



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

FINAL REGULATIONS

COPYRIGHT ARBITRATION ROYALTY PANELS

The following excerpt is taken in part from Volume 59, Number 234 of the *Federal Register* for Wednesday December 7, 1994 (pp. 63025-63040)

Due to *Federal Register* restrictions, the Copyright Office was unable to publish in a single document all of the rules and regulations governing the conduct of royalty distribution and rate adjustment proceedings. This publication reprints the entire set of those rules and regulations, including technical corrections which have yet to be published in the *Federal Register*, and the preamble from the final regulations at 59 FR 63025. The preambles to the interim regulations and notice of proposed rulemaking, which explain and interpret many of the rules and regulations contained in this document, are contained in the *Federal Register* and are reprinted in prior Copyright Office publications. See, *Notice of Proposed Rulemaking in Docket RM 94-1*, 59 FR 2550 (January 18, 1994) (ML-473); and *Interim Regulations*, 59 FR 23964 (May 9, 1994) (ML-478).

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 251-259

[Docket No. RM 94-1A]

Copyright Arbitration Royalty Panels; Rules and Regulations

AGENCY: Copyright Office, Library of Congress

ACTION: Final regulations

SUMMARY: The Copyright Office of the Library of Congress is adopting final regulations governing the conduct of royalty distribution and rate adjustment proceedings prescribed by the Copyright Royalty Tribunal Reform Act of 1993.

EFFECTIVE DATE: These regulations are effective on January 6, 1995.

FOR FURTHER INFORMATION

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SUPPLEMENTARY INFORMATION: The Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 107 Stat. 2304, eliminated the Copyright Royalty Tribunal (CRT) and replaced it with a system of *ad hoc* Copyright Arbitration Royalty Panels (CARPs) administered by the Librarian of Congress (Librarian) and the Copyright Office (Office). The CARPs adjust royalty rates and distribute royalties collected under the various compulsory licenses and statutory obligations of the Copyright Act. The CRT Reform Act, which was effective immediately upon enactment, directed the Librarian and the Office to adopt the rules and regulations of the CRT found in 37 CFR chapter 3, 17 U.S.C. 802(d), and provided that the CRT's regulations were to remain in effect until the

Librarian adopts "supplemental or superseding regulations." The Office adopted the CRT's rules and regulations on an interim basis on December 22, 1993, and notified the public that it intended to begin a rulemaking proceeding to revise and update those rules. 58 FR 67690 (1993).

The Office began the rulemaking proceeding with publication of a Notice of Proposed Rulemaking (NPRM) on January 18, 1994. 59 FR 2550 (1994). The NPRM contained substantial revisions required by the dual structure of the royalty rate adjustment and distribution system created by the CRT Reform Act. Since the CRT's rules were designed for a single administrative body, the Office proposed extensive changes to accommodate the division of authority between the Librarian and the Copyright Office on the one hand, and the CARPs on the other. In addition to inviting written public comment, the Copyright Office invited interested parties to a public meeting to discuss the proposed regulations. More than

50 individuals attended the February 1, 1994, meeting.

I. Interim Regulations

After considering the concerns the parties expressed at the February public meeting, and thoroughly reviewing the written comments, the Copyright Office issued Interim Regulations on May 9, 1994. 59 FR 23964 (1994).¹ The Interim Regulations substantially revised and updated the rules adopted in December of 1993.

The need for immediate adoption of a regulatory framework was underscored by the imminence of a royalty distribution of money collected under the Audio Home Recording Act of 1992 for digital audio recording technology (DART). Section 1007(b), 17 U.S.C., requires determination of a DART controversy and commencement of arbitration proceedings on March 30 of each year for the prior year's royalty collections. The 1992 DART distribution proceeding was begun by the Copyright Royalty Tribunal but was suspended when the Tribunal was abolished, and therefore needed to be started anew. The 1993 DART distribution was begun by the Copyright Office under the new authority conferred by the CRT Reform Act, and on March 1, 1994, the Office published a notice in the *Federal Register* asking the claimants to the 1992 and 1993 DART royalties to comment as to the existence of any controversies in the royalty funds. 59 FR 9773 (1994).

Anticipating a consolidated DART distribution proceeding for the 1992 and 1993 calendar years, the Copyright Office postponed the date for determination of DART controversies from March 30, 1994, to June 30, 1994, in order to permit adequate time for the adoption of regulations governing a CARP proceeding. On May 9, 1994, the Office adopted the Interim Regulations with the intention that they would govern any DART controversies and proceedings beginning June 30, 1994.

The Office created a new subdivision of the regulations devoted entirely to the operation and procedures of the CARPs. We removed parts 301 through 311 of chapter III of 37 CFR and created subchapters A and B of chapter II. Subchapter A comprises the Copyright Office rules and procedures, consisting of parts

201-211, and remains unchanged. New subchapter B, created by the Interim Regulations, comprises parts 251-259, and prescribes the rules and procedures of the CARPs.

Part 251, the Copyright Arbitration Royalty Panel Rules of Procedure, consists of regulations governing the organization of the CARPs, access to CARP meetings and records, rules governing the conduct and course of proceedings, and procedures applicable to rate adjustments and distributions. Part 251 also includes extensive rules of conduct for arbitrators, as well as appropriate ethical and financial standards. We did not propose any specific rules of conduct in the NPRM, but did reserve a subpart for such rules and solicited comment from the interested parties on the issue. See 59 FR 2554 (1994).

Part 252 contains revised rules for the filing of claims to cable royalties, modeled after the system used by the CRT for the filing of DART royalty claims. Parts 253 to 256—Use of Certain Copyrighted Works in Connection With Noncommercial Educational Broadcasting; Adjustment of Royalty Rate for Coin-Operated Phonorecord Players; and Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords—is virtually identical to the former CRT's rules, with only some minor technical changes. Like part 252, part 257—Filing of Claims to Satellite Carrier Royalty Fees—is modeled after the royalty claim procedures used by the CRT for DART. Finally, parts 258 and 259—Adjustment of Royalty Fee for Secondary Transmissions by Satellite Carriers and Filing of Claims to Digital Audio Recording Devices and Media Royalty Payments—contains only minor variations from the former CRT's rules. Since the CRT Reform Act eliminated the jukebox compulsory license and replaced it with a new provision for negotiated licenses (formerly section 116A of the Copyright Act, as amended by the CRT Reform Act), the Copyright Office dropped the regulations governing the filing of jukebox royalty claims (formerly 37 CFR part 305).

In addition to soliciting general comments on the Interim Regulations, the Copyright Office also posed a number of questions to focus the commentators' attention on specific issues and to encourage the parties to offer their solutions. The questions ranged from whether certain types of DART proceedings were subject to CARP jurisdiction, 59 FR 23967 (1994), to asking for comment on ten hypothetical scenarios designed to test

the parameters of the conduct rules. 59 FR 23980.

Written comments on the Interim Regulations were due June 15, 1994. Reply comments were due July 15, 1994.² The Copyright Office received a total of 14 comments and replies. Many parties filed joint comments, and some of the joint commentators also filed separate comments. The commentator groups for comments and/or replies were as follows:

Canadian Claimants (Canadian Claimants);
Electronic Industries Association (EIA);
James Cannings (Cannings);
Joint Sports Claimants, the National Association of Broadcasters, Public Broadcasting Service, the Devotional Claimants, the Canadian Claimants, and National Public Radio (collectively Certain Copyright Owners);
National Association of Broadcasters (NAB);
National Music Publishers Association and the Harry Fox Agency (collectively "Music Publishers");
Office of the Commissioner of Baseball (Baseball);
Program Suppliers (Program Suppliers);
Program Suppliers, Joint Sports Claimants, the National Association of Broadcasters, Public Broadcasting Service, American Society of Composers, Authors and Publishers, Broadcast Music, Inc., SESAC, Inc., the Devotional Claimants, the Canadian Claimants and National Public Radio (collectively Copyright Owners);
Public Broadcasting Service and National Public Radio (collectively PBS/NPR);
Recording Industry Association of America, Inc. ("RIAA");
Recording Industry Association of America, Inc. and the Alliance of Artists and Recording Companies, Inc. (RIAA/AARC).

II. Suspension of DART Distribution

As discussed above, the Office adopted the Interim Regulations to establish a regulatory framework in time for the start of DART distribution. The Office postponed the date for determination of controversies to the 1992/93 DART royalty pools from March 30, 1994, to June 30, 1994, to

²In addition, the Copyright Office met with representatives from ASCAP, BMI, the Canadian Claimants, the Devotional Claimants, the Joint Sports Claimants, NAB, NPR, PBS, and Program Suppliers on August 11th on matters pertaining to cable copyright royalty distribution. The minutes of that meeting are associated with the comment file and are available for public inspection and copying.

¹The Copyright Office also published technical corrections to the Interim Regulations. 59 FR 33201 (1994).

prepare for the possibility of convening a CARP for DART distribution. We published a request for comment on the existence of a controversy for the 1992/93 funds, adopted the Interim Regulations, established a procedural schedule for the filing of comments and motions leading up to a convocation of a CARP, and published the arbitrator list all before June 30. See 59 FR 9773 (1994) (Request for comments as to existence of controversy and consolidation of 1992 and 1993 funds); 59 FR 23964 (1994) (Interim Regulations); 59 FR 25506 (1994) (Schedule of procedural dates); 59 FR 24486 (1994) (Arbitrator list).

In response to the Office's request for comments as to the existence of controversies, the Office received a motion, supported by a majority of the 1992/93 DART claimants, requesting that the 1992/93 DART royalty distribution be consolidated with the 1994 DART distribution. The movants argued that although they anticipated the existence of controversies, the amount of royalties in the 1992 and 1993 funds was insufficient to justify the cost of a CARP proceeding. They therefore requested that the Office suspend all procedural dates and defer all consideration of DART distributions until 1995.

On July 13, 1994, the Librarian of Congress granted the claimants' motion for suspension of the 1992/1993 DART distribution proceeding and consolidation of that proceeding with the 1994 DART distribution. 59 FR 35762 (1994). The result of the Librarian's action is that the first DART distribution proceeding will begin no sooner than March 30, 1995. The Librarian also authorized distribution of the 1992 and 1993 Nonfeatured Musicians and Nonfeatured Vocalists DART subfunds — two subfunds not subject to CARP proceedings — and scheduled a public meeting for September 27, 1994, to discuss what would constitute the best evidence for distribution of the Sound Recordings Fund and the Musical Works Fund. *Id.*

With the suspension of DART until 1995, the first proceeding conducted by a Copyright Arbitration Royalty Panel will likely be distribution of the 1990 and 1991 cable royalties. The claimant groups to 1990/1991 cable royalties have informed the Copyright Office that they wish to begin proceedings in accordance with final, not interim, regulations. The Office has already received written comments on the Interim Regulations; therefore, the Copyright Office is adopting Final Regulations that will govern all rate adjustments and distributions of

royalties prescribed by the CRT Reform Act.³

III. Joint Claims

Commentators had extensive comments about the interim rule governing the filing of joint royalty claims. Sections 252.3(4) and 257.3(4) require claimants filing a joint claim to cable and satellite carrier compulsory license royalties, respectively, to identify at least one secondary transmission containing a claimant's copyrighted works for each claimant listed in the joint claim. See 59 FR 23992, 23994 (1994). Performing rights societies were exempted from this requirement by §252.3(a)(4) and 257.3(a)(4). Because these sections generated much controversy, and because some of the commentators filed a motion requesting that the Office reconsider this part of the regulations, we find that the issue deserves reconsideration and resolution separate from the general discussion of amendment to the Interim Regulations.

The former CRT's rules and regulations governing the filing of claims of the CRT, which we adopted on an interim basis in December 1993, are brief. Section 302.7(a) of the CRT's old rules simply permitted the filing of joint claims for cable royalties, but provided little else:

For purposes of this clause claimants may file claims jointly or as a single claim. Such filing shall include such information as the Copyright Royalty Tribunal may require. A joint claim shall include a concise statement of the authorization for the filing of the joint claim. A performing rights society shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard agreements, for purposes of this filing and fee distribution.

37 C.F.R. 302.7(a) (1993). To the Copyright Office's knowledge, the Tribunal never adopted or prescribed any additional requirements for the filing of joint claims, nor was there any guidance on what information should be included in a claim. Section 309 of the Tribunal's rules, governing the

filing of claims to satellite carrier royalties, was even more concise with respect to the requirements for filing joint claims, stating simply that "[c]laimants may file jointly or as a single claim," and providing the same exemption for performing rights societies regarding authorizations. 37 C.F.R. 309.2 (1993).

Our NPRM proposed significant revisions to the Tribunal's rules regarding the filing of both cable and satellite carrier royalty claims. 59 FR 2556, 2557 (1994). The purpose of the proposed revision was to "implement a procedural system similar to that adopted by the Tribunal for the filing of digital audio claims." 59 FR 2556. Claimants were expressly authorized to file joint claims, and would be required to file "a concise statement of the authorization for the filing of the joint claim." 59 FR 2566 (cable), 2567 (satellite). Performing rights societies would continue to enjoy an exemption from obtaining separate authorizations from each of their members for filing a joint claim. For claimants initially filing an individual claim and later negotiating a joint claim with other claimants, the proposed rules required that either the joint or individual claimant notify the Copyright Office of the change within 14 days of making the agreement to enter into a joint claim. *Id.* Finally, the proposed rules required joint claimants to "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." *Id.* No mention was made as to whether each joint claimant was required to identify at least one secondary transmission of its works, beyond the general language of §§ 253.3(a)(4) (cable) and 257.3(a)(4) (satellite) establishing the basis for a claim: "A general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission * * * establishing a basis for the claim." *Id.*

The Office's proposed changes to the requirements for filing cable and satellite carrier royalty claims elicited little comment. Only PBS asked for clarification of the requirement for identifying a secondary transmission for a joint claim; it asked what it took to satisfy the requirement — a statement that merely identified at least one secondary transmission for at least one of the claimants included within the joint claim, or a statement identifying at least one secondary transmission for each claimant to the joint claim. See 59 FR 23979 (1994) (comments of PBS at 2). In discussing

³It is important to note that while today's Final Regulations replace the rules contained in the Interim Regulations, there are several policy determinations and decisions discussed in the preambles to the Interim Regulations and Notice of Proposed Rulemaking which remain in effect. For example, the Office will continue to consider proceedings pending before the CRT at the time of its elimination as null and void and without binding effect. See 59 FR at 23965-66 (1994). Parties practicing before the CARPs should therefore be familiar with the preambles to the Interim Regulations and the NPRM in this docket in conjunction with today's Final Regulations.

PBS' comment in the Interim Regulations, we acknowledged that the NPRM "muddie[d] the waters" for the filing of cable and satellite carrier claims, and the Interim Regulations deleted the proposed requirement for joint claimants providing a list identifying each claimant to the joint claim. *Id.* In so doing, we stated our belief that the former Tribunal's regulations required that a joint claim identify at least one secondary transmission for *each* joint claimant, and found support for such requirement in the Copyright Act:

We are troubled, however, by changing what had been a longstanding requirement at the Tribunal for obliging all claimants to identify at least one secondary transmission of their copyrighted works. While such requirement does undoubtedly add to the time and expense burdens of joint claimants such as PBS, it is not without purpose. The law states plainly that cable compulsory license royalties are only to be distributed to "copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period." 17 U.S.C. 111(d)(3). To support such a claim, each claimant may reasonably be asked to identify at least one secondary transmission of his or her work, thus permitting the Copyright Office to screen the claims and dismiss any claimants who are clearly not eligible for royalty fees. The requirement will also help to reduce time spent by a CARP determining which claimants have a valid claim: if only one secondary transmission is identified for one of the joint claimants, then it could not readily be determined if the other claimants were even eligible for cable royalties.

In an effort to end this confusion we are deleting subsection (e) with its requirement that joint claimants submit a list identifying all the claimants. Instead, we are amending subsection (a)(4) to require that each claimant to a joint claim, other than a joint claim filed by a performing rights society on behalf of its members or affiliates, must identify at least one secondary transmission of his or her works.

59 FR 23979 (1994).

A number of commentators protested the Office's decision. PBS/NPR, the Office of the Commissioner of Baseball (Baseball), RIAA, NAB and Program Suppliers submitted comments devoted solely to the filing requirements for joint claims, with Program Suppliers asking that reconsideration of the joint claims interim regulations be severed from the instant proceeding for immediate disposition. *See* Program Suppliers, comments at 5.

The commentators offered

essentially four arguments against the Office's decision: 1) to require each joint claimant to identify a secondary transmission containing its work serves no valid purpose; 2) it creates undue expense; 3) the Copyright Office is erroneous in believing that the Copyright Royalty Tribunal required each joint claimant to identify a secondary transmission; and 4) it is unfair and inappropriate to afford performing rights societies an exemption and not others.

First, PBS/NPR argued that "no substantive purpose is served by the requirement for separate identifications of secondary transmissions as to each party included within the joint claim; this is simply a jurisdictional prerequisite that will not determine the distribution of royalties." PBS/NPR, comments at 2. Program Suppliers concurred with this view and criticized the Office's expressed concern that individual program information is needed to assist it and the CARPs to identify claims that should be dismissed:

[T]he Office's suggestion that such information is needed so it could screen hundreds of yearly filings to determine eligibility, seems a particularly inefficient use of its resources. * * * Furthermore, it is unclear what action, if any, the Office could take regarding eligibility problems related to an individual claimant within a joint claim. Even if the Office finds that one claimant is ineligible to receive royalties, we would assume that the joint claim would still remain a valid claim. Whether and to what extent the share awarded to the joint claimants should be reduced by the ineligibility of one member of the group are questions for a panel based on the record evidence. Indeed, such questions are incapable of answers at the filing stage.

Program Suppliers, comments at 3—4 (footnote omitted). Program Suppliers and Baseball recommended that the Office should refrain from any examination or "screening" of claims as a regular practice, and leave such activities and eligibility issues to the claimants to raise through motions either to the Librarian or the CARPs. Program Suppliers, comments at 4; Baseball, comments at 7.

Second, RIAA asserted that the requirement for each joint claimant to identify a secondary transmission is unduly expensive and burdensome. Organizations like RIAA, that represent many claimants, would be forced to contact all of their members and track down a secondary transmission for each one. The problem is compounded by the time lag between most secondary transmissions and the time period for

filings of claims. RIAA, comments at 2-3. PBS submits that it devotes roughly 300 hours annually to the task of identifying secondary transmissions for its member stations. PBS/NPR, comments at 2. These commentators submitted that elimination of the identification requirement for all joint claimants would dramatically reduce their expense and workload.

