

DEPARTMENT OF LABOR**Employment and Training
Administration**

[TA-W-63,817]

**JHP Transport LLC, Myerstown,
Pennsylvania; Notice of Termination of
Investigation**

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 5, 2008, in response to a worker petition filed by a company official on behalf of workers at JHP Transport LLC, Myerstown, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 8th day of August 2008.

Linda G. Poole,

*Certifying Officer, Division of Trade
Adjustment Assistance.*

[FR Doc. E8-19183 Filed 8-18-08; 8:45 am]

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LIBRARY OF CONGRESS**Copyright Office**

[Docket No. RF 2008-1]

**Division of Authority Between the
Copyright Royalty Judges and the
Register of Copyrights under the
Section 115 Statutory License**

AGENCY: Copyright Office, Library of Congress.

ACTION: Final Order.

SUMMARY: The Copyright Royalty Judges, acting pursuant to statute, referred material questions of substantive law to the Register of Copyrights concerning the division of authority between the Judges and the Register of Copyrights under the section 115 statutory license. Specifically, the Copyright Royalty Board requested a decision by the Register of Copyrights regarding whether the Judges' authority to adopt terms under the section 115 license is solely limited to late payment, notice of use and recordkeeping regulations; and if the answer is no, what other categories or types of terms may the Judges prescribe by regulation. The Register of Copyrights responded in a timely fashion by delivering a Memorandum Opinion to the Copyright Royalty Board on August 8, 2008.

DATES: Effective Date: August 8, 2008.

FOR FURTHER INFORMATION CONTACT: Stephen Ruwe, Attorney Advisor, and Tanya M. Sandros, General Counsel,

Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: In the Copyright Royalty and Distribution Reform Act of 2004, Congress amended Title 17 to replace the copyright arbitration royalty panel with the Copyright Royalty Judges ("CRJs"). One of the functions of the CRJs is to make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119 and 1004 of the Copyright Act. The CRJs have the authority to request from the Register of Copyrights ("Register") an interpretation of any material question of substantive law that relates to the construction of provisions of Title 17 and arises out of the course of the proceeding before the CRJs. See 17 U.S.C. 802(f)(1)(A)(ii).

On July 25, 2008, the CRJs delivered to the Register: (1) an Order referring material questions of substantive law; and (2) the Briefs filed with the CRJs by the Recording Industry Association of America; the Digital Media Association; and National Music Publishers' Association, Inc., the Songwriters Guild of America, and the Nashville Songwriters Association International. The CRJs' delivery of the request for an interpretation triggered the 14-day response period prescribed in Section 802 of the Copyright Act. This statutory provision states that the Register "shall deliver to the Copyright Royalty Judges a written response within 14 days after the receipt of all briefs and comments from the participants." See 17 U.S.C. 802(f)(1)(A)(ii). The statute also requires that "[t]he Copyright Royalty Judges shall apply the legal interpretation embodied in the response of the Register of Copyrights if it is timely delivered, and [that] the response shall be included in the record that accompanies the final determination." *Id.* On August 8, 2008, the Register responded in a Memorandum Opinion to the CRJs that addressed the material questions of law. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety, below.

Dated: August 12, 2008

David O. Carson,

*Associate Register for Policy and
International Affairs*

Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

In the Matter of

Mechanical and Digital Phonorecord
Delivery Rate Adjustment Proceeding

Docket No. RF 2008-1

**MEMORANDUM OPINION
ON MATERIAL QUESTIONS OF
SUBSTANTIVE LAW****I. Procedural Background**

On July 25, 2008, under the terms of 17 U.S.C. § 802(f)(1)(A)(ii), the Copyright Royalty Judges ("CRJs") referred to the Register of Copyrights material questions of substantive law which have arisen in this proceeding. The Copyright Royalty Judges included briefs from the parties to the proceeding that had been submitted in February, 2008 relating to the authority of the CRJs to set terms governing the section 115 compulsory license.

After recounting the relevant statutory provisions of section 115 and Chapter 8 of Title 17, the CRJs posed the following questions:

Is the Judges' authority to adopt terms under the section 115 license solely limited to late payment, notice of use and recordkeeping regulations? If the answer is no, what other categories or types of terms may the Judges' prescribe by regulation?

