



ANNOUNCEMENT

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

PRECONTROVERSY DISCOVERY SCHEDULE AND REQUEST FOR NOTICES OF INTENT TO PARTICIPATE

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS

The following excerpt is taken from Volume 61, Number 150 of the *Federal Register* for Friday, August 2, 1996 (pp. 40464-40466)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 96-5 CARP DSTRA]

Digital Performance Right in Sound Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Precontroversy discovery schedule and request for notices of intent to participate.

SUMMARY: The Copyright Office of the Library of Congress is announcing the precontroversy discovery schedule, including the date of initiation of arbitration, for the Copyright Arbitration Royalty Panel (CARP) proceeding to set the rates and terms for the 17 U.S.C. 114 compulsory license for nonexempt digital subscription transmissions. The Office is also requesting interested parties to file comments on the rate petition by August 30, 1996. Parties who wish to participate in the CARP proceeding must file their Notices of Intent to Participate by August 30, 1996.

DATES: Comments on the rate petition, and Notices of Intent to Participate are due on or before August 30, 1996.

ADDRESSES: If sent by mail, an original and five copies of the comments, and an original and five copies of the Notice of Intent to Participate should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. If hand delivered, an original and five copies of

the comments, and an original and five copies of the Notice of Intent to Participate should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington D.C. 20540.

FOR FURTHER INFORMATION CONTACT:

William Roberts, Senior Attorney, or Tanya Sandros, CARP Specialist, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: On November 1, 1995, the President signed into law the "Digital Performance Right in Sound Recordings Act of 1995" ("Digital Performance Act"). Pubic Law No. 104-39. The Digital Performance Act creates an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly the sound recordings by means of certain digital audio transmissions. See 17 U.S.C. 106(6).

Among the limitations on the performance of a sound recording publicly by means of a digital audio transmission is the creation of a new compulsory license for nonexempt subscription transmissions. The Digital Performance Act defines a "subscription transmission" as one that "is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." 17 U.S.C. 114(j)(8). All

nonexempt subscription transmissions are eligible for section 114 compulsory licensing provided they are not made by an "interactive service," which is defined in part as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient." See 17 U.S.C. 114(j)(4).

The terms and rates of the section 114 statutory license are determined by voluntary negotiation among the affected parties and, where necessary, compulsory arbitration conducted under chapter 8 of the Copyright Act. On December 1, 1995, the Copyright Office published a notice in the *Federal Register* initiating the voluntary negotiation period from December 1, 1995, to June 1, 1996. 60 FR 61655 (December 1, 1995). The Office encouraged parties that negotiated voluntary license agreements to submit two copies of the agreement to the Office within 30 days of its execution. No agreements were filed during this period.

Because an industry-wide agreement has not been reached, copyright owners and entities performing sound recordings not subject to a voluntary agreement shall be bound by the terms and rates set by a CARP. The Office directed parties not subject to a voluntary agreement to file their petitions for a CARP proceeding by August 1, 1996. See 60 FR 61656 (1995). On June 4, 1996, the Office received a petition from the Recording Industry Association of America ("RIAA") requesting the "Librarian of Congress to commence proceedings to determine a schedule of terms and rates for a statutory license for the public performance of sound recordings via

those audio digital subscription transmission services currently in operation."

Pursuant to the RIAA's petition and the rules and regulations of 37 CFR part 251, the Librarian of Congress, upon the recommendation of the Register of Copyrights, is announcing the precontroversy discovery schedule for the proceeding to set terms and rates for the section 114 license, including the date on which the proceeding before the CARP will be initiated.

Notices of Intent To Participate

Any party wishing to appear before the CARP, and to present evidence, in this proceeding must file a Notice of Intent to Participate by August 30, 1996. Failure to file a timely Notice of Intent to Participate will preclude a party from participating in this proceeding.

Comments on RIAA Petition

Section 251.45(a) of the rules states that "the Librarian of Congress shall, after receiving a petition for rate adjustment filed under 251.62, *** publish in the Federal Register a notice requesting interested parties to comment on the petition for rate adjustment." 37 CFR 241.45(a). Any party wishing to comment on the RIAA's petition should do so by August 30, 1996.

