

distribution proceedings and noncommercial educational broadcasting proceedings. Id.

While this observation may be valid, the Office notes that, historically, these organizations have represented their members' only for their public performance rights in the designated proceedings, and not the reproduction right addressed under DART.

The Office does not find that any misunderstanding on the part of a member as to the performing rights organization role vis-a-vis the former CRT, and now the Copyright Office, can be a valid basis for a rebuttable presumption. Furthermore, the Office believes the performing rights societies have had sufficient time to correct any misunderstanding.

Alternatively, the PRO argue that the regulation imposes a penalty on their members because the performing rights societies use broad, generalized agency terms in place of specific language that directly addresses the right to collect royalties under AHRA. Id. To that extent, § 259.2(c)(2) which we are adopting here does permit general agency terms to be sufficient if a court with the authority to interpret a PRO contract rules that the terms in question do extend to the filing of claims for DART royalties.

Under the regulation which requires separate, written and specific authorization, the Office provides an exception. The exception allows the membership or affiliation agreement to authorize the performing rights organization to represent its members before the Copyright Office or the Copyright Arbitration Royalty Panel in royalty filing and fee distribution proceedings, and pointedly does not require the agreement to articulate which exclusive right under the Copyright Act of 1976 the organization represents. 37 CFR 259.2(c)(1).

This exception supports an earlier argument raised by Mr. James Cannings, and incorporated by reference in the present proceeding, which asserted that the standard agreements between performing rights societies and their members did not grant a society an automatic right to represent its members before the Tribunal. See Cannings comment to Interim Regulations, 58 FR 6441 (January 29, 1993). While the Office cannot interpret the terms of the membership contracts, the Office will accept express statements in a membership agreement which authorize the organization to represent a member before the Copyright Office or a CARP as an appropriate grant of authority to the performing rights society to act on behalf of the signatory.

Another earlier argument raised by GMC in support of the present regulation concerned the confusion arising from duplicative and overlapping claims. GMC comment and reply comment to NPRM, 57 FR 54542, (November 18, 1992). The Office finds this argument moot under the present regulations, since it requires all joint claimants to file a list of all individual claimants to the joint claim. This requirement allows the parties to spot overlapping claims quickly and to resolve the issue among themselves.

Additionally, the Gospel Music Coalition has argued on several occasions that the rebuttable presumption allows the performing rights societies to file on behalf of all its members, whether entitled or not under the Act, thereby inflating the magnitude of their initial claim. See GMC comment and reply comment to NPRM, 57 FR 54542 (November 18, 1992); and GMC comment to Interim Regulations, 58 FR 6441 (January 29, 1993). The Office concurs and acknowledges the fact that to allow the performing rights organizations to avail themselves continually of the rebuttable presumption grants the performing rights societies a preferential position in the filing process.

The PRO state a corollary to this argument and assert that failure to grant the rebuttable presumption will create a windfall for the other claimants at the expense of unsuspecting, disenfranchised claimants. The Office recognizes that both positions depict potential outcomes under different final rules, but neither argument addresses the main concerns underpinning the current rule; namely, the language and intent of the Act.

On another front, the PRO stress that the adoption of a permanent rebuttable inference of agency will not impair the rights of individuals to file their own claim, or join their claims together. See PRO Comment at 7. While the Office agrees with this statement, the Office cannot reconcile the use of the inference with the plain language of the Act and its intent as depicted in the underlying legislative history. Clearly, the Act contemplated a process where an individual takes the initiative to file on his or her own behalf, or expressly authorizes a common agent to act on his or her behalf.¹

¹ Performing rights organizations, which are interested copyright parties under the Act pursuant to 17 U.S.C. 1001(7)(D), are never mentioned in section 1006, much less granted agency status for purposes of filing claims for their members. Additional support for this interpretation is found in 17 U.S.C. 1007(a)(2) which allows interested copyright parties specified in section 1006(b) to

The Office does not refute the Performing Rights Organizations' assertion that Congress recognized a licensing association or organization's status as an interested copyright party. But recognition of this fact still does not provide adequate grounds for allowing a performing rights organization to assert a rebuttal inference of agency when the statute clearly denies it a right to file a claim or negotiate on behalf of its members without an express grant of authority.

In fact, Congress made no presumptions about the agency status of any organization or association which (1) represents parties entitled to royalties under AHRA, or (2) engages in licensing rights in musical works to music users on behalf of writers and publishers, i.e., an interested copyright party under 17 U.S.C. 1001(7)(D). As GMC pointed out, the language in the Act and the legislative history merely permits the performing rights organizations to act as common agents, if so designated. See discussion of GMC comment and reply to NPRM, 57 FR 54542, (November 18, 1992). The Copyright Office agrees with this interpretation and will not open a door which Congress expressly left closed.

For all the reasons stated above, the Copyright Office affirms the original regulation requiring separate, specific and written authorization and applies the rule to all organizations and associations acting as common agents, and thereby declines to grant a permanent, rebuttable inference of agency to the performing rights organizations.

IV. Clarification of a Filing Requirement

The Copyright Office further notes that organizations and associations that are interested copyright parties pursuant to 17 U.S.C. 1001(7)(D) are not entitled to file claims on their own behalf unless the organization or association is also an interested copyright party as defined under 17 U.S.C. 1001(7)(A), (B) or (C). These organizations and associations, however, may act as common agents on behalf of their members or affiliates, if so authorized. But, common agents, which are also interested copyright parties under the Act, cannot satisfy the requirement under 37 CFR 259.3(a)(3), to state "how the claimant fits within the definition of interested copyright party pursuant to 17 U.S.C. 1001(7)" by stating that the common agent is an interested copyright party pursuant to

designate a common agent, including any organization described in section 1001(7)(D), to negotiate or receive payment on their behalf.