

Guard will certify under 5 U.S.C. 605(b), that this proposal, if adopted, will not have significant economic impact on a substantial number of small entities.

Collection of Information

This proposal contains no collection of Information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism Assessment

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

This rulemaking has been thoroughly reviewed by the Coast Guard and determined to be categorically excluded from further environmental documentation in accordance with section 2.B.2.c of Commandant Instruction M16475.1B. A Categorical Exclusion Determination statement has been prepared and been placed in the rulemaking docket, and is available for inspection or copying where indicated under "ADDRESSES".

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Proposed Regulations

In consideration of the foregoing, part 100 of title 33, Code of Federal Regulations is amended as follows:

PART 100—[AMENDED]

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. A new section 100.523 is added to read as follows:

§ 100.523 Southern Branch, Elizabeth River, Portsmouth, Virginia.

(a) Definitions: (1) *Regulated area.* The waters of the Southern Branch, Elizabeth River from shoreline to shoreline bounded to the south by a line drawn from latitude 36°49'11.0" North, longitude 76°17'33.0" West to latitude 36°49'11.0" North, longitude 76°17'22.0" West and bounded to the north by a line drawn from latitude 36°50'17.5" North, longitude 76°17'45.0" West to latitude 36°50'17.5" North, longitude 76°17'30.0" West.

(2) *Coast Guard Patrol Commander.* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer

of the Coast Guard who has been designated by the Commander, Coast Guard Group Hampton Roads.

(b) *Special Local Regulations.* (1) Except for participants in the Crawford Bay Crew Classic and vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area without the permission of the Patrol Commander.

(2) The operator of any vessel in the immediate vicinity of this area shall:

(i) Stop the vessel immediately when directed to do so by any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard ensign.

(3) The Coast Guard Patrol Commander may allow vessels to transit the regulated area whenever a race heat is not being run.

(4) Vessel operators are advised to remain clear of the advisory area during the effective periods of this regulation.

(c) *Effective periods:* This regulation will be effective from 12 noon to 7 p.m. on the third Friday of March and from 6 a.m. to 6 p.m. on the third Saturday of March, unless otherwise specified in the Coast Guard Local Notice to Mariners and a Federal Register document.

Dated: November 16, 1992.

W.T. Leland,

Rear Admiral, U.S. Coast Guard Commander,
Fifth Coast Guard District.

[FR Doc. 92-2862A Filed 11-24-92; 8:45 am]

BILLING CODE 4910-14-M

COPYRIGHT ROYALTY TRIBUNAL

37 CFR Part 304

[Docket No. 92-2-PBRA]

1992 Adjustment of the Public Broadcasting Royalty Rates and Terms

AGENCY: Copyright Royalty Tribunal.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Act of 1976 (Act) requires the Copyright Royalty Tribunal (Tribunal) to conduct proceedings from June 30 to December 31, 1992 to establish reasonable terms and rates of royalty payments for certain uses by public broadcasting entities of published nondramatic musical works, and published pictorial, graphic, and sculptural works. This notice announces that the Tribunal is considering regulations which set forth the terms and rates for the five year

period of 1993-1997. Comments regarding these proposed regulations are sought by the Tribunal.

DATES: All comments are due by December 4, 1992.

ADDRESSES: Comments are to be filed with: Chairman, Copyright Royalty Tribunal, 1825 Connecticut Avenue, NW., suite 918, Washington, DC 20009.

FOR FURTHER INFORMATION CONTACT: Linda R. Bocchi, General Counsel, Copyright Royalty Tribunal, 1825 Connecticut Avenue, NW., suite 918, Washington, DC 20009. (202) 606-1400.