Precontroversy Discovery Schedule

The Library of Congress is announcing the scheduling of the precontroversy discovery period, and other procedural matters, for the establishment of rates and terms for the section 114 compulsory license. In addition, the Library is announcing the date on which arbitration proceedings will be initiated before a CARP, thereby commencing the 180-day arbitration period. Once a CARP has been convened, the scheduling of the arbitration period is within the discretion of the CARP and will be announced at that time.

A. Commencement of the Proceeding

A rate adjustment proceeding under part 251 of 37 CFR is divided into two essential phases. The first is the 45-day precontroversy discovery phase, during which the parties exchange their written direct cases, exchange their documentation and evidence in support of their written direct cases, and engage in the pre-CARP motions practice described in Sec. 251.45. The other phase is the proceeding before the CARP itself, including the presentation of evidence and the submission of proposed findings by all of the participating parties. The proceeding before the CARP may be in the form of hearings or, in accordance with the requirements of Sec. 251.41(b) of

the rules, the proceeding may be conducted solely on the basis of written pleadings.

Both of these phases to a rate adjustment proceeding require significant amounts of work, not just for the parties, but for the Librarian, the Copyright Office, and the arbitrators as well. The rate setting proceeding for section 114 is not the only CARP proceeding likely to take place this year. The Library of Congress is currently conducting a royalty distribution proceeding under chapter 10 of the Copyright Act, a cable rate adjustment proceeding, a satellite carrier rate adjustment proceeding, and must schedule a cable royalty distribution proceeding, and a satellite carrier royalty distribution proceeding all within this calendar year. It would be extremely difficult for the Office to conduct the precontroversy discovery phase of more than one of these proceedings at the same time, and the Library must, therefore, conduct them sequentially.

Because of the number of CARP proceedings to be conducted this year, and the attending workload, selection of a date to initiate a section 114 rate setting proceeding is not dependent on the schedules of one or more of the participating parties, but must be weighed against the interests of all involved. The RIAA filed their petition in early June 1996, and it is likely that this arbitration proceeding will only involve three other parties who are already aware of the RIAA's petition. The Library therefore believes that a commencement of the precontroversy discovery period in the early fall would not come as a surprise to the affected parties or create an undue burden. Aware of the other proceedings which must be scheduled, the attending workload, and the need to manage the interests of all involved, the Library is announcing the precontroversy discovery schedule and arbitration period in this proceeding without seeking further comment from the participating parties.

B. Precontroversy Discovery Schedule and Procedures

Any party that has filed a Notice of Intent to Participate in the section 114 rate setting proceeding is entitled to participate in the precontroversy discovery period. Each party may request of an opposing party nonprivileged documents underlying facts asserted in the opposing party's written direct case. The precontroversy discovery period is limited to discovery of documents related to written direct cases and any amendments made during the period.

The rules of the Library of Congress do not specify any particular steps or

regimen to the precontroversy discovery period. We believe, however, that it is necessary to establish procedural dates for exchange of documents and filing of motions within the 45-day period to provide order and allow discovery to proceed smoothly and efficiently. The precontroversy discovery schedule set forth by the Library in the recent cable distribution proceeding, see 54 FR 14971, 14975-76 (March 21, 1995), proved to be successful in promoting an orderly and efficient discovery period, and we have chosen to adopt the same format and structure for the precontroversy discovery period in this proceeding.

The following is the precontroversy discovery procedural schedule with corresponding deadlines:

Action	Deadline
Filing of Written Direct Cases	September 9, 1996
Requests for Underlying Documents Related to Written Direct Cases	September 18, 1996
Responses to Requests for Underlying Documents	September 25, 1996
Completion of Document Production	September 30, 1996
Follow-up Requests for Underlying Documents	October 7, 1996
Responses to Follow-up Requests	October 11, 1996
Motions Related to Document Production	October 15, 1996
Production of Documents in Response to Follow-up Requests	October 18, 1996
All Other Motions, Petitions, and Objections	October 23, 1996

The precontroversy discovery period, as specified by Sec. 251.45(b) of the rules, begins on September 9, 1996, with the filing of written direct cases by each party. Each party in this proceeding who has filed a Notice of Intent to Participate must file a written direct case on the date prescribed above. Failure to submit a timely filed written direct case will result in dismissal of that party's case. Parties must comply with the form and content of written direct cases as prescribed in Sec. 251.43. Each party to the proceeding must deliver a complete copy of its written direct case to each of the other parties to the proceeding, as well as file a complete copy with the Copyright Office by close of business on September 9, 1996, the first day of the 45-day period.

