ANNOUNCEMENT

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

WAIVER OF INTERIM RULE; AND REQUEST FOR COMMENTS

REPRESENTATION FOR CLAMING DART ROYALTIES IN MUSICAL WORKS

The following excerpt is taken from Volume 59, Number 234 of the Federal Register for Wednesday, December 7, 1994 (pp. 63043-63045)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 259

[Docket No. 94–3 CARP]

Representation for Claiming DART Royalties in Musical Works

AGENCY: Copyright Office, Library of Congress.

ACTION: Waiver of interim rule; and request for comments.

SUMMARY: The Copyright Office of the Library of Congress is waiving the rule that requires a performing rights organization to have written authorization in order to represent its members and affiliates for 1993 and 1994 DART royalties in the Musical Works Fund. At the same time we waive the rule, we seek comment on whether a performing rights society should have separate, specific, written authorization from its members to collect DART royalties for its members or affiliates.

DATES: The waiver of §259.2 is effective December 7, 1994. Written comments should be received on or before February 6, 1995.

ADDRESSES: Fifteen copies of written comments should be addressed, if sent by mail, to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. If delivered by hand, copies should be brought to: Office of the General Counsel, Copyright Office, Room LM-407, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

I. Background

Parties that import and distribute in the United States or manufacture and distribute in the United States any digital audio recording technology (DART), either a device or audio recording medium, must deposit royalties with the Copyright Office under the Audio Home Recording Act (AHRA) for ultimate distribution to interested copyright parties. The AHRA defines "interested copyright parties" as copyright owners and any association or other organization representing them. 17 U.S.C. 1001(7). If the parties do not reach distribution agreements among themselves, copyright arbitration royalty panels (CARPs), administered by the Library of Congress and the Copyright Office, determine what joint or individual claimants receive.

In order to qualify, copyright owners must file a claim in January or February of each calendar year for royalties collected during the preceding year. 17 U.S.C. 1006(a)(2), 1007(a)(1). The DART Funds are divided into the Sound Recordings Fund and the Musical Works Fund. This interim rule deals only with the Musical Works Fund.

II. Representation by Performing Rights Organizations

Until it was abolished on December 17, 1993, the Copyright Royalty Tribunal (CRT) prescribed the "form and manner" for filing DART claims. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (eliminating former Chapter 8 of 17 U.S.C.). Shortly after the October 28, 1992, enactment of the AHRA, an issue arose concerning the filing of claims to royalties. That issue was the extent of proof that performing rights organizations were required to present in order to demonstrate proper representation of their members and affiliates. The CRT invited public comment in an Advance Notice of Rulemaking. 57 FR 54542 (Nov. 19, 1992). On January 29, 1993, the CRT adopted a rebuttable inference that performing rights organizations represented their respective members and affiliates (hereafter "members") in royalty proceedings. 58 FR 6441, 6444 (Jan. 29, 1993). The interim regulations also directed the parties to file a report, by June 1, 1993, on the issue. Subsequently, on October 18, 1993, the CRT published final regulations requiring such organizations to submit separate, specific, and written authorization to represent their members. Notice Adopting Final Regulations to Implement the Audio Home Recording Act of 1992, 58 FR 53822 (Oct. 18, 1993).

On November 3, 1993, the performing rights organizations—the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc. (SESAC) (hereafter Performing Rights Organizations) filed with the CRT a petition to reopen for reconsideration the rulemaking proceeding that resulted in the CRT's final rule. On December 3, 1993, the CRT officially held the petition in abeyance. Order, dated Dec. 3, 1993, *In the Matter of Digital Recording Technology Act; Implementation*, CRT Docket No. 92–3–DART.

On December 17, 1993, the President signed into law the Copyright Royalty Tribunal Reform Act of 1993 (CRT 'Reform Act'). Effective immediately upon enactment, the CRT Reform Act eliminated the CRT and transferred its responsibilities to ad hoc CARPs. The new act directed the Librarian of Congress to convene CARPs to adjust rates and distribute royalties. See 17 U.S.C. 111, 115, 116, 118, 119, and chapter 10.

Following Congress' direction in the CRT Reform Act, the Copyright Office issued a notice adopting the full text of the former CRT's rules and regulations on an interim basis. 58 FR 67690 (Dec. 22, 1993). We made only slight technical changes to those rules, stating that we intended to review and revise them during the course of a future rulemaking. *Id.* We then published proposed regulations that revised the adopted CRT rules to adapt them to the requirements of the new CARP system. 59 FR 2550 (Jan. 18, 1994). We concluded that we were not a successor agency of the CRT, and that Congress intended to establish an entirely new system. Therefore, the proceedings the CRT had begun but not concluded by the effective date of the CRT Reform Act would not be taken up where they had been left, but would rather be begun anew under the new CARP regime. *Id.* at 2551.[1] The Copyright Royalty Tribunal's final rule requiring Performing Rights Organizations to submit separate, specific, and written authorization to represent their members is stated in section 259.2.

On February 15, 1994, the Performing Rights Organizations filed a comment with the Copyright Office seeking to reconsider the rule, now adopted by the Copyright Office, that required separate, specific, written authorization from Performing Rights Organization members. (In the Matter of Copyright Arbitration Royalty Panels; Rules and Regulations, Copyright Office Docket No. RM 94–1). Essentially in response to our Notice of Proposed Rulemaking Comment 4, the Performing Rights Organizations asked that their comments either serve to reopen the CRT's former rulemaking proceeding or that the Office consider the matter anew.

