



ANNOUNCEMENT

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

NOTICE OF PRECONTROVERSY DISCOVERY SCHEDULE

DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

The following excerpt is taken from Volume 61, Number 239 of the *Federal Register* for Wednesday, December 11, 1996 (pp. 65243-65245)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 96-4 CARP DPRA]

Digital Phonorecord Delivery Rate Adjustment Proceeding

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of precontroversy discovery schedule.

SUMMARY: The Library of Congress is announcing a new precontroversy discovery period for determining reasonable rates and terms for digital transmissions that constitute a digital phonorecord delivery. The Library is also establishing new dates for the filing of petitions to convene a Copyright Arbitration Royalty Panel (CARP) and Notices of Intent to Participate. This action is intended to give all interested parties additional time to negotiate voluntary agreements.

EFFECTIVE DATES: Petitions to convene a CARP to determine the terms and rates for digital phonorecord deliveries must be filed by March 3, 1997. Notices of Intent to Participate must be filed by March 17, 1997.

ADDRESSES: Petitions to convene a CARP and Notices of Intent to Participate, when sent by mail, should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977,

Southwest Station, Washington, DC 20024. If hand delivered, they should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-407, First and Independence Avenues, SE, Washington, DC.

FOR FURTHER INFORMATION

CONTACT: William Roberts, Senior Attorney for Compulsory Licenses, or Tanya Sandros, Attorney Advisor, Copyright Arbitration Royalty Panels, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707 8380.

SUPPLEMENTARY INFORMATION: Background

On November 1, 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("Digital Performance Act"). Public Law No. 104-39, 109 Stat. 336. Among other things, it confirms and clarifies that the scope of the compulsory license to make and distribute phonorecords of nondramatic musical compositions includes the right to distribute or authorize distribution by means of a digital transmission which constitutes a "digital phonorecord delivery." 17 U.S.C. 115(c)(3)(A). A "digital phonorecord delivery" is defined as 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...." 17 U.S.C. 115(d).

The Digital Performance Act established that the rate for all digital phonorecord deliveries made or authorized under a compulsory license on or before December 31, 1997, is the

same rate in effect for the making and distribution of physical phonorecords. 17 U.S.C. 115(c)(3)(A)(i). For digital phonorecord deliveries made or authorized after December 31, 1997, the Digital Performance Act established a process that may take two-steps for determining the terms and rates. 17 U.S.C. 115(c)(3)(A)(ii). The first step in the process is a voluntary negotiation period initiated by the Librarian of Congress to enable copyright owners and users of the section 115 digital phonorecord delivery license to negotiate the terms and rates of the license. The Librarian initiated this period on July 17, 1996, and directed it to end on December 31, 1996. 61 FR 37213 (July 17, 1996).

The second step of the process is the convening of a CARP to determine reasonable terms and rates for digital phonorecord deliveries for parties not subject to a negotiated agreement. In the July 17, 1996, *Federal Register* notice, the Library stated that CARP proceedings would begin, in accordance with the rules of 37 CFR part 251, on January 31, 1997. 61 FR 37214. The Library also directed those parties not subject to a negotiated agreement to file their petitions to convene a CARP, as required by 17 U.S.C. 115(c)(3)(D), by January 10, 1997, and their Notices of Intent to Participate in CARP proceedings by January 17, 1997. *Id.* In addition, the Library directed interested parties to comment by November 8, 1996, on the possibility of consolidating the CARP proceeding to determine terms and rates for digital phonorecord deliveries with the proceeding to adjust the mechanical royalty rate for the making and distributing of physical phonorecords. 61 FR 37215.

Petition to Vacate

On November 8, 1996, the Library received a joint motion from the Recording Industry Association of America, the National Music Publishers' Association, Inc., and The Harry Fox Agency, Inc. (collectively, "the Parties") to vacate the scheduled dates appearing in the July 17, 1996, **Federal Register** notice for convening a CARP. The Parties submit that they are in continuous negotiations to reach a private agreement as to the terms and rates for digital phonorecord deliveries, and that the Library's announced schedule for CARP proceedings will prematurely terminate these negotiations and eliminate the likelihood that a private agreement will be reached. The Parties request an extension of the negotiation period until April 1, 1997, at which point they will inform the Library if they need additional time.