Third, all of the commentators argued that the Copyright Office erred in believing that the Copyright Royalty Tribunal required each joint claimant to identify a secondary transmission. Apparently, while a reading of the CRT's rules indicated there may be such a requirement, *see* footnote 15, 59 FR 23979 (1994), in actual practice the Tribunal allowed joint claimants to submit only one secondary transmission of a copyrighted work belonging to one of the joint claimants as establishing a basis for a claim for all of the joint claimants. Baseball and RIAA submitted several examples of such filings. Baseball, comments at appendix; RIAA, comments at appendix. They asserted that the CRT interpreted its rules to apply the requirement of identification of at least one secondary transmission to apply equally to individual claims as well as joint claims, meaning that identification of a least one secondary transmission of one joint claimant was satisfactory to establish a basis for the entire joint claim. PBS/NPR, comments at 4-5. They therefore submitted that the Copyright Office erroneously interpreted CRT practice and should alter its regulations to conform with CRT precedent. PBS/NPR comments at 6; Program Suppliers, comments at 5; RIAA, comments at 6; Baseball, comments at 5; NAB, comments at 1.

Finally, Baseball, PBS/NPR, and RIAA objected to the exemption granted performing rights societies from the Interim Regulations' requirement of identifying at least one secondary transmission for each joint claimant. Baseball stated that it "is firmly of the view that it should not be treated less favorably than the performing rights societies," noting that the Interim Regulations gave no reason why performing rights societies should enjoy privileged status. Baseball, comments at 5. *See also* PBS/NPR, comments at 5. RIAA urged that, if the Copyright Office insists on continuing to require each joint claimant to identify a secondary transmission, it should broaden the definition of a performing rights society "to include not only traditional performing rights societies, but also

those joint claimants such as RIAA who, with respect to the royalties distributed to its members under sections 111 and 119, essentially perform the same functions of "performing rights societies." RIAA, comments at 6.

In addition to seeking relief from §§252.3(a)(4) and 257.3(a)(4), several commentators urged the Copyright Office to reconsider other requirements for the filing of cable and satellite carrier royalty claims. Baseball and the RIAA urged the Copyright Office to eliminate entirely the requirement of identifying a secondary transmission to establish a basis for a cable or satellite carrier royalty claim. Baseball, comments at 5-7; RIAA, comments at 3, 6. Baseball noted several instances where the CRT refused to dismiss a claim for failure to identify a secondary transmission, and suggested this demonstrates that "the secondary transmission identification requirement did nothing more than unnecessarily increase the costs of claimants." Baseball, comments at 6. NAB, however, strongly opposed Baseball's recommendation, asserting that there is no compelling reason to change the requirement and that elimination of identification of a secondary transmission would be violative of section 111(d)(3) of the Copyright Act, which authorizes distribution of royalties only to copyright owners whose works were retransmitted on a distant signal. NAB, comments at 2-3.

Baseball took the "hands off" approach one step further by urging the Copyright Office to refrain from making any substantive review of royalty claims. Baseball, comments at 6-7. See also NAB, comments at 2; Copyright Owners, reply comments at 9. Baseball argued that "[r]outine Copyright Office review of all claims needlessly increases the costs of all copyright owners and does not serve any useful function," concluding that "[d]isputes over a particular claimant's eligibility to royalties (when they arise) may be resolved internally within a Phase II class without involvement of the Copyright Office or a CARP." Baseball, comments at 7-8. Copyright Owners concurred, stating that "[t]he parties themselves are in the best position to identify those claimants who are not entitled to royalties," and that they "do not believe...that the Copyright Office's resources (and Copyright Owners' royalties) should be expended to screen each and every one of the thousands of claims that will be timely filed over the years." Copyright Owners, reply comments at

9-10. Copyright Owners do not object, however, to the Copyright Office returning claims that are not timely filed. *Id.* at 9.

Given the pendency of receipt of cable and satellite carrier royalty claims and the request of Program Suppliers to sever the joint claims issue from this proceeding, the Copyright Office issued an Order addressing the filing requirements for joint claims for the 1993 cable and satellite carrier royalties. *Order* in Docket Nos. RM 94-1A; 94 CARP (93-CD); 94 CARP (93-SD)(July 13, 1994). The Office stated that while it would "make a decision on the requirement for joint claims when we publish the final rules," it would waive the requirement of identification of a secondary transmission for each joint claimant in §§252.3(a)(4) and 257.3(a)(4) for the July 1994 filing period. As a result of this action, anyone filing a joint claim for 1993 cable or satellite carrier royalties was only required to identify at least one secondary transmission to establish a basis for the entire joint claim.

The Copyright Office has reviewed the comments of the parties regarding the identification of a secondary transmission requirement for joint claims and is amending §§252.3(a)(4) and 257.3(a)(4) to require identification of at least one secondary transmission for each joint claim, as opposed to at least one for each joint claimant.⁴ We have stated on several occasions that our intention in implementing the CRT Reform Act is to create a streamlined process that limits the cost of distribution and rate adjustment proceedings to the participating parties as much as possible. See *e.g.* 59 FR 23967 (1994). It is apparent from the unanimous opinion of the commentators that requiring identification of a secondary transmission for each joint claimant would add in some cases a substantial burden and cost to joint claimants without yielding an appreciable return in administrative efficiency. We are also aware that, in the past, the CRT did not require identification of a secondary transmission for each joint claimant.⁵ The practice of the CRT was apparently an unwritten policy, and

⁴In amending these sections, we are also eliminating the exemption for performing rights societies filing joint claims, since the amended rules will treat all joint claimants equally.

⁵It would appear from the comments that while Baseball, after consultation with the Tribunal, would only include some examples of secondary transmissions in their joint claim, PBS would include an example for each one of the claimants represented in its joint claim. PBS/NPR, comments at 2.

therefore of questionable precedential value, but it does demonstrate that the Tribunal did not experience any practical or administrative difficulties in allowing joint claimants to identify at least one secondary transmission for the entire joint claim.

The amended rule, however, does require each joint claim to identify all claimants participating in the joint claim. Those who are not identified in the joint claim may not be added to it after the filing period. An exception, however, is made for the performing rights societies when they file cable and satellite carrier claims. If ASCAP, BMI and SESAC were to file a joint claim, those three organizations would have to be listed in the claim, but when ASCAP, BMI and SESAC file claims separately, they will not have to list their members or affiliates because of the burden of doing so, and the recognition that, together, they represent virtually every composer, lyricist, and publisher entitled to royalties.⁶ A similar exception is not being made for the performing rights societies in the case of DART claims. There, it is not clear that the performing rights societies represent virtually the entire composer-lyricist-publisher universe, because they have an affirmative duty to obtain a separate written authorization to collect on behalf of their members and affiliates and it is unknown how many of them they represent, and because there are other organizations such as the Harry Fox Agency and the Songwriters Guild who file claims in that proceeding.

While we are eliminating the requirement of identification of a secondary transmission for each joint claimant, we are not accepting RIAA and Baseball's recommendation of eliminating the secondary transmission identification requirement altogether. We agree with NAB that section 111(d)(3) of the Copyright Act authorizes distribution of cable royalties only to copyright owners whose works were retransmitted on a distant signal. Eliminating the requirement that the claim identify at least one instance of such qualifying retransmission would effectively eviscerate the claim requirement itself. See NAB, comments at 3. The

⁶By this statement, we do not intend to prejudge controversies in the Music category. We know that there are composers, lyricists, and publishers, such as ACEMLA and Italian Book Corporation, who are unaffiliated with the three performing rights societies. However, to the extent that they file claims separate from the three performing rights societies, they become identified in the filing period as independent, leaving for future proceedings their proper share vis-a-vis the performing rights societies.

argument has equal force for satellite carrier royalty claims. *See* 17 U.S.C. 119(b)(3).

The Office also does not accept Baseball, NAB, and Copyright Owners' recommendation that the Office not review claims for eligibility and sufficiency. Section 801(c) expressly allows the Librarian, before a CARP is convened, to "make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel." We believe that this grant of authority is broad enough to allow the Copyright Office to examine royalty claims for timeliness and sufficiency. Furthermore, we do not accept Baseball and NAB's argument that review of claims is a waste of copyright owners' money. Eliminating claims which are untimely filed or patently deficient on their face promotes administrative efficiency by reducing the workload for the CARPs, which will already be pressed to conduct proceedings and issue a report within the 180-day time period. The Copyright Office will, therefore, continue to examine royalty claims for timeliness and sufficiency on their face.

IV. Precontroversy Discovery

Of all the issues generated by the CRT Reform Act and the transfer of royalty distributions and rate adjustments to the Librarian and the CARPs, precontroversy discovery has generated the greatest amount of comment and concern. The questions are general (Should there be any precontroversy discovery? Who should conduct it?), as well as specific (What discovery motions may be filed? When and how will discovery orders be issued?). We have examined this controversial issue extensively and considered all of the arguments. We are adopting as our final rule a solution that we hope will streamline the evidentiary process for the CARPs: a limited discovery period of 45 days conducted by the Librarian prior to declaration of a controversy requiring exchange of cases among the participating parties and one round of discovery motions and rulings.

The question of whether or not to have precontroversy discovery, defined as a period for exchange of evidence among the parties to a distribution or rate adjustment proceeding prior to the Librarian's declaration of a controversy and convocation of a CARP, has come full circle during the course of this rulemaking proceeding. In reaction to a statement of Representative William Hughes, Chairman of the House Subcommittee on Intellectual Property

and Judicial Administration of the House Committee on the Judiciary, accompanying the passage of the CRT Reform Act and commenting favorably on the use of precontroversy discovery and exchange of information, *see* 139 Cong. Rec. H10973 (daily ed. Nov. 22, 1993), the Copyright Office proposed a precontroversy discovery period in the NPRM. In the case of distributions, we proposed that the Librarian would declare a 90-day period for discovery and exchange of documents sometime after the filing of royalty claims for the distribution and ending with the declaration of the controversy. 59 FR 2550 (Jan. 18, 1994). Similarly, the Librarian would declare a 90-day period for rate adjustment proceedings corresponding with the time period set aside for consideration of rate adjustment petitions. Any party to a proceeding could file motions related to discovery with the Librarian during these time periods, as well as "objections to royalty claims or petitions, or motions for procedural or evidentiary rulings." *Id.* All parties were to be given 14 days in which to respond to a motion or objection, and the Librarian could not declare a controversy in a proceeding until he had ruled on all motions. *Id.*

In addition to the proposed precontroversy discovery procedures, the Office asked for comment on several matters:

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.

Id.

The commentators did not approve of the NPRM's precontroversy discovery proposal. In fact, the commentators urged the Librarian and the Copyright Office to refrain completely from conducting any precontroversy discovery, and proposed a unique solution whereby the CARPs could be convened for conducting such discovery prior to the beginning of the 180-day arbitration period. *See* 59 FR 23964, 23976 (1994). Under the proposal offered by Copyright Owners, a distinction would be made between "the commencement of proceedings" in 17 U.S.C. 803(d) and the "notice initiating an arbitration proceeding" described in 17 U.S.C. 802(b) and (e). The Copyright Office would first declare the "commencement of proceedings" and then immediately

require the filing of written direct cases and empanel the CARP; discovery motions and objections would be ruled on by the CARP. After discovery was completed, the Office would "initiate an arbitration proceeding," and at that point the statutory 180-day arbitration period would begin to run. 59 FR 23977 (1994) (comments of Copyright Owners at 9-12).

We considered the statutory basis for Copyright Owners' proposal and concluded with respect to the Interim Regulations that it was without support:

[A]s a matter of statutory construction, the Office cannot agree that the "commencement of proceedings" can be conceptually separated from "initiating an arbitration proceeding" so as to permit the CARP to sit earlier than the 180-day arbitration period. Section 802(b) (of the Copyright Act), which first uses the phrase "initiating an arbitration proceeding," employs it in the context of "a notice in the Federal Register initiating an arbitration proceeding under section 803 * * *". In §803, the notice to which §802(b) refers is the "notice of commencement of proceedings." Therefore, the phrases refer to each other and must be considered synonymous. (parenthetical added).

59 FR 23977 (1994). We acknowledged that Chairman Hughes recommended that our regulations provide for precontroversy discovery "to the extent practicable," but concluded that "there is no way to accomplish this goal under the statutory scheme." *Id.* The result was that the Interim Regulations contained no rules for precontroversy discovery or exchange of documents.

Copyright Owners have changed their approach⁷ and now seek restoration of a precontroversy discovery procedure similar to the one proposed by the Office in the NPRM. The Copyright Owners' proposal has three principal facets: 1) mandatory exchange of direct cases among all parties to a proceeding prior to commencement of arbitration; 2) formal scheduling of a precontroversy discovery period by the Librarian; and 3) submission of and ruling on direct case discovery motions and objections

⁷Copyright Owners ask the Copyright Office to reconsider their proposal of convening CARPs prior to commencement of the 180-day arbitration period, suggesting that the Office could consider that the phrases "notice initiating an arbitration proceeding" and "notice of commencement of proceedings" have different meanings and therefore could constitute two separate events. For the reasons described in the Interim Regulations, however, the Office is adhering to its position that CARPs may not be convened prior to the commencement of the 180-day arbitration period. *See* 59 FR 23977 (1994).

by the Librarian, including motions, objections, and petitions contemplated in §§251.4, 251.41(b) and 251.45(a) of the Interim Regulations.

Copyright Owners argue that in order for precontroversy discovery to be in any way productive, the Copyright Office rules must be amended to require the parties to a proceeding to exchange their direct cases prior to the commencement of arbitration, as opposed to after a CARP has been convened. Copyright Owners, comments at 3-5, 7-10. They assert that without an exchange of direct cases, precontroversy discovery would become a fishing expedition as the parties attempt to guess at each other's theory of the case and principal evidence. Exchange of direct cases would allow the parties to focus on the evidence that will be presented at a hearing and reduce the amount of time the CARPs will need to devote to discovery matters. *Id.* at 3-4.

In order to streamline the process and promote efficiency, the Copyright Owners suggest that the Librarian coordinate and schedule the precontroversy discovery process. Under the Copyright Owners' plan for distribution proceedings, the Librarian would first publish a notice seeking comment as to the existence of a controversy.⁸ *Id.* at 8. The notice would specify a filing date for comments, request that interested parties file their notice of intent to participate in the proceeding with their comments, and ask the participating parties for their comments on scheduling issues. *Id.* After receipt of the comments and participation notices, the Librarian would evaluate the existence of controversies, and then issue a scheduling order that would provide:

1. dates for the filing of:
 - (a) motions and objections contemplated by §251.45(a) of the Interim Regulations;
 - (b) petitions to dispense with formal hearings under §251.41 (b); and
 - (c) objections to arbitrators under §251.4;
2. a date for the filing of direct cases by parties;
3. dates for discovery by the parties and for filing of discovery and evidentiary motions;
4. a date by which the Librarian will rule on discovery and evidentiary motions; and
5. a future date certain on which each identified controversy will be declared and the initiation of an arbitration proceeding will be published.

⁸Copyright Owners propose a similar plan for rate adjustment proceedings. Copyright Owners, reply comments at 7 n.5.

Id. at 9. Copyright Owners recommend that "scheduling should be done on a case-by-case basis reflecting the comments from the parties; the rules themselves should not contain particular time periods for filing deadlines." *Id.*

Copyright Owners argue that statutory authority for the above-recommended procedures can be found in section 801(c) of the Copyright Act, which permits the Librarian "before a Copyright Arbitration Royalty Panel is convened, [to] make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel." *Id.* at 10. This provision, they argue, coupled with Chairman Hughes' expressed desire for precontroversy discovery, indicates the legislative intent to have a formal and organized precontroversy discovery period.

Aside from satisfying legislative intent, Copyright Owners submit that their proposed plan offers advantages. Setting a date certain for declaration of controversies and commencement of arbitration in the scheduling order will give potential arbitrators sufficient advance notice to plan their schedules, thereby increasing the likelihood of their being able to serve. *Id.* at 11. Also, having the Librarian rule on prehearing discovery and other motions allows the parties to prepare their cases properly and permits the full 180-day period to be devoted to hearing, briefing, and decision on the merits. *Id.* at 12.

We have carefully considered the views of the Copyright Owners with respect to precontroversy discovery, especially in light of their request that the CARPs conduct precontroversy discovery and our earlier proposal set forth in the NPRM. For reasons stated in the Interim Regulations, *see* 59 FR 23977, we do not believe that it is statutorily permissible to convene a CARP prior to the beginning of the 180-day arbitration period for the purposes of conducting precontroversy discovery. We reaffirm our decision that the CARPs cannot conduct or permit discovery prior to the beginning of the 180-day arbitration period.

After considering the proposal of the Copyright Owners, however, we do think that it is appropriate that the Librarian of Congress and the Copyright Office conduct some precontroversy discovery. We are therefore adopting a precontroversy discovery procedure similar to that now being endorsed by the Copyright Owners and initially proposed in the NPRM.

We therefore amend §251.45 of the rules to provide a procedure for conducting precontroversy discovery. New paragraph (b) directs the Librarian to designate a 45-day period for the conduct of precontroversy discovery. The Librarian shall designate the dates for the 45-day precontroversy discovery period on a case-by-case basis after receiving and reviewing comments on the existence of controversies and notices of intention to participate described in §251.45(a). During this time period, the parties will exchange their written direct cases and the Librarian will entertain motions and objections regarding discovery matters, motions and objections to dismiss any party's royalty claim, motions for declaratory rulings or for procedural or evidentiary rulings, petitions to dispense with formal hearings under §251.41(b), and objections to arbitrators under §251.4.

As stated in the Interim Regulations, "[w]e agree with the Copyright Owners that precontroversy discovery before the filing of written direct cases would not be productive." 59 FR 23977 (1994). The 45-day precontroversy discovery period therefore shall begin with an exchange of written direct cases among the parties to the proceeding. Each party must serve one complete copy of their written direct case on each of the parties to the proceeding no later than the first day of the 45-day period. At any time during the 45-day period, the parties may file their motions and objections with the Librarian. Objections to any and all motions will be due seven days after the filing date for motions.

