ANNOUNCEMENT
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INTERIM REGULATIONS.

NOTICE AND RECORDKEEPING FOR MAKING AND DISTRIBUTING PHONORECORDS

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 98-7C]

Notice and Recordkeeping for Making and Distributing Phonorecords

AGENCY: Copyright Office, Library of Congress

ACTION: Interim regulations.

SUMMARY: The Copyright Office is announcing interim regulations which specify notice and recordkeeping requirements associated with the making of digital phonorecord deliveries. The Digital Performance Right in Sound Recordings Act of 1995 requires the Librarian of Congress to establish these regulations to insure proper payment to copyright owners for the use of their works.

EFFECTIVE DATE: The interim regulations shall become effective on August 30, 1999.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel ("CARP"), P.O. Box 70977, Southwest tation, Washington, D.C. 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:

Background

On November 1, 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Pub. L. 104-39 (1995). Among other things, this law clarifies that the compulsory license for making and distributing phonorecords includes the distribution of a phonorecord of a nondramatic musical work by means of a digital phonorecord delivery. 17 U.S.C. 115(c)(3).

The DPRA requires the Librarian of Congress to "establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries." 17 U.S.C. 115(c)(3)(D).

The Copyright Office initiated the process to promulgate regulations on the subject of the notice and recordkeeping requirements on September 4, 1998, with the publication of a Notice of Inquiry. 63 FR 47215 (September 4, 1998). The notice sought comment on whether the existing regulations, 37 CFR 201.18 and 201.19, governing the administration of the section 115 compulsory license, could be amended to accommodate the additional notice and recordkeeping requirements. Comments were due on October 19, 1998, and reply comments were due on November 18, 1998.

On October 19, 1998, the Recording Industry Association of America ("RIAA") and the National Music Publishers' Association of America, Inc. ("NMPA") filed a joint petition with the Copyright Office. The petition requested a six-month extension of the filing period in order to allow these parties additional time to work out a joint proposal that would address the complex technical and business issues involved in the making of digital phonorecord deliveries ("DPDs"). In response to the parties' concerns expressed in the petition and a second request for additional time, the Copyright Office reopened the comment period twice. 63 FR 65567 (November 27, 1998); 63 FR 69251 (December 16, 1998).

The Commenters

The Copyright Office received five comments from six parties: NMPA and the Songwriters Guild of America ("SGA"), jointly; RIAA; Digital Media Association ("DiMA"); Broadcast Music, Inc. ("BMI"), and the American Society of Composers, Authors, and Publishers ("ASCAP").

The Scope of This Proceeding

BMI and ASCAP filed comments to underscore their understanding that the DPRA does not in any way diminish the right of public performance and that the current rulemaking does not involve the right of public performance, but rather is limited to the right of reproduction and the right of distribution. BMI's and ASCAP's assessment as to the scope of this proceeding is correct. It implicates only the rights of reproduction and distribution in the making and distribution of phonorecords, and not the right of public performance.

A Request for Interim Regulations

NMPA/SGA, RIAA, and DiMA indicate a strong preference for delaying the adoption of final regulations on notice and recordkeeping because the industry is in its infancy and business models to handle the transactions involved in making DPDs are still evolving. These commenters encourage the Office to adopt interim regulations for a period of between six months to two years in order to allow continued negotiations among industry representatives. BMI and ASCAP also have no objections to adopting interim regulations so long as such amendments do not apply to the right of public performance. The Copyright Office agrees with the commenters and is adopting interim regulations for a period of two years; however, a party with a substantial interest in notice and recordkeeping requirements for DPDs may petition the Office to reopen the

rulemaking for good cause before the expiration of this period. The interim regulations are promulgated without prejudice to the parties who, at the appropriate time, may propose final regulations that may differ significantly from the interim rules based upon the developing business trends in the industry.