In addition, a footnote to the referral indicates that the CRJs are particularly interested in knowing whether it is the CRJs or the Register that have authority to prescribe regulations governing categories or types of terms where those categories or types of terms are not specifically identified or delineated in the statute.

As required by 17 U.S.C. § 802(f)(1)(A)(ii), the Register hereby responds to the CRJs.

**II. Statutory Authority in Section 115
and Chapter 8 of Title 17.**

Prior to 1995, the copyright law empowered the Copyright Royalty Tribunal and, subsequently, the Copyright Arbitration Royalty Panels ("CARPs") and the Librarian of Congress, to set only the rates applicable to the section 115 license. This authority was modified in 1995 by the Digital Performance Right in Sound Recording Act of 1995 in which Congress added provisions to section 115 for "digital phonorecord deliveries." The CARPs became authorized to set "reasonable terms and rates of royalty payments" for digital phonorecord deliveries ("DPDs"), and these rates and terms were subject to modification by the Librarian on recommendation by the Register of Copyrights. The same legislation authorized the Librarian to "establish requirements by which copyright owners may receive reasonable notice of

the use of their works..., and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.” 17 U.S.C. § 115(c)(3)(D) (1996). With respect to physical phonorecords, the CARPs’ authority was limited to setting rates; there was no statutory authorization to set “terms.” See 17 U.S.C. § 801(b)(1) (1996). However, the Register of Copyrights had the authority to issue regulations concerning payment. Section 115(c)(5) provided (and continues to provide), in pertinent part:

Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

This provision applies to both digital phonorecord deliveries and physical phonorecords.

Since 1978, section 115 has also provided that persons wishing to use the section 115 compulsory license must serve a Notice of Intention to Obtain Compulsory License on the copyright owner, and that the “notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.” 17 U.S.C. § 115(b)(1).

In 2004, Congress passed the Copyright Royalty and Distribution Reform Act (“CRDRA”). This legislation created the CRJs and empowered them to set “terms and rates of royalty payments” under section 115. See 17 U.S.C. § 801(b)(1). It also amended section 115 to provide that the CRJs had authority to set “reasonable rates and terms of royalty payments” for use of works under the license as well as “requirements by which records of such use shall be kept and made available.” 17 U.S.C. § 115(c)(3)(D). However, the statutory provisions authorizing the Register to regulate notice of intention to obtain the section 115 license and requirements regarding monthly payment and monthly and annual statements of account remained in place.

III. Summary of Parties’ Arguments

The brief of the Digital Media Association (“DiMA”) in response to the

CRJs’ inquiry on its authority to set certain terms asserts that to the extent that the authority of the Register and the CRJs overlap, their jurisdiction is concurrent. Given this concurrent jurisdiction, DiMA maintains that both the Register and the CRJs may administer the license in a way that gives effect to the statute and avoids inconsistency. In keeping with this assertion, DiMA argues that the CRJs are authorized to identify the revenue against which the license rate should be applied, define the work, and set forth the scope of the activities covered by the license.

The brief of the National Music Publishers’ Association, the Songwriters Guild of America, and the Nashville Songwriters Association International (collectively, “NMPA”) in response to the CRJs’ inquiry on its authority to set certain terms asserts that CRJs have broad authority to determine rates and terms for the section 115 license. Further, it notes that the CRJs have express power to establish terms with respect to late fees and that they may specify notice and recordkeeping requirements that apply in lieu of existing regulations. In NMPA’s determination, the CRJs have the authority to issue fees for payments that are either late or are the result of a pass-through arrangement. NMPA argues that the CRJs are empowered to require licensees to issue reports indicating the specific configuration used, and in the case of pass-through licenses, identify the retailer through which delivery occurred. NMPA then contends that the CRJs are able to clarify whether the license fee is to be calculated on manufacture or distribution. It also asserts that the Register is explicitly granted authority over signing and certification of statements of account and that therefore the CRJs are not able to modify existing regulations in these areas, which are not properly considered recordkeeping.