The 45-day designated period shall be the sole time for filing precontroversy motions and objections. Any motions and objections received prior to, or after, the 45-day period will be returned. The Librarian will rule on motions and objections after the 45-day period has ended and prior to the declaration of the existence of a controversy. However, motions for production of documents or to compel production of evidence should be ruled upon by the Librarian within five days of receipt of the motion so as to expedite the discovery process.

In addition to the exchange of direct cases and the filing of motions and objections, the Librarian will set the date on which controversies will be declared. We agree with Copyright Owners that fixing a date certain for declaration of controversies and initiation of arbitration proceedings will allow potential arbitrators and participating parties to clear their schedules, as well as afford the

participating parties more time to prepare their cases.

The precontroversy discovery period for rate adjustment proceedings is similar to that for distributions. After receiving a petition for rate adjustment, the Librarian will issue a request for public comment or conduct public hearings to determine whether the petitioner's interest is significant⁹, and require interested parties to file a notice of intention to participate. After reviewing comments or the hearing record as to the petitioner's significant interest and receiving notices of intention to participate, and after the period described in §251.63(a), the Librarian will issue a precontroversy discovery scheduling order identical to that for distribution proceedings. The Librarian will require exchange of direct cases, conduct the one round of motions and objections, issue appropriate rulings, and announce the date on which initiation of arbitration proceedings will begin.

We believe that these precontroversy discovery and scheduling regulations should provide a workable solution to the time pressures of distribution and rate adjustment proceedings, and should sharpen the focus of the proceedings by eliminating much of the preliminary work that would be faced by the CARPs without such procedures. We agree with the Copyright Owners that 17 U.S.C. 801(c), coupled with Chairman Hughes' floor statement regarding precontroversy discovery, provides ample statutory authority for the Librarian and the Copyright Office to conduct precontroversy discovery and issue rulings. It may be that, with some issues, the Librarian will designate the issue raised during the 45-day precontroversy discovery period to the appropriate CARP for disposition, but it is our belief that the Librarian will be able to dispose of most precontroversy discovery issues.

V. Status of Certain DART Proceedings

The Copyright Office concluded in the Interim Regulations that two categories of digital audio proceedings set forth in chapter 10 of the Copyright Act were not CARP proceedings and therefore not subject to these rules:

⁹The determination of "significant" interest is not required for the noncommercial educational broadcasting and satellite carrier rate adjustments since they begin automatically as provided in sections 118 and 119 of the Copyright Act. The Librarian shall, therefore, schedule precontroversy discovery in advance of the pre-set starting dates for those proceedings.

(i) the proceeding raising the maximum rate for digital audio tape royalties which, under 17 U.S.C. 1004(a)(3), is to be handled solely by the Librarian;

(ii) the arbitration proceeding under 17 U.S.C. 1010 to determine if a digital audio recording or interface device is subject to royalty payments.

59 FR 23967 (1994).

RIAA/AARC agrees with the Office that proceedings under section 1004(a)(3) to raise the royalty maximum should be "handled solely by the Librarian." RIAA/AARC, comments at 2. RIAA/AARC is concerned, however, with the costs involved in adjusting the royalty maximum and urges the Copyright Office to apply to DART its policy for CARP rate adjustments; that is, requiring that the burden of costs be shared equally by both copyright owners and users participating in an adjustment proceeding. *Id.* at 3 (59 FR 23977).

RIAA/AARC does not agree that arbitration proceedings under section 1010 should be treated separately and states that "the CARP system should be applied in these proceedings." *Id.* RIAA/AARC, however, offers no support for its position.

EIA supports the Copyright Office position for both section 1004(a)(3) royalty maximum adjustment and section 1010 arbitration. EIA notes that section 801 of the Copyright Act contains no reference to royalty maximum adjustments or section 1010 arbitration, and that the Copyright Office correctly observed that the former Copyright Royalty Tribunal's duty to "carry out its other responsibilities under chapter 10" was expressly repealed from section 801 in the CRT Reform Act. EIA, comments at 2. Absent jurisdictional authorization, EIA argues that section 1010 is outside the scope of the CARPs. Furthermore, EIA notes that CARP procedures are inconsistent with section 1010 arbitration; a petition initiates CARP rate adjustments whereas agreement of the parties is necessary to initiate section 1010 arbitration. *Id.* at 3 (citing section 1010(a) & (b)). Section 1010 arbitration is also governed "by such procedures as [the Arbitration Panel] may adopt," as opposed to CARP procedures adopted by the Librarian of Congress. *Id.* (citing section 1010(d)). Finally, argues EIA, section 1010 arbitration relates solely to whether given devices are subject to chapter 10 requirements and are therefore unrelated to the purpose or expertise of the CARPs to make royalty rate adjustments and distributions. *Id.* at 3-4.

In addition to its comments regarding section 1010 arbitration, EIA believes that the issue of costs regarding both section 1010 and section 1004(a)(3) proceedings is not properly before the Copyright Office since neither is a CARP proceeding. *Id.* at 4.

The Copyright Office reaffirms the conclusion announced in the Interim Regulations that proceedings under sections 1004(a)(3) and 1010 are not within the jurisdiction of the CARPs. 59 FR 23967 (1994). Proceedings to adjust the royalty maximum under section 1004(a)(3) shall therefore be handled solely by the Librarian, and proceedings under section 1010 shall not be subject to the rules and regulations governing the CARPs. It may be that an arbitration panel convened under section 1010 chooses to use some or all of the rules applicable to CARP proceedings; that choice, however, is up to the arbitration panel. See 17 U.S.C. 1010(d) (the arbitration panel is governed by "such procedures as it may adopt").

With respect to the division of costs among the parties participating in a section 1004(a)(3) or section 1010 proceeding, we agree with the EIA that the issue is not ripe for decision since neither of these proceedings is within the scope of this rulemaking.

VI. Costs

The issue of the costs involved in the entire CARP process was understandably a serious concern of a number of commentators. These concerns included the payment and fees charged by arbitrators, deductions from royalty pools, and billing cycles for arbitrators. The commentators offered some unique solutions to these problems, some of which we are adopting in these Final Regulations.

Sections 251.54, 251.65 and 251.74 are the principal regulations governing the costs of CARP proceedings.¹⁰ Section 251.54 directs the CARP panels in the case of rate adjustment proceedings to establish each participating party's share of the costs of the proceeding. In the case of distribution proceedings, each participating party's cost is in direct proportion to its share of the distribution. Sections 251.65 and 251.74 allow the Library of Congress and the Copyright Office to recover

¹⁰Section 251.38 governs the accounting and costs that arbitrators are allowed to charge (meals, lodging, etc.). This section, however, relates to the ethical standards of arbitrators and is discussed in the context of subpart D of these regulations.

their respective costs for rate adjustment and distribution proceedings. For rate adjustments, the Librarian and Office may deduct their reasonable costs from the relevant royalty pool. If no such pool exists, then the participating parties' costs shall be assessed directly to them. In distribution proceedings, reasonable costs may be deducted directly from the relevant royalty pool.

A. Assessment of arbitrator costs in distribution proceedings.

We concluded in the Interim Regulations that we did not have the authority to deduct the costs of the CARPs from the relevant royalty pool, and could only deduct our costs. We noted that this was an unsatisfactory result, and described our effort to have Congress amend the statute. 59 FR 23977 (1994). Our proposed statutory amendment would allow the Librarian and the Copyright Office to deduct a CARP's costs from the relevant royalty pool, and pay the arbitrators with such deductions, before the fees were distributed to copyright claimants.

Copyright Owners noted a problem with our proposal, specifically the provision which provided that deductions would be made "before the fees are distributed to any copyright claimants." Copyright Owners submit that this sentence could be interpreted as suggesting that all royalty fees must remain on deposit until the final deduction for the costs of a CARP proceeding has been made. Such an interpretation, they argue, "would contradict the authority to make partial distribution as found elsewhere in the statute and present a serious hardship to Copyright Owners because of the potential long delay between collection of royalty fees and their distribution after an arbitration hearing." Copyright Owners, comments at 35. They therefore recommend that the provision be amended to read "Such deduction shall be made before the fees are fully distributed to all copyright claimants." *Id.*

Aside from the legislative solution, the commentators offer other ways for handling the payment and costs of the CARPs. Copyright Owners offer a unique proposal: make a substantial partial distribution of royalties at an early stage of each distribution proceeding to an escrow account administered jointly by all of the claimants. The sole purpose of the escrow account would be to make funds available for timely payment of monthly CARP member billings, while avoiding the need for advance cash outlays from the claimants. Copyright

Owners, comments at 33. Further partial distributions to the escrow account could, if necessary, be made during the proceeding, and any excess remaining after all CARP bills are paid could be distributed in accordance with the final distribution determination. *Id.*

RIAA/AARC generally supports the proposed escrow account, but expresses concern that in DART proceedings, the escrow account could be depleted by monthly CARP payments before the end of the proceeding. RIAA/AARC also points out that monthly payments in a DART distribution proceeding are problematic since there has not yet been a DART distribution decision and there is no precedent to follow for division of royalties among the claimants and each claimant's pro rata share of expenses. RIAA/AARC, reply comments at 2-3. RIAA/AARC therefore recommends that the Copyright Office deduct all CARP expenses from the royalty pool at the end of a distribution proceeding, citing 17 U.S.C. 802(h)(1) and 802(c) as providing the Office with authority to make such deductions. RIAA/AARC, comments at 5.

The method of payment of the CARPs is a problem, especially given our lack of statutory authority to pay the arbitrators directly. Unfortunately, the legislative solution discussed in the Interim Regulations, 59 FR 23977, failed for this Congress. Thus, we cannot pay the CARPs. We will seek the necessary statutory authority in the 104th Congress.

Because of our lack of authority in this area, we are not adopting any regulations governing the method of payment of CARP costs. As discussed above, the Copyright Owners proposed the creation of an escrow account, administered by the parties, to pay the arbitrators. Compensation of the arbitrators is the responsibility of the parties to a proceeding. 17 U.S.C. 802(g). If Copyright Owners wish to establish such an escrow account, and can obtain the consent of all parties to the proceeding, they are free to do so. We note that in the proceeding to adjust royalty rates for the section 119 satellite carrier license in 1991, the parties paid an upfront sum to those arbitrators to begin the proceeding, and a final payment at the conclusion of the proceeding. We offer no opinion as to whether this is the appropriate manner in which to proceed, but offer it as a possibility to be considered by the CARPs who have the authority to direct the "manner and proportion" of payment of a CARP's costs.

B. Assessment of Library of Congress and Copyright Office costs in rate adjustment proceedings.

Section 251.65 of the Interim Regulations allows the Library and Copyright Office to deduct their costs in rate adjustment proceedings from the "relevant royalty pool," and, if no such pool exists, to assess the costs directly to the parties to the proceeding. RIAA/AARC and Copyright Owners oppose deductions from royalty pools for rate adjustment proceedings.

RIAA/AARC submits that §251.65 is contrary to the intent of the CRT Reform Act. They note that 17 U.S.C. 802(h)(1) provides for assessment of costs directly to parties where "no royalty pool exists from which [the Library and Copyright Office's] costs can be deducted —i.e. a rate adjustment proceeding." Thus, according to RIAA/AARC, deductions can only be made from royalty pools in distribution proceedings and not in rate adjustment proceedings. RIAA/AARC, comments at 10-11. Furthermore, if costs are deducted from the relevant royalty pool for rate adjustment proceedings, then copyright owners will bear the entire brunt of the proceeding in contradiction to the Office's determination that both owners and users should share the cost of rate adjustments. *Id.* at 11.

Copyright Owners believe that a portion of the costs of a rate adjustment could be deducted from a royalty pool, but submit that it is difficult to identify exactly what is the "relevant" royalty pool. Copyright Owners, reply comments at 1-2. Rate adjustment proceedings involve the setting of rates for future, not-yet-collected royalty funds. The "relevant" pools would therefore be the future funds affected by the rate change, rather than past funds. Copyright Owners submit that the Office should therefore seek the comments of the owners as to what is the proper meaning of the word "relevant." *Id.* at 5. Furthermore, Copyright Owners argue that it is completely unfair for owners to bear all of the Office's expenses for rate adjustments, since users clearly benefit as well from the adjustments. They ask that the Office reinstate the deduction rule proposed in the NPRM which simply provides that rate adjustment costs will be assessed "directly to the parties participating in the proceedings." *Id.* at 6 (citing 59 FR 2565 (1994)).

We agree that RIAA/AARC and Copyright Owners raise valid points with respect to §251.65. As we stated

in the Interim Regulations, we believe that the burden of the Library and Office's costs in a rate adjustment proceeding should be shared by both owners and users. We did not intend to place the burden solely on copyright owners, although it is arguable that §251.65 appears to do that very thing. We also agree with Copyright Owners' assessment that the "relevant" royalty pool is not clear; it would seem that it may be necessary to amortize the costs over a number of royalty pools. In an attempt to solve these problems, we are therefore accepting Copyright Owners' suggestion of reinstating §251.65 as proposed in the NPRM. The section therefore now reads:

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.

C. Frivolous claims.

Both RIAA/AARC and Copyright Owners are concerned with the costs that may be generated by frivolous claimants to royalty distributions. Section 251.54(a)(2) provides that CARPs may assess their costs in direct proportion to each party's share of the distribution. Thus, a party who received 0% of the distribution would bear 0% of the costs, even though the claim of that party may have contributed greatly to the costs of the other claimants. RIAA/AARC believes that every party participating in a distribution proceeding should be prepared to bear some portion of the procedural costs, regardless of whether or not it receives any portion of the royalty fund. RIAA/AARC, reply comments at 3. They recommend that the Office adopt some type of participation fee for distribution proceedings, similar to that used by other government agencies conducting proceedings. *Id.* at 4. In lieu of a participation fee, RIAA/AARC recommends that the CARPs be granted the discretion to allocate a share of expenses of the proceeding to bad faith or frivolous claimants who receive little or no share of the distribution. *Id.* at 4-5.

Copyright Owners echo RIAA/AARC's concerns regarding frivolous claims and the added costs associated with those claimants. Copyright Owners, however, would resolve the problem by an amendment to the statute which they propose the Copyright Office seek. Such an amendment would provide that "upon a finding of bad faith or other frivolous

or vexatious conduct, the Librarian may allow a different allocation of costs of the proceedings as necessary to respond to such conduct." Copyright Owners, comments at 38.

With regard to costs in distribution proceedings, section 802(c) is quite clear in providing that "the parties shall bear the cost in direct proportion to their share of the distribution." 17 U.S.C. 802(c). No provision is made to charge parties fees for participating in distribution proceedings, or assessing costs against parties for frivolous behavior or claims. We cannot imply or interpret the statute to provide for such measures, nor are we prepared to seek an amendment of the statute to allow the Librarian to make an assessment of a claimant's conduct or behavior and impose an additional share of the cost of the proceedings against that party. Since the Librarian is only charged with handling matters preliminary to the arbitration and reviewing the CARP's decision, the Librarian is not in a proper position to evaluate the conduct of participants to a proceeding. There is no authority in the statute for the CARPs to change 17 U.S.C. 802(c)'s direction to assess costs in direct proportion to each party's share of the distribution, nor is there authority for the CARPs to sanction parties or individuals to a proceeding. The CARPs are, however, in the best position to assess the conduct of the participants to a distribution proceeding. Deliberate misrepresentation to a CARP by a party or individual to a proceeding will be referred by the Copyright Office to the Justice Department for possible prosecution under the applicable provisions of title 18 of the United States Code.

D. Arbitrator Costs.

Section 251.54(a) provides that a CARP may "assess its ordinary and necessary costs" to the participants to a proceeding. NMPA/HFA urges the Office to adopt a mechanism for appealing the reasonableness of fees and expenses assessed. They recommend creation of a procedure, although they do not describe what kind of procedure or when and how it could be invoked, whereby the Librarian would be available in instances where the parties question the fees and expenses charged. NMPA/HFA, comments at 4.

We are declining to adopt a fee review procedure at this time because we believe that the rules already contain adequate safeguards. Section 251.38 governs billing and provides that "[a]rbitrators are bound by the

hourly or daily fee they proposed to the Librarian of Congress when their names were submitted to be listed under §251.3, and shall not bill in excess of their proposed charges." 59 FR 23986 (1994). Subsection (b) further provides that "[a]rbitrators shall not charge the parties any expenses in addition to their hourly or daily charge." The safeguards in these rules are reinforced by the agreement the arbitrators must sign stating they will abide by the terms of these Final Regulations including "the billing restrictions specified in this subpart." §251.38(e). The regulations already contain substantial provisions to assure that arbitrators not charge excessive rates or expenses.

Although our regulations do not specifically address the number of hours for which an arbitrator can charge, we expect that the arbitrators will be fair and charge for the actual amount of time they devoted to the proceedings. In some cases, the amount spent may be more or less for one arbitrator than it is for another. Should an arbitrator charge for an unreasonable number of hours that could not possibly bear any relationship to the amount of work performed, we believe that such action would amount to an ethical violation subject to the remedies of §251.39. We do not, however, intend to judge or measure the amount of time it should take an arbitrator to perform a specific task, and we therefore decline to create a billing review procedure.

VII. Final Regulations.

The following is a section-by-section summary of the amended regulations, together with a discussion of the applicable comments on the corresponding provisions of the Interim Regulations.

(a) Part 251—Copyright Arbitration Royalty Panels Rules of Procedure

Part 251 contains most of the rules and procedures governing the operation of the CARPs and, like the rules proposed in the NPRM, received the greatest number of observations and suggestions from the commentators. It is divided into seven subparts, identified as subparts A through F. Subpart A, entitled "Organization," describes the composition and selection process for the CARPs. Subparts B and C, "Public Access to Copyright Arbitration Royalty Panel Meetings" and "Public Access to and Inspection of Records," remain virtually the same as those adopted in the Interim Regulations, with only a few minor amendments.

Subpart D, "Standards of Conduct," prescribes the financial and ethical requirements for arbitrators, and governs ex parte communications, billing, sanctions for misconduct, and other matters involving ethical standards. Subpart E, "Procedures of Copyright Arbitration Royalty Panels," prescribes the procedures to be followed by the CARPs in conducting proceedings, including those governing submission of evidence, conduct of hearings, reports of the CARPs, and orders of the Librarian. Subparts F and G, "Rate Adjustment Proceedings" and "Royalty Fee Distribution Proceedings," provide certain additional requirements inherent in rate adjustment and distribution proceedings.