SUPPLEMENTARY INFORMATION:

Authority

Section 118 of the Act establishes a copyright compulsory license for the use of published nondramatic musical works and published pictorial, graphic and sculptural works by public broadcasting entities. 17 U.S.C. 118. The Act specifically provides that between June 30 and December 31 of 1982, and at five year intervals thereafter, the Tribunal "shall" conduct a proceeding for the determination of the rates and terms for the use of the works. 17 U.S.C. 118(c). The Act also directs the Tribunal to "establish requirements by which copyright owners may receive reasonable notice of the use of their works," and under which public broadcasting entities "shall" maintain records of such use. 17 U.S.C. 118(b)(3).

Background

In 1978, shortly after the Tribunal was created, it adopted public broadcasting royalty rates. 43 FR 25068 (June 8, 1978). These original rates have been adjusted twice, in 1982 and in 1987. 47 FR 57923 (December 29, 1982); 52 FR 44610 (November 20, 1987). Part 304 of the Tribunal's current rules sets forth the rates and terms applicable to public broadcasting entities for the use of certain copyrighted works for the period beginning January 1, 1988 and ending December 31, 1992. 37 CFR part 304. The purpose of the current proceeding is to determine the rates and terms which will apply during the period beginning January 1, 1993 and ending December 31, 1997.

The Tribunal commenced the current public broadcasting rate setting proceeding on June 30, 1992. 57 FR 29066 (June 30, 1992). Prior to its commencement of the proceeding, on May 1, 1992, the Tribunal sent a letter to all of the parties who participated in the 1978, 1982 and/or 1987 noncommercial broadcasting rate adjustment proceedings, requesting settlement status reports by June 19, 1992. Notices

of appearance were filed by the parties in early August.

By Order of September 15, 1992, the Tribunal set October 19, 1992, as the due date for filing direct cases and October 22, 1992, as the due date for filing objections to a "paper" disposition of the proceeding. On October 19, all of the parties filed direct cases, settlement agreements, or joint proposals. No objections to a "paper" hearing were filed by the parties on October 22. By Order of October 30, 1992, the Tribunal accepted the parties' October 19 submissions into the record, closed the record, and set November 9, 1992, as the due date for filing Proposed Findings and Conclusions of Law. Post-hearing briefs were filed by Public Broadcasting Services (PBS), and National Public Radio (NPR), Broadcast Music, Inc. (BMI) and American Society of Composers, Authors and Publishers (ASCAP), which have negotiated voluntary agreements with PBS and NPR and negotiated joint proposals with the American Council on Education (ACE), the National Federation of Community Broadcasters (NFCB), and National Religious Broadcasters Radio Music License Committee (NRB), filed documents recommending the adoption of the joint proposals. SESAC, Inc. (SESAC), Harry Fox Agency, Inc. (HFA), and National Music Publishers Association, Inc. (NMPA) all filed voluntary agreements, instead of direct cases. Therefore, they were not required to file Proposed Findings and Conclusions of Law. The Coalition of Visual Artists Organizations (CVAO), American Society of Magazine Photographers (AMP), and Graphic Artists Guild, Inc. (GAG) filed a direct case opposing PBS' proposed rates, but failed to file Proposed Findings and Conclusions of Law as they were directed to do by the Tribunal. ASCAP filed a letter on November 13, 1992 to clarify one point raised in the direct cases and Proposed Findings and Conclusions of Law of PBS and NPR.

The Parties

There are thirteen parties in this proceeding. Representing the users of the copyrighted works are: PBS, NPR, ACE, NFCB, and NRB. Representing owners of the copyrighted works are: ASCAP, BMI, SESAC, HFA, NMPA, COVA, ASMP, and GAG.

Performance of Musical Works by PBS and NPR

Voluntary agreements were reached by PBS and NPR with the following representatives of copyright owners: ASCAP, BMI, and SESAC. Section 118(b)(2) provides that "(l)icense

agreements voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effective in lieu of any determination by the Tribunal * * *." 17 U.S.C. 118(b)(2). Accordingly, with respect to the use by PBS and NPR of musical compositions found in the repertoires of ASCAP, BMI, and SESAC, the Tribunal proposes no regulation.

