



ANNOUNCEMENT

NOTICE OF PROPOSED RULEMAKING AND ANNOUNCEMENT OF OPEN MEETING

COPYRIGHT ARBITRATION ROYALTY PANELS; RULES AND REGULATIONS

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 251, 252, 253, 254, 255, 256, 257, 258, 259, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, and 311

ocket No. RM 94-1]

Copyright Arbitration Royalty Panels; Rules and Regulations

AGENCY: Copyright Office; Library of Congress.

ACTION: Notice of Proposed Rulemaking and Announcement of Open Meeting

SUMMARY: On December 22, 1993, the Copyright Office of the Library of Congress in accordance with the Copyright Royalty Tribunal Reform Act of 1993, adopted in their entirety the rules and regulations of the former Copyright Royalty Tribunal. The Office stated at that time that it was adopting the rules on an interim basis, and that it would soon commence a rulemaking proceeding to update and revise those rules. Today's action commences that proceeding by publishing a set of proposed rules and announcing a public meeting to discuss the proposed regulations.

DATES: Written comments should be received on or before February 15, 1994. The open meeting will be held on February 1, 1994.

ADDRESSES: Ten copies of written

comments should be addressed, if sent by mail, to: Copyright Office, Library of Congress, Department 17, Washington, D.C. 20540. If delivered by hand, copies should be brought to: Office of the General Counsel, Copyright Office, Room LM-407, James Madison Memorial Building, 101 Independence Avenue, S.E. Washington, D.C. 20540. In order to ensure prompt receipt of these time sensitive documents, the Office recommends that the comments be delivered by a private messenger service.

The meeting will be in Hearing Room 921, 9th Floor, 1825 Connecticut Avenue, N.W., Washington, D.C. beginning at 10:00 a.m. Parties need not inform the Copyright Office of their intention to participate.

FOR FURTHER INFORMATION CONTACT: Marybeth Peters, Acting General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20540, (202) 707-8380.

SUPPLEMENTARY INFORMATION: The Copyright Office of the Library of Congress is proposing new regulations under 17 U.S.C. 802(d), supplementing and superseding the former Copyright Royalty Tribunal's rules and regulations which were adopted on December 22, 1993. 58 FR 67690 (1993). The Office is also proposing a course of action for dealing with rate adjustment and distribution matters which were pending before the Tribunal at the time of its elimination. A meeting open to the public will be held on February 1, 1994 at 10:00 a.m. to discuss all issues related to today's publication.

I. Background

On December 17, 1993, the President signed into law the Copyright Royalty Tribunal Reform Act of 1993 ("Reform Act"). Pub. L. No. 103-198, 107 Stat. 2304. Effective immediately upon enactment, the Reform Act amends the Copyright Act, 17 U.S.C., by eliminating the Copyright Royalty Tribunal and transferring its responsibilities and duties to ad hoc Copyright Arbitration Royalty Panels (CARPs), to be administered by the Library of Congress and the Copyright Office. As directed by the new act, the Librarian of Congress will convene Copyright Arbitration Royalty Panels for the purpose of adjusting rates and distributing royalties. See 17 U.S.C. 111, 115, 116, 118, 119 and chapter 10.

Immediately upon enactment of the Reform Act the Copyright Office issued a notice adopting the full text of the former Tribunal's rules and regulations on an interim basis. 58 FR 67690 (1993). This action was required by new section 802(d) of the Copyright Code, which provides:

Effective on the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, the Librarian of Congress shall adopt the rules and regulations set forth in chapter 3 of title 37 of the Code of Federal Regulations to govern proceedings under this chapter. Such rules and regulations shall remain in effect unless and until the Librarian, upon the recommendation of the Register of Copyrights, adopts supplemental or superseding regulations under subchapter II of chapter 5 of title 5.

17 U.S.C. 802(d). The Copyright Office made only slight technical changes to the

former Tribunal's rules, stating that it intended to review and revise the rules during the course of a future rulemaking. 58 FR at 67690 (1993). The Office now commences that proceeding to conform the rules to the new system of Copyright Arbitration Royalty Panels.

II. Matters Pending before the Former Tribunal

A major issue facing the Copyright Office of the Library of Congress at the outset of today's proposed rulemaking is the resolution of rate adjustments and distributions, and related matters, which were pending before the Copyright Royalty Tribunal at the time of its demise. Some of these proceedings, such as distribution of 1990 cable royalties, had already commenced hearings, while others were awaiting determination of controversies or rulings on procedural issues. Since the Office is proposing new rules and regulations which will govern and shape rate adjustment and distribution proceedings under the new system, the Office must first decide how to handle the Tribunal's old business.

The Copyright Office is of the firm opinion that it is not the successor agency or office to the Copyright Royalty Tribunal. The Reform Act represents a radically different approach for adjusting rates and distributing royalties for the copyright compulsory licenses, and is not an absorption of one agency by another. The Tribunal is replaced, not moved or merged, by ad hoc Arbitration Panels which are to be administered by the Copyright Office of the Library of Congress. The Office is, therefore, not simply picking up where the Tribunal left off, but is responsible for administering a completely new system of rulemaking and distribution.

Because the Copyright Office is not a successor agency, it is our preliminary finding that all proceedings pending before the Tribunal at the time of its elimination were terminated at that time. In other words, the Office will not continue to conduct and handle matters and proceedings which were before the Tribunal, but will require that all parties which had pending business before the Tribunal at the time of its elimination must, if they desire the matter to receive further consideration, file the matter anew before the Copyright

Office. Thus, for example, the Librarian will not automatically convene a Copyright Arbitration Royalty Panel to pick up where the proceedings left off for the 1990 cable distribution, but will require the parties who participated in that proceeding to refile their case with the Office in accordance with the rules and regulations proposed below. While the Office understands that the parties may be somewhat burdened by duplicating at least a portion of their case, it is necessary that the Office wipe the slate clean and, for purposes of the operation of the proposed rules and administrative efficiency, begin anew the matters pending before the former Tribunal.

An issue related to the termination of proceedings pending before the former Tribunal and the requirement of new filings is the legal effect of orders and decisions issued by the Tribunal during those proceedings. New section 802(c) of the Copyright Act states that Copyright Arbitration Royalty Panels "shall act on the basis of...prior decisions of the Copyright Royalty Tribunal....", but does not bind the Panels to those decisions; the effect of those decisions on the Librarian or the Copyright Office is not mentioned.

The Copyright Office has no intention of questioning or reopening matters decided by the former Tribunal with respect to ongoing proceedings. However, we understand that the termination of pending Tribunal proceedings and the requirement of new filings will likely raise again some of the issues previously decided by the Tribunal. The Copyright Office of the Library of Congress makes a preliminary finding that, while we will look to the Tribunal's decisions and orders for guidance, neither the Office nor the Copyright Arbitration Royalty Panels are legally bound by those decisions.¹ All legal issues related to proceedings pending before the Tribunal at the time of its elimination may therefore be resubmitted to the Copyright Office and, where appropriate, to the Arbitration Panels for consideration.

¹ The Copyright Office acknowledges that it is of course bound by rate adjustments and distributions that the Tribunal had conducted and concluded before its elimination. Thus, for example, the Office will not entertain any petitions to reexamine cable distributions for years earlier than 1990.

III. Proposed Rules

Revising the former Tribunal's rules is a particularly complicated task, given the division of authority between the Copyright Arbitration Royalty Panels and the Copyright Office of the Library of Congress. Under the old law the Tribunal acted as a single autonomous body; in contrast, the distribution of royalty fees or the setting of royalty rates under the new legislation will often be a multistage process. For example, in order to adjust a compulsory license royalty rate, the Librarian of Congress, with the recommendation of the Register of Copyrights, must appoint an arbitration panel and then review the panel's report and, with the Register's recommendation, either approve the report or substitute his/her own judgment. This new system renders many of the former Tribunal's rules and regulations inappropriate, and requires creation of a new framework to allocate responsibilities.

At the same time, the Library and the Copyright Office recognize the desirability of preserving as much continuity as possible between the old and new systems.² The proposed rules are based upon and seek to track the structure and organization of the former Tribunal's rules.

The Library and Copyright Office have thoroughly reviewed the entire body of the former Tribunal's rules and regulations and considered the extent to which they fit with the new bifurcated system of ad hoc Arbitration Panels administered by the Library and the Office. The results are today's proposed rules, which are intended to preserve the essential elements of the Tribunal's system while taking into account the requirements and complexities presented by an independent arbitration process.

At the outset a technical change is required by the regulations governing the Code of Federal Regulations itself: the former Tribunal's rules are being moved from chapter III to chapter II of Title 37, CFR. Chapter III is repealed, and chapter II is restructured to accommodate the new body of regulations. Chapter II, which until now has contained five individual parts (Parts 201-204 and 211), will be divided into

² The need for continuity is underscored by the Reform Act's instruction that the Tribunal's rules be fully adopted upon enactment, to be later amended or superseded. See 17 U.S.C. 802(d).

two subchapters. Subchapter A will contain the five original parts of chapter II, and new subchapter B will contain the entire body of the former Tribunal's rules, along with today's proposed changes. Any future rule changes or additions bearing upon the Copyright Arbitration Royalty Panels will appear in subchapter B¹¹ of chapter II, 37 CFR.

The part numbers of the rules generally track the Tribunal's original structure (parts 301-311), and are redesignated parts 251-259 of the Copyright Office's rules. Two parts of the Tribunal's former rules, parts 303 and 305 relating to jukebox performances, are being repealed since their relevance has been eliminated by the Reform Act's repeal of the jukebox compulsory license.

The main task of today's proposed rulemaking is to provide the substantive changes in the former Tribunal's rules necessary to implement the Reform Act and to create a workable and efficient system for adjusting royalty rates and distributing royalties. The following is a part-by-part summary of the proposed changes.

A. Part 251—Copyright Arbitration Royalty Panels Rules of Procedure

Part 251 is a proposed revision of part 301 of the former Tribunal's rules, which covered most of the Tribunal's operating procedures and rules of practice. This is the part that is in greatest need of revision, since many of the rules are inappropriate to govern the new system of ad hoc Arbitration Panels. The following summarizes the proposed changes in the various subparts of part 251.

1. Subpart A—Organization

Subpart A of part 251, entitled "Organization" and describing the composition of the Copyright Royalty Tribunal, was rendered superfluous by the Reform Act. Since it is necessary to create a completely different organizational scheme to implement the new system, we are planning to repeal all of subpart A and to substitute completely new provisions.

Official Address. Section 251.1¹² provides a single official address for all proceedings and actions conducted under

subchapter B. Establishment of an official address is important, since many sections of subchapter B refer to this section or require documents to be filed at this address, including all royalty claims, requests for information, public access to documents, payments of Arbitration Panel costs, and motions, objections, and records filed with the Panels. Moreover, since all records submitted to the Copyright Office, to the Library, and to the CARPs are, with limited exceptions, available to the public for inspection and copying, a single address is required to assure that all documents will be assembled in a single location for the convenience of those wishing to inspect them. We also believe that providing a single permanent repository for all documents created and submitted under subchapter B is not only important, but required.

All this may seem self-evident, but there is a problem here. Unlike the proceedings of the Tribunal, arbitration proceedings will not necessarily take place at a single location, within the Library of Congress or elsewhere. There may be incentive in particular cases for parties to deliver filings directly to the actual location where the CARP is meeting, but we believe it would be a mistake to allow entire filings to go to locations different from the mailing address specified in these proposed regulations. Any possible advantages of such a system to the parties or the Panels would be outweighed by the dangers of confusion among parties to different proceedings and possible uncertainties and difficulties in mail receipt and delivery. Since individuals' rights often depend on the timely filing and delivery of papers, the guarantee of proper handling can only be afforded by delivery to a single address in the Copyright Office of the Library of Congress.

At the same time, while §251.1 creates a single official address, §251.44 provides the parties flexibility in submitting documents and filing papers. In cases where an Arbitration Panel is conducting a hearing, the arbitrators are directed to establish requirements permitting delivery of filings directly to them, as long as one copy of the filing is delivered to the Copyright Office at its official address.

