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 IN RE: :
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 REGULATIONS FOR COPYRIGHT :
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 OWNERS ACCESS TO PHONORECORD- : 37 C. F. R. 303
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 PLAYERS (JUKEBOXES) and :
 :
 CERTAIN ESTABLISHMENTS :
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2100 K Street, Northwest
Room 610
Washington, D.C.

Friday, June 5, 1981

The hearing in the above-entitled matter commenced
2:00 p.m., pursuant to adjournment,

BEFORE:

THOMAS C. BRENNAN, Acting Chairman

DOUGLAS E. COULTER, Commissioner

MARY LOU BURG, Commissioner

FRANCES GARCIA, Commissioner

P R O C E E D I N G S

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2 CHAIRMAN BRENNAN: The meeting will come to
3 order. We shall proceed now to the considerations of the
4 proposed amendment of 37 CFR Part 303.

5 The text of the proposed amendment and some
6 commentary appeared in the Federal Register on April 6, 1981.
7 I direct that this publication be entered at this point in
8 the record.

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COPYRIGHT ROYALTY TRIBUNAL

7 CFR Part 303

Regulations for Copyright Owner
Access to Phonorecord Players
(Jukeboxes) and Certain
EstablishmentsAGENCY: Copyright Royalty Tribunal
(Tribunal).

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Tribunal proposes to amend its rule whereby persons who may reasonably be expected to have claims resulting from public performance of nondramatic musical works by coin-operated phonorecord players may have access to the establishments where such phonorecord players located by deleting the existing requirements for the recording with the Tribunal of current listings of locations where licensed phonorecord players are placed, and the number of players at such locations.

DATE: Comments should be submitted on or before May 15, 1981, and reply comments by May 26, 1981.

ADDRESS: Comments should be addressed to Chairman, Copyright Royalty Tribunal, 1111 20th Street, N.W., Room 450, Washington, D.C. 20036.

FOR FURTHER INFORMATION CONTACT: Clarence L. James, Jr., Chairman, Copyright Royalty Tribunal, 202-653-5175.

SUPPLEMENTARY INFORMATION: 17 USC 116(c)(5) provides that

The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which the performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine by sampling procedures or otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited.

On September 12, 1978 the Tribunal published in the Federal Register (43 FR 40498) a Final Rule requiring the operators of phonorecord players (jukeboxes) who are licensed by the Copyright Office of the Library of Congress for the performance of certain copyrighted musical compositions according to the requirements of 17 U.S.C. 116 to record with the Tribunal the location of establishments in which they have placed jukeboxes, and the

number of such boxes. The purpose of the rule is to permit copyright owners of musical works to prepare their claims for entitlement to jukebox royalty fees by conducting surveys of performance of musical compositions on licensed jukeboxes. A second purpose of the rule is to, if necessary, assist the Tribunal in performing its statutory duties concerning the distribution of jukebox royalty fees by conducting its own independent survey of data submitted by claimants to jukebox royalty fees. In adopting the rule, the Tribunal stated that "There can be no right of access to an establishment if one does not know where the establishment is located."

The Tribunal further stated: "It was not within the scope of this proceeding to consider whether the disclosure of location listings to appropriate copyright owners should be subject to any conditions or protective safeguards. Such issues may be explored in a future proceeding." Subsequently, on November 9, 1978, the Tribunal adopted a policy to protect the business relationship between jukebox operators and the owners of establishments in which such boxes are located by providing that the Tribunal would only make available to copyright claimants a jukebox fees a representative sampling of location listings without any identification of particular jukebox operators.

The representatives of the jukebox industry asserted before the Tribunal and elsewhere that these protective measures were inadequate and that there was a serious danger that location lists filed with the Tribunal by jukebox operators could come into the possession of unauthorized parties, causing damage to jukebox business relationships. Despite these assertions by representatives of the jukebox industry, the Tribunal has not received a single complaint from any jukebox operator of improper conduct concerning the location lists filed with the Tribunal.

It is the practice of the Tribunal to monitor all its regulations and procedures in order to assess their necessity and effectiveness. The commencement of the evidentiary phase of the Tribunal proceeding for the distribution of the 1979 jukebox royalty fees provides the first opportunity for the Tribunal to assess its location listing rule.

On the basis of the pleadings submitted by the claimants by the 1979 jukebox royalty fund and the proceedings of the prehearing conference of March 10, 1981, it is apparent that copyright owner claimants will not have occasion to use information from the list to establish

their entitlement to jukebox fees. Since the adoption of the rule, the Tribunal has not received a single request from any claimant in accordance with the resolution of November 9, 1978 for information from the list.

