



# ANNOUNCEMENT

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

## NOTICE OF PROPOSED RULEMAKING

### DIGITAL RECORDING DEVICES AND MEDIA; AUDITING OF, AND CONFIDENTIAL ACCESS TO, STATEMENTS OF ACCOUNT

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**LIBRARY OF CONGRESS**

Copyright Office

37 CFR Part 201

[Docket No. RM 93-2]

**Digital Recording Devices and Media:  
Auditing of, and Confidential Access to,  
Statements of Account.**

**AGENCY:** Copyright Office, Library of Congress.  
**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document is issued to advise the public that the U.S. Copyright Office in the Library of Congress is proposing regulations to implement portions of the Audio Home Recording Act of 1992. Section 1003 of title 17 of the United States Code imposes an obligation to make royalty payments on persons who import and distribute in the United States, or manufacture and distribute in the United States, any digital audio recording device or digital audio recording medium. In addition to remitting the royalties to the Copyright Office, the importer or manufacturer must file Statements of Account with the Copyright Office. Section 1003 also provides that the Register of Copyrights shall issue regulations to provide for the verification and audit of such statements and to protect the confidentiality of information contained in such statements. The effect of this proposed regulation is to provide for the access to and confidentiality of such statements. The Copyright Office also solicits comments about the form and content of regulations govern-

ing verification and audit of Statements of Account.

**DATES:** Public comments on the proposed regulation should be received on or before July 6, 1993. Reply comments should be received on or before August 5, 1993.

**ADDRESSES:** Ten copies of written comments should be addressed, if sent by mail to: Library of Congress, Department 100, Washington, D.C. 20540. If delivered by hand, copies should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room 407, First and Independence Avenue, S.E., Washington, D.C. 20559.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, General Counsel, Copyright Office Library of Congress, Washington, D.C. 20540. Telephone (202) 707-8380.

**SUPPLEMENTARY INFORMATION:**

**1. Background.**

Effective October 28, 1992, the Audio Home Recording Act (AHRA), Public Law 102-563, 106 Stat. 4237, created new statutory obligations in a new Chapter 10 of title 17 U.S.C. The AHRA provides solutions to the policy problems presented by consumer products that make nearly perfect copies of digital sound recordings. It 1) provides consumers an exemption for private noncommercial home recording of analog or digital sound recordings, 2) mandates that digital audio recorders restrict serial copying by technological means, and 3) requires that manufacturers and importers of digital audio recorders and media must file an initial notice of distribution, file state-

ments of account, and pay royalties upon distribution in the United States of digital audio recording devices and media. The AHRA also directs the Register to issue regulations to provide for the verification and audit of such Statements of Account and to protect the confidentiality of the information contained in such statements and to provide for the disclosure, in confidence, of such statements to interested copyright parties.

In separate proceedings, the Copyright Office issued interim regulations governing the filing of notices of initial distribution (RM 92-6) 57 Fed. Reg. 55464 (November 25, 1992) and to establish requirements governing the filing dates, frequency of filing, and content of the Statements of Account that must be filed by persons exercising the statutory license (RM 92-8) 58 Fed. Reg. 9544 (February 22, 1993). In this proceeding the Office is taking a third step to implement the AHRA, by proposing rules for the disclosure and confidentiality of information contained in Statements of Account, and by soliciting public comment regarding the form and content of regulations governing verification and audit of Statements of Account.

Section 1003(c)(2) of the Audio Home Recording Act of 1992 provides in part, that the Register shall issue regulations to provide for the verification and audit of statements of account and to protect the confidentiality of the information contained in such statements. Such regulations shall provide for the disclosure, in confidence, of such statements to interested copyright parties.

Section 1001(7) defines an "interested copyright party" and creates four categories of persons or entities who may

be given access to AHRA Statements of Account. The first category is the owner of the exclusive right under section 106(1) of title 17 to reproduce a sound recording of a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under title 17 that has been distributed.

The second category is the legal or beneficial owner of, or the person that controls, the right to reproduce in a digital musical recording or analog musical recording a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under title 17 that has been distributed.

The third category is a featured recording artist who performs on a sound recording that has been distributed.