We have already described most of the major issues raised by the commentators to the Interim Regulations and discussed our responses and amendments. The following summarizes other additions and changes to the Interim Regulations in the various subparts of part 251.

(1) Subpart A—Organization

Arbitrator lists. Section 251.3 describes the information that must be submitted to the Librarian by an arbitration association for each person to be eligible to serve on a Copyright Arbitration Royalty Panel. Section 251.3(a)(5) requires "a description or schedule detailing fees proposed to be charged by the person for service on a CARP." James Cannings submits that the proposed fees "should reflect the current market daily or hourly rate as are charged by arbitrators who serve National Arbitration Associations, such as, the Arbitration Association of America." Cannings, comments at 2.

For reasons stated above in the discussion of our rejection of a fee schedule, it is not appropriate for the Librarian or the Copyright Office to impose fee restrictions on persons seeking to be arbitrators. Although the fee information provided by a potential arbitrator will have a bearing on his or her selection, we decline to amend §251.3(a)(5) to adopt fee limitations.

Qualifications of the arbitrators. As was the case with the comments filed in response to the NPRM in this rulemaking proceeding, Copyright Owners had disparate opinions regarding the requirement in §251.5 that all CARP arbitrators be admitted to the practice of law. Program Suppliers filed a separate comment in response to the Interim Regulations devoted solely to arguing that the Librarian should also consider non-lawyers in the selection process, while

other copyright owners identified as Certain Copyright Owners filed a separate comment urging that the Copyright Office retain the requirement.

Program Suppliers advance essentially the same argument, which they made in response to the NPRM, that allowing non-lawyers as arbitrators could prove invaluable in expediting the arbitration process:

In reaching its ruling, the Office ignored the important value that non-lawyers with expertise in the types of statistical and economic studies that comprise the heart and body of distribution and rate adjustment evidence could bring to the decisionmaking process. Having arbitrators who are familiar with statistical and economic studies similar to those presented in prior rate adjustment and distribution proceedings would give each panel added competence to deal with the substantive issues raised, and thus assist the decision making.

It is ironic, to say the least, that the Office's ruling was based on a concern about the lack of time for non-lawyers to learn the nuances of legal rulings, but ignored the possibility that lawyer-arbitrators might have absolutely no familiarity with the type of complex studies presented by expert witnesses over and over again in prior distribution and rate adjustment hearings. Although legal rulings can affect certain aspects of a hearing, interpretation and understanding of the conflicting substantive evidence is crucial to reasoned final determinations setting rates or distribution royalties.

Program Suppliers, comments at 2-3. Program Suppliers believe that retaining subsection (c) of §251.5 requiring arbitrators to have "[e]xperience in conducting arbitration proceedings or facilitating the resolution and settlement of disputes" would satisfactorily provide the potential arbitrator with the type of experience necessary to conduct arbitration proceedings. *Id.* at 2.

Certain Copyright Owners argue that Program Suppliers' arguments have already been rejected in the Interim Regulations, and that Program Suppliers fail to make any showing that "the list already developed will fail to yield at least three Panel members who are capable of resolving royalty disputes in a fair and efficient manner." Certain Copyright Owners, reply comments at 2. Certain Copyright Owners believe that economic expertise is not necessary, and might cause an undue bias among the panel members. *Id.*

The Copyright Office has reconsidered the lawyer requirement imposed by §251.5 and reaffirms its decision to retain the requirement. It appears that Program Suppliers are not

so much concerned with allowing non-lawyers to serve on CARP panels as they are with seeing economists among the listed arbitrators. Section 251.5 in no way prevents economists or those with economic training from serving on a CARP, provided that they are admitted to the practice of law. Furthermore, we agree with Certain Copyright Owners' observation that Program Suppliers have failed to demonstrate any deficiency in the quality of experience of the potential arbitrators appearing on the current list. See 59 FR 24486 (1994). The listed arbitrators have diverse backgrounds and training, including economic expertise. Moreover, all of the listed persons have experience in the practice of law which, given the shortness of the arbitration period, is important in the efficiency and speedy disposition of CARP proceedings. The Copyright Office, therefore, declines to make any changes to §251.5.

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

CARP Meetings. Copyright Owners make several suggestions with respect to meetings of the CARPs. Because confidential proprietary information is sometimes introduced into the record, it is necessary for the CARP to close a meeting for the purposes of receiving that information. When confidential material is involved in only a limited portion of the meeting, it is not necessary to close the entire meeting. The Interim Regulations, however, provide only for the closing of an entire meeting. Copyright Owners therefore suggest that §§251.11(b) and 251.13 be amended to make clear that a CARP may close only that part of a meeting during which confidential information is discussed; all other portions of the meeting, however, would be open. Copyright Owners, comments at 26.

Copyright Owners also note that because it is often impossible to determine when and if confidential information may be disclosed at a meeting, it may be impossible to give the seven-day advance notice in the **Federal Register** required by §251.11(b). Copyright Owners therefore suggest that a general notice of the possibility of the introduction of confidential information during the course of a hearing should suffice to meet the notice requirements even though it would be impossible to provide a specific date and time of the closed portion of the meeting. *Id.*

Another issue raised by Copyright Owners is the treatment of a CARP's

internal deliberations. According to Copyright Owners, a literal reading of Subpart B would apply to confidential deliberations among CARP arbitrators. "Thus, for example, if the members of a CARP want to talk over an objection to testimony during the course of a hearing before ruling on it, they would be obliged to have that discussion transcribed and to announce the fact of that confidential 'meeting' in the *Federal Register*." *Id.* at 26-27. Copyright Owners therefore propose that the procedures of §§251.14 and 251.15 be modified so that (a) transcripts or minutes are not necessary for internal CARP deliberations, and (b) the procedures for closed meetings in §251.14 do not apply to such deliberations. *Id.* at 27.

The points made by Copyright Owners are well taken. In order to allow CARPs to close only a portion of a meeting, as opposed to an entire meeting, for the taking of confidential information and related material, we are amending §§251.11(b) and 251.13 by adding the phrase "any portion of a meeting." With respect to seven-day advance publication notice in the *Federal Register* of a meeting that may be closed in part or in whole, we agree that a general notice of the possibility of the introduction of confidential information should suffice to satisfy the notice requirements. The notice of publication in the *Federal Register* therefore shall, as a matter of policy, contain such a general statement.

Finally, with respect to the procedures required for closed meetings applying to CARP deliberations, we agree with Copyright Owners that application of those procedures is neither desirable nor appropriate. We are therefore amending §251.14 by adding a new subsection (d) which provides that "[t]he procedure for closed meetings in this section and §251.15 shall not apply to the internal deliberations of arbitrators carried out in furtherance of their duties and obligations under this chapter."

(3) Subpart C—Public Access to and Inspection of Records

No comments were received regarding subpart C. However, §251.22(c) has been amended to delete the \$.40 per page charge for photocopies of CARP or Copyright Office records. Because such charges change from time to time, the section now reads that photocopies are available at the "applicable Office charge."

(4) Subpart D—Standards of Conduct *Financial conflict of interests.* When

we originally proposed financial conflict of interest rules, our main concern was with their proper scope. Did we propose rules that did not cover enough situations, and therefore miss some very real conflicts of interest, or, on the other hand, did our proposed rules go too far, and eliminate qualified persons for inconsequential reasons? In an effort to reach the proper scope, we not only proposed rules, but we also asked for comments on certain hypothetical situations that went beyond the scope of our proposed rules.

The Copyright Owners' response reflects the difficulty of drawing the proper line. While they offered opinions about the hypothetical situations that indicated a belief that our proposed rules did not go far enough, ultimately they did not ask to expand the rules, but proposed handling the gray area questions on a case-by-case basis, using the disclosure procedure to the parties described in §251.32(b)(2) as a method to decide whether the conflict is disqualifying. The Copyright Owners stated:

Copyright Owners believe that decisions about the financial conflicts of potential arbitrators must be made on a case-by-case basis, with no single application of the rules being dispositive on a specific case. . . . The screening of arbitrators for any panel ought not to occur through rote application of the rules * * * If the Librarian finds a question arising as to whether a conflict exists as to a particular arbitrator, further information should be made available to the parties so that they may determine whether the person should be disqualified or whether the potential conflict might be waived.

Copyright Owners, comments at 21.

We agree with the Copyright Owners that this is the proper approach. Therefore, we have not modified the scope of the financial conflict of interest rules, but we have made a change in the disclosure rule, §251.32(b)(2). Whenever a potential arbitrator has a conflict of interest as defined by our rules and has indicated that he or she wants this conflict to be disclosed to the parties, or whenever a potential arbitrator has an interest beyond the specified scope of the rules which raises our concern, §251.32(b)(2) provides we will list these interests anonymously in an order issued to the parties to each upcoming proceeding at the time the Librarian establishes for precontroversy motions, and we will request that the parties indicate within 30 days which conflicts or potential conflicts they believe are disqualifying. For those interests within the scope of our conflict of interest rules, the indications of the parties will be dispositive. For those potential

conflicts outside of the scope of our conflict of interest rules, the indications of the parties will aid the Librarian in his decision.¹¹

There was, however, one area in which the Copyright Owners commented that the scope of the conflict of interest rules was too broad. Section 251.31(d)(3) imputes the financial interest of the arbitrator's general partner to the arbitrator. The Copyright Owners believe that §251.31(d)(3) means that each potential arbitrator would have to inquire of each of his/her general partners about their personal investments. The Copyright Owners consider this an unworkable burden and doubt that any potential arbitrator would be influenced by the personal holdings of a general partner, especially if that general partner's financial interest is unknown to the arbitrator. The Copyright Owners ask that an exception to the rule on imputation of interests be made in the case of a general partner's personal financial holdings. Copyright Owners, comments at 24-25. We agree, and §251.31(d)(3) has been modified to reflect this exception.

Ex parte communications. In our proposed interim rules, distinctions were made among four classes of persons concerning *ex parte* communications: (1) the Librarian of Congress and the Register of Copyrights, (2) the selected arbitrators, (3) the listed arbitrators, and (4) the Library and Copyright Office personnel. In particular, we drew a distinction between selected arbitrators who are subject to a total ban on contact between them and interested parties in their controversy, and listed arbitrators who are not subject to a total ban on contact, but who may not communicate with any interested party about the merits of any past, pending, or future proceeding relating to CARP.

Both the Copyright Owners and James Cannings state that they believe no distinction should be made between selected and listed arbitrators, and that there should be a total ban on contact with all arbitrators. The Copyright

¹¹For example, arbitrator X has a spouse who is employed by one of the parties to the proceeding. Because that is an interest within the scope of our rules, the response of the parties will be dispositive. That is, if any one of the parties objects, arbitrator X may not serve. On the other hand, if arbitrator X has a parent who is employed by one of the parties, that would be an interest outside of the scope of our rules. In that case, if one or more of the parties objects, that objection will be taken into account when the Librarian makes his decision, but the objection will not automatically disqualify arbitrator X.

Owners argue for the highest standard concerning selected and listed arbitrators because of "the substantial financial interests at stake." The Copyright Owners, however, would mitigate the severity of a total ban to permit nonsubstantive pleasantries between arbitrators and parties. Finally, the Copyright Owners note that the restrictions concerning arbitrators are against contact with any interested "party" and would prefer that it be changed to "person" because of what they believe to be the ambiguous meaning of the word "party." Copyright Owners, comments at 15-18.

Having reviewed the comments of the Copyright Owners and James Cannings, we continue to believe that the distinction between selected and listed arbitrators is valid. In any given year, 75 persons will be listed to be available to serve as arbitrators. A total ban on contact with all 75 persons would be unworkable, and unfair to the persons offering their services. For the remote chance of being selected, they would be giving up a degree of personal freedom, not for any actual impropriety but for the avoidance of the appearance of impropriety. However, we believe it is fair and highly necessary that listed arbitrators understand that they may not engage in any actual impropriety, that is, discuss the merits of any royalty proceeding, past, present or future. This is a much narrower and more appropriately tailored limitation on their activities. Once selected, the total ban on contact with the three selected arbitrators is essential. It assures fairness to all parties by guaranteeing that no opportunity for influence can possibly occur. Procedural requests of the selected arbitrators should be routed through Library or Copyright Office personnel who are assigned to support the arbitrators.

We do agree, however, with the Copyright Owners' request that innocent pleasantries should not be subject to the total ban, and that the word "party" should be changed to "person" to avoid any ambiguity. The changes to §251.33 have been made accordingly.

Gifts and other things of monetary value. In our interim rules, we make a distinction between selected arbitrators who are subject to a total ban on soliciting or accepting gifts or any other thing of monetary value from an interested person, and listed arbitrators who may solicit or accept gifts of less than \$20 per occasion, and not more than \$50 per year from any one source. We also provide that a listed arbitrator

may accept a gift beyond the \$20-\$50 limit where it is clear that the gift is motivated by a family relationship or a personal friendship rather than the potential of the listed arbitrator to be selected.

The Copyright Owners and James Cannings believe that no distinction should be made between selected and listed arbitrators and that they should all abide by a total ban on the soliciting or acceptance of any gift. The Copyright Owners state that applying the total ban to listed arbitrators would "reduce the perceived opportunities for influencing of either listed or selected arbitrators." Copyright Owners, comments at 18.

Again, as stated above, we believe that the restrictions on the activities of listed arbitrators should be limited to actual improprieties only, considering that they may never be selected. Requiring listed arbitrators to refuse gifts no matter how small, and to avoid normal relations with existing friends and family simply to avoid the appearance of impropriety is too great a restriction, and may result in various individuals refusing to participate. The exceptions for nominally valued gifts and for gifts from existing friends and family were derived from the regulations issued by the Office of Government Ethics, and represent their line-drawing for thousands of compensated government employees who are in a position to confer a benefit on a private party (versus listed arbitrators who are neither compensated nor in a position to confer a benefit). We do not believe that a lunch valued at less than \$20 where no discussion of the merits of any past, present or future proceeding takes place would result in the influencing of any listed arbitrator. Consequently, the distinction between selected and listed arbitrators is retained in the final rules.

Post-arbitration employment restrictions. While we did not receive any comments on our rule against arbitrators being employed for three years by any party, person or entity with a financial interest in the proceeding, we did receive a comment on the hypothetical we posed based on this section. The hypothetical asked whether an arbitrator who has ruled on a cable rate adjustment may take a cable system as a client afterwards if that cable system, although affected by the outcome, had neither participated in the proceeding nor authorized anyone else to represent it. The Copyright Owners stated that they believed the arbitrator could take the cable system as a client, but gave no

reasons, and prefaced their answers to all the hypotheticals by saying they were difficult to answer given the limited facts available. Copyright Owners, comments at 22, 24.

We believe that since we received only one limited comment on this hypothetical, we do not have sufficient comments to render a conclusion. We reserve judgment until an actual case presents itself. In the meantime, the rule is adopted as proposed.

Remedies. Currently, §251.39 provides sanctions against selected arbitrators, listed arbitrators, and outside parties who violate the standards of conduct. The Copyright Owners argue that sanctions should also be put in place for Library and Copyright Office personnel who violate the standards. Copyright Owners, comments at 24.

Library of Congress Regulations (LCRs) already set forth sanctions for Library and Copyright Office personnel who violate internal personnel rules. LCR 2023-1 instructs all staff members to avoid actions which might result in or create the appearance of using public office for private gain, giving inequitable and improper preferential treatment to any person to the prejudice or detriment of others, or compromising the independence or impartiality of the Library.

We believe this applies to the rules on *ex parte* communications, and would cover any disclosure of nonpublic information, even though §251.37 only applies to arbitrators. In addition, however, the Library's General Counsel, who serves as the agency's ethics officer, has issued a memorandum that will be circulated to all personnel likely to have any interaction with a CARP detailing the new situations that could arise and how employees should respond to them.

(5) Subpart E—Procedures of Copyright Arbitration Royalty Panels

a. *Formal Hearings.* (i) Phase I/Phase II. In the preamble text to the Interim Regulations, we asked several questions with regard to the procedural division of royalty distribution proceedings. The Copyright Royalty Tribunal traditionally divided distribution proceedings into two phases: Phase I determined the percentage allocation among the categories of claimants, while Phase II resolved disputes within a claimant category. The Tribunal practice, however, was just that, and was never embodied in the rules. We sought comment on the following:

Is the procedure of dividing a cable distribution proceeding into Phases I and II a precedent that is binding on the Copyright Office?

If not, should it nonetheless be followed?

If it should be followed, should we adopt rules governing the procedure?

Should those rules include a definition of each of the Phase I categories?

59 FR 23976-23976 (1994).

Copyright Owners urge that, regardless of the binding effect of the former Tribunal's practice on the Office, the division of proceedings into Phase I and Phase II should continue in order to prevent chaos in the distribution process. Copyright Owners, comments at 13. They note that Phase I claimant categories offer two primary benefits to the distribution process. First, by allowing each claimant category to collect the total royalty awarded to it and distribute that total to its individual claimants, the "process frees the Copyright Office from the expense of mailing hundreds of distribution checks to individual claimants each time a distribution is made." *Id.* at 14. Second, the grouping together of claimants into categories reduces Phase I litigation to less than ten parties, rather than hundreds of individual claimants. *Id.* "In short, the established Phase I/Phase II divisions provide very strong procedural and organizational efficiencies that have worked well in the past and should be continued in the future." *Id.*

Copyright Owners urge the Office to adopt procedures governing Phase I/Phase II proceedings that would allow for separate hearings of Phase I and Phase II proceedings, but offer no comment or suggestion as to what those rules should be. *Id.* at 14-15. They also believe that definitions of Phase I categories should be available to arbitrators, but not included in these rules because "it could create unnecessary rigidity that would fail to accommodate changing conditions." *Id.* at 15. Copyright Owners therefore suggest that parties provide a stipulated set of program definitions to arbitrators at the start of each distribution proceeding. *Id.*

The Copyright Office believes that the division of distribution proceedings into Phase I and Phase II categories provides an efficient manner for conducting such proceedings, and therefore will retain the use of the categories. In dividing distribution proceedings into Phase I and Phase II categories, we will look to Tribunal precedent for guidance, as well as the exigencies of each individual case. For

these reasons, we do not believe that it is necessary to adopt separate procedures for Phase I and Phase II proceedings, as is suggested by Copyright Owners. The Copyright Royalty Tribunal functioned for fifteen years without separate rules for each type of proceeding, and exercised its discretion to divide each distribution into Phase I and Phase II categories on a case-by-case basis. The procedural rules of the subchapter applicable to distribution proceedings apply with equal basis to each controversy, regardless of whether it is Phase I or Phase II, and therefore do not require separate sets of rules. Furthermore, it is the Librarian who shall determine the number and category of controversies in each distribution proceeding, and submit each controversy or controversies to one or more CARPs as is appropriate. Copyright Owners are therefore correct in their assertion, *see* comments at 14-15, that the nature and extent of controversies in one royalty distribution proceeding may require the convocation of more than one CARP for resolution. Thus, for example, a CARP may be convened to resolve controversies in Phase I, and another may be required at a later date to resolve controversies in Phase II. The only way to make such determinations is on a case-by-case basis, as was done by the former Tribunal, and the Office therefore heeds the advice of Copyright Owners by declining to adopt rules governing the identification and classification of Phase I/Phase II procedures which could "create unnecessary rigidity that would fail to accommodate changing conditions." Copyright Owners, comments at 15.

