

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR EPHEMERAL COPIES
OF SOUND RECORDINGS USED BY
BUSINESS ESTABLISHMENTS**
(Business Establishments III)

Docket No. 17-CRB-0001-BER
(2019-2023)

**NOTICE OF PARTICIPANTS,
COMMENCEMENT OF VOLUNTARY NEGOTIATION PERIOD,
AND CASE SCHEDULING ORDER**

By notice published in the *Federal Register*, the Copyright Royalty Judges (Judges) solicited Petitions to Participate in the captioned proceeding to determine royalty rates and terms for licensing the making of ephemeral copies of sound recordings for transmission to business establishments. 82 Fed. Reg. 143 (Jan. 3, 2017). Section 112(e)(1) of the Copyright Act (Act) establishes a compulsory license for making ephemeral recordings of sound recordings to facilitate certain digital audio transmissions, including transmissions to business establishments pursuant to the limitations on exclusive rights specified by section 114(d)(1)(C)(iv) of the Act. Chapter 8 of the Act and procedural regulations adopted by the Judges and codified in Chapter III of title 37 of the Code of Federal Regulations (Rules) govern proceedings to set the royalty rates applicable to statutory licensees. This scheduling order details the Judges' expectations regarding compliance with the Act and the Rules in the present rate proceeding. Specific schedule dates are set forth on "Attachment A" to this Notice and Order.

Participation in the Proceeding

Participation in this proceeding is limited in the first instance to parties in interest who filed a timely Petition to Participate. Attached to this Notice and Order as "Attachment B" is a list of participants that filed timely Petitions to Participate.¹

Voluntary Negotiation Period

All participants shall engage directly or by counsel in good faith settlement negotiations aimed at resolving controversies regarding the terms and rates for payment of royalty fees for

¹ Exhibit B includes every entity or individual that filed a petition and paid the filing fee. The Judges have not determined whether every entity or individual listed on Exhibit B has a "significant interest" in this proceeding, entitling it to continued and full participation in the proceeding. Nonetheless, a putative participant must participate fully in the proceeding, unless the participant withdraws its Petition, joins with other participants and shares joint representation, or is the subject of a dismissal order.

making ephemeral recordings of sound recordings for digital audio transmissions to business establishments during the years at issue in this proceeding. The Voluntary Negotiation Period (VNP) commences on the date of this Notice and Order. In addition to all aspects of rates and terms for payment, the negotiations shall address expressly issues relating to the rate structure and terms of recordkeeping and reporting.

Five calendar days after the end of the Voluntary Negotiation Period, the participants shall file a Notice of Settlement, only if some or all participants have agreed on the applicable royalty rates and terms for recordkeeping, reporting, and royalty payment by licensees.² The Judges will issue an Order for Further Proceedings for all participants not reporting a settlement. Nothing in this Notice and Order or the Order for Further Proceedings limits participants' ability to continue negotiations and reach a settlement of their differences at any time during the course of the proceeding.

Prehearing Procedures

Chapter 8 of the Act prescribes procedural steps and timelines the Judges must follow in every rate proceeding. Chapter 8 also authorizes the Judges to make "any necessary procedural or evidentiary ruling[] in any proceeding" *See* 17 U.S.C. § 801(c). To encourage meaningful settlement negotiations and to facilitate participants' identification of issues, the Judges schedule an initial disclosure and discovery period, after the Voluntary Negotiation Period and *before* the deadline to file Written Direct Statements. During this period, each participant shall provide to all other participants a brief statement of proposed rates and terms. Each participant shall disclose the name, title, and contact information, of all fact witnesses upon whom it intends to rely to supply evidence of the business bases of their respective rate proposals. *Cf.* Fed. R. Civ. P 26(a)(1)(A)(i) & (ii). Each participant also shall disclose all testifying expert witnesses, providing name, qualifications, contact information, and the substance of the witness's anticipated testimony.

After preliminary disclosure and discovery, each participant shall file³ its Written Direct Statement and deliver a copy to *all* other remaining participants, whether or not the participant believes it has a controversy with another given participant. The Judges will not schedule filing of Amended Written Direct Statements unless a participant files a motion for leave to file, stating a substantial need therefor.

