



# ANNOUNCEMENT

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

## NOTICE OF PROPOSED RULEMAKING

### MECHANICAL AND DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

The following excerpt is taken from Volume 62, Number 230 of the *Federal Register* for Monday, December 1, 1997 (pp.63506-63509)

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#### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 255

[Docket No. 96-4 CARP DPRA]

#### Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding

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

**ACTION:** Notice of proposed rulemaking.

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**SUMMARY:** The Copyright Office of the Library of Congress is submitting for public comment a joint petition concerning the adjustment of the Physical phonorecord and digital phonorecord delivery royalty rates and proposed regulations implementing these rates.

**DATES:** Comments and notices of intent to participate are due by December 29, 1997. If comments and Notices of Intent to Participate are not received by this date, the proposed terms and rates shall become effective on January 1, 1998.

**ADDRESSES:** If sent by mail, an original and five copies of comments, and Notices of Intent to Participate,

should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand Delivered, an original and five copies of comments, and Notices 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, SE., Washington, DC 20540.

**FOR FURTHER INFORMATION CONTACT:** David O. Carson, General Counsel; William J. Roberts, Senior Attorney, or Tanya Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

#### SUPPLEMENTARY INFORMATION:

#### How Were the Current Royalty Rates and Terms Established for the Making and Distribution of a Physical Phonorecord and a Digital Phonorecord Delivery?

The mechanical compulsory license, 17 U.S.C. 115, requires a copyright owner of a nondramatic musical work to grant a license to any person who wants to make and distribute phonorecords of that work, provided that the copyright owner has allowed phonorecords of the work to be produced and distributed, and that the licensee pays the statutory

rate. Until its demise in 1993, the Copyright Royalty Tribunal had authority to adjust the statutory rates for the making and distribution of physical phonorecords, and did so in 1987, see 52 FR 22637 (June 15, 1987), setting the rates and terms for the mechanical compulsory license for at least the next ten years.

The Copyright Act provides that, during the tenth calendar year, any copyright owner or user whose royalty rates are specified by the statutory license may file a petition requesting an adjustment to the rates and terms. 17 U.S.C. 803(a) (1) and (3). This ten-year cycle makes 1997 a window year for commencing a proceeding to further adjust the mechanical phonorecord compulsory license royalty rates.

On November 1, 1995, Congress passed the Digital Performance Right in Sound Recording Act of 1995 (Digital Performance Act), Pub. L. 104-39, 109 Stat. 336, which extended the mechanical license to digital phonorecord deliveries. Congress passed this Act to maintain and reaffirm the mechanical rights of songwriters and music publishers in an era of emerging technology which makes delivery of digital phonorecords possible. Among other things, the Digital Performance Act 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).

The Digital<sup>a</sup> Performance Act sets the royalty rate for all digital phonorecord deliveries made or authorized under the section 115 compulsory license on or before December 31, 1997, at the current rate for the making and distribution of physical phonorecords: 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. 37 CFR 255.5.

### **When Does the Current Digital Phonorecord Delivery Royalty Rate Expire and How is a New Rate Set?**

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

If interested parties reach a negotiated settlement, they may submit their proposals for adjusting the rates and terms for digital phonorecord deliveries directly to the Librarian of Congress. 37 CFR 251.63. This rule further provides that:

The Librarian may, upon the request of the parties, submit the agreed upon rate to the public in a notice-and-comment proceeding. The Librarian may adopt the rate embodied in the proposed settlement without convening an arbitration panel, provided that no opposing comment is received by the Librarian from a party with an intent to participate in a CARP proceeding.

37 CFR 251.63. This procedure applies to the adjustment of the compulsory license rates concerning both digital phonorecord and physical phonorecord deliveries.

### **Chronology—Current Rate Adjustment Proceeding**

On July 17, 1996, the Copyright Office published a notice designating

July 17, 1996, to December 31, 1996, as the period for the copyright owners and users to negotiate reasonable terms and rates for the delivery of a digital phonorecord. 61 FR 37312 (July 17, 1996). The notice also established a schedule for convening a CARP which would have established new rates for digital phonorecord deliveries before the current rate expired. In addition, the Office noted that 1997 was a window year for adjusting the royalty rates concerning the making and distribution of physical phonorecords, and requested comment from interested parties on the possibility of conducting a single CARP proceeding to adjust both the physical phonorecord and the digital phonorecord delivery rates, even though the physical phonorecord rates would not expire on December 31, 1997. 61 FR 37215.

According to the interested parties,<sup>1</sup> however, the proposed schedule did not allot sufficient time for negotiating a comprehensive joint proposal. Therefore, they filed a motion with the Office on November 8, 1996, requesting that the Office vacate the proposed schedule to allow them more time to continue their negotiations. The Office granted the moving Parties' motion and rescheduled the proceeding. 61 FR 65243 (December 11, 1996).