The Copyright Office also accepts Copyright Owners' suggestion of allowing parties to a proceeding to stipulate the definitions of Phase I categories and programs to the arbitrators in that proceeding. In order to allow arbitrators a sufficient amount of time to become familiar with the definitions, the Librarian will, in the notice establishing the 45-day precontroversy discovery period, instruct the parties to the proceeding to stipulate a complete set of definitions by the end of the precontroversy discovery period. If the parties are unable to reach agreement by that date, the Copyright Office will, in accordance with our authority to provide support to the CARPs under 17 U.S.C. 801(d), provide the arbitrators with the necessary definitions of Phase I categories and programs to allow them to accomplish their task.

(ii) Paper proceedings. Section 251.41(b) permits the parties to a proceeding to petition the Librarian to have their controversy decided solely on the submission of written pleadings. The petition may be granted if "(1) there is no genuine issue as to any material fact, or (2) all parties to the controversy agree with the petition." 59 FR 23976 (1994).

Copyright Owners believe that §251.41(b)(2) is in need of clarification. They note:

As currently drafted, Section 251.41(b)(2) allows rulings only in uncontested cases where "all parties to the controversy agree with the petition." Of course, if all parties agree with the petition, then there would be no need for a ruling.

Copyright Owners believe that Section 251.41(b)(2) was intended to allow ruling where all parties agree *with the request* that the issue be decided by petition, regardless of whether they agree with the merits of the petition.

Copyright Owners, comments at 31.

Copyright Owners' point is well taken. The intention of the rule is to allow the parties to a proceeding to petition the Librarian and dispense with formal proceedings. The CARP panel would then decide the controversy or rate adjustment on the basis of written pleadings only, i.e., a "paper" proceeding. In deciding whether to allow a paper proceeding before a CARP, the petition must demonstrate that (1) there is no genuine issue of material fact involved in the proceeding (not the petition), or else (2) the parties unanimously agree that they wish to have a paper proceeding. If either one of these factors is properly represented in the petition, the Librarian may (not must) grant the petition, or can designate the issue of whether a paper proceeding would be proper to the CARP. Section 251.41(b)(2) is only intended to allow the Librarian to decide if a paper proceeding before a CARP would be appropriate; it is not designed to allow the Librarian to decide the merits of a paper proceeding or the case. To clarify the intention of the rule, we are amending it.

b. Conduct of hearings: Role of arbitrators. Section 251.46(b) provides that "Only the arbitrators of a CARP, or counsel as provided in this chapter, shall question witnesses." James Cannings argues that the rule, as drafted, precludes parties from appearing *pro se* before the CARPs, since only the CARPs and "counsel" can question witnesses. Cannings, comments at 2.

Section 251.46(b) does not prohibit *pro se* representation in a CARP proceeding. A *pro se* litigant acts as his

own counsel, and is entitled to question witnesses in the same manner as parties represented by counsel. No amendment to §251.46(b) is necessary.

c. *Witnesses and Counsel.* Copyright Owners suggest that there may be some confusion with the drafting of §251.47. Subsection (l) provides:

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.

59 FR 23989 (1994).

Copyright Owners believe that, as currently drafted, the subsection "seems to require that all parties with a similar interest accede to a single counsel for examination or cross-examination of all witnesses. It is unlikely that parties would agree to such a broad transfer." Copyright Owners, comments at 32. Copyright Owners therefore suggest that the phrase "of any given witness" be added each time after the word "cross-examination" to clarify that agreements between parties of similar interest to utilize one representative for questioning applies only to individual witnesses, and not across the board for an entire proceeding. *Id.*

We do not perceive the confusion expressed by Copyright Owners and believe that subsection (l), as drafted, permits parties with similar interest to agree to one representative for examining and cross-examining either one witness or as many as the agreement allows. Nevertheless, in the interest of clarity, we are adopting Copyright Owners' suggested amendment.

d. *Transcript and Record.* In our discussion of §251.49 in the Interim Regulations, we solicited comments on whether the hearing sessions should be recorded on video as well as audio tape. We noted that videotaping would add to the cost of the proceeding, but it would also:

"(1) Ensur[e] the accuracy of the official transcript, (2) allow[] the arbitrators to reach a better decision by helping them to review the case more accurately, and (3) afford[] arbitrators who missed any portion of the proceeding, because of illness or because they were appointed after the proceeding had begun, an opportunity to make up for their absences.

59 FR 23977 (1994).

Copyright Owners are opposed to the videotaping of proceedings, arguing that they "do not believe that any advantage derived from videotaping would be worth the considerable expense and difficulty associated with video recording." Copyright Owners, comments at 29. They also note that videotaping "could, in fact, have the unintended and perverse effect of increasing the number of hearing days missed by an arbitrator who considers seeing a taped performance as equivalent to being present during the live presentation." *Id.*

For these reasons, we will not videotape distribution or rate adjustment proceedings, unless the parties to a particular proceeding unanimously ask us to do so.

(6) Rate Adjustment Proceedings

Settlements.

(i) *Settlement period.* Section 251.63 provides a 30-day period before commencement of a rate adjustment proceeding to allow for consideration of the rate adjustment petition and, more significantly, to give the parties an opportunity to settle their differences. We are amending this section to make it clear that the Librarian shall designate this 30-day period prior to, and separate from, the 45-day period for precontroversy discovery. We are also amending §251.64 to reflect that the arbitration proceedings will commence after both the 30-day period for settling rate differences, and the 45-day period for precontroversy discovery.

(ii) *Universal Settlements.* In the Interim Regulations, we asked two questions related to settlement of rate adjustments:

If a settlement is reached, would it be a useful alternative to the convening of a CARP for the Library/Office to propose the agreed-upon rate to the public in a notice-and-comment proceeding?

Does the Librarian have the authority to adopt such a procedure, or would the convening of a CARP be required?

59 FR 23978 (1994).

RIAA¹² and Copyright Owners believe that in the case of a universal settlement a CARP would have no authority over a proceeding. The Office would therefore be responsible for amending the rules, after a public notice-and-comment period, to reflect the agreed upon rate. RIAA/AARC, comments at 8; Copyright Owners, reply comments at 6. RIAA argues that

¹² AARC took no position on this particular issue involving rate adjustment proceedings.

the CARPs' authority is limited to controversies over royalty rates; if there is no controversy because there has been a settlement, then there is no CARP authority. RIAA/AARC, comments at 8-9 [(citing our NPRM, 59 FR 2553 (1994)]. Copyright Owners note that convening a CARP after settlement has been reached "would make no sense" and "would subject the owner/user participants to needless expense." Copyright Owners, reply comments at 6-7. A public notice-and-comment period "should provide the Librarian with an adequate record on which to determine whether to amend the regulations consistent with the terms of the settlement." *Id.* at 8.

NMPA/HFA believes that the rules should provide the parties to a rate adjustment proceeding with the option of either having a CARP convened, or submitting the agreed upon rate to a public notice-and-comment proceeding. NMPA/HFA, comments at 2. NMPA/HFA believes that the statutory authority to provide such procedures "can be fairly implied from the Reform Act's direction that the Librarian adopt procedures and regulations relating to CARP proceedings and the Reform Act's express grant of authority to the Librarian to make the final determination in rate adjustment proceedings." *Id.* at 3.

We agree with Copyright Owners that it would make little sense to go through the time and expense of convening a CARP solely for the purpose of approving a settlement agreement. Without deciding the issue of whether a CARP would have jurisdiction in such cases, we are amending §251.63 by adding a new subsection:

(b) In the case where a settlement is reached as to the appropriate royalty rate, the Librarian may, upon the request of the settling parties, submit the agreed upon rate to the public in a notice-and-comment proceeding. The Librarian may adopt the rate embodied in the proposed settlement without convening an arbitration panel, provided that no opposing comment is received by the Librarian from a party with an intent to participate in a CARP proceeding.

(7) Part 252—Filing of Claims to Cable Royalties

Compliance with statutory dates. Section 252.4 describes the circumstances under which a claim to cable copyright royalties must be filed in order to be considered timely.

(i) *Delivery of claims.* We are amending §252.4(a) to adjust for some of the difficulties faced by the Copyright Office in receiving cable royalty claims on a timely basis.

Unlike the CRT, the Copyright Office and the Library of Congress are large institutions receiving a tremendous amount of mail each day, only a small percentage of which involves CARP matters. For the July 1994 filing period, we experienced difficulties with cable and satellite claims arriving at different locations of the Library by many different means of delivery (U.S. mail, messenger service, private mail carrier delivery). In order to assure that claims arrive during the statutorily prescribed time period, we are amending §252.4(a) to specify the two methods by which claims may be delivered to the Copyright Office. The first method is by mailing the claim to the official CARP address with the U.S. Postal Service, proper postage attached, so that when the claim arrives at the Copyright Office, it bears a July U.S. postmark. The second method is hand delivery to the Office of the Register of Copyrights, located in Room 403 of the James Madison Building, 101 Independence Avenue, S.E., Washington, D.C. 20540, during normal business hours in the month of July. Such hand delivery may be done by the claimant itself, or by the claimant's agent, or by a private delivery carrier (ex. Federal Express, DHL, messenger service) or other such manner. Hand delivery of claims to the mail receiving area of the Library of Congress, or to other locations in either the Library or the Copyright Office, is not compliance with the regulation. Claims which are hand delivered to other locations in the Library or Copyright Office will be dismissed if the Office cannot conclusively determine that the claim was physically located on Library and/or Copyright Office premises during the month of July.

(ii) *U.S. postmark.* Canadian claimants challenge the requirement in §252.4(a)(2) that mailed claims must bear a July U.S. postmark. We took this provision directly from the Copyright Royalty Tribunal's rules. See 59 FR 23979 (1994). Canadian Claimants acknowledge that they did not object to the Tribunal's initial adoption of U.S. postmark requirement, but state that they have experienced "difficulties" with the requirement since its adoption, although they do not precisely state what those "difficulties" are.¹³

¹³Canadian Claimants state earlier in their comment that their membership changes from year to year and that produces "the constant presence of new claimants who are unaware of the filing requirements and appear on the scene at (or shortly after) the last moment..." *Id.* Presumably it is the last minute identification of Canadian copyright owners eligible for cable royalties that produces the "difficulties."

Canadian Claimants, comments at 2. They therefore urge the Office to accept both Canadian and U.S. postmarks. *Id.*

We discussed in the Interim Regulations the Copyright Owners' request that we allow July mailings from Canadian and Mexican post offices. See 59 FR 23979 (1994). We declined the request, but stated that "we invite them [Copyright Owners], and any other interested parties, to provide further information and comments on the question." *Id.* Our request for further information emanates from our concern with compliance with the statute. The statutory requirement for filing cable claims is clearly spelled out in 17 U.S.C. 111(d)(4)(A): "During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Librarian of Congress * * * " The statute requires that the claim be with the Librarian during the month of July, arguably meaning in his possession. However, we accept the submission of a claim to the U.S. Postal Service, as statutorily sufficient, providing it bears a July U.S. postmark. The postmark is an acknowledgment that the claim was validly tendered with the U.S. Government in the month of July.

Our concern with allowing Canadian and Mexican postmarks is that those marks would not necessarily prove compliance with the statute. Neither the Canadian nor the Mexican postal service is part of the U.S. Government. Furthermore, if we were to allow Canadian and Mexican postmarks, we would have to allow national postmarks from all countries, since there are some copyright owners of cable retransmitted programming that do not reside in the United States, Canada or Mexico.

Copyright Owners and Canadian Claimants' desire for allowing Canadian and Mexican postmarks appears to be motivated by the desire ostensibly to add a few more days to the claim period. We, however, agree with what the Tribunal said in 1989 when it adopted the July U.S. postmark requirement:

The Tribunal does not believe that our insistence that either a claim be received in our office during July or that it bear a July U.S. postmark is too restrictive. The claim itself is easy to prepare. No government forms are necessary. The information that is required can be put on one page. Further, the claimant has six months from the close of the calendar year to prepare it, and the entire month of July to submit it to the Tribunal. Our proposed rule provides a bright line test which should end all questions of fact regarding the timeliness of the claim.

54 FR 12614, 12615 (1989). For these reasons, we are not adopting the Canadian Claimants' suggestion.

(iii) *Proving mailed claims.* Section 252.4(e) provides in the pertinent part that:

In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove that the claim was properly mailed if it was sent by certified mail return receipt requested, and the claimant can provide the receipt.

59 FR 23993 (1994).

Copyright Owners believe that this provision, as drafted, could cause some confusion. Copyright Owners, reply comments at 8. They note that there are two receipts associated with certified mail — the one given the sender by the Post Office and the one signed by the receptionist and returned to the sender — and that subsection (e) does not identify which receipt is acceptable proof. Copyright Owners, however, state that our discussion of the provision in the Interim Regulations makes it clear that either receipt would be acceptable. See 59 FR 23980 (1994). ("If the claim was sent by certified mail, return receipt requested, we will accept the claim if the claimant can produce the receipt showing that it was properly mailed.") In order to clear up any possible ambiguity in the regulation, the Copyright Owners propose that we amend subsection (e) to read:

In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove that the claim was properly mailed if it was sent by certified mail return receipt requested, and the claimant can provide the receipt showing that it was properly mailed or timely received.

Copyright Owners, reply comments at 9. We are adopting the Copyright Owners' suggestion.

(8) Part 257—Filing of Claims to Satellite Carrier Royalty Fees

Part 257 remains unchanged, except that we amend §257.4(a) regarding timely filing of claims, discussed above, and accept Copyright Owners proposed amendment regarding the proving of mailed satellite carrier royalty claims through the use of certified mail return receipt requested. §257.4 (e). We are also retaining the requirement of a U.S. postmark for satellite carrier claims, §257.4(a)(2), for the same reasons we are retaining the requirement for cable claims.

(9) Part 259—Filing of Claims to Digital Audio Recording Devices and Media Royalty Payments

Consistent with our decision concerning joint claims for cable and satellite carriers, §259.3 is amended to require that joint claimants to the DART fund include a list of all their joint claimants when the claim is filed, except, as discussed above, the performing rights societies will receive no exemption from this requirement. Performing rights societies will have to list the members and affiliates they

have signed to represent in DART as part of their filing a claim. As a result, the current §259.3(d), which allows joint claimants to lump their claims together after the claim period, and the current §259.3(f) which provides that the Office may require the productions of the list after the claim period ends, are deleted. As a practical matter, joint claimants who decide after the claim period to join together will simply

report to the Office that they have settled, and no need to consolidate their claim exists.

In addition, we amend §259.5(a) regarding timely delivery of claims and accept the Copyright Owners' proposed amendment of §259.5(e) regarding the proving of mailed DART claims through the use of certified mail return receipt requested.

SUBCHAPTER B—COPYRIGHT ARBITRATION ROYALTY PANEL RULES AND PROCEDURES

PART 251—COPYRIGHT ARBITRATION ROYALTY PANEL RULES OF PROCEDURE

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Subpart A—Organization

§251.1 Official address.

Copyright Arbitration Royalty Panel (CARP)
P.O. Box 70977
Southwest Station
Washington, D.C. 20024

§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 making and distributing 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 and satellite carrier royalty fees and digital audio recording devices and media payments under 17 U.S.C. 111, 119, and chapter 10, respectively, deposited with the Register of Copyrights.

(f) To adjust royalty rates for the satellite carrier compulsory license in accordance with 17 U.S.C. 119(c).

§251.3 Arbitrator lists.

(a) Any professional arbitration association or organization may submit, before January 1 of each year, a list of persons qualified to serve as arbitrators on a Copyright Arbitration Royalty Panel. The list shall contain the following for each person:

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

(2) The current position and name of the person's employer, if any, along with a brief summary of the person's employment history, including areas of expertise, and, if available, a description of the general nature of clients represented and the types of proceedings in which the person represented clients.

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

(4) A statement of the facts and information which qualify the person to serve as an arbitrator under §251.5.

(5) A description or schedule detailing fees proposed to be charged by the person for service on a CARP.

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

(b) After January 1 of each year, the Librarian of Congress shall publish in the FEDERAL REGISTER a list of at least 30, but not more than 75 persons, submitted to the Librarian from at least three professional arbitration associations or organizations. The persons so listed must satisfy the qualifications and requirements of this subchapter and can reasonably be expected to be available to serve as arbitrators on a Copyright Arbitration Royalty Panel during that calendar year. This list will constitute the "arbitrator list" referred to in this subchapter. With respect to persons on the arbitrator list, the Librarian will make available for copying and inspection the information provided under paragraph (a) of this section.

§251.4 Arbitrator lists: Objections.

(a) In the case of a rate adjustment proceeding, any party to a proceeding may, during the 45-day period specified in §251.45(b)(2)(i), 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 claimed to be objectionable.

(b) In the case of a royalty distribution proceeding, any party to the proceeding may, during the 45-day time period specified in §251.45(b)(1)(i), file an objection with the Librarian of Congress to one or more of the persons contained on the arbitrator list for the proceeding. Such objection shall plainly state the grounds and reasons for each person claimed 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) Admitted to the practice of law in 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 ten days after publication of a notice in the FEDERAL REGISTER initiating arbitration proceedings under this subchapter, the Librarian of Congress will, upon recommendation of the Register of Copyrights, select two arbitrators from the arbitrator list for that calendar year.

(b) The two arbitrators so selected shall, within ten days of their selection, choose a third arbitrator from the same arbitrator list. The third arbitrator shall serve as the chairperson of the panel during the course of the proceedings.

