



# ANNOUNCEMENT

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

NOTICE WITH A REQUEST FOR COMMENTS.

## DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS

The following excerpt is taken from Volume 64, Number 186 of the  
*Federal Register* for Monday, September 27, 1999 (pp. 52107-52109)

### LIBRARY OF CONGRESS

#### Copyright Office

[Docket No. 99-6 CARP DTRA]

#### Digital Performance Right in Sound Recordings and Ephemeral Recordings

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

**ACTION:** Notice with a request for  
comments.

**SUMMARY:** The Copyright Office is  
announcing the schedule for the Copyright  
Arbitration Royalty Panel which shall set  
rates and terms for two compulsory licenses.  
One license allows certain eligible  
nonsubscription services to perform sound  
recordings publicly by means of digital audio  
transmissions and the other allows a  
transmitting organization to make an  
ephemeral recording of a sound recording for  
the purpose of making a permitted public  
performance. The Office is also announcing  
the date by which a party who wishes to  
participate in the rate adjustment proceeding  
must file its Notice of Intention to  
Participate.

**DATES:** Comments and Notices of Intention  
to Participate are due no later than November  
1, 1999.

**ADDRESSES:** An original and five copies  
of a Notice of Intention to Participate and an  
original and five copies of any comment shall  
be delivered to: Office of the General  
Counsel, Copyright Office, James Madison  
Building, Room LM-403, First and  
Independence Avenue, S.E. Washington, D.C.  
20559-6000; or mailed to: Copyright  
Arbitration Royalty Panel (CARP), P.O. Box  
70977, Southwest Station, Washington, D.C.

20024.

#### FOR FURTHER INFORMATION

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

#### SUPPLEMENTARY INFORMATION:

##### Background

In 1995, Congress passed the Digital  
Performance Right in Sound Recordings Act  
("DPRA"), Public Law 104-39, 109 Stat. 336  
(1995), which created for copyright owners  
of sound recordings an exclusive right,  
subject to certain limitations, to perform  
publicly the copyrighted work by means of a  
digital audio transmission. 17 U.S.C. 106(6).  
Among the limitations placed on the  
performance of the sound recording was the  
creation of a new compulsory license for  
nonexempt, noninteractive, digital  
subscription services. 17 U.S.C. 114. The  
scope of this license was expanded in 1998  
with the passage of the Digital Millennium  
Copyright Act ("DMCA") to cover the public  
performance of sound recordings by means  
of eligible nonsubscription transmissions and  
transmissions by any preexisting satellite  
digital audio radio service which performs a  
sound recording by means of a digital audio  
transmission.

An "eligible nonsubscription  
transmission" is a noninteractive digital  
audio transmission which, as the name  
implies, does not require a subscription for  
receiving the transmission. The transmission  
must also be made as part of a service that  
provides audio programming consisting in  
whole or in part of performances of sound  
recordings the purpose of which is to provide  
audio or entertainment programming, but not  
to sell, advertise, or promote particular goods  
or services. A "preexisting satellite digital

audio radio service" is a subscription digital  
audio radio service that received a satellite  
digital audio radio service license issued by  
the Federal Communications Commission on  
or before July 31, 1998. See 17 U.S.C.  
114(j)(6) and (10). Only two known entities,  
CD Radio and XM Satellite Radio (formerly  
known as American Mobile Radio  
Corporation), qualify under the statutory  
definition as preexisting satellite digital  
audio radio services.

In addition to expanding the current  
section 114 license, the DMCA creates a new  
statutory license for the making of an  
"ephemeral recording" of a sound recording  
by certain transmitting organizations. The  
new statutory license allows entities that  
transmit performances of sound recordings to  
business establishments, pursuant to the  
limitations set forth in section  
114(d)(1)(C)(iv), to make an ephemeral  
recording of a sound recording for purposes  
of a later transmission.

The new license also provides a means by  
which a transmitting entity with a statutory  
license under section 114(f) can make more  
than the one phonorecord specified in section  
112(a). 17 U.S.C. 112(e).