Although the new schedule extended the negotiation period by three months, the Parties thought the time still insufficient for conducting the necessary negotiations, and so, requested a meeting with the Office to discuss the difficulties associated with negotiating rates and terms for use of a new technology in a marketplace with little definition or clear direction. The Office granted their request and met with the Parties on January 9, 1997. At that meeting, the Parties again requested more time for conducting the negotiations on setting the rates and terms for the section 115 license, having acknowledged the need to establish the mechanical rate before they attempted to negotiate the rates for the digital delivery of phonorecords. After considering the difficulties confronting the Parties, the Office agreed to vacate the schedule. 62 FR 5057 (February 3, 1997).

The additional time for further negotiations proved to be beneficial, and

on November 7, 1997, the National Music Publishers' Association, Inc. (NMPA), The Songwriters Guild of America (SGA), and the Recording Industry Association of America (RIAA) filed a joint petition with the Copyright Office outlining a proposal to adjust the physical phonorecord and digital phonorecord delivery royalty rates. NMPA, SGA, and RIAA, the organizations that represent the interests of copyright owners and copyright users in the current proceeding, were also the principal participants representing these interests in the 1980 and the 1987 mechanical rate adjustment proceedings. 46 FR 55276 (November 9, 1981) and 52 FR 22637 (June 15, 1987).

The Parties to the joint petition, having duly filed a proposal concerning the 1997 physical phonorecord and digital phonorecord delivery royalty rate adjustments, asked the Copyright Office to submit their proposal to a notice and comment proceeding to promulgate regulations to adjust the proposed rates and terms. Accordingly, pursuant to 17 U.S.C. 803(c) and 37 CFR 251.63(b), the Copyright Office invites public comment on the proposed rates and terms for adjusting the physical phonorecord and digital phonorecord delivery royalty rates, and on the regulatory language implementing the proposal.

### **Comments and Notices of Intent to Participate**

Any party who wishes to challenge the proposed rates and terms must submit his or her written comments to the Librarian of Congress no later than close of business on December 31<sup>b</sup>, 1997. The content of the written challenge should describe the party's interest in this proceeding, the proposed rule that the party finds objectionable, and the reasons for the challenge.

In addition, any party submitting written challenges must also submit an accompanying Notice of Intent to Participate. Failure to submit a Notice of Intent to Participate will preclude the interested party from participating in a CARP proceeding to adjust the rates and terms, and will preclude consideration of his or her challenge. If no comments or Notices of Intent to Participate are

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<sup>a</sup>Error: Line should read: "The Digital Performance Act sets"

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<sup>1</sup>The interested parties are the Recording Industry Association of America, the National Music Publishers' Association, Inc., and The Harry Fox Agency, Inc. (collectively, "the parties").

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<sup>b</sup>Error: Line should read: "close of business on December 29, 1997."

received by close of business on the date for filing such comments, the proposed terms and rates shall become effective on January 1, 1998.

### List of Subjects in 37 CFR Part 255

Copyright, Recordings.

For the reasons set forth in the preamble, the Library proposes to amend 37 CFR part 255 as follows:

### PART 255—ADJUSTMENT OF ROYALTY PAYABLE UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

1. The authority citation for part 255 continues to read as follows:

**Authority:** 17 U.S.C. 801(b)(1) and 803.

2. In § 255.3(a), the phrase “(b), (c), (d), (e), (f), (g), and (h)” is removed and the phrase “(b) through (m)” is added after the word “paragraphs”.

3. In § 255.3(b), the phrase “(c), (d), (e), (f), (g), and (h)” is removed and the phrase “(c) through (m)” is added after the word “paragraphs”.

4. In § 255.3(c), the phrase “(d), (e), (f), (g), and (h)” is removed and the phrase “(d) through (m)” is added after the word “paragraphs”.

5. In § 255.3(d), the phrase “(e), (f), (g), and (h)” is removed and the phrase “(e) through (m)” is added after the word “paragraphs”.

6. In § 255.3(e), the phrase “(f), (g), and (h)” is removed and the phrase “(f) through (m)” is added after the word “paragraphs”.

7. In § 255.3(f), the phrase “(g), and (h)” is removed and the phrase “(g) through (m)” is added after the word “paragraphs”.

8. In § 255.3(g), the phrase “paragraph (h)” is removed and the phrase “paragraphs (h) through (m)” is added after the phrase “pursuant to”.

9. In § 255.3(h), the phrase “, subject to further adjustment pursuant to paragraphs (i) through (m) of this section” is added after the word “larger”.

10. Add new paragraphs (i), (j), (k), (l), and (m) to § 255.3 to read as follows:

### § 255.3 Adjustment of royalty rate.

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(i) For every phonorecord made and distributed on or after January 1, 1998, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 7.1 cents, or 1.35 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (j) through (m) of this section.

(j) For every phonorecord made and distributed on or after January 1, 2000, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 7.55 cents, or 1.45 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (k) through (m) of this section.

(k) For every phonorecord made and distributed on or after January 1, 2002, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 8.0 cents, or 1.55 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (l) through (m) of this section.