(c) If the two arbitrators fail to agree upon the selection of the third, the Librarian will promptly select the third arbitrator from the same arbitrator list.

(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) Two arbitrators shall constitute a quorum necessary to the determination of any proceeding.

(f) If, before the commencement of hearings in a proceeding, one or more of the arbitrators is unable to continue service on the CARP, the Librarian will suspend the proceeding as provided by §251.8, and will inaugurate a procedure to bring the CARP up to the full complement of three arbitrators. Where one or two vacancies exist, and either or both of the vacant seats were previously occupied by arbitrators selected by the Librarian, the Librarian will select the necessary replacements from the current arbitrator list. If there is one vacancy, and it was previously occupied by the chairperson, the two remaining arbitrators shall select the replacement from the arbitrator list, and the person chosen shall serve as chairperson. If there are two vacant seats, and one of them was previously occupied by the chairperson, the Librarian will select one replacement from the arbitrator list, and that person shall join with the remaining arbitrator to choose the replacement, who shall serve as chairperson.

(g) After hearings have commenced, the Librarian will not suspend the proceedings or inaugurate a replacement procedure unless it is necessary in order for the CARP to have a quorum. If the hearing is underway and two arbitrators are unable to continue service, or if the hearing had been proceeding with two arbitrators and one of them is no longer able to serve, the Librarian will suspend the proceedings under §251.8 and seek the unanimous written agreement of the parties to the proceeding for the Librarian to select a replacement. In the absence of such an agreement, the Librarian will terminate the proceeding. If such agreement is obtained, the Librarian will select one arbitrator from the arbitrator list.

(h) If, after hearings have commenced, the chairperson of the CARP is no longer able to serve, the Librarian will ask the two remaining arbitrators, or the one remaining arbitrator and the newly-selected arbitrator, to agree between themselves which of them will serve as chairperson. In the absence of such an agreement, the Librarian will terminate 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.

§251.8 Suspension of proceedings.

(a) Where it becomes necessary to replace a selected arbitrator under §251.6 or to remove and replace a selected arbitrator under subpart D of this part, the Librarian will order a suspension of any ongoing hearing or other proceeding by notice in writing to all parties. Immediately after issuing the order of suspension, and without delay, the Librarian will take the necessary steps to replace the arbitrator or arbitrators, and upon such replacement will issue an order, by notice in writing to all parties, resuming the proceeding from the time and point at which it was suspended.

(b) Where, for any other reason, such as a serious medical or family emergency affecting an arbitrator, the Librarian considers a suspension of a proceeding necessary and fully justified, he may, with the unanimous written consent of all parties to the proceeding, order a suspension of the proceeding for a stated period not to exceed one month.

(c) Any suspension under this section shall result in a complete cessation of all aspects of the proceeding, including the running of any period provided by statute for the completion of the proceeding.

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 seven 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, or any portion of a meeting, is 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 as are practicable.

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

§251.12 Conduct of open meetings.

Meetings of a Copyright Arbitration Royalty Panel will be conducted in a manner to ensure the greatest degree of openness possible. Reasonable access for the public will be provided at all public sessions. Any person may take photographs, and make audio or video recordings of the proceedings, so long as the panel is informed in advance. The chairperson has the discretion to regulate the time, place, and manner of the taking of photographs or the audio or video recording of the proceedings to ensure the order and decorum of the proceedings. The right of the public to be present does not include the right to participate or make comments.

§ 251.13 Closed meetings.

In the following circumstances, a Copyright Arbitration Royalty Panel may close its meetings, or any portion of a meeting, 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 a 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 interests 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 CARP may vote to keep the discussions closed for 30 days, starting from the first meetings. If the CARP 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 CARP.

(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.

(d) The procedure for closed meetings in this section and section §251.15 shall not apply to the internal deliberations of arbitrators carried out in furtherance of their duties and obligations under this chapter.

§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 two years, or for at least one 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 the chairperson determines that they should be disclosed, he or she will resubmit the question to the CARP 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 three 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, the

Copyright Office, or the Library of Congress;

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

(5) Communications among arbitrators of a CARP concerning the drafting of decisions, opinions, reports, and findings on any CARP 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 that 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.

§251.22 Public access.

(a) *Location of records.* All of the following records relating to rate adjustment and distribution proceedings under this subchapter shall be maintained at the Copyright Office:

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

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

(3) Records submitted to or produced by a Copyright Arbitration Royalty Panel during the course of a concluded proceeding. In the case of records submitted to or produced by a CARP that 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 the applicable Office charge. 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

Freedom of Information Act and Privacy Act provisions applicable to CARP proceedings can be found in parts 203 and 204 of subchapter A of this chapter.

Subpart D—Standards of Conduct

§251.30 Basic obligations of arbitrators.

(a) *Definitions.* For purposes of these regulations, the following terms shall have the meanings given in this subsection:

(1) A "selected arbitrator" is a person named by the Librarian of Congress, or by other selected arbitrators, for service on a particular CARP panel, in accordance with §251.6 of these regulations;

(2) A "listed arbitrator" is a person named in the "arbitration list" published in accordance with §251.3 of these regulations.

(b) *General principles applicable to arbitrators.* Selected arbitrators are persons acting on behalf of the United States, and the following general principles apply to them. Where a situation is not covered by standards set forth specifically in this subpart, selected arbitrators shall apply these general

principles in all cases in determining whether their conduct is proper. Listed arbitrators shall apply these principles where applicable.

(1) Arbitrators are engaged in a matter of trust that requires them to place ethical and legal principles above private gain.

(2) Arbitrators shall not hold financial interests that conflict with the conscientious performance of their service.

(3) Arbitrators shall not engage in financial transactions using nonpublic information or allow the improper use of such information to further any private interest.

(4) Selected arbitrators shall not solicit or accept any gift or other item of monetary value from any person or entity whose interests may be affected by the arbitrators' decisions. Listed arbitrators may accept gifts of nominal value or gifts from friends and family as specified in §251.34(b).

(5) Arbitrators shall put forth their honest efforts in the performance of their service.

(6) Arbitrators shall act impartially and not give preferential treatment to any individual, organization, or entity whose interests may be affected by the arbitrators' decisions.

(7) Arbitrators shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflicts with the performance of their service.

(8) Arbitrators shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this subpart.

(9) Arbitrators shall maintain order and decorum in the proceedings, be patient, dignified, and courteous to the parties, witnesses, and their representatives, and dispose promptly the business before them.

§251.31 Financial interests.

(a) No selected arbitrator shall have a direct or indirect financial interest —

(1) in the case of a distribution proceeding, in any claimant to the proceeding whether or not in a voluntary settlement agreement, or any copyright owner who receives royalties from such claimants because of their representation;

(2) in the case of a rate adjustment proceeding, in any individual, organization or entity that would be affected by the outcome of the proceeding.

(b) "Direct or indirect financial interest" shall include: being employed by, being a consultant to, being a representative or agent for, being a member or affiliate of, being a partner of, holding any office in, owning any stocks, bonds, or other securities, or deriving any income from the prohibited entity.

(c) "Direct or indirect financial interest" shall not include —

(1) owning shares in any stock or bond mutual fund or blind trust which might have an interest in a prohibited entity but whose decisions to invest or sell is not under the control of the selected arbitrator, or

(2) receiving any post-employment benefit such as health insurance or a pension so long as the benefit would not be affected by the outcome of the proceeding.

(d) For the purposes of this section, the financial interests of the following persons will serve to disqualify the selected arbitrator to the same extent as if they were the arbitrator's own interests:

(1) the arbitrator's spouse;

(2) the arbitrator's minor child;

(3) the arbitrator's general partner, except that the personal financial holdings, including stock and bond investments, of such partner will not serve to disqualify the selected arbitrator; or

(4) an organization or entity for which the arbitrator serves as officer, director, trustee, general partner or employee.

§251.32 Financial disclosure statement.

(a) Each year, within one month of publication in the FEDERAL REGISTER of the list of available arbitrators, each listed arbitrator shall file with the Librarian of Congress a confidential financial disclosure statement as provided by the Library of Congress, which statement shall be reviewed by the Librarian and designated Library staff to determine what conflicts of interest, if any, exist according to §251.31.

(b) If any conflicts do exist, the Librarian shall not choose that person for the proceeding for which he or she has the financial conflict, except—

(1) the listed arbitrator may divest himself or herself of the interest that caused the disqualification, and become qualified to serve, or

(2) the listed arbitrator may offer to disclose on the record the conflict of interest causing disqualification. In such instances:

(i) The Librarian shall publish a list detailing the conflicts of interest the listed arbitrators have offered to disclose, and any other matters which, although outside of the scope of the restrictions of §251.31, nevertheless, in the view of the Librarian, raise sufficient concerns to warrant disclosure to the affected parties;

(ii) Such list shall be published in the order establishing the period for precontroversy motions (*see*, §251.45(b));

(iii) Such list shall contain the matters of concern, but shall not contain the names of the listed arbitrators.

(iv) Any party to the proceeding for which the listed arbitrator is being considered may interpose within the 45-day period described in §251.45(b) an objection to that arbitrator being selected. If the objection is raised to a matter found to be within the scope of §251.31, the objection will serve automatically to disqualify the arbitrator. If the objection is raised to a matter found to be outside the scope of §251.31, the objection will be taken into account when the Librarian makes his or her selection, but will not serve automatically to disqualify the arbitrator.

(c) At such time as the two selected arbitrators choose a third arbitrator, they shall consult with the Librarian to determine if any conflicts of interest exist for the third arbitrator. If, in the opinion of the Librarian of Congress, any conflicts of interest do exist, the two selected arbitrators shall be asked to choose another arbitrator who has no conflict of interest.

(d) Within one week of the selection of the CARP panel, the three selected arbitrators shall file with the Librarian an updated confidential financial disclosure form or, if there are any changes in the arbitrator's financial interests, a statement to that effect. If any conflicts of interest are revealed on the updated form, the Librarian will suspend the proceeding and replace the selected arbitrator with another arbitrator from the arbitrator list in accordance with the provision of §251.6.

(e) During the following periods of time, the selected arbitrators shall be obliged to inform the Librarian immediately of any change in their financial interests that would reasonably raise a conflict of interest—

(1) during the period beginning with the filing of the updated disclosure form or statement required by paragraph (d) of this section and ending with the submission of the panel's report to the Librarian, and

(2) if the same arbitrator or arbitrators are recalled to serve following a court-ordered remand, during the time the panel is reconvened.

(f) If the Librarian determines that an arbitrator has failed to give timely notice of a financial interest constituting a conflict of interest, or that the arbitrator in fact has a conflict of interest, the Librarian shall remove that arbitrator from the proceeding.

§251.33. Ex parte communications.

(a) *Communications with Librarian or Register.* No person outside the Library of Congress shall engage in *ex parte* communication with the Librarian of Congress or the Register of Copyrights on the merit or status of any matter, procedural or substantive, relating to the distribution of royalty fees, the adjustment of royalty rates or the status of digital audio recording devices, at any time whatsoever. This prohibition shall not apply to statements concerning public policies related to royalty fee distribution and rate adjustment so long as they are unrelated to the merits of any particular proceeding.

(b) *Selected arbitrators.* No interested person shall engage in, or cause someone else to engage in, *ex parte* communications with the selected arbitrators in a proceeding for any reason whatsoever from the time of their selection to the time of the submission of their report to the Librarian, and, in the case of a remand, from the time of their reconvening to the time of their submission of their report to the Librarian. Incidental communications unrelated to any proceeding, such as an exchange of pleasantries, shall not be deemed to constitute an *ex parte* communication.

(c) *Listed arbitrators.* No interested person shall engage in, or cause someone else to engage in, *ex parte* communications with any person listed by the Librarian of Congress as qualified to serve as an arbitrator about the merits of any past, pending, or future proceeding relating to the distribution of royalty fees or the adjustment of royalty rates. This prohibition applies during any period when the individual appears on a current arbitrator list.

(d) *Library and Copyright Office personnel.* No person outside the Library of Congress (including the Copyright Office staff) shall engage in *ex parte* communications with any employee of the Library of Congress about the substantive merits of any past, pending, or future proceeding relating to the distribution of royalty fees or the adjustment of royalty rates. This prohibition does not apply to procedural inquiries such as scheduling, filing requirements, status requests, or requests for public information.

(e) *Outside contacts.* The Librarian of Congress, the Register of Copyrights, the selected arbitrators, the listed arbitrators, and the employees of the Library of Congress described in paragraphs (a) through (d) of this section, shall not initiate or continue the prohibited communications that apply to them.

(f) *Responsibilities of recipients of communication.* (1) Whoever receives a prohibited communication shall immediately end it and place on the public record of the applicable proceeding:

- (i) all such written or recorded communications;
- (ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (f)(1)(i) and (ii) of this section.

(2) The materials described in this paragraph (f) shall not be considered part of the record for the purposes of decision unless introduced into evidence by one of the parties.

(g) *Action by Librarian.* When notice of a prohibited communication described in paragraphs (a) through (d) of this section has been placed in the record of a proceeding, either the Librarian of Congress or the CARP may require the party causing the prohibited communication to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, or otherwise adversely affected.

§251.34 Gifts and other things of monetary value.

(a) *Selected arbitrators.* From the time of selection to the time of the submission of the arbitration panel's report, whether during the initial proceeding or during a court-ordered remand, no selected arbitrator shall solicit or accept, directly or indirectly, any gift, gratuity, favor, travel,

entertainment, service, loan, or any other thing of monetary value from a person or organization that has an interest that would be affected by the outcome of the proceeding, regardless of whether the offer was intended to affect the outcome of the proceeding.

(b) *Listed arbitrators.* No listed arbitrator shall solicit or accept, directly or indirectly, any gift, gratuity, favor, travel, entertainment, service, loan, or any other thing of monetary value from a person or organization that has an interest in any proceeding for which the arbitrator might be selected, regardless of whether the offer was intended to affect the outcome of the proceeding, except—

(1) a listed arbitrator may accept unsolicited gifts having an aggregate market value of \$20 or less per occasion, as long as the aggregate market value of individual gifts received from any one source does not exceed \$50 in a calendar year, or

(2) a listed arbitrator may accept a gift given under circumstances in which it is clear that the gift is motivated by a family relationship or personal friendship rather than the potential of the listed arbitrator to decide a future proceeding.

(c) A gift that is solicited or accepted indirectly includes a gift—

(1) given with the arbitrator's knowledge and acquiescence to the arbitrator's parent, sibling, spouse, child, or dependent relative because of that person's relationship to the arbitrator, or

(2) given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the arbitrator.

§251.35 Outside employment and other activities.

(a) From the time of selection to the time when all possibility of being selected to serve on a court-ordered remand is ended, no arbitrator shall—

(1) engage in any outside business or other activity that would cause a reasonable person to question the arbitrator's ability to render an impartial decision;

(2) accept any speaking engagement, whether paid or unpaid, related to the proceeding or sponsored by a party that would be affected by the outcome of the proceeding; or

(3) accept any honorarium, whether directly or indirectly paid, for any appearance, speech, or article related to the proceeding or offered by a party who would be affected by the outcome of the proceeding.

(b) Honoraria indirectly paid include payments—

(1) given with the arbitrator's knowledge and acquiescence to the arbitrator's parent, sibling, spouse, child, or dependent relative because of that person's relationship to the arbitrator, or

(2) given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the arbitrator.

§251.36 Pre-arbitration and post-arbitration employment restrictions.

(a) The Librarian of Congress will not select any arbitrator who was employed at any time during the period of five years immediately preceding the date of that arbitrator's selection by any party to, or any person, organization or entity with a financial interest in, the proceeding for which he or she is being considered. However, a listed arbitrator may disclose on the record the past employment causing disqualification and may ask the parties to consider whether to allow him or her to serve in the proceeding, in which case any agreement by the parties to allow the listed arbitrator to serve shall be unanimous and shall be incorporated into the record of the proceeding.

(b) No arbitrator may arrange for future employment with any party to, or any person, organization, or entity with a financial interest in, the proceeding in which he or she is

serving.

(c) For a period of three years from the date of submission of the arbitration panel's report to the Librarian, no arbitrator may enter into employment with any party to, or any person, organization, or entity with a financial interest in, the particular proceeding in which he or she served.

(d) For purposes of this section, "employed" or "employment" means any business relationship involving the provision of personal services including, but not limited to, personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner or trustee, but does not include serving as an arbitrator, mediator, or neutral engaged in alternative dispute resolution.

§251.37 Use of nonpublic information.

(a) Unless required by law, no arbitrator shall disclose in any manner any information contained in filings, pleadings, or evidence that the arbitration panel has ruled to be confidential in nature.

(b) Unless required by law, no arbitrator shall disclose in any manner—

(1) intra-panel communications or communications between the Library of Congress and the panel intended to be confidential;

(2) draft interlocutory rulings or draft decisions; or

(3) the CARP report before its submission to the Librarian of Congress.

(c) No arbitrator shall engage in a financial transaction using nonpublic information, or allow the improper use of nonpublic information, to further his or her private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

§251.38 Billing and commitment to standards.

(a) Arbitrators are bound by the hourly or daily fee they proposed to the Librarian of Congress when their names were submitted to be listed under §251.3, and shall not bill in excess of their proposed charges.

(b) Arbitrators shall not charge the parties any expense in addition to their hourly or daily charge, except, in the case of an arbitrator who resides outside the Washington, D.C. metropolitan area, for travel, lodging, and meals not to exceed the government rate.

(c) When submitting their statement of costs to the parties under §251.54, arbitrators shall include a detailed account of their charges, including the work performed during each hour or day charged.

(d) Except for support services provided by the Library of Congress, arbitrators shall perform their own work, including research, analysis of the record, and decision-writing.

(e) At the time of selection, arbitrators shall sign an agreement stating that they will abide by all the terms therein, including all of the standards of conduct and billing restrictions specified in this subpart. Any arbitrator who does not sign the agreement will not be selected to serve.

§251.39 Remedies.

In addition to those provided above, remedies for the violation of the standards of conduct of this section may include, but are not limited to, the following—

(a) in the case of a selected arbitrator—

(1) removal of the arbitrator from the proceeding;

(2) permanent removal of the arbitrator's name from the current and any future list of available arbitrators published by the Librarian;

(3) referral of the matter to the bar of which the arbitrator is a member.

