



ANNOUNCEMENT

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

AMENDMENT OF INTERIM REGULATIONS AND NOTICE OF HEARING

PART 201-GENERAL PROVISIONS

COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

The following excerpt is taken from Volume 43, No. 189 of the Federal Register for Thursday, September 28, 1978 (pp. 44511-44521).

Please note the interim regulations, as amended, are effective October 30, 1978, however, hearings will be held on November 28 and 29, 1978, commencing at 9:30 a.m. on November 28, 1978.

[1410-03]

Title 37—Patents, Trademarks, and Copyrights

CHAPTER II—COPYRIGHT OFFICE, LIBRARY OF CONGRESS

[Docket RM 77-3]

PART 201—GENERAL PROVISIONS

Compulsory License for Making and Distributing Phonorecords

AGENCY: Library of Congress, Copyright Office.

ACTION: Amendment of interim regulations and notice of hearing.

SUMMARY: This notice is issued to advise the public that the Copyright Office of the Library of Congress (1) is adopting amendments to § 201.18 and § 201.19 of its regulations, as adopted (on an interim basis) on January 1, 1978; and (2) will hold a public hearing to consider comments on the interim regulations as amended. These regula-

tions were issued to implement section 115 of the act for General Revision of the Copyright Law. That section establishes a compulsory license for the making and distribution of phonorecords of nondramatic musical works. The effect of the interim regulations, as amended, is to establish requirements governing the content and service of certain notices and statements of account to be filed by persons exercising the compulsory license.

DATES: The interim regulations, as amended, are effective on October 30, 1978.

The hearing will be held on November 28 and 29, 1978, commencing at 9:30 a.m. on November 28, 1978. Please note: Specific dates for requests to present testimony and special rules of procedure for the hearing are set forth later in this notice.

ADDRESSES: Requests to present testimony and to cross-examine, and copies of written statements, should be addressed, if by hand, to: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Crystal Mall Building No. 2, Room 519, Arlington,

Va.; or, if by mail, to: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Caller No. 2999, Arlington, Va. 22202.

The hearing will be held in Room 910, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, Va.

FOR FURTHER INFORMATION CONTACT:

Jon Baumgarten, General Counsel,
U.S. Copyright Office, Library of
Congress, Washington, D.C. 20559,
703-557-8731.

SUPPLEMENTARY INFORMATION: Section 115 of 17 U.S.C. provides that "[w]hen phonorecords of a nondramatic musical work have been distributed to the public in the United States under authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work" for certain purposes.

A compulsory license permits the use of a copyrighted work without the consent of the copyright owner if certain conditions are met and royalties paid.

Paragraph (b)(1) of section 115 provides that a condition of the compulsory license for making and distributing phonorecords is the service or filing of a notice of intention:

(b) *Notice of intention to obtain compulsory license.* (1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content and manner of service, with requirements that the Register of Copyrights shall prescribe by regulations.

Paragraph (c) of section 115 deals with the statutory royalties to be paid to copyright owners by persons exercising the compulsory license; it provides in relevant part:

(2) . . . the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, a phonorecord is considered "distributed" if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.

(3) Royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

On April 26 and 27, 1977, in accordance with an Advance Notice of Proposed Rulemaking (42 FR 16837), we held a public hearing to elicit information relevant to the formulation of regulations under this section. After considering the testimony given at the hearing and in supplemental statements, on December 29, 1977 (42 FR 64889), we issued interim regulations. Interested parties were given until February 10, 1978, to comment on the interim regulations. A total of six original and reply comments (all from the Recording Industry Association of America, Inc. [RIAA], the National Music Publishers Association, Inc. [NMPA], and the Harry Fox Agency, Inc. ["Fox"]) were received in response to the interim regulations.

However, we deferred taking final action on the regulations to permit their full consideration by a committee of the American Institute of Certified Public Accountants ("AICPA").¹ Following a meeting of the AICPA committee on April 24, 1978, on June 20, 1978, we received a "Petition to Reopen" this proceeding from RIAA. This petition was opposed in a statement filed on June 27, 1978, by NMPA and Fox. A "Reply" to the statement of opposition was filed by the RIAA on July 6, 1978, and supplemented on July 13, 1978. Additional arguments were filed by NMPA and Fox on July 24, 1978, and by RIAA on July 27, 1978.

The documents filed since June 20, 1978, in this proceeding have been directed to those parts of the interim regulations dealing with the application of conventional accounting principles to the distribution and return of product in the recording industry. We have carefully analyzed the relevant testimony and comments of the parties on this issue and have been assisted in this area by an independent accounting consultant. These issues involve the operation of specialized accounting rules falling outside the normal competence of the Copyright Office, and we believe it desirable to have these questions fully explored in a public forum. We have therefore decided to proceed as follows:

1. By this Notice, we are immediately adopting certain amendments to the interim regulations. These amendments are based upon our consideration of all comments filed in response to our December 29th Notice, and are discussed below.

2. We will hold a public hearing, on November 28 and 29, 1978, to take testimony on the interim regulations as amended.

Members of the public desiring to testify should submit written requests to present testimony before October 20, 1978, to the address given under "ADDRESSES" above. The request should clearly identify the individual or entity requesting to testify (the "initial witness") and the amount of time desired.

A list of initial witnesses will be available through the General Counsel of the Copyright Office, at the address and phone number given under "FURTHER INFORMATION, CONTACT," above. Persons desiring to cross-examine witnesses shall submit written requests to do so, naming the initial witness or witnesses to be cross-examined, to the Copyright Office at the address given above no later than November 9, 1978. A list of persons

¹Certain principles "as expressed by the American Institute of Certified Public Accountants" are referred to in § 201.1(a)(4)(ii) of the regulations.

whose requests to cross-examine have been granted by the Copyright Office (cross-examining witnesses") will also be available through the General Counsel. A particular person may be an "initial witness" and also a "cross-examining witness" at different points in the hearing.

All initial witnesses are requested to provide 10 copies of a written statement of their testimony to the address given above by November 24, 1978. The record of the proceedings will be kept open until December 29, 1978, for receipt of written statements from any interested person, including supplemental statements from initial and cross-examining witnesses.

In order to provide for the orderly conduct of the hearing, the dates set forth above will be strictly adhered to.

RULES FOR CONDUCT OF HEARING

Because of the particular factors related to this proceeding and indicated above, we have decided that it will be helpful to adopt special rules, permitting cross-examination, for the November 28-29, 1978, hearing. The rules are as follows:

1. The hearing will be conducted by a Copyright Office Hearing Panel consisting of officials of the Copyright Office and an independent accounting consultant to the Office. The Chair of the Hearing will be the Register of Copyrights or a member of the Hearing Panel designated by her.

2. The Panel will hear from both "initial witnesses" (persons who asked to present testimony) and "cross-examining witnesses" (persons whose requests to cross-examine particular initial witnesses have been granted by the Copyright Office). Both types of witnesses may be accompanied by counsel and advisers and they may participate in the testimony, questions, and answers, if first recognized and permitted to do so by the Chair. A member of the Panel may, with the permission of the Chair, question any witness at any point in the proceedings.

3. The Chair will have sole discretion to determine the scope, duration, and relevance of all original testimony, cross-examination, and additional testimony, and may at any time direct a particular witness to present any further remarks in writing rather than orally.

4. The Chair will establish and announce the order of appearance of all initial witnesses, and the order in which cross-examining witnesses may question a particular initial witness. For each initial witness, the Chair will also establish and announce approximate times allotted for initial testimony, cross-examination, additional testimony, and questions by the Hearing

Panel. These times may be varied at the discretion of the Chair.