On February 27, 1981, the Amusement and Music Operators Association filed with the Tribunal a Motion for Reconsideration of the Regulations.

The Tribunal consequently has determined to publish for comment an amendment to Part 303 of Chapter III of Title 37 of the Code of Federal Regulations to delete Section 303.3 "Recording of location listings in Copyright Royalty Tribunal."

Accordingly, Part 303 of Title 37 of the Code of Federal Regulations is proposed to be amended by removing Section 303.3 "Recording of location listings in Copyright Royalty Tribunal."

Dated: March 30, 1981.

Clarence L. James, Jr.,
Chairman.

[FR Doc. 81-30355 Filed 4-3-81; 6:45 am]

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In accordance with the practice of the Tribunal,
at this time we wish to entertain oral argument on the
proposed amendment. Does any opponent of the proposed
amendment wish to begin here?

MR. DUNCAN: Mr. Chairman, speaking for BMI,
we are prepared to submit on the document that we have
submitted. We don't have anything to add to it.

CHAIRMAN BRENNAN: Thank you, Mr. Duncan.

Mr. Korman?

MR. KORMAN: The same is true with respect to
ASCAP. I will add to the documents submitted, the record
that was made earlier when the access regulation was being
considered. From that record and the current statements,
it is clear that the continuing direction in mandatory
terms that access be, that a regulation be adopted by the
Tribunal permitting access on pretty much the basis of
the regulation.

I have nothing to add to that.

CHAIRMAN BRENNAN: Thank you very much, Mr. Korman.

Any questions? Are there requests for recognition
by supporters of the proposed amendment.

MR. ALLEN: I suppose, Mr. Chairman, since I
don't have any opposition I should keep quiet. But I
think I would like to take the opportunity to recap our
position for the record.

1 Without reprinting any of the papers that we have
2 filed, the list that consists of the motions for recon-
3 sideration of the regulation we filed February 27, 1981,
4 a letter response to the Tribunal's note of the proposed
5 rule that we filed April 28, 1981, a reply memoranda that we
6 filed May 22, 1981, to the BMI memoranda of May 13 and the
7 ASCAP memoranda of May 15.

8 There was also filed with the Tribunal a letter
9 by counsel for Stern Electronics Company, the counsel is
10 Idley and Auston on May 15. Stern Electronics is a
11 successor to the Seeburg Company in the manufacture of
12 jukeboxes.

13 They recently have taken over a company. It is
14 under the management -- it is under that new firm name.
15 We are happy to have the support of the jukebox manufacturer.

16 I would like to say that we here today reserve
17 the position we have taken on the legality of the
18 regulation. Our answer to BMI and ASCAP to both of them
19 is that they both admitted in the papers they filed that
20 they have not used the location list for the purpose they
21 intended. Namely, for preparing claims for the distribution
22 of royalties. As ASCAP just filed itself for not using
23 them on the grounds that there were not as many locations
24 listed as ASCAP would have liked to have.

25 The information I have from the Tribunal is that

1 25,402 locations have been listed as of the end of last
2 year or late last year. BMI said that it did not use or
3 would not use it. BMI stated that it would use location
4 lists if the Tribunal would rescind its policy of non-
5 disclosure of the list that is filed by the operators.

6 We would like to say that the operators having
7 filed those lists in reliance upon that policy, a rescission
8 to them would violate the confidentiality under which they
9 submitted the list.

10 I think the most telling thing for this
11 proceeding is the fact that BMI has done a survey without
12 the use of the location list. From all I can gather and
13 all I have heard in the distribution hearing, it is a
14 very splendid survey. It shows that it can be
15 done and it shows that ASCAP can do the very same thing
16 if they really wanted to.

17 I would like for the record also to say that
18 the characterization in the ASCAP reply to the Stern
19 Electronics letter of May 15 to the effect Stern Electronics,
20 Incorporated, is now speaking for the jukebox operators
21 in place of the AMOA is incorrect.

22 AMOA is still in business representing operators.
23 I understand counsel for Stern Electronics has written to
24 the Tribunal by letter of June 2nd to that effect.

25 CHAIRMAN BRENNAN: The letter has been received.

1 MR. ALLEN: That's all I have to say. We hope
2 the rescission as proposed, the regulation as proposed
3 will be adopted by the Tribunal.

4 CHAIRMAN BRENNAN: Mr. Allen, you said that you
5 on behalf of your client are reserving your position on
6 the legality or jurisdictional question. Do you in any
7 way regard the forthcoming vote as a vote on the
8 jurisdiction on this body?