In the case of the rates applicable to copyright owners of musical works who are not affiliated with ASCAP, BMI, or SESAC and whose works appear in PBS or PBS-station programming; or in NPR or NPR-station programming; PBS and NPR propose: (i) That the rates be increased by 15 percent over the 1988-1992 rates and set at an equal amount for each year of the 1993-1997 term, (ii) that the rate increase be accomplished by averaging the rates in effect for each year of the 1988-1992 period, multiplying that average or "blended" rate by 115 percent, and applying that new 15 percent higher rate in each year of the upcoming license term. This methodology will result in a rate increase for the foregoing unaffiliated copyright owners that is consistent with the voluntary license agreements negotiated by public broadcasting with respect to music performing rights for the 1993-1997 period.

PBS and NPR filed joint Proposed Findings and Conclusions of Law, in which they reiterated and recommended the adoption of their proposals. They maintain that the proposed rates and terms build upon those adopted by the Tribunal in 1978. Citing Section 118(b) of the Act, they assert that the rates should be adopted because they are comparable to voluntary license agreements negotiated between Public Broadcasting and music rights organizations. 17 U.S.C. 118(b).

ASCAP filed a letter in response to PBS' and NPR's Proposed Findings and Conclusions of Law. There, ASCAP refuted PBS' and NPR's allegation that the ASCAP-Public Broadcasting negotiated agreement provides for annual license fees of an equal amount for the five year term of the license. ASCAP clarifies that the negotiated agreement provides for a single license fee for the full five year term of the license, to be paid out in equal annual installments. See ASCAP-Public Broadcasting Agreement, ¶ 3(a). The Tribunal clarifies the record accordingly.

The Tribunal finds that the suggested rates are reasonable and, so, proposes to adopt them.

Performances of Musical Works by Public Broadcasting Entities Licensed to Colleges and Universities Not Affiliated With NPR

ASCAP and ACE have jointly proposed to increase the rate which applies to public broadcasting entities licensed to colleges and universities not affiliated with NPR. ASCAP and ACE have submitted a joint proposal to the Tribunal, rather than a voluntary agreement, because ACE, although representing a majority of the colleges and universities operating college radio stations, does not represent all of them. Moreover, it does not have the power to bind its members to an agreement. In a voluntary agreement, both parties to the agreement represent all persons who would be affected by the agreement and both parties have the authority to bind their members. In a joint proposal, at least one of the parties to the agreement either does not represent all persons who would be affected by the agreement, or does not have the authority to bind its members. Consequently, in a joint proposal the Tribunal has the responsibility to assure that the rates and terms are in the interest of all potentially affected persons.

Specifically, ASCAP and ACE propose that the new rate consists of the current rate with a cost-of-living adjustment, according to the annual change in the Consumer Price Index (CPI), as the Tribunal has done under section 304.10. 37 CFR 304.104 (1991). This proposal is supported by BMI, which proposes that the rates for the use of BMI and ASCAP works continue to be the same. 37 CFR 304.5(c) 1991. Both BMI and ASCAP submitted post-hearing filings in support of the proposals.

The Tribunal determines that the foregoing rates are reasonable and proposes to adopt them. However, the Tribunal notes that the proposed rates must be derived based upon a change in the CPI, during the period between the first CPI published subsequent to December 1, 1991, and the last CPI published prior to December 1, 1992. The Tribunal does not yet have the figures for the last CPI to be published prior to December 1, 1992. Consequently, the Tribunal will temporarily list the current dollar amounts in the text of the proposed rules. These dollar amounts will be replaced with the inflation adjusted figures at the time the final rule making is published in the Federal Register.

In proposing to adopt the joint proposals, the Tribunal recognizes that they do not reflect any assessment by

any of the parties as to the absolute or relative value of the right of performance of music in the ASCAP repertory by college radio stations.

