



ANNOUNCEMENT

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

AMENDMENT OF REGULATION AND POLICY STATEMENT

REPRESENTATION FOR CLAIMING DART ROYALTIES IN MUSICAL WORKS

The following excerpt is taken from Volume 60, Number 231 of the *Federal Register* for Friday, December 1, 1995 (pp. 61657-61660)

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: Amendment of regulation and policy statement.

SUMMARY: The Copyright Office currently requires a performing rights organization to have separate, specific and written authorization from its members or affiliates in order to file a claim on behalf of its members for DART royalties in the Musical Works Fund. The performing rights organization had sought reconsideration of this rule. This document establishes that the Office retains this practice, but amends the rule and applies the requirement to all organizations and associations that act as common agents for the purposes of filing claims, negotiating settlements and receiving digital royalties on behalf of their members or affiliates. Under this amended rule, organizations and associations that act only as common agents must specify in their claim how the parties entitled to receive royalties, i.e., their members or affiliates, fit the definition of interested copyright party under the Act.

EFFECTIVE DATE: January 2, 1996.

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SUPPLEMENTARY INFORMATION:

I. Background

On October 28, 1992, Congress enacted the Audio Home Recording Act (AHRA). This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) that are distributed in the United States. The royalties are deposited with the Copyright Office and distributed in one of two ways. Parties may negotiate settlements among themselves; or if they cannot settle, a Copyright Arbitration Royalty Panel (CARP), convened by the Copyright Office (hereafter "Office"), and the Librarian of Congress, allocates royalty payments among the joint and individual claimants.

To qualify for DART royalties, interested copyright parties entitled to receive funds under section 1006 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 royalties are divided into two funds — the Sound Recording Fund, which accounts for 66 2/3% of the royalties, and the Musical Works Fund, which accounts for the remaining 33 1/3% of the royalties.

The Copyright Royalty Tribunal (CRT) had the original authority to promulgate the rules and regulations to administer the AHRA. Shortly after the

October 28, 1992, enactment of the AHRA, the CRT faced the issue of defining the extent of proof required of a performing rights organization to demonstrate that it had the proper authorization to represent its members or affiliates before the CRT in a DART proceeding. The CRT invited public comment in an Advance Notice of Rulemaking. 57 FR 54542 (November 19, 1992). On January 29, 1993, the CRT adopted a rebuttable presumption that performing rights organizations represented their respective members or affiliates in royalty proceedings for the 1992 fund. 58 FR 6441, 6444 (January 29, 1993). The interim regulations also directed the parties to file a report, by June 1, 1993, on this issue. Subsequently, on October 18, 1993, the CRT published final regulations which required performing rights organizations to obtain separate, specific, written authorization from its members. 58 FR 53822 (October 18, 1993); 37 CFR 259.2 (formerly 37 CFR 311.2).

On November 3, 1993, the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc. (SESAC) 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.

Shortly thereafter, on December 17, 1993, the President signed the Copyright Royalty Tribunal Reform Act of 1993,

Pub. L. 103-198, 107 Stat. 2304, thereby eliminating the CRT and replacing it with a system of *ad hoc* Copyright Arbitration Royalty Panels administered by the Librarian of Congress and the Copyright Office. 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, and to immediately adopt the rules and regulations of the former CRT. In response to these directions, the Copyright Office issued a notice adopting the full text of the rules and regulations of the former CRT on an interim basis. 58 FR 67690 (December 22, 1993).

On January 18, 1994, the Copyright Office published proposed regulations that revised the adopted CRT rules and adapted them for the administration of the new *ad hoc* arbitration panels. 59 FR 2550 (January 18, 1994). At this time, the Office concluded that it was not a successor agency of the CRT, and would therefore, not continue any matter before the CRT at the time the CRT Reform Act became law. Instead, parties who had issues pending before the Tribunal would need to initiate new action under the rules and regulations governing the administration of the CARPs.