Proposed Amendments to 37 CFR 201.18 and 201.19

Section 115(b)(1) of the Copyright Act, title 17 of the United States Code, requires "[a]ny person who wishes to obtain a compulsory license under this section . . . [to] serve notice of intention to do so on the copyright owner." This section also requires the Copyright Office to prescribe regulations specifying the form, content, and manner of service of the notice of intention. Section 201.18 of title 37 of the Code of Federal Regulations meets this requirement. Similarly, the regulations in Sec. 201.19 address the requirement that each compulsory licensee file monthly and annual

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statements of account for each section 115 compulsory license in accordance with 17 U.S.C. 115(c)(5).

NMPA/SGA, RIAA, and DiMA proposed amendments to Secs. 201.18 and 201.19 that would adapt these rules to digital phonorecord deliveries at least for purposes of filing notices of intention to use the license and statements of account. However, NMPA and SGA do not believe that amending the current regulations will be sufficient to address the requirements of section 115(c)(3)(D), of title 17 of the United States Code, relating to notice and recordkeeping. They contend that the requirements of section 115(c)(3)(D) are separate and distinct from the requirements to file a notice of intention to use the license and statements of account specified in sections 115(b)(1) and (c)(5), respectively, but acknowledge that the requirements share some common ground. On the other hand, RIAA states that it believes the proposed amendments would fulfill the notice and recordkeeping requirements set out in 17 U.S.C. 115(c)(3)(D), in addition to the traditional requirements for filing a notice of intention to use the license and statements of account set out in 17 U.S.C. 115(b)(1) and (c)(5). Reply comments of RIAA at 5 n.1.

While acknowledging the potential need to draft additional amendments, for purposes of the interim regulations the Copyright Office accepts RIAA's analysis on this point. The interim regulations will require those users who avail themselves of the section 115 license for the purpose of making DPDs to file a notice of intention to use the license and statements of account with the copyright owner in those cases where the public records of the Copyright Office identify the owner. Certainly, direct notice to the copyright owner fulfills the section 115(c)(3)(D) requirement for notice, and the detailed statements of account filed with the copyright owner should provide sufficient information to document the use of the copyrighted works to meet the recordkeeping requirement. Nevertheless, the Office supports NMPA/SGA's suggestion for further discussion on these issues, especially as to whether the current regulations, as amended herein, go far enough to prescribe how "records of such use shall be kept and made available by persons making digital phonorecord deliveries." 17 U.S.C. 115(c)(3)(D).

As to the actual amendments proposed, we note that each party proposed modest changes to the existing rules that would allow a user to take advantage of the compulsory license, but that the commenters differed in their view on whether the traditional concepts of "relinquished from possession," "phonorecord reserves," or "returns" applied to DPDs. NMPA/SGA contend that the terms, "voluntarily distributed," "reserves," and "returns" do not properly apply to DPDs as used in the current regulations. "NMPA and SGA are not aware of any 'returns' of DPDs or even how such returns could technically be accomplished. Accordingly, we see no basis to provide for 'reserves' with respect to such 'returns' of DPDs." Further comments of NMPA and SGA at 4 n.3.

RIAA and DiMA, however, have less trouble applying these same concepts to DPDs. Citing the possibility of a failed transmission or an incomplete reproduction, RIAA and DiMA foresee a need to be able to offer DPD recipients credits or replacements. RIAA argues that "(w)hen the relevant commercial arrangements provide for a credit or replacement and generally accepted accounting principles require such treatment, RIAA believes that a maker of DPDs should have the opportunity to make mechanical royalty payments reflecting such credits or replacements and any corresponding reserve." Reply comments of RIAA at 4; *see also* DiMA at 3. Similarly, DiMA foresees a business model that allows a distributor to prepay for a preset number of DPDs in conjunction with the right to return the unsold portion for a credit or as an offset. Both approaches incorporate the concepts of "reserves" and "returns," and require that the rules define the term "voluntarily distributed" as it relates to a DPD. Under either model, the user must be able to account for and receive credit for the "returns" and the "reserves."