Performances of Musical Compositions by Public Broadcasting Stations Other Than NPR or College Stations

A joint proposal was filed by ASCAP, NFCB, and NRB, suggesting the adjusted rates for public broadcasting radio stations which are not affiliated with NPR, and are not licensed to colleges and universities. An identical joint proposal was submitted by BMI, NFCB, and NRB. SESAC, NFCB, and NRB submitted their own different joint proposal. BMI and ASCAP filed post-hearing documents in support of the proposals.

The Tribunal determines that all of the suggested rates are reasonable and proposes to adopt them. In proposing to adopt the joint proposals, the Tribunal recognizes that they do not reflect any assessment by any of the parties as to the absolute or relative value of the right of performance of music in the ASCAP repertory by community radio stations.

Recording Rates and Terms

HFA, PBS, and NPR filed a voluntary agreement, which covers the period from January 1, 1993 through December 31, 1997. This agreement grants PBS and NPR a nonexclusive license for synchronization and recording uses of any and all nondramatic musical compositions for which HFA was appointed licensing agent by the copyright owners, with respect to television and radio programs broadcast over public broadcasting stations. NMPA participated in the negotiation of the voluntary agreement as an interested party and supports the agreement's adoption by the Tribunal. PBS also submitted letters extending its 1987-1989 voluntary agreements with the American Mechanical Rights Agency (AMRA), Copyright Management, Inc. (CMI), and Bug Music (Bug) for recording and synchronization rights. Accordingly, with respect to the use by PBS or NPR of any copyrighted works in HFA's catalogue and the use by PBS of any copyrighted works in the catalogues of AMRA, CMI, and Bug, the Tribunal will not propose regulations. 17 U.S.C. 118(b)(2).

For the unaffiliated copyright owners of recording rights in musical compositions, PBS and NPR propose that the Tribunal set rates which correspond to the rates contained in the voluntary license agreement negotiated with HFA. Specifically, PBS and NPR propose that the current rates provided in § 304.7, subsections (b)(1)(i), (ii), and

(2) of the Tribunal's rules be adjusted by: (a) Averaging the annual rates applicable to unaffiliated copyright owners in each year of the prior license period, (b) multiplying that amount by 115 percent, and (c) applying that new 15 percent higher rate throughout the upcoming five year period beginning January 1, 1993. 37 CFR 304.7 (b) (1) (i), (ii), (2) (1991). PBS and NPR, in their joint Proposed Findings and Conclusions of Law again recommend that the Tribunal adopt their suggested rates.

The Tribunal finds that the recommended rates are reasonable and proposes to adopt them.

The Tribunal notes that none of the parties filed any comments regarding the rates for uses other than in NPR-produced radio programs. 37 CFR 304.7(b) (4) (1991). Nonetheless, the Tribunal has reviewed these rates and proposes to adjust them, as it has done in the past, on the basis of the change of the cost of living over the past five years, rounded off to the nearest five cents. 52 FR at 44612.

Hence, a feature use would increase from 60¢ to 70¢, a concert feature use would increase from \$1.20 to \$1.45, and a background use would increase from 30¢ to 35¢.

Visual Works Rates and Terms

PBS has filed letters extending its 1987 voluntary agreement with Artists Rights Society, Inc. (ARS), and its 1989 voluntary agreement with Visual Artists & Galleries Association (VAGA). Therefore, with regard to the uses of copyrighted works for which either of the foregoing organizations serve as licensing agents, the Tribunal will not propose regulations. 17 U.S.C. 118(b)(2).

Additionally, PBS proposes rates for the uses of published pictorial, graphic and sculptural works under § 304.8. 37 CFR 304.8 (1991). PBS recommends that the Tribunal set rates which correspond to the rates contained in the voluntary license agreements negotiated with ARS and VAGA. The rates contained in PBS's voluntary agreement with ARS are identical to those contained in PBS's voluntary agreement with VAGA.