On February 15, 1994, the performing rights organizations filed a comment with the Copyright Office seeking reconsideration of the rule, now adopted by the Copyright Office, that required separate, specific, written authorization from the members of the performing rights societies. 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, 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. PRO Comment at 4. The Gospel Music Coalition and Copyright Management, Inc. filed a joint reply on February 23, 1994, to the performing rights organizations' comment and opposed reconsideration of the issue. *Id.*

On May 9, 1994, the Copyright Office issued interim regulations which noted that the Office considered the performing rights organizations' comment as a petition for reconsideration of a pending CRT matter and would consider the petition anew in a separate rulemaking. 59 FR 23964, 23966 (May 9, 1994). Subsequently, the Office initiated a review of the rule with a request for comments on the issue of whether performing rights organizations need specific, separate, written authorization to represent their members' or affiliates' interest in the

collection and distribution of DART royalties. 59 FR 63043 (December 7, 1994).

II. The Parties

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. (SESAC) (collectively, "Performing Rights Organizations or PRO") filed joint comments advocating the adoption of a rebuttable presumption of agency between the Performing Rights Organizations and their members or affiliates for the collection and distribution of royalties.

The Gospel Music Coalition ("GMC") and James Cannings filed comments with the former CRT supporting the present requirement for specific, separate, written authorization. In response to the notice for comments in this proceeding, GMC and Mr. Cannings requested that these former comments be incorporated into the present review.

III. Discussion

Section 1007(a)(1) of the Copyright Code defines the class of eligible claimants as "every interested copyright party seeking to receive royalty payments to which such party is entitled under §1006."

Section 1006 describes the entitlement to royalties as belonging to those interested copyright parties whose works were embodied in a digital or analog musical recording, and distributed, or disseminated to the public in transmissions.

Therefore, a performing rights society is not eligible by itself to file claims because it does not own the works described in §1006. However, it could be eligible to file claims if it were authorized by someone who does own a work described in §1006.

This was explained in the House Report:

Section 1001(7)(D) refers to * * * (4) any association or organization that is 'engaged in licensing rights in musical works to music users on behalf of writers and publishers,' i.e., performing rights societies such as ASCAP and BMI. These various associations and organizations are not themselves directly entitled to receive royalties; only those individuals or organizations specified in section 1006(a) receive royalties directly. Nevertheless, these associations and organizations may be designated as common agents to negotiate and receive payment for royalties on behalf of others pursuant to section 1007(a)(2)* * *. For example, with respect to the 50 percent of the Musical Works Fund allocated to writers, writers eligible to file a claim can negotiate among themselves regarding who should receive how much of the 50 percent, or could appoint common agents, for example, one of the interested copyright parties defined in section

1007(7)(D), to negotiate and file claims on their behalf (emphasis ours). H.R. Rep. No. 873, 102nd Cong., 2d Sess. 23 (1992).

The issue, therefore, is, not whether a performing rights society can file claims by itself. Clearly, it can not. The issue is whether it can file claims on behalf of its members or affiliates based on a rebuttable assumption that its members or affiliates have granted it the authority to do so, or whether a specific, separate, written authorization to represent a member or affiliate is required.

Previously rulings requiring a performing rights society to obtain specific, separate, written authorizations were based on the fact a performing rights society represent its members or* affiliates for the public performing right only, and not for any other right. Because the DART royalty was intended as a compensation for the reproduction right (i.e., home taping), the former Copyright Royalty Tribunal could not conceptually accept the performing rights societies' assertion that they had a right to represent their members or affiliates based on a rebuttable assumption.

However, throughout the rulemaking proceedings for the regulations governing the administration of the AHRA, the performing rights organizations have argued strenuously for a rebuttable presumption of agency which would allow them to file for royalties on behalf of their members or affiliates without specific authorization. The past three filing periods, the former CRT and the Copyright Office granted the presumption for the filing years in question to these organizations for two fundamental reasons: 1) To avoid** disenfranchising an unwary claimant, and 2) to grant sufficient time to the performing rights organizations to complete the enormous task of contacting their members and obtaining the necessary authorization.

The Office shares the PROs concern over disenfranchising an unwary claimant, but believes the strength of this argument has steadily diminished over time. Similarly, the Office believes the performing rights organizations have had sufficient time to obtain the proper authorization. In fact, the performing rights organizations have had over two years to meet the requirements of the disputed rule, since it went into effect on October 18, 1993. 58 FR 53822. Therefore, the Office no longer finds these reasons, which are still put forth by the performing rights organizations, see PRO Comment 1 at 4, compelling; and

*Error; line should read: "rights society represents its members or"

**Error; line should read: "fundamental reasons: 1) to avoid"

now seeks to equalize the filing process with respect to all organizations and associations that file on behalf of their members.

