



# ANNOUNCEMENT

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

## FINAL REGULATIONS; NOTICE OF INITIATION OF NEGOTIATION PERIOD

### DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

The following excerpt is taken from Volume 61, Number 138 of the *Federal Register* for Wednesday, July 17, 1996 (pp. 37213-37216)

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#### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 251

#### [Docket No. 96-4 CARP DPRA]

#### Digital Phonorecord Delivery Rate Adjustment Proceeding

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

**ACTION:** Final regulations; notice of initiation of negotiation period.

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**SUMMARY:** The Copyright Office is announcing the initiation of the negotiation period for determining reasonable rates and terms for digital transmissions that constitute a digital phonorecord delivery. This negotiation period is mandated by the Digital Performance Right in Sound Recordings Act of 1995 and is intended to promote the private settlement of the rates and terms for digital phonorecord delivery. In addition, the Office is adopting procedural regulations implementing the Digital Performance Right in Sound Recordings Act of 1995. The Office also solicits comments on the advisability of consolidating the digital phonorecord delivery rate adjustment proceeding with the physical phonorecord rate adjustment proceeding.

**EFFECTIVE DATES:** The regulations are effective August 16, 1996. The negotiation period begins July 17, 1996 and ends December 31, 1996. Comments on consolidation are due November 8,

1996. Petitions for rate adjustment are due January 10, 1997.

**ADDRESSES:** Comments, copies of voluntary license agreements, and petitions, when sent by mail, should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Comments, copies of voluntary license agreements, and petitions, when hand delivered, should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Marilyn J. Kretsinger, Acting General Counsel, or William Roberts, Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, D.C. 20024, (202) 707-8380.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On November 1, 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("Digital Performance Act"). Pub. L. 104-39, 109 Stat. 336. Among other things, it confirms and clarifies that the scope of the compulsory license to make and distribute phonorecords of nondramatic musical compositions includes digital transmissions which constitute "digital phonorecord deliveries." 17 U.S.C. 115(c)(3). 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. 17 U.S.C. 115(d), 37 C.F.R. 255.4.

The Digital Performance Act also provides that the rate for all digital phonorecord deliveries made or authorized under a compulsory license on or before December 31, 1997, shall be the same as the rate in effect for the making and distributing of physical phonorecords. Accordingly, the Copyright Office and the Library of Congress amended part 255 of the Copyright Office's rules to set the rate for digital phonorecord deliveries at 6.95 cents for each work embodied in a phonorecord, or 1.3 cents per minute of playing time or fraction thereof, whichever amount is larger. 60 FR 61655 (December 1, 1995); 37 C.F.R. 255.5. This is the same rate that applies to the manufacture and distribution of physical phonorecords.

#### This Rate Adjustment Proceeding

The current rate for digital phonorecord deliveries expires December 31, 1997. Accordingly, in the Digital Performance Act, Congress established a two-step process for adjusting the royalty rate: a negotiation period during the second half of 1996 wherein the owners and the users attempt to reach their own voluntary licenses, and the\*, if necessary, and upon petition in 1997, the convening of a copyright arbitration panel\*\* (CARP) to establish rates and terms for those persons who are not covered by such voluntary licenses. 17 U.S.C. 115(c)(3)(C) and (D).

For the first step in the process, the negotiation period, the Digital

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\*Error: word should read; then

\*\*Error: line should read; copyright arbitration royalty panel (CARP)

Performance Act provides that during the period of June 30, 1996, through December 31, 1996, the Librarian of Congress shall cause notice to be published in the *Federal Register* of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates for digital phonorecord deliveries. 17 U.S.C. 115(c)(3)(C).

The Digital Performance Act does not require the negotiation period to begin on June 30, 1996, nor does it require that the negotiation period be six months long. It is the Office's understanding that the Act leaves the commencement and the length of the negotiation period to the discretion of the Librarian.

Upon consideration, the Office believes that the negotiation period should begin in July, 1996, and should conclude by December 31, 1996, and that petitions to convene a CARP should be filed by January 10, 1997, for the following reason. The current rate for digital phonorecord deliveries, by operation of law, is set to expire December 31, 1997. Should negotiations fail and the Librarian be petitioned to convene a CARP, written direct cases would have to be filed by January 31, 1997, if the precontroversy period (three months), the arbitration proceeding (six months) and the Librarian's review of the CARP's decision (two months) is to conclude by December 31, 1997. Otherwise, there will be a lapse in time when no rates apply to digital phonorecord deliveries.