PBS, in its post-hearing brief, maintains that the proposed rates are reasonable and correspond to the rates incorporated in the voluntary license agreements between PBS and ARS, and between PBS and VAGA. With regard to the specific arguments made by COVA, ASMP, and GAG, PBS asserts that these identical arguments have been considered and rejected by the Tribunal on three prior occasions. Therefore, PBS concludes that, pursuant to well-established Tribunal precedent, the Tribunal should reject the arguments.

In their direct case, CVAO, ASMP, and GAG submit their own proposal regarding the rates for the uses of visual works. They argue, as they did in the 1987 public broadcasting rate adjustment proceeding, that the rates proposed by PBS and adopted by the Tribunal bear no realistic relationship to the marketplace prices. CVAO, ASMP, and GAG further request the opportunity to submit additional information regarding market rates and ask that the Tribunal consider the market for stock photography and illustration as an appropriate standard. In the alternative, they request that the Tribunal increase the rates to reflect cost of living increases over the last five years.

Irrespective of their proposals for new rates, CVAO, ASMP, and GAG argue that the compulsory licensing scheme for pictorial, graphic, and sculptural works has provided PBS with "a system of 'free use'." To substantiate their allegations, CVAO, ASMP, and GAG cite to the most recent compilation of cue sheets received from PBS. Pursuant to the Tribunal's rules, PBS and its stations or other public broadcasting entities must maintain and furnish cue sheets either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic, and sculptural works. 37 CFR 304.8(d) (1991). According to the cue sheets submitted for the period of January 1, 1992 through June 30, 1992, PBS's use of visual works for the six month interval was limited. CVAO, ASMP, and GAG question PBS's scarce use of visual works. Additionally, they accuse PBS of neglecting to satisfy its obligation, under the Tribunal's rules, to attempt to locate the copyright owners of visual works. 37 CFR 304.8(c), 304.9 (1991). Therefore, they request that the Tribunal recommend to Congress the repeal of this particular compulsory licensing scheme.

The Tribunal has reviewed the arguments of PBS, CVAO, ASMP, and GAG, and the proposes to adopt the rates recommended by PBS. With regard to the arguments advanced by CVAO, ASMP, and GAG, the Tribunal notes that these organizations failed to file Proposed Findings and Conclusions of Law as they were directed to do. Consequently, pursuant to the Tribunal's regulations, they are deemed to have waived their right to participate further in this proceeding, and are hereby dismissed from the proceeding. 37 CFR 301.53(b) (1991).

Even if the Tribunal were to consider the arguments of CVAO, ASMP and GAG, it would have no choice but to

reject them based on its well-established precedent. In fact, the Tribunal has considered and rejected identical arguments on two prior occasions. 52 FR at 44610 (November 20, 1987); 47 FR at 57923 (December 29, 1982). As a general rule, the Tribunal does not reverse previous decisions unless it determines that the circumstances have changed or new evidence establishes the need for a reversal. 52 FR at 44612. This policy is supported by the well-established legal principle that, absent a clearly articulate and logically defensible rationale, an agency may not reach different results in cases with essentially the same facts. *Doubleday Broadcasting Co., Inc. v. FCC*, 655 F.2d 417, 423 (D.C. Cir. 1981) [The [agency] may not decide a case one way today and a substantially similar case another way tomorrow, without a more reasonable explanation than is offered here.]; *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) ("we have twice said that (an agency) 'cannot act arbitrarily nor can it treat similar situations in dissimilar ways'"), quoting *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 (D.C. Cir. 1969). Here, the Tribunal has issued consistent decisions on two previous occasions, establishing a certain level of rates for the use of visual works. The Tribunal has typically rejected the marketplace information for stock photograph proffered by the visual work organizations, because they fail to clearly or credibly link the evidence to television use of photographs. 52 FR at 44612, 47 FR at 57925. CVAO, ASMP and GAG offer to provide the same type of information. In light of the fact that CVAO, ASMP, and GAG neither provide, nor offer to provide, any information other than that which the Tribunal has already considered and rejected, the Tribunal must again reject their proposals.

