LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 263

[Docket No. 2002–1 CARP DTRA3]

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 made by noncommercial licensees, and for the making of related ephemeral recordings. The rates and terms are for the 2003 and 2004 statutory licensing period.

DATES: Comments are due no later than September 22, 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: Since 1995, copyright owners of sound recordings have had the exclusive right to perform their works publicly by means of a digital audio transmission, subject to certain limitations. 17 U.S.C. 106(6). Among the limitations on the performance right was the creation of a new compulsory license for nonexempt, noninteractive digital subscription transmissions. 17 U.S.C. 114. Section 114 was later amended with the passage of the Digital Millennium Copyright Act of 1998 (''DMCA''), Public Law 105–304, to cover additional digital audio transmissions, including services making eligible nonsubscription transmissions. The DMCA also created a new statutory license to provide for the making of certain ephemeral phonerecords that facilitate the making of digital audio transmissions pursuant to the section 114 license. *See* 17 U.S.C. 112(e).

Rates and terms for use of sound recordings pursuant to these licenses by eligible nonsubscription services and by business-to-business establishment services were published in the **Federal Register** on July 8, 2002, after a full hearing before a Copyright Arbitration Royalty Panel (''CARP''), but these rates only applied to those transmissions made through December 31, 2002. *See* 67 FR 45239 (July 8, 2002).

In accordance with section 114(f)(2)(C)(i)(II), the Copyright Office initiated a new rate proceeding in January 2002 to set rates and terms for the current license period, January 1, 2003 through December 31, 2004. The first step in the rate adjustment process is the announcement of a voluntary six-month negotiation period *See* 67 FR 4472 (January 30, 2002). Although no agreements were reached during the early stages of this proceeding, copyright owners and performers did ultimately reach an agreement with certain licensees and the proposed settlement was published in the **Federal Register** on May 20, 2003. 68 FR 27506 (May 20, 2003). This agreement, however, did not make any special provisions for noncommercial entities who operate under the same statutory licenses, because noncommercial webcasters were involved in separate rate negotiations to establish an alternative rate structure to the one that would be set in accordance with the procedures set forth in 17 U.S.C. 112(e) and 114(f). These negotiations were conducted in accordance with the Small Webcaster Settlement Act of 2002 (''SWSA''), Public Law 107–321, 116 Stat. 2780.

The SWSA was passed in 2002 to address certain concerns of small webcasters with respect to the rates announced on July 8, 2002, and the CARP process which established those rates. Basically, it gave small commercial webcasters and noncommercial webcasters another opportunity to negotiate a different and separate rate schedule applicable to their use of sound recordings in digital transmissions for the period through 2004. The negotiations for these alternative agreements were conducted sequentially. SoundExchange, an unincorporated division of the

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.
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> 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 Intention 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.

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

Noncommercial Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period 2003–2004.

§ 263.2 Definitions.

For purposes of this part, the following definition shall apply:

A *Noncommercial Licensee* is a person or entity that has obtained a compulsory license under 17 U.S.C. 114 and the implementing regulations therefor, or that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make ephemeral recordings for use in facilitating such transmissions, and—

(a) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(b) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(c) Is a State of possession or any governmental entity or subordinate thereof, or the United States or District of Columbia, making transmissions for exclusively public purposes.

§ 263.3 Royalty Rates and Terms.

A Noncommercial Licensee shall in every respect be treated as a ''Licensee'' under part 262 of this chapter, and all terms applicable to Licensees and their payments under part 262 of this chapter shall apply to Noncommercial Licensees and their payment, except that a Noncommercial Licensee shall pay royalties at the rates applicable to such a ''Licensee,'' as currently provided in § 261.3(a), (c), (d) and (e) of this chapter, rather than at the rates set forth in § 262.3(a) through (d) of this chapter.

Dated: August 18, 2003.

David O. Carson,

General Counsel.

[FR Doc. 03–21467 Filed 8–20–03; 8:45 am]

BILLING CODE 1410–33–P

DEPARTMENT OF DEFENSE

48 CFR Part 242

[DFARS Case 2002–D015]

Defense Federal Acquisition Regulation Supplement; Production Surveillance and Reporting

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to eliminate requirements for contract administration offices to perform production surveillance on contractors that have only Criticality Designator C (low-urgency) contracts. This change will permit contract administration offices to devote more resources to critical and high-risk contracts.

DATES: DoD will consider all comments received by October 20, 2003.

ADDRESSES: Respondents may submit comments directly on the World Wide Web at *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm.* As an alternative, respondents may e-mail comments to: *dfars@osd.mil.* Please cite DFARS Case 2002–D015 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Mr. Steven Cohen, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2002–D015.

At the end of the comment period, interested parties may view public comments on the World Wide Web at *http://emissary.acq.osd.mil/dar/dfars.nsf.*

FOR FURTHER INFORMATION CONTACT: Mr. Steven Cohen, (703) 602–0293.

SUPPLEMENTARY INFORMATION:

A. Background

DFARS 242.1104 presently requires the cognizant contract administration office to conduct a periodic risk assessment of each contractor to determine the degree of production surveillance needed for contracts awarded to that contractor, and to develop a production surveillance plan based on the risk level determined during the risk assessment. This proposed rule revises DFARS 242.1104 to eliminate requirements for production surveillance on contractors that have only Criticality Designator C (low-urgency) contracts, and for monitoring of progress on any Criticality Designator C contract, unless production surveillance or contract monitoring is specifically requested by the contracting officer. This change will enable contract administration offices to use production surveillance resources in a more effective manner.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the DFARS changes in this rule primarily affect the allocation of Government resources to production surveillance functions. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002–D015.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 242

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, DoD proposes to amend 48 CFR part 242 as follows:

1. The authority citation for 48 CFR part 242 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

2. Section 242.1104 is revised to read as follows:

242.1104 Surveillance requirements.

(a) The cognizant contract administration office (CAO)—

(i) Shall perform production surveillance on all contractors that have Criticality Designator A or B contracts;

(ii) Shall not perform production surveillance on contractors that have only Criticality Designator C contracts, unless specifically requested by the contracting officer; and

(iii) When production surveillance is required, shall—

(A) Conduct a periodic risk assessment of the contractor to determine the degree of production surveillance needed for all contracts awarded to that contractor. The risk assessment shall consider information provided by the contractor and the contracting officer;