FINAL REGULATIONS: NOTICE OF INITIATION OF NEGOTIATION PERIOD

DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

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LIBRARY OF CONGRESS

Copyright Office
37 CFR Part 251
[Docket No. 96-4 CARP DPRA]

Digital Phonorecord Delivery Rate Adjustment Proceeding

AGENCY: Copyright Office, Library of Congress.

ACTION: Final regulations; notice of initiation of negotiation period.

SUMMARY: The Copyright Office is announcing the initiation of the negotiation period for determining reasonable rates and terms for digital transmissions that constitute a digital phonorecord delivery. This negotiation period is mandated by the Digital Performance Right in Sound Recordings Act of 1995 and is intended to promote the private settlement of the rates and terms for digital phonorecord delivery. In addition, the Office is adopting procedural regulations implementing the Digital Performance Right in Sound Recordings Act of 1995. The Office also solicits comments on the advisability of consolidating the digital phonorecord delivery rate adjustment proceeding with the physical phonorecord rate adjustment proceeding.


ADDRESSES: Comments, copies of voluntary license agreements, and petitions, when sent by mail, should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Comments, copies of voluntary license agreements, and petitions, when hand delivered, should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, or William Roberts, Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, D.C. 20024, (202) 707-8380.

SUPPLEMENTARY INFORMATION:

1. Background


The Digital Performance Act also provides that the rate for all digital phonorecord deliveries made or authorized under a compulsory license on or before December 31, 1997, shall be the same as the rate in effect for the making and distributing of physical phonorecords. Accordingly, the Copyright Office and the Library of Congress amended part 255 of the Copyright Office's rules to set the rate for digital phonorecord deliveries at 6.95 cents for each work embodied in a phonorecord, or 1.3 cents per minute of playing time or fraction thereof, whichever amount is larger. 60 FR 61655 (December 1, 1995); 37 C.F.R. 255.5. This is the same rate that applies to the manufacture and distribution of physical phonorecords.

This Rate Adjustment Proceeding

The current rate for digital phonorecord deliveries expires December 31, 1997. Accordingly, in the Digital Performance Act, Congress established a two-step process for adjusting the royalty rate: a negotiation period during the second half of 1996 wherein the owners and the users attempt to reach their own voluntary licenses, and the*, if necessary, and upon petition in 1997, the convening of a copyright arbitration panel** (CARP) to establish rates and terms for those persons who are not covered by such voluntary licenses. 17 U.S.C. 115(c)(3)(C) and (D).

For the first step in the process, the negotiation period, the Digital

*Error: word should read; then
**Error: line should read; copyright arbitration royalty panel (CARP)
Performance Act provides that during the period of June 30, 1996, through December 31, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates for digital phonorecord deliveries. 17 U.S.C. 115(c)(3)(C).

The Digital Performance Act does not require the negotiation period to begin on June 30, 1996, nor does it require that the negotiation period be six months long. It is the Office's understanding that the Act leaves the commencement and the length of the negotiation period to the discretion of the Librarian.

Upon consideration, the Office believes that the negotiation period should begin in July, 1996, and should conclude by December 31, 1996, and that petitions to convene a CARP should be filed by January 10, 1997, for the following reason. The current rate for digital phonorecord deliveries, by operation of law, is set to expire December 31, 1997. 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.

Therefore, the following procedural dates shall apply:

- From today's publication in the Federal Register, 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.

- If negotiations are successful, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license for digital phonorecord deliveries may submit to the Librarian of Congress licenses covering such activities. 17 U.S.C. 115(c)(3)(C).

- In addition, if negotiations are successful, the Librarian may, upon the request of the parties to the negotiation proceeding, submit the agreed upon rates and terms to the public in a notice-and-comment proceeding. The Librarian may adopt the rates and terms embodied in the proposed settlement without convening a CARP, provided that no opposing comment is received by the Librarian from a party with an intent to participate in a CARP proceeding. 37 C.F.R. 251.63(a). Such petitions are to be filed by January 10, 1997.