The accusations of CVAO, ASMP and GAG regarding PBS' compliance with the Tribunal's requirements to maintain and furnish records of the copyrighted works it uses, and to locate the owners, must also be rejected. As was the case when this accusation was made to the Tribunal in 1987 and 1982, CVAO, ASMP and GAG fail to provide any significant evidentiary support.

The public is invited to comment on the proposed rule changes described above and the actual text which is provided below by December 4, 1992.

List of Subjects in 37 CFR Part 304

Copyright, Music, Radio, Television.

For the reasons set forth in the preamble, the Tribunal proposes to revise 37 CFR part 304 as follows:

PART 304—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING

- Sec.
- 304.1 General.
- 304.2 Definition of public broadcasting entity.
- 304.3 [Reserved]
- 304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).
- 304.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.
- 304.6 Performance of musical compositions by other public broadcasting entities.
- 304.7 Recording rights, rates and terms.
- 304.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.
- 304.9 Unknown copyright owners.
- 304.10 Cost of living adjustment.
- 304.11 Notice of restrictions on use of reproductions of transmission programs.
- 304.12 Amendment of certain regulations
- 304.13 Issuance of interpretative regulations.

Authority: 17 U.S.C. 118, 801(b)(1) and 804.

§ 304.1 General.

This part 304 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, 1993 and ending on December 31, 1997. Upon compliance with 17 U.S.C. 118, and the terms and rates of this part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. 118(d).

§ 304.2 Definition of public broadcasting entity.

As used in this part, the term *public broadcasting entity* means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(d)(2).

§ 304.3 [Reserved.]

§ 304.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d) of copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by §§ 304.5 and 304.6, and except for compositions which are the subject of

voluntary license agreements, such as the PBS/NPR/ASCAP, the PBS/NPR/BMI and the PBS/NPR/SESAC license agreements.

(a) *Determination of royalty rate.* (1) For the performance of such a work in a feature presentation of PBS:

1993-1997—\$199.18

(2) For the performance of such work as background or theme music in a PBS program:

1993-1997—\$50.46

(3) For the performance of such a work in a feature presentation of a station of PBS:

1993-1997—\$17.02

(4) For the performance of such a work as background or theme music in a program of a station of PBS:

1993-1997—\$3.59

(5) For the performance of such a work in a feature presentation of NPR:

1993-1997—\$20.19

(6) For the performance of such a work as background or theme music in an NPR program:

1993-1997—\$4.90

(7) For the performance of such a work in a feature presentation of a station of NPR:

1993-1997—\$1.43

(8) For the performance of such a work as background or theme music in a program of a station of NPR:

1993-1997—\$5.51

(9) For the purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.

(10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.

(b) *Payment of royalty rate.* The required royalty rate shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(c) *Records of use.* PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner

has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that is required by paragraph 4b of the PBS/NPR/ASCAP license agreement dated October 19, 1992 to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

(d) *Terms of use.* The fees provided in this schedule for the performance of a musical work in a program shall cover performances of such work in such program for a period of three years following the first performance.

§ 304.5 Performance of musical compositions by public broadcasting entities licensed to colleges or universities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and colleges, universities, and other nonprofit educational institutions concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, \$173 annually.

(2) For all such compositions in the repertory of BMI, \$173 annually.

(3) For all such compositions in the repertory of SESAC, \$41 annually.

(4) For the performance of any other such composition, \$1.00.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31, of each year.

(e) *Records of use.* The public broadcasting entity subject to this section shall furnish to ASCAP, BMI and

SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports.

§ 304.6 Performance of musical compositions by other public broadcasting entities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by radio stations not licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and noncommercial radio stations within the scope of this section concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For all such compositions in the repertory of ASCAP, in 1993, \$295; in 1994, \$310; in 1995, \$325; in 1996, \$340; in 1997, \$360.