5. Each initial witness will first present an oral review of his or her written statement. The statement, and the oral review of it, may cover any matter raised by the interim regulations as amended, but witnesses are strongly urged to devote the major portion of their testimony to the following: (a) the definition of "permanently parted with possession" in § 201.19(a)(4)(ii); and particularly the use of "generally accepted accounting principles" and the example given later in this Notice; and (b) the form of certification of annual statements of account set forth in § 201.19(c)(5)(ii).

6. Only those persons who have been granted permission by the Copyright Office to cross-examine an initial witness (or their counsel or advisers as authorized by the Chair) shall be permitted to participate in cross-examination. The order of appearance of two or more cross-examining witnesses shall be strictly regulated by the Chair and, once a cross-examining witness has concluded cross-examination of a particular initial witness, that cross-examination may not be reopened except under exceptional circumstances and with the express permission of the Chair. No cross-examining witness will be permitted to interject questions or comments during another cross-examining witness' appearance, and cross-questioning or other dialog among cross-examining witnesses will not be permitted at any time. During cross-examination an initial witness will not be permitted to question a cross-examining witness. However, any witness who has the floor may request the Chair to direct a particular question to any other witness, and it is within the discretion of the Chair to do so at a time it considers appropriate.

7. The questions asked during cross-examination shall be germane to matters raised in the initial witness' written statement, oral statement, or both, and the Chair may, in its discretion rule out any question as irrelevant. An initial witness (or accompanying counsel or advisers) may object to answering any question on the grounds of irrelevancy, and the Chair shall rule on any such objection. However, in no case will an initial witness be compelled to answer any question to which that witness objects for any reason.

8. After cross-examination, the initial witness will be permitted to offer additional testimony germane to any of the matters raised during cross-examination. This additional testimony may consist of a direct statement, or it may consist of answers to questions posed by the initial witness' counsel or advisers.

9. At the conclusion of the initial witness's additional testimony, if any, the Copyright Office Hearing Panel will question the initial witness. No further cross-examination of that initial witness will be permitted during the hearing. In written supplemental statements filed after the hearing, cross-examining witnesses may direct further questions to initial witnesses, but it shall be entirely optional with such initial witness whether or how to answer any such questions.

DISCUSSION OF COMMENT LETTERS AND AMENDMENTS

A. *Amendments.* The following amendments have been made to the interim regulations:

1. Following a suggestion by Fox, we have amended § 201.18(c)(1)(iv) to require that a Notice of Intention include a statement of "the fiscal year of the person or entity intending to obtain the compulsory license". To avoid confusion, we have also provided that if the "fiscal year is a calendar year, the Notice shall so state".

2. We have amended §§ 201.18(c)(a)(iii)(C) and 201.19(c)(3)(iii)(C) to require that Notices of Intention and Annual Statements of Account filed by noncorporate compulsory licensees identify any "entity or individual" (instead of "any individuals") owning a specified interest in the licensee. This change, which follows a suggestion by Fox, was made to take into account the possibility that a compulsory license might be a joint venture or partnership including one or more corporate members. We have also required that additional ownership information concerning the corporation be provided in these cases. This is consistent with the general policy we have adopted, in other sections of these regulations, of requiring full disclosure of ownership interests in the case of corporations (see §§ 201.18(c)(1)(iii) (A) and (B) and 201.19(c)(3)(iii) (A) and (B)).

3. As issued, the interim regulations required that Notices of Intention and Monthly Statements of Account identify "the names of the principal recording artists" whose performances are fixed on phonorecords made under the compulsory license. RIAA argued that it would be unnecessarily burdensome to require the name of each of the individual recording artists engaged in a "group" performance. We agree, and have amended § 201.18(c)(1)(viii) (formerly (vii)), § 201.19(b)(v)(C) (formerly (B)), and § 201.19(c)(3)(vi)(G) to require the name either of the principal recording artist or of the principal recording group.

4. Fox raised the possibility that, under the statute and the interim regulations, a Notice of Intention sent by

registered or certified mail to the last address for the copyright owner shown by Copyright Office records might be returned if the owner was no longer located at that address. Fox urged that in these cases, as in the case where the copyright owner's address is not on file with the Copyright Office, the compulsory licensee should be "required" to file the Notice in the Copyright Office. We agree with this suggestion; in these cases the copyright owner's address on Copyright Office records is not "an address at which notice can be served" within the meaning of 17 U.S.C. 115(b)(1). We have amended § 201.18(c) by adding a new paragraph (3) accordingly. We have also extended this provision to situations where the copyright owner refuses to accept delivery of a Notice served by registered or certified mail.

The comments on this issue did not take into account the possible effect of a wrong address (or refusal to accept delivery) on the compulsory licensee's statutory obligations to serve the Notice "before or within 30 days after making" phonorecords and before distributing them. 17 U.S.C. 115(b)(1). In order to protect a compulsory licensee in these cases, our amendment provides that if the Notice is filed with a statement of mailing and return, and evidence of proper mailing, "the Copyright Office will specially mark its records to consider the date the original Notice was mailed * * * as the date of filing."²

Although we believe that it would be permissible to impose a filing fee in these cases (since the statute imposes such a fee where there is no address in Copyright Office records), we have decided not to do so—the compulsory licensee will have already expended money in using registered or certified mail, and the necessity of later filing in the Copyright Office is caused by the copyright owner's failure to accept delivery or maintain accurate Copyright Office records of its address.

5. Section 201.19(a)(4) of the interim regulations defined "permanently parted with possession" of a phonorecord made under the compulsory license as occurring 1 year from the date on which the compulsory licensee actually parted with possession, or at the time when a sale of the phonorecord is "recognized" by the compulsory licensee, whichever occurs first. The compulsory licensee was considered to "recognize" a sale when it would be recognized in accordance with "generally accepted accounting

²Under 17 U.S.C. 115(b)(1), it is not entirely clear whether the filing of a Notice of Intention in the Copyright Office must (as in the case of serving a Notice on the copyright owner) be accomplished within the period mentioned. Our amendment is not intended to resolve this question one way or the other.

principles" or "applicable rules, regulations, and practices of the Internal Revenue Service", whichever would cause the sale to be recognized first. RIAA argued that the incorporation of Internal Revenue Service rules would virtually always result in royalties being finally payable immediately upon shipment of each phonorecord, and that this would be inconsistent with Congress intent that our regulations recognize the practice of unsold phonorecords being returned to the compulsory licensee. Upon further consideration of the applicable tax law and cases, we agree with RIAA. We have therefore amended §201.19(a)(4)(ii) to eliminate the reference to IRS rules, regulations, and practices.

6. Section 201.19(a)(5) of the regulations makes special adjustments in the definition of "permanently parted with possession" in the case of compulsory licensees who have had a judgment or the like entered against them for failure to pay mechanical royalties. In the interim regulations, paragraph (ii) of this section applied the special rule to corporate compulsory licensees when the corporation's directors or officers, or the owner of 25 percent of the corporation's securities, had been subject to such a judgment; however, under paragraph (i) this did not apply to corporations registered with the Securities and Exchange Commission. Fox argued that although SEC-registered corporations might be treated specially for identification purposes under §§ 201.18(c)(1)(iii) and 201.19(c)(3)(iii), there was no real reason to exempt them from the special rules regarding prior judgments against officers, etc. We agree with this point and have amended §201.19(a)(5) to apply to all corporations.