Purpose of the CARPs. Section 251.2 describes the purpose of the Copyright Arbitration Royalty Panels: to make rate

adjustments and/or royalty distributions for the cable (17 U.S.C. 111), mechanical (17 U.S.C. 115), jukebox (17 U.S.C. 116), public broadcasting (17 U.S.C. 118), satellite carrier (17 U.S.C. 119) and digital audio recording devices and media (17 U.S.C. chapter 10) licenses. The jurisdiction of the Copyright Arbitration Royalty Panels is more limited than that of the Copyright Royalty Tribunal which, for example, had authority to adjust the royalty maximum for digital audio recording devices. This adjustment is now the province of the Librarian. See 17 U.S.C. 1004(a)(3). There are also certain arbitration procedures in the Copyright Act which are not within the jurisdiction of the CARPs. See 17 U.S.C. 119 and 1010.

Lists of Arbitrators. The Reform Act provides that the selection of arbitrators for a Royalty Panel must be made from "lists provided by professional arbitration associations." 17 U.S.C. 802(b). Sections 251.3 and 251.4 govern the creation and use of those lists. Before the beginning of each year (and, in the case of the current year of 1994, before March 1), any professional arbitration association or organization may submit a list of its member arbitrators who would be qualified to serve on a Copyright Arbitration Royalty Panel. Specific information is required with respect to each person whose name is submitted, including current and past employment, educational background, and a description of the facts and information that would qualify the person to serve as an arbitrator. After receiving the lists, there will be an initial screening process in which the Librarian will determine: 1) if the proposed person meets the necessary qualifications to serve as an arbitrator; and 2) if that person can reasonably be expected to be available during that calendar year. The names of persons meeting the requirements will be published in the Federal Register at the beginning of each year (in the case of 1994, by March 1), and this publication will serve as the master list from which the Librarian can select names for any arbitration proceeding commencing in that calendar year.

Objection Procedure. The Librarian will screen the master list, and there is also a procedure for objection. The objection procedure is confined to the period before an individual arbitration proceeding begins, and is limited to the parties participating in that proceeding. In the case of rate adjustment proceedings, parties may file their objections

¹¹ Appeared in Federal Register as "And"

¹² Appeared in Federal Register as "Subchapter B"

¹³ Appeared in Federal Register as "Part 251.1"

during the 90-day "cooling off" period following the filing of petitions for adjustment. See § 251.63. In the case of distribution proceedings, objections must be filed during the precontroversy discovery period specified by § 251.45(a). Objections must clearly spell out the facts and reasons for disqualification of persons on the arbitrator list, and the Librarian will consider them during the selection process for the first two arbitrators. Once the Librarian has made his selections, the objections will be made available to the two arbitrators to assist them in their selection of the third arbitrator. No peremptory objections will be allowed.

Qualifications of the Arbitrators.

Section 251.5 describes the qualifications a person must have to serve as an arbitrator. We have deliberately avoided adopting an extensive and specific list of qualifications on the theory that the results of a long, overly-particularized list of qualifications would likely result in a homogeneous Panel, and that the Librarian should be able to choose from persons of diverse backgrounds and skills. The Reform Act requires that an arbitrator have experience in conducting arbitration proceedings and experience in settling disputes. The only two qualifications the Office has added are membership in a bar association and ten or more years of legal practice. Since the arbitration process contemplated by the Reform Act often resembles an adjudicatory procedure more than a traditional arbitration, the Office felt that it was necessary for arbitrators to be lawyers with a fair amount of experience as practitioners. The area of practice is not specified; we believe that a background in copyright, though helpful, is not necessarily indispensable to serving as an arbitrator. Keeping the number of qualifications to a minimum should produce a diversified group of individuals to serve as arbitrators with the necessary legal training and experience to accomplish the task efficiently and effectively.

Selection Process. Section 251.6 describes the selection process for an arbitration panel, restating the process described in the Reform Act. See 17 U.S.C. 802(b). The section requires the chairperson to act according to the majority wishes of the panel. There is also a provision regarding substitution of arbitrators who,

after selection, for some reason become unable to continue service. In that event, the Librarian is directed to select a replacement promptly unless hearings have already begun in the proceeding. If hearings have begun, the remaining arbitrators or arbitrator would constitute the quorum necessary to render a determination.

Division of Authority between Librarian and CARP. Section 251.7 underscores the division of authority between the Librarian and the Royalty Panels. The Panels are limited by the statute to making determinations in individual and separate proceedings necessary to settling a controversy over royalty rates or distributions. Although given authority to issue orders governing the conduct of the proceedings, the Panels do not have rulemaking authority to amend or otherwise alter these rules and regulations when they are issued in final form.³ Furthermore, since the Panels are not independent agencies, they have no authority to publish materials in the Federal Register. Because the Panels are considered a part of the Copyright Office and the Library of Congress, any orders and rulings of the Panels that are to be published must be issued under the auspices of the Office and the Library.

2. Subpart B—Public Access to Copyright Arbitration Royalty Panel Meetings

Although the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, does not apply to Copyright Arbitration Royalty Panels, since CARPs are not an "agency or agencies," the Copyright Office believes that the

³ Section 251.42 allows an individual Panel to waive or suspend the rules of subchapter B for purposes of the proceeding. In the cases where subchapter B does not prescribe a rule governing a particular question, the Panel, in accordance with 17 U.S.C. 802(c), may adopt its own rule for purposes of that proceeding. This provision is designed to give a Panel some flexibility in executing its duties with respect to the facts of its case. It is not, however, a grant of rulemaking authority, and any waiver, suspension or adoption of a rule has effect only on the course of that proceeding and in no way affects the rules and regulations of this subchapter or their application to other proceedings. It is expected that each Panel will follow these rules and apply them in a way that produces a just and equitable proceeding.

provisions of the Act should apply to the conduct of meetings held by the arbitrators. This subpart, therefore, tracks the procedures governing open and closed meetings which the former Tribunal adopted and followed with only a few changes.

Section 251.11 states that all meetings of a Copyright Arbitration Royalty Panel shall be open to the public unless otherwise specified. Notice of the anticipated schedule of the hearings will be placed in the Federal Register at least 7 days before the meeting. As amendments to the schedule are made, every practicable effort will be made to keep the public informed. Section 251.12 provides for public and media access to open meetings, adopting the former Tribunal's rules *in toto*.

Sections 251.13 to 251.16¹ prescribe the procedures to be followed in closed meetings, adopting virtually all of the former Tribunal's rules. Section 251.13 drops the requirement of closed meetings for internal personnel matters, since the Panels are without authority to hire or maintain personnel, but it adds to the discretion of the Panel to go into closed session to deliberate on a motion or objection raised orally at hearing. Section 251.16 directs that transcripts of closed meetings shall be kept at the Copyright Office, which is the official address for all arbitration proceedings.

3. Subpart C—Public Access to and Inspection of Records

As in subpart B, the Copyright Office is proposing in subpart C to adopt the former Tribunal's rules with respect to public access to and inspection of records, but with some important changes. The range of documents available to the public is expanded. Section 251.21 provides that, with limited exceptions, all records of the Copyright Arbitration Royalty Panels, and also those of the Librarian of Congress assembled and/or created under 17 U.S.C. 801 and 802, are available for public inspection and copying. Thus, for example, rulings or decisions of the Librarian made before the convening of an Arbitration Panel would be publicly available.

The same difficulties raised by adoption of a single official address, as discussed above, also arise with respect to the location

¹ Appeared in Federal Register as "152.16"

² Appeared in Federal Register as "Subpart 3"

of documents. While all filings with a CARP required by the proposed rules must be submitted through the Copyright Office, certain documents other than filings may, during the course of a proceeding, be in the sole possession of a Panel. Examples are a document admitted into evidence during the course of a hearing to impeach the testimony of a witness, or the transcript of an ongoing proceeding. Section 251.22 therefore specifies that all documents and records in the sole possession of a Copyright Arbitration Royalty Panel and not required to be filed with the Copyright Office may be maintained by the chairperson at the location of the hearing, or at a location specified by the Panel. All requests for access, however, must be directed to the Copyright Office, and not the Arbitration Panel. In the case of documents solely in the possession of the Panel, the Copyright Office shall make' arrangements to allow the person making the request to inspect and copy them. The schedule of fees for services of this sort are those currently charged by the Copyright Office for like services.

Because the Copyright Office already has its own Freedom of Information Act and Privacy Act guidelines, *see* 37 C.F.R. 203 and 204, it is not adopting the former Tribunal regulations related to those Acts. The Office acknowledges that some adjustments to those rules may be required by the peculiarities of the Copyright Arbitration Royalty Panel system, but we believe there should be some practical experience before we identify any necessary changes.

4. Subpart D—Standards of Conduct *

The Office is not proposing any regulations at this time, but as part of this proceeding we are inquiring as to standards of conduct that should apply to the arbitrators.

5. Subpart E—Procedures of Copyright Arbitration Royalty Panels

As with so many of the rules of this subchapter, the new bifurcated system of the Reform Act requires some changes in the former Tribunal's rules governing the conduct of proceedings. Nevertheless, although consequential adjustments are needed, we believe that the over-all system of procedures long used by the Tribunal in rate adjustment and distribution proceedings have served the public interest well and should be preserved. Maintaining the Tribunal's system to the extent possible should reduce the learning process for parties that have appeared before the former Tribunal for many years and should also, we hope, avoid some confusion.

Application of CARPs Procedures and Practice. For the most part the hearing procedures and motions practice applicable to the CARPs are carried over from those of the former Tribunal. Section 251.40 specifies that the procedural rules of this subpart E apply only to the Copyright Arbitration Royalty Panels and not to the actions of the Librarian or the Copyright Office, unless otherwise expressly provided in this subpart. The section also states that subpart E only applies to CARPs, and not to other arbitration proceedings under the Copyright Code. The Office is not statutorily required to apply these rules to other arbitration proceedings. Although it is possible that some or all of these rules may ultimately be adopted for other arbitration purposes; the statement clarifies the issue as of now and grants the Office flexibility in making future decisions on the point.

Formal Hearings and Other CARP Proceedings. Section 251.41 directs the Panels to conduct formal hearings for rate adjustment and royalty distribution proceedings. All parties intending to participate in a hearing must file a notice of their intention to do so. The Panels are also allowed to conduct other proceedings in the exercise of their basic functions, subject to §251.7. For example, in the course of a distribution controversy, a legal issue may arise which requires resolution before the proper distribution can be determined. The Panel could conduct a proceeding to resolve that issue, which would be part of its function in determining the distribution. It may also happen that resolution of the legal question will permit the parties to the proceeding to settle their differences,

thereby avoiding the need for a Panel distribution determination. The Panel, however, is still subject to §251.7, and could not conduct a rulemaking proceeding affecting any provisions of subpart E. Section 251.41 also recognizes that, in the interest of reducing the expense of litigation, some parties may wish to have their royalty entitlement or rate determined solely by written submissions, and a procedure for petitioning the Librarian to have a "paper" proceeding is provided.

Suspension or Waiver of Rules; Ad Hoc Procedures. As noted above, although it is clear that the Arbitration Panels have no rulemaking authority, §251.42 authorizes them to waive or suspend the rules of subpart E for purposes of a particular proceeding. This carries on a practice formerly used by the Tribunal, and allows the Panels flexibility in addressing the specific conditions and circumstances of each proceeding; if the Panels were not allowed this flexibility, the resulting procedural rigidity could produce injustices. In cases where subpart E is silent as to the correct procedure to be observed, the Panel may follow its own procedures, as long as they are consistent with the Administrative Procedure Act. However, as with suspension or waiver, the ad hoc procedures adopted by that Panel apply only to that particular proceeding and that particular Panel.

Institution of Proceedings. As was the case with the former Tribunal, proceedings before a Panel begin with the filing of the written direct case. Section 251.43 specifies that the written direct case must include all testimony and exhibits, complete with proper referencing. Each party submitting a written direct case must specify its requested royalty rate or percentage of the royalty pool, whichever is applicable. No evidence may be submitted in the direct written case without a sponsoring witness or official notice, unless good cause is shown. Section 251.43 also gives Copyright Arbitration Royalty Panels discretion in setting the time for the filing of written rebuttal cases after the conclusion of the hearing.

