



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

NOTICE OF PROPOSED RULEMAKING

NONCOMMERCIAL EDUCATIONAL BROADCASTING COMPULSORY LICENSE

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LIBRARY OF CONGRESS

Copyright Office
37 CFR Part 253
[Docket No. 2002-4 CARP NCBRA]

Noncommercial Educational Broadcasting Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is publishing negotiated rate adjustments, under the Copyright Act, for the noncommercial educational broadcasting compulsory license for the period 2003 through 2007. The proposed rate adjustments shall become final unless one or more parties with a significant interest in the rates notifies the Office that it will litigate the rate adjustment before a Copyright Arbitration Royalty Panel ("CARP").

DATES: Notices of Intent to Participate in a CARP proceeding are due on or before December 2, 2002.

ADDRESSES: If sent by mail, an original and five copies of Notices of Intent to Participate should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, an original and five copies of Notices of Intent to Participate should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE., Washington, DC 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 252-3423

SUPPLEMENTARY INFORMATION:

Background

Section 118 of the Copyright Act, 17 U.S.C., creates a compulsory license for the use of certain copyrighted works in connection with noncommercial broadcasting. Terms and rates for this compulsory license applicable to parties who are not subject to privately negotiated licenses are published in 37 CFR part 253 and are subject to adjustment at five-year intervals. This is a window year for such an adjustment.

On April 1, 2002, the Library of Congress published a notice in the *Federal Register* announcing a voluntary negotiation period for adjustment of the section 118 rates and requested interested parties to submit their Notices of Intent to Participate in a CARP proceeding. The Library also announced the schedule for the precontroversy discovery period should a CARP proceeding be necessary. 67 FR 15414 (April 1, 2002). The Library received Notices of Intent to Participate from the following users of the section 118 license: National Public Radio ("NPR"); the Public Broadcasting System ("PBS"); the Corporation for Public Broadcasting ("CPB"); the American Council on Education ("ACE"); the National Religious Broadcasters Music License Committee ("NRBMLC"); the National Federation of Community Broadcasters ("NFCB"); and WCPE-FM. The Library received Notices of Intent to Participate from the following copyright owners whose works are subject to use under section 118: the American Society of Composers, Authors and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); SESAC, Inc. ("SESAC"); the National Music Publishers Association ("NMPA"); and the Harry Fox Agency, Inc. ("HFA").

Not long after the issuance of the April 1 Notice, representatives of the above-listed parties informed the Library that settlement negotiations were proceeding well and, in the interest of avoiding a CARP proceeding, requested additional time to negotiate. On June 19, 2002, the Library granted their request and issued an order directing them to submit their voluntary agreements and proposals for ad-

justment of the section 118 rates and terms by July 1, 2002. The Library also requested those not reaching a settlement by this date to identify themselves for purposes of scheduling a CARP proceeding. Fortunately, settlements were reached by all the parties.

This Notice

The Library has received voluntary license agreements for rates and terms under the section 118 license, and proposals to adjust the section 118 rates and terms in 37 CFR part 253. There is a distinction between voluntary agreements and proposals. Section 118(b) of the Copyright Act provides that "any owners of copyright in published nondramatic musical works and published pictorial, graphic, and sculptural works and any public broadcasting entities, respectively, may negotiate and agree upon the terms and rates of royalty payments * * * "provided that copies of such agreements are filed in the Copyright Office within thirty days of execution * * *" 17 U.S.C. 118(b)(1)&(2). A particular copyright owner may negotiate with a particular public broadcasting entity for the use of that copyright owners works, and that agreement governs the royalty fees and terms of payment to be made by the public broadcasting entity provided that the agreement is deposited with the Copyright Office. However such an agreement would not govern the rates to be paid by another public broadcasting entity not party to the agreement.

