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

PRECONTROVERSY DISCOVERY SCHEDULE AND REQUEST FOR NOTICES OF INTENT TO PARTICIPATE

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS

The following excerpt is taken from Volume 61, Number 150 of the Federal Register for Friday, August 2, 1996 (pp. 40464-40466)

LIBRARY OF CONGRESS
Copyright Office
[Docket No. 96-5 CARP DSTRA]

Digital Performance Right in Sound Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Precontroversy discovery schedule and request for notices of intent to participate.

SUMMARY: The Copyright Office of the Library of Congress is announcing the precontroversy discovery schedule, including the date of initiation of arbitration, for the Copyright Arbitration Royalty Panel (CARP) proceeding to set the rates and terms for the 17 U.S.C. 114 compulsory license for nonexempt digital subscription transmissions. The Office is also requesting interested parties to file comments on the rate petition by August 30, 1996. Parties who wish to participate in the CARP proceeding must file their Notices of Intent to Participate by August 30, 1996.

DATES: Comments on the rate petition, and Notices of Intent to Participate are due on or before August 30, 1996.

ADDRESSES: If sent by mail, an original and five copies of the comments, and an original and five copies of the Notice of Intent to Participate should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington D.C. 20540.

FOR FURTHER INFORMATION CONTACT: William Roberts, Senior Attorney, or Tanya Sandros, CARP Specialist, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.


Among the limitations on the performance of a sound recording publicly by means of a digital audio transmission is the creation of a new compulsory license for nonexempt subscription transmissions. The Digital Performance Act defines a "subscription transmission" as one that "is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." 17 U.S.C. 114(j)(8). All nonexempt subscription transmissions are eligible for section 114 compulsory licensing provided they are not made by an "interactive service," which is defined in part as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient." See 17 U.S.C. 114(j)(4).

The terms and rates of the section 114 statutory license are determined by voluntary negotiation among the affected parties and, where necessary, compulsory arbitration conducted under chapter 8 of the Copyright Act. On December 1, 1995, the Copyright Office published a notice in the Federal Register initiating the voluntary negotiation period from December 1, 1995, to June 1, 1996. 60 FR 61655 (December 1, 1995). The Office encouraged parties that negotiated voluntary license agreements to submit two copies of the agreement to the Office within 30 days of its execution. No agreements were filed during this period.

Because an industry-wide agreement has not been reached, copyright owners and entities performing sound recordings not subject to a voluntary agreement shall be bound by the terms and rates set by a CARP. The Office directed parties not subject to a voluntary agreement to file their petitions for a CARP proceeding by August 1, 1996. See 60 FR 61656 (1995). On June 4, 1996, the Office received a petition from the Recording Industry Association of America ("RIAA") requesting the "Librarian of Congress to commence proceedings to determine a schedule of terms and rates for a statutory license for the public performance of sound recordings via
those audio digital subscription
transmission services currently in
operation.”

Pursuant to the RIAA’s petition and
the rules and regulations of 37 CFR part
251, the Librarian of Congress, upon
the recommendation of the Register of
Copyrights, is announcing the
precontroversy discovery schedule for
the proceeding to set terms and rates for
the section 114 license, including the date
on which the proceeding before the
CARP will be initiated.

Notices of Intent To Participate

Any party wishing to appear before the
CARP, and to present evidence, in
this proceeding must file a Notice of
Intent to Participate by August 30, 1996.
Failure to file a timely Notice of
Intent to Participate will preclude a party
from participating in this proceeding.

Comments on RIAA Petition

Section 251.45(a) of the rules states that “the Librarian of Congress shall,
after receiving a petition for rate
adjustment filed under 251.62, * * * * publish in the Federal Register a notice requesting interested parties to comment
on the petition for rate adjustment.” 37
CFR 241.45(a). Any party wishing to
comment on the RIAA’s petition should
do so by August 30, 1996.

Precontroversy Discovery Schedule

The Library of Congress is
announcing the scheduling of the
precontroversy discovery period, and
other procedural matters, for the
establishment of rates and terms for the
section 114 compulsory license. In
addition, the Library is announcing the
date on which arbitration proceedings
will be initiated before a CARP; thereby
commencing the 180-day arbitration
period. Once a CARP has been convened,
the scheduling of the arbitration period
is within the discretion of the CARP
and will be announced at that time.

A. Commencement of the Proceeding

A rate adjustment proceeding under part
251 of 37 CFR is divided into two
essential phases. The first is the 45-day
precontroversy discovery phase, during
which the parties exchange their written
direct cases, exchange their
documentation and evidence in support
of their written direct cases, and engage
in the pre-CARP motions practice
described in Sec. 251.45. The other phase
is the proceeding before the CARP itself,
including the presentation of evidence
and the submission of proposed findings
by all of the participating parties. The
proceeding before the CARP may be in
the form of hearings or, in accordance
with the requirements of Sec. 251.41(b) of
the rules, the proceeding may be
conducted solely on the basis of written
pleadings.

Both of these phases to a rate
adjustment proceeding require
significant amounts of work, not just for
the parties, but for the Librarian, the
Copyright Office, and the arbitrators as
well. The rate setting proceeding for
section 114 is not the only CARP
proceeding likely to take place this year.
The Library of Congress is currently
conducting a royalty distribution
proceeding under chapter 10 of the
Copyright Act; a cable rate adjustment
proceeding, a satellite carrier rate
adjustment proceeding, and must
schedule a cable royalty distribution
proceeding, and a satellite carrier royalty
distribution proceeding all within this
year. It would be extremely
difficult for the Office to conduct the
precontroversy discovery phase of more
than one of these proceedings at the
same time, and the Library must,
therefore, conduct them sequentially.