In support of their position, the performing rights organizations have argued that their members do not distinguish their right to recover royalties under DART from their right to recover royalties under the compulsory licenses, especially in light of the historical practice where a performing rights organization represented its members' interests before the former CRT in cable, satellite, and jukebox distribution proceedings and noncommercial educational broadcasting proceedings. *Id.*

While this observation may be valid, the Office notes that, historically, these organizations have represented their members' only for their public performance rights in the designated proceedings, and not the reproduction right addressed under DART.

The Office does not find that any misunderstanding on the part of a member as to the performing rights organization role vis-a-vis the former CRT, and now the Copyright Office, can be a valid basis for a rebuttable presumption. Furthermore, the Office believes the performing rights societies have had sufficient time to correct any misunderstanding.

Alternatively, the PRO argue that the regulation imposes a penalty on their members because the performing rights societies use broad, generalized agency terms in place of specific language that directly addresses the right to collect royalties under AHRA. *Id.* To that extent, §259.2(c)(2) which we are adopting here does permit general agency terms to be sufficient if a court with the authority to interpret a PRO contract rules that the terms in question do extend to the filing of claims for DART royalties.

Under the regulation which requires separate, written and specific authorization, the Office provides an exception. The exception allows the membership or affiliation agreement to authorize the performing rights organization to represent its members before the Copyright Office or the Copyright Arbitration Royalty Panel in royalty filing and fee distribution proceedings, and pointedly does not require the agreement to articulate which exclusive right under the Copyright Act of 1976 the organization represents. 37 CFR 259.2(c)(1).

This exception supports an earlier argument raised by Mr. James Cannings, and incorporated by reference in the present proceeding, which asserted that the standard agreements between performing rights societies and their

members did not grant a society an automatic right to represent its members before the Tribunal. *See Cannings comment to Interim Regulations, 58 FR 6441 (January 29, 1993).* While the Office cannot interpret the terms of the membership contracts, the Office will accept express statements in a membership agreement which authorize the organization to represent a member before the Copyright Office or a CARP as an appropriate grant of authority to the performing rights society to act on behalf of the signatory.

Another earlier argument raised by GMC in support of the present regulation concerned the confusion arising from duplicative and overlapping claims. GMC comment and reply comment to NPRM, 57 FR 54542, (November 18, 1992). The Office finds this argument moot under the present regulations, since it requires all joint claimants to file a list of all individual claimants to the joint claim. This requirement allows the parties to spot overlapping claims quickly and to resolve the issue among themselves.

Additionally, the Gospel Music Coalition has argued on several occasions that the rebuttable presumption allows the performing rights societies to file on behalf of all its members, whether entitled or not under the Act, thereby inflating the magnitude of their initial claim. *See GMC comment and reply comment to NPRM, 57 FR 54542 (November 18, 1992); and GMC comment to Interim Regulations, 58 FR 6441 (January 29, 1993).* The Office concurs and acknowledges the fact that to allow the performing rights organizations to avail themselves continually of the rebuttable presumption grants the performing rights societies a preferential position in the filing process.

The PRO state a corollary to this argument and assert that failure to grant the rebuttable presumption will create a windfall for the other claimants at the expense of unsuspecting, disenfranchised claimants. The Office recognizes that both positions depict potential outcomes under different final rules, but neither argument addresses the main concerns underpinning the current rule; namely, the language and intent of the Act.

On another front, the PRO stress that the adoption of a permanent rebuttable inference of agency will not impair the rights of individuals to file their own claim, or join their claims together. *See PRO Comment at 7.* While the Office agrees with this statement, the Office cannot reconcile the use of the inference with the plain language of the Act and its intent as depicted in the underlying

legislative history. Clearly, the Act contemplated a process where an individual takes the initiative to file on his or her own behalf, or expressly authorizes a common agent to act on his or her behalf.¹

The Office does not refute the Performing Rights Organizations' assertion that Congress recognized a licensing association or organization's status as an interested copyright party. But recognition of this fact still does not provide adequate grounds for allowing a performing rights organization to assert a rebuttal inference of agency when the statute clearly denies it a right to file a claim or negotiate on behalf of its members without an express grant of authority.