(b) in the case of a listed but not selected arbitrator—

(1) permanent removal of the arbitrator's name from the

current and any future list of available arbitrators published by the Librarian;

(2) referral of the matter to the bar of which the listed arbitrator is a member.

(c) in the case of an interested party or individual who engaged in the ethical violation—

(1) referral of the matter to the bar or professional association of which the interested individual is a member;

(2) barring the offending individual from current and/or future appearances before the CARP;

(3) designation of an issue in the current or in a future proceeding as to whether the party's interest should not be dismissed, denied, or otherwise adversely affected.

(d) In all applicable matters of violations of standards of conduct, the Librarian may refer the matter to the Department of Justice, or other legal authority of competent jurisdiction, for criminal prosecution.

Subpart E—Procedures of Copyright Arbitration Royalty Panels

§251.40 Scope.

This subpart governs the proceedings of Copyright Arbitration Royalty Panels convened under 17 U.S.C. 803 for the adjustment of royalty rates and distribution of royalty fees. 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 45-day period specified in §251.45(b)(1)(i) for distribution proceedings, or during the 45-day period specified in §251.45(b)(2)(i) for rate adjustment proceedings, as appropriate, any party may petition the Librarian of Congress to dispense with formal hearings, and have the CARP decide the controversy or rate adjustment on the basis of written pleadings. The petition may be granted if—

(1) the controversy or rate adjustment, as appropriate, does not involve any genuine issue of material fact; or

(2) all parties to the proceeding agree, in writing, that a grant of the petition is appropriate.

§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) All parties who have filed a notice of intent to participate in the hearing shall file written direct cases with the Copyright Arbitration Royalty Panel, and with other parties in the manner

in which the Librarian of Congress shall direct in accordance with §251.45(b).

(b) The written direct case shall include all testimony, including each witness's 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. No 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 CARP 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 to the best of his or her knowledge and belief there is good ground to support the document, 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.* The Librarian of Congress shall compile and distribute to those parties who have filed a notice of intent to participate, the official service list of the proceeding, which shall be composed of the names and addresses of the representatives of all the parties to the proceeding. 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 CARP panel or the Copyright Office. If a party files a pleading that requests or would require action by the panel or the Librarian within ten 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. Parties shall notify the Librarian of any change in the name or address to which service shall be made, and shall serve a copy of such notification on all parties and the CARP panel.

(g) *Oppositions and replies.* Except as otherwise provided in these rules or by the Librarian of Congress or a CARP, oppositions to motions shall be filed within ten business days of the date of service of the motion, and replies to oppositions shall be filed within five business days of the date of service of the opposition. The date of service shall be deemed to be the third business day following service by mail or the next business day following service by overnight delivery, by hand, or by facsimile.

§251.45 Discovery and prehearing motions.

(a) *Request for comment, notice of intention to participate.* In the case of a royalty fee distribution proceeding, the Librarian of Congress shall, after the time period for filing claims, publish in the FEDERAL REGISTER a notice requesting each claimant on the claimant list to negotiate with each other a settlement of their differences, and to comment by a date certain as to the existence of controversies with respect to the royalty funds described in the notice. Such notice shall also establish a date certain by which parties wishing to participate in the proceeding must file with the Librarian a notice of intention to participate. In the case of a rate adjustment proceeding, the Librarian of Congress shall, after receiving a petition for rate adjustment filed under §251.62, or, in the case of noncommercial educational broadcasting and satellite carrier, prior to the commencement of proceedings, publish in the FEDERAL REGISTER a notice requesting interested parties to comment on the petition for rate adjustment. Such notice shall also establish a date certain by which parties wishing to participate in the proceeding must file with the Librarian a notice of intention to participate.

(b) *Precontroversy discovery, filing of written cases, scheduling.*
(1)(i) In the case of a royalty fee distribution proceeding, the Librarian of Congress shall, after the filing of comments and notices described in paragraph (a) of this section, designate a 45-day period for precontroversy discovery and exchange of documents. The period will begin with the exchange of written direct cases among the parties to the proceeding. Each party to the proceeding must serve a complete copy of its written direct case on each of the parties to the proceeding no later than the first day of the 45-day period. At any time during the 45-day period, parties to the proceeding may file with the Librarian prehearing motions and objections, including petitions to dispense with formal hearings under §251.41(b),

and objections to arbitrators appearing on the arbitrator list under §251.4. Replies to motions, petitions, and objections must be filed with the Librarian seven days from the filing of such motions, petitions, and objections with the Librarian.

(ii) Subject to §251.72, the Librarian shall establish, prior to the commencement of the 45-day period, the date on which arbitration proceedings will be initiated.

(2)(i) In the case of a rate adjustment proceeding, the Librarian of Congress shall, after the filing of comments and notices described in paragraph (a) of this section, designate a 45-day period for precontroversy discovery and exchange of documents. The period will begin with the exchange of written direct cases among the parties to the proceeding. Each party to the proceeding must serve a complete copy of its written direct case on each of the parties to the proceeding no later than the first day of the 45-day period. At any time during the 45-day period, parties to the proceeding may file with the Librarian prehearing motions and objections, including petitions to dispense with formal hearings under §251.41(b), and objections to arbitrators appearing on the arbitrator list under §251.4. Replies to motions, petitions and objections must be filed with the Librarian seven days from the filing of such motions, petitions, and objections with the Librarian.

(ii) Subject to §251.64, the Librarian shall establish, prior to the commencement of the 45-day period, the date on which arbitration proceedings will be initiated.

(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 written direct and rebuttal cases with it in which parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.

(2) After the filing of written cases with a CARP, 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 CARP 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 CARP 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 CARP panel expands the witness's 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 CARP 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 CARP 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 CARP 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's direct testimony and cannot itself be relied upon in findings of fact as rebutting the witness's 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.

(1) 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 of any given witness. 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 of any given witness, 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 CARP 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 the characteristics which 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 that employ alternative models and variables, if requested.

(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 themselves.

§251.49 Transcript and record.

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

(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 record.

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 ten 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 findings submitted by someone other than a party in a proceeding shall be restricted to those issues specifically affecting that person.

(d) Proposed conclusions shall be stated separately.

§251.53 Report to the Librarian of Congress.

(a) At any time after the filing of proposed findings of fact and conclusions of law and any replies thereto 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 opinion 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) The panel may assess its ordinary and necessary costs, according to §251.38, to the participants to the proceeding as follows:

(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 total cost of the proceeding in direct proportion to their share of the distribution.

(3) In the case of a change in the share of distribution because of the Librarian's substitution of a new determination, or a determination reached as a result of a court-ordered remand, the parties shall make restitution to each other for the difference in payments that resulted from the change.

(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.

§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 (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 satellite carriers (17 U.S.C. 119). 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, phonorecords, and coin-operated phonorecord players (jukeboxes), rate adjustment proceedings shall commence with the filing of a petition by an interested party according to the following schedule:

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

(2) Phonorecords: During 1997 and each subsequent tenth 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.

(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 five year intervals thereafter.

(d) In the case of the satellite carrier compulsory license, rate adjustment proceedings shall commence on January 1, 1997, in accordance with 17 U.S.C. 119(c)(3)(A), for satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with 17 U.S.C. 119(c)(2).

§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 Consideration of petition; settlements.

(a) To allow time for the parties to settle their differences regarding rate adjustments, the Librarian of Congress shall, after the filing of a petition under §251.62 and before the 45-day period specified in §251.45(b)(2)(i), designate a 30-day period for consideration of their settlement. The Librarian shall cause notice of the dates for that period to be published in the FEDERAL REGISTER.

(b) In the case of a settlement among the parties to a proceeding, the Librarian may, upon the request of the parties, submit the agreed upon rate to the public in a notice-and-comment proceeding. The Librarian may adopt the rate embodied in the proposed settlement without convening an arbitration panel, provided that no opposing comment is received by the Librarian from a party with an intent to participate in a CARP proceeding.

§251.64 Disposition of petition; initiation of arbitration proceeding.

After the end of the 45-day precontroversy discovery period, and after the Librarian has ruled on all motions and objections filed under §251.45, the Librarian will 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 significant, he or she will 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 and the satellite carrier compulsory license in accordance with 17 U.S.C. 118 and 119, respectively. 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 (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.* 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 Declaration of controversy: Initiation of arbitration proceeding.

If the Librarian determines that a controversy exists among the claimants to either cable, 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.

§251.73 Deduction of costs of distribution proceedings.

The Librarian of Congress and the Register of Copyrights may, before any distributions of royalty fees are made, deduct the reasonable costs incurred by the Library of Congress and the Copyright Office as a result of the distribution proceeding, from the relevant royalty pool.

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 Copies of claims.

§252.1 Scope.

This part prescribes procedures under 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, and the name of each claimant to 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 affiliate agreements, or to list the name of each of its members or affiliates in the joint claim.

(4) For individual claims, a general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission by a cable system of such works establishing a basis for the claim. For joint claims, a general statement of the nature of the joint claimants' copyrighted works and identification of at least one secondary transmission of one of the joint claimants' copyrighted works by a cable system establishing a basis for the joint 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 notify the Copyright Office of such change. If the good faith efforts of the Copyright Office to contact the claimant are frustrated because of failure to notify the Office of a name and/or address change, 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.

§252.4 Compliance with statutory dates.

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

(1) They are hand delivered, either by the claimant, the claimant's agent, or a private delivery carrier, to: Office of the Register of Copyrights, Room 403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540, during normal business hours during the month of July, or

(2) They are addressed to: Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, D.C. 20024, and are deposited with sufficient postage with the United States Postal Service and bear a July U.S. postmark.

(b) Notwithstanding subsection (a), in any year in which

July 31 falls on a Saturday, Sunday, holiday, or other nonbusiness day within the District of Columbia or the Federal Government, claims received by the Copyright Office by the first business day in August, or properly addressed and deposited with sufficient postage with the United States Postal Service and postmarked by the first business day in August, shall be considered timely filed.

(c) Claims dated only with a business meter that are received after July 31, will not be accepted as having been timely filed.

(d) No claim may be filed by facsimile transmission.

(e) In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove that the claim was properly mailed if it was sent by certified mail return receipt requested, and the claimant can provide the receipt showing that it was properly mailed or timely received. No affidavit of an officer or employee of the claimant, or of a U.S. postal worker will be accepted as proof in lieu of the receipt.

§252.5 Copies of claims.

A claimant shall, for each claim submitted to the Copyright Office, file an original and two copies of the claim to cable royalty fees.

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

Sec.

253.1 General.

253.2 Definition of public broadcasting entity.

253.3 [Reserved]

253.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in activities set forth in 17 U.S.C. 118(d).

253.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

253.6 Performance of musical compositions by other public broadcasting entities.

253.7 Recording rights, rates and terms.

253.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

253.9 Unknown copyright owners.

253.10 Cost of living adjustment.

253.11 Notice of restrictions on use of reproductions of transmission programs.

§253.1 General.

This part 253 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning January 1, 1993 and ending on December 31, 1997. Upon compliance with 17 U.S.C. 118, and terms and rates of this part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. 118(d).

§253.2 Definition of public broadcasting entity.

As used in this part, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(d)(2).

§253.3 [Reserved]

§253.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in activities set forth in 17 U.S.C. 118(d) of copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by §253.5 and 253.6, and except for compositions which are the subject of voluntary license agreements, such as the PBS/NPR/ASCAP, the PBS/NPR/BMI and the PBS/NPR/SESAC license agreements.

(a) *Determination of royalty rates.* (1) For the performance of such a work in a feature presentation of PBS:

1993-1997.....\$199.18

(2) For the performance of such a work as background or theme music in a PBS program:

1993-1997.....\$50.46

(3) For the performance of such a work in a feature presentation of a station of PBS:

1993-1997.....\$17.02

(4) For the performance of such a work as background or theme music in a program of a station of PBS:

1993-1997.....\$3.59

(5) For the performance of such a work in a feature presentation of NPR:

1993-1997.....\$20.19

(6) For the performance of such a work as background or theme music in an NPR program:

1993-1997.....\$4.90

(7) For the performance of such work in a feature presentation of a station of NPR:

1993-1997.....\$1.43

(8) For the performance of such work as background or theme music in a program of a station of NPR:

1993-1997.....\$51

(9) For the purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

(10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.

(b) *Payment of royalty rate.* The required royalty rate shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(c) *Records of use.* PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performance of musical compositions on PBS and NPR programs. Any local PBS and NPR station that is required by paragraph 4b of the PBS/NPR/ASCAP license agreement dated October 19, 1992 to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

(d) *Terms of use.* The fees provided in this schedule for the performance of a musical work in a program shall cover performances of such work in such program for a period of three years following the first performance.

§253.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and colleges, universities, and other nonprofit educational institutions concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, \$205 annually.

(2) For all such compositions in the repertory of BMI, \$205 annually.

(3) For all such compositions in the repertory of SESAC, \$48 annually.

(4) For the performance of any other such composition, \$1.00.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each year.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports.

§253.6 Performance of musical compositions by other public broadcasting entities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by radio stations not licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and noncommercial radio stations within the scope of this section concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, in 1993, \$295; in 1994, \$310; in 1995, \$325; in 1996, \$340; in 1997, \$360.

(2) For all such compositions in the repertory of BMI, in 1993, \$295; in 1994, \$310; in 1995, \$325; in 1996, \$340; in 1997, \$360.

(3) For all such compositions in the repertory of SESAC, in 1993, \$63; in 1994, \$66; in 1995, \$69; in 1996, \$72; in 1997, \$75.

(4) For the performance of any other such compositions, in 1993 through 1997, \$1.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each year.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC each shall not in any one calendar year request more than 5 stations to furnish such reports.

§253.7 Recording rights, rates and terms.

(a) *Scope.* This section establishes rates and terms for the recording of nondramatic performances and displays of musical works, other than compositions subject to voluntary license agreements, on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction, and distribution of copies and phonorecords of public broadcasting programs containing such nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1)(i) For uses described in paragraph (a) of this section of a musical work in a PBS-distributed program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in that PBS-distributed program:

1993-1997

Feature.....	\$99.85
Concert feature (per minute).....	\$29.98
Background.....	\$50.46
Theme:	
Single program or first series program.....	\$50.46
Other series program.....	\$20.48

(ii) For such uses other than in a PBS-distributed television program, the royalty fee shall be calculated by multiplying the following per-composition rates by the number of different compositions in that program:

1993-1997

Feature.....	\$8.25
Concert feature (per minute).....	\$2.17
Background.....	\$3.59
Theme:	
Single program or first series program.....	\$3.59
Other series program.....	\$1.43

(iii) In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in an NPR program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule "National Public Radio" programs include all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

1993-1997

Feature.....	\$10.81
Concert feature (per half hour).....	\$15.87
Background.....	\$5.41
Theme:	
Single program or first series program.....	\$5.41
Other series program.....	\$2.16

(3) For the purposes of this schedule, a "Concert Feature" shall be deemed to be the nondramatic presentation in a

program of all or part of a symphony, concerto, or other serious work originally written for concert performance or the nondramatic presentation in a program of portions of a serious work originally written for opera performance.

(4) For such uses other than in a NPR-produced radio program:

1993-1997

Feature.....	\$.70
Feature (concert) (per half hour).....	\$1.45
Background.....	\$.35

(5) The schedule of fees covers broadcast use for a period of three years following the first broadcast. Succeeding broadcast use periods will require the following additional payment: second three year period—50 percent; each three year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1997 shall be subject to the royalty rates established in this schedule.

(c) *Payment of royalty rates.* The required royalty rates shall be paid to each known copyright owner no later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) Maintenance of cue sheets. PBS and its stations, NPR, or other television public broadcasting entities shall maintain and make available for examination pursuant to subsection (e) copies of their standard cue sheets or summaries of the same listing the recording of the musical works of such copyright owners.

(2) Content of cue sheets or summaries. Such cue sheets or summaries shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For Concert Feature music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) *Filing of use reports with the Copyright Office.* Deposit of cue sheets or summaries. PBS and its stations, NPR, or other television public broadcasting entity shall deposit with the Copyright Office copies of their standard music cue sheets or summaries of same (which may be in the form of hard copy of computerized reports) listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets or summaries shall be deposited not later than July 31 of each calendar for recordings during the first six months of the calendar year and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. PBS and NPR shall maintain at their offices copies of all standard music cue sheets from which such music use reports are prepared. Such music cue sheets shall be furnished to the Copyright Office upon its request and also shall be available during regular business hours at the offices of PBS or NPR for examination by a copyright owner who believes a musical composition of such owner has been recorded pursuant to this schedule.

§253.8 Terms and rates of royalty payments for the use of published pictorial, graphic and sculptural works.

(a) *Scope.* This section establishes rates and terms for the use of published pictorial, graphic and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) The following schedule of rates shall apply to the use of works within the scope of this section:

(i) For such uses in a PBS-distributed program:

(A) For a featured display of a work.

1993-1997..... \$61.00

(B) For background and montage display.

1993-1997..... \$29.75

(C) For use of a work for program identification or for thematic use.

1993-1997..... \$120.25

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1993-1997..... \$39.50

(ii) For such uses in other than PBS-distributed programs:

(A) For featured display of a work.

1993-1997..... \$39.50

(B) For background and montage display.

1993-1997..... \$20.25

(C) For use of a work for program identification or for thematic use.

1993-1997..... \$80.75

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1993-1997..... \$20.25

For the purposes of this schedule the rate for the thematic use of a work in an entire series shall be double the single program theme rate. In the event the work is first used other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) "Featured display" for purposes of this schedule means a full-screen or substantially full-screen display appearing on the screen for more than three seconds. Any display less than full-screen or substantially full-screen, or full screen for three seconds or less, is deemed to be a "background or montage display."

(3) "Thematic use" is the utilization of the works of one or more artists where the works constitute the central theme of the program or convey a story line.

(4) "Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced" means a transparency or other reproduction of an underlying work of fine art.

(c) *Payment of royalty rate.* PBS or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic and sculptural works, copies of their standard lists containing the pictorial, graphic and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(e) *Filing of use reports with the Copyright Office.* (1) PBS and its stations or other public broadcasting entity shall deposit with the Copyright Office copies of their standard lists containing the pictorial, graphic and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(f) *Terms of use.* (1) The rates of this schedule are for unlimited broadcast use for a period of three years from the date of the first broadcast use of the work under this schedule. Succeeding broadcast use periods will require the following additional payment: Second three year period—50 percent; each three year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1997 shall be subject to the rates established in this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118(f), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

§253.9 Unknown copyright owners.