Filing and Service of Written Cases and Pleadings. Section 251.44 governs the filing and service of written cases and pleadings. The division of authority, together with the possible differences in the location of the Copyright Office and the

*The Copyright Office is proposing to repeal Subpart D, as it appeared in the former Tribunal's rules, and replace it with rules governing standards of conduct for arbitrators. Former Subpart D contained Equal Employment Opportunity provisions for the Tribunal, which are no longer relevant for CARPs since they are without authority to hire personnel or maintain a staff.
*Appeared in Federal Register as "made"

places where the CARPs hold their hearings, require special filing and service requirements. The former Tribunal could maintain all records and evidence at one location, but this is not possible under the new system. Section 251.44(a), therefore, requires that an original and three copies of all filings made to a Panel be submitted in such manner as the Panel shall direct. As was discussed above in connection with the official mailing address, location of arbitration proceedings is likely to change, and the circumstances surrounding mail delivery and receipt could be uncertain. Section 251.44(a) allows the Panels flexibility to deal with this problem by allowing them to establish the means of delivery, whether it be by direct hand delivery, delivery to a specified address, or establishment of a temporary post office box. The parties submitting filings, however, are still required to deliver one copy of their pleading or filing to the Copyright Office at its official address. In the case of large or bulky filings, a Panel may reduce the number of copies it requires, but a complete copy must nonetheless be submitted to the Copyright Office.

Section 251.44(b) prescribes the requirements with respect to all filings with the Librarian of Congress--that is motions and pleadings filed with the Librarian in accordance with these proposed rules both before and after the CARP proceedings. Under the proposed rule, each party must file an original and five copies with the Copyright Office. Section 251.44 also maintains the English-language translation, affidavit, subscription and verification, and service requirements of the former Tribunal.

Precontroversy Discovery. Section 251.45 significantly expands the scope of permitted discovery in arbitration proceedings. In his statement accompanying H.R. 2840, Representative William Hughes, Chairman of the House Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary, commented favorably on the use of precontroversy discovery and exchange of information. See 139 Cong. Rec. H10973 (daily ed. Nov. 22, 1993) ("In order to reduce the amount of actual litigation time, and thereby reduce expenses, I encourage the

Librarian to promulgate regulations permitting exchange of information before the tolling of the 180-day decision period, and, to the extent practicable, generally to permit precontroversy discovery." Section 251.45 is proposed to explore the efficacy of Chairman Hughes' recommendation. We particularly seek comments on the scope of such precontroversy discovery: whether it should include interrogatories of witnesses as well as production of supporting documents, and whether it would advance Chairman Hughes' goal of reducing costs by being able to stipulate facts and remove issues, or whether the additional procedures might add costs to the proceeding.

In the case of royalty distribution proceedings, the proposed rule directs the Librarian to designate a period for precontroversy discovery and exchange of documents. This period is to start after the filing of claims and to end at the declaration of a controversy, and is the same time period referred to by §251.4(b) for the filing of objections to arbitrators. In the case of rate adjustment proceedings, the period for precontroversy discovery and exchange of documents corresponds with the 90-day consideration period for all rate adjustment petitions and proceedings specified by § 251.63.

All parties to a proceeding may voluntarily exchange documents during this time, or may make discovery requests. Failure to respond to requests, and any other discovery controversies or issues, will be resolved by the Librarian. All other objections to royalty claims or petitions, or motions for procedural or evidentiary rulings, shall also be submitted to the Librarian for decision during the same time period. All parties to the proceeding will be given 14 days in which to respond to a motion or objection, regardless of whether or not this 14-day period goes beyond the time periods specified in subsection (a). The Librarian, after consultation with the Register, shall rule on all motions or objections timely submitted, and will not declare a controversy and initiate arbitration proceedings until all rulings have been made. See 17 U.S.C. 801(c).

Discovery and Motions during Proceedings. Section 251.45(c) pre-

scribes a similar procedure for exchanging documents and motions and objections filed with a Panel once a proceeding begins. The Panel must designate a period for discovery with respect to both the written direct and rebuttal cases. No time limits are set on the length of the discovery periods--although, given the Panel's 180-day existence, the deadline will necessarily be short.

After the filing of written cases, either direct or rebuttal, any party may file objections. If an objection is apparent on the face of the written case, it must be raised or may thereafter be considered waived. Section 251.45(d) allows each party whose claim, petition, written case or direct evidence is the subject of an objection, either before the Librarian or a Copyright Arbitration Royalty Panel, to amend its filing to respond to the objection. The Librarian or the Panel may also request that such amended filing be made where necessary. All parties will be given a reasonable period of time to conduct discovery on the amended filing.

Conduct of Hearings. Sections 251.46 through 251.48 are adopted nearly intact from the former Tribunal's rules. Section 251.46 describes the role of the arbitrator and the chairperson during the course of a hearing. Section 251.47 describes the course of proceedings once a hearing has begun, and §251.48 prescribes the rules of evidence. Only conforming changes have been made to these sections.

Transcript and Record. Section 251.49 governs transcription of the hearings and creation of the record. The Librarian shall, from time to time, designate an official reporter to transcribe the hearings of any arbitration proceedings taking place during that time. Since arbitration proceedings are likely to take place in different locations, the location of the transcript will not always be at a fixed site. Therefore, the chairperson is directed to specify the location of the transcript for public inspection. It is anticipated that the location will usually correspond to that of the hearing, although this may not always be the case. Once the arbitration proceeding is concluded, the transcript, along with the full written record, will be delivered to the Librarian and may be viewed at the Copyright Office.

Rulings and Orders. Section 251.50 gives CARPs the authority to issue rules

and orders necessary to the resolution of their proceedings. Once again, the absence of the Panels' authority to issue remakings amending, superseding, or supplementing the rules and regulations of this subchapter is underscored.

Closing Hearings; Submission of Findings and Conclusions; Report.

Section 251.51, with respect to closing the hearing, and §251.52, on submission of proposed findings and conclusions, are adopted intact from the former Tribunal's rules, with conforming amendments.

Section 251.53 essentially codifies the provisions of 17 U.S.C. 802(e) governing the report of Copyright Arbitration Royalty Panels to the Librarian of Congress. The determination of a Panel is to be certified and signed by all the arbitrators, and any written dissent is to be certified and signed by the dissenting arbitrator. Panels must distribute copies of their determination to all participating parties.

Assessment of Costs of Panels. Section 251.54 governs the assessment of costs by Copyright Arbitration Royalty Panels.³ It implements new section 802(c) of the Copyright Act which states:

In ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the Arbitration Panels shall direct. In distribution proceedings, the parties shall bear the cost in direct proportion to their share of the distribution.

After the conclusion of an arbitration proceeding, the Panel will assess its costs in accordance with the above-described proportions. The chairperson will deliver a statement to each participating party listing the Panel's total costs, the party's individual share, and the amount due to each arbitrator from that party. Payment is to be made to each arbitrator, as provided in the statement, and must be made either by money order, check, or bank draft. Failure to submit timely payment will subject the party to the provisions of the Debt Collection Act of 1982.

Post-Panel Motions; Order of the Librarian; Effective Date; Appeals.

After the arbitration process has concluded and the Panel has delivered its report, the Reform Act requires that the Librarian of Congress review the sufficiency of the

³ Assessment of costs by the Library and the Copyright Office are addressed in §§251.65 and 251.74.

⁴ Appeared in Federal Register as "the"

Panel's determination within 60 days of receipt of the report. Section 251.55 grants the parties to the proceeding 14 days in which to file petitions with the Librarian requesting that the determination be modified or set aside, and an additional 14 days to reply to such petitions. The petitioner must clearly state its reasons for the modification or reversal, and include applicable portions of its proposed findings of fact and conclusions of law. After the four-week period has run, the Librarian will proceed to a decision on the Panel's report. Section 251.56 essentially codifies the review process described in 17 U.S.C. 802(f), with the Librarian publishing the order of his/her decision in the Federal Register and delivering it to all the parties to the proceeding. The order is to be effective 30 days after its publication in the Federal Register, unless an appeal is taken (§ 251.57). The appeals process described in §251.58 comes directly from 17 U.S.C. 802(g).

6. Subpart F—Rate Adjustment Proceedings.

The basic procedural mechanics of an arbitration proceeding are described in subpart E, but the different nature of rate adjustment proceedings in comparison with that of distribution proceedings calls for additional separate requirements. Subpart F contains those requirements for rate adjustment proceedings.

Scope of Subpart F. Section 251.60 describes the scope of subpart F, emphasizing that it applies only to rate adjustment proceedings and that it augments the rules of subpart E. In circumstances where one or more provisions of subparts E and F are inconsistent, §251.60 makes clear that subpart F is controlling.

Commencement of Proceedings;

Content of Petitions. Section 251.61 describes the commencement of adjustment proceedings for the applicable compulsory licenses. Adjustment is either automatic, as in the case of non-commercial broadcasting, or by petition, as in the cases of cable, phonorecords, jukeboxes, and audio home recording devices and media. The section implements the changes made by the Reform Act with respect to the dates when proceedings begin or when petitions may be filed. Thus, cable rate adjustment petitions may be filed in 1995 and every 5 years thereafter; those for phonorecords in 1997

and every 10 years thereafter; those for jukeboxes within one year of termination or expiration of a negotiated license; and those for audio home recording devices and media from October 29, 1997 to October 28, 1998 and not more than once a year thereafter. In the case of noncommercial educational broadcasting, the Librarian will publish notice of initiation of arbitration proceedings on June 30, 1997, and every 5 years thereafter. Section 251.62 adopts the former Tribunal's rules governing the content of a petition.

Period for Consideration. Section 251.63 is an important provision. Although it adopts the 90-day "cooling off" period used by the Tribunal to facilitate settlements after the filing of a petition, or prior to a non-commercial educational broadcasting rate adjustment, the 90-day period is significant for other purposes. This same 90-day period is used to conduct precontroversy discovery and exchange of documents (§ 251.45), and to file objections to names on the arbitrator list (§ 251.4). The Librarian will designate the 90-day period for consideration by publishing notice in the Federal Register, including the effective beginning and ending dates of that period.

Disposition of Petition; Initiation of Proceeding. After the expiration of the 90-day period, and after the Librarian has resolved all motions submitted during that period, §251.64 prescribes that the Librarian will determine the sufficiency of the rate adjustment petition. If the petition is sufficient, the Librarian will publish in the Federal Register a declaration of a controversy and, at the same time, a notice of initiation of an arbitration proceeding. The same declaration and notice of initiation shall be done for noncommercial educational broadcasting in accordance with 17 U.S.C. 118(b) and (c). The declaration and notice of initiation will commence the 180-day period for proceedings described in 17 U.S.C. 802.

Deduction of Costs. The final section of subpart F, §251.65, implements section 802(h)(1) of the Copyright Act which allows the Copyright Office and the Library to assess their reasonable costs for the rate adjustment proceeding directly to the participating parties. These costs include any administrative services provided under U.S.C. 801(d).

7. Subpart G—Royalty Fee Distribution Proceedings.

Subpart G is like subpart F in that it prescribes additional procedural requirements inherent in certain royalty distribution proceedings. There are three compulsory licenses that require royalty-fee distributions: cable, satellite and digital audio. Section 251.70 states that the provisions of subpart G apply to these licenses, and underscores that, in the case of inconsistencies, subpart G takes precedence over subpart E.

Commencement of Proceedings; Determination of Controversy. Section 251.71 describes the commencement of distribution proceedings by prescribing the time period for the filing of royalty claims.⁶ In the case of cable, claims must be filed during the month of July; for satellite during July; and for digital audio during January and February. Under §251.72, after the filing of claims as prescribed by 17 U.S.C. §§ 111(d)(4)(B) (cable), 119(b)(4)(B) (satellite carrier), and 1007(b) (digital audio), the Librarian must determine whether a controversy exists. The Librarian may issue requests for information or conduct hearings to assist in determining the existence of a controversy, with notice of the proceedings to be published in the Federal Register.

Declaration of Controversy: Initiation of Proceeding. Once the Librarian has determined that a controversy exists, he/she shall publish in the Federal Register a declaration of controversy along with a notice of initiation of arbitration. The notice is to include a description of the nature, structure and schedule of the proceeding.