- If negotiations are not successful, petitions to convene a CARP are to be filed by January 10, 1997. The petition shall detail petitioner's interest in the royalty rate sufficiently to permit the Librarian of Congress to determine whether the petitioner has a "significant interest" in the rate. The petition must also identify the extent to which the petitioner's interest is shared by other owners or users; owners or users with similar interests may file a joint petition. 37 C.F.R. 251.62.

- Notices of Intent to Participate in a CARP proceeding to adjust the rates and establish the terms of the digital phonorecord delivery compulsory license are to be filed by January 17, 1997.

- Written direct cases in the CARP proceeding shall be filed by January 31, 1997.

- After the precontroversy discovery period, the Librarian will initiate the CARP proceeding on May 1, 1997.

Relationship to Rate Adjustment Proceeding for Physical Phonorecords

The year 1997 is also when the mechanical royalty rate for physical phonorecords may be adjusted. This rate can be the same as, or different from, the rate that applies to digital phonorecord deliveries. While the rate for digital phonorecord deliveries expires, by law, on December 31, 1997, and needs to be replaced, there is no similar urgency to adjust the mechanical royalty rate for physical phonorecords. If no rate adjustment proceeding for physical phonorecords is concluded by December 31, 1997, the rate in existence now will simply continue until such time as it is adjusted.

The question is still raised whether it wouldn't be more efficient and less costly to have the same CARP panel, if one is to have the same CARP panel, if one is to be convened, consider the mechanical royalty rates for both physical phonorecords and digital phonorecord phonorecords. To consolidate such proceedings, it would be necessary to have a petition to adjust the physical phonorecord rate filed at the same time as the petition to adjust the digital phonorecord deliveries rate, January 10, 1997.

However, to require petitions to be filed by January 10, 1997, might deprive the interested copyright owners and users of time in 1997 to negotiate the rate. Therefore, the Office solicits comments on the advisability of consolidating the two rate adjustment proceedings. Comments are due by November 8, 1996. If the comments favor consolidation, the Office will issue an order indicating that the two proceedings will be consolidated. The order will also call for physical phonorecord petitions to be filed by January 10, 1997. Notices of Intent to Participate to be filed by January 17, 1997, written direct cases to be filed by January 31, 1997, and list all other procedural dates. The order will also cancel, because of time constraints, the 30-day negotiation period that follows the filing of a physical phonorecord petition set out in 37 CFR 251.63(a). The Librarian will initiate the consolidated proceeding on May 1, 1997.

Amendment of CARP rules to reflect passage of Digital Performance Act

In addition to expanding the scope of the mechanical compulsory license to include digital phonorecord deliveries, the Digital Performance Act also added a new compulsory license: the license for qualifying subscription digital audio transmission services to perform sound recordings. The rates and terms for both these licenses are to be set by the CARP, if negotiations prove successful.

Therefore, the current CARP rules need to be amended to reflect these additional responsibilities. Section 553(b)(3)(A) of the Administrative Procedure Act states that general notice of proposed rulemaking is not required for rules of agency organization, procedure, or practice. Since the Office finds that the following final regulations are rules of agency organization, procedure, or practice, no notice of proposed rulemaking is required.

List of Subjects in 37 CFR Part 251

Administrative practice and procedure, Cable television, Copyright, Jukeboxes, Organization and functions (government agencies), Recordings, Satellites.

For the reasons set forth in the preamble, the Copyright Office and the Library of Congress amend 37 CFR 251 as follows:

1 Because the law requires petitions to be filed in 1997, and because written direct cases must be filed by January 31, 1997, if the proceeding is to conclude by December 31, 1997, the petitions must be received by the Copyright Office by January 10, 1997. Therefore, it is advisable for petitioners to deliver their petitions to the Copyright Office. If petitions are mailed to the CARP post office box, it is advisable that they be sent well in advance.

2 Error: word should read; unsuccessful
PART 251 - COPYRIGHT
ARBITRATION ROYALTY PANEL
RULES OF PROCEDURE

1. The authority citation for part 251 continues to read as follows:

2. Section 251.2 is revised to read as follows:

§251.2 Purpose of Copyright
Arbitration Royalty Panels.