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the Copyright Office, upon request, information concerning fees deposited to trust funds.

§253.10 Cost of living adjustment.

(a) On December 1, 1993 the Librarian of Congress shall publish in the FEDERAL REGISTER a notice of the change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published prior to December 1, 1992 to the most recent Index published prior to December 1, 1993. On each December 1 thereafter the Librarian of Congress shall publish a notice of the change in the cost of living during the period from the most recent Index published prior to the previous notice, to the most recent Index published prior to December 1 of that year.

(b) On the same date of the notices published pursuant to paragraph (a) of this section, the Librarian of Congress shall publish in the FEDERAL REGISTER a revised schedule of rates for §253.5 which shall adjust those royalty amounts established in dollar amounts according to the change in the cost of living determined as provided in paragraph (a) of this section. Such royalty rates shall be fixed at the nearest dollar.

(c) The adjusted schedule of rates for §253.5 shall become effective thirty days after publication in the FEDERAL REGISTER.

§253.11 Notice of restrictions on use of reproductions of transmission programs.

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of not more than seven days from the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

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

Sec.

254.1 General.

254.2 Definition of coin-operated phonorecord player.

254.3 Compulsory license fees for coin-operated phonorecord players.

§254.1 General.

This part 254 establishes the compulsory license fees for coin-operated phonorecord players beginning on January 1, 1982, in accordance with the provisions of 17 U.S.C. 116.

§254.2 Definition of coin-operated phonorecord player.

As used in this part, the term "coin-operated phonorecord player" is a machine or device that:

(a) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(b) is located in an establishment making no direct or indirect charge for admission;

(c) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(d) affords a choice of works available for performance and permits the choice to be made by patrons of the establishment in which it is located.

§254.3 Compulsory license fees for coin-operated phonorecord players.

(a) Commencing January 1, 1982, the annual compulsory license fee for a coin-operated phonorecord player shall be \$25.

(b) Commencing January 1, 1984, the annual compulsory license fee for a coin-operated phonorecord player shall be \$50.

(c) Commencing January 1, 1987, the annual compulsory license fee for a coin-operated phonorecord player shall be \$63.

(d) If performances are made available on a particular coin-operated phonorecord player for the first time after July 1 of any year, the compulsory license fee for the remainder of that year shall be one half of the annual rate of (a), (b), or (c) of this section, whichever is applicable.

(e) Commencing January 1, 1990, the annual compulsory license fee for a coin-operated phonorecord player is suspended through December 31, 1999, or until such earlier or later time as the March, 1990 license agreement between AMOA and ASCAP/BMI/SESAC is terminated.

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

Sec.

255.1 General.

255.2 Royalty payable under compulsory license.

255.3 Adjustment of royalty rate.

§255.1 General.

This part 255 adjusts the rates of royalty payable under compulsory license for making and distributing phonorecords embodying nondramatic musical works, under 17 U.S.C. 115.

§255.2 Royalty payable under compulsory license.

With respect to each work embodied in the phonorecord, the royalty payable shall be either four cents, or three-quarters of one cent per minute of playing time or fraction thereof, whichever amount is larger, for every phonorecord made and distributed on or after July 1, 1981, subject to adjustment pursuant to §255.3.

§255.3 Adjustment of royalty rate.

(a) For every phonorecord made and distributed on or after January 1, 1983, the royalty payable with respect to each work embodied in the phonorecord shall be either 4.25 cents, or .8 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (b), (c), (d), (e), (f), (g) and (h) of this section.

(b) For every phonorecord made and distributed on or after July 1, 1984, the royalty payable with respect to each work embodied in the phonorecord shall be either 4.5 cents, or .85 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (c), (d), (e), (f), (g) and (h) of this section.

(c) For every phonorecord made and distributed on or after January 1, 1986, the royalty payable with respect to each work embodied in the phonorecord shall be either 5 cents, or .95 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (d), (e), (f), (g) and (h) of this section.

(d) For every phonorecord made and distributed on or after January 1, 1988, the royalty payable with respect to each work embodied in the phonorecord shall be either 5.25 cents, or 1 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (e), (f), (g) and (h) of this section.

(e) For every phonorecord made and distributed on or after January 1, 1990, the royalty payable with respect to each work embodied in the phonorecord shall be either 5.7 cents, or 1.1 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (f), (g) and (h) of this section.

(f) For every phonorecord made and distributed on or after January 1, 1992, the royalty payable with respect to each work embodied in the phonorecord shall be 6.25 cents, or 1.2 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (g) and (h) of this section.

(g) For every phonorecord made and distributed on or after January 1, 1994, the royalty payable with respect to each work embodied in the phonorecord shall be either 6.6 cents, or 1.25 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraph (h) of this section.

(h)(1) On November 1, 1995 the Librarian of Congress shall publish in the FEDERAL REGISTER a notice of the percent change in the Consumer Price Index (all urban consumers, all items)(CPI) from the Index published for the September two years earlier to the Index published for the September of the year in which such notice is published, and the underlying calculations.

(2) On the same date as the notice is published pursuant to paragraph (h)(1) of this section, the Librarian of Congress shall publish in the FEDERAL REGISTER revised compulsory license royalty rates which shall adjust the amounts then in effect in direct proportion to the percent change in the CPI determined as provided in paragraph (h)(1) of this section, rounded to the nearest 1/20th of a cent; *Provided*, however, that:

(i) The adjusted rates shall be no greater than 25% more than the rates then in effect; and

(ii) The adjusted rates shall be no less than the amounts set forth in paragraph (c) of this section.

(3) The revised royalty rates for the compulsory license adjusted pursuant to this paragraph (h) shall become effective for every phonorecord made and distributed on or after January 1 of the year following that in which such notice is published; that is, on January 1, 1996.

PART 256—ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY LICENSE

Sec.

256.1 General.

256.2 Royalty fee for compulsory license for secondary transmission by cable systems.

§256.1 General.

This part establishes adjusted terms and rates for royalty payments in accordance with the provisions of 17 U.S.C. 111 and 801(b)(2)(A),(B),(C) and (D).

Upon compliance with 17 U.S.C. 111 and the terms and rates of this part, a cable system entity may engage in the activities set forth in 17 U.S.C. 111.

§256.2 Royalty fee for compulsory license for secondary transmission by cable systems.

(a) Commencing with the first semiannual accounting period of 1985 and for each semiannual accounting period thereafter, the royalty rates established by 17 U.S.C. 111(d)(1)(B) shall be as follows:

(1) .893 of 1 per centum of such gross receipts for the privilege of further transmitting any non-network programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (a)(2) through (4);

(2) .893 of 1 per centum of such gross receipts for the first distant signal equivalent;

(3) .563 of 1 per centum of such gross receipts for each of the second, third and fourth distant signal equivalents; and

(4) .265 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter.

(b) Commencing with the first semiannual accounting period of 1985 and for each semiannual accounting period thereafter, the gross receipts limitations established by 17 U.S.C. 111(d)(1)(C) and (D) shall be adjusted as follows:

(1) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmission of primary broadcast transmitters total \$146,000 or less, gross receipts of the cable system for the purpose of this paragraph shall be

computed by subtracting from such actual gross receipts the amount by which \$146,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than \$5,600. The royalty fee payable under this paragraph shall be 0.5 of 1 per centum regardless of the number of distant signal equivalents, if any; and

(2) If the actual gross receipts paid by the subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than \$146,000 but less than \$292,000, the royalty fee payable under this paragraph shall be: (i) 0.5 of 1 per centum of any gross receipts up to \$146,000 and (ii) 1 per centum of any gross receipts in excess of \$146,000 but less than \$292,000, regardless of the number of distant signal equivalents, if any.

(c) Notwithstanding paragraphs (a) and (d) of this section, commencing with the first accounting period of 1983 and for each semiannual accounting period thereafter, for each distant signal equivalent or fraction thereof not represented by carriage of:

(1) Any signal which was permitted (or, in the case of cable systems commencing operations after June 24, 1981, which would have been permitted) under the rules and regulations of the Federal Communications Commission in effect on June 24, 1981, or

(2) A signal of the same type (that is, independent, network, or non-commercial educational) substituted for such permitted signal, or

(3) A signal which was carried pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules were in effect on June 24, 1981; the royalty rate shall be, in lieu of the royalty rates specified in paragraphs (a) and (d) of this section, 3.75 per centum of the gross receipts of the cable systems for each distant signal equivalent; any fraction of a distant signal equivalent shall be computed at its fractional value.

(d) Commencing with the first semiannual accounting period of 1990 and for each semiannual accounting period thereafter, in the case of a cable system located outside the 35-mile specified zone of a commercial VHF station that places a predicted Grade B contour, in whole or in part, over the cable system, and that is not significantly viewed or otherwise exempt from the FCC's syndicated exclusivity rules in effect on June 24, 1981, for each distant signal equivalent or fraction thereof represented by the carriage of such commercial VHF station, the royalty rate shall be, in addition to the amount specified in paragraph (a) of this section,

(1) For cable systems located wholly or in part within a top 50 television market,

(i) .599 per centum of such gross receipts for the first distant signal equivalent;

(ii) .377 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents; and

(iii) .178 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter;

(2) For cable systems located wholly or in part within a second 50 television market,

(i) .300 per centum of such gross receipts for the first distant signal equivalent;

(ii) .189 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents; and

(iii) .089 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter;

(3) For purposes of this section, "top 50 television markets" and "second 50 television markets" shall be defined as the

comparable terms are defined or interpreted in accordance with 47 CFR 76.51, as effective June 24, 1981.

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 Copies of claims.
- 257.6 Separate claims required.

§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 to such fees 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 claims jointly or as a single claim.

§257.3 Content of claims.

(a) Claims filed by parties claiming to be entitled to satellite carrier 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 of the filing of the joint claim, and the name of each claimant to 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, or to list the name of each of its members or affiliates in the joint claim.

(4) For individual claims, a general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission by a satellite carrier of such works establishing a basis for the claim. For joint claims, a general statement of the nature of the joint claimants' copyrighted works and identification of at least one secondary transmission of one of the joint claimant's copyrighted works by a satellite carrier establishing a basis for the joint 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. If the good faith efforts of the Copyright Office to contact the claimant are frustrated because of failure to notify the Office of a name and/or address change, 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.

§257.4 Compliance with statutory dates.

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

(1) They are hand delivered, either by the claimant, the claimant's agent, or a private delivery carrier, to: Office of the Register of Copyrights, Room 403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington D.C. 20540, during normal business hours during the month of July, or

(2) They are addressed to: Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, D.C. 20024, and are deposited with sufficient postage with the United States Postal Service and bear a July U.S. postmark.

(b) Notwithstanding subsection (a), in any year in which July 31 falls on a Saturday, Sunday, holiday, or other nonbusiness day within the District of Columbia or the Federal Government, claims received by the Copyright Office by the first business day in August, or properly addressed and deposited with sufficient postage with the United States Postal Service and postmarked by the first business day in August, shall be considered timely filed.

(c) Claims dated only with a business meter that are received after July 31, will not be accepted as having been timely filed.

(d) No claim may be filed by facsimile transmission.

(e) In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove the claim was properly mailed if it was sent by certified mail return receipt requested, and the claimant can provide the receipt showing that it was properly mailed or timely received. No affidavit of an officer or employee of the claimant, or of a U.S. postal worker will be accepted as proof in lieu of the receipt.

§257.5 Copies of claims.

A claimant shall, for each claim submitted to the Copyright Office, file an original and two copies of the claim to satellite carrier royalty fees.

§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.

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

Sec.

- 258.1 General.
- 258.2 Definition of syndex-proof signal.
- 258.3 Royalty fee for secondary transmission of broadcast stations by satellite carriers.

§258.1 General.

This part 258 adjusts the rates of royalties payable under the compulsory license for the secondary transmission of broadcast stations under 17 U.S.C. 119.

§258.2 Definition of syndex-proof signal.

A satellite retransmission of a broadcast signal shall be deemed "syndex-proof" for purposes of §258(3)(b) if, during any semiannual reporting period, the retransmission does not include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission.

§258.3 Royalty fee for secondary transmission of broadcast stations by satellite carriers.

Commencing May 1, 1992, the royalty rate for the secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

- (a) 17.5 cents per subscriber per month for independent stations;
- (b) 14 cents per subscriber per month for independent stations whose signals are syndex-proof; and
- (c) 6 cents per subscriber per month for network stations and noncommercial educational stations.

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

Sec.

- 259.1 General.
- 259.2 Time of filing.
- 259.3 Contents of claims.
- 259.4 Content of notices regarding independent administrators.
- 259.5 Compliance with statutory dates.
- 259.6 Copies of claims.

§259.1 General.

This part prescribes procedures pursuant to 17 U.S.C. 1007(a)(1), whereby interested copyright parties, as defined in 17 U.S.C. 1001(7), claiming to be entitled to royalty payments made for the importation and distribution in the United States, or the manufacture and distribution in the United States, of digital audio recording devices and media pursuant to 17 U.S.C. 1006, shall file claims with the Copyright Office.

§259.2 Time of filing.

Commencing with January and February, 1993 and during January and February of each succeeding year, every interested copyright party claiming to be entitled to digital audio recording devices and media royalty payments made for quarterly periods ending during the previous calendar year shall file a claim with the Copyright Office. No royalty payments shall be distributed to any interested copyright party for the specified period unless such interested copyright party has filed a claim to such royalty payments during January or February of the following calendar year. Claimants may file claims jointly or as a single claim. A performing rights society shall be required to obtain from its members or affiliates separate, specific, and written authorization, signed by members, affiliates, or their representatives, to file claims to the Musical Works Fund, apart from their standard agreements, for purposes of royalties filing and fee distribution. However, such written authorization will not be required in cases where either, (a) The agreement between the performing rights society and its members of affiliates specifically authorizes such societies to represent their members or affiliates before the Copyright Office and/or Copyright Arbitration Royalty Panels in royalty filing and fee distribution proceedings; or (b) the agreement between the performing rights societies and their members or affiliates, as specified in a court order, authorizes such societies to represent their members or affiliates before the Copyright Office and/or Copyright Arbitration Royalty Panels in royalty filing and fee distribution proceedings.

§259.3 Contents of claims.

(a) Claims filed by interested copyright parties for digital audio recording devices and media royalty payments shall include the following information:

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

(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) A statement as to how the claimant fits within the definition of interested copyright party specified in 17 U.S.C. 1001(7).

(4) A statement as to whether the claim is being made against the Sound Recordings Fund or the Musical Works Fund, as set forth in 17 U.S.C. 1006(b) and as to which Subfund of the Sound Recordings Fund (i.e., the copyright owners or featured recording artists Subfund) or the Musical Works Fund (i.e., the music publishers or writers Subfund) the claim is being made against as set forth in 17 U.S.C. 1006(b)(1)—(2).

(5) Identification, establishing a basis for the claim, of at least one musical work or sound recording embodied in a digital music recording or an analog musical recording lawfully made under Title 17 U.S.C. that has been distributed (as that term is defined in 17 U.S.C. 1001(6)), and that, during the period to which the royalty payments claimed pertain, has been

(i) Distributed (as that term is defined in 17 U.S.C. 1001(6)) in the form of digital music recordings or analog musical recordings, or

(ii) Disseminated to the public in transmissions.

(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 notify the Copyright Office of such change. If the good faith efforts of the Copyright Office to contact the claimant are frustrated because of failure to notify the Office of a name and/or address change, the claim may be subject to dismissal.

(d) If the claim is a joint claim, it shall include a concise statement of the authorization for the filing of the joint claim, and the name of each claimant to the joint claim.

(e) If an interested copyright party intends to file claims against more than one Subfund, each such claim must be filed separately with the Copyright Office. Any claim that purports to file against more than one Subfund will be rejected.

§259.4 Content of notices regarding independent administrators.

(a) The independent administrator jointly appointed by the interested copyright parties, as defined in 17 U.S.C. 1001(7)(A), and the American Federation of Musicians (or any successor entity) for the purpose of managing, and ultimately distributing the royalty payments to nonfeatured musicians as defined in 17 U.S.C. 1006(b)(1), shall file a notice with the Copyright Office of his/her name and address.

(b) The independent administrator jointly appointed by the interested copyright parties, as defined in 17 U.S.C. 1001(7)(A), and the American Federation of Television and Radio Artists (or any successor entity) for the purpose of managing, and ultimately distributing the royalty payments to nonfeatured vocalists as defined in 17 U.S.C. 1006(b)(1), shall file a notice informing the Copyright Office of his/her full name and address.

(c) A notice filed under paragraph (a) or (b) of this section shall include the following information:

- (1) The full name of the independent administrator;
- (2) The telephone number and facsimile number, if any, full address, including a specific number and street name or rural route, of the place of business of the independent administrator.

(d) Notice shall bear the original signature of the independent administrator or a duly authorized representative of the independent administrator, and shall be filed with the Copyright Office no later than March 31 of each year, commencing March 31, 1994.

(e) No notice may be filed by facsimile transmission.

§259.5 Compliance with statutory dates.

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

(1) They are hand delivered, either by the claimant, the claimant's agent, or a private delivery carrier, to: Office of the Register of Copyrights, Room 403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington D.C. 20540, during normal business hours during the month of January or February, or

(2) They are addressed to: Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, D.C. 20024, and are deposited with sufficient postage with the United States Postal Service and bear a January or February U.S. postmark.

(b) Notwithstanding subsection (a), in any year in which the last day of February falls on Saturday, Sunday, a holiday, or other nonbusiness day within the District of Columbia or the Federal Government, claims received by the Copyright Office by the first business day in March, or properly addressed

and deposited with sufficient postage with the United States Postal Service and postmarked by the first business day in March, shall be considered timely filed.

(c) Claims dated only with a business meter that are received after the last day of February, will not be accepted as having been timely filed.

(d) No claim may be filed by facsimile transmission.

(e) In the event that a properly addressed and mailed claim is not timely received by the Copyright Office, a claimant may nonetheless prove that the claim was properly mailed if it was sent by certified mail return receipt requested, and the claimant can provide the receipt showing that it was properly mailed or timely received. No affidavit of an officer or employee of the claimant, or of a postal worker will be accepted as proof in lieu of the receipt.

§259.6 Copies of claims.

A claimant shall, for each claim submitted to the Copyright Office, file an original and two copies of the claim to digital audio recording devices and media royalty payments.

