

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. The voluntary negotiation period was triggered on enactment of the Digital Performance Act, which directs the Librarian of Congress, within 30 days of enactment, to publish in the Federal Register a notice initiating "voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments \* \* \*" 17 U.S.C. 114(f)(1). The voluntary negotiation period is to last for six months, and any terms and rates negotiated during the period are to be effective from February 1, 1996, the effective date of the Digital Performance Act,<sup>1</sup> through December 31, 2000. The Digital Performance Act requires that the terms and rates should be established separately for each different type of digital audio transmission service then in operation, but does not require or suggest that the terms and rates established must be different. The negotiations between copyright owners of sound recordings and the entities performing such recordings under the § 114 license are to be governed by the provisions of section 114(e) (which grants the negotiating parties an antitrust exemption), and each party is responsible for bearing its own costs.

In the legislative history to the Digital Performance Act, the Committee expressed hope that the voluntary negotiation period will lead to an industry-wide agreement concerning royalty terms and rates. S. Rep. No. 128, 104th Cong., 1st Sess. 29 (1995). If an agreement as to rates and terms is reached and there is no further controversy, then it is not necessary for the parties to submit to arbitration. In such cases, the Librarian of Congress will follow current rate regulation procedures and 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 intent to participate in an arbitration proceeding, the Librarian will adopt the terms and rates embodied in the agreement without convening a copyright arbitration royalty panel. 37 CFR 251.63(b). If, however, no industry-wide agreement is reached, or only certain parties negotiate license agreements, then those 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. Arbitration proceedings are initiated upon the filing of a petition for ratemaking with the Librarian of Congress during the 60 days immediately following the six month voluntary negotiation period. Arbitration cannot take place without the filing of a petition even if no voluntary license agreements are negotiated.

#### Initiation of Voluntary Negotiations

Pursuant to 17 U.S.C. 114(f)(1), the Copyright Office of the Library of Congress is initiating the six month voluntary negotiation period for sound recording copyright owners and entities that perform or authorize the performance of sound recordings by means of nonexempt digital subscription transmissions. The negotiation period is to run from December 1, 1995 to June 1, 1996. Parties which negotiate a voluntary license agreement during this period are encouraged to submit two copies of the agreement to the Copyright Office at the above listed address within 30 days of its execution.

#### Petitions

Pursuant to 17 U.S.C. 114(f)(2), those sound recording copyright owners and entities that perform or authorize the performance of sound recordings by means of nonexempt digital transmissions and who have not negotiated license agreements under section 114(f)(1) are subject to arbitration upon the filing of a petition. Only those parties with a significant interest in the establishment of terms and rates for the section 114 license may file a petition. Petitions must be submitted in accordance with 17 U.S.C. 803(a)(1), and may be filed at any time during the period commencing on June 2, 1996, and ending on August 1, 1996. Petitions should be submitted to the Copyright Office at the address listed in this notice. The petitioner must deliver an original and five copies of the petition to the Office.

If all the affected parties negotiate a single industry-wide agreement during the period described in section 114(f)(1), they must petition the Librarian of Congress for acceptance of the agreement during the same 60 day period. The Librarian will then follow the notice and comment procedures of 37 CFR 251.63(b). If a party with a significant interest and an intent to participate in an arbitration proceeding files an objection to the agreement during the notice and comment

proceeding, then the Librarian shall initiate an arbitration proceeding in accordance with chapter 8 of the Copyright Act and 37 CFR 251 part.

#### Digital Phonorecord Delivery

The Digital Performance Act also provides that the section 115 compulsory license to make and distribute phonorecord includes the right of the compulsory licensee to make or authorize digital phonorecord deliveries. The Act identifies 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 distribution of a physical phonorecord.<sup>2</sup> As a result, the Office is amending part 255 of its rules to reflect the new royalty rate for digital phonorecord deliveries, and to adopt the same definition of digital phonorecord delivery as appears in the Digital Performance Act. The effective date of the rule change is February 1, 1996, the date on which the Digital Performance Act takes effect.

#### Good Cause Finding

Section 553(b)(3)(B) states that notice of a proposed rulemaking is not required "when the agency for good cause finds \* \* \* that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Because the Digital Performance Act requires that the new rate for digital phonorecord deliveries is to be the same as for the making and distribution of physical phonorecords until December 31, 1997, the Office is without any discretion in the matter. Therefore, it would be impracticable, unnecessary, and contrary to the public interest to solicit comments on a rule that is mandated by law.

#### List of Subjects in 37 CFR Part 255

##### Copyright, Recordings.

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 255 as follows:

#### **PART 255—ADJUSTMENT OF ROYALTY PAYABLE UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS**

1. The authority citation for part 255 continues to read as follows:

<sup>2</sup> After December 31, 1997, the rate for digital phonorecord deliveries could be the same or different than the rate for making and distributing a physical phonorecord, depending on the outcome of negotiations or CARP proceedings scheduled to take place that year.

<sup>1</sup> The effective date of the Digital Performance Act is February 1, 1996, with the exception of sections 114 (e) and (f) of the law, which became effective upon date of enactment.