Deduction of Costs. Section 251.74 is the royalty-distribution counterpart of § 251.65; it allows the Library and the Copyright Office to deduct their reasonable costs incurred as a result of a distribution proceeding. These expenses include administrative services provided under 17 U.S.C. 801(d).

B. Part 252—Filing of Claims to Cable

Royalty Fees.

Part 252 prescribes the filing requirements for claims to cable royalties. The part significantly revises the former Tribunal's rules governing the filing of cable claims by implementing a procedural system similar to that adopted by the Tribunal for the filing of digital audio claims. See 58 FR 53822 (1993). Section 252.1 defines the scope of part 252.

Time of Filing. Section 252.2 specifies the time of filing for cable claims. Claims for cable royalties from the preceding calendar year must be filed during the month of July, and no distribution will be made to any party failing to make a timely filing. Cable claims may be filed jointly or singly as the submitting parties choose.

Content of Claims. Section 252.3 describes the required content of a claim and is more detailed than the former Tribunal's requirements. The Copyright Office is not yet prepared to issue claimant forms, and each claimant must therefore take care to insure that information meeting all the requirements of §252.3 is contained in each claim. Each claim must state the full legal name of the claimant, and its address, telephone number and facsimile number, if any. The claimant must also identify at least one of its copyrighted works that was subject to a secondary transmission by a cable system in the previous calendar year, thereby establishing a basis for a claim to royalties. If the claim is a joint claim, there must be a concise statement of the authorization for filing the joint claim. For this purpose, performing rights societies will not be required to obtain separate authorizations from their individual members beyond their standard agreements.

All claims must be signed by the claimant or a duly authorized representative, and the Copyright Office must be notified of name and/or address changes within 30 days of the change. Failure to notify the Office in a timely fashion is grounds for dismissal of the claim. If a party submitting an individual claim wishes to change it to a joint claim, the Office must be notified within 14 days of the agreement to submit a joint claim. All joint claimants must make available to the

Copyright Office and, if applicable, to a Copyright Arbitration Royalty Panel—a list of all individual claimants covered by the joint claim.

Compliance with Statutory Dates. Section 252.4 underscores the importance of complying with the July filing period. A claim is considered timely filed if it is received by the Copyright Office during normal business hours in July, or is properly addressed to the Copyright Office with correct postage and bears a July U.S. postmark. Claims dated only with a business meter and not received in July are untimely. Absolutely no claim will be accepted if it is filed by facsimile transmission.

Proof of Fixation. Finally, §252.5 clarifies that the Copyright Office will not require claimants to file copies of their works. In the event that the issue of fixation arises, the CARP conducting the proceeding will resolve the controversy on the basis of affidavits and other appropriate documentary evidence. No affidavits need be submitted, however, unless requested by the Panel.

C. Parts 253-256.

Parts 253 through 256 adopt, with only minor technical changes, the provisions of the former Tribunal's regulations for use of copyrighted works by noncommercial educational broadcasters, adjustment of royalty rates for phonorecord players (jukeboxes), adjustment of royalty rates for making and distributing phonorecords, and adjustment of royalty rates for the cable compulsory license. These sections contain current royalty rates, as adopted by the Tribunal, and will be amended by the Copyright Office in the future as new rates are set by a Copyright Arbitration Royalty Panel or the Librarian of Congress, as the case may be.

In adopting parts 253-256, several regulations of the former Tribunal are being repealed. Former part 303, entitled "Access to Phonorecord Players (Jukeboxes)" is repealed, as is former part 305, "Claims to Phonorecord Player (Jukebox) Royalty Fees." The need for these parts was eliminated by the Reform Act's repeal of the section 116 jukebox compulsory license and replacement with section 116 governing negotiated licenses. The need for former Tribunal part 306, however, was

⁶ The procedures for filing claims are described in Parts 252, 256, and 258.

not eliminated since it contains royalty rates applicable to periods dating back to January 1, 1982. These rates must be reserved, even though the compulsory license has now been eliminated for future years, in the event that parties making use of copyrighted works during the periods covered by the license may now, or in the future, make initial or supplementary payments. Part 254 therefore adopts part 306 of the former Tribunal's rules, with only one minor technical change.

D. Part 257—Filing of Claims to Satellite Carrier Royalty Fees.

Part 257 implements exactly the same requirements for 17 U.S.C. 119 satellite carrier royalty claims that part 252 adopts for cable claims. Like those for cable, claims in these cases must be filed during the month of July, and may be filed singly or jointly. Section 257.6 makes it clear that, although cable and satellite have the same filing period, separate claims must be filed by a party seeking both cable and satellite royalty fees for the same calendar year. Any single claim which attempts to file for both royalty funds will be dismissed.

E. Parts 258-259.

Parts 258 and 259 govern the adjustment of royalty fees for the satellite carrier compulsory license and the filing of digital audio claims, respectively. These two parts adopt parts 310 and 311 of the former Tribunal's rules with only minor technical changes.

List of Subjects:

37 CFR Parts 251 and 301

Administrative Practice and Procedure, Hearing and Appeal Procedures.

37 CFR Parts 252 and 302

Cable television, Claims, Copyright.

37 CFR Parts 253 and 304

Copyright, Music, Radio, Rates, Television.

37 CFR Parts 254 and 306

Copyright, Jukeboxes, Rates.

37 CFR Parts 255 and 307

Copyright, Music, Recordings.

37 CFR Parts 256 and 308

Cable television, Rates.

37 CFR Parts 257 and 309

Cable television, Claims.

37 CFR Parts 258 and 310

Copyright, Satellite.

37 CFR Parts 259 and 311

Claims, Copyright, Digital audio recording devices and media.

37 CFR Parts 303

Copyright, Jukeboxes.

37 CFR Parts 305

Claims, Jukeboxes.

Proposed Rules

For the reasons set out in the preamble, 37 CFR chapters II and III are proposed to be amended under authority of 17 U.S.C. 802(d) as follows:

1. Part 301 of chapter III is removed.

1a. New subchapter A--Copyright Office Rules and Procedures--is created consisting of parts 201-211.

1b. New subchapter B--Copyright Arbitration Royalty Panel Rules and Procedures--is created consisting of parts 251-259.

2. A new part 251 is added to subchapter B of chapter II to read as follows:

PART 251—COPYRIGHT ARBITRATION ROYALTY PANEL RULES OF PROCEDURE

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Sec.

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251.2 Purpose of Copyright Arbitration Royalty Panels.

251.3 Arbitrator lists.

251.4 Arbitrator lists: Objections.

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251.42 Suspension or waiver of rules.

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251.44 Filing and service of written cases and pleadings.

251.45 Discovery and prehearing motions.

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251.47 Conduct of hearings: Witnesses and counsel.

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Subpart G—Royalty Fee Distribution Proceedings

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251.74 Deduction of costs of distribution proceedings.

Authority: 17 U.S.C. 801-803.

Subpart A—Organization

§ 251.1 Official address.

Copyright Office, Copyright Arbitration Royalty Panels, Library of Congress, Washington, DC 20557-6400 (202) 707-8150

§ 251.2 Purpose of Copyright Arbitration Royalty Panels.

The Librarian of Congress, upon the recommendation of the Register of Copyrights, may appoint and convene a Copyright Arbitration Royalty Panel (CARP) for the following purposes:

(a) To make determinations concerning copyright royalty rates for the cable compulsory license, 17 U.S.C. 111.

(b) To make determinations concerning copyright royalty rates for the making and distributing of phonorecords, 17 U.S.C. 115.

(c) To make determinations concerning copyright royalty rates for coin-operated phonorecord players (jukeboxes) whenever a negotiated license authorized by 17 U.S.C. 116 expires or is terminated and is not replaced by another such license agreement.

(d) To make determinations concerning royalty rates and terms for the use by noncommercial educational broadcast stations of certain copyrighted works, 17 U.S.C. 118.

(e) To distribute cable television, satellite carrier and digital audio recording devices and media royalty fees under 17 U.S.C. 111, 119, and chapter 10, respectively, deposited with the Register of Copyrights.

§ 251.3 Arbitrator lists.

(a) Any professional arbitration association or organization may submit, before March 1, 1994 and before January 1 of each year thereafter, a list of its members qualified to serve as arbitrators

on a Copyright Arbitration Royalty Panel. Such list shall contain the following for each member:

(1) The full name, address and telephone number of the member.

(2) The current position and name of the member's employer, if any, along with a brief summary of the member's employment history.

(3) A brief description of the educational background of the member, including teaching positions and membership in professional associations, if any.

(4) A description of the facts and information which qualify the member to serve as an arbitrator under §251.4.

(5) Any other information which the professional arbitration association or organization may consider relevant.

(b) After March 1, 1994, and after January 1 of each year thereafter, the Librarian of Congress shall publish in the Federal Register a list of all the members of professional arbitration associations and organizations submitted to the Librarian who satisfy the qualifications and requirements of this subchapter and can reasonably be expected to be available to serve as an arbitrator to a Copyright Arbitration Royalty Panel during that calendar year.

§ 251.4 Arbitrator lists: Objections.

(a) In the case of a rate adjustment proceeding, any party to the proceeding may, during the 90-day period specified in §251.63, file an objection with the Librarian of Congress to one or more of the persons contained on the arbitrator list for that proceeding. Such objection shall plainly state the grounds and reasons for each person found to be objectionable.

(b) In the case of a royalty distribution proceeding, any party to the proceeding may, during the time specified in §251.45(a), file an objection with the Librarian of Congress to one or more of the persons contained on the arbitrator list for that proceeding. Such objection shall plainly state the grounds and reasons for each person found to be objectionable.

§ 251.5 Qualifications of the arbitrators.

In order to serve as an arbitrator to a Copyright Arbitration Royalty Panel, a person must, at a minimum, have the following qualifications:

(a) Membership in a bar association of

any state, territory, trust territory or possession of the United States.

(b) Ten or more years of legal practice.

(c) Experience in conducting arbitration proceedings or facilitating the resolution and settlement of disputes.

§ 251.6 Composition and selection of Copyright Arbitration Royalty Panels.

(a) Within 10 days after publication of a notice in the Federal Register initiating arbitration proceedings under this subchapter, the Librarian of Congress shall, upon recommendation of the Register of Copyrights, select 2 arbitrators from lists provided by professional arbitration associations.

(b) The 2 arbitrators so selected shall, within 10 days of their selection, choose a third arbitrator from the same lists. The third arbitrator shall serve as the chairperson of the Panel during the course of the proceedings.

(c) If the 2 arbitrators fail to agree upon the selection of the third, the Librarian shall promptly select the third arbitrator from the same lists.

(d) The third arbitrator so chosen shall serve as the chairperson of the Panel during the course of the proceeding. In all matters, procedural or substantive, the chairperson shall act according to the majority wishes of the Panel.

(e) If for any reason one or more of the arbitrators selected by the Librarian is unable to serve during the course of the proceedings, the Librarian shall promptly appoint a replacement; Provided, that once hearings have commenced, no such appointment shall be made and the remaining arbitrators shall constitute a quorum necessary to the determination of the proceeding.

§ 251.7 Actions of Copyright Arbitration Royalty Panels.

Any action of a Copyright Arbitration Royalty Panel requiring publication in the Federal Register according to 17 U.S.C. or the rules and regulations of this subchapter shall be published under the authority of the Librarian of Congress and the Register of Copyrights. Under no circumstances shall a CARP engage in rulemaking designed to amend, supplement or supersede any of the rules and regulations of this subchapter, or seek to have any such action published in the Federal Register.

Subpart B—Public Access to Copyright Arbitration Royalty Panel Meetings

§ 251.11 Open meetings.

(a) All meetings of a Copyright Arbitration Royalty Panel shall be open to the public, with the exception of meetings that are listed in § 251.13.

(b) At the beginning of each proceeding, the CARP shall develop the original schedule of the proceeding which shall be published in the Federal Register at least 7 calendar days in advance of the first meeting. Such announcement shall state the times, dates, and place of the meetings, the testimony to be heard, whether any of the meetings are to be closed, and, if so, which ones, and the name and telephone number of the person to contact for further information.

