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Mary E. Peters,

Federal Highway Administrator.

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 260

[Docket No. 2001–1 CARP DSTRA2]

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office is requesting comment on proposed regulations that set rates and terms for the use of sound recordings by preexisting subscription services for the period January 1, 2002 through December 31, 2007.

DATES: Comments are due no later than March 3, 2003.

ADDRESSES: An original and five copies of any comment shall be delivered by hand to: Office of the General Counsel, Copyright Office, James Madison Building, Room LM–403, First and Independence Avenue, SE. Washington, DC; 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, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

Background

Section 106(6) of the Copyright Act, title 17 of the United States Code, gives a copyright owner of sound recordings an exclusive right to perform the copyrighted works publicly by means of a digital audio transmission. This right is limited by section 114(d), which allows certain non-interactive digital audio services to make digital transmissions of a sound recording under a compulsory license, provided that the services pay a reasonable royalty fee and comply with the terms of the license. Moreover, these services may make any necessary ephemeral

reproductions to facilitate the digital transmission of the sound recording under a second license set forth in section 112(e) of the Copyright Act.

The procedure for setting the rates and terms for these two statutory licenses is a two-step process. 17 U.S.C. 112(e)(3),(4) and (6) and 17 U.S.C. 114(f)(1). The first step requires the Librarian of Congress to initiate a voluntary negotiation period to give interested parties an opportunity to determine the applicable rates and terms through a less formal process. However, if the parties are unable to reach an agreement during this period, sections 112(e)(4) and 114(f)(1)(B) directs the Librarian of Congress to convene a three-person Copyright Arbitration Royalty Panel (''CARP'') for the purpose of determining the rates and terms for the compulsory license upon receipt of a petition filed in accordance with 17 U.S.C. 803(a)(1).

The first proceeding to set rates and terms for the section 114 license for preexisting subscription services began in 1995 and concluded with the issuance of a final rule and order by the Librarian of Congress on May 8, 1998. *See* 63 FR 25394 (May 8, 1998). The parties in that proceeding numbered four: the Recording Industry Association of America (''RIAA''); Digital Cable Radio Associates, now known as Music Choice; DMX Music, Inc. (''DMX''); and Muzak, L.P. (''Muzak'').

Later that same year, Congress passed the Digital Millennium Copyright Act (''DMCA''), amending the section 114 statutory license to cover additional transmission services and extending the term of the existing section 114 license rate as it applies to preexisting subscription services [1] through December 31, 2001. The DMCA also created a new statutory license to allow for the making of ephemeral reproductions for the purpose of facilitating certain digital audio transmissions, including those made by preexisting subscription services.

In accordance with the time frame set forth in the law for the purpose of setting rates and terms for use of the section 114 license by preexisting services, the Copyright Office published a notice in the **Federal Register** on January 9, 2001. 66 FR 1700 (January 9, 2001). This notice initiated a six-month negotiation period the purpose of which was to provide an opportunity for interested parties to set rates and terms for use of the section 114 license as it applied to both the preexisting subscription services and the preexisting satellite digital audio radio services. Unfortunately, no agreement was reached by the end of that period. Consequently, Music Choice and RIAA filed separate petitions with the Copyright Office, requesting that the Librarian of Congress convene a CARP to determine the rates and terms for both categories of preexisting services.

On November 13, 2001, the Copyright Office initiated the next phase of the rate adjustment proceeding with the publication of a notice in the **Federal Register** calling for Notices of Intent to Participate. 66 FR 58180 (November 13, 2001). Music Choice, DMX, Muzak, RIAA, the American Federation of Television and Radio Artists (''AFTRA''), the American Federation of Musicians of the United States and Canada (''AFM''), XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc. filed the requisite notices with the Office, and the Office scheduled the 45-day precontroversy discovery period. Initially, it set the date for the filing of direct cases for December 2, 2002. Order in Docket No. 2001–1 CARP DSTRA2, dated September 12, 2002. However, at the request of the parties, the Office readjusted the schedule and set February 24, 2003, as the new date for the filing of direct cases. Order in Docket No. 2001–1 CARP DSTRA2, dated December 16, 2003. However, in light of a petition filed with the Copyright Office, a hearing may not be necessary to establish rates and terms for the use of sound recordings by the preexisting services.

Joint Petition for Adjustment of Rates and Terms Applicable to Preexisting Subscription Services

On January 17, 2003, RIAA, AFTRA, AFM, Music Choice, DMX Music, Inc. and Muzak, LLC (collectively, ''Petitioners'') filed a joint petition for adjustment of rates and terms for statutory licenses applicable to preexisting subscription services and a request for an immediate stay of the obligation to file direct cases on February 24, 2002.[2] Having reached agreement on the rates and terms for the use of sound recordings by preexisting services for the period January 1, 2002, through December 31, 2007, the petitioners request that the Office publish the proposed rates and terms for public comment in lieu of convening a CARP to determine the rates and terms for this period.

Pursuant to § 251.63(b) of title 37 of the Code of Federal Regulations, the Librarian can adopt the parties' proposed terms without convening a CARP, provided that the proposed 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 adopt rates and terms for preexisting subscription services that use sound recordings to make digital audio transmissions 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.
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> S. Rep. No. 104–128, at 29 (1995)(citations omitted).

Accordingly, the Copyright Office is granting the joint petition and is publishing for public comment the proposed rates and terms embodied in the January 17, 2003, joint petition. 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. 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. If no comments are received, the regulations shall become final upon

[1] In the DMCA, Congress recognized two types of subscription services that were either in operation on or before July 31, 1998, or licensed by the Federal Communications Commission pursuant to a satellite digital audio radio service license on or before July 31, 1998. The former were designated as ''preexisting subscription services'' and the latter were termed a ''preexisting satellite digital audio radio service.'' See 17 U.S.C. 114(j)(10) and (11).

[2] The request for an immediate stay of the petitioners' obligation to file direct cases on February 24, 2002, will be addressed in a separate order.

publication of a final rule, and shall cover the period from January 1, 2002, to December 31, 2007.

List of Subjects in 37 CFR Part 260

Copyright, Digital Audio Transmissions, Performance Right, Sound Recordings.

Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes amending part 260 of 37 CFR as follows:

PART 260—USE OF SOUND RECORDINGS IN A DIGITAL PERFORMANCE

1. The authority citation for part 260 continues to read as follows:

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

2. The heading of Part 260 is revised as follows:

PART 260—RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES' DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE MAKING OF EPHEMERAL PHONORECORDS

3. Section 260.1 is revised to read as follows:

§ 260.1 General

(a) This part 260 establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114(d)(2), and the making of ephemeral phonorecords in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this part, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this part, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

(d) For purposes of this part, *Licensee* means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

4. Section 260.2 is amended as follows:

a. By revising the section heading;

b. By revising paragraphs (a) and (b);

c. By redesignating paragraph (c) as paragraph (e), and adding a new paragraph (c);

d. By redesignating paragraph (d) as paragraph (f), and adding a new paragraph (d);

e. In redesignated paragraph (e)(1)(ii) by adding ''a'' before ''recognized advertising agency'';

f. In redesignated paragraphs (e)(1)(iii) and (vi), by removing ''Programming Service'' and adding ''programming service'' in its place; and

g. In redesignated paragraphs (e)(1)(viii) and (e)(2), by removing ''(c)'' and adding ''(e)'' in its place.

The additions and revisions to § 260.2 read as follows:

§ 260.2 Royalty fees for the digital performance of sound recordings and the making of ephemeral phonorecords by preexisting subscription services.

(a) Commencing January 1, 2002 and continuing through December 31, 2003, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.0% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(b) Commencing January 1, 2004 and continuing through December 31, 2007, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.25% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(c) Commencing in the year 2003 and continuing through the year 2007, each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114(d)(2) and ephemeral phonorecords pursuant to 17 U.S.C. 112(e) shall make an advance payment of $100,000 per year, payable no later than January 20th of each year; Provided, however, that for 2003, the annual advance payment shall be due on [the 20th day following the month in which these rates and terms are published in the **Federal Register** notice as a final rule]. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraphs (a) and (b) of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received after the due date. Late fees shall accrue from the due date until payment is received.

* * * * *

5. Section 260.3 is amended as follows:

a. In paragraph (b), by removing ''twentieth'' and adding ''forty-fifth'' in its place;

b. By revising paragraphs (d) and (e); and

c. By adding a new paragraph (f).

The additions and revisions to § 260.3 read as follows:

§ 260.3 Terms for making payments of royalty fees.

* * * * *

(d) The designated agent may deduct from any of its receipts paid by Licensees under § 260.2, prior to the distribution of such receipts to any person or entity entitled thereto, the reasonable costs permitted to be deducted under 17 U.S.C. 114(g)(3); Provided, however, that the parties entitled to receive royalty payments according to the provisions set forth at 17 U.S.C. 114(g)(1) & (2) who have authorized a designated agent may agree to deduct such other costs agreed to by such other parties and the designated agent.

(e) Until such time as a new designation is made, SoundExchange, which initially is an unincorporated division of the Recording Industry Association of America, Inc., shall be the agent receiving royalty payments and statements of account and shall continue to be designated if it should be separately incorporated.

(f) A Licensee shall make any payments due under § 260.2(a) for digital transmissions or ephemeral phonorecords made between January 1, 2002, and [last day of the month in which these rates and terms are published in the **Federal Register** as a final rule] 2003, to the Designated Agent, less any amounts previously paid by such period to the Recording Industry Association of America, Inc., or SoundExchange by [the 45th day following the month in which these rates and terms are published in the **Federal Register** notice as a final rule].

6. Section 260.4 is amended as follows:

a. In paragraphs (a) and (b), by removing ''nonexempt subscription digital transmission service'' in each place it appears and adding ''nonexempt preexisting subscription service'' in its place; and

b. By revising paragraphs (d)(1) and (e).

The revisions to § 260.4 read as follows:

§ 260.4 Confidential information and statements of account.

* * * * *

(d)(1)Those employees, agents, consultants and independent contractors of the designated agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related hereto, who are not also employees or officers of a sound recording copyright owner or performing artist, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records; and

* * * * *

(e) The designated agent or any person identified in paragraph (d) of this section shall implement procedures to safeguard all confidential financial and business information, including, but not limited to royalty payments, submitted as part of the statements of account, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the designated agent or such person.

* * * * *

§ 260.5 [Amended]

7. Section 260.5(b) is amended by removing ''nonexempt subscription digital transmission service'' and adding ''nonexempt preexisting subscription service'' in its place.

§ 260.6 [Amended]

8. Section 260.6(g) is amended by removing ''copyright owners''.

§ 260.7 [Amended]

9. Section 260.7 is amended by removing ''the cost of the administration of the collection and distribution of the royalty fees' and adding ''any costs deductible under 17 U.S.C. 114(g)(3)'' in its place.

Dated: January 24, 2003.

David O. Carson,

General Counsel.

[FR Doc. 03–2081 Filed 1–29–03; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 020603140–3010–02 , I.D. 050102G]

RIN 0648–AQ00

Regulations Governing the Taking and Importing of Marine Mammals; Eastern North Pacific Southern Resident Killer Whales

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: Following a review of the status of the eastern North Pacific Southern Resident stock of killer whales (*Orcinus orca*), NMFS has determined that the stock is below its Optimal Sustainable Population (OSP) and, therefore, proposes to designate the Southern Resident stock of killer whales as depleted under the Marine Mammal Protection Act (MMPA). NMFS requests that interested parties submit comments on this proposal and on potential conservation measures that may benefit these whales.

DATES: Information and comments must be received by March 31, 2003.

ADDRESSES: Information and comments should be submitted to Chief, Protected Resources Division, NMFS, 525 NE Oregon Street, Suite 500, Portland, OR 97232. Alternatively, comments may also be submitted via the Internet (*see* Electronic Access) or by facsimile (fax) to (503) 230–5435.

FOR FURTHER INFORMATION CONTACT: Mr. Garth Griffin, Northwest Regional Office, NMFS, Portland, OR (503) 231–2005, or Dr. Thomas Eagle, Office of Protected Resources, NMFS, Silver Spring, MD (301) 713–2322, ext. 105.

SUPPLEMENTARY INFORMATION:

Electronic Access

A list of the references used in this notice and other information related to the status of this stock of killer whales is available on the Internet at *http://www.nwr.noaa.gov/mmammals/whales/srkw.htm.* Comments may be submitted at the Internet address above or at the following: *http://www.nmfs.noaa.gov/ibrm.*

Background

Section 3(1)(A) of the MMPA (16 U.S.C. 1362(1)(A)) defines the term, ''depletion'' or ''depleted'', as any case in which ''the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals ... determines that a species or population stock is below its optimum sustainable population [(OSP)].'' Section 3(9) of the MMPA defines OSP ''...with respect to any population stock, [as] the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity [(K)] of the habitat and the health of the ecosystem of which they form a constituent element.'' NMFS' regulations at 50 CFR 216.3 clarify the definition of OSP as a population size which falls within a range from the population level of a given species or stock that is the largest supportable within the ecosystem (carrying capacity [K]) to the population level that results in the maximum net productivity level (MNPL). MNPL is the greatest net annual increment (increase) in population numbers resulting from additions due to reproduction less losses due to natural mortality.

A population stock below its MNPL is, by definition, below OSP and, thus, would be considered depleted under the MMPA. Historically, the estimated MNPL has been expressed as a range of values, generally 50 to 70 percent of K (42 FR 12010, March 1, 1977). In 1977, the midpoint of this range (60 percent of K) was used to determine whether dolphin stocks in the eastern tropical Pacific Ocean were depleted under the MMPA (42 FR 64548, December 27, 1977). The 60–percent-of-K value was used in the final rule governing the taking of marine mammals incidental to commercial tuna purse seine fishing in the eastern tropical Pacific Ocean (45 FR 72178, October 31, 1980) and has been used since that time for other status reviews under the MMPA. For stocks of marine mammals, including killer whales, K is generally unknown. NMFS, therefore, has used the best estimate available of maximum historical abundance as a proxy for K.

Pursuant to section 115 of the MMPA (16 U.S.C. 1383b), NMFS published an advance notice of proposed rulemaking (ANPR) (67 FR 44132, July 1, 2002) which included a request for scientific information. The notice requested information, comments, and supporting documents on stock status, areas of significance to the stock, and any factors that may be causing the decline or impeding the recovery of the stock. The 60–day comment period on the ANPR closed on August 30, 2002. A summary of the public comments received and