(2) For all such compositions in the repertory of BMI, in 1993, \$295; in 1994, \$310; in 1995, \$325; in 1996, \$340; in 1997, \$360.

(3) For all such compositions in the repertory of SESAC, in 1993, \$63; in 1994, \$66; in 1995, \$69; in 1996, \$72; in 1997, \$75.

(4) For the performance of any other such compositions, in 1988 through 1992, \$1.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each year.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC each shall not in any one calendar year request more than 5 stations to furnish such reports.

§ 304.7 Recording rights, rates and terms.

(a) *Scope.* This section establishes rates and terms for the recording of

nondramatic performances and displays of musical works, other than compositions subject to voluntary license agreements, on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduction, and distribution of copies and phonorecords of public broadcasting programs containing such nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) (i) For uses described in paragraph (a) of this section of a musical work in a PBS-distributed program, the royalty fees shall be calculated by multiplying the following per-composition rates by the number of different compositions in that PBS-distributed program:

	1993-1997
Feature.....	\$99.85
Concert feature (per minute).....	29.98
Background.....	50.46
Theme:	
Single program or first series program.....	50.46
Other series program.....	20.48

(ii) For such uses other than in a PBS-distributed television program, the royalty fee shall be calculated by multiplying the following per-composition rates by the number of different compositions in that program:

	1993-1997
Feature.....	\$8.25
Concert feature (per minute).....	2.17
Background.....	3.59
Theme:	
Single program or first series program.....	3.59
Other series program.....	1.43

(ii) In the event the work is first recorded other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) For uses licensed herein of a musical work in a NPR program, the royalty fees shall be calculated by multiplying the following per-

composition rates by the number of different compositions in any NPR program distributed by NPR. For purposes of this schedule "National Public Radio" programs include all programs produced in whole or in part by NPR, or by any NPR station or organization under contract with NPR.

	1993-1997
Feature.....	\$10.81
Concert feature (per minute).....	15.87
Background.....	5.41
Theme:	
Single program or first series pro-gram.....	5.41
Other series program.....	2.16

(3) For the purposes of this schedule, a "Concert Feature" shall be deemed to be the nondramatic presentation in a program of all or part of a symphony, concerto, or other serious work originally written for concert performance or the nondramatic presentation in a program of portions of a serious work originally written for opera performance.

(4) For such uses other than in a NPR-produced radio program:

Feature.....	.70
Feature (concert) (per half hour)....	1.45
Background.....	.35

(5) The schedule of fees covers broadcast use for a period of three years following the first broadcast. Succeeding broadcast use periods will require the following additional payment: second three-year period—50 percent; each three-year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1997 shall be subject to the royalty rates established in this schedule.

(c) *Payment of royalty rates.* The required royalty rates shall be paid to each known copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) Maintenance of cue sheets. PBS and its stations, NPR, or other television public broadcasting entities shall maintain and make available for examination pursuant to paragraph (e) of this section copies of their standard cue sheets or summaries of same listing the recording of the musical works of such copyright owners.

(2) Content of cue sheets or summaries. Such cue sheets or summaries shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For Concert Feature music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) *Filing of use reports with the Copyright Royalty Tribunal (CRT).*—(1) *Deposit of cue sheets or summaries.* PBS and its stations, NPR, or other television public broadcasting entity shall deposit with the CRT copies of their standard music cue sheets or summaries of same (which may be in the form of hard copy of computerized reports) listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets or summaries shall be deposited not later than July 31 of each calendar year for recordings during the first six months of the calendar year and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. PBS and NPR shall maintain at their offices copies of all standard music cue sheets from which such music use reports are prepared. Such music cue sheets shall be furnished to the CRT upon its request and also shall be available during regular business hours at the offices of PBS or NPR for examination by a copyright owner who believes a musical composition of such owner has been recorded pursuant to this schedule.