(c) If changes are made to the original schedule, they will be announced in open meeting and issued as orders to the parties participating in the proceeding, and the changes will be noted in the docket file of the proceeding. In addition, the contact person for the proceeding shall make any additional efforts to publicize the change are practicable.

(d) If it is decided that the publication of the original schedule must be made on shorter notice than 7 days, that decision must be made by a recorded vote of the Panel and included in the announcement.

§ 251.12 Conduct of open meetings.

(a) Meetings of a Copyright Arbitration Royalty Panel will be conducted in a manner to insure both the public's right to observe and the ability of the Panel to conduct its business properly. The chairperson will take whatever measures necessary to achieve that purpose.

(b) The right of the public to be present does not include the right to participate or make comments.

(c) Reasonable access for news media will be provided at all public sessions, as long as it does not interfere with the comfort or efficiency of the arbitrators or witnesses. Cameras will be admitted only on the authorization of the chairperson, and no witness may be photographed or have his or her testimony recorded for broadcast if he or she objects.

§ 251.13 Closed meetings.

In the following circumstances, a

Copyright Arbitration Royalty Panel may close its meetings or withhold information from the public:

(a) If the matter to be discussed has been specifically authorized to be kept secret by Executive Order, in the interests of national defense or foreign policy; or

(b) If the matter relates solely to the internal practices of a Copyright Arbitration Royalty Panel; or

(c) If the matter has been specifically exempted from disclosure by statute (other than 5 U.S.C. 552) and there is no discretion on the issue; or

(d) If the matter involves privileged or confidential trade secrets or financial information; or

(e) If the result might be to accuse any person of a crime or formally censure him or her; or

(f) If there would be clearly unwarranted invasion of personal privacy; or

(g) If there would be disclosure of investigatory records compiled for law enforcement, or information that if written would be contained in such records, and to the extent disclosure would:

(1) Interfere with enforcement proceedings; or

(2) Deprive a person of the right to a fair trial or impartial adjudication; or

(3) Constitute an unwarranted invasion of personal privacy; or

(4) Disclose the identity of a confidential source or, in the case of a criminal investigation or a national security intelligence investigation, disclose confidential information furnished only by a confidential source; or

(5) Disclose investigative techniques and procedures; or

(6) Endanger the life or safety of law enforcement personnel.

(h) If premature disclosure of the information would frustrate a Copyright Arbitration Royalty Panel's action, unless the Panel has already disclosed the concept or nature of the proposed action, or is required by law to make disclosure before taking final action; or

(i) If the matter concerns a CARP's participation in a civil action or proceeding or in an action in a foreign court or international tribunal, or an arbitration, or a particular case of formal agency adjudication pursuant to 5 U.S.C. 554, or

otherwise involving a determination on the record after opportunity for a hearing:

or

(j) If a motion or objection has been raised in an open meeting and the Panel determines that it is in the best interest of the proceeding to deliberate on such motion or objection in closed session.

§ 251.14 Procedure for closed meetings.

(a) Meetings may be closed, or information withheld from the public, only by a recorded vote of a majority of arbitrators of a Copyright Arbitration Royalty Panel. Each question, either to close a meeting or to withhold information, must be voted on separately, unless a series of meetings is involved, in which case the Panel may vote to keep the discussions closed for 30 days, starting from the first meetings. If the panel feels that information about a closed meeting must be withheld, the decision to do so must also be the subject of a recorded vote.

(b) Before a discussion to close a meeting or withhold information, the chairperson of a CARP must certify that such an action is permissible, and the chairperson shall cite the appropriate exemption under §251.13. This certification shall be included in the announcement of the meeting and be maintained as part of the record of proceedings of that Panel.

(c) Following such a vote, the following information shall be published in the Federal Register as soon as possible:

(1) The vote of each arbitrator; and

(2) The appropriate exemption under §251.13; and

(3) A list of all persons expected to attend the meeting and their affiliation.

§ 251.15 Transcripts of closed meetings.

(a) All meetings closed to the public shall be subject either to a complete transcript or, in the case of §251.13(h) and at the discretion of the Copyright Arbitration Royalty Panel, detailed minutes. Detailed minutes shall describe all matters discussed, identify all documents considered, summarize action taken as well as the reasons for it, and record all roll call votes as well as any views expressed.

(b) Such transcripts or minutes shall be kept by the Copyright Office for at least 2 years, or for at least 1 year after the conclusion of the proceedings, whichever is

later. Any portion of transcripts of meetings which the chairperson of a CARP does not feel is exempt from disclosure under §251.13 will ordinarily be available to the public within 20 working days of the meeting. Transcripts or minutes of closed meetings will be reviewed by the chairperson at the end of the proceedings of the Panel and, if at that time he or she determines that they should be disclosed, he or she will resubmit the question to the Panel to gain authorization for their disclosure.

§ 251.16 Requests to open or close meetings.

(a) Any person may request a Copyright Arbitration Royalty Panel to open or close a meeting or disclose or withhold information. Such request must be captioned "Request to Open" or "Request to Close" a meeting on a specified date concerning a specific subject. The person making the request must state his or her reasons, and include his or her name, address, and telephone number.

(b) In the case of a request to open a meeting that a CARP has previously voted closed, the Panel must receive the request within 3 working days of the meeting's announcement. Otherwise the request will not be heeded, and the person making the request will be so notified. An original and three copies of the request must be submitted.

(c) For a CARP to act on a request to open or close a meeting, the question must be brought to a vote before the Panel. If the request is granted, an amended meeting announcement will be issued and the person making the request notified. If a vote is not taken, or if after a vote the request is denied, said person will also be notified promptly.

Subpart C—Public Access to and Inspection of Records

§ 251.21 Public records.

(a) All official determinations of a Copyright Arbitration Royalty Panel will be published in the Federal Register in accordance with §251.7 and include the relevant facts and reasons for those determinations.

(b) All records of a CARP, and all records of the Librarian of Congress assembled and/or created under 17 U.S.C.

801 and 802, are available for inspection and copying at the address provided in §251.1 with the exception of:

(1) Records that relate solely to the internal personnel rules and practices of the Copyright Office or the Library of Congress;

(2) Records exempted by statute from disclosure;

(3) Interoffice memoranda or correspondence not available by law except to a party in litigation with a CARP, Copyright Office or Library of Congress;

(4) Personnel, medical or similar files whose disclosure would be an invasion of personal privacy;

(5) Communications among arbitrators of a Panel concerning the drafting of decisions, opinions, reports, and findings on any Panel matter or proceeding;

(6) Communications among the Librarian of Congress and staff of the Copyright Office or Library of Congress concerning decisions, opinions, reports, selection of arbitrators or findings on any matter or proceeding conducted under 17 U.S.C. chapter 8;

(7) Offers of settlement which have not been accepted, unless they have been made public by the offeror;

(8) Records not herein listed but which may be withheld as "exempted" if a CARP or the Librarian of Congress finds compelling reasons for such action to exist.

§ 251.22 Public access.

(a) *Location of Records.* All records relating to rate adjustment and distribution proceedings under this subchapter which are:

(1) Required to be filed with the Copyright Office; or

(2) Submitted to or produced by the Copyright Office of Library of Congress under 17 U.S.C. 801 and 802, or

(3) Submitted to or produced by a Copyright Arbitration Royalty Panel during the course of a concluded proceeding shall be maintained at the Copyright Office. In the case of records submitted to or produced by a CARP which is currently conducting a proceeding, such records shall be maintained by the chairperson of that Panel at the location of the hearing or at a location specified by the panel. Upon conclusion of the proceeding, all records

shall be delivered by the chairperson to the Copyright Office.

(b) *Requesting information.* Requests for information or access to records described in §251.21 shall be directed to the Copyright Office at the address listed in §251.1. No requests shall be directed to or accepted by a Copyright Arbitration Royalty Panel. In the case of records in the possession of a CARP, the Copyright Office shall make arrangements with the Panel for access and copying by the person making the request.

(c) *Fees.* Fees for photocopies of CARP or Copyright Office records are \$0.40 per page, and fees for searching for records, certification of documents, and other costs incurred are as provided in 17 U.S.C. 705, 708.

§ 251.23 FOIA and Privacy Act— [Reserved]

Subpart D—Standards of Conduct [Reserved]

Subpart E—Procedures of Copyright Arbitration Royalty Panels

§ 251.40 Scope.

This subpart governs the proceedings of Copyright Arbitration Royalty Panels for the adjustment of royalty rates and distribution of royalty fees convened under 17 U.S.C. 803. This subpart does not apply to other arbitration proceedings specified by 17 U.S.C., or to actions or rulemakings of the Librarian of Congress or the Register of Copyrights, except where expressly provided in the provisions of this subpart.

§ 251.41 Formal hearings.

(a) The formal hearings that will be conducted under the rules of this subpart are rate adjustment hearings and royalty fee distribution hearings. All parties intending to participate in a hearing of a Copyright Arbitration Royalty Panel must file a notice of their intention. A CARP may also, on its own motion or on the petition of an interested party, hold other proceedings it considers necessary to the exercise of its functions, subject to the provisions of § 251.7. All such proceedings will be governed by the rules of this subpart.

(b) During the time periods provided § 251.45(a) and § 251.63, any party to the proceeding may petition the Librarian of

Congress to have the determination of the controversy rendered strictly on the submission of written pleadings. Replies such petitions may be filed within 14 days. The Librarian, upon recommendation of the Register of Copyrights, shall rule on the petition prior to the declaration of a controversy and initiation of a proceeding.

§ 251.42 Suspension or waiver of rules.

For purposes of an individual proceeding, the provisions of this subpart may be suspended or waived, in whole or in part, by a Copyright Arbitration Royalty Panel upon a showing of good cause, subject to the provisions of §251.7. Such suspension or waiver shall apply only to the proceeding of the CARP taking that action, and shall not be binding on any other Panel or proceeding. Where procedures have not been specifically prescribed in this subpart, and subject to §251.7, the Panel shall follow procedures consistent with 5 U.S.C. chapter 5, subchapter II.

§ 251.43 Written cases.

(a) The proceedings of a Copyright Arbitration Royalty Panel for rate adjustment, royalty fee distribution, or arbitration conducted under 17 U.S.C. 1010 shall begin with the filing of written direct cases of the parties who have filed a notice of intent to participate in the hearing.

(b) The written direct case shall include all testimony, including each witness' background and qualifications, along with all the exhibits to be presented in the direct case.

(c) Each party may designate a portion of past records, including records of the Copyright Royalty Tribunal, that it wants included in its direct case. Complete testimony of each witness whose testimony is designated (i.e., direct, cross and redirect) must be referenced.

(d) In the case of a royalty fee distribution proceeding, each party must state in the written direct case its percentage or dollar claim to the fund. In the case of a rate adjustment proceeding, each party' must state its requested rate. party will be precluded from revising

its claim or its requested rate at any time during the proceeding up to the filing of the proposed findings of fact and conclusions of law.

(e) No evidence, including exhibits, may be submitted in the written direct case without a sponsoring witness, except where the Panel has taken official notice, or in the case of incorporation by reference of past records, or for good cause shown.

(f) Written rebuttal cases of the parties shall be filed at a time designated by a CARP upon conclusion of the hearing of the direct case in the same form and manner as the direct case, except that the claim or the requested rate shall not have to be included if it has not changed from the direct case.

§ 251.44 Filing and service of written cases and pleadings.

(a) *Copies filed with a Copyright Arbitration Royalty Panel.* In all filings with a Copyright Arbitration Royalty Panel, the submitting party shall deliver, in such a fashion as the Panel shall direct, an original and three copies to the Panel. The submitting party shall also deliver one copy to the Copyright Office at the address listed in §251.1. In the case of exhibits whose bulk or whose cost of reproduction would unnecessarily encumber the record or burden the party, a CARP may reduce the number of copies required by the Panel, but a complete copy must still be submitted to the Copyright Office. In no case shall a party tender any written case or pleading by facsimile transmission.

(b) *Copies filed with the Librarian of Congress.* In all pleadings filed with the Librarian of Congress, the submitting party shall deliver an original and five copies to the Copyright Office. In no case shall a party tender any pleading by facsimile transmission.

