

Recording Industry Association of America, Inc. that is authorized to negotiate on behalf of copyright owners and performers, reached an agreement with small commercial webcasters in December 2002. *See* 67 FR 78510 (December 24, 2002). Negotiations between SoundExchange and the noncommercial webcasters followed and were completed in May 2003. The SWSA agreement applicable to the noncommercial entities was published in the **Federal Register** on June 11, 2003. 68 FR 35008 (June 11, 2003). Noncommercial webcasters who wished to take advantage of the rates and terms set forth in this agreement and had already made digital audio transmissions were required to submit a completed and signed election form to SoundExchange no later than 30 days after publication of the rates and terms in the **Federal Register**. Noncommercial webcasters who have not yet made a digital audio transmission may still elect to operate under the SWSA provided that they file the election form no later than the first date on which it would be obligated to make a royalty payment. *See* 68 FR at 35009.

Shortly thereafter, SoundExchange, the American Council on Education, and the Intercollegiate Broadcasting System, Inc., jointly with Harvard Radio Broadcasting Co., Inc. filed a petition with the Copyright Office for adjustment of the section 112 and 114 statutory rates and terms applicable to noncommercial licensees, requesting that the Office publish the proposed rates and terms for public comment pursuant to 37 CFR 251.63(b). The proposed rates and terms are identical to the applicable rates and terms for the period ending December 31, 2002, as established in the Order of the Librarian of Congress published July 8, 2002. *See* 67 FR 45239 (July 8, 2002).

The purpose for proposing these rates and terms is to ensure that a statutory rate is set for noncommercial licensees, so that there is no gap in the statutory rate scheme. Thus, a noncommercial licensee who does not opt to operate under the rates and terms negotiated in the SWSA agreement would operate according to the rates and terms announced today, should they be adopted as final rules. However, noncommercial webcasters who have elected to operate under the rates and terms negotiated pursuant to the SWSA and published on June 11, 2003, will not be affected by the proposed rates and terms announced today.

Section 251.63(b) of title 37 of the Code of Federal Regulations allows the Librarian to adopt proposed rates and terms without convening a CARP,

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 setting rates and terms applicable to noncommercial licensees and who is prepared and eligible to participate in a CARP proceeding, 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 July 3, 2003, and is publishing for public comment the proposed rates and terms embodied in the agreement. Any party who objects to the proposed rates and terms set forth herein must file a written objection with the Copyright Office and an accompanying Notice of Intent to Participate, if the party has not already done so, in accordance with the requirements set forth in the Copyright Office's November 20, 2001, Notice. *See* 66 FR 58180, 58181 (November 20, 2001). The content of the written challenge should describe the party's interest in the proceeding, the proposed rule the party finds objectionable, and the reasons for the challenge.

Only a party with a significant interest in these rates and terms and who is prepared to participate in a CARP proceeding has standing to object. A noncommercial webcaster that has elected to operate under the rates and terms negotiated under the SWSA and published on June 11 would have no standing to object to the rates and terms announced today.

If no comments are received, the regulations shall become final upon publication of a final rule and shall cover the period from January 1, 2003, to December 31, 2004.

Schedule for Filing a Written Direct Case

On August 18, 2004, the Copyright Office issued an order in this proceeding in which it: (1) Announced the consolidation of this proceeding with the proceeding to establish rates and terms for new subscription services, Docket No. 2001–2–DTNSRA; (2) set forth a new precontroversy discovery schedule and set a date for a meeting to discuss administrative issues; (3) directed parties in this proceeding to file a Notice of Intent to Submit a Written Direct Case; and (4) set a new briefing schedule for filing oppositions and replies to the pending motion to adopt the interim protective order.

Any new participants who may enter this proceeding by filing an objection to the proposed rates and terms as they apply to noncommercial entities must comply with the dates and requirements set forth in the August 18 order. *See* <http://www.copyright.gov/carp/order81803.pdf>. Accordingly, all parties to this proceeding, including any new participants, must be prepared to file a written direct case with the Copyright Office and serve a copy of the written direct case on all parties to this proceeding on October 6, 2003.

List of Subjects in 37 CFR Part 263

Copyright, Digital audio transmissions, Performance right, Sound recordings.

Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes adding part 263 to 37 CFR to read as follows:

PART 263—RATES AND TERMS FOR CERTAIN TRANSMISSIONS AND THE MAKING OF EPHEMERAL REPRODUCTIONS BY NONCOMMERCIAL LICENSEES

Sec.

263.1 General.

263.2 Definitions.

263.3 Royalty Rates and Terms.

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

§ 263.1 General.

This part 263 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Noncommercial Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of ephemeral recordings by certain