(2) [Reserved]

§ 304.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

(a) *Scope.* This section establishes rates and terms for the use of published pictorial, graphic, and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) The following schedule of rates shall apply to the use of works within the scope of this section:

(i) For such uses in a PBS-distributed program:

(A) For a featured display of a work.

1993-1997
\$61.00

(B) For background and montage display.

1993-1997
\$29.75

(C) For use of a work for program identification or for thematic use.

1993-1997
\$120.25

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject to payment of a display fee under the terms of this schedule.

1993-1997
\$39.50

(ii) For such uses in other than PBS-distributed programs:

(A) For a featured display of a work.

1993-1997
\$39.50

(B) For background and montage display.

1993-1997
\$20.25

(C) For use of a work for program identification or for thematic use.

1993-1997
\$80.75

(D) For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule.

1993-1997
\$20.25

For the purposes of this schedule the rate for the thematic use of a work in an entire series shall be double the single program theme rate. In the event the work is first used other than in a PBS-distributed program, and such program is subsequently distributed by PBS, an additional royalty payment shall be made equal to the difference between the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for other than a PBS-distributed program and the rate specified in this section for a PBS-distributed program.

(2) *Featured display* for purposes of this schedule means a full-screen or substantially full-screen display appearing on the screen for more than three seconds. Any display less than full-screen or substantially full-screen, or full-screen for three seconds or less, is deemed to be a "background or montage display".

(3) *Thematic use* is the utilization of the works of one or more artists where the works constitute the central theme of the program or convey a story line.

(4) *Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced* means a transparency or other reproduction of an underlying work of fine art.

(c) *Payment of royalty rate.* PBS or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year.

(d) *Records of use.* (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organizations representing the copyright owners of pictorial, graphic and sculptural works, copies of their standards lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(e) *Filing of use reports with the CRT.* (1) PBS and its stations or other public broadcasting entity shall deposit with the CRT copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year.

(f) *Terms of use.* (1) The rates of this schedule are for unlimited broadcast use for a period of three years from the date of the first broadcast use of the work

under this schedule. Succeeding broadcast use periods will require the following additional payment: Second three-year period—50 percent; each three-year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1997 shall be subject to the rates established in this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118(f), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

§ 304.9 Unknown copyright owners.

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this Part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the CRT, upon request, information concerning fees deposited in trust funds.

§ 304.10 Cost of living adjustment.

(a) On December 1, 1993 the CRT shall publish in the *Federal Register* a notice of the change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published prior to December 1, 1992 to the most recent Index published prior to December 1, 1993. On each December 1 thereafter the CRT shall publish a notice of the change in the cost of living during the period from the most recent Index published prior to the previous notice, to the most recent Index published prior to December 1, of that year.

(b) On the same date of the notices published pursuant to paragraph (a) of this section, the CRT shall publish in the *Federal Register* a revised schedule of rates for § 304.5 which shall adjust those royalty amounts established in dollar amounts according to the change in the

cost of living determined as provided in paragraph (a) of this section. Such royalty rates shall be fixed at the nearest dollar.

(c) The adjusted schedule of rates for § 304.5 shall become effective thirty days after publication in the *Federal Register*.

§ 304.11 Notice of restrictions on use of reproductions of transmission programs.

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of not more than seven days from the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

§ 304.12 Amendment of certain regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time amend, modify or repeal regulations in this Part adopted pursuant to 17 U.S.C. 118(b)(3) by which "copyright owners may receive reasonable notice of the use of their works" and "under which records of such use shall be kept by public broadcasting entities."

§ 304.13 Issuance of interpretative regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time, either on its own motion or the motion of a person having a significant interest in the subject matter, issue such interpretative regulations as may be necessary or useful to the implementation of this Part. Such regulations may not prior to January 1, 1998, alter the schedule of rates and terms of royalty payments by this part.

Dated: November 19, 1992.

Cindy Daub,
Chairman.

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