(c) *English language translations.* In all filings with a CARP or the Librarian of Congress, each submission that is in a language other than English shall be accompanied by an English-language translation, duly verified under oath to be a true translation. Any other party to the proceeding may, in response, submit its own English-language translation, similarly verified.

(d) *Affidavits.* The testimony of each witness in a party's written case, direct or

rebuttal, shall be accompanied by an affidavit or a declaration made pursuant to 28 U.S.C. 1746 supporting the testimony.

(e) *Subscription and verification.* (1)

The original of all documents filed by any party represented by counsel shall be signed by at least one attorney of record and shall list the attorney's address and telephone number. All copies shall be conformed. Except for English-language translations, written cases, or when otherwise required, documents signed by the attorney for a party need not be verified or accompanied by an affidavit. The signature of an attorney constitutes certification that he or she has read the document, that to the best of his or her knowledge and belief there is good ground to support it, and that it has not been interposed for purposes of delay.

(2) The original of all documents filed by a party not represented by counsel shall be both signed and verified by that party and list that party's address and telephone number.

(3) The original of a document that is not signed, or is signed with the intent to defeat the purpose of this section, may be stricken as sham and false, and the matter shall proceed as though the document had not been filed.

(f) *Service.* In all filings with a CARP or the Librarian of Congress, a copy shall be served upon counsel of all other parties identified in the service list, or, if the party is unrepresented by counsel, upon the party itself. Proof of service shall accompany the filing with the Panel or the Copyright Office. If a party files a pleading that requests or would require action by the Panel or the Librarian within 10 or fewer days after the filing, it must serve the pleading upon all other counsel or parties by means no slower than overnight express mail on the same day the pleading is filed.

§ 251.45 Discovery and prehearing motions.

(a) *Precontroversy exchange of documents and discovery.* In the case of a royalty fee distribution proceeding, the Librarian of Congress shall, after the time period for filing claims and before publication of the notice initiating an arbitration proceeding under 17 U.S.C. 803, designate a period for precontroversy exchange and discovery of nonprivileged underlying documents related to the proceeding. In the case of rate

¹Appeared in the Federal Register as "part".

adjustment proceedings, the period for precontroversy exchange and discovery of documents shall correspond with the 90-day period specified in §251.63.

(b) *Precontroversy motions and objections.* During the time periods specified in §251.45(a), as appropriate, any party to the proceeding may file with the Librarian of Congress motions regarding precontroversy exchange of documents or discovery, objections to any party's royalty claim or petition, or motions for procedural or evidentiary rulings, on any proper ground. Any party to the proceeding wishing to file a response to such motion or objection may do so within 14 days. The Librarian, upon recommendation of the Register of Copyrights, shall rule on the motion or objection prior to the declaration of a controversy and initiation of an arbitration proceeding.

(c) *Discovery and motions filed with a Copyright Arbitration Royalty Panel.*

(1) A Copyright Arbitration Royalty Panel shall designate a period following the filing of the written direct and rebuttal cases in which parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.

(2) After the filing of the written cases, any party may file with a CARP objections to any portion of another party's written case on any proper ground including, without limitation, relevance, competency, and failure to provide underlying documents. If an objection is apparent from the face of a written case, that objection must be raised or the party may thereafter be precluded from raising such an objection.

(d) *Amended filings and discovery.* In the case of objections filed with either the Librarian of Congress or a CARP, each party may amend its claim, petition, written case, or direct evidence to respond to the objections raised by other parties, or to the requests of either the Librarian or a Panel. Such amendments must be properly filed with the Librarian or the CARP, wherever appropriate, and exchanged with all parties. All parties shall be given a reasonable opportunity to conduct discovery on the amended filings.

§ 251.46 Conduct of hearings: Role of arbitrators.

(a) At the opening of a hearing

conducted by a Copyright Arbitration Royalty Panel, the chairperson shall announce the subject under consideration.

(b) Only the arbitrators of a CARP, or counsel as provided in this chapter, shall question witnesses.

(c) Subject to the vote of the CARP, the chairperson shall have responsibility for:

(1) Setting the order of presentation of evidence and appearance of witnesses;

(2) Administering oaths and affirmations to all witnesses;

(3) Announcing the Panel's ruling on objections and motions and all rulings with respect to introducing or excluding documentary or other evidence. In all cases, whether there are an even or odd number of arbitrators sitting at the hearing, it takes a majority vote to grant a motion or sustain an objection. A split vote will result in the denial of the motion or the overruling of the objection;

(4) Regulating the course of the proceedings and the decorum of the parties and their counsel, and insuring that the proceedings are fair and impartial; and

(5) Announcing the schedule of subsequent hearings.

(d) Each arbitrator may examine any witness or call upon any party for the production of additional evidence at any time. Further examination, cross-examination, or redirect examination by counsel relevant to the inquiry initiated by an arbitrator may be allowed by a Panel, but only to the limited extent that it is directly responsive to the inquiry of the arbitrator.

§ 251.47 Conduct of hearings: Witnesses and counsel.

(a) With all due regard for the convenience of the witnesses, proceedings shall be conducted as expeditiously as possible.

(b) In each distribution or rate adjustment proceeding, each party may present its opening statement with the presentation of its direct case.

(c) All witnesses shall be required to take an oath or affirmation before testifying; however, attorneys who do not appear as witnesses shall not be required to do so.

(d) Witnesses shall first be examined by their attorney and by opposing

attorneys for their competency to support their written testimony and exhibits (voir dire).

(e) Witnesses may then summarize, highlight or read their testimony. However, witnesses may not materially supplement or alter their written testimony except to correct it, unless the Panel expands the witness' testimony to complete the record.

(f) Parties are entitled to raise objections to evidence on any proper ground during the course of the hearing, including an objection that an opposing party has not furnished nonprivileged underlying documents. However, they may not raise objections that were apparent from the face of a written case and could have been raised before the hearing without leave from the Panel. See §251.45(c).

(g) All written testimony and exhibits will be received into the record, except any to which the Panel sustains an objection; no separate motion will be required.

(h) If the Panel rejects or excludes testimony and an offer of proof is made, the offer of proof shall consist of a statement of the substance of the evidence which it is contended would have been adduced. In the case of documentary or written evidence, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(i) The Panel shall discourage the presentation of cumulative evidence, and may limit the number of witnesses that may be heard on behalf of any one party on any one issue.

(j) Parties are entitled to conduct cross-examination and redirect examination. Cross-examination is limited to matters raised on direct examination. Redirect examination is limited to matters raised on cross-examination. The Panel, however, may limit cross-examination and redirect examination if in its judgment this evidence or examination would be cumulative or cause undue delay. Conversely, this subsection does not restrict the discretion of the Panel to expand the scope of cross-examination or redirect examination.

(k) Documents that have not been exchanged in advance may be shown to a witness on cross-examination. However, copies of such documents must be distributed to the Panel and to other participants or their counsel at hearing before being shown to the witness at the time of cross-

examination, unless the Panel directs otherwise. If the document is not, or will not be, supported by a witness for the cross-examining party, that document can be used solely to impeach the witness' direct testimony and cannot itself be relied upon in findings of fact as rebutting the witness' direct testimony. However, upon leave from the Panel, the document may be admitted as evidence without a sponsoring witness if official notice is proper, or if, in the Panel's view, the cross-examined witness is the proper sponsoring witness.

(l) A CARP will encourage individuals or groups with the same or similar interests in a proceeding to select a single representative to conduct their examination and cross-examination for them. However, if there is no agreement on the selection of a representative, each individual or group will be allowed to conduct its own examination and cross-examination, but only on issues affecting its particular interests, provided that the questioning is not repetitious or cumulative of the questioning of other parties within the group.

§ 251.48 Rules of evidence.

(a) *Admissibility.* In any public hearing before a Copyright Arbitration Royalty Panel, evidence that is not unduly repetitious or cumulative and is relevant and material shall be admissible. The testimony of any witness will not be considered evidence in a proceeding unless the witness has been sworn.

(b) *Documentary evidence.* Evidence that is submitted in the form of documents or detailed data and information shall be presented as exhibits. Relevant and material matter embraced in a document containing other matter not material or relevant or not intended as evidence must be plainly designated as the matter offered in evidence, and the immaterial or irrelevant parts shall be marked clearly so as to show they are not intended as evidence. In cases where a document in which material and relevant matter occurs is of such bulk that it would unnecessarily encumber the record, it may be marked for identification and the relevant and material parts, once properly authenticated, may be read into the record. If the Panel desires, a true copy of the material and relevant matter may be presented in

extract form, and submitted as evidence. Anyone presenting documents as evidence must present copies to all other participants at the hearing or their attorneys, and afford them an opportunity to examine the documents in their entirety and offer into evidence any other portion that may be considered material and relevant.

(c) *Documents filed with a Copyright Arbitration Royalty Panel or Copyright Office.* If the matter offered in evidence is contained in documents already on file with a Copyright Arbitration Royalty Panel or the Copyright Office, the documents themselves need not be produced, but may instead be referred to according to how they have been filed.

(d) *Public documents.* If a public document such as an official report, decision, opinion, or published scientific or economic data, is offered in evidence either in whole or in part, and if the document has been issued by an Executive Department, a legislative agency or committee, or a Federal administrative agency (Government-owned corporations included), and is proved by the party offering it to be reasonably available to the public, the document need not be produced physically, but may be offered instead by identifying the document and signaling the relevant parts.

(e) *Introduction of studies and analyses.* If studies or analyses are offered in evidence, they shall state clearly the study plan, all relevant assumptions, the techniques of data collection, and the techniques of estimation and testing. The facts and judgments upon which conclusions are based shall be stated clearly, together with any alternative courses of action considered. If requested, tabulations of input data shall be made available to the Copyright Arbitration Royalty Panel.

(f) *Statistical studies.* Statistical studies offered in evidence shall be accompanied by a summary of their assumptions, their study plans, and their procedures. Supplementary details shall be included in appendices. For each of the following types of statistical studies the following should be furnished:

(1) *Sample surveys.* (i) A clear description of the survey design, the definition of the universe under consideration, the sampling frame and units, the

validity and confidence limits on major estimates; and

(ii) An explanation of the method of selecting the sample and of which characteristics were measured or counted.

(2) *Econometric investigations.* (i) A complete description of the econometric model, the reasons for each assumption, and the reasons for the statistical specification;

(ii) A clear statement of how any changes in the assumptions might affect the final result; and

(iii) Any available alternative studies, if requested, which employ alternative models and variables.

(3) *Experimental analysis.* (i) A complete description of the design, the controlled conditions, and the implementation of controls; and

(ii) A complete description of the methods of observation and adjustment of observation.

(4) *Studies involving statistical methodology.* (i) The formula used for statistical estimates;

(ii) The standard error for each component;

(iii) The test statistics, the description of how the tests were conducted, related computations, computer programs and all final results; and

(iv) Summarized descriptions of input data and, if requested, the input data itself.

§ 251.49 Transcript and record.

(a) An official reporter for the recording and transcribing of hearings shall be designated by the Librarian of Congress from time to time. Anyone wishing to inspect the transcript of a hearing may do so at a location specified by the chairperson of the Copyright Arbitration Royalty Panel conducting the hearing. Anyone wishing a copy of the transcript must purchase it from the official reporter.

(b) The transcript of testimony and all exhibits, papers, and requests filed in the proceeding, shall constitute the official written record. Such record shall accompany the report of the determination of the CARP to the Librarian of Congress required by 17 U.S.C. 802(e).

(c) The record, including the report of the determination of a CARP, shall be available at the Copyright Office for public inspection and copying in accordance with §251.22.

§ 251.50 Rulings and orders.

In accordance with 5 U.S.C., subchapter II, a Copyright Arbitration Royalty Panel may issue rulings or orders, either on its own motion or that of an interested party, necessary to the resolution of issues contained in the proceeding before it; Provided, That no such rules or orders shall amend, supplement or supersede the rules and regulations contained in this subchapter. See §251.7.

§ 251.51 Closing the hearing.

To close the record of hearing, the chairperson of a Copyright Arbitration Royalty Panel shall make an announcement that the taking of testimony has concluded. In its discretion the Panel may close the record as of a future specified date, and allow time for exhibits yet to be prepared to be admitted, provided that the parties to the proceeding stipulate on the record that they waive the opportunity to cross-examine or present evidence with respect to such exhibits. The record in any hearing that has been recessed may not be closed by the chairperson before the day on which the hearing is to resume, except upon 10 days' notice to all parties.