The brief of the Recording Industry of America (“RIAA”) in response to the CRJs’ inquiry on its authority to set certain terms asserts that Congress split the administration of the section 115 license between the CRJs and the Register of Copyrights. In its determination, the CRJs enjoy broad authority to set rates as well as a more limited authority to set terms of royalty payments. Additionally, RIAA maintains that the CRJs are empowered to set rules regarding notice to copyright owners of the use of their works and recordkeeping of such use. However, RIAA argues that the Copyright Office has a broad authority to establish detailed provisions that govern the

operation of the license. In RIAA’s view, section 803(c)(3) resolved any tension between these competing authorities by resolving that the CRJs’ final determination in the areas of notice and recordkeeping may supplant applicable regulations by the Register. Under this statutory interpretation, RIAA argues that the CRJs are unable to issue payment terms such as pass-through fees or attorney’s fees that conflict with existing payment regulations. RIAA also posits that the CRJs are unable to alter the regulations regarding reserves or notices of intention that have been issued by the Register. On the other hand, RIAA maintains that the CRJs are able to clarify that the section 115 license extends to all reproductions necessary to engage in activities covered by the license. It asserts that the CRJs are able to modify the current provisions regarding when DPDs shall be treated as distributed, as well as those addressing audit and signature of signature of statements of account.

IV. Register’s Determination

Congress intentionally split the administration of section 115 between the CRJs and the Register of Copyrights. The result of this division of authority is that the CRJs may issue regulations that supplant currently applicable regulations, including those heretofore issued by the Librarian of Congress, solely in the areas of notice and recordkeeping. 17 U.S.C. § 803(c)(3). However, the scope of the CRJs’ authority in the areas of notice and recordkeeping for the section 115 license must be construed in light of Congress’s more specific delegation of responsibility to the Register of Copyrights, which includes the authority to issue regulations regarding notice of intention to obtain the section 115 license as well as those regarding monthly payment and monthly and annual statements of account. 17 U.S.C. §§ 115(b)(1) and 115(c)(5). Moreover, accepted principles of statutory construction dictate that the CRJs’ authority to set “terms” must be construed in light of the more specific delegations of authority to the Register. See *Simpson v. United States*, 435 U.S. 6, 15 (1978) (“Precedence [is given] to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later.”).

In the CRDRA, Congress amended section 115(c)(3)(D) to authorize the CRJs to “establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under

which records of such use shall be kept and made available by persons making digital phonorecord deliveries.” Previously this power had been held by the Librarian of Congress, who issued such recommendations on the recommendation of the Register of Copyrights. The CRDRA also added a new section 803(c)(3), which allowed the CRJs to “specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations.” On its face it may appear as if the CRJs are empowered to supplant all current regulations in the area of notice and recordkeeping. However, the CRJs’ authority to issue regulations in the areas of notice and recordkeeping must be construed in light of the specific grants of responsibility over the section 115 license to the Register of Copyrights. *Simpson v. United States*, 435 U.S. at 15.

With regard to the CRJs’ authority to issue requirements by which copyright owners may receive notice of the use of their works under 17 U.S.C. § 115(c)(3)(D), the Register first notes that the authority granted to the CRJs is limited to notice of use that has already taken place under the license. Notice of a use that has already taken place under the license is to be distinguished from notice of intention to obtain the section 115 license, which must be served on copyright owners prior to actual use under the license. Regulations governing notice of intention to obtain the section 115 license remain within the Register’s authority. The CRJs’ authority over notice and recordkeeping does not include the ability to supplant the Register’s regulations governing notice of intention to obtain the section 115 license.

Notice of use requirements are also limited by the Register’s specific grant of authority to issue regulations regarding statements of account. These regulations set forth information that is required to be served on the copyright owner in statements of account. While the level of detail, which includes requirements regarding oath, signature, and indication of each phonorecord configuration involved, is quite extensive, the Register understands that it may be conceivable that the CRJs may determine that licensees should be required to provide some information related to notice of use that is not addressed in either the notice of intention to obtain the section 115 license or the statements of account. If the CRJs are able to identify such information that is not addressed in either the notice of intention to obtain

the section 115 license or the statements of account, then the CRJs may require that a licensee include that type of information in a notice of use (but not in the statement of account) to be served on the copyright owner. Alternatively, a recommendation by the CRJs to the Register to amend the regulations governing statements of account to include additional information presumably would meet with a favorable response.