7. Under the interim regulations, Monthly Statements of Account were not required to identify the number of phonorecords voluntarily released, but not yet permanently distributed, during the month. Although Fox acknowledged that this information could be obtained from the Annual Statement of Account, it suggested that it would be helpful to copyright owners to have this information on a more current basis. Since this does not appear to impose any undue burden on compulsory licensees, we have revised §201.19(b)(2)(v) to require that information. Similarly, we have revised §201.19(b)(5) to require a Monthly Statement of Account for any month in which phonorecords are voluntarily released.

8. Fox raised the issue of the rules to be followed regarding the service of statements of account and royalty fees where the compulsory licensee does not know the address of the copyright owner,³ or where the statement and

fee are served by registered or certified mail but are returned to the sender. Fox urged that compulsory licensees be required to file the statement of account in the Copyright Office and deposit the royalty fee in the Copyright Office for the benefit of the copyright owner in these cases. RIAA did not object "in principle" to filing the statement in the Copyright Office (if no filing fee were required), but strongly opposed depositing the royalty fee with the Copyright Office.

We have concluded that it would be appropriate to open the records of the Copyright Office to the filing of Monthly and Annual Statements of Account in the circumstances described, and we have amended §§ 201.19(b)(5) and 201.19(c)(6) accordingly. As suggested by Fox, this would permit organizations representing copyright owners to review our records periodically and "attempt to locate the proper copyright owner * * * so that payment may be appropriately made and the address of such owner properly reflected in the Copyright Office records, thereby allowing subsequent payments and statements to be properly directed." However, we do not believe it would be proper to require the filing of statements of account in the Copyright Office in these cases. Such a requirement would go beyond the literal wording of the statute and could not take into account the variety of factors, and allocation of "fault", which might relate to the failure to serve a statement of account on the copyright owner. We believe that these questions, and any interpretation of the differences between paragraphs (b)(1) and (c)(1) of 17 U.S.C. 115, are best left to judicial consideration in particular cases. Thus, our amendment merely permits such filing, and expressly provides that "neither the filing of a * * * statement of account in the Copyright Office, nor the failure to file such statement, shall have any effect other than that which may be attributed to it by a court of competent jurisdiction." Additionally, it is impossible for our Office, without specific statutory authority, to act as a depository for royalty fees owed to copyright owners; general government policy and the issues of accounting, retention and disposition of funds which would be raised by such a practice are prohibitive. Accordingly, the amendment provides that the Copyright Office will not accept any royalty fees submitted

be served on the copyright owner if the owner is "identified" in the records of the Copyright Office and if the Copyright Office records include an "address" for the owner; but that 17 U.S.C. 115(c)(1) states that a copyright owner is entitled to royalties under the compulsory license if it is "identified" in the records of the Copyright Office, an "address" not being referred to.

with statements of account. Finally, we agree with RIAA that it would not be equitable to impose a filing fee in these cases, and the amendment provides that no such fee will be required.

9. In accordance with a recommendation from a committee of the American Institute of Certified Public Accountants, we have amended §201.19(c)(5)(A) to refine the wording of the CPA certification required to appear on Annual Statements of Account. Also, following a suggestion by Fox, we have amended that section to include the certificate number and jurisdiction of certification of the certifying accountant. However, we have required this information only where the statement is not signed "in the name of a partnership or a professional corporation with two or more shareholders."

10. The regulations as issued stated that a post office box would not be sufficient as the compulsory licensee's "address" in Notices of Intention and Statements of Account. However, in dealing with a similar issue in our regulations concerning the compulsory license for jukebox performances of music (Docket RM 77-4A; see 43 FR 37451), we found that, in some areas of the country, a post office box is the only realistic address that can be given. We have therefore amended §§ 201.18(c)(1)(ii), 201.19(b)(2)(iii) and 201.19(c)(3)(iv) of these regulations to permit the use of a post office box or similar designation when it is the only address that can be given by the licensee.

11. All parties commenting in this proceeding urged that the Copyright Office maintain a "separate registry" of documents filed under 17 U.S.C. 115. As a matter of Copyright Office practice, these documents will be separately filed in the records of the Licensing Division of the Copyright Office.

B. Other comments. The following comments filed in response to our December 29th notice have not been accepted:

1. Both Fox and RIAA urged the Copyright Office to develop printed forms for Notices of Intention and Statements of Account, although they differed on whether use of the forms should be required. Since we have not yet received a significant number of Notices of Intention in our Office or review of potential problems, and because we will be holding a further hearing on these regulations, the issue of forms is now premature.

2. We have not accepted RIAA's suggestion that we permit corporate "agents", as well as duly authorized corporate officers, to sign Notices of Intention. We agree with Fox's argument that requiring a corporate officer's signature "will insure to the

³ Fox pointed out that although 17 U.S.C. 115(b)(1) requires that a Notice of Intention

copyright owner that review of [the] information [in the Notice] has been conducted at the appropriate level of corporate responsibility, and that the seriousness of the consequences of any misstatement is fully appreciated [and that] any slight inconvenience [to compulsory licensees] is outweighed by these considerations."

3. Section 201.19(d) of the interim regulations requires that compulsory licensees keep "all records and documents necessary and appropriate" to support the information in statements of account for a period of 3 years from the service of the Annual Statement. Fox has requested us to extend this period to 6 years to take into account the possible application of State statutes of limitations which may apply to causes of action based on fraud; however, we do not believe that the mere possibility of such actions warrants the very substantial extension proposed. Fox also requested that our regulations require that access to these records and documents be made available to the copyright owner for inspection. However, we believe that rules governing access to business records (and, by implication, the consequences of refusal) are beyond our authority to establish. In any event, judicial discovery procedures—and possible other alternatives—are available to copyright owners to secure such access.

4. Section 201.18(e) of the interim regulations requires the service of Notices of Intention of the copyright owner, if the owner's address is reflected in Copyright Office records. RIAA suggested that we revise this section to require the service of Notices of Intention on copyright owners if the compulsory licensee "knows" the owner's address, whether it is reflected in Copyright Office records or not. Under RIAA's suggestion, the filing of the Notice in the Copyright Office would be required only if the compulsory licensee does not "know" the identity of the copyright owner or that owner's address, and a search of Copyright Office records does not identify the owner and the owner's address. Under the proposal, searching would be required only in cases where the compulsory licensee lacks "knowledge" of the owner's address.

This suggestion was strongly opposed by Fox, which argued that it is inconsistent with the language and purpose of the statute, that it would subject the copyright owner to the uncertainty of the licensee's "knowledge," and that it might result in the copyright owner being left unaware of the use of its works. We agree with

⁴During the 1977 hearing in this docket, Fox's own witnesses testified that there is a common law right to audit persons under a royalty obligation, and an "accepted industry practice" of record companies submitting to music publisher audits.

Fox and have not made the revision recommended by RIAA. It must be remembered that a compulsory license, by definition, permits the use of a copyrighted work without the owner's consent. Although the regulations require compulsory licensees to conduct a search of Copyright Office records before serving a Notice of Intention in certain cases, we believe that this is consistent with the intention of the Act and that it does not constitute an unreasonable burden.