§ 251.52 Proposed findings and conclusions.

(a) Any party to the proceeding may file proposed findings of fact and conclusions, briefs, or memoranda of law, or may be directed by the chairperson to do so. Such filings, and any replies to them, shall take place at such time after the record has been closed as the chairperson directs.

(b) Failure to file when directed to do so shall be considered a waiver of the right to participate further in the proceeding, unless good cause for the failure is shown.

(c) Proposed findings of fact shall be numbered by paragraph and include all basic evidentiary facts developed on the record used to support proposed conclusions, and shall contain appropriate citations to the record for each evidentiary fact. Proposed conclusions shall be stated

separately. Proposed findings submitted by someone other than an applicant in a proceeding shall be restricted to those issues specifically affecting that person.

§ 251.53 Report to the Librarian of Congress.

(a) At any time after the filing of proposed findings of fact and conclusions of law specified in §251.52, and not later than 180 days from publication in the Federal Register of notification of commencement of the proceeding, a Copyright Arbitration Royalty Panel shall deliver to the Librarian of Congress a report incorporating its written determination. Such determination shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination.

(b) The determination of the Panel shall be certified by the chairperson and signed by all of the arbitrators. Any dissenting opinions shall be certified and signed by the arbitrator so dissenting.

(c) At the same time as the submission to the Librarian of Congress, the chairperson of the Panel shall cause a copy of the determination to be delivered to all parties participating in the proceeding.

(d) The Librarian of Congress shall make the report of the CARP and the accompanying record available for public inspection and copying.

§ 251.54 Assessment of costs of Arbitration Panels.

(a) After the conclusion of the proceeding and the delivery of the report of the determination of the Copyright Arbitration Royalty Panel, the Panel may assess its costs to the participants to the proceeding.

(1) In the case of a rate adjustment proceeding, the parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

(2) In the case of a royalty distribution proceeding, the parties to the proceeding shall bear the cost of the proceeding in direct proportion to their share of the distribution.

(b) The chairperson of the Panel shall cause to be delivered to each participating party a statement of the total costs of the proceeding, the party's share of the

total cost, and the amount owed by the party to each arbitrator.

(c) All parties to a proceeding shall have 30 days from receipt of the statement of costs and bill for payment in which to tender payment to the arbitrators. Payment should be in the form of a money order, check, or bank draft. Failure to submit timely payment may submit the nonpaying party to the provisions of the Debt Collection Act of 1982, including disclosure to consumer credit reporting agencies and referral to collection agencies.

§ 251.55 Post-Panel motions.

(a) Any party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the Panel's report of its determination. Such petition shall state the reasons for modification or reversal of the Panel's determination, and shall include applicable sections of the party's proposed findings of fact and conclusions of law.

(b) Replies to petitions to modify or set aside shall be filed within 14 days of the filing of such petitions.

§ 251.56 Order of the Librarian of Congress.

(a) After the filing of post-Panel motions, see §251.55, but within 60 days from receipt of the report of the determination of a Panel, the Librarian of Congress shall issue an order accepting the Panel's determination or substituting the Librarian's own determination. The Librarian shall adopt the determination of the Panel unless he or she finds that the determination is arbitrary or contrary to the applicable provisions of 17 U.S.C.

(b) If the Librarian substitutes his or her own determination, the order shall set forth the reasons for not accepting the Panel's determination, and shall set forth the facts which the Librarian found relevant to his or her determination.

(c) The Librarian shall cause a copy of the order to be delivered to all parties participating in the proceeding. The Librarian shall also publish the order, and the determination of the Panel, in the Federal Register.

§ 251.57 Effective date of order.

An order of determination issued by the Librarian under §251.56 shall become

effective 30 days following its publication in the *Federal Register*, unless an appeal has been filed pursuant to §251.58 and notice of the appeal has been served on all parties to the proceeding.

§ 251.58 Judicial review.

(a) Any order of determination issued by the Librarian of Congress under §251.55 may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after publication of the order in the *Federal Register*.

(b) If no appeal is brought within the 30 day period, the order of determination of the Librarian is final, and shall take effect as set forth in the order.

(c) The pendency of any appeal shall not relieve persons obligated to make royalty payments under 17 U.S.C. 111, 115, 116, 118, 119, or 1003, and who would be affected by the determination on appeal, from depositing statements of account and royalty fees specified by those sections.

Subpart F—Rate Adjustment Proceedings

§ 251.60 Scope.

This subpart governs only those proceedings dealing with royalty rate adjustments affecting cable television (17 U.S.C. 111), the production of phonorecords (17 U.S.C. 115), performances on coin-operated phonorecord players (jukeboxes) (17 U.S.C. 116), noncommercial educational broadcasting (17 U.S.C. 118), and audio home recording devices and media (17 U.S.C. chapter 10). Those provisions of subpart E of this part generally regulating the conduct of proceedings shall apply to rate adjustment proceedings, unless they are inconsistent with the specific provisions of this subpart.

§ 251.61 Commencement of adjustment proceedings.

(a) In the case of cable television, phonorecords, coin-operated phonorecord players (jukeboxes) and audio home recording devices and media, rate adjustment proceedings shall commence with the filing of a petition by an interested party according to the following schedule:

(1) Cable Television: During 1995, and each subsequent fifth calendar year.

(2) Phonorecords: During 1997 and each subsequent 10th calendar year.

(3) Coin-operated phonorecord players (jukeboxes): Within one year of the expiration or termination of a negotiated license authorized by 17 U.S.C. 116.

(4) Audio home recording devices and media: From October 29, 1997 to October 28, 1998, and not more than once each year thereafter.

(b) Cable rate adjustment proceedings may also be commenced by the filing of a petition, according to 17 U.S.C. 801(b)(2)(B) and (C), if the Federal Communications Commission amends certain of its rules with respect to the carriage by cable systems of broadcast signals, or with respect to syndicated and sports programming exclusivity.

(c) In the case of noncommercial educational broadcasting, a petition is not necessary for the commencement of proceedings. Proceedings commence with the publication of a notice of the initiation of arbitration proceedings in the *Federal Register* on June 30, 1997, and at 5 year intervals thereafter.

§ 251.62 Content of petition.

(a) In the case of a petition for rate adjustment proceedings for cable television, phonorecords, and coin-operated phonorecord players (jukeboxes), the petition shall detail the petitioner's interest in the royalty rate sufficiently to permit the Librarian of Congress to determine whether the petitioner has a "significant interest" in the matter. The petition must also identify the extent to which the petitioner's interest is shared by other owners or users; owners or users with similar interests may file a petition jointly.

(b) In the case of a petition for rate adjustment proceedings as the result of a Federal Communications Commission rule change, the petition shall also set forth the actions of the Federal Communications Commission on which the petition for a rate adjustment is based.

§ 251.63 Period for consideration.

To allow time for parties to settle their differences regarding rate adjustments, the Librarian of Congress shall, after the filing of a petition, or prior to a rate

adjustment made under 17 U.S.C. 118(b), designate a 90-day period for consideration. The Librarian shall cause notice of the consideration period to be published in the *Federal Register*, and such notice shall include the effective dates of that period.

§ 251.64 Disposition of petition: Initiation of arbitration proceeding.

At the end of the 90-day period, and after the Librarian has resolved all motions filed during that period under §251.45(b), the Librarian shall determine the sufficiency of the petition including, where appropriate, whether one or more of the petitioners' interests are "significant." If the Librarian determines that a petition is sufficient, he/she shall cause to be published in the *Federal Register* a declaration of a controversy accompanied by a notice of initiation of an arbitration proceeding. The same declaration and notice of initiation shall be made for noncommercial educational broadcasting in accordance with 17 U.S.C. 118(b) and (c). Such notice shall, to the extent feasible, describe the nature, general structure, and schedule of the proceeding.

§ 251.65 Deduction of costs of rate adjustment proceedings.

In accordance with 17 U.S.C. 802(h)(1), the Librarian of Congress and the Register of Copyrights may assess the reasonable costs incurred by the Library of Congress and the Copyright Office as a result of the rate adjustment proceedings directly to the parties participating in the proceedings.

Subpart G—Royalty Fee Distribution Proceedings

§ 251.70 Scope.

This subpart governs only those proceedings dealing with distribution of royalty payments deposited with the Register of Copyrights for cable television (17 U.S.C. 111), satellite carrier (17 U.S.C. 119), and digital audio recording devices and media (17 U.S.C. chapter 10). Those provisions of subpart E generally regulating the conduct of proceedings shall apply to royalty fee distribution proceedings, unless they are inconsistent with the specific provisions of this subpart.

§ 251.71 Commencement of proceedings.

(a) *Cable television.* In the case of

royalty fees collected under the cable compulsory license (17 U.S.C. 111), any person claiming to be entitled to such fees must file a claim with the Copyright Office during the month of July each year in accordance with the requirements of this subchapter.

(b) *Satellite carriers.* In the case of royalty fees collected under the satellite carrier compulsory license (17 U.S.C. 119), any person claiming to be entitled to such fees must file a claim with the Copyright Office during the month of July each year in accordance with the requirements of this subchapter.

(c) *Digital audio recording devices and media.* In the case of royalty payments for the importation and distribution in the United States, or the manufacture and distribution in the United States, of any digital recording device or medium, any person claiming to be entitled to such payments must file a claim with the Copyright Office during the month of January or February each year in accordance with the requirements of this subchapter.

§ 251.72 Determination of controversy.

(a) *Cable television.* After the first day of August each year, the Librarian of Congress shall determine whether a controversy exists among the claimants of cable television compulsory license royalty fees. In order to determine whether a controversy exists, and to facilitate agreement among the claimants as to the proper distribution, the Librarian may request public comment or conduct public hearings, whichever he or she deems necessary. All requests for information and notices of public hearings shall be published in the *Federal Register*, along with a description of the general structure and schedule of the proceeding.

(b) *Satellite carriers.* After the first day of August of each year, the Librarian shall determine whether a controversy exists among the claimants of the satellite carrier compulsory license royalty fees. In order to determine whether a controversy exists, and to facilitate agreement among the claimants as to the proper distribution, the Librarian may request public comment or conduct public hearings, whichever he or she deems necessary. All requests for information

and notices of public hearings shall be published in the *Federal Register*, along with a description of the general structure and schedule of the proceeding.

(c) *Digital audio recording devices and media.* Within 30 days after the last day of February each year, the Librarian of Congress shall determine whether a controversy exists among the claimants of digital audio recording devices and media royalty payments as to any Subfund of the Sound Recording Fund or the Musical Works Fund as set forth in 17 U.S.C. 1006(b)(1) and (2). In order to determine whether a controversy exists, and to facilitate agreement among the claimants as to the proper distribution, the Librarian may request public comment or conduct public hearings, whichever he or she deems necessary. All requests for information and notices of public hearings shall be published in the *Federal Register*, along with a description of the general structure and schedule of the proceeding.

§ 251.73 Declaration of controversy: Initiation of arbitration proceeding.

If the Librarian determines that a controversy exists among the claimants to either cable television, satellite carrier, or digital audio recording devices and media royalties, the Librarian shall publish in the *Federal Register* a declaration of controversy along with a notice of initiation of an arbitration proceeding. Such notice shall, to the extent feasible, describe the nature, general structure and schedule of the proceeding.

§ 251.74 Deduction of costs of distribution proceedings.

Pursuant to 17 U.S.C. 802(h)(1), the Librarian of Congress and the Register of Copyrights may, before any distributions of cable television royalty fees are made, deduct the reasonable costs incurred by the Library of Congress and the Copyright Office as a result of the distribution proceedings.

3. Part 302 of chapter III is removed.

3(a) A new part 252 is added to subchapter B of chapter II to read as follows:

PART 252—FILING OF CLAIMS TO CABLE ROYALTY FEES

Sec.

252.1 Scope.

252.2 Time of filing.

252.3 Content of claims.

252.4 Compliance with statutory dates.

252.5 Proof of fixation of works.

Authority: 17 U.S.C. 111(d)(4), 801, 803.

