



ANNOUNCEMENT

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

NOTICE WITH REQUEST FOR COMMENTS

ASCERTAINMENT OF CONTROVERSY FOR 1994 DIGITAL AUDIO RECORDING ROYALTY FUNDS

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. 95-1 CARP DD 92-94]

Ascertainment of Controversy for 1994 Digital Audio Recording Royalty Funds

AGENCY: Copyright Office, Library of Congress

ACTION: Notice with request for comments

SUMMARY: The Copyright Office directs all claimants to royalty fees collected for Digital Audio Recording Devices and Media (DART) for the 1992 and 1993 Musical Works Fund, and the 1994 Musical Works and Sound Recordings Funds, to submit comments as to whether a controversy exists as to the distribution of these funds. The Office also announces the deadline for filing Notices of Intent to Participate in royalty distribution.

DATES: Written comments due by April 15, 1995.*
Notices of Intent to Participate are due May 5, 1995.

ADDRESSES: If sent by mail, an original and five copies of written comments and Notices of Intent to Participate should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If delivered by hand, copies

should be brought to: Office of the General Counsel, Copyright Office, Room LM-407, James Madison Memorial Building, 101 Independence Avenue, SE, Washington, DC 20540. In order to ensure prompt receipt of these time sensitive documents, the Office recommends that the comments and Notices of Intent to Participate be delivered by private messenger service.

FOR FURTHER INFORMATION CONTACT: Marilyn Kretsinger, Acting General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone (202)707-8380.

SUPPLEMENTARY INFORMATION:

I. Background

On October 28, 1992, Congress enacted the Audio Home Recording Act. This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) that are distributed in the United States. The royalties are deposited with the Copyright Office and distributed by Copyright Arbitration Royalty Panels (CARPs)¹, convened by the Librarian of Congress, to interested copyright parties who file claims with the Copyright Office each year during January and February.

The Act provides that the royalties are to be divided into two funds—the Sound

Recordings Fund, which accounts for 66 2/3% of the royalties, and the Musical Works Fund, which accounts for 33 1/3% of the royalties.

Within each fund, the Act establishes subfunds. The Sound Recordings Fund consists of four subfunds: the first of these — the Nonfeatured Musicians Subfund — is allocated 2 5/8% of the Sound Recordings Fund, and the second subfund — the Nonfeatured Vocalists Subfund — gets a 1 3/8% share. After the shares of these two subfunds are subtracted, two other subfunds — the Featured Recording Artist Subfund and the Sound Recording Owners Subfund — receive 40% and 60%, respectively, of the remainder. In the Musical Works Fund, there are two subfunds — the Publishers Subfund and the Writers Subfund — which each receive 50% of that Fund. Thus, the Act establishes the percentages for each fund and subfund, but directs the CARPs, through the process of a distribution proceeding, to determine what amount each claimant within a subfund is entitled to receive.

Accordingly, the Act requires the Librarian of Congress to ascertain within 30 days after the last day for filing claims — March 30 — whether there are any controversies among the claimants as to the proper distribution of the royalties in their fund and/or subfund. If there are controversies, then the Librarian is directed immediately to convene a CARP or CARPs to decide the proper distribution.

II. Consolidation of Proceedings

The first proceeding to be initiated under the new CARP system was the distribution of the 1992 and 1993 DART royalties. The 1992 DART distribution

*Error: line should read; "April 5, 1995."

¹ At the time of passage of the Audio Home Recording Act, the Copyright Royalty Tribunal conducted DART distribution proceedings. The Tribunal, however, was eliminated by the Copyright Royalty Tribunal Reform Act of 1993, Pub.L. No. 103-198, and the authority to distribute DART funds was given to the CARPs, as administered by the Librarian of Congress.

proceeding was begun by the Copyright Royalty Tribunal, but was suspended when the Tribunal was abolished and needed to be started anew. The 1993 DART distribution was begun by the Copyright Office under the new authority conferred by the Copyright Royalty Tribunal Reform Act of 1993. On March 1, 1994, the Office published a notice in the *Federal Register* seeking comment as to the existence of controversies in both the 1992 and the 1993 DART funds. 59 FR 9773 (March 1, 1994). The interested copyright parties reported that there were controversies in the Sound Recordings Fund and the Musical Works Fund for both 1992 and 1993. In addition, several of the larger claimants to both funds requested that the Office consolidate the 1992 and the 1993 DART distribution proceedings with the 1994 DART distribution proceeding and defer all consideration of DART distributions until 1995. After seeking comment on the request, the Office granted the motion to consolidate. 59 FR 35762 (July 13, 1994).