5. RIAA also recommended that the special rules governing the definition of "permanently parted with possession" be limited to those compulsory licensees held to have "willfully" failed to pay mechanical royalties in the past. Although we accept RIAA's assertion that record companies may inadvertently become involved in publisher-author or similar disputes over the proper recipient of mechanical royalties, we believe that to impose a condition of "willful" action would raise significant doubts about the applicability of the special rules in various cases. Recalling again that we are dealing with a situation in which the copyright owner has not had occasion to negotiate voluntary terms for the use of its work, we believe that the regulation as issued, and its application only to actions falling within a limited 3-year period, is fully consistent with Congress direction that we "prescribe situations in which a compulsory licensee is barred from maintaining reserves * * *" H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 111. For similar reasons, we cannot agree with RIAA's suggestion that a system of "rebates" be established in these cases.

6. RIAA also suggested that we amend § 201.19(c)(6)(ii) to "specify * * * what action shall be taken" when the licensee finds it has made over-payments during the monthly accounting periods. RIAA recommended that we "specify that the copyright owner shall rebate the difference to the compulsory licensee, or, in the alternative, that the compulsory licensee shall be entitled to credit the difference against subsequent payments to be made to the copyright owner." We agree that, as we envision how the monthly reporting requirements will work, a compulsory licensee should be able to credit overpayments for a particular monthly shipment against payments owing a copyright owner in a later month under the same compulsory license. We believe that this ability to take credits should be limited to payments owing to a particular copyright owner for a particular recording of a particular song under a particular compulsory license; in other words, the compulsory licensee should not be able to credit over-

payments under a compulsory license against sums owing to the copyright owner for other works, for other recordings, or under other compulsory or voluntary licenses.

As explained in paragraph 10, below, this is how we see our definition of "permanently parted with possession" working in practice. Credit (or debit) adjustments in the accounts during the year following a shipment would be mandated and made in accordance with "generally accepted accounting principles" ("GAAP"). At the present stage of these proceedings, we do not believe any amendment of our interim regulations is necessary to accomplish this result, but we will, of course, explore the issue fully in our November hearings.

We grant that it is possible, though not likely in most cases, that a licensee would be left with an overpayment after the final accountings for all shipments under a compulsory license (for example, if sales were grossly over-estimated at the outset, and total sales were insufficient to offset the initial payment). However, even assuming that such a situation could arise in reality, we do not believe that the copyright owner should be burdened by our regulations with a requirement of making a rebate. This would raise substantial procedural difficulties and problems of enforcement, particularly where a publisher-copyright owner may have already distributed royalties to its composers and lyricists. We believe that, at least as far as our regulations are concerned, the compulsory licensee must be held to the burden of making realistic estimates of net sales and of making accurate monthly adjustments in these estimates in the light of sales experience. This does not mean that copyright owners should in every case be entitled as a matter of right to retain any sums paid in excess of the compulsory licensee's ultimate obligation; however, we believe that resolution of this issue in particular uses is best left to negotiation between the parties, or application of general legal principles in the appropriate forum.

7. A committee of the AICPA recommended that the language of the CPA certification required in Annual Statements of Account be "illustrative" rather than required. We have not accepted this suggestion. To make the form of certification merely illustrative would allow the CPA to qualify his or her opinion because of lack of independence, insufficient evidential matter, restriction of audit scope by the licensee, or for some other reason. Restricting the CPA's freedom of choice to a "clean" opinion in the form required, or no opinion at all, in effect requires the CPA to state that the licensee either is or is not in com-

pliance with the law and applicable regulations. The resulting clear and unambiguous statement fulfills Congress purpose in requiring certification of the Annual Statement.

8. Fox urged that the accountant certifying an Annual Statement of Account be required personally to verify the destruction of phonorecords asserted to have been destroyed before their permanent distribution under § 201.19(a)(4)(iii). We do not believe that such a verification should be required. The required form of accountant's certification of the Annual Statement, which presumably will be based on business records and practices satisfactory to that accountant, is sufficient protection for the copyright owner. Likewise, we believe that generally accepted auditing standards are sufficient to govern the quality of evidential matter that must be obtained by a CPA to form an opinion.

9. NMPA has again suggested that the point at which there has been a "permanent parting with possession" should be measured from the release date of a recording—that is, the date when the first phonorecord of a performance is shipped. We do not agree. As argued by RIAA earlier in this proceeding, the "release date" has little if any relevance to the return pattern of records shipped months or years after initial release (where, for example, records were shipped in response to a recent TV or concert appearance by the recording artist, or a resurgence of interest in earlier recordings of an artist, or a "seasonal surge").

10. Under the regulations as amended, a compulsory licensee will be required to pay royalties on all phonorecords made under the compulsory license of which that licensee has "permanently parted with possession." Generally, the licensee will be considered to have "permanently parted with possession" of a phonorecord (a) 1 year from the date on which the licensee actually first parted with possession of the phonorecord; or (b) at the time when revenue from a sale of the phonorecord is "recognized" by the licensee, whichever occurs first. For these purposes the compulsory licensee is considered to "recognize" sales revenue when "sales revenue would be recognized in accordance with generally accepted accounting principles as expressed by the American Institute of Certified Public Accountants or the Financial Accounting Standards Board, whichever would cause sales revenue to be recognized first."

NMPA argued that the 1-year outside limit on "recognition" is too long, and proposed an alternative of 6 months. However, on the present record, we can find no factual justification for the 6 months suggestion,

and a period shorter than 1 year would appear to impose an unjustifiable burden on compulsory licensees. RIAA's contrary suggestion—that the outside time period be lengthened or eliminated—is also unacceptable. The 1-year requirement gives the copyright owner some assurance that unreasonable reserves will not be held by the compulsory licensee.

NMPA also suggested, in cases where the compulsory licensee reports a certain number of phonorecords of which it has relinquished possession but has not yet "permanently parted with possession," that this number be subjected to a specific percentage limitation. We have not accepted this suggestion for what would in effect be a uniform reserve limitation. As we stated in our Notice accompanying the interim regulations (42 FR 64889):

We are not persuaded on the current record that any fair basis in fact exists for the regulatory determination of a single, uniform, reserve policy for copyright purposes. The numerous factors and variables which enter into the issue of reserves (for example, configuration of phonorecord, time of year, type of music, popularity of recording artist, and sales history of producer) appear to be such as to make our determination of such a policy realistically impractical, if not impossible.

Finally, RIAA has voiced strong objections to our use of "generally accepted accounting principles" ("GAAP") to determine the point of "recognition" and permanent distribution.⁴ In essence, RIAA's argument is that the use of GAAP is inappropriate for determining the point of permanent distribution because, for individual phonorecords, it cannot be used to determine the likely rate of return.

We recognize that individual phonorecords are not serially numbered, and are indistinguishable from one another. Tracking an individual record after its initial release from possession would, we agree, be realistically impracticable if not actually impossible. Our interim regulations were not intended to require any such item-by-item accounting. However, they do require tracking of *shipments* on a monthly basis.

We believe, on the current record, that as a practical matter compulsory licensees can, without radically changing their present accounting procedures: (1) Keep track of the date when each shipment is made and the total number of records in each shipment; (2) in the months following shipments made for sale, make reasonable estimates of the number of records out of the total shipped that will be "sold"

⁴As noted earlier, we have agreed to RIAA's objection to the use of Internal Revenue Service Rules as an alternative to generally accepted accounting principles, and have amended the interim regulations to eliminate this alternative.

(that is, in accounting terms, the number of phonorecords that will be included in "net sales" and therefore for which revenue would be "recognized"), and make royalty payments based on those estimates; and (3) no later than the 13th month following shipments made for sale, account for all records in that month's shipments as either sold or destroyed.