On February 23, 1994, the Gospel Music Coalition and Copyright Management, Inc., jointly replied to the Performing Rights Organizations' comment and opposed reconsideration of the issue. *Id.* Reply comment 10.

III. Petition for Inference of Agency

In commenting on our adoption of the CRT rule, the Performing Rights Organizations assert that the rule disenfranchises the many writers and publishers who would otherwise be qualified to receive DART royalties. Following the CRT's interim rule, the performing rights societies contacted their members. One wrote to each of its members that unless the members notified the organization to the contrary, the organization would represent its member writers and publishers. Subsequently, when the CRT later required separate, specific, written authorization, the Performing Rights Organizations again attempted to contact more than two hundred thousand writer and publisher members in less than four months. Performing Rights Organizations states that they have agreements with the major foreign performing rights organizations to represent foreign writers and publishers whose works are exploited in the United States. They also assert that since not all eligible claimants responded to the writing, a significant number of members may still have the impression that the Performing Rights Organizations are representing their claims and that the CRT's final rule effectively leaves these members without an avenue to present their claims. *Id.* Comment 4 at 4–8.

The Performing Rights Organizations also urge that even if the Copyright Office rejects the concept of a permanent rebuttable inference, the rebuttable inference should extend through the 1993 DART distribution proceeding. Claims for 1993 royalties were required to be filed during the months of January and February 1994. The Performing Rights Organizations claim that even with the mass mailings following the Tribunal's final ruling, there was no practical way to obtain all of the required signed written authorizations before the filing period expired. They also suggest that the abolition of the CRT effectively disenfranchised the Performing Rights Organizations' members and affiliates, since it eliminated their only forum for being reheard on this issue. The Performing Rights Organizations also contend that further prejudice will result to their members and affiliates because of a private settlement, entered into by all joint claimant groups and all but one of the individual claimants to the Musical Works Fund, that links distribution of 1992 DART royalties, to which the rebuttable inference of agency applies, to the outcome of the 1993 proceedings, to which the rebuttable presumption would not apply. *Id.*, at 12–15.

IV. Opposition for Reconsideration

The Gospel Music Coalition and Copyright Management, Inc., oppose reconsideration of the issue. They believe the matter has been amply briefed and settled by the CRT, and no new issues of fact or law have been raised. They oppose the rebuttable presumption of agency and urge the Copyright Office not to disturb the final regulation. Reply Comment 10, Notice of Proposed Rulemaking (94–1).

The Gospel Music Coalition and Copyright Management, Inc., note that the CRT's rationale for granting a temporary inference of agency is no longer applicable, since the time pressures have been greatly eased. Moreover, they state that since the CRT specifically ruled in January 1993 that the AHRA did not grant Performing Rights Organizations special entitlement to make claims on behalf of their members more than a year remained until the end of the filing period. They contend this was ample time to obtain the required authorizations from members. Furthermore, they argue that all organizations had the same opportunity to obtain written authorizations from their members. They state that if the Copyright Office adopts the rebuttable inference in favor of the Performing Rights Organizations, it will give these organizations a benefit over other group claimants. Moreover, the Gospel Music Coalition and Copyright Management, Inc., claim that the silence of members should not be considered as implied consent to representation by a performing rights society, and that excusing the performing rights societies from obtaining separate, specific, written authorizations to file claims grants these organizations preferential treatment. *Id.*

V. Policy Decision and Request for Comments

The Copyright Office has not considered this issue. Less than 30 days before the CRT Reform Act was enacted, the CRT expressly ordered the Performing Rights Organizations' petition to reconsider to be held in abeyance. In our December 22 rule, we noted that we did not consider the Office to be a successor agency to the CRT. Therefore, matters pending before the CRT would have to begin anew.

On May 9, 1994, we issued interim CARP regulations. At that time we noted that the Performing Rights Organizations' comment serving as a petition to reopen was actually a petition for reconsideration of a pending CRT matter and that we would consider it in a separate rulemaking proceeding. 59 FR 23964, 23966 (May 9, 1994). We are now addressing that matter, and the Copyright Office requests

[1] Copyright Office revised and renumbered rules that had been found in 37 CFR part 311 of the CRT's regulations as 37 CFR Part 257.

comments on the issue of whether Performing Rights Organizations need separate, specific, and written authorization to represent members and affiliates in collecting DART musical works royalties. Any party who has already filed comments on this issue with the former CRT may simply incorporate those comments by reference.

Because we are reconsidering the rule, we are waiving the rule adopted at 37 CFR 259.2, and inferring an agency relationship between the Performing Rights Organizations and their members for the 1993 and 1994 DART royalty distribution. This rebuttable inference will be utilized solely for the purpose of filing claims for, and distribution of, 1993 and 1994 DART royalties payments. We include 1994 in the waiver of our rules because the parties have already sought and been granted consolidation of 1993 and 1994 DART royalties. Therefore, it would be cumbersome to have different rules for the consolidated proceeding. If a member files an individual claim or grants express authority to another agent, such action will rebut the implied agency relationship. This action is without precedential value and shall not prejudice the Copyright Office's ultimate determination of the issue.

List of Subjects in 37 CFR Part 259

Claims, Copyright, Digital audio reading devices, Media.

Accordingly, 37 CFR part 259 is amended as follows:

PART 259

1. The authority citiation for part 259 continues to read as follows:

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

§ 259.2 [Suspended]

2. Section 259.2 is suspended effective December 7, 1994, through February 28, 1995.

Dated: December 1, 1994

Marybeth Peters,
Register of Copyrights.

James H. Billington,
The Librarian of Congress.

[FR Doc. 94-30046 Filed 12-6-94; 8:45 am]

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