

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

1285 AVENUE OF THE AMERICAS  
NEW YORK, NEW YORK 10019-6064

TELEPHONE (212) 373-3000  
FACSIMILE (212) 757-3990

LLOYD K. GARRISON (1946-1991)  
RANDOLPH E. PAUL (1946-1956)  
SIMON H. RIFKIND (1950-1995)  
LOUIS S. WEISS (1927-1950)  
JOHN F. WHARTON (1927-1977)

RICHARD DEHÉ\*\*  
PHILIPPE JAMBRUN\*\*  
PIERRE PETIT\*\*  
EUROPEAN COUNSEL

WRITER'S DIRECT DIAL NUMBER

(212) 373-3240

WRITER'S DIRECT FACSIMILE

(212) 373-2773

WRITER'S DIRECT E-MAIL ADDRESS

cramos@paulweiss.com

1615 L STREET, NW  
WASHINGTON, DC 20036-5694  
TELEPHONE (202) 223-7300  
FACSIMILE (202) 223-7420

62, RUE DU FAUBOURG SAINT-HONORÉ  
75008 PARIS, FRANCE  
TELEPHONE (33 1) 53 43 14 14  
FACSIMILE (33 1) 53 43 00 23

FUKOKU SEIMEI BUILDING  
2-2 UCHISAIWAICHO 2-CHOME  
CHIYODA-KU, TOKYO 100, JAPAN  
TELEPHONE (81-3) 3597-8101  
FACSIMILE (81-3) 3597-8120

SUITE 2201 SCITECH TOWER  
22 JIANGUOMENWAI DAJIE  
BEIJING, 100004  
PEOPLE'S REPUBLIC OF CHINA  
TELEPHONE (86-10) 6512-3628-30  
FACSIMILE (86-10) 6512-3631

13TH FLOOR, HONG KONG CLUB BUILDING  
3A CHATER ROAD, CENTRAL  
HONG KONG  
TELEPHONE (852) 2536-9933  
FACSIMILE (852) 2536-9622

NEALE M. ALBERT\*  
MARK H. ALCOTT  
ALLAN J. ARFFA  
ROBERT A. ATKINS  
JONATHAN R. BELL  
DANIEL J. BELLER  
MARK A. BELNICK  
MITCHELL L. BERG  
MARK S. BERGMAN  
BRUCE BIRENBOIM  
RICHARD S. BORISOFF  
JOHN F. BREGLIO  
RICHARD J. BRONSTEIN  
JEANETTE K. CHAN  
LEWIS R. CLAYTON  
JAY COHEN  
JEROME ALAN COHEN  
RUSSELL E. COLWELL  
DOUGLAS R. DAVIS  
ROBERT D. DRAIN  
JAMES M. DUBIN  
LESLIE GORDON FAGEN  
DOMINIQUE FARGUE\*\*  
PETER L. FELCHER  
MITCHELL S. FISHMAN  
ROBERT C. FLEDER  
MARTIN FLUMENBAUM  
TERENCE J. FORTUNE  
PAUL D. GINSBERG  
MAX GITTER  
ERIC S. GOLDSTEIN  
CHARLES H. GOOGE, JR.  
BRUCE A. GUTENPLAN  
GAINES GWATHMEY, III  
ALBERT P. HAND  
GERARD E. HARPER  
ROBERT M. HIRSH  
STEVEN R. HOWARD  
NICHOLAS C. HOWSON  
JEH CHARLES JOHNSON  
ANNALIESE S. KAMBOUR  
MEREDITH J. KANE  
BRAD S. KARP  
JOHN C. KENNEDY  
FRED KINMONTH\*  
ALAN W. KORNBERG  
RUBEN KRAIEM

DAVID K. LAKHDHIR  
STEVEN E. LANDERS  
JOHN E. LANGE  
ROBERT L. LAUFER  
DANIEL J. LEFFELL  
WALTER F. LEINHARDT  
MARTIN LONDON  
SCOTT R. MACLEOD  
EDWIN S. MAYNARD  
JOHN P. McENROE  
ROBERT E. MONTGOMERY, JR.  
TOBY S. MYERSON  
MATTHEW NIMETZ  
KEVIN J. O'BRIEN  
LIONEL H. OLMER\*  
JOHN J. O'NEIL  
ROBERT P. PARKER\*  
MARC E. PERLMUTTER  
JAMES L. PURCELL  
LEONARD V. QUIGLEY  
VALERIE E. RADWANER  
CAREY R. RAMOS  
CARL L. REISNER  
WALTER RIEMAN  
SIDNEY S. ROSDEITCHER  
RICHARD A. ROSEN  
STEVEN B. ROSENFELD  
PETER J. ROTHENBERG  
WARREN B. RUDMAN\*  
JEFFREY B. SAMUELS  
TERRY E. SCHIMEK  
KENNETH M. SCHNEIDER  
ROBERT B. SCHUMER  
JAMES H. SCHWAB  
STEPHEN J. SHIMSHAK  
DAVID R. SICULAR  
MOSES SILVERMAN  
STEVEN SIMKIN  
ROBERT S. SMITH  
MARILYN SOBEL  
THEODORE C. SORENSEN  
PHILLIP L. SPECTOR\*  
STUART G. STEINGOLD  
JUDITH R. THOYER  
MARIA T. VULLO  
STEVEN L. WOLFRAM  
ALFRED D. YOUNGWOOD

November 11, 1998

\*NOT ADMITTED TO NEW YORK BAR.  
\*\*ADMITTED IN FRANCE ONLY.

GENERAL COUNSEL  
OF COPYRIGHT

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BY FACSIMILE

David O. Carson, Esq.  
General Counsel  
U.S. Copyright Office, Room LM-407  
James Madison Memorial Building  
First and Independence Avenue, S.E.  
Washington, D.C. 20540

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));

David O. Carson, Esq.

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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).