The Librarian of Congress, upon the
recommendation of the Register of
Copyrights, may appoint and convene a
Copyright Arbitration Royalty Panel
(CARP) for the following purposes:

(a) To make determinations
concerning royalty rates for the cable
compulsory license, 17 U.S.C. 111;

(b) To make determinations
concerning royalty rates and terms for
the subscription digital audio
transmissions compulsory license, 17
U.S.C. 114;

(c) To make determinations
concerning royalty rates for making and
distributing phonorecords, and royalty
rates and terms for digital transmissions
that constitute digital phonorecord
deliveries, 17 U.S.C. 115;

(d) To make determinations
concerning royalty rates for coin-
operated phonorecord players
(jukeboxes) whenever a negotiated
license expires or is terminated and is not
replaced by another such license
agreement, 17 U.S.C. 116;

(e) To make determinations
concerning royalty rates and terms for
the use by noncommercial educational
broadcast stations for certain
copyrighted works, 17 U.S.C. 118;

(f) To make determinations
concerning royalty rates for the satellite
carrier compulsory license, 17 U.S.C. 119;

(g) To make determinations
concerning the distribution of cable and
satellite carrier royalty fees and digital
audio recording devices and media
payments deposited with the Register of
Copyrights, 17 U.S.C. 111, 119, and
chapter 10, respectively.

3. Section 251.58(c) is revised to read as
follows:

§251.58 Judicial review.

(c) The pendency of any appeal shall
not relieve persons obligated to make
royalty payments under 17 U.S.C. 111,
114, 115, 116, 118, 119, or 1003, and who
would be affected by the determination
on appeal, from depositing statements of
account and royalty fees by those
sections.

4. The first sentence of §251.60 is
revised to read as follows:

§251.60 Scope.

This subpart governs only those
proceedings dealing with royalty rate
adjustments affecting cable (17 U.S.C.
111), subscription digital audio
transmissions (17 U.S.C. 114), the
manufacture and distribution of
phonorecords, including digital
phonorecord deliveries (17 U.S.C. 115),
performances on coin-operated
phonorecord players (jukeboxes) (17
U.S.C. 116), noncommercial educational
broadcasting (17 U.S.C. 118) and satellite

5. In §251.61, paragraph (a) is revised
to read as follows:

§251.61 Commencement of adjustment
proceedings.

(a) In the case of cable, subscription
digital audio transmissions,
phonorecords, digital phonorecord
deliveries, and coin-operated
phonorecord players (jukeboxes), rate
adjustment proceedings shall commence
with the filing of a petition by an
interested party according to the
following schedule:

(1) Cable: During 1995, and each
subsequent fifth calendar year.

(2) Subscription Digital Audio
Transmissions: During a 60-day period
prescribed by the Librarian in 1996, 2000,
each and each subsequent fifth calendar year.

(3) Phonorecords: During 1997 and
each subsequent tenth calendar year.

(4) Digital Phonorecord Deliveries:
During 1997 and each subsequent fifth
calendar year except to the extent that
different years may be determined by the
parties to a negotiated settlement or by the
copyright arbitration royalty panel.

(b)(1) Coin-operated phonorecord
players (jukeboxes): Within one year of
the expiration or termination of a
negotiated license authorized by 17

6. In §251.62, the first sentence of
paragraph (a) is revised to read as
follows:

§251.62 Content of petition.

(a) In the case of a petition for rate
adjustment proceedings for cable,
subscription digital audio transmissions,
phonorecords, digital phonorecord
deliveries, and coin-operated
phonorecord players (jukeboxes), the
petition shall detail the petitioner's
interest in the royalty rate sufficiently to
permit the Librarian of Congress to
determine whether the petitioner has a
"significant interest" in the matter.

7. In §251.63, the first sentence of
paragraph (a) is revised to read as
follows:

§251.63 Consideration of petition;
settlements.

(a) To allow time for the parties to
settle their differences concerning cable,