The statute provides that for those copyright owners and public broadcasting entities not subject to an agreement, the Librarian shall convene a CARP "to determine and publish in the *Federal Register* a schedule of rates and terms which * * * shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities. * * *" 17 U.S.C. 118(b)(3). Where the parties in this proceeding have not been able to negotiate license agreements, due to the fact that either the copyright owners or the users of the works affected by section 118 have not participated in negotiations (*i.e.* they are not parties to this proceeding), the parties have proposed adjustments to the section 118

rates and terms for these works. These proposals are subject to Sec. 251.63(b) of the CARP rules, which provides that “[i]n the case of a settlement among the parties to a proceeding, the Librarian may, upon the request of the parties, submit the agreed upon rate to the public in a notice-and-comment proceeding. The Librarian may adopt the rate embodied in the proposed settlement without convening an arbitration panel, provided that no opposing comment is received by the Librarian from a party with an intent to participate in a CARP proceeding.” 37 CFR 251.63(b).

The Librarian will adopt the negotiated and proposed section 118 rates and terms for the period 2003 through 2007 unless one or persons objects on or before December 2, 2002. However, a simple objection to a proposed rate or term is not sufficient. As provided by Sec. 251.63(b) of the CARP rules, an objecting party must file a Notice of Intent to Participate in a CARP proceeding along with its objection and must be prepared to participate fully in a CARP proceeding to adjust the rates and/or terms to which it objects. Furthermore, the objecting party must have a significant interest in the rates and/or terms to which it is objecting to be eligible to participate in the CARP proceeding.

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Summary of Adjustments to 37 CFR Part 253

Part 253 of the CARP rules sets forth the rates and terms for the section 118 license. These regulations are quite lengthy. Rather than republish the entire text of these regulations, the Library is only printing those portions that will be changed as a result of the parties agreements and proposals. The following is a section-by-section summary of the proposed changes.

1. Section 253.1 General

Section 253.1 will be amended to reflect that the rates and terms set forth in part 253 of 37 CFR will apply for the period beginning January 1, 2003, and ending December 31, 2007.

2. Section 253.2 Definition of public broadcasting entity

No change.

3. Section 253.3 Performance of musical compositions in the repertory of ASCAP and BMI by PBS and NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

ASCAP and BMI have negotiated voluntary agreements with PBS, NPR, and CPB pursuant to 17 U.S.C. 118(b). PBS/NPR/CPB represent (a) PBS; (b) PBS member television stations; (c) noncommercial television stations unaffiliated with PBS but eligible for CPB funding; (d) NPR; (e) NPR affiliated radio stations; and (f) noncommercial radio

stations unaffiliated with NPR but eligible for CPB funding. Because these organizations are covered by voluntary licenses, there is no longer need for this section, and the Library is proposing that it be deleted.

4. Section 253.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

This section sets forth the rates applicable to public broadcasters who perform the musical compositions of copyright owners who are not represented by ASCAP, BMI, SESAC, HFA or the NMPA. For these unaffiliated copyright owners, PBS/NPR/CPB propose the following new rates:

a. For performance of a nondramatic musical composition in a feature presentation of PBS: \$224.22, up from \$211.53.

b. For performance of a nondramatic musical composition as background or theme music in a PBS program: \$56.81, up from \$53.59.

c. For performance of a nondramatic musical composition in a feature presentation of a station of PBS: \$19.16, up from \$18.08

d. For performance of a nondramatic musical composition as background or theme music in a program of a station of PBS: \$4.04, up from \$3.81.

e. For performance of a nondramatic musical composition in a feature presentation of NPR: \$22.73, up from \$21.44.

f. For performance of a nondramatic musical composition as background or theme music in a NPR program: \$5.51, up from \$5.20.

g. For performance of a nondramatic musical composition in a feature presentation of a station of NPR: \$1.61, up from \$1.52.

h. For performance of a nondramatic musical composition as background or theme music in a program of a station of NPR: \$.57, up from \$.54.

PBS/NPR/CPB also propose to amend subsection (d) to permit the rates set forth above to be applicable to the performance of a television or radio program for a period of four years after the first performance of the program, rather than the current three-year limitation.