The fourth category is any association or other organization which either represents persons specified in the first three categories, or is engaged in licensing rights in musical works to music users on behalf of writers and publishers.

## 2. Proposed Access Regulations

The general public is denied access to Copyright Office files of Statements of Account for Digital Audio Recording Products. Access will be granted to interested copyright parties and their duly authorized legal representatives in accordance with these regulations. Only those interested copyright parties named in section 1001(7) of title 17 U.S.C. shall have access to such information. They shall be required to sign a certification to limit the use of the information to verification functions under section 1003(c)(2) and any enforcement actions that may result from such verification procedures. Importers and manufacturers will have access to their own Statements of Accounts.

Employees of the Copyright Office and the Copyright Royalty Tribunal who require statement of account information in the performance of their duties will also have access to such information.

The Office will provide a DART Statement of Account Access Form, which must be used by interested copyright parties, importers, or manufacturers for access to the statements. The completed form will contain certification of the identity of the requestor and the prospective use of the information. The Office provides the forms free of charge.

The Office will charge a fee of \$10 to make a copy of a statement plus the statutory fee of \$8 if the copy is to be certified, and \$0.50 for each page of any other material in the statement file.

## 3. Verification and Audit

Pursuant to section 1003(c)(2) of title 17 United States Code, the Register of Copyrights shall issue regulations to provide for the verification and audit of AHRA Statements of Account. Although the AHRA does not explicitly state who shall verify and audit, the Copyright Office assumes the interested copyright parties as defined in section 1001(7) are entitled to verify and audit the Statements of Account. Presumably, one or more interested copyright parties will select an independent certified public accountant to conduct the audit and verify the accuracy of the information disclosed in the quarterly and annual Statements of Account filed by manufacturers and importers with the Copyright Office.

The Senate version of the bill (S. 1623, 102d Congress, First Session) later enacted as the Audio Home Recording Act of 1992 contained detailed provisions regarding verification and audit which were dropped from the bill as passed. The Copyright Office generally understands that the Congress eliminated these detailed provisions in the interest of shortening the bill and in order to provide regulatory flexibility. The Office assumes that Congress did not intend to disapprove of S. 1623's detailed verification and audit provisions. Accordingly, the Copyright Office is inclined to adopt the relevant provisions of S. 1623 and the accompanying explanation in Senate Report 102-294, 102d Congress, 2d Session 55-57 (1992) as the framework for the regulations governing verification and audit of AHRA Statements of Account.

The Copyright Office is not proposing the details of a verification and audit regulation at this time. By this Notice, however, we solicit public comments and detailed proposals for the form and content of a verification and audit regulation.

In addition to general comment and detailed proposals, the Office solicits public comment on the following specific questions.

1. Does the Copyright Office have authority to prescribe regulations authorizing the audit of business records held by manufacturers and importers? If yes, how should that authority be exercised? Should the Office simply require that the business records be maintained for a certain period of years and be made available as specified in regulations to interested copyright parties?

2. Should the Copyright Office specify that "generally accepted audit standards" shall mean the auditing standards applied by the American Institute of Certified Public Accountants?

3. What is the extent of the Register's duty to determine the independence of an auditor? How can the Register's responsibilities be carried out?

4. How long should the Copyright Office retain the results of a verification audit?

5. What is a reasonable period to notify manufacturers and importers of an impending audit? To whom should the notice be given? What is a reasonable period of time for conducting the audit?

6. What is the Copyright Office's role in case of disputes among the parties regarding the conduct of an audit? For example, if an audit discloses that additional royalties are owed, should the Office take affirmative action to collect the royalties due, or will the interested copyright party or parties alone bear that responsibility?

7. Should the Copyright Office require the filing of "working papers" along with the results of a verification audit?

8. Should the scope of the audit be limited? If so, what limitations would be appropriate.

9. Who should bear the cost of a verification audit? Should the regulations allocate the costs on the same basis as originally proposed in S. 1623? If not, why not; what alternate solution should be adopted?

10. Should the audit be conducted no more than once a calendar or fiscal year, in accordance with the manufacturing party's basis of filing? Should the audit be conducted less frequently than on an annual basis? If so, how frequently should audits be conducted?

