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The petitioner has requested that the petition be withdrawn.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]

BILLING CODE 4510–FN–P

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.


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(o), 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 provisions that govern the manner of service, with requirements for the section 115 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” 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 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 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 are within the
Register’s authority. The CRJs’
authority over notice and recordkeeping
does not include the authority 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 over issues of
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 DPRSRA 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 how accounting matters,” as well as “related details.” S.
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
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
DPRSRA 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 any conclusion that the CRJs
have the authority to impose an
attorney’s fee regime on compulsory
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. The 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