5. Section 253.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities

This section is applicable to the performance of musical compositions by colleges, universities and other nonprofit educational institutions which are not affiliated with NPR. ASCAP, BMI and SESAC, in negotiation with ACE and NRBMLC, propose the following adjustments for the use of music in their repertories.¹ For ASCAP compositions, the proposal is that the current rate of \$244 per year be adjusted by the change in the cost of living as determined by the Consumer Price Index (“CPI”) during the period from the most recent Index published prior to December 1, 2002, to the most recent Index published

prior to December 1, 2003. A cost of living adjustment would then be performed each year thereafter through 2007. The proposal is the same for BMI compositions: \$244 per year adjusted by the annual change in the CPI through 2007. For SESAC compositions, the proposal is \$80 per year, up from \$66, with the annual CPI adjustment through 2007.

6. Section 253.6 Performance of musical compositions by other public broadcasting entities

This section applies to the performance of nondramatic musical compositions by radio stations not licensed to colleges, universities or other nonprofit educational institutions and which are not affiliated with NPR. NRBMLC and NFCB have reached an agreement with the copyright owners in this proceeding and propose the following adjustments.

For performance of all the compositions in the repertory of ASCAP: \$460 in 2003; \$475 in 2004; \$495 in 2005; \$515 in 2006; and \$535 in 2007. The same rates are proposed for the performance of all compositions in the repertory of BMI. For performance of all compositions in the repertory of SESAC: \$98 in 2003; \$100 in 2004; \$102 in 2005; \$104 in 2006; and \$106 in 2007. NRBMLC also proposes that the rate of \$1 for performance of a composition of an unaffiliated copyright owner remain in effect for the 2003-2007 period.

7. Section 253.7 Recording rights, rates and terms

This section establishes rates and terms for the recording of nondramatic performances and displays of musical works on or for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction and distribution of copies and phonorecords of public broadcasting programs containing such nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities.

PBS/NPR/CPB propose the following rate adjustments:

a. For use of a musical work in a PBS-distributed program

(i) Feature: \$112.40, up from \$106.04;

(ii) Concert feature (per minute): \$33.75, up from \$31.84;

(iii) Background: \$56.81, up from \$53.59;

(iv) Theme:

Single program or first series: \$56.81, up from \$53.59

Other series program: \$23.06, up from \$21.75.

b. For use of a musical work other than in a PBS-distributed program

(i) Feature: \$9.29, up from \$8.76;

(ii) Concert feature (per minute): \$2.44, up from \$2.30;

¹ NFCB supports these rates as well.

(iii) Background: \$4.04, up from \$3.81;

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(iv) Theme:

Single program or first series program: \$4.04, up from \$3.81;

Other series program: \$1.61, up from \$1.52.

c. For use of a musical work in a NPR program

(i) Feature: \$12.17, up from \$11.48;

(ii) Concert feature (per half hour): \$17.86, up from \$16.85;

(iii) Background: \$6.10, up from \$5.75;

(iv) Theme:

Single program or first series program: \$6.10, up from \$5.75;

Other series program: \$2.43, up from \$2.29.

d. For use of a musical work other than in a NPR-produced program:

(i) Feature: \$.78, up from \$.74;

(ii) Feature (concert)(per half hour): \$1.63, up from \$1.54;

(iii) Background: \$.39, up from \$.37.

This schedule of fees would cover use of musical works for a period of three years following the first use. Succeeding use would require an additional payment. For an additional use of one year, twenty-five percent of the initial three-year fee. For a second three-year period, fifty percent of the initial three-year fee. For each three-year period thereafter, twenty-five percent of the initial three-year fee.

In addition, PBS/NPR/CPB request that the proposed rates apply to a "use" of a musical work, as opposed to the "broadcast" of a musical work as described in the current regulations.