Because of the number of CARP
proceedings to be conducted this year,
and the attending workload, selection of a
date to initiate a section 114 rate setting
proceeding is not dependent on the
schedules of one or more of the
participating parties, but must be
weighed against the interests of all
involved. The RIAA filed their petition in
early June 1996, and it is likely that this
arbitration proceeding will only involve
three other parties who are already
aware of the RIAA’s petition. The Library
therefore believes that a commencement of the precontroversy discovery period in
the early fall would not come as a
surprise to the affected parties or create
an undue burden. Aware of the other
proceedings which must be scheduled,
the attending workload, and the need to
manage the interests of all involved, the
Library is announcing the
precontroversy discovery schedule and
arbitration period in this proceeding
without seeking further comment from
the participating parties.

B. Precontroversy Discovery Schedule and
Procedures

Any party that has filed a Notice of
Intent to Participate in the section 114
rate setting proceeding is entitled to
participate in the precontroversy
discovery period. Each party may
request of an opposing party
nonprivileged documents underlying
facts asserted in the opposing party’s
written direct case. The precontroversy
discovery period is limited to discovery
of documents related to written direct
cases and any amendments made during
the period.

The rules of the Library of Congress
do not specify any particular steps or
regimen to the precontroversy discovery
period. We believe, however, that it is
necessary to establish procedural dates
for exchange of documents and filing of
motions within the 45-day period to
provide order and allow discovery to
proceed smoothly and efficiently. The
precontroversy discovery schedule set
forth by the Library in the recent cable
distribution proceeding, see 54 FR 14971,
14975-76 (March 21, 1995), proved to be
successful in promoting an orderly and
efficient discovery period, and we have
chosen to adopt the same format and
structure for the precontroversy
discovery period in this proceeding.

The following is the precontroversy
discovery procedural schedule with
corresponding deadlines:

<table>
<thead>
<tr>
<th>Action</th>
<th>Deadline</th>
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<tbody>
<tr>
<td>Filing of Written Direct Cases</td>
<td>September 9, 1996</td>
</tr>
<tr>
<td>Requests for Underlying Documents Related to</td>
<td>September 18, 1996</td>
</tr>
<tr>
<td>Written Direct Cases</td>
<td></td>
</tr>
<tr>
<td>Responses to Requests for Underlying Documents</td>
<td>September 25, 1996</td>
</tr>
<tr>
<td>Completion of Document Production</td>
<td>September 30, 1996</td>
</tr>
<tr>
<td>Follow-up Requests for Underlying Documents</td>
<td>October 7, 1996</td>
</tr>
<tr>
<td>Responses to Follow-up Requests</td>
<td>October 11, 1996</td>
</tr>
<tr>
<td>Motions Related to Document Production</td>
<td>October 15, 1996</td>
</tr>
<tr>
<td>Production of Documents in Response to</td>
<td>October 18, 1996</td>
</tr>
<tr>
<td>Follow-up Requests</td>
<td></td>
</tr>
<tr>
<td>All Other Motions, Petitions, and Objections</td>
<td>October 23, 1996</td>
</tr>
</tbody>
</table>

The precontroversy discovery period,
as specified by Sec. 251.45(b) of the rules,
begins on September 9, 1996, with the
filing of written direct cases by each
party. Each party in this proceeding who
has filed a Notice of Intent to Participate
must file a written direct case on the date
prescribed above. Failure to submit a
timely filed written direct case will result
in dismissal of that party’s case. Parties
must comply with the form and content
of written direct cases as prescribed in
Sec. 251.43. Each party to the proceeding
must deliver a complete copy of its
written direct case to each of the other
parties to the proceeding, as well as file a
complete copy with the Copyright Office
by close of business on September 9,
1996, the first day of the 45-day period.

After the filing of the written direct
cases, document production will proceed
according to the above-described
schedule. Each party may request
underlying documents related to each of
the other parties’ written direct cases by
Copyright Office is not required.

Filing and service of all precontroversy motions, petitions, objections, oppositions and replies shall be as follows. In order to be considered properly filed with the Librarian and/or Copyright Office, all pleadings must be brought to the Copyright Office at the following address no later than 5 p.m. of the filing deadline date: Office of the Register of Copyrights, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540. The form and content of all motions, petitions, objections, oppositions and replies filed with the Office must be in compliance with Sec. 251.44(b)-(e). As provided in Sec. 251.45(b), oppositions to any motions or petitions must be filed with the Office no later than seven business days from the date of filing of such motion or petition. Replies are due five business days from the date of filing of such oppositions. Service of all motions, petitions, objections, oppositions and replies must be made on counsel or the parties by means no slower than overnight express mail on the same day the pleading is filed.

C. Initiation of Arbitration

Because there are two phases to a rate adjustment proceeding—precontroversy discovery and arbitration—there are two time periods to be scheduled. The regulations do not provide how much time must separate precontroversy discovery from initiation of arbitration. There is no reason to schedule an inordinate amount of time between the two; however, there must be adequate time for the Librarian to rule upon all motions filed within the 45-day precontroversy period. In order to give the parties as much of the month of December as possible for proceedings before the CARP, the Library will initiate arbitration on December 2, 1996. The schedule of the arbitration proceeding will be established by the CARP after the three arbitrators have been selected. Delivery of the written report of the arbitrators to the Librarian, in accordance with 17 U.S.C. 802(e), must be no later than May 30, 1997.

Dated: July 29, 1996

Marilyn J. Kretsinger,
Acting General Counsel.

Approved:

James H. Billington,
The Librarian of Congress.