In support of their request, the Parties submit that a CARP proceeding to set terms and rates for digital phonorecord deliveries, if required, need not be completed in calendar year 1997. Despite the fact that the current rates for digital phonorecord deliveries expire on December 31, 1997, the Parties submit that any rates and terms established through a CARP proceeding, no matter when it is completed, will be effective beginning January 1, 1998. 17 U.S.C. 115(c)(3)(D). As a result, the Parties assert that no party will be prejudiced by vacating the current schedule and allowing the current negotiations to continue until completed.

In addition to their request to vacate the CARP schedule, the Parties oppose at this time the consolidation of the digital phonorecord delivery CARP proceeding with the CARP proceeding for adjusting the mechanical royalty rate for physical phonorecords. Should negotiations for a digital phonorecord delivery agreement fail, the Parties will notify the Library at that time as to their views on consolidation.

New Precontroversy Discovery Schedule

The Library is announcing a new and complete precontroversy discovery schedule for a CARP proceeding to establish the terms and rates for the section 115 license for digital phonorecord deliveries for parties not subject to a negotiated agreement. The Library is creating a new schedule to provide all interested parties with additional time to negotiate, subject to the following comments.

As the Parties correctly observed in their joint motion, the Library set the original schedule for CARP proceedings

based on the termination of the current rates for digital phonorecord deliveries on December 31, 1997. 61 FR 37214 ("Should negotiations fail and the Librarian be petitioned to convene a CARP, written direct cases would have to be filed by January 31, 1997, if the precontroversy period (three months), the arbitration proceeding (six months) and the Librarian's review of the CARP's decision (two months) is to conclude by December 31, 1997. Otherwise, there will be a lapse in time when no rates apply to digital phonorecord deliveries."). The Parties submit that there will not be any lapse because 17 U.S.C. 115(c)(3)(D) provides that terms and rates determined through a CARP proceeding are effective on January 1, 1998, no matter when adopted. As a result, the Parties view a CARP proceeding as an open-ended process, in that it could take place in 1998, 1999, or any subsequent year with a retroactive application to January 1, 1998.

The Library does not share the Parties' view that the first CARP proceeding to set terms and rates for digital phonorecord deliveries is so open-ended. Congress did intend that the parties have a sufficient period of time to negotiate voluntary agreements, 141 Cong. Rec. S11,945, S11,958 (daily ed. August 8, 1995), but there is no indication that the period was to be indefinite. The statute is clear that subsequent CARP proceedings to adjust terms and rates for digital phonorecord deliveries must be "repeated and concluded...in each fifth calendar year after 1997". 17 U.S.C. 115(c)(3)(F). The statute is silent as to how long the 1997 CARP proceeding is to take, but it is reasonable to conclude from the language of section 115(c)(3)(F) that Congress did not intend the initiation and conclusion of the CARP proceeding to take place much after the current rates expire on December 31, 1997, notwithstanding that new terms and rates are effective on January 1, 1998.

The Library has balanced its interpretation of what Congress desired for the first CARP proceeding for digital phonorecord deliveries with the interest of promoting voluntary agreements and, is therefore, announcing a new schedule. The Library is doing this in no small part because of the representation of the Parties that a voluntary agreement is in the offing. However, the Parties, and any others who file a Notice of Intent to Participate in the CARP proceeding, are put on notice that this is the last time the Library will be able to alter the schedule for this proceeding. The schedule described below gives all parties almost one year to negotiate voluntary agreements, a decidedly longer period of time than Congress has established for

future digital phonorecord delivery proceedings.

The following is the procedural schedule for the digital phonorecord delivery CARP proceeding, including the filing deadlines for Notices of Intent to Participate, additional comments on the advisability of consolidating the digital phonorecord delivery proceeding with the proceeding for adjustment of the mechanical royalty rate for physical phonorecords, and the deadline for filing petitions to initiate a CARP proceeding for digital phonorecord delivery transmissions.

