



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

NOTICE OF PROPOSED RULEMAKING.

MECHANICAL AND DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 255

[Docket No. 96-4 CARP DPRA]

Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is submitting for public comment proposed regulations which set the royalty rate for the delivery of digital phonorecords in general and defer until the next scheduled rate adjustment proceeding further consideration of the royalty rate for the delivery of a digital phonorecord where the reproduction or distribution is incidental to the transmission which constitutes a digital phonorecord delivery.

DATES: Comments are due by January 25, 1999.

ADDRESSES: If sent by mail, an original and five copies of comments, should be addressed to: Copyright Arbitration Royalty Panel ("CARP"), PO Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, an original and five copies of comments, should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE., Washington, DC 20559-6000.

FOR FURTHER INFORMATION

CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney

Advisor, Copyright Arbitration Royalty Panel ("CARP"), PO Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:

On November 1, 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("Digital Performance Act"). Pub. L. 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 of a phonorecord of that sound recording * * *." 17 U.S.C. 115(d).

The Digital Performance Act established that the rate for all digital phonorecord deliveries ("DPDs") made or authorized under a compulsory license on or before December 31, 1997, was 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 two-step process 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 Copyright Arbitration Royalty Panel ("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 (July 17, 1996). 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. 61 FR 37214-15 (July 17, 1996). 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 (July 17, 1996).

On November 8, 1996, the Library received a joint motion from the Recording Industry Association of America ("RIAA"), the National Music Publishers' Association, Inc. ("NMPA"), and The Harry Fox Agency, Inc. ("Harry Fox") to vacate the scheduled dates appearing in the July 17, 1996, **Federal Register** notice for convening a CARP. The Library vacated the schedule on December 11, 1996, and established a new precontroversy discovery schedule and date for the filing of Notices of Intent to Participate. 61 FR 65243 (December 11, 1996).

After publication of the new schedule, representatives of the RIAA, NMPA and Harry Fox informed the Library that terms

and rates for digital phonorecord deliveries could be negotiated through voluntary agreement and requested that the Library vacate the new schedule to allow sufficient time for such negotiations. The Library vacated the new schedule on February 3, 1997. 62 FR 5057 (February 3, 1997). In time, the parties did reach a voluntary agreement and, pursuant to the rules, the Library published the proposed rates and terms for digital phonorecord deliveries for public comment. 62 FR 63506 (December 1, 1997). In that notice of proposed rulemaking, the Library specified that any party that objected to the proposed rates and terms was required to file a Notice of Intent to Participate and was expected to fully participate in a CARP proceeding. 62 FR 63507 (December 1, 1997).¹

Three parties filed comments to the proposed terms and rates, the United States Telephone Association ("USTA"), the Coalition of Internet Webcasters ("Webcasters"), and Broadcast Music, Inc. ("BMI"). USTA and the Webcasters also filed their Notices of Intent to Participate because they challenged directly the proposed rates and terms for the delivery of incidental digital phonorecord deliveries. BMI, on the other hand, did not file a Notice of Intent to Participate

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because it limited its comments to a request for an amendment to the proposed regulations which would "state that nothing herein affects the public performance right under 17 U.S.C. 106(4)." BMI comment at 3.

These comments served to identify heretofore unknown parties who have a significant interest in the setting of the rates and terms for the delivery of digital phonorecord deliveries. Consequently, the parties entered a new round of negotiations in an attempt to resolve the noted concerns and reach a voluntary agreement.

On October 14, 1998, the NMPA, SGA, and RIAA submitted a memorandum to the Copyright Office requesting that it adopt the unopposed rate for the delivery of digital phonorecords in general and the schedule for future rate adjustment proceedings set forth in the November 5, 1997, petition, and that it either adopt the proposed rates and terms for incidental digital phonorecord deliveries set forth in the proposed regulations or sever and

defer further consideration of these rates and terms until the next rate adjustment proceeding. The Copyright Office then offered the parties who had filed a Notice of Intent to Participate an opportunity to comment on the memorandum. See Order, Docket No. 96-4 CARP DPRA (October 16, 1998).

USTA responded that its concerns were fully addressed by the memorandum; and the three performing rights organizations, ASCAP, BMI, and SESAC, filed a joint comment which generally supported the recommendations outlined in the NMPA/SGA/RIAA memorandum, provided that the final regulations included a provision recognizing that the section 115 license does not affect in any way the public performance rights granted under 17 U.S.C. 106(4). Similarly, the Webcasters filed comments which supported the adoption of the rate and terms for digital phonorecord deliveries in general and the suggestion to sever and defer further consideration of rates and terms for incidental DPDs until the next rate adjustment proceeding with two modifications. First, the Webcasters sought an amendment to the proposed rules that would allow a party to petition the Copyright Office for a proceeding to set a rate for the transmission of an incidental digital phonorecord delivery prior to the next scheduled date. Second, the Webcasters requested that no rate be set for the incidental DPDs prior to the completion of a study required by Congress under section 104 of the Digital Millennium Copyright Act of 1998 ("DMCA"), subject to the right to petition for an interim rate adjustment proceeding.