8. Section 253.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works

This section establishes rates and terms for use of published pictorial, graphic and sculptural works by public broadcasting entities. PBS/NPR/CPB propose the following rate adjustments:

a. For use of a work in a PBS-distributed program:

(i) For a featured display of a work: \$68.67, up from \$64.78;

(ii) For background and montage display: \$33.49, up from \$31.59;

(iii) For use of a work for program identification or for thematic use: \$135.37, up from \$127.71;

(iv) For display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of the schedule: \$44.47, up from \$41.95.

b. For use of a work in other than a PBS-distributed program:

(i) For a featured display of a work: \$44.47, up from \$41.95;

(ii) For background and montage display: \$22.80, up from \$21.51;

(iii) For use of a work for program identification or for thematic use: \$90.91, up from \$85.76;

(iv) For display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of the schedule: \$22.80, up from \$21.51.

This schedule of fees would cover the use of works for a period of three years from the date of their first use. Succeeding use would require an additional payment. For an additional use of one year, twenty-five percent of the initial three-year fee. For a second three-year period of use, fifty percent of the initial three-year fee. For each three year period thereafter, twenty-five percent of the initial three-year fee.

9. Section 253.9 Unknown copyright owners

No change.

10. Section 253.10 Cost of living adjustment

The dates in this section would be changed to reflect the annual cost of living adjustment for the rates in Sec. 253.5 for the new 2003-2007 period.

11. Section 253.11 Notice of restrictions on use of reproductions of transmission programs

No change.

List of Subjects in 37 CFR Part 253

Copyright, Music, Radio, Television, Rates.

Proposed Regulations

For the reasons set out in the preamble, the Copyright Office proposes amending part 253 of 37 CFR as follows:

PART 253—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

1. The authority citation for part 253 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1) and 803.

2. Section 253.1 is amended by removing the phrase "January 1, 1998 and ending on December 31, 2002" and adding "January 1, 2003 and ending on December 31, 2007" in its place.

3. Section 253.3 is removed and reserved.

4. Section 253.4 is amended as follows:

a. In the introductory text, by removing "and compositions in the repertoires of ASCAP, BMI, or SESAC which are licensed on terms and conditions established by a duly empow-

ered Copyright Arbitration Royalty Panel pursuant to the procedures set forth in subchapter B of 37 CFR, part 251.;"

b. by revising paragraph (a);

c. in paragraph (c), by removing the phrase "January 1, 1998, to December 31, 2002" and adding "January 1, 2003, to December 31, 2007" in its place; and

d. in paragraph (d), by removing "three" and adding "four" in its place.

The revisions to Sec. 253.4 read as follows:

Sec. 253.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

* * * * *

(a) Determination of royalty rate. (1) For performance of such work in a feature presentation of PBS:

2003-2007.....\$224.22

(2) For performance of such a work as background or theme music in a PBS program: 2003-2007.....\$56.81

(3) For performance of such a work in a feature presentation of a station of PBS: 2003-2007.....\$19.16

(4) For performance of such a work as background or theme music in a program of a station of PBS: 2003-2007.....\$4.04

(5) For the performance of such a work in a feature presentation of NPR: 2003-2007.....\$22.73

(6) For the performance of such a work as background or theme music in an NPR program: 2003-2007.....\$5.51

(7) For the performance of such a work in a feature presentation of a station of NPR: 2003-2007.....\$1.61

(8) For the performance of such a work as background or theme music in a program of a station of NPR: 2003-2007.....\$5.7

(9) For purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

(10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.

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5. Section 253.5(c)(3) is amended by removing "\$66" and adding "\$80" in its place.

6. Section 253.6(c) is revised to read as follows:

Sec. 253.6 Performance of musical compositions by other public broadcasting entities.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertoire of ASCAP, in 2003, \$460; in 2004, \$475; in 2005, \$495; in 2006, \$515; in 2007, \$535.

(2) For all such compositions in the repertoire of BMI, in 2003, \$460; in 2004, \$475; in 2005, \$495; in 2006, \$515; in 2007, \$535.

(3) For all such compositions in the repertoire of SESAC, in 2003, \$98; in 2004, \$100; in 2005, \$102; in 2006, \$104; in 2007, \$106.