Therefore, the following procedural dates shall apply:

- From today's publication in the *Federal Register* to December 31, 1996, there is established the voluntary negotiation proceeding for determining reasonable terms and rates of royalty payments for digital phonorecord deliveries. Such terms and rates shall distinguish between (a) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (b) digital phonorecord deliveries in general.

- If negotiations are successful, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license for digital phonorecord deliveries may submit to the Librarian of Congress licenses covering such activities. 17 U.S.C. 115 (c)(3)(C).

- In addition, if negotiations are successful, the Librarian may, upon the request of the parties to the negotiation proceeding, submit the agreed upon rates and terms to the public in a notice-and-comment proceeding. The Librarian may adopt the rates and terms embodied

in the proposed settlement without convening a CARP, provided that no opposing comment is received by the Librarian from a party with an intent to participate in a CARP proceeding. 37 C.F.R. 251.63(a). Such petitions are to be filed by January 10, 1997.

- If negotiations are not successful, petitions to convene a CARP are to be filed by January 10, 1997.<sup>1</sup> The petition shall detail petitioner's interest in the royalty rate sufficiently to permit the Librarian of Congress to determine whether the petitioner has a "significant interest" in the rate. The petition must also identify the extent to which the petitioner's interest is shared by other owners or users; owners or users with similar interests may file a joint petition. 37 C.F.R. 251.62.

- Notices of Intent to Participate in a CARP proceeding to adjust the rates and establish the terms of the digital phonorecord delivery compulsory license are to be filed by January 17, 1997.

- Written direct cases in the CARP proceeding shall be filed by January 31, 1997.

- After the precontroversy discovery period, the Librarian will initiate the CARP proceeding on May 1, 1997.

#### **Relationship to Rate Adjustment Proceeding for Physical Phonorecords**

The year 1997 is also when the mechanical royalty rate for physical phonorecords may be adjusted. This rate can be the same as, or different from, the rate that applies to digital phonorecord deliveries. While the rate for digital phonorecord deliveries expires, by law, on December 31, 1997, and needs to be replaced, there is no similar urgency to adjust the mechanical royalty rate for physical phonorecords. If no rate adjustment proceeding for physical phonorecords is concluded by December 31, 1997, the rate in existence now will simply continue until such time as it is adjusted.

The question is still raised whether it wouldn't be more efficient and less costly to have the same CARP panel, if one is to be convened, consider the mechanical royalty rates for both physical phonorecords and digital phonorecord deliveries. To consolidate such proceedings, it would be necessary to have a petition to adjust the physical

phonorecord rate filed at the same time as the petition to adjust the digital phonorecord deliveries rate, January 10, 1997.

However, to require petitions to be filed by January 10, 1997, might deprive the interested copyright owners and users of time in 1997 to negotiate the rate. Therefore, the Office solicits comments on the advisability of consolidating the two rate adjustment proceedings. Comments are due by November 8, 1996. If the comments favor consolidation, the Office will issue an order indicating that the two proceedings will be consolidated. The order will also call for physical phonorecord petitions to be filed by January 10, 1997, Notices of Intent to Participate to be filed by January 17, 1997, written direct cases to be filed by January 31, 1997, and list all other procedural dates. The order will also cancel, because of time constraints, the 30-day negotiation period that follows the filing of a physical phonorecord petition set out in 37 CFR 251.63(a). The Librarian will initiate the consolidated proceeding on May 1, 1997.

#### **Amendment of CARP rules to reflect passage of Digital Performance Act**

In addition to expanding the scope of the mechanical compulsory license to include digital phonorecord deliveries, the Digital Performance Act also added a new compulsory license: the license for qualifying subscription digital audio transmission services to perform sound recordings. The rates and terms for both these licenses are to be set by the CARP, if negotiations prove successful†. Therefore, the current CARP rules need to be amended to reflect these additional responsibilities.

Section 553(b)(3)(A) of the Administrative Procedure Act states that general notice of proposed rulemaking is not required for rules of agency organization, procedure, or practice. Since the Office finds that the following final regulations are rules of agency organization, procedure, or practice, no notice of proposed rulemaking is required.

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

Administrative practice and procedure, Cable television, Copyright, Jukeboxes, Organization and functions (government agencies), Recordings, Satellites.

For the reasons set forth in the preamble, the Copyright Office and the Library of Congress amend 37 CFR 251 as follows:

<sup>1</sup> Because the law requires petitions to be filed in 1997, and because written direct cases must be filed by January 31, 1997, if the proceeding is to conclude by December 31, 1997, the petitions must be received by the Copyright Office by January 10, 1997. Therefore, it is advisable for petitioners to deliver their petitions to the Copyright Office. If petitions are mailed to the CARP post office box, it is advisable that they be sent well in advance.

