



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

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2000-3 CARP DTRA2]

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 receipt of a petition to convene a Copyright Arbitration Royalty Panel ("CARP") to set rates and terms for the period beginning January 1, 2001, for two statutory licenses which, in one case, allows certain eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions and, in the second case, 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 October 13, 2000.

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, SE., Washington, DC 20559-6000; or mailed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024.

FOR FURTHER INFORMATION

CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty

Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:

Background

Since 1995 copyright owners of sound recordings have enjoyed an exclusive right to perform publicly their copyrighted work by means of a digital audio transmission, subject to certain limitations. 17 U.S.C. 106(6). Among the initial limitations placed on the performance of the sound recording was the creation of a statutory license to cover performances made by nonexempt, noninteractive, digital subscription services. 17 U.S.C. 114 (1995).

However, it soon became apparent that with the increased use of digital communications networks, like the Internet, further legislation was needed to clarify how the law applied to nonsubscription digital audio services. Congress responded by passing the Digital Millennium Copyright Act of 1998 ("DMCA"), Public Law 105-304, which amended section 114 to expand the scope of the statutory license to include a public performance of a sound recording by means of "an eligible nonsubscription transmission"¹ and a transmission by "a preexisting satellite digital audio radio service" which performs a sound recording by means of a digital audio transmission.²

¹ 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. 17 U.S.C. 114(j)(6)(1998).

² 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. 17 U.S.C. 114(j)(10)(1998). Only two entities, CD Radio and XM Satellite Radio (formerly known as American Mobile Radio Corporation), are known to qualify under the statutory definition as preexisting satellite digital audio radio services.

The DMCA also created a second statutory license to cover the making of an "ephemeral recording" of a sound recording—a necessary adjunct to the making of a digital transmission. 17 U.S.C. 112(e). 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 procedure set forth in the statute for establishing reasonable terms and rates is the same for both licenses. See 17 U.S.C. 112(e), 114(f), 801(b)(1) and 803(a). The terms and rates for the two new statutory licenses may be determined through a voluntary

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negotiation process, or if necessary, through compulsory arbitration conducted pursuant to Chapter 8 of the Copyright Act. If interested parties are able to negotiate an industry-wide agreement during the negotiation phase of the proceeding, they may submit the proposal to the Copyright Office for publication in the **Federal Register**. The Librarian can adopt the proposed terms and rates without convening a copyright arbitration royalty panel ("CARP"), provided that no party with a substantial interest and a desire to participate in an arbitration proceeding files a comment opposing the negotiated rates and terms. 37 CFR 251.63(b). If, however, no industry-wide agreement is reached, or only certain parties negotiate license agreements, then a user relying upon one or both of the statutory licenses shall be bound by the terms and rates established through the arbitration process.

To initiate the arbitration phase of the proceeding, an interested party must file a petition with the Copyright Office, requesting that a CARP be convened for the purpose of determining the rates and terms for the statutory licenses. See 17 U.S.C. 112(e)(6), 114(f)(2)(C), 801(b)(1) and 803(a)(1).

Initial Rate Adjustment Proceeding

When Congress passed the DMCA in 1998, it chose not to set rates and terms for either the new section 112 or the expanded section 114 license. Instead, the statute directed the Librarian of Congress to initiate a voluntary negotiation period within 30 days of enactment of the act for the purpose of determining reasonable terms and rates for each license for the period beginning on the date of enactment of the DMCA and ending on December 31, 2000. 17 U.S.C. 112(e)(4) and 114(f)(2)(A); see also, 63 FR 65555 (November 27, 1998).

In response to the November 27 notice, interested parties engaged in extensive negotiations but were unable to reach a settlement agreeable to all parties. Consequently, the Recording Industry Association of America, Inc. ("RIAA") filed a petition on July 23, 1999, with the Copyright Office in accordance with 17 U.S.C. 112(e)(4) and 114(f)(2)(B), requesting that the Office convene a CARP for the purpose of setting rates and terms for the public performance of sound recordings by means of eligible nonsubscription transmissions and the making of the necessary ephemeral recordings to facilitate the transmissions during the period beginning on October 28, 1998, and ending on December 31, 2000.

Accordingly, the Office announced a schedule, setting the dates for the 45-day precontroversy discovery period and the initiation of the date of the 180-day arbitration period for the initial rate adjustment proceeding. See 64 FR 52107 (September 27, 1999). This schedule was later suspended, pending completion of a rulemaking proceeding the purpose of which was to determine whether a broadcaster could stream an AM/FM radio signal via the Internet under a statutory provision that exempted a broadcast transmission from the digital performance right. See Order, Docket No. 99-6 CARP DTRA (March 21, 2000); 65 FR 14227 (March 16, 2000).

Petition to Convene a Second Copyright Arbitration Royalty Panel

In the interim, the Copyright Office announced a new negotiation period, in accordance with section 112(e)(6) and 114(f)(2)(C)(i)(II) of the Copyright Act. See 65 FR 2194 (January 13, 2000). The purpose of the second round of negotiations was to set the rates and terms for the section 112 and section 114 statutory licenses for the next period beginning on January 1, 2001. Absent an industry-wide, negotiated license

agreement for the new period, copyright owners of sound recordings and entities availing themselves of the statutory licenses from January 1, 2001, onward, are subject to the final determination of an arbitration proceeding that will set the rates and terms for the new period. To date, no settlement agreement has been filed with the Office. To convene a CARP for this purpose, however, a party with a significant interest in establishing reasonable terms and rates for the statutory licenses must file a petition with the Copyright Office, requesting that a CARP adjust the rates and terms. 17 U.S.C. 112(e)(6), 114(f)(2)(C), 801(b)(1) and 803(a)(1). Petitions had to be filed with the Office during a 60-day period beginning on July 1, 2000.

On August 28, 2000, RIAA filed a petition in accordance with 17 U.S.C. 112(e)(6) and 114(f)(2)(C) requesting that the Office convene a CARP for the purpose of setting rates and terms in accordance with these provisions for the two-year period beginning January 1, 2001. In the petition, RIAA also states that it "reserves the right to request that the Librarian adopt terms and rates under sections 112 and 114 for the 2001-2002 license period without convening a CARP, depending on the outcome of the pending negotiations and the 1998-2000 CARP proceeding . . . [and] the right to seek separate proceedings to establish terms and rates as appropriate even though [it] is submitting a single petition under both Section 112 and Section 114 statutory licenses and for all eligible services." Petition at 2-3.

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 October 13, 2000. The Librarian will consider these comments when evaluating the sufficiency of the petition. See 37 CFR 251.64.

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 October 13, 2000 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 the purpose of which 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.

Precontroversy Discovery Periods and

Initiation of Arbitrations

Schedules for the 45-day precontroversy discovery period will be announced for the rate adjustment proceedings, Docket Nos. 99-6 CARP DTRA and 2000-3 CARP DTRA2, once the Office concludes the rulemaking proceeding concerning the streaming of an AM/FM radio signal over the Internet by an FCC-licensed broadcaster and issues its ruling on a pending motion to consolidate the initial rate adjustment proceeding with the second proceeding the purpose of which is to consider rates and terms for the sections 112 and 114 statutory licenses for the period beginning on January 1, 2001.

Dated: September 8, 2000.
David O. Carson,
General Counsel.

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