In reply comments, NMPA/SGA/RIAA agreed to the ASCAP/BMI/SESAC suggestion for a clarification and the Webcasters' suggestion for a right to petition for a rate adjustment proceeding for incidental DPDs during the interim period. However, they did not support the Webcasters' request to postpone the rate adjustment proceeding for incidental DPDs until the Office completes its study on the operation of sections 109 and 117 of the Copyright Act, 17 U.S.C., as effected by Title I of the DMCA.

On December 4, 1998, the NMPA/SGA/RIAA submitted a joint petition for adjustment of digital phonorecord delivery royalty rates, incorporating the proposed modifications except for the suggestion to postpone the rate adjustment proceeding until the completion of the study. The petition was filed pursuant to 17 U.S.C. 115(c) and 803(a) and 37 CFR 251.63(b). Section 251.63(b) allows the Librarian, at the request of the parties, to adopt rates and terms embodied in a proposed settlement without convening an arbitration panel, once the Librarian conducts a notice-and-comment proceeding so long as no party with an intent to participate in a CARP proceeding files a substantive

comment opposing the proposed regulations. See e.g., 62 FR 63502 (December 1, 1997) (proposing regulations setting rates and terms for the section 118 license).

Accordingly, the Copyright Office is publishing for public comment the rates and terms embodied in the December 4, 1998, joint petition. Any party who objects to the proposed rates and terms for digital phonorecord deliveries must file a written objection with the Copyright Office and an accompanying Notice of Intent to Participate, if the party has not already done so. The content of the written challenge should describe the party's interest in the proceeding, the proposed rule the party finds objectionable, and the reasons for the challenge. If no comments are received, the regulations shall become final upon publication of a final rule, and pursuant to proposed Secs. 255.5(b) and 255.7 will cover the period from January 1, 1998, to January 1, 2001. See 17 U.S.C. 115(c)(3)(A).

List of Subjects in 37 CFR Part 255

Copyright, Recordings.

For the reasons set forth in the preamble, the Library proposes to amend 37 CFR part 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. Revise Sec. 255.5 to read as follows:

§255.5 Royalty rate for digital phonorecord deliveries in general.

(a) 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.

(b) For every digital phonorecord delivery made on or after January 1, 1998, except for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, as specified in 17 U.S.C. 115(c)(3)(C) and (D), the royalty rate payable with respect to each work embodied in the phonorecord shall be the royalty rate prescribed in Sec. 255.3 for the making and distribution of a phonorecord made and distributed on the date of the digital phonorecord delivery (the "Physical Rate"). In any future proceeding

¹On July 1, 1998, the Copyright Office published a notice requesting that any other party with an interest in participating in a CARP proceeding to establish the rates and terms for digital phonorecord deliveries file a Notice of Intent to Participate. 63 FR 35984 (July 1, 1998). In response to this request, the Office received Notices of Intent to Participate from the RIAA, NMPA, Harry Fox, the Songwriters Guild of America ("SGA"), the American Federation of Television and Radio Artists ("AFTRA"), America Online, Inc. ("AOL"), Digital Cable Radio Associates ("DCR"), SESAC, Inc., and the American Society for Composers, Authors and Publishers ("ASCAP").

under 17 U.S.C. 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

3. Add Sec. 255.6 through Sec. 255.8 to read as follows:

§255.6 Royalty rate for incidental digital phonorecord deliveries.

The royalty rate for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes a digital phonorecord delivery, as specified in 17 U.S.C. 115(c)(3)(C) and (D), is deferred for consideration until the next digital phonorecord delivery rate adjustment proceeding pursuant to the schedule set forth in Sec. 255.7; provided, however, that any owner or user of a copyrighted work with a significant interest in such royalty rate, as provided in 17 U.S.C. 803(a)(1), may petition the Librarian of Congress to establish a rate prior to the commencement of the next digital

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phonorecord delivery rate adjustment proceeding. In the event such a petition is filed, the Librarian of Congress shall proceed in accordance with 17 U.S.C. 115(c)(3)(D), and all applicable regulations, as though the petition had been filed in accordance with 17 U.S.C. 803(a)(1).

§255.7 Future Proceedings.

The procedures specified in 17 U.S.C. 115(c)(3)(C) shall be repeated in 1999, 2001, 2003, and 2006 so as to determine the applicable rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2001, 2003, 2005, and 2008. The procedures specified in 17 U.S.C. 115(c)(3)(D) shall be repeated, in the absence of license agreements negotiated under 17 U.S.C. 115(c)(3)(B) and (C), upon the filing of a petition in accordance with 17 U.S.C. 803(a)(1), in 2000, 2002, 2004, and 2007 so as to determine new rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2001, 2003, 2005, and 2008. Thereafter, the procedures specified in 17 U.S.C. 115(c)(3)(C) and (D) shall be repeated in each fifth calendar year. Notwithstanding the foregoing, different years for the repeating of such proceedings may be determined in accordance with 17 U.S.C. 115(c)(3)(C) and (D).

§255.8 Public performances of sound recordings and musical works.

Nothing in this part annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under 17 U.S.C. 106(4) and 106(6).

Dated: December 18, 1998.

Marybeth Peters,
Register of Copyrights.

Approved by:
James H. Billington,
The Librarian of Congress.

[FR Doc. 98-34027 Filed 12-23-98; 8:45 am]

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