



ANNOUNCEMENT

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

COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

ANNOUNCEMENT OF AVAILABILITY OF BACKGROUND PAPER AND NOTICE OF MEETING

The following excerpt is taken from Volume 44, No. 175 of the Federal Register for Friday, September 7, 1979, (pp. 52260-52262).

LIBRARY OF CONGRESS

Copyright Office

[37 CFR Part 201]

[Docket RM 77-3A]

Compulsory License for Making and Distributing Phonorecords

AGENCY: Library of Congress, Copyright Office.

ACTION: Announcement of availability of background paper and notice of meeting.

SUMMARY: This notice is issued to advise the public that the Copyright Office of the Library of Congress (1) has prepared a background paper addressing certain aspects of § 201.18 and § 201.19 of its regulations, as amended (or an interim basis) on * October 30, 1978; and (2) will hold a public meeting on October 19, 1979, to consider comments on the principles and conclusions embodied in the background paper. These regulations were issued to implement section 115 of the Copyright Act of 1976, which establishes a compulsory license for the making and distribution of phonorecords of nondramatic musical works. The effect of the interim regulations, as amended, was to establish requirements governing the content and service of

certain notices and Statements of Account to be filed by persons exercising the compulsory license. After extensive hearings, public comments, and study of the problem, the Copyright Office has reached tentative conclusions on the principal points in issue, and these conclusions are described and discussed in some detail in the background paper. Following an informal discussion of these conclusions at the public meeting on October 19, 1979, the Copyright Office will institute further proceedings aimed at the issuance of final regulations on the subject.

DATES: The meeting will be held at 9:30 a.m. on October 19, 1979.

ADDRESSES: The background paper, embodying the Copyright Office's tentative conclusions with respect to the calculation of royalty payments under section 115, will form the basis of discussion at the meeting to be held on October 19, 1979. Copies of the paper may be obtained by writing to or calling: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Caller No. 2999, Arlington, Virginia 22202, (703) 557-8731. If you wish to pick up a copy in person, you should come to the following address: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Crystal Mall Building No. 2, Room 519, 1921 Jefferson

Davis Highway, Arlington, Virginia. The meeting to discuss the conclusions outlined in the background paper will be held in Room 910, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, Virginia.

Advance requests to participate will not be required, but will be helpful to the Copyright Office in planning the meeting. Similarly, written comments on the background paper (or on other written comments) are not required but could prove useful to the Copyright Office and to the other parties. Anyone filing written comments should submit ten copies, preferably on or before October 12, 1979. Requests to participate and written comments should be addressed, if by mail, to: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Caller No. 2999, Arlington, Virginia 22202, (703) 557-8731. Or, if delivered by hand, requests or comments should be brought to: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Crystal Mall Building No. 2, Room 519, 1921 Jefferson Davis Highway, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559, (703) 557-8731.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to bring

*Error; line should read: "amended (on an interim basis) on"

together the representatives of the interests concerned with the calculation of royalty payments under section 115, for a full, informal discussion, in an effort to sharpen, narrow, and, if possible, settle remaining issues and thus to assist the Copyright Office in issuing final regulations on the subject. To encourage an atmosphere of free-wheeling, open, give-and-take interchanges among the parties, the Copyright Office decided: (1) to make the meeting open for participation or attendance by the public; (2) to concentrate on discussion of issues among the participants rather than formal presentations; and (3) to prepare summary minutes of the meeting rather than a verbatim transcript.

Section 115 of 17 U.S.C. provides that "[w]hen phonorecords of a nondramatic musical work have been distributed to the public in the United States under authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work" for certain purposes. A compulsory license permits that use of a copyrighted work without the consent of the copyright owner if certain conditions are met and royalties paid.

Paragraphs (b) and (c) of section 115 direct the Copyright Office to issue regulations governing the content and filing of certain notices and Statements of Account under this section. On April 26, 1977, in accordance with an Advance Notice of Proposed Rulemaking (42 FR 16837), we held a public hearing aimed at formulating regulations under this section. After considering the testimony given at the hearing and in supplemental statements, on December 29, 1977 (42 FR 64889), we issued interim regulations. We then considered public comments received in response to the interim regulations and, on September 28, 1978 (43 FR 44511), we: (1) Adopted amendments to the interim regulations; and (2) announced a public hearing to be held on November 28 and 29, 1978, to take testimony on the interim regulations as amended. The record remained open until January 31, 1979 (43 FR 57252), for receipt of written statements from any interested person, including supplemental statements from the witnesses.