This system is based on a recognition of the unlimited return policies and the practices of setting up reserves now in use in the record industry. Our intention is not to force compulsory licensees to change these policies and practices; on the contrary, our interim regulations are aimed at allowing compulsory licensees to follow their ordinary business practices for the most part. We assume, as we must, that conventional reserve practices are in accord with "generally accepted accounting principles." If this is the case, most compulsory licensees would be able to follow their ordinary reserve practices under our interim regulations, with two limitations: (1) The licensee would have to report and pay monthly rather than at quarterly or other intervals; and (2) recognition of revenue could not be delayed beyond 1 year from the date of shipment.

A key element in this system is the ability of the compulsory licensee to identify shipments and track what happened to them. RIAA itself has urged that the date of shipment "of a specific phonorecord" be used to start the clock running on the determination of when phonorecords are considered permanently distributed. But if the clock starts when a particular shipment is sent, then as essential element of the system is to determine what was done with the batch of fungible records comprising the shipment: How many were sent and, from that total, how many were destroyed during the 1-year period when the clock was running. This necessarily requires some form of identification (dating, batch marking, invoice control, etc.) of the records comprising a particular shipment.

A second key element in the system envisioned by our interim regulation is the ability of the compulsory licensee to make reasonable estimates of returns and to pay royalties on the basis of these estimates. RIAA has taken the position that GAAP cannot be used to determine the likely rate of return of phonorecords within a batch, but we find nothing in the present record to support this position. Indeed, we believe that the operation of the reserve system, and the accounting practices and procedures that have grown up around it, are based entirely on estimates of returns, and it is our intention to adopt regulations that are consistent with these

practices and procedures, not contrary to them. We note, in this connection, that the AICPA's "Statement of Position on Accounting Practices in the Record and Music Industry" (§ 26) states:

The Division believes that manufacturers and distributors in the record and music industry must be able to make a reasonable estimate of returns in order to account for shipments to customers as sales.

In our opinion, the making of reasonable estimates of returns, quite the opposite of being prevented by GAAP, is positively required by GAAP. We are therefore issuing the interim regulations on this point without substantive change, and will take further testimony on our conclusions at a public hearing. For the sake of clarification we have amended § 201.19(a)(4)(ii)(B) to refer to the recognition by the compulsory licensee of "revenue from a sale of the phonorecord" rather than merely "a sale of the phonorecord"; this amendment is intended to avoid any confusion between "net sales" and "gross sales," but is not intended to change the substantive meaning of the definition of "voluntarily distributed" in any way.

As a further explanation of the interim regulations, and to facilitate discussion of this point at the hearings, we have decided to include here one example of how we think the regulations might work in a typical case. Note that we are dealing here with the monthly accounting to a copyright owner under a compulsory license for a particular song, where phonorecords are shipped *for sale*; if records are "relinquished from possession for purposes other than sale" royalties must be paid at the point of shipment under § 201.19(a)(4)(i), regardless of returns.

December 1978. Initial release of record, 1,000 phonorecords shipped.

January 1979. Compulsory licensee sends first monthly statement of account to copyright owner and, in accordance with GAAP, estimates that 80 percent of all records made under the compulsory license and shipped for purposes of sale will be included in "net sales." Pays royalties on 800 records (1,000 (total records shipped to date) \times 0.80 = 800). Ships 1,000 records never previously shipped.

February 1979. Second monthly statement. Compulsory licensee sticks with 80-percent estimate. Pays royalties on 800 records (2,000 (total records shipped to date) \times .80 = 1,600 less 800 (total records on which royalties already paid) = 800). Ships 2,000 records never previously shipped.

March 1979. Third monthly statement. Disappointing reviews and retail sales reports cause revision of estimate, in accordance with GAAP, to 75 percent "net sales." Pays royalties on 1,400 records (4,000 (total records

shipped to date) \times .75 = 3,000 less 1,600 (total records on which royalties already paid) = 1,400) Ships 1,000 records never previously shipped.

April 1979. Fourth monthly statement. Further sales slump causes revision of estimate to 66 percent "net sales." Pays no royalties (5,000 (total records shipped to date) \times .60 = 3,000 less 3,000 (total records on which royalties already paid) = 0). Ships 500 records never previously shipped.

May 1979. Fifth monthly statement. Revises estimate to 50 percent "net sales." Pays no royalties (5,500 (total records shipped to date) \times .50 = 2,750 less 3,000 (total records on which royalties already paid) = <250> (previous overpayment)). Note: On May 21, 1979, after fifth monthly statement filed, record artist dies causing sudden demand. Compulsory licensee ships 5,000 records never previously shipped.

June 1979. Sixth monthly statement. Revises estimate to 90 percent "net sales." Pays royalties on 6,450 records (10,500 (total records shipped to date) \times .90 = 9,450 less 3,000 (total records on which royalties already paid) = 6,450). Ships 1,000 records never previously shipped.

July 1979. Seventh monthly statement. Same 90-percent estimate. Pays royalties on 900 records (11,500 (total records shipped to date) \times .90 = 10,350 less 9,450 (total records on which royalties already paid) = 900.) Ships 1,000 records never previously shipped.

August, September, October, November 1979. Eighth through eleventh monthly statements. Same 90-percent estimate, same procedures as for July, and each month ships 1,000 records never previously shipped. Royalties paid on total of 3,600 records and compulsory licensee ships total of 4,000 records never previously shipped.

December 1979. Twelfth monthly statement. Same 90-percent estimate and same procedures as for July. Pays royalties on 900 records (16,500 (total records shipped to date) \times .90 = 14,850 less 13,950 (total records on which royalties already paid) = 900). As result of seasonal surge, ships 2,000 records never previously shipped.

January 1980. Thirteenth monthly statement. Same 90-percent estimate and same procedures as for July. Statement covers December 1979, shipments and also final accounting for December 1978, shipments showing total shipped that month and number from that month's shipments that were destroyed within 12 months from the particular shipment. Determines that, of the 1,000 records shipped in December 1978, 250 records were destroyed.

Pays on total of 1,650 records calculated as follows: (1) 18,500 (total records shipped to date) \times .90 = 16,650

less 14,850 (total records for which royalties already paid) = 1,800. (2) 1,000 (total records shipped in December 1978) less 250 (records destroyed) = 750 (records shipped in December 1978, on which royalty actually payable) less 900 (records shipped in December 1978, on which royalty already paid under 90-percent estimate) = <150> (credit to be applied to amount owing for previous month's shipment) (3) 1,800 less 150 = 1,650.

(Note that this statement is entirely different from the "Annual Statement of Account" which must also be filed by the compulsory licensee. The Annual Statement is a cumulative statement covering the entire fiscal year of the compulsory licensee, and is to be filed by the twentieth day of the third month following the end of that fiscal year.)

11. RIAA has suggested that some of the terminology used in the regulations (e.g., "voluntary relinquished," "permanently parted with possession") is unduly cumbersome. Much of this language derives directly from the statute and its legislative history, and we agree that it would benefit from simplification. However, at this stage in the proceedings we believe it would be a mistake to abandon specific language in favor of loose terms or colloquialisms (such as "shipped" or "sales") which are not accurate in all cases. Later, after the hearing has opened a full exploration of the issues, and before issuing final regulations, we will review all of the terminology used.

The interim regulations are amended as set forth below.

Dated: September 20, 1978.

WALDO H. MOORE,
Assistant Register of
Copyrights for Registration.

Approved:

WILLIAM J. WELSH,
The Acting Librarian
of Congress.