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (Title 5, Chapter 5 of the U.S. Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since the Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.<sup>1</sup>

<sup>1</sup> The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title (17)," except with respect to the making of copies of copyright deposits). (17 U.S.C. 706(b)). The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined and hereby certifies that this regulation will have no significant impact on small businesses.

**List of Subjects in 37 CFR Part 201**

Copyright; Digital audio recording products.

**Proposed Regulation**

In consideration of the foregoing, the Copyright Office proposes to amend part 201 of 37 CFR chapter II in the manner set forth below.

**PART 201 —[AMENDED]**

1. The authority citation of part 201 would be revised to read as follows:

**Authority:** Section 702, 90 Stat. 2541, 17 U.S.C. 702; 201.29 is also issued under Pub. L. 102-563.

2. Section 201.29 would be added to read as follows:

**§201.29 Access to, and Confidentiality of, Statements of Account for Digital Audio Recording Devices or Media.**

(a) *General.* This section prescribes rules pertaining to access to Statements of Account filed pursuant to section 1003(c) of title 17 of the United States Code, as amended by Pub. L. 102-563. The form and content of Statements of Account are governed by section 201.28 of these regulations.

(b) *Definitions*—(1) A "DART Statement of Account Access Form" is the form provided by the Copyright Office for access to a digital audio recording product statement of account filed pursuant to 17 U.S.C. 1003, or a photocopy of said access form.

(2) "Access" to a DART Statement of Account Form consists of examining the Statement of Account Form, making notes of information contained on the form, or obtaining a certified or uncertified copy of the form from the Copyright Office.

(3) The phrase "interested copyright party" has the same meaning as the statutory phrase in section 1001 of title 17 of the United States Code, as amended by Pub. L. 102-563.

(c) *Persons Allowed Access to Statements of Account.* Access to quarterly and annual DART Statements of Account deposited under section 1003(c) of title 17 U.S.C. is limited to:

(1) interested copyright parties or their duly authorized legal representatives;

(2) the manufacturer or importer who deposited the particular Statement of

Account or its duly authorized legal representative;

(3) staff of the Copyright Office who require access in performance of their duties under title 17 U.S.C., and,

(4) staff of the Copyright Royalty Tribunal who require access in performance of their duties under title 17 U.S.C.

(d) *Requests for Access Procedure.* Requests for access to Statements of Account from interested copyright parties, or manufacturers or importers, must be accompanied by a fully completed and signed "DART Statement of Account Access Form." Requests for access submitted by mail should be addressed to: Licensing Division, Copyright Office, Library of Congress, Washington, D.C. 20557. Requests for access may be made in person, at the Licensing Division, Room LM-457, Madison Memorial Building, First and Independence Avenue, between 8:30 a.m. and 5:00 p.m., Monday through Friday (except legal holidays).

(e) *Content of DART Statement of Account Access Form.* The DART Statement of Account Access Form shall include the following information:

(1) Identification by name of the Statement of Account to be accessed, including the quarter and year to be accessed.

(2) The name of the interested copyright party or manufacturer or importer on whose behalf the request is made. A full street address, not a post office box number, must be included.

(3) The name and address of the person making the request for access and his/her relationship to the party on whose behalf the request is made.

(4) The purpose for the request for access, whether it is for an actual or potential audit or verification of the statement, for inspection by the manufacturer or importer, or for some other reason.

(5) The actual signature of the attorney or authorized representative of the party requesting access.

(f) *Fees.* (1) DART Statement of Account Access forms are provided free of charge.

(2) The following fees must be paid:

(i) to obtain an uncertified copy of a DART Statement of Account, \$10;

(ii) to obtain a certified copy of a DART Statement of Account, \$18;

(iii) for each page of other file material, \$0.50 per page.

(3) Payment of these fees may be in the form of a personal or company check, or of a certified check, cashier's check or money order, payable to the Register of Copyrights. No request will be processed until the appropriate filing fees are received.

Dated: April 22, 1993  
Ralph Oman  
Register of Copyrights  
Approved by:  
James H. Billington  
The Librarian of Congress

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