Subsequent to the consolidation of proceedings, the Copyright Office received notification from the claimants to the 1992 and 1993 Sound Recordings Fund that they had reached a settlement. On December 15, 1994, the Office issued a distribution order distributing all of the royalties in the 1992 and 1993 Sound Recordings Fund to the parties designated in the settlement agreement. *Distribution Order*, Docket No. 94-2 CARP-DD (December 15, 1994). No settlement has been reached yet for either the 1992 or the 1993 Musical Works Fund.

III. Request for Comments and Notices of Intent to Participate

In accordance with the Copyright Office's consolidation order, 59 FR 35762, and 17 U.S.C. 1007, the Librarian of Congress and the Copyright Office are beginning distribution proceedings for the 1992 (Musical Works Fund only), 1993 (Musical Works Fund only), and 1994 (both funds) DART royalties (collectively the 1992-94 DART proceeding) by requesting that interested copyright parties comment as to the existence of controversies. Written comments are due by April 5, 1995.

To begin the distribution process for DART royalties, the pertinent regulation of the Copyright Office rules, 37 CFR 251.45(a), requires that:

[T]he Librarian of Congress shall, after the time period for filing claims, publish in the *Federal Register* a notice requesting each claimant on the claimant list to negotiate with each other a settlement of their differences, and to comment by a date certain as to the existence of controversies with respect to the royalty funds described in the notice. Such notice shall also establish a date certain by

which parties wishing to participate in the proceeding must file with the Librarian a Notice of Intention to Participate.

See 59 FR 63041 (December 7, 1994).

A. *Negotiating settlement.* Section 251.45(a) places an affirmative duty on all claimants to DART royalties to contact each other and attempt to negotiate a settlement of their differences. The claimants to the 1992 and 1993 Sound Recordings Fund have already negotiated a settlement and have received a distribution of royalties. The 1992 and 1993 Sound Recordings Funds, therefore, are no longer a part of this DART distribution proceeding. The Musical Works Funds for 1992 and 1993, and the Sound Recordings Fund and Musical Works Fund for 1994, however, are part of this proceeding, and claimants to these funds are subject to the negotiation requirement of §251.45(a).

The purpose of the negotiation requirement is to make all of the claimants within each fund aware of each other and to encourage active participation and open discussion between them, thereby increasing the possibility of settlements. The Copyright Office has compiled a claimant list of all interested copyright parties who timely filed a claim or claims for the 1992 and 1993 Musical Works Fund, and 1994 Musical Works and Sound Recordings Funds. The claimant lists are available from the Copyright Office at the addresses provided in this Notice, and claimants must use these lists in negotiating settlements with each other and in reporting on the existence of controversies to the royalty funds.

B. *Comments as to controversies.* In order to determine whether controversies exist for the 1992-94 DART proceeding, and consequently whether it will be necessary to convene a CARP or CARPs to distribute these royalties, we are asking the claimants to provide the Office with the following information: (a) whether any controversies exist concerning distribution of the 1992 and 1993 Musical Works Fund, and the 1994 Musical Works and Sound Recordings Funds; (b) if controversies do exist, the particular subfunds for which they exist; and (c) if settlements have been made, the identity of all of the claimants who are covered by the settlement.

After the existence of any controversies are determined, the Audio Home Recording Act gives the Copyright Office 30 days to distribute those royalties not in controversy. In addition to the information solicited above, in order to determine the amount of royalties not in controversy, we are asking any claimants who report a controversy to state how much is in controversy in each subfund.

The information provided should include each claimant's asserted percentage or dollar claim to the subfund, and a brief narrative justifying that asserted claim.

C. *Notices of Intent to Participate.* As prescribed by §251.45(a), the Office is requesting all claimants who expect to participate in the 1992-94 DART proceeding to file a Notice of Intent to Participate with the Copyright Office. See 59 FR 63041. The Notice of Intent to Participate must be filed with the Office by May 5, 1995. Failure of a claimant to file a timely Notice of Intent to Participate, or to be represented by another claimant filing a timely notice, may subject the claim to dismissal. The filing of a Notice of Intent to Participate is thus critical to a claimant being able to present an effective claim.