Part 201 of 37 CFR, Chapter II is amended by revising §§ 201.18 and 201.19 to read as follows:

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

(a) *General.* (1) A "Notice of Intention" is a notice identified in section 115(b) of title 17 of the United States Code, as amended by Pub. L. 94-553, and required by that section to be served on a copyright owner, or in certain cases to be filed in the Copyright Office, to obtain a compulsory license to make and distribute phonorecords of nondramatic musical works.

(2) A separate Notice of Intention shall be served or filed for each nondramatic musical work embodied, or intended to be embodied, in phonore-

cords made under the compulsory license.

(3) For the purposes of this section, the term "copyright owner" in the case of any work having more than one copyright owner means any one of the co-owners. In such cases, the service of a notice of intention on one coowner under paragraph (e)(2) of this section shall be sufficient with respect to all coowners.

(b) *Form.* The Copyright Office does not provide printed forms for the use of persons serving or filing Notices of Intention.

(c) *Content.* (1) A Notice of Intention shall be clearly and prominently designated, at the head of the notice, as a "Notice of Intention To Obtain a Compulsory License for Making and Distributing Phonorecords", and shall include a clear statement of the following information:

(i) The full legal name of the person or entity intending to obtain the compulsory license, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(ii) The full address, including a specific number and street name or rural route, of the place of business of the person or entity intending to obtain the compulsory license. A post office box or similar designation will not be sufficient for this purpose except where it is the only address that can be used in that geographic location;

(iii) A statement of the nature of the business organization used by the person or entity intending to obtain the compulsory license in connection with the making and distribution of phonorecords (for example, a corporation, a partnership, or an individual proprietorship); additionally:

(A) If the person or entity intending to obtain the compulsory license is a corporation registered with the Securities and Exchange Commission under section 12 of the Securities and Exchange Act of 1934, the Notice shall so state.

(B) If the person or entity intending to obtain the compulsory license is a corporation that is not registered with the Securities and Exchange Commission under section 12 of the Securities and Exchange Act of 1934, the Notice shall include a list of the names of the corporation's directors and officers, and the names of each beneficial owner of twenty-five percent (25%) or more of the outstanding securities of the corporation.

(C) In all other cases, the Notice shall include the names of any entity or individual owning a beneficial interest of twenty-five percent (25%) or more in the entity intending to exercise the compulsory license. If a corporate entity is named in response to

this paragraph (C), then: if that corporation is registered with the Securities and Exchange Commission under section 12 of the Securities and Exchange Act of 1934, the Notice shall so state; if that corporation is not so registered, the Notice shall include a list of the names of the corporation's directors and officers, and the names of each beneficial owner of twenty-five percent (25%) or more of the outstanding securities of that corporation.

(iv) The fiscal year of the person or entity intending to obtain the compulsory license. If that fiscal year is a calendar year, the Notice shall so state.

(v) The title of the nondramatic musical work embodied or intended to be embodied in phonorecords made under the compulsory license, and the names of the author or authors of such work is known;

(vi) The type of all phonorecord configurations (for example, single disk, long playing disk, cassette, cartridge, reel-to-reel, or a combination of them) already made (if any) and anticipated to be made under the compulsory license;

(vii) The anticipated date of initial distribution of phonorecords already made (if any) or anticipated to be made under the compulsory license;

(viii) The name of the principal recording artist or group actually engaged and anticipated to be engaged in rendering the performances fixed on phonorecords already made (if any) and anticipated to be made under the compulsory license; and

(ix) The catalog number or numbers, and label name or names, used and anticipated to be used on phonorecords already made (if any) and anticipated to be made under the compulsory license.

(2) A "clear statement" of the information listed in paragraph (c)(1) of this section requires a clearly intelligible, legible, and unambiguous statement in the Notice itself and (subject to paragraph (c)(1)(iii)(A) of this section) without incorporation by reference of facts or information contained in other documents or records.

(3) Where information is required to be given by paragraph (c)(1) "if known" or as "anticipated", such information shall be given in good faith and on the basis of the best knowledge, information, and belief of the person signing the Notice. If so given, later developments affecting the accuracy of such information shall not affect the validity of the Notice.

(d) *Signature.* The Notice shall be signed by the person or entity intending to obtain the compulsory license. If that person or entity is a corporation, the signature shall be that of a duly authorized officer of the corporation; if that person or entity is a partnership, the signature shall be that of

a partner. The signature shall be accompanied by the printed or typewritten name of the person signing the Notice, and by the date of signature.

(e) *Filing and Service.* (1) If, with respect to the nondramatic musical work named in the Notice of Intention, the registration or other public records of the Copyright Office do not identify the copyright owner of such work and include an address for such owner, the Notice shall be filed in the Copyright Office. Notices of Intention submitted for filing shall be accompanied by a fee of \$6. Notices of Intention will be filed by being placed in the appropriate public records of the Licensing Division of the Copyright Office. The date of filing will be the date when a proper Notice and fee are both received in the Copyright Office. A written acknowledgement of receipt and filing will be provided to the sender. Upon request and payment of an additional fee of \$4, a Certificate of Filing will be provided to the sender.

(2) If the registration or other public records of the Copyright Office do not identify the copyright owner of the nondramatic musical work named in the Notice of Intention and include an address for such owner, the Notice shall be served on such owner by certified mail or by registered mail sent to the last address for such owner shown by the records of the Office; it shall not be necessary to file a copy of the Notice in the Copyright Office in this case.

(3) If the Notice is sent by certified or registered mail to the last address for the copyright owner shown by the records of the Copyright Office and is returned to the sender because the copyright owner is no longer located at that address or has refused to accept delivery, the original Notice as sent shall be filed in the Copyright Office. Notices of Intention submitted for filing under this paragraph (e)(3) shall be submitted to the Licensing Division of the Copyright Office, and shall be accompanied by a brief statement that the Notice was sent to the last address for the copyright owner shown by the records of the Copyright Office but was returned, and by appropriate evidence that it was sent by certified or registered mail to that address. In these cases the Copyright Office will specially mark its records to consider the date the original Notice was mailed, as shown by the evidence mentioned above, as the date of filing. A written acknowledgment of receipt and filing will be provided to the sender. No filing fee will be required in the case of Notices filed under this paragraph (e)(3). Upon request and payment of a fee of \$4, a Certificate of Filing will be provided to the sender.

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

(a) *Definition.* (1) A "Monthly Statement of Account" is a statement accompanying monthly royalty payments identified in section 115(c)(3) of title 17 of the United States Code, as amended by Pub. L. 94-553, and required by that section to be made under the compulsory license to make and distribute phonorecords of nondramatic musical works.

(2) An "Annual Statement of Account" is a statement identified in section 115(c)(3) of title 17 of the United States Code, as amended by Pub. L. 94-553, and required by that section to be filed for every compulsory license to make and distribute phonorecords of nondramatic musical works.

(3) For the purpose of this section, the term "copyright owner" in the case of any work having more than one copyright owner means any one of the coowners. In such cases, the service of a statement of account on one coowner under paragraph (b)(5) or (c)(6) of this section shall be sufficient with respect to all coowners.