The Copyright Office has weighed the arguments of the commenting parties and agrees with RIAA that a distributor should be allowed to provide a replacement DPD in order to rectify a problem on the receiving end of the transmission, or to account for a failed transmission or an incomplete reproduction. However, the Office has found no basis for adopting the concept of "reserves" to DPDs. Therefore, the interim regulations require accounting for all DPDs, both attempted and completed, but at the same time, provide a mechanism whereby a distributor may adjust for failed transmissions and replacement DPDs made for the purpose of delivering a complete and usable DPD to an intended recipient. We also adopt DiMA's suggestion to add the term, "digital phonorecord delivery," to the list of phonorecord configurations in Secs. 201.18(c)(1)(vi) and 201.19(e)(3)(ii)(D).

To effect the proposed scheme, it is necessary to ascertain when a DPD is made, manufactured, or distributed for purposes of the section 115 license such that the obligation to pay the royalty fee attaches. RIAA and NMPA/SGA define the point as the "date the digital delivery is completed," but neither commenter offered any insight on how to ascertain the date of completion. The answer to this question is of critical import, because royalties will be paid only for those DPDs which are completed. In anticipation of this problem, DiMA suggests amending Sec. 201.19(a)(5) to define the concept of "voluntarily and permanently part(ing) with," a DPD as "the time when the delivery and making of the digital phonorecord can be confirmed as completed." DiMA at 3. According to DiMA, the transmitting entity could confirm "that the transmission arrived intact," DiMA at 3, but it need not do so. Instead, DiMA proposes a presumption in favor of a successful transmission in the absence of a notification from the intended recipient that the transmission or reproduction failed.

The Copyright Office finds that DiMA's approach sets the mark too far down the line when determining the point at which delivery is complete because it leaves the resolution of when the DPD actually occurs in the hands of the intended recipient. This approach fails to account for a misdirected DPD or for a successful transmission to a recipient who, for whatever reason, cannot access and utilize the phonorecord. Therefore, for purposes of the interim regulations, the Office will start with a rebuttable presumption that a DPD is complete on the date the transmission is made. However, the Office recognizes that if a transmission fails or results in an incomplete reproduction, as determined by means within the sole control of the distributor, no delivery has occurred and no copyright liability accrues. In such cases, the distributor may overcome the presumption by explaining when and why the transmission failed and deduct one unit DPD from the monthly total. A distributor may also deduct a unit DPD from the monthly tally for a retransmission of a sound recording to an intended recipient in the case where although the initial transmission to the intended recipient resulted in a specifically identifiable reproduction of that sound recording, for

some reason it remained inaccessible to the intended recipient.

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This interpretation comports with the statutory definition of a digital phonorecord delivery. Section 115(d)(1) defines a digital phonorecord delivery as "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." The statutory definition requires only that transmission of an identifiable reproduction of a sound recording be successfully completed. It does not require that the intended recipient actually receive and verify receipt of a usable reproduction. The key factor is the delivery of a specifically identifiable reproduction of a sound recording and not verification by an intended recipient. Consequently, receipt of an identifiable, but unusable reproduction still will require payment of an initial copyright royalty fee. Under such circumstances, the distributor may retransmit a phonorecord of the same sound recording and treat the retransmission as a replacement for the initial phonorecord.

The Office takes this approach because it accounts for every transaction without imposing additional liability on the distributor in those cases where replacements need to be supplied to a customer. While it is arguable that each transmission constitutes a separate DPD, the Office has determined that it is unreasonable to impose additional costs for replacements on a distributor, since retransmissions are not likely to increase the risk of further copying at the expense of the copyright owner. A recipient who wishes to make further copies can do so easily from a single reproduction of the sound recording. Such is the nature of the digital environment. Therefore, the Copyright Office can see no reason to prevent a distributor from making multiple transmissions to the same recipient for the sole purpose of completing the DPD of a particular sound recording, nor can it see any reason why a customer would request a second transmission once he or she has received a complete and usable file. Consequently, the interim regulations will allow a maker of DPDs to adjust the total monthly count of DPDs to account for subsequent transmissions of a sound recording made to an intended recipient in an attempt to complete delivery of the initial request. However, this does not mean that the distributor can avoid payment on an initial transmission which results in a specifically identifiable reproduction, or extend a credit to a customer for a different sound recording because the customer was unable to make use of the initial DPD.

