

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 262

[Docket Nos. 2002–1 CARP DTRA3 and 2001–2 CARP DTNSRA]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is requesting comment on proposed regulations that set rates and terms for the use of sound recordings in eligible nonsubscription transmissions and new subscription services, other than transmissions made by certain noncommercial entities, together with related ephemeral recordings. The rates and terms are for the 2003 and 2004 statutory licensing period, except in the case of new subscription services in which case the license period runs from 1998 through 2004. The agreement published herein supersedes the agreement published in the **Federal Register** on May 1, 2003, and parties should only comment on the proposed rates and terms set forth in this notice.

DATES: Comments are due no later than June 19, 2003.

ADDRESSES: An original and five copies of any comment shall be delivered by hand to: Office of the General Counsel, James Madison Memorial Building, Room LM–403. First and Independence Avenue, SE., Washington, DC 20559–6000; or mailed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024–0977.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, 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: On May 1, 2003, the Copyright Office published a notice in the **Federal Register** requesting comment on proposed regulations that set rates and terms for the use of sound recordings in certain eligible nonsubscription transmissions made pursuant to sections 114 of the Copyright Act, title 17 of the United States Code, during the 2003 and 2004 statutory licensing period, as well as for the making of ephemeral recordings

necessary for the facilitation of such transmissions in accordance with a second statutory license set forth in section 112(e). The proposal also included rates and terms for the use of sound recordings in transmissions made by new subscription services from 1998 through December 31, 2004, and the making of the related ephemeral recordings under these same statutory licenses. 68 FR 23241 (May 1, 2003). These proposed rates and terms were part of a settlement agreement negotiated by Sound Exchange, a division of the Recording Industry Association of America, Inc., the American Federation of Television and Radio Artists, the American Federation of Musicians of the United States and Canada, and the Digital Media Association, and were submitted to the Copyright Office on April 14, 2003, along with a petition, requesting that the Office publish the proposed rates and terms pursuant to § 251.63(b) of title 37 of the Code of Federal Regulations, which it did. *Id.*

However, the April 14 proposal has been superseded by a second proposal which was submitted to the Copyright Office on May 8, 2003. The new agreement amends the proposal in the April 14 submission with the approval of the parties to the first agreement, who did not participate in the new round of negotiations, and includes for the first time rates and terms for simulcasts of AM and FM radio broadcast programming.¹ These new rates are the result of an agreement between Copyright Owners and Performers and Broadcasters.² The May 8 agreement also includes proposed rates and terms for the use of sound recordings in the reproduction of ephemeral recordings by business establishment services. These rates and terms were agreed to by the Copyright Owners and Performers and Music Choice, the only business establishment service participating in this proceeding, and cover the 2003 and 2004 statutory license period. As before, the Petitioners request that the Office

¹ Petitioners note that a dispute over the scope of certain exemptions to Section 106(6) pertaining to the broadcasters is pending in the U.S. Court of Appeals for the Third Circuit, *Bonneville Int'l Corp. v. Peters*, No. 01–CV–408 (E.D. Pa. Aug. 1, 2001), appeal docketed, No. 01–3720 (3rd Cir. Oct. 1, 2001) and that “[n]othing in this Joint Petition is intended to resolve that dispute, prejudice the position of any of the parties thereto, or imply that any activities determined to be exempt are ‘covered’ by the rates and terms set forth herein.” Petition at 3 n.3 (May 8, 2003).

² Those entities who negotiated on behalf of the broadcasters include, Bonneville International Corporation, Clear Channel Communications, Inc., the National Religious Broadcasters Music License Committee, Salem Communications Corporation and Susquehanna Radio Corporation.

publish the amended proposed rates and terms for public comment pursuant to 37 CFR 251.63(b).

Section 251.63(b) of title 37 of the Code of Federal Regulations allows the Librarian to adopt the parties’ proposed rates and terms without convening a Copyright Arbitration Royalty Panel (“CARP”) for this purpose, provided that the proposed rates and terms are published in the **Federal Register** and no interested party with an intent to participate in the proceeding files a comment objecting to the proposed terms. In other words, unless there is an objection from a person with a significant interest in the proceeding who is prepared and eligible to participate in a CARP proceeding, the purpose of which is to adjust the rates and terms for use of sound recordings in eligible nonsubscription transmissions and new subscription services pursuant to the section 112 and section 114 statutory licenses, the Librarian can adopt the rates and terms in the proposed settlement in final regulations without convening a CARP. This procedure to adopt negotiated rates and terms in the case where an agreement has been reached has been specifically endorsed by Congress.

If an agreement as to rates and terms is reached and there is no controversy as to these matters, it would make no sense to subject the interested parties to the needless expense of an arbitration proceeding conducted under [section 114(f)(2)(1995)]. Thus, it is the Committee’s intention that in such a case, as under the Copyright Office’s current regulations concerning rate adjustment proceedings, the Librarian of Congress should notify the public of the proposed agreement in a notice-and-comment proceeding and, if no opposing comment is received from a party with a substantial interest and an intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the agreement without convening an arbitration panel.

S. Rep. No. 104–128, at 29 (1995)(citations omitted).

Accordingly, the Copyright Office is granting the joint petition filed on May 8 and is publishing for public comment the proposed rates and terms embodied in the amended agreement as submitted to the Office on May 8. Because this notice includes amendments to the proposal published in the May 1 notice, interested parties should comment only on the rates and terms published herein and should not comment on those published in the May 1 notice. Any party who objects to the amended proposed rates and terms set forth herein must file a written objection with the Copyright Office and an accompanying Notice of Intent to