(4) A phonorecord is considered "voluntarily distributed" if the person or entity exercising the compulsory license has voluntarily and permanently parted with possession of the phonorecord. For this purpose a person or entity exercising the compulsory license shall be considered to have "permanently parted with possession" of a phonorecord made under the license:

(i) In the case of phonorecords relinquished from possession for purposes other than sale, at the time at which the person or entity exercising the compulsory license actually first parts with possession;

(ii) In the case of phonorecords relinquished from possession for purposes of sale: (A) 1 year from the date on which that person or entity actually first parted with possession; or (B) at the time when revenue from a sale of the phonorecord is "recognized" by the person or entity exercising the compulsory license, whichever occurs first. For these purposes a person or entity exercising the compulsory license shall be considered to "recognize" revenue from the sale of a phonorecord when sales revenue would be recognized in accordance with generally accepted accounting principles as expressed by the American Institute of Certified Public Accountants or the Financial Accounting Standards Board, whichever would cause sales revenue to be recognized first; and

(iii) In any case, the destruction of a phonorecord made under the compulsory license by the person or entity exercising the license before the person

or entity is considered to have "permanently parted with possession" of that phonorecord under paragraphs (i) and (ii) of this § 201.19(a)(4) shall not be considered a "distribution."

(5) The provisions of paragraph (a)(4)(ii) of this section are subject to the following qualification: In any case where, within 3 years before the phonorecord was relinquished from possession, the person or entity exercising the compulsory license has had final judgment entered against it for failure to pay royalties for the reproduction of copyrighted music on phonorecords, or within such period has been definitively found in any proceeding involving bankruptcy, insolvency, receivership, assignment for the benefit of creditors, or similar action, to have failed to pay such royalties, that person or entity shall be considered to have "permanently parted with possession" of a phonorecord made under the license at the time at which that person or entity actually first parts with possession. For these purposes the "person or entity exercising the compulsory license" shall mean:

(i) In the case of (any) corporation, the corporation or any director, officer, or beneficial owner of twenty-five percent (25 percent) or more of the outstanding securities of the corporation;

(ii) In all other cases, any entity or individual owning a beneficial interest of twenty-five percent (25 percent) or more in the entity exercising the compulsory license.

(b) *Monthly Statements of Account*
(1) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Monthly Statements of Account.

(2) *Content.* A monthly Statement of Account shall be clearly and prominently identified as a "Monthly Statement of Account Under Compulsory License for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

(i) The period (month and year) covered by the statement;

(ii) The full legal name of the person or entity exercising the compulsory license, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(iii) The full address, including a specific number and street name or rural route, of the place of business of the person or entity exercising the compulsory license. A post office box or similar designation will not be sufficient for this purpose, except where it is the only address that can be used in that geographic location;

(iv) The title or titles of the nondramatic musical work or works embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the statement and the name of the author or authors of such work or works if known;

(v) For each nondramatic musical work embodied in phonorecords made, voluntarily relinquished from possession, or "voluntarily distributed," under the compulsory license, during the month covered by the statement and owned by the same copyright owner being served with the statement:

(A) The number of phonorecords made during the month covered by the statement;

(B) The number of phonorecords voluntarily relinquished from possession during the month covered by the statement, regardless of when made;

(C) The number of phonorecords "voluntarily distributed" during the month covered by the statement, regardless of when made, together with:
(i) The catalog number or numbers, and label name or names, used on such phonorecords; and (ii) the names of the principal recording artist or group engaged in rendering the performances fixed on such phonorecords; and

(D) The playing time of each such nondramatic musical work on the phonorecords.

The information required by paragraphs (A), (B), and (C) of this § 201.19(b)(2)(v) shall be separately stated and identified for each phonorecord configuration (for example, single disk, long playing disk, cartridge, cassette, or reel-to-reel) made.

(vi) The total royalty payable for the month covered by the statement. For these purposes, the applicable royalty as specified in section 115(c)(2) of title 17 shall be payable for every phonorecord "voluntarily distributed" during that period. In any case where the person or entity exercising the compulsory license falls within the provisions of paragraph (a)(5) of this section, the statement shall also include a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that paragraph.

(3) A "clear statement" of the information required by paragraph (b)(2) of this section requires a clearly intelligible, legible, and unambiguous statement in the Statement of Account itself and without incorporation by reference of facts or information contained in other documents or records.

(4) *Oath and Signature.* (i) Each Monthly Statement of Account shall be accompanied by an affidavit under the official seal of any officer author-

ized to administer oaths within the United States, or a statement in accordance with section 1746 of title 28 of the United States Code, which shall be signed by the person or entity exercising the compulsory license. If that person or entity is a corporation, the signature shall be that of a duly authorized officer of the corporation; if that person or entity is a partnership, the signature shall be that of a partner. The signature shall be accompanied by the printed or typewritten name of the person signing the affidavit or statement, and by the date of signature.

(ii) The affidavit or statement required by paragraph (b)(4)(i) of this section shall state that the person signing the affidavit or statement has examined the statement of account, and that all statements of fact contained therein are true, complete, and correct to the best of that person's knowledge, information, and belief, and are made in good faith.

(5) *Service.* (i) Each Monthly Statement of Account shall be served on the copyright owner to whom or which it is directed, together with the total royalty for the month covered by statement, by certified mail, or by registered mail on or before the 20th day of the immediately succeeding month. It shall not be necessary to file a copy of the statement in the Copyright Office.

(ii)(A) In any case where a Monthly Statement of Account is sent by certified mail or registered mail and is returned to the sender because the copyright owner is not located at that address or has refused to accept delivery, or in any case where an address for the copyright owner is not known, the Monthly Statement of Account, together with any evidence of mailing, may be filed in the Licensing Division of the Copyright Office. Any Monthly Statement of Account submitted for filing in the Copyright Office shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender. (B) The Copyright Office will not accept any royalty fees submitted with Monthly Statements of Account under this § 202.19(b)(5)(ii). (C) Neither the filing of a Monthly Statement of Account in the Copyright Office, nor the failure to file such statement, shall have effect other than that which may be attributed to it by a court of competent jurisdiction. (D) No filing fee will be required in the case of Monthly Statements of Account submitted to the Copyright Office under this § 202.19(b)(5)(ii). Upon request and payment of a fee of \$4, a Certificate of Filing will be provided to the sender.

(iii) A separate Monthly Statement of Account shall be served for each month during which a phonorecord or phonorecords are made, voluntarily relinquished from possession, or "voluntarily distributed" under the compulsory license. The Annual Statement of Account identified in paragraph (c) of this section does not replace any Monthly Statement of Account.

(c) *Annual Statements of Account.*

(1) *Forms.* The Copyright Office does not provide printed forms for the use of persons serving Annual Statements of Account.

(2) *Annual Period.* An Annual Statement of Account shall cover the full fiscal year of the person or entity exercising the compulsory license.

(3) *Content.* An Annual Statement of Account shall be clearly and prominently identified as an "Annual Statement of Account Under Compulsory License for Making and Distributing Phonorecords," and shall include a clear statement of the following information:

(i) The fiscal year covered by the statement;

(ii) The full legal name of the person or entity exercising the compulsory license, together with all fictitious or assumed names used by such person or entity for the purpose of conducting the business of making and distributing phonorecords;

(iii) A statement of the nature of the business organization used by the person or entity exercising the compulsory license in connection with the making and distribution of phonorecords (for example, a corporation, a partnership, or an individual proprietorship); additionally:

(A) If the person or entity exercising the compulsory license is a corporation registered with the Securities and Exchange Commission under section 12 of the Securities and Exchange Act of 1934, the statement shall so state.

(B) If the person or entity exercising the compulsory license is a corporation that is not registered with the Securities and Exchange Commission under section 12 of the Securities and Exchange Act of 1934, the statement shall include a list of the names of the corporation's directors and officers, and the names of each beneficial owner of twenty-five percent (25 percent) or more of the outstanding securities of the corporation.