9 MR. ALLEN: I have no opinion about that, Mr.
10 Chairman. It would speak for itself I suppose.

11 CHAIRMAN BRENNAN: Is it not conceivable that
12 a Commissioner might be disposed to vote in favor of the
13 proposed amendment if the issue is divorced in the
14 question of jurisdiction but would perhaps find considerable
15 difficulty in voting in that direction if this is to
16 be regarded as a vote on the jurisdictional question?

17 MR. ALLEN: I don't know how to answer that,
18 Mr. Chairman. I would say how ever the Commissioners
19 view it.

20 CHAIRMAN BRENNAN: How do you view it?

21 MR. ALLEN: I think it would be an act of -- well
22 advised act to rescind something that has been objected
23 to on all grounds we have objected to it as well as on
24 the merits as you would see it.

25 CHAIRMAN BRENNAN: Thank you, Mr. Allen.

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Does any Commissioner wish to be recognized at this time for the purpose of debate or to other new amendments to the proposed amendment?

In my personal capacity, I wish to request the insertion at this point in the record of Section 610 of the Regulatory Flexibility Act.

“(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

“(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

“(3) the direct notification of interested small entities;

“(4) the conduct of open conferences or public hearings concerning the rule for small entities; and

“(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

“§ 610. Periodic review of rules

5 USC 610.

“(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

Plan, publication in Federal Register.

“(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

Consideration factors.

“(1) the continued need for the rule;

“(2) the nature of complaints or comments received concerning the rule from the public;

“(3) the complexity of the rule;

“(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

“(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

“(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

Publication in Federal Register.

“§ 611. Judicial review

5 USC 611.

“(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provi-

1 If no Commissioner is seeking recognition at
2 this time, we shall proceed to a vote on the proposed
3 amendment as published in the Federal Register. We shall
4 have a rollcall vote.

5 Commissioner Coulter.

6 COMMISSIONER COULTER: Yes.

7 CHAIRMAN BRENNAN: Commissioner Burg.

8 COMMISSIONER BURG: Yes.

9 CHAIRMAN BRENNAN: Commissioner Garcia.

10 COMMISSIONER GARCIA: No.

11 CHAIRMAN BRENNAN: The Chair votes yes.

12 The yeas are three. The nay is one. The
13 proposed amendment has been adopted.

14 The proposed amendment will be published in the
15 Federal Register with an effective date of approximately
16 30 days following publication. There remains the
17 question of assuming the proposed amendment becomes
18 effective of the disposition of the terms currently in the
19 possession of the Tribunal. Does any counsel wish to be
20 recognized at this time to discuss that matter?

21 MR. ALLEN: Mr. Chairman, I had not given that
22 thought. So, I would have to be speaking for myself
23 rather than those who have filed none -- many I know by
24 name, of course.

25 I would think if it does not involve great

1 expense to the Tribunal that a way to handle it might be
2 to query each of the filers and ask if they want it back.
3 If they don't, to destroy it or what other disposition
4 you would have.

5 COMMISSIONER BURG: Mr. Chairman, Mr. Allen I
6 suppose we could do that. On the other hand, I would feel
7 more comfortable speaking personally, if we could turn the
8 entire package over to some agent as opposed to doing it
9 piecemeal.

10 Incidentally and I suppose is not inconceivable
11 one of those operators has gone out of business or moved or
12 we don't have the correct address. I would not want to
13 be responsible for that. I would feel better if we disposed
14 of the whole package at one time.

15 MR. ALLEN: I will consult with AMOA officers.
16 I think they would be glad to be of assistance. I would
17 be glad to come back to you. I conceive of problems. They
18 still are confidential. You would be turning them over
19 to somebody.

20 COMMISSIONER BURG: Maybe we ought to shred
21 them.

22 MR. ALLEN: Maybe you should. I don't know.
23 This is why I thought about direct mail back. Identity is
24 not supposed to be known. I was going to say we could write
25 for you.

1 COMMISSIONER BURG: It is also not conceivable
2 that the names and some of the addresses are not members of
3 the AMOA.

4 MR. ALLEN: That is entirely possible.

5 COMMISSIONER BURG: Mr. Chairman, I would strongly
6 suggest we don't make a final disposition on that today and
7 give all counsel input.

8 MR. DUNCAN: The only thought that occurs to us
9 without suggesting anything they should at least be
10 retained until any time appeals would have expired.

11 CHAIRMAN BRENNAN: Yes. I thought that was
12 implicit in what the Chair said in its initial comments.

13 Regardless of what we might do about the
14 particular listings, we would certainly permanently reserve
15 the list of the operators who submitted the listing. That
16 has also been regarded as a public document.

17 If there is no further business, we will recess
18 at the call of the Chair.

19 (Whereupon, at 3:20 p.m., the hearing was
20 recessed, to reconvene on July 1, 1981.)

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