Paragraph (c)(2) of section 115 states that statutory royalties are payable for every phonorecord made and distributed under the license; it defines distribution as occurring when "the person exercising the compulsory license has voluntarily and permanently parted" with possession of the phonorecord. In

discussing the meaning of the term "permanent" for these purposes, the Report of the Judiciary Committee of the House of Representatives states (H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. at 110-111):

Under existing practices in the record industry, phonorecords are distributed to wholesalers and retailers with the privilege of returning unsold copies for credit or exchange. As a result, the number of recordings that have been "permanently" distributed will not usually be known until some time—six or seven months on the average—after the initial distribution. In recognition of this problem, it has become a well-established industry practice, under negotiated licenses, for record companies to maintain reasonable reserves of the mechanical royalties due the copyright owners against which royalties on the returns can be offset. The Committee recognizes the possibility that, without proper safeguards, the maintenance of such reserves could be manipulated to avoid making payments of the full amounts owing to copyright owners. *Under these circumstances, the regulations prescribed by the Register of Copyrights should contain detailed provisions ensuring that the ultimate disposition of every phonorecord made under a compulsory license is accounted for, and that payment is made for every phonorecord "voluntarily and permanently" distributed. In particular, the Register should prescribe a point in time when, for accounting purposes under section 115, a phonorecord will be considered "permanently distributed," and should prescribe the situations in which a compulsory licensee is barred from maintaining reserves (e.g., situations in which the compulsory licensee has frequently failed to make payments in the past.) [Italics added]*

Most of the testimony at the public hearing held on November 28 and 29, 1978, dealt with our amended interim regulations [§ 201.19(a)(4)] designed to implement this provision. The record of the hearing, including the testimony and the written statements received before and after the hearing, helped a great deal to clarify the difficult accounting issues presented by section 115. The Copyright Office has given careful consideration to the information and arguments that came out of the November 1978 hearing, and has reached some tentative conclusions as to what our final regulations on the point should provide. These conclusions have been set out in the background paper referred to above, and will be the subject of the meeting to be held on October 19, 1979.

The following is a very brief summary of the conclusions set out and discussed in detail in our background paper:

1. *Certain earlier conclusions confirmed.* The hearing served to reinforce certain conclusions underlying our interim regulations now in effect:

(a) *GAAP.* Reserves must be estimated in accordance with generally accepted accounting principles (GAAP).

(b) *One-year cut off.* The "point in time" when a phonorecord is considered "permanently distributed"—when reserves must be paid out—is one year, measured from the month of a particular shipment of phonorecords (not from the initial release date of the recording).

(c) *No percentage limitation.* GAAP would control the setting of reserve percentages, and there would be no fixed percentage limitations on the number of phonorecords that may be reserved.

(d) *No refunds under regulations.* The regulations will not include a provision explicitly requiring the refund of royalties in the case of overpayments.

(e) *No middle paragraph.* The CPA certification of the Annual Statement of Account would not contain a "middle paragraph" allowing the accountant to explain or qualify the Statement.

2. *Changes in earlier conclusions.* The hearing convinced us that some of our earlier conclusions were wrong, and that our interim regulations should be changed accordingly:

(a) *No tracking.* We now conclude that a requirement for actually tracking particular phonorecord shipments, and determining whether phonorecords are destroyed or reshipped, is impractical.

(b) *Use of FOFI.* Instead of tracking, the compulsory licensee should be required to reduce phonorecord reserves in accordance with the "first-out-first-in" (FOFI) accounting convention.

(c) *New formula for calculating royalties.* As a result of the foregoing conclusions, we have developed a formula to be used in computing monthly royalty payments under the compulsory license.

Step 1: Compute the total gross number of phonorecords shipped in the given month. *(Add* the gross number relinquished from possession for purposes other than sale *and* the gross number relinquished from possession for purposes of sale.)

Step 2: Subtract the number that have been reserved in the given month. *(Deduct* from the total arrived at in Step 1 the gross number of phonorecords relinquished from possession for purposes of sale in the given month that have been reserved under GAAP.)

Step 3: Add the amount of lapsed reserves. *(Add,* to the subtotal resulting from Step 2, the number of phonorecords relinquished from possession for purposes of sale that have been reserved in the 12th previous month and have not been offset under FOFI by actual returns. *This gives you the*

monthly total of voluntarily distributed phonorecords.

Step 4: Multiply by the statutory royalty rate. (Multiply the result of Step 3 by the statutory rate of 2¼ cents or ½ cent per minute or fraction of playing time, whichever is larger; *this gives you the monthly royalty payment.*)

Our hope is that those participating in the October 19, 1979, meeting will concentrate their comments on this formula, including the use of FOPI, and that they will not restate positions and arguments already amply documented in the record of these proceedings. The record of this phase of the proceedings will be kept open until November 19, 1979, for receipt of written supplemental comments.

(17 U.S.C. 115; 702; 708.)

Dated: August 28, 1979.

Barbara Ringer,
Register of Copyrights.

Approved:

Donald C. Curran,
Acting Librarian of Congress.

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