Action	Deadline
Petitions to Initiate CARP Proceeding to Establish Terms and Rates for Digital Phonorecord Deliveries	March 3, 1997
Notices of Intent to Participate	March 17, 1997
Comments on Consolidation of Digital Phonorecord Delivery CARP Proceeding With CARP Proceeding for Physical Phonorecords	March 17, 1997
Filing of Written Direct Cases	April 1, 1997
Requests for Underlying Documents to Written Direct Cases	April 8, 1997
Responses to Requests for Underlying Documents	April 14, 1997
Completion of Document Production	April 18, 1997
Follow-Up Request for Underlying Documents	April 23, 1997
Responses to Follow-up Requests	April 30, 1997
Motions Related to Document Production	May 5, 1997
Production of Documents in Response to Follow-Up Requests	May 12, 1997
All Other Motions, Petitions and Objections	May 15, 1997
Initiate CARP	June 23, 1997

The precontroversy discovery period, as specified by 37 CFR 251.45(b), begins on April 1, 1997, with the filing of written

direct cases by each party. Each party in this proceeding who has filed a Notice of Intent to Participate must file a written direct case on the date prescribed above. Failure to submit a timely filed written direct case will result in dismissal of that party's case. Parties must comply with the form and content of written direct cases as prescribed in §251.43. Each party to the proceeding must deliver a complete copy of its written direct case to each of the other parties to the proceeding, as well as file a complete copy with the Copyright Office by close of business on April 1, 1997, the first day of the 45-day period.

After the filing of the written direct cases, document production will proceed according to the above-described schedule. Each party may request underlying documents related to each of the other parties' written direct cases by April 8, 1997, and responses to those requests are due by April 14, 1997. Documents which are produced as a result of the requests must be exchanged by April 18, 1996. It is important to note that all initial document requests must be made by the April 8, 1997, deadline. Thus, for example, if one party asserts facts that expressly rely on the results of a particular study that was not included in the written direct case, another party desiring production of that study must make its request by April 8; otherwise, the party is not entitled to production of the study.

The precontroversy discovery schedule also establishes deadlines for follow-up discovery requests. Follow-up requests are due by April 23, 1997, and responses to those requests are due by April 30, 1997. Any documentation produced as a result of a follow-up request must be exchanged by May 12, 1997. An example of a follow-up request would be as follows. In the above example, one party expressly relies on the results of a particular study which is not included in its written direct case. As noted above, a party desiring production of that study or survey must make its request by April 8, 1997. If, after receiving a copy of the study, the reviewing party determines that the study heavily relies on the results of a statistical survey, it would be appropriate for that party to make a follow-up request for production of the statistical survey by the April 23, 1997, deadline. Again, failure to make a timely follow-up request would waive that party's right to request production of the survey.

In addition to the deadlines for document requests and production, there are two deadlines for the filing of precontroversy motions. Motions related to document production must be filed by May 5, 1997. Typically, these motions are

motions to compel production of requested documents for failure to produce them, but they may also be motions for protective orders. Finally, all other motions, petitions and objections must be filed by May 15, 1997, the final day of the 45-day precontroversy discovery period. These motions, petitions, and objections include, but are not limited to, objections to arbitrators appearing on the arbitrator list under 37 CFR 251.4, and petitions to dispense with formal hearings under §251.41(b).

Due to the strict time limitations between the procedural steps of the precontroversy discovery schedule, we are requiring that all discovery requests and responses to such requests be served by hand or fax on the party to whom such response or request is directed. Filing of requests and responses with the Copyright Office is not required.

Filing and service of all precontroversy motions, petitions, objections, oppositions and replies shall be as follows. In order to be considered properly filed with the Librarian and/or Copyright Office, all pleadings must be brought to the Copyright Office at the following address no later than 5 p.m. of the filing deadline date: Office of the Register of Copyrights, Room LM 403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, DC 20540. The form and content of all motions, petitions, objections, oppositions and replies filed with the Office must be in compliance with §§251.44(b)-(e). As provided in §251.45(b), oppositions to any motions or petitions must be filed with the Office no later than seven business days from the date of filing of such motion or petition. Replies are due five business days from the date of filing of such oppositions. Service of all motions, petitions, objections, oppositions and replies must be made on counsel or the parties by means no slower than overnight express mail on the same day the pleading is filed.

DATED: December 6, 1996

Marilyn J. Kretsinger,
Acting General Counsel.
[FR Doc. 96—31425 Filed 12-10-96; 8:45 am]

[BILLING CODE 1410-33-P]