



ANNOUNCEMENT

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

INITIATION OF VOLUNTARY NEGOTIATION PERIOD AND FINAL RULE

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS

The following excerpt is taken from Volume 60, Number 231 of the *Federal Register* for Friday, December 1, 1995 (pp. 61655-61657)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 255

[Docket No. RM 95-4 CARP]

Digital Performance Right in Sound Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Initiation of voluntary negotiation period and final rule.

SUMMARY: The Copyright Office is initiating the six month voluntary negotiation period for negotiating terms and rates for a compulsory license for digital subscription transmissions, and adopting the rate for a compulsory license for digital phonorecord delivery as required by the Digital Performance Right in Sound Recordings Act of 1995.

EFFECTIVE DATES: The effective date of the initiation of the six month voluntary negotiation period is December 1, 1995. The effective date of the rate for digital phonorecord deliveries is February 1, 1996.

ADDRESSES: Copies of voluntary license agreements and petitions, if sent by mail, should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. If hand delivered, they should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E. Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: Marilyn Kretsinger, Acting General Counsel, or William Roberts, Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station,

Washington, D.C. 20024, (202) 707-8380.

SUPPLEMENTARY INFORMATION: On November 1, 1995, the President signed into law the "Digital Performance Right in Sound Recordings Act of 1995" ("Digital Performance Act"). Pub. L. 104-39. The Digital Performance Act creates an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly the sound recordings by means of certain digital audio transmissions. See 17 U.S.C. 106(6).

Among the limitations on the performance of a sound recording publicly by means of a digital audio transmission is the creation of a new compulsory license for nonexempt subscription transmissions. The Digital Performance Act defines a "subscription transmission" as one that "is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." 17 U.S.C. 114(j)(8). All nonexempt subscription transmissions are eligible for §114 compulsory licensing provided they are not made by an "interactive service," which is defined in part as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient." See 17 U.S.C. 114(j)(4).

The terms and rates of the §114 statutory license are determined by voluntary negotiation among the affected parties and, where necessary, compulsory arbitration conducted under chapter 8 of the Copyright Act. The voluntary negotiation period was triggered on enactment of the Digital Performance Act, which directs the

Librarian of Congress, within 30 days of enactment, to publish in the **Federal Register** a notice initiating "voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments * * * " 17 U.S.C. 114(f)(1). The voluntary negotiation period is to last for six months, and any terms and rates negotiated during the period are to be effective from February 1, 1996, the effective date of the Digital Performance Act¹, through December 31, 2000. The Digital Performance Act requires that the terms and rates should be established separately for each different type of digital audio transmission service then in operation, but does not require or suggest that the terms and rates established must be different. The negotiations between copyright owners of sound recordings and the entities performing such recordings under the §114 license are to be governed by the provisions of §114(e) (which grants the negotiating parties an antitrust exemption), and each party is responsible for bearing its own costs.

In the legislative history to the Digital Performance Act, the Committee expressed hope that the voluntary negotiation period will lead to an industry-wide agreement concerning royalty terms and rates. S. Rep. No. 128, 104th Cong., 1st Sess. 29 (1995). If an agreement as to rates and terms is reached and there is no further controversy, then it is not necessary for the parties to submit to arbitration. In such cases, the Librarian of Congress will follow current rate regulation procedures and notify the public of the

¹ The effective date of the Digital Performance Act is February 1, 1996, with the exception of §§114(e) and (f) of the law, which became effective upon date of enactment.

proposed agreement in a notice and comment proceeding and, if no opposing comment is received from a party with a substantial interest and intent to participate in an arbitration proceeding, the Librarian will adopt the terms and rates embodied in the agreement without convening a copyright arbitration royalty panel. 37 CFR 251.63(b). If, however, no industry-wide agreement is reached, or only certain parties negotiate license agreements, then those copyright owners and entities performing sound recordings not subject to a voluntary agreement shall be bound by the terms and rates set by a CARP. Arbitration proceedings are initiated upon the filing of a petition for ratemaking with the Librarian of Congress during the 60 days immediately following the six month voluntary negotiation period. Arbitration cannot take place without the filing of a petition even if no voluntary license agreements are negotiated.