(C) In all other cases, the statement shall include the names of any entity or individual owning a beneficial interest of twenty-five percent (25 percent) or more in the entity exercising the compulsory license. If a corporate entity is named in response to this paragraph (C), then: If that corporation is registered with the Securities and Exchange Commission under section 12 of the Securities and Exchange

Act of 1934, the Statement shall so state; if that corporation is not so registered, the Statement shall include a list of the names of the corporation's directors and officers, and the names of each beneficial owner of twenty-five percent (25 percent) or more of the outstanding securities of that corporation.

(iv) The full address, including a specific number and street name or rural route, or the place of business of the person or entity exercising the compulsory license. A post office box or similar designation will not be sufficient for this purpose except where it is the only address that can be used in that geographic location;

(v) The title or titles of all nondramatic musical works embodied in phonorecords made under the compulsory license during the fiscal year covered by the statement and owned by the copyright owner being served with the statement, and the name of the author or authors of such works if known;

(vi) For each nondramatic musical work embodied in phonorecords made under the compulsory license and owned by the copyright owner being served with the statement:

(A) The number of such phonorecords made under the compulsory license through the end of the fiscal year covered by the statement, including any made during earlier years;

(B) The number of such phonorecords which have never been relinquished from possession of the person or entity exercising the compulsory license through the end of the fiscal year covered by the statement;

(C) The number of such phonorecords involuntarily relinquished from possession (as through theft or fire) of the person or entity exercising the compulsory license during the fiscal year covered by the statement and any earlier years, together with a description of the facts of such involuntary relinquishment;

(D) The number of such phonorecords voluntarily relinquished from possession of the person or entity exercising the compulsory license for purposes of sale during the fiscal year covered by the statement, but not "voluntarily distributed" by the end of that year;

(E) The number of such phonorecords destroyed during the fiscal year covered by the statement and any earlier years, by the person or entity exercising the compulsory license, before such phonorecords were "voluntarily distributed";

(F) The number of such phonorecords "voluntarily distributed" by the person or entity exercising the compulsory license during all years before the fiscal year covered by the statement;

(G) The number of such phonorecords "voluntarily distributed" by the person or entity exercising the compulsory license during the fiscal year covered by the statement, together with (1) the catalog number or numbers, and label name or names, used on such phonorecords; and (2) the names of the principal recording artists or groups engaged in rendering the performances fixed on such phonorecords;

(H) If the information given under paragraphs (A) through (G) of this § 201.19(c)(3)(vi) does not reconcile, the statement shall also include a clear and detailed explanation of the difference. For these purposes, the information given under such paragraphs shall be considered not to reconcile if, after the number of phonorecords given under paragraphs (B), (C), (D), (E), and (F) are added together and that sum is deducted from the number of phonorecords given under paragraph (A), the result is different from the amount given under paragraph (G); and

(I) The playing time of each nondramatic musical work on such phonorecords.

The information required by paragraphs (A) through (I) of this § 201.19(c)(3)(vi) shall be separately stated and identified for each phonorecord configuration (for example, single disk, long playing disk, cartridge, cassette, or reel-to-reel) made.

(vii) The total royalty payable for the fiscal year covered by the statement. For these purposes, the applicable royalty as specified in section 115(c)(2) of title 17 shall be payable for every phonorecord "voluntarily distributed" during the fiscal year covered by the statement. In any case where the person or entity exercising the compulsory license falls within the provisions of paragraph (a)(5) of this section the statement shall also include a clear description of the action or proceeding involved, including the date of the final judgment or definitive finding described in that paragraph; and

(viii) The total sum paid, under Monthly Statements of Account, by the person or entity exercising the compulsory license to the copyright owner being served with the statement during the fiscal year covered by the statement.

(4) A "clear statement" of the information required by paragraph (c)(3) of this section has the meaning set forth in paragraph (b)(3) of this section.

(5) *Signature and Certification.* (1) Each Annual Statement of Account shall be signed by the person or entity exercising the compulsory license. If that person or entity is a corporation, the signature shall be that of a duly authorized officer of the corporation;

if that person or entity is a partnership, the signature shall be that of a partner. The signature shall be accompanied by the printed or typewritten name of the person or entity signing the statement, and by the date of signature.

(ii) (A) Each Annual Statement of Account shall also be certified by a licensed Certified Public Accountant. Such certification shall consist of the following statement:

We have examined the attached "Annual Statement of Account Under Compulsory License For Making and Distributing Phonorecords" for the fiscal year ended (date) of (name of person or entity exercising compulsory license) applicable to phonorecords embodying (title or titles of nondramatic musical works embodied in phonorecords made under the compulsory license) made under the provisions of section 115 of title 17 of the United States Code and applicable regulations of the United States Copyright Office. Our examination was made in accordance with generally accepted auditing standards and accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion the Annual Statement of Account referred to above presents fairly the number of phonorecords embodying each of the above-identified nondramatic musical works made under compulsory license and voluntarily distributed by (name of person or entity exercising compulsory license) during the fiscal year ending (date), and the amount of royalties applicable thereto under such compulsory license, on a consistent basis and in accordance with the above cited law and applicable regulations published thereunder.

(City and State of Execution)

(Signature of Certified Public Accountant or CPA Firm)

Certificate Number

Jurisdiction of Certificate

(Date of Opinion)

(B) The certificate shall be signed by an individual, or in the name of a partnership or a professional corporation with two or more shareholders. The certificate number and jurisdiction are not required if the certificate is signed in the name of a partnership or a professional corporation with two or more shareholders.

(6) *Service.* (1) Each Annual Statement of Account shall be served on the copyright owner to whom or which it is directed by certified mail or by registered mail on or before the twentieth day of the third month following the end of the fiscal year cov-

ered by the statement. It shall not be necessary to file a copy of the statement in the Copyright Office. An Annual Statement of Account shall be served for each fiscal year during which at least one Monthly Statement of Account was required to have been served under paragraph (b)(5) of this section.

(ii) In any case where the amount required to be stated in the Annual Statement of Account under paragraph (c)(3)(vii) of this section is greater than the amount stated in that Statement under paragraph (c)(3)(viii) of this section, the difference between such amounts shall be delivered to the copyright owner together with service of the Annual Statement. The delivery of such sum does not require the copyright owner to accept such sum, or to forego any right, relief, or remedy which may be available under law.

(iii) (A) In any case where an Annual Statement of Account is sent by certified mail or registered mail and is returned to the sender because the copyright owner is not located at that address or has refused to accept delivery, or in any case where an address for the copyright owner is not known, the Annual Statement of Account, together with any evidence of mailing, may be filed in the Licensing Division of the Copyright Office. Any Annual Statement of Account submitted for filing shall be accompanied by a brief statement of the reason why it was not served on the copyright owner. A written acknowledgment of receipt and filing will be provided to the sender. (B) The Copyright Office will not accept any royalty fees submitted with Annual Statements of Account under this § 202.19(c)(6)(iii). (C) Neither the filing of an Annual Statement of Account in the Copyright Office, nor the failure to file such statement, shall have any effect other than that which may be attributed to it by a court of competent jurisdiction. (D) No filing fee will be required in the case of Annual Statements of Account submitted to the Copyright Office under this § 202.19(c)(6)(iii). Upon request and payment of a fee of \$4, a Certificate of Filing will be provided to the sender.

(d) *Records.* All persons or entities exercising the compulsory license shall, for a period of at least 3 years from the date of service of an Annual Statement of Account, keep and retain in their possession all records and documents necessary and appropriate to support fully the information set forth in such Statement and in Monthly Statements served during the fiscal year covered by such Statement.

(17 U.S.C. 115; 702; 708.)

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