The CRJs’ authority to issue requirements for recordkeeping is similarly limited by specific grants of authority to the Register. As previously indicated, the Register has set forth detailed requirements addressing the type of information, including phonorecord configuration, that is to be served on the copyright owner in the statements of account. Authority to issue regulations regarding these statements of account is the exclusive domain of the Register. Of course, if the CRJs set rates for new types of configurations, the Register can amend the regulations governing statements of account accordingly.

In addition to the authority to issue regulations in the areas of notice and recordkeeping, the CRJs enjoy authority to determine reasonable “rates and terms” of the license. The power to issue “terms” of the license was established in the DPRSA and the scope of this authority is addressed in the legislative history of that Act. The legislative history indicates that “terms” means such details as “how payments are made, when and other accounting matters,” as well as “related details.” S. Rep. No. 104–128, at 40 (1995). As with the CRJs’ authority over the areas of notice and recordkeeping, the authority to issue “terms” is limited by specific statutory grants of authority to the Register. If and to the extent that an express statutory grant of authority to the Register conflicts with an interpretation of language in the legislative history relating to the CRJs’ power to set terms on how payments are made and other accounting matters, the statutory text controls and the Register’s express authority is paramount. However, to the extent that the Register’s authority does not extend to particular matters relating to terms of payment and related details which the CRJs determine should be addressed, the CRJs have the authority to supplement the Register’s regulations in this area. The legislative history of the DPRSA indicates that the CRJs’ authority to determine “terms” includes additional terms “necessary to effectively implement the statutory license.” *Id.* at 30. Consistent with the

legislative history, the Librarian of Congress, in a previous determination regarding the scope of “terms” in the course of a 1998 proceeding addressing the 114 license, concluded that the authority to set reasonable terms extends “only so far as those terms insured the smooth administration of the license.” Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 FR 25394, 25411 (May 8, 1998). See also *Recording Industry Association of America v. Librarian of Congress*, 176 F.3d 528, 531 (D.C. Cir. 1999) (Librarian of Congress’s authority to set “terms” for the section 114 statutory license includes authority to set terms relating to allocation of royalties, to audits and to deductions from royalties, but such determination must be based on record evidence).

While the Register is not able to exhaustively address all of the types of terms that insure the “smooth administration of the license” or are “necessary to effectively implement the statutory license,” the Register does conclude that the CRJs do have the authority to issue requirements regarding audit of statements of account and records that are required to be kept. See *RIAA v. Librarian of Congress*, 176 F.3d at 531. However, the Register concludes that a provision entitling copyright owners to recover attorney’s fees expended to collect past due royalties is not among the types of “terms” that insure the “smooth administration of the license” or are “necessary to effectively implement the statutory license.” Moreover, the statutory method for enforcement of the section 115 license is found in section 115(c)(6), which provides that the owner may issue a notice of default, which unless remedied within 30 days terminates the license and provides for infringement action. Section 505 governs awards of attorney’s fees in infringement actions, and it is not within the CRJs’ scope of authority to provide for awards of attorney’s fees other than as provided in section 505. The statutory method for enforcement found in section 115(c)(6) appears to foreclose other legal avenues by which a copyright owner may seek remedy for past due royalties and late fees. However, even if other remedies are available to recover past due royalties, the well established “American Rule” that attorney’s fees are available only when explicitly established by statute or through negotiated contract would foreclose any conclusion that the CRJs have the authority to impose an attorney’s fee regime on compulsory

licensees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (U.S. 1975) (absent statute or enforceable contract, litigants pay their own attorneys' fees). As section 115 does not contain an explicit provision for attorney's fees, the CRJs are unable to provide for awards of attorney's fees in actions to collect past due royalties.

The CRJs do not have the authority to issue rules setting forth the scope of activities covered by the license. However, the CRJs certainly have the authority to set rates for different types of DPDs. In so doing, they may have to make determinations to identify particular types of DPDs. Such determinations may implicate the question of what activity falls within the scope of the license. In instances where particular rates are being requested for the creation of particular types of DPDs and there is some question whether these DPDs fall within the scope of the license, those questions must be resolved in the proceeding. When such a question has not been determined before, it is a novel question of law which should be referred to the Register under section 802(f)(1)(B). In any event, any such determination by the CRJs will be subject to review for legal error by the Register under section 802(f)(1)(D).