Initiation of Voluntary Negotiations

Pursuant to 17 U.S.C. 114(f)(1), the Copyright Office of the Library of Congress is initiating the six month voluntary negotiation period for sound recording copyright owners and entities that perform or authorize the performance of sound recordings by means of nonexempt digital subscription transmissions. The negotiation period is to run from December 1, 1995 to June 1, 1996. Parties which negotiate a voluntary license agreement during this period are encouraged to submit two copies of the agreement to the Copyright Office at the above listed address within 30 days of its execution.

Petitions

Pursuant to 17 U.S.C. 114(f)(2), those sound recording copyright owners and entities that perform or authorize the performance of sound recordings by means of nonexempt digital transmissions and who have not negotiated license agreements under §114(f)(1) are subject to arbitration upon the filing of a petition. Only those parties with a significant interest in the establishment of terms and rates for the §114 license may file a petition. Petitions must be submitted in accordance with 17 U.S.C. 803(a)(1), and may be filed at any time during the period commencing on June 2, 1996, and ending on August 1, 1996. Petitions should be submitted to the Copyright Office at the address listed in this notice. The petitioner must deliver an original and five copies of the petition to the Office.

If all the affected parties negotiate a single industry-wide agreement during the period described in §114(f)(1), they must petition the Librarian of Congress for acceptance of the agreement during

the same 60 day period. The Librarian will then follow the notice and comment procedures of 37 CFR 251.63(b). If a party with a significant interest and an intent to participate in an arbitration proceeding files an objection to the agreement during the notice and comment proceeding, then the Librarian shall initiate an arbitration proceeding in accordance with chapter 8 of the Copyright Act and 37 CFR 251 *et. seq.*

Digital Phonorecord Delivery

The Digital Performance Act also provides that the section 115 compulsory license to make and distribute phonorecord includes the* right of the compulsory licensee to make or authorize digital phonorecord deliveries. The Act identifies that the rate for all digital phonorecord deliveries made or authorized under a compulsory license on or before December 31, 1997, shall be the same as the rate in effect for the making and distribution of a physical phonorecord.² As a result, the Office is amending Part 255 of its rules to reflect the new royalty rate for digital phonorecord deliveries, and to adopt the same definition of digital phonorecord delivery as appears in the Digital Performance Act. The effective date of the rule change is February 1, 1996, the date on which the Digital Performance Act takes effect.

Good Cause Finding

Section 553(b)(3)(B) states that notice of a proposed rulemaking is not required "when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Because the Digital Performance Act requires that the new rate for digital phonorecord deliveries is to be the same as for the making and distribution of physical phonorecords until December 31, 1997, the Office is without any discretion in the matter. Therefore, it would be impracticable, unnecessary, and contrary to the public interest to solicit comments on a rule that is mandated by law.

List of Subjects in 37 CFR Part 255

Copyright, Recordings.**
For the reasons set forth in the

*Error; line should read:
"distribute phonorecords includes the"

**Error; line should read:
"Copyright, Music recordings"

² After December 31, 1997, the rate for digital phonorecord deliveries could be the same or different than the rate for making and distributing a physical phonorecord, depending on the outcome of negotiations or CARP proceedings scheduled to take place that year.

preamble, the Copyright Office amends 37 CFR 255 as follows:

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

1. The authority citation for Part 255 continues to read as follows:

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

2. Sec. 255.1 is revised to read as follows:

§255.1 General.

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

3. A new Sec. 255.4 is added to read as follows:

§255.4 Definition of digital phonorecord delivery

A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

4. A new Sec. 255.5 is added to read as follows:

§255.5 Royalty rate for digital phonorecord deliveries

For every digital phonorecord delivery made on or before December 31, 1997, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 6.95 cents, or 1.3 cents per minute of playing time or fraction thereof, whichever amount is larger.

Dated: November 24, 1995

Marilyn Kretsinger,
Acting General Counsel.

Approved:

James H. Billington,
The Librarian of Congress.

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