Participants shall file Written Rebuttal Statements based upon the participants' stated positions in filings, their mutual discovery responses, and the mandatory settlement conference. *See* 17 U.S.C. § 803(b)(6)(C)(x). The Judges *may* permit additional discovery after the

² Participants may notify the Judges of a settlement "in principle," but all participants shall follow the case schedule until all terms of their settlement are documented and presented for publication, comment, and approval.

³ The Judges remind participants of the recent codification of procedural rules relating to electronic filing. *See* 37 C.F.R., Parts 350, 351 (2017). Unless the Judges order otherwise, during the initial period of electronic filing, participants must use the electronic system known as eCRB and also continue to follow the rules relating to paper filings.

participants file Written Rebuttal Statements, but will do so only on motion of a participant showing a need and purpose for additional discovery. *See* 17 U.S.C. § 803(b)(6)(C)(iv).

Prior to the scheduled hearing, the Judges will schedule a prehearing conference or telephone conference, to discuss, *inter alia*, issues remaining for evidentiary hearing, order of presentation, exhibit numbering and presentation, scheduling concerns, disabilities to accommodate, or any other matter that might affect conduct of the hearing. At the prehearing conference or at another time prior to the hearing, the Judges will confer with the participants to determine details concerning length of opening statements, order of witnesses, time required to address issues relating to proposed regulations, and time for and length of closing arguments.

Not fewer than ten calendar days prior to the date set for hearing, each participant shall deliver to all other participants a list of witnesses the participant intends to call and a list of exhibits the participant intends to offer into evidence. The witness list shall include the witness's name, contact information, a brief statement of the substance of the witness's testimony, and an estimate of the time required for direct examination of the witness. No later than September 25, 2018, the participants shall confer and prepare and file a joint witness list. The joint witness list shall include estimated time for direct-, cross-, and redirect-examination of each witness.

No later than September 25, 2018, the participants shall confer and eliminate duplicate exhibits. The final exhibit list for the hearing shall include all proposed exhibits and no proposed exhibit more than once. The participants shall prepare a joint exhibit list, which shall include the exhibit's unique number, the title or a description of the exhibit, and whether the exhibit or any part of it is "restricted" under the terms of any protective order. Participants shall register on the exhibit list objections, if any, to proposed exhibits, stating the basis of the objection. Regardless of the exhibit designation, any participant may offer into evidence any exhibit on the final exhibit list *unless* another participant objects to the admissibility of the exhibit. The Judges shall deem all objections to proposed exhibits NOT noted on the exhibit list as waived, *except* objections to relevance. No participant may utilize any unlisted exhibit, *except* for impeachment purposes, as rebuttal to unanticipated evidence, or to refresh recollection. The Judges shall determine admissibility of these exceptional exhibits on a case-by-case basis.

Not later than September 27, 2018, the participants shall file in eCRB and deliver to the Judges and to (or as directed by) all other participants copies of all the exhibits each listed on the final exhibit list, tabbed in the same order and with the same number as on the exhibit list. In the case of exhibits originally listed by more than one participant, the participant offering the exhibit first (with the lowest denomination exhibit number) shall include the exhibit in its notebook.

Evidentiary Hearing

Participants are reminded that the captioned proceeding is one to determine both rates and *terms* regarding application of the rates. Participants must present evidence regarding the content and propriety of any proposed terms to be included in CRB regulations.

Order

The Judges hereby **ORDER** that all participants adhere to the case schedule attached as “Attachment A” to this Notice and Order and refer to the foregoing narrative as needed for interpretation of the schedule. At any time, a participant may file a motion stating good cause to vary the schedule, within the dictates of the Act. The Judges will not accept or respond to requests submitted in any form other than a formal motion. The Judges may sanction any participant that fails to follow the schedule or, if in doubt, fails to seek clarification of the schedule and its requirements.

The Judges **FURTHER ORDER** that, as soon as practicable and at any time up to and including during the hearing, the participants notify the Judges if the participants, or any of them, reach a settlement or accommodation that narrows or resolves any open issue or obviates the need for further participation in the proceeding.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: