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November 11, 1998

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Digital Phonorecord Delivery  
Rate Adjustment Proceeding  
Docket No. 96-4 CARP DPRA

Dear Mr. Carson:

In anticipation of the meeting called by the Copyright Office in this matter, we enclose proposed regulations as to which the parties (based on their submissions) appear to be in substantial agreement. The regulations would:

- (i) Establish the royalty rate for general digital phonorecord deliveries (subsection 255.5(b));

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- (ii) Defer the setting of rates for incidental digital phonorecord deliveries, with the modification suggested by the Webcasters in their comments dated October 23, 1998 (section 255.6);
- (ii) Establish the schedule for future proceedings, as previously proposed in the joint petition of NMPA, RIAA and SGA (section 255.7); and
- (iv) Include a new section setting forth the clarification sought by ASCAP, BMI and SESAC, as modified to include rights under section 106(6) of the Copyright Act (section 255.8).

Sincerely,



Carey R. Ramos

Enclosure

cc: Service List

## Proposed DPD Regulations

1. The title of section 255.5 is revised to read "Royalty rate for digital phonorecord deliveries in general." and the present paragraph of section 255.5 is designated as paragraph (a).

Section 255.5 is further revised by adding the following new paragraph:

(b) For every digital phonorecord delivery made on or after January 1, 1998, except for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, as specified in 17 U.S.C. § 115(c)(3)(C) and (D), the royalty rate payable with respect to each work embodied in the phonorecord shall be the royalty rate prescribed in section 255.3 for the making and distribution of a phonorecord made and distributed on the date of the digital phonorecord delivery (the "Physical Rate"). In any future proceeding under 17 U.S.C. § 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

2. A new section 255.6 is added, which reads as follows:

### **§ 255.6 Royalty rate for incidental digital phonorecord deliveries.**

The royalty rate for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes a digital phonorecord delivery, as specified in 17 U.S.C. § 115(c)(3)(C) and (D), is deferred for consideration until the next digital phonorecord delivery rate adjustment proceeding pursuant to the schedule set forth in section 255.7; provided, however, that any owner or user of a copyrighted work with a significant interest in such royalty rate, as provided in 17 U.S.C. § 803(a)(1), may petition the Librarian of Congress to establish a rate prior to the commencement of the next digital phonorecord delivery rate adjustment proceeding. In the event such a petition is filed, the Librarian of Congress shall proceed in accordance with 17 U.S.C. § 115(c)(3)(D), and all applicable regulations, as though the petition had been filed in accordance with 17 U.S.C. § 803(a)(1).

3. A new section 255.7 is added, which reads as follows:

**255.7 Future proceedings.**

The procedures specified in 17 U.S.C. § 115(c)(3)(C) shall be repeated in 1998 and every second year thereafter until 2006 so as to determine the applicable rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. The procedures specified in 17 U.S.C. § 115(c)(3)(D) shall be repeated, in the absence of license agreements negotiated under 17 U.S.C. § 115(c)(3)(B) and (C), upon the filing of a petition in accordance with 17 U.S.C. § 803(a)(1), in 1999 and every second year thereafter until 2007 so as to determine new rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. Thereafter, the procedures specified in 17 U.S.C. § 115(c)(3)(C) and (D) shall be repeated in each fifth calendar year. Notwithstanding the foregoing, different years for the repeating of such proceedings may be determined in accordance with 17 U.S.C. § 115(c)(3)(C) and (D).

4. A new section 255.8 is added, which reads as follows:

**255.8 Public performances of sound recordings and musical works.**

Nothing in Part 255 annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under 17 U.S.C. §§ 106(4) and 106(6).