The Office rejects RIAA's proposal to adopt a regulatory scheme that would allow a distributor of DPDs to offer credits to a consumer in the event of a purported faulty or incomplete transmission, because the potential for abuse is too high. This is true because there is no apparent means to verify whether a request for a credit is legitimate. Nothing would prevent a customer from claiming a credit upon the mere assertion that the DPD was incomplete, even though the initial DPD was properly made. The intended recipient could then use the credit to order a different DPD, ultimately receiving two DPDs for the price of one. Such a result is contrary to the purpose of the compulsory license and must be avoided. For purposes of the compulsory license, the royalty obligation accrues upon the initial transmission of the phonorecord. Corrections for defective transmissions or for replacement DPDs are made as adjustments to the total number of transmissions. Such offsets benefit the distributor only, and may not be extended to the consumer directly under the auspices of the statutory license. Of course, a distributor may decide to grant a credit to a consumer who does not receive a complete reproduction or cannot access a file, but that decision does not alter how the distributor meets his obligations under the statutory license.

The Copyright Office also rejects DiMA's concept of reserves. Under its model, a distributor would prepay for the right to deliver a preset number of DPDs, and consequently, would have need of a system that allowed the distributor to receive a credit or offset for the authorized DPDs that never occurred. Yet, under section 115, the distributor incurs no copyright liability until the DPD is completed. For this reason, the Office can see no rationale for prepaying a copyright owner for DPDs which may not occur, when all that is needed is an accurate accounting mechanism for registering those that do. Of course, a distributor may enter into a contractual relationship with a copyright owner which calls for prepayment. In such cases, the parties could provide for additional credits or offsets.

In addition, the Office has not adopted the suggested language that would require the recipient to delete or destroy an original DPD before a second transmission is made, since such actions cannot be verified nor do they seem calculated to alleviate any identifiable problem. However, if the technology develops to the point where such actions prove useful in controlling the distribution of sound recordings by means of a digital transmission, an interested party may petition for reconsideration of the regulations on this point.

We adopt these amendments on an interim basis in order to adapt the existing regulatory framework to the immediate needs of the compulsory licensee who wishes to make DPDs in today's marketplace. Nevertheless, we acknowledge that the developing technologies associated with making DPDs may require a different system for notice and recordkeeping and will consider any new proposals, suggestions, or adjustments when we revisit the issue before finalizing regulations governing the notice and recordkeeping requirements associated with making DPDs.

Regulatory Flexibility Act

Although the Copyright Office, as a department of the Library of Congress and part of the legislative branch, is not an "agency" subject to the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Register of Copyrights has considered the effect of these interim regulations on small businesses. The Register has determined that the regulations would not have a significant economic impact on a substantial number of small entities that would require provision of special relief for small entities in the regulations. The interim regulations are designed to minimize any significant economic impact on small entities.

List of Subjects in 37 CFR Part 201

Copyright.

Interim Regulations

For the reasons set forth in the preamble, part 201 of title 37 of the Code of Federal Regulations is amended as follows:

PART 201--GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Section 201.18 is amended as follows:

(a) By adding a new paragraph (a)(4); and

(b) In paragraph (c)(1)(vi), by adding the phrase "a digital phonorecord delivery," in the parenthetical clause before the words "or a combination of them".

The new paragraph (a)(4) reads as follows:

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§201.18 Notice of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works.