†Error: word should read; unsuccessful

**PART 251 - COPYRIGHT  
ARBITRATION ROYALTY PANEL  
RULES OF PROCEDURE**

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

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

2. Section 251.2 is revised to read as follows:

**§251.2 Purpose of Copyright Arbitration Royalty Panels.**

The Librarian of Congress, upon the recommendation of the Register of Copyrights, may appoint and convene a Copyright Arbitration Royalty Panel (CARP) for the following purposes:

(a) To make determinations concerning royalty rates for the cable compulsory license, 17 U.S.C. 111;

(b) To make determinations concerning royalty rates and terms for the subscription digital audio transmissions compulsory license, 17 U.S.C. 114;

(c) To make determinations concerning royalty rates for making and distributing phonorecords, and royalty rates and terms for digital transmissions that constitute digital phonorecord deliveries, 17 U.S.C. 115;

(d) To make determinations concerning royalty rates for coin-operated phonorecord players (jukeboxes) whenever a negotiated license expires or is terminated and is not replaced by another such license agreement, 17 U.S.C. 116;

(e) To make determinations concerning royalty rates and terms for the use by noncommercial educational broadcast stations for certain copyrighted works, 17 U.S.C. 118;

(f) To make determinations concerning royalty rates for the satellite carrier compulsory license, 17 U.S.C. 119; and

(g) To make determinations concerning the distribution of cable and satellite carrier royalty fees and digital audio recording devices and media payments deposited with the Register of Copyrights, 17 U.S.C. 111, 119, and chapter 10, respectively.

3. Section 251.58(c) is revised to read as follows:

**§251.58 Judicial review.**

\* \* \* \* \*

(c) The pendency of any appeal shall not relieve persons obligated to make royalty payments under 17 U.S.C. 111, 114, 115, 116, 118, 119, or 1003, and who would be affected by the determination on appeal, from depositing statements of account and royalty fees by those sections.

4. The first sentence of §251.60 is revised to read as follows:

**§251.60 Scope.**

This subpart governs only those

proceedings dealing with royalty rate adjustments affecting cable (17 U.S.C. 111), subscription digital audio transmissions (17 U.S.C. 114), the manufacture and distribution of phonorecords, including digital phonorecord deliveries (17 U.S.C. 115), performances on coin-operated phonorecord players (jukeboxes) (17 U.S.C. 116), noncommercial educational broadcasting (17 U.S.C. 118) and satellite carriers (17 U.S.C. 119). \* \* \*

5. In §251.61, paragraph (a) is revised to read as follows:

**§251.61 Commencement of adjustment proceedings.**

(a) In the case of cable, subscription digital audio transmissions, phonorecords, digital phonorecord deliveries, and coin-operated phonorecord players (jukeboxes), rate adjustment proceedings shall commence with the filing of a petition by an interested party according to the following schedule:

(1) Cable: During 1995, and each subsequent fifth calendar year.

(2) Subscription Digital Audio Transmissions: During a 60-day period prescribed by the Librarian in 1996, 2000, and each subsequent fifth calendar year.

(3) Phonorecords: During 1997 and each subsequent tenth calendar year.

(4) Digital Phonorecord Deliveries: During 1997 and each subsequent fifth calendar year except to the extent that different years may be determined by the parties to a negotiated settlement or by the copyright arbitration royalty panel.

(5) Coin-operated phonorecord players (jukeboxes): Within one year of the expiration or termination of a negotiated license authorized by 17 U.S.C. 116.

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6. In §251.62, the first sentence of paragraph (a) is revised to read as follows:

**§251.62 Content of petition.**

(a) In the case of a petition for rate adjustment proceedings for cable, subscription digital audio transmissions, phonorecords, digital phonorecord deliveries, and coin-operated phonorecord players (jukeboxes), the petition shall detail the petitioner's interest in the royalty rate sufficiently to permit the Librarian of Congress to determine whether the petitioner has a "significant interest" in the matter. \* \* \*

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7. In §251.63, the first sentence of paragraph (a) is revised to read as follows:

**§251.63 Consideration of petition; settlements.**

(a) To allow time for the parties to settle their differences concerning cable,

phonorecord, and jukebox rate adjustments, the Librarian of Congress shall, after the filing of the petition under §251.62 and before the 45-day period specified in §251.45(b)(2)(i), designate a 30-day period for consideration of their settlement. \* \* \*

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Dated: July 12, 1996

Recommended by:

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

Approved by:

**James H. Billington,**  
*The Librarian of Congress.*

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