In fact, Congress made no presumptions about the agency status of any organization or association which 1) represents parties entitled to royalties under AHRA, or 2) engages in licensing rights in musical works to music users on behalf of writers and publishers, i.e., an interested copyright party under 17 U.S.C. 1001(7)(D). As GMC pointed out, the language in the Act and the legislative history merely permits the performing rights organizations to act as common agents, if so designated. *See discussion of GMC comment and reply to NPRM, 57 FR 54542, (November 18, 1992).* The Copyright Office agrees with this interpretation and will not open a door which Congress expressly left closed.

For all the reasons stated above, the Copyright Office affirms the original regulation requiring separate, specific and written authorization and applies the rule to all organizations and associations acting as common agents, and thereby declines to grant a permanent, rebuttable inference of agency to the performing rights organizations.

IV. Clarification of a filing requirement

The Copyright Office further notes that organizations and associations that are interested copyright parties pursuant to 17 U.S.C. 1001(7)(D) are not entitled to file claims on their own behalf unless the organization or association is also an interested copyright party as defined under 17 U.S.C. 1001(7)(A), (B) or (C).

¹ Performing rights organizations, which are interested copyright parties under the Act pursuant to 17 U.S.C. 1001(7)(D), are never mentioned in section 1006, much less granted agency status for purposes of filing claims for their members. Additional support for this interpretation is found in 17 U.S.C. 1007(a)(2) which allows interested copyright parties specified in section 1006(b) to designate a common agent, including any organization described in section 1001(7)(D), to negotiate or receive payment on their behalf.

These organizations and associations, however, may act as common agents on behalf of their members or affiliates, if so authorized. But, common agents, which are also interested copyright parties under the Act, cannot satisfy the requirement under 37 CFR 259.3(a)(3), to state "how the claimant fits within the definition of interested copyright party pursuant to 17 U.S.C. 1001(7)" by stating that the common agent is an interested copyright party pursuant to 17 U.S.C. 1001(7)(D). Rather, the common agent must state how its members or affiliates, who are the actual claimants, fit into the definition of interested copyright party under 17 U.S.C. 1001(7)(A), (B) or (C) in order to satisfy this filing requirement.

Additionally, the Copyright Office requires only a concise statement of the authorization for the filing of the joint claim. See 37 CFR 259.3(d). Copies of the separate, specific and written authorizations should not be filed with the Office.

List of Subjects in 37 CFR Part 259

Claims, Copyright, Recordings.

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

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

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

2. Sec. 259.3 is revised to read as follows:

§259.2 Time of filing.

(a) *General.* During January and February of each succeeding year, every interested copyright party claiming to be entitled to digital audio recording devices and media royalty payments made for quarterly periods ending during the previous calendar year shall file a claim with the Copyright Office. Claimants may file claims jointly or as a single claim.

(b) *Consequences of an untimely filing.* No royalty payments for the previous calendar year shall be distributed to any interested copyright party who has not filed a claim to such royalty payments during January or February of the following calendar year.

(c) *Authorization.* Any organization or association, acting as a common agent, shall be required to obtain from its members or affiliates separate, specific, and written authorization, signed by members, affiliates, or their representatives, to file claims to the Musical Works Fund or the Sound

Recording Fund, apart from their standard agreements, for purposes of royalties filing and fee distribution. Such written authorization, however, will not be required in cases where either:

(1) The agreement between the organization or association and its members or affiliates specifically authorizes such entity to represent its members or affiliates before the Copyright Office and/or the Copyright Arbitration Royalty Panels in royalty filing and fee distribution proceedings; or

(2) The agreement between the organization or association and its members or affiliates, as specified in a court order issued by a court with authority to interpret the terms of the contract, authorizes such entity to represent its members or affiliates before the Copyright Office and/or Copyright Arbitration Royalty Panels in royalty filing and fee distribution proceedings.

Date: November 24, 1995

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Approved by:

James H. Billington
The Librarian of Congress

[FR Doc. 95-29147 Filed 11-30-95; 8:45am]

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