NMPA has proposed that the CRJs determine that the license fee is to be calculated on the date of distribution, not the date of manufacture. The CRJs' authority to set rates and terms does appear to be sufficiently broad to include the authority to determine the date on which the mechanical license fee is to be calculated. However, we caution that the legislative history of section 115 suggests that the applicable rate should be the date the phonorecord is made. When the House Judiciary Committee considered the language that was to become section 115 of the 1976 Copyright Act in 1966 and 1967, it stated that "the committee believes that, unless a negotiated agreement provides otherwise, the liability for royalties should be fixed at the time phonorecords are made under a compulsory license." *Second Supplementary Register's Report on the General Revision of the U.S. Copyright Law* (1975) at 251. Moreover, it would most likely be beyond the power of the CRJs to provide that with respect to phonorecords that have already (*i.e.*, prior to the effective date of the current rate determination) been manufactured, the royalty fee is to be calculated as of the date of distribution rather than the date of manufacture. Such retroactive rulemaking is in most cases beyond the power of an agency. See *Bowen v.*

Georgetown University Hospital, 488 U.S. 204 (1988).

Finally, the CRJs request clarity regarding their authority over terms of late payments. Under section 803(c)(7), the CRJs have a clear authority to include terms with respect to late payments. However, the Register notes that this authority applies solely to payments that are in fact past due.

August 8, 2008

David O. Carson

Acting Register of Copyrights

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BILLING CODE 1410-30-S

NATIONAL CREDIT UNION ADMINISTRATION

Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Interpretive Ruling and Policy Statement 08-1.

SUMMARY: The NCUA is issuing an Interpretive Ruling and Policy Statement (IRPS) regarding prohibitions imposed by Section 205(d) of the Federal Credit Union Act (FCU Act) (12 U.S.C. 1785(d)(1)). Section 205(d) of the FCU Act prohibits a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from participating in the affairs of an insured credit union except with the prior written consent of the NCUA Board. This IRPS provides direction and guidance to federally-insured credit unions and those persons who may be affected by Section 205(d) because of a prior criminal conviction or pretrial diversion program participation by describing the actions that are prohibited under the statute and establishing the procedures for applying for NCUA Board consent on a case-by-case basis.

DATES: This IRPS is effective September 18, 2008.

FOR FURTHER INFORMATION CONTACT: Jon Canerday, Trial Attorney, Office of General Counsel, at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, by e-mail at canerday@ncua.gov or by telephone at (703) 518-6548.

SUPPLEMENTARY INFORMATION:

A. Background

In April 2008, the NCUA Board published a proposed IRPS regarding the prohibition imposed by Section 205(d) of the FCU Act. 73 FR 18576 (April 4, 2008). Section 205(d) of the FCU Act prohibits, without the prior written consent of the NCUA Board, a person convicted of any criminal offense involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party, or otherwise participating, directly or indirectly, in the conduct of the affairs of an insured credit union. The comment period closed on June 3, 2008. NCUA received seven comments on the proposal. After consideration of the comments, NCUA is finalizing the IRPS, which generally adopts the guidance as proposed.

B. Public Comments

NCUA welcomed general comments on the proposed IRPS. In addition, the Board specifically sought comments as to whether the format of this guidance as an IRPS was appropriate or whether a regulation would be more suitable. The Board invited comments as to whether a specific form, similar to the form required by the FDIC in connection with a similar statute, should be used to request consent pursuant to Section 205(d).

NCUA received seven comment letters in response to the proposed IRPS: two from federal credit unions, two from national credit union trade organizations, and three from credit union leagues. The commenters generally supported the need for the guidance as contained in the proposed IRPS and offered several suggestions intended to assist the Board in improving the proposed IRPS.

Two commenters believed that a regulation was the more appropriate format for the guidance. One of the commenters who favored a regulation thought a regulation provided greater protection to a credit union that might be challenged by a prospective employee. Another commenter believed a regulation was preferable because it would help reinforce a credit union's right to appeal an adverse decision and subject future changes to public notice and comment. A third commenter suggested the guidance should take the form of a Letter to Credit Unions, believing that format was more familiar to credit union officials.

The Board appreciates the need to provide protection for credit unions that