(4) For the performance of any other such compositions, in 2003 through 2007, \$1.

7. Section 253.7 is amended as follows:

a. in paragraph (a), by removing "or compositions represented by the Harry Fox Agency, Inc., SESAC, and/or the National Music Publishers Association and which are licensed on terms and conditions established by a duly empowered Copyright Arbitration Royalty Panel pursuant to the procedures set forth in this subchapter,"; and

b. by revising paragraph (b).

The revisions to Sec. 253.7 read as follows:

Sec. 253.7 Recording rights, rates and terms.

(b) *Royalty rate.* (1)(i) For uses described in paragraph (a) of this section of a musical work in a PBS-distributed program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in that PBS-distributed program:

2003-2007

Feature.....	\$112.40
Concert feature (per minute).....	33.75
Background.....	56.81
Theme:	
Single program or first series program	56.81
Other series program.....	23.06

(ii) For such uses other than in a PBS-distributed television program, the royalty fee shall be calculated by multiplying the following per-composition rates by the number of different compositions in that program:

2003-2007

Feature	\$9.29
Concert feature (per minute)	2.44
Background	4.04
Theme:	
Single program or first series program	4.04
Other series program	1.61

(iii) In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in a NPR program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule "National Public Radio" programs include all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

2003-2007

Feature.....	\$12.17
Concert feature (per minute)	17.86
Background	6.10
Theme:	
Single program or first series program	6.10
Other series program.....	2.43

(3) For purposes of this schedule, a "Concert Feature" shall be deemed to be the nondramatic presentation in a program of all or part of a symphony, concerto, or other serious work originally written for concert performance or the nondramatic presentation in a program of portions of a serious work originally written for opera performance.

(4) For such uses other than in a NPR-produced radio program:

2003-2007

Feature	\$.78
Feature (concert) (per half hour)	1.63
Background39

(5) The schedule of fees covers use for a period of three years following the first use. Succeeding use periods will require the following additional payment: additional one year period—25 percent of the initial three year fee; second three year period—50 percent of the initial three year fee; each three year fee thereafter—25 percent of the initial three year fee; provided that a 100 percent additional payment prior to the expiration of the first three year will cover use during all subsequent use periods without limitation. Such succeeding uses which are subsequent to December 31, 2007, shall be subject to the royalty rates established in this schedule.

8. Section 253.8 is amended by revising paragraphs (b)(1) and (f)(1) to read as follows:

Sec. 253.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

(b) *** (1) The following schedule of rates shall apply to the use of works within the scope of this section:

(i) For such uses in a PBS-distributed program:

2003-2007

(A) For featured display of a work	\$68.67
(B) For background and montage display	33.49
(C) For use of a work for program identification or for thematic use	135.37
(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of the schedule	44.47

(ii) For such uses in other than PBS-distributed programs:

2003-2007

(A) For featured display of a work	\$44.47
(B) For background and montage display	22.80
(C) For use of a work for a program identification or for thematic use	90.91
(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule	22.80

(f) *** (1) The rates of this schedule are for unlimited use for a period of three years from the date of the first use of the work under this schedule. Succeeding use periods will require the following additional payment: additional one year period—25 percent of the initial three year fee; second three year period—50 percent of the initial three year fee; each three year period thereafter—25 percent of the initial three year fee; provided that a 100 percent additional payment prior to the expiration of the first three year period

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will cover use during all subsequent use peri-

ods without limitation. Such succeeding uses which are subsequent to December 31, 2007, shall be subject to the rates established in this schedule.

* * * * *

9. In Sec. 253.10, the first sentence in paragraph (a) is revised to read:

Sec. 253.10 Cost of living adjustment.

(a) On December 1, 2003, the Librarian of Congress shall publish in the **Federal Register** a notice of the change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published prior to December 1, 2002, to the most recent Index published prior to December 1, 2003. * * *

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Dated: October 22, 2002.

David O. Carson,
General Counsel.

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