgment of receipt and filing will be provided to the sender.

(2) If the registration records or other public records of the Copyright Office identify the copyright owner of the nondramatic musical works named in the Notice of Intention and include an address for such owner, the Notice may be served on such owner by certified mail or by registered mail sent to the last address for such owner shown by the records of the Office. It shall not be necessary to file a copy of the Notice in the Copyright Office in this case.

(3) If the Notice is sent by certified or registered mail to the last address for the copyright owner shown by the records of the Copyright Office and is returned to the sender because the copyright owner is no longer located at the address or has refused to accept delivery, the original Notice as sent shall be filed in the Copyright Office. Notices of Intention submitted for filing under this paragraph (e)(3) shall be submitted to the Licensing Division of the Copyright Office, and shall be accompanied by a brief statement that the Notice was sent to the last address for the copyright owner shown by the records of the Copyright Office but was returned, and by appropriate evidence that it was sent by certified or registered mail to that address. In these cases, the Copyright Office will specially mark its records to consider the date the original Notice was mailed, as shown by the evidence mentioned above, as the date [[Page 45245]] of filing. An acknowledgement of receipt and filing will be provided to the sender.

(4) Alternatively, if the person or entity intending to obtain the compulsory license knows the name and address of the lawful copyright owner of the nondramatic musical work, the Notice of Intention may be served on this person or entity by sending the Notice via certified or registered mail to the address of the copyright owner identified in the Notice. For purposes of section 115(b)(1) of title 17 of the United States Code, the notice will not be considered properly served if the notice is mistakenly sent to a person or entity who is not the lawful copyright owner or duly authorized agent, or to an incorrect address.

(f) *Harmless errors.* Harmless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of section 115(b)(1) of title 17 of the United States Code, shall not render the notice invalid.

3. Section 201.19 is amended as follows:

a. by revising paragraph (a)(3);

b. by redesignating paragraphs (a)(4) through (11) as paragraph (a)(5) through (a)(12); and

c. by adding a new paragraph (a)(4).

The revisions and additions to Sec. 201.19 read as follows:

Sec. 201.19 Royalties and statements of account under compulsory license for making and distributing phonorecords of nondramatic musical works.

(a) * * *

(3) For the purposes of this section, the term copyright owner, in the case of any work having more than one copyright owner means any one of the co-owners.

(4) For the purposes of this section, the service of a Statement of Account on a copyright owner under paragraph (e)(7) or (f)(7) of this section shall include service of the Statement of Account on an agent of the copyright owner who is duly authorized to grant or administer the particular rights being licensed. In the case where the work has more than one copyright owner, the service of the Statement of Account on one co-owner or upon a duly authorized agent of one of the co-owners shall be sufficient with respect to all co-owners.

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Dated: August 21, 2001

Marybeth Peters
Register of Copyrights

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