§ 252.1 Scope.

This part prescribes procedures under to 17 U.S.C. 111(d)(4)(A), whereby parties claiming to be entitled to cable compulsory license royalty fees shall file claims with the Copyright Office.

§ 252.2 Time of filing.

During the month of July each year, any party claiming to be entitled to cable compulsory license royalty fees for secondary transmissions of one or more of its works during the preceding calendar year shall file a claim to such fees with the Copyright Office. No royalty fees shall be distributed to a party for secondary transmissions during the specified period unless such party has timely filed a claim to such fees. Claimants may file claims jointly or as a single claim.

§ 252.3 Content of claims.

(a) Claims filed by parties claiming to be entitled to cable compulsory license royalty fees shall include the following information:

(1) The full legal name of the person or entity claiming royalty fees.

(2) The telephone number, facsimile number, if any, and full address, including a specific number and street name or rural route, of the place of business of the person or entity.

(3) If the claim is a joint claim, a concise statement of the authorization for the filing of the joint claim. For this purpose a performing rights society shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard agreements.

(4) A general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission by a cable system establishing a basis for the claim.

(b) Claims shall bear the original signature of the claimant or of a duly authorized representative of the claimant.

(c) In the event that the legal name and/or address of the claimant changes after the filing of the claim, the claimant shall noti

the Copyright Office of such change within 30 days of the change, or the claim may be subject to dismissal.

(d) In the event that, after filing an individual claim, a claimant chooses to negotiate a joint claim, either the particular joint claimant or the individual claimant shall notify the Copyright Office of such change within 14 days from the making of the agreement.

(e) All claimants filing a joint claim shall make available to the Copyright Office, other claimants, and, where applicable, a Copyright Arbitration Royalty Panel, a list of all individual claimants covered by the joint claim.

§ 252.4 Compliance with statutory dates.

Claims filed with the Copyright Office shall be considered timely filed only if:

(a) They are received in the offices of the Copyright Office during normal business hours during the month of July, or

(b) They are properly addressed to the Copyright Office, *see* § 251.1, and they are deposited with sufficient postage with the United States Postal Service and bear July U.S. postmark. Claims dated only with a business meter that are received after July 31 will not be accepted as having been filed during the month of July. No claim may be filed by facsimile transmission.

§ 252.5 Proof of fixation of works.

In any proceeding for the distribution of cable television royalty fees, the Copyright Office shall not require the filing by claimants of tangible fixations of works in whole or in part. In the event of a controversy concerning the actual fixation of a work in a tangible medium of expression as required by the Copyright Code, the Copyright Arbitration Royalty Panel conducting the distribution proceeding shall resolve such controversy on the basis of affidavits by appropriate operational personnel and other appropriate documentary evidence, and such oral testimony as the Panel may deem necessary. Affidavits submitted by claimants should establish that the work for which the claim is submitted was fixed in its entirety, and should state the nature of the work, the title of the program, the duration of the program, and the date of

fixation. No such affidavits need be filed with a Copyright Arbitration Royalty Panel unless requested by that Panel.

4. Part 303—ACCESS TO PHONORECORD PLAYERS (JUKEBOXES) of chapter III is removed.

5. Part 304 of chapter III is transferred to subchapter B of chapter II and is redesignated as part 253.

6. The heading for part 253 is revised to read as follows:

PART 253—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

7. The authority citation to part 253 is revised to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1) and 803.

§ 253.4 [Amended]

8. Section 253.4 is amended in the introductory text of the section by removing “§§ 304.5 and 304.6” and adding “§§ 253.5 and 253.6”.

§ 253.8 [Amended]

9. Section 253.8(e) is amended by removing “CRT” each place it appears and adding “Copyright Office”.

§ 253.9 [Amended]

10. Section 253.9 is amended by removing “CRT” and adding “Copyright Office”.

§ 253.10 [Amended]

11. Section 253.10 is amended by removing “CRT” each place it appears and adding “Copyright Office”.

§ 253.10b [Amended]

11a. Section 253.10(b) is amended by removing “§ 304.5” and adding “§ 253.5”.

§ 253.10c [Amended]

11b. Section 253.10(c) is amended by removing “§ 304.5” and adding “§ 253.5”.

§ 253.12 [Amended]

12. Section 253.12 “Amendment of certain regulations” and 253.13 “Issuance of interpretative regulations” are removed.

PART 305—[REMOVED]

13. Part 305 CLAIMS TO PHONORECORD PLAYER (JUKEBOX) ROYALTY FEES of chapter III is removed.

14. Part 306 is transferred to chapter

II, subchapter B and is redesignated as part 254.

15. The heading for part 254 is revised to read as follows:

PART 254—ADJUSTMENT OF ROYALTY RATE FOR COIN-OPERATED PHONORECORD PLAYERS

16. The authority citation for part 254 is revised to read as follows:

Authority: 17 U.S.C. 116, 801(b)(1).

§ 254.1 [Amended]

17. Section 254.1 is amended by removing “306” and adding “254” and by removing “and 804(a)”.

18. Part 307 of chapter III is transferred to subchapter B of chapter II and is redesignated as part 255.

19. The heading for part 255 is revised to read as follows:

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

20. The authority citation for part 255 is revised to read as follows:

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

§ 255.1 [Amended]

21. Section 255.1 is amended by removing “307” and adding “255”.

§ 255.2 [Amended]

22. Section 255.2 is amended by removing “§ 307.3” and adding “§ 255.3”.

§ 255.3 [Amended]

23. Section 255.3 is amended in paragraph (g)(1) by removing “Copyright Royalty Tribunal” and in (g)(1) and (g)(2) by removing “CRT” each place it appears and adding “Librarian of Congress” in each place, respectively.

24. Part 308 of chapter III is transferred to subchapter B of chapter II and is redesignated as part 256.

25. The heading for part 256 is revised to read as follows:

PART 256—ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY LICENSE

26. Part 309 of chapter III is transferred to subchapter B of chapter II and is redesignated as part 257.

27. Part 257 is revised to read as follows:

PART 257—FILING OF CLAIMS TO SATELLITE CARRIER ROYALTY FEES

Sec.

257.1 General.

257.2 Time of filing.

257.3 Content of claims.

257.4 Compliance with statutory dates.

257.5 Proof of fixation of works.

257.6 Separate claims required.

Authority: 17 U.S.C. 119(b)(4).¹

§ 257.1 General.

This part prescribes the procedures under 17 U.S.C. 119(b)(4) whereby parties claiming to be entitled to compulsory license royalty fees for secondary transmissions by satellite carriers of television broadcast signals to the public for private home viewing shall file claims with the Copyright Office.

§ 257.2 Time of filing.

During the month of July each year, any party claiming to be entitled to compulsory license royalty fees for secondary transmissions by satellite carriers during the previous calendar year of television broadcast signals to the public for private home viewing shall file a claim with the Copyright Office. No royalty fees shall be distributed to any party during the specified period unless such party has timely filed a claim to such fees. Claimants may file jointly or as a single claim.

§ 257.3 Content of claims.

(a) Claims filed for satellite carrier compulsory license royalty fees shall include the following information:

(1) The full legal name of the person or entity claiming compulsory license royalty fees.

(2) The telephone number, facsimile number, if any, and full address, including a specific number and street name or rural route, of the place of business of the person or entity.

(3) If the claim is a joint claim, a concise statement of the authorization for the filing of the joint claim. For this purpose, a performing rights society shall

not be required to obtain from its members or affiliates separate authorizations, apart from their standard membership or affiliate agreements.

(4) A general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission by a satellite carrier establishing a basis for the claim.

(b) Claims shall bear the original signature of the claimant or of a duly authorized representative of the claimant.

(c) In the event that the legal name and/or full address of the claimant changes after the filing of the claim, the claimant shall notify the Copyright Office of such change within 30 days of the change, or the claim may be subject to dismissal.

(d) In the event that, after filing an individual claim, an interested copyright party chooses to negotiate a joint claim, either the particular joint claimants or individual claimant shall notify the Copyright Office of such change within 14 days from the making of the agreement.

(e) All claimants filing a joint claim shall make available to the Copyright Office, other claimants, and, where applicable, a Copyright Arbitration Royalty Panel, a list of all individual claimants covered by the joint claim.

§ 257.4 Compliance with statutory dates.

Claims filed with the Copyright Office shall be considered timely filed only if:

(a) They are received in the offices of the Copyright Office during normal business hours during the month of July, or

(b) They are properly addressed to the Copyright Office, *see* §251.1, and they are deposited with sufficient postage with the United States Postal Service and bear a July U.S. postmark. Claims dated only with a business meter that are received after July 31 will not be accepted as having been filed during the month of July. No claim may be filed by facsimile transmission.

§ 257.5 Proof of fixation of works.

In any proceeding for the distribution of satellite carrier royalty fees, the

Copyright Office shall not require the filing by claimants of tangible fixations of works in whole or in part. In the event of² a controversy concerning the actual fixation of a work in a tangible medium of expression as required by the Copyright Code, the Copyright Arbitration Royalty Panel conducting the distribution proceeding shall resolve such controversy on the basis of affidavits by appropriate operational personnel and other appropriate documentary evidence, and by such oral testimony as the Panel may deem necessary. Affidavits submitted by claimants should establish that the work for which the claim was submitted was fixed in its entirety, and should state the nature of the work, the title of the program, the duration of the program, and the date of fixation. No such affidavits need be filed with a CARP unless requested by that Panel.

§ 257.6 Separate claims required.

If a party intends to file claims for both cable compulsory license and satellite carrier compulsory license royalty fees during the same month of July, that party must file separate claims with the Copyright Office. Any single claim which purports to file for both cable and satellite carrier royalty fees will be dismissed.

28. Part 310 of chapter III is transferred to subchapter B of chapter II and is redesignated as part 258.

29. The heading for part 258 is revised to read as follows:

PART 258—ADJUSTMENT OF ROYALTY FEE FOR SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS

29a. The authority citation for part 258 continues to read as follows:

Authority: 17 U.S.C. 119(c)(3)(F).

§ 258.1 [Amended]

30. Section 258.1 is amended by removing "310" and adding "258".

§ 258.2 [Amended]

31. Section 258.2 is amended by removing "§310(3)(b)" and adding "§258(3)(b)".

32. Section 311 of chapter III is transferred to subchapter B of chapter II and is redesignated as part 259.

¹Appeared in Federal Register as "Authority: 17 U.S.C. 119."

²Appeared in Federal Register as "a".

³Appeared in Federal Register as "that".

33. The heading for part 259 is revised to read as follows:

PART 259—FILING OF CLAIMS TO DIGITAL AUDIO RECORDING DEVICES AND MEDIA ROYALTY PAYMENTS

33a. The authority citation for part 259 is amended to read as follows:

Authority: 17 U.S.C. 1007(a)(1).

§ 259.1 [Amended]

34. Section 259.1 is amended by removing "Copyright Royalty Tribunal" and adding "Copyright Office".

§ 259.2 [Amended]

35. Section 259.2 is amended by removing "Copyright Royalty Tribunal" each place it appears and adding "Copyright Office".

§ 259.3 [Amended]

36. Section 259.3 is amended by removing "Copyright Royalty Tribunal" each place it appears and adding "Copyright Office".

§ 259.4 [Amended]

37. Section 259.4 is amended by removing "Copyright Royalty Tribunal" each place it appears and adding "Copyright Office".

§ 259.5 [Amended]

38. Section 259.5 is amended by removing "Copyright Royalty Tribunal" each place it appears and adding "Copyright Office".

§ 259.5b [Amended]

39. Section 259.5(b) is amended by removing "1825 Connecticut Avenue, NW, suite 918, Washington, DC 20009" and adding "Copyright Office, *see* §251.1,".

§ 259.6 [Removed]

40. Section 259.6 is removed.

CHAPTER III—[REMOVED]¹

41. Chapter III is removed.

Dated: January 11, 1994.

Barbara A. Ringer,
Acting Register of Copyrights.

James H. Billington,
The Librarian of Congress.

Billing Code: 1410-09-M

¹ Sentences "CHAPTER III - [REMOVED]" and "41 Chapter III is removed" were omitted in the Federal Register