#### Determination of Reasonable Terms and Rates

The statutory scheme for establishing  
reasonable terms and rates is the same for  
both licenses. The terms and rates for the two  
new statutory licenses may be determined  
through a voluntary negotiation process, or if  
necessary, through compulsory arbitration  
conducted pursuant to Chapter 8 of the  
Copyright Act. Because the DMCA does not  
establish reasonable rates and terms for either  
the new section 112 or the expanded section  
114 license, the statute requires the Librarian  
of Congress to initiate a voluntary  
negotiation period, the first phase in the rate  
setting process, within 30 days of enactment

for the purpose of determining reasonable terms and rates for each license. See 17 U.S.C. 112(e)(4) and 114(f)(2)(A).

Accordingly, the Office announced the dates for the six-month negotiation period in the Federal Register on November 27, 1998. 63 FR 65555

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(November 27, 1998).<sup>1</sup> The designated six-month negotiation period began on November 27, 1998, and concluded on May 27, 1999.

At this time, the parties continue to negotiate. If the affected parties are able to negotiate an industry-wide agreement, then it will not be necessary for the parties to participate in an arbitration proceeding. In such a case, the Librarian of Congress will follow current rate regulation procedures and notify the public of the proposed agreement in a notice and comment proceeding. If no party with a substantial interest and an intent to participate in an arbitration proceeding files a comment opposing the negotiated rates and terms, the Librarian will adopt the proposed terms and rates without convening a copyright arbitration royalty panel. 37 CFR 251.63(b). If, however, no industry-wide agreement is reached or only certain parties negotiate license agreements, then those copyright owners and users relying upon one or both of the statutory licenses shall be bound by the terms and rates established through the arbitration process.

Arbitration proceedings are initiated upon the filing of a petition for ratemaking with the Librarian of Congress during the 60 days immediately following the six-month negotiation period. Arbitration cannot take place, however, unless a party files a petition. 17 U.S.C. 112(e)(5) and 114(f)(2)(B).

On July 23, 1999, the Recording Industry of America, Inc. ("RIAA") filed a petition in accordance with 17 U.S.C. 112(e)(5) and 114(f)(2)(B) requesting that the Office convene a Copyright Arbitration Royalty Panel for the purpose of setting rates and terms for the expanded section 114 license and the newly created section 112 license.

In addition, RIAA asks that the Office not require the filing of a Notice of Intention to Participate before October 1, 1999, nor set the commencement of the 45-day precontroversy period to begin before January 15, 2000. RIAA makes these requests based upon its belief "that more time for voluntary negotiation is likely to result in additional agreements that may avoid a CARP proceeding altogether." RIAA petition at 2.

<sup>1</sup> The docket number for this proceeding has been changed from RM 98-4 CARP, as indicated in the November 27 notice, to 99-6 CARP DTRA. All future filings shall reference this proceeding accordingly.

### Comments and Notices of Intention to Participate

The regulations governing rate adjustment proceedings require that, upon the filing of a petition for rate adjustment, the Office establish a date certain by which parties wishing to participate in the proceeding must file with the Librarian a Notice of Intention to Participate. 37 CFR 251.45(a). In consideration of the ongoing negotiations, the Office is setting November 1, 1999, as the date by which an interested party must file its Notice of Intention to Participate. Failure to submit a timely notice will preclude the interested party from participating in the CARP proceeding whose purpose will be to set rates and terms for: (1) certain digital audio transmissions by a service eligible to make use of the expanded section 114 license, and (2) for ephemeral recordings made in accordance with the section 112 license.

In addition, any party who wishes to comment on the RIAA petition may file a comment with the Copyright Office no later than close of business on November 1, 1999. The Librarian will consider these comments when evaluating the sufficiency of the petition. See 37 CFR 251.64.

### Precontroversy Discovery Schedule

The Copyright Office is announcing the schedule for the 45-day precontroversy discovery period. Any party that files a Notice of Intention to Participate in this proceeding may participate in the precontroversy discovery period, provided that the party has submitted a written direct case with the Copyright Office and with all other parties who have filed a Notice of Intention to Participate. Each party may request of an opposing party nonprivileged documents underlying facts asserted in another party's written direct case. The precontroversy discovery period is limited to discovery of documents related to a party's written direct case and any amendment made to it during the 45-day period.