III. DART Deadline

A. *DART deadline.* The Audio Home Recording Act establishes several statutory deadlines to assure the speedy distribution of DART royalties. Claims are to be filed by the last day of February, each year. The existence of controversies is to be ascertained by March 30. Distribution of royalties not in controversy are to be authorized for distribution within 30 days of the finding that they were not in controversy — that is, no later than April 29. Prior to the passage of the Copyright Royalty Tribunal Reform Act, the Tribunal was given one year to resolve any controversies in royalty distribution after their declaration. As a result of this one year period, the Tribunal had a greater amount of time to address controversies and address issues such as discovery and collection and presentation of evidence, and this time period was reflected in the construction and operation of the Tribunal's procedural and administrative rules. However, with the passage of the CRT Reform Act, the time period for resolving controversies has been cut in half. This time reduction, along with the novel demands and requirements of the CARPs, has required the Copyright Office to adopt completely new rules and procedures for distribution of royalties and has, consequently, made the meeting of certain statutory deadlines exceedingly difficult. Nowhere is this more evident than the March 30 deadline for declaring DART distribution controversies.

The Administrative Conference of the United States has considered the issue of how agencies should respond to circumstances that affect their ability to adhere to schedule, and has issued a series of recommendations concerning statutory time limits. 43 FR 27509 (June 26, 1978), 1 CFR 305.78-3. The Administrative Conference said:

[I]t should be recognized that special

circumstances, such as a sudden substantial increase in caseload, or complexity of the issues raised in a particular proceeding, or the presence of compelling public interest considerations, may justify an agency's failure to act within a predetermined time. An agency's departure from the legislative timetable should be explained in current status reports to affected persons or in a report to Congress.

Id. at para. 4.

The Copyright Office has already faced the difficulties of meeting the March 30 deadline for declaring DART controversies and initiating arbitration. The Office postponed the deadline for the 1992 and 1993 DART royalties, prior to the consolidation of these royalties with the 1994 royalties, because it was soon after the passage of the CRT Reform Act and we had not yet implemented procedural rules for the CARPs. See 59 FR 9773. Although we have now adopted final procedural rules, 59 FR 63025, good cause nonetheless remains for postponing the statutory deadline of March 30, 1995, for declaring controversies and initiating arbitration for the 1992-94 DART proceeding.

An important facet of the new CARP procedural rules adopted by the Office are regulations creating a 45-day precontroversy discovery period, prior to initiating arbitration, in which claimants are directed to exchange their direct cases, make discovery requests, file their

objections regarding selection of the arbitrators, and otherwise engage in precontroversy motions practice. 37 C.F.R. 251.45. Adoption of a precontroversy discovery period was strongly urged by all of the commentators to the Office's rulemaking proceeding, see 59 FR 63030, and was endorsed by Representative William Hughes, Chairman of the House Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary, in his statement accompanying the House version of the Copyright Royalty Tribunal Reform Act. See 139 Cong. Rec. H10973 (daily ed. Nov. 22, 1993) ("In order to reduce the amount of actual litigation time, and thereby reduce expenses, I encourage the Librarian to promulgate regulations permitting exchange of information before the tolling of the 180-day decision period, and, to the extent practicable, generally to permit precontroversy discovery.").

There can be no meaningful precontroversy discovery period under the current requirement of beginning DART arbitration within 30 days of filing the claims. The 45-day precontroversy discovery period prescribed in §251.45(a) could not take place prior to March 30, since it would overlap the period for filing claims. Shortening the period to 30 days beginning the first day after the filing of claims would reduce the benefits

of precontroversy discovery enjoyed by claimants in other proceedings and deny DART claimants a period in which to negotiate settlements. Exchange of direct cases on the first day after the close of the filing period for claims is also impossible since the Office will not have had sufficient time to prepare the claimant service list, and it is highly unlikely that most claimants will be prepared to exchange their direct cases immediately after the filing period. There is, therefore, justifiable cause for postponing the March 30, 1995, date for determining controversies for the 1992-94 DART funds to permit proper and efficient operation of the Office's procedural rules.²

In order to assure that there is not a lengthy delay in distribution of 1992-94 DART royalties, the Office will publish the precontroversy discovery schedule in the **Federal Register** shortly after receipt of the comments on the existence of controversies. In addition to the prehearing schedule, the Office will also announce the date on which controversies will be declared, if any, and arbitration will commence.

Date: February 23, 1995

Marybeth Peters
Register of Copyrights

Approved:
James H. Billington
The Librarian of Congress
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² The statutory requirement of declaring DART controversies 30 days after the close of the claims filing period is obviously a problem that will be faced annually by the Copyright Office. To correct for the inequities that this requirement poses, the Office will be seeking legislative amendment of 17 U.S.C. 1007(b) in the 104th Congress by changing the phrase "Within 30 days after the period established for the filing of claims..." to "After the period established for the filing of claims..."