(a) * * *

(4) For the purposes of this section, a digital phonorecord delivery shall be treated as a type of phonorecord configuration, and a digital phonorecord delivery shall be treated as a phonorecord manufactured, made, and distributed on the date the phonorecord is digitally transmitted.

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3. Section 201.19 is amended as follows:

(a) By redesignating paragraphs (a)(5), (a)(6) and (a)(7) as (a)(6), (a)(8) and (a)(9) respectively;

(b) By adding a new paragraph (a)(5);

(c) By revising the first sentence of newly designated paragraph (a)(6);

(d) By adding new paragraphs (a)(7), (a)(10), and (a)(11);

(e) In paragraph (e)(3)(i)(A), by adding

the phrase ", including digital phonorecord deliveries," after the phrase "The number of phonorecords";

(f) In paragraph (e)(3)(i)(B), by removing the word "or" after the fourth undesignated clause "Returned to the compulsory licensee for credit or exchange;" and adding two new clauses to the end of the section;

(g) By revising paragraph (e)(3)(ii)(D);

(h) By adding a new paragraph (e)(3)(ii)(E); and

(i) In paragraph (e)(4)(ii), by adding paragraphs (d) and (e) to Step 4.

The additions and revisions to Sec. 201.19 read as follows:

§201.19 Royalties and statements of account under compulsory license for making and distributing phonorecords of nondramatic musical works.

(a) * * *

(5) For the purposes of this section, a digital phonorecord delivery shall be treated as a type of phonorecord configuration, and a digital phonorecord delivery shall be treated as a phonorecord, with the following clarifications:

(i) A digital phonorecord delivery shall be treated as a phonorecord made and distributed on the date the phonorecord is digitally transmitted; and

(ii) A digital phonorecord delivery shall be treated as having been *voluntarily distributed* and *relinquished from possession*, and a compulsory licensee shall be treated as having *permanently parted with possession* of a digital phonorecord delivery, on the date that the phonorecord is digitally transmitted.

(6) Except as provided in paragraph (a)(5), a phonorecord is considered *voluntarily distributed* if the compulsory licensee has voluntarily and permanently parted with possession of the phonorecord.

* * * * *

(7) To the extent that the terms *reserve, credit and return* appear in this section, such provisions shall not apply to digital phonorecord deliveries.

* * * * *

(10) An *incomplete transmission* is any digital transmission of a sound recording which, as determined by means within the sole control of the distributor, does not result in a specifically identifiable reproduction of the entire sound recording by or for any transmission recipient.

(11) A *retransmission* is a subsequent digital transmission of the same sound recording initially transmitted to an identified recipient for the purpose of completing the delivery of a complete and usable reproduction of that sound recording to that recipient.

* * * * *

(e) * * *

(3) * * *

(i) * * *

(B) * * *

Never delivered due to a failed transmission; or

Digitally retransmitted in order to complete a digital phonorecord delivery.

* * * * *

(ii) * * *

(D) Each phonorecord configuration involved (for example: single disk, long-playing disk, cartridge, cassette, reel-to-reel, digital phonorecord delivery, or a combination of them).

(E) The date of and a reason for each incomplete transmission.

* * * * *

(4) * * *

(ii) * * *

Step 4: * * *

(d) *Incomplete transmissions.* If, in the month covered by the Monthly Statement, there are any digital transmissions of a sound recording which do not result in specifically identifiable reproductions of the entire sound recording by or for any transmission recipient, as determined by means within the sole control of the distributor, the number of such phonorecords is subtracted from the Step 3 subtotal.

(e) *Retransmitted digital phonorecords.* If, in the month covered by the Monthly Statement, there are retransmissions of a digital phonorecord to a recipient who did not receive a complete and usable phonorecord during an initial transmission, and such transmissions are made for the sole purpose of delivering a complete and usable reproduction of the initially requested sound recording to that recipient, the number of such retransmitted digital phonorecords is subtracted from the Step 3 subtotal.

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Dated: July 15, 1999.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

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