After the filing of the written direct cases, document production will proceed according to the above-described schedule. Each party may request underlying documents related to each of the other parties' written direct cases by

September 18, 1996, and responses to those requests are due by September 25, 1996. Documents which are produced as a result of the requests must be exchanged by September 30, 1996. It is important to note that all initial document requests must be made by the September 18, 1996, deadline. Thus, for example, if one party asserts facts that expressly rely on the results of a particular study that was not included in the written direct case, another party desiring production of that study must make its request by September 18; otherwise, the party is not entitled to production of the study.

The precontroversy discovery schedule also establishes deadlines for follow-up discovery requests. Follow-up requests are due by October 7, 1996, and responses to those requests are due by October 11, 1996. Any documentation produced as a result of a follow-up request must be exchanged by October 18, 1996. An example of a follow-up request would be as follows. In the above example, one party expressly relies on the results of a particular study which is not included in its written direct case. As noted above, a party desiring production of that study or survey must make its request by September 18, 1996. If, after receiving a copy of the study, the reviewing party determines that the study heavily relies on the results of a statistical survey, it would be appropriate for that party to make a follow-up request for production of the statistical survey by the October 7, 1996 deadline. Again, failure to make a timely follow-up request would waive that party's right to request production of the survey.

In addition to the deadlines for document requests and production, there are two deadlines for the filing of precontroversy motions. Motions related to document production must be filed by October 15, 1996. Typically, these motions are motions to compel production of requested documents for failure to produce them, but they may also be motions for protective orders. Finally, all other motions, petitions and objections must be filed by October 23, 1996, the final day of the 45-day precontroversy discovery period. These motions, petitions, and objections include, but are not limited to, objections to arbitrators appearing on the arbitrator list under Sec. 251.4, and petitions to dispense with formal hearings under Sec. 251.41(b).

Due to the time limitations between the procedural steps of the precontroversy discovery schedule, we are requiring that all discovery requests and responses to such requests be served by hand or fax on the party to whom such response or request is directed. Filing of requests and responses with the

Copyright Office is not required.

Filing and service of all precontroversy motions, petitions, objections, oppositions and replies shall be as follows. In order to be considered properly filed with the Librarian and/or Copyright Office, all pleadings must be brought to the Copyright Office at the following address no later than 5 p.m. of the filing deadline date: Office of the Register of Copyrights, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540. The form and content of all motions, petitions, objections, oppositions and replies filed with the Office must be in compliance with Sec. 251.44 (b)-(e). As provided in Sec. 251.45(b), oppositions to any motions or petitions must be filed with the Office no later than seven business days from the date of filing of such motion or petition. Replies are due five business days from the date of filing of such oppositions. Service of all motions, petitions, objections, oppositions and replies must be made on counsel or the parties by means no slower than overnight express mail on the same day the pleading is filed.

C. Initiation of Arbitration

Because there are two phases to a rate adjustment proceeding—precontroversy discovery and arbitration—there are two time periods to be scheduled. The regulations do not provide how much time must separate precontroversy discovery from initiation of arbitration. There is no reason to schedule an inordinate amount of time between the two; however, there must be adequate time for the Librarian to rule upon all motions filed within the 45-day precontroversy period. In order to give the parties as much of the month of December as possible for proceedings before the CARP, the Library will initiate arbitration on December 2, 1996. The schedule of the arbitration proceeding will be established by the CARP after the three arbitrators have been selected. Delivery of the written report of the arbitrators to the Librarian, in accordance with 17 U.S.C. 802(e), must be no later than May 30, 1997.

Dated: July 29, 1996

Marilyn J. Kretsinger,
Acting General Counsel.

Approved:

James H. Billington,
The Librarian of Congress.

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