The precontroversy discovery schedule will be as follows:

Action	Deadline
Filing of written direct cases	January 18, 2000.
Requests for underlying documents related to written direct cases.	January 26, 2000.
Responses to request for underlying documents.	February 1, 2000.
Completion of document production	February 7, 2000.
Follow-up requests for underlying documents.	February 11, 2000.
Responses to follow-up requests	February 16, 2000.
Motions related to document production.	February 22, 2000.
Production of documents in response to follow-up requests.	February 28, 2000.
All other motions, petitions, and objections.	March 2, 2000.

The precontroversy discovery period, as specified by Sec. 251.45(b) of the rules, will begin on January 18, 2000, with the filing of written direct cases by each party. Each party in this proceeding who has filed a Notice of Intention 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 claim. Parties must comply with the form and content of written direct cases as prescribed in 37 CFR 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 January 18, 2000, 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 January 26, 2000, and responses to those requests by February 1, 2000. Documents which are produced as a result of the requests must be exchanged by February 7, 2000. It is important to note that all initial document requests must be made by the January 26, 2000, 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 January 26, 2000; otherwise, the requesting 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 February 11, 2000, and responses to those requests are due by February 16, 2000. Any documentation produced as a result of a follow-up request must be exchanged by February 28, 2000. 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 January 26, 2000. 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 February 11, 2000, deadline. Again, failure to make a timely follow-up request would waive the requesting 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.

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Motions related to document production must be filed by February 22, 2000.

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 March 2, 2000, the final day of the 45-day precontroversy discovery period. These motions, petitions, and objections include, for example, 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 neither encouraged nor 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 delivered to the Copyright Office no later than 5 p.m. of the filing deadline date. Parties may deliver the pleadings to: Office of the Register of Copyrights, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540; or alternatively, parties may send their pleadings by Federal Express to: Copyright Arbitration Royalty Panel (CARP), Attn: Gina Giuffreda (Tel. 202-707-8380), Federal Express, 208 Second Street, S.E., Washington, D.C. 20003, provided that the filing reaches the Copyright Office by the deadline. The Office cautions parties to use only the Federal Express address listed in this Notice, to include the telephone number of the Office, and to direct the package to the attention of the CARP Specialist, Ms. Gina Giuffreda. The Federal Express office will notify the Copyright Office upon receipt of a properly addressed package, and the Copyright Office will make arrangements to pick up the package the same day. Under no circumstances will the Office make arrangements to retrieve a package from any other Federal Express location or track a misdirected package. Each party bears the responsibility for insuring that the filings are in the Copyright Office by the deadline.

The form and content of all motions, petitions, objections, oppositions, and replies filed with the Office must be in compliance with Secs. 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.

#### **Initiation of Arbitration**

The 180-day arbitration period will be initiated on May 1, 2000. The schedule of the arbitration proceeding will be established by the CARP after the three arbitrators have been selected.

#### **Future Proceedings**

Sections 114(f)(2)(C) and 112(e)(7) of the Copyright Act, title 17, require the publication of a notice of the initiation of voluntary negotiation proceedings during the first week of January 2000. The purpose of these negotiations would be to set rates and terms for the public performance of sound recordings by means of eligible nonsubscription transmission services and for the making of ephemeral recordings for the period January 1, 2001, to December 31, 2003. Parties to a voluntary agreement, however, may designate an alternative schedule for setting rates and terms for the section 114 license as a provision of the settlement agreement. 17 U.S.C. 14(f)(2)(A) and (2)(C)(i)(II); 17 U.S.C. 112(e) (4) and (7).

In the event the parties to the current proceeding do not reach a settlement agreement prior to the first week of January, 2000, which includes an alternative schedule for setting rates and terms to cover the period January 1, 2001, to December 31, 2003, the Office will adhere to the statutory time frame and announce the initiation of the voluntary negotiation period for this next two-year cycle.

Dated: September 21, 1999.

**David O. Carson,**  
*General Counsel.*

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