(l) For every phonorecord made and distributed on or after January 1, 2004, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 8.5 cents, or 1.65 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraph (m) of this section.

(m) For every phonorecord made and distributed on or after January 1, 2006, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 9.1 cents, or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

11. Revise § 255.5 to read as follows:

### § 255.5 Royalty rate for digital phonorecord deliveries in general.

(a) For every digital phonorecord delivery made on or before December 31, 1997, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 6.95 cents, or 1.3 cents per minute of playing time

or fraction thereof, whichever amount is larger.

(b) Except as provided in § 255.6, for every digital phonorecord delivery made on or after January 1, 1998, the royalty rate payable with respect to each work embodied in the phonorecord shall be the royalty rate prescribed in § 255.3 for the making and distribution of a phonorecord made and distributed on the date of the digital phonorecord delivery (the “Physical Rate”). In any future proceeding under 17 U.S.C. 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

12. Add § 255.6 to read as follows:

### § 255.6 Royalty rate for incidental digital phonorecord deliveries.

(a) Except as provided in paragraphs (b) and (c) of this section, for every digital phonorecord delivery made on or after January 1, 1998, where the reproduction or distribution of the phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery (an “Incidental DPD”), the royalty rate payable with respect to each work embodied in the phonorecord shall be the Physical Rate. In any future proceeding under 17 U.S.C.

115(c)(3)(C) or (D), the characterization of a digital phonorecord delivery as “incidental” and the royalty rates payable for a compulsory license for Incidental DPDs shall be established de novo, and no precedential effect shall be given to the characterization of a digital phonorecord delivery as “incidental” under this section or to the royalty rate payable under this section for any period prior to the period as to which the characterization of a digital phonorecord delivery as “incidental” or the royalty rates are to be established in such future proceeding.

(b) No royalty shall be payable for any “Transient Phonorecord” made in the course of any digital phonorecord delivery made on or after January 1,

1998: provided that a royalty shall be payable with respect to each work embodied in the phonorecord ultimately reproduced by or for the ultimate transmission recipient of such digital phonorecord delivery at the royalty rate prescribed under § 255.5 or the other paragraphs of this section, as applicable. Nothing in this paragraph shall limit or impair any rights or remedies of the copyright owner of a work against any person who makes reproductions from a Transient Phonorecord for any purpose other than to facilitate the transmission to the ultimate transmission recipient. For the purpose of this paragraph, a "Transient Phonorecord" is a transient phonorecord reproduced in temporary computer memory or digital storage intermediate to the communications system through which a digital phonorecord delivery is made, where such transient phonorecord is made in the ordinary operation of such system solely to facilitate the transmission to the ultimate transmission recipient. An example of a Transient Phonorecord is a phonorecord reproduced temporarily in a router intermediate to the Internet.

(c)(1) For every digital phonorecord delivery made on or after January 1, 1998, no royalty shall be payable where:

(i) The reproduction or distribution of the phonorecord is incidental to the promotion of a sound recording embodying a work,

(ii) The phonorecord is of no more than 30 seconds of playing time of the sound recording of such work, or in the case of sound recordings of a work with a playing time of more than 5 minutes, the phonorecord is of no more than the lesser of 10% or 60 seconds of playing time of the sound recording of such work, and

(iii) The digital phonorecord delivery is made or authorized by the copyright owner of such sound recording.

(2) The copyright owner of any work embodied in a sound recording may, without payment of any royalty to the copyright owner of the sound recording, make or authorize a digital phonorecord delivery where:

(i) The reproduction or distribution of the phonorecord is incidental to the promotion of the work embodied in the sound recording,

(ii) The phonorecord is of no more

than 30 seconds of playing time of the sound recording of such work, or in the case of sound recordings of a work with a playing time of more than 5 minutes, the phonorecord is of no more than the lesser of 10% or 60 seconds of playing time of the sound recording of such work, and

(iii) The digital phonorecord delivery is made by the copyright owner of such work, either individually or collectively with other copyright owners of such works, or by an organization of copyright owners designated by such copyright owners as their common agent.

13. Add § 255.7 to read as follows:

### § 255.7 Future proceedings.

The procedures specified in 17 U.S.C. 115(c)(3)(C) shall be repeated in 1998 and every second year thereafter until 2006 so as to determine the applicable rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. The procedures specified in 17 U.S.C.

115(c)(3)(D) shall be repeated, in the absence of license agreements negotiated under 17 U.S.C. 115(c)(3)(B) and (C), upon the filing of a petition in accordance with 17 U.S.C. 803(a)(1), in 1999 and every second year thereafter until 2007 so as to determine new rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. Thereafter, the procedures specified in 17 U.S.C.

115(c)(3)(C) and (D) shall be repeated in each fifth calendar year. Notwithstanding the provisions of this section, different years for the repeating of such proceedings may be determined in accordance with 17 U.S.C. 115(c)(3)(C) and (D).

Dated: November 18, 1997.

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

Approved by:  
**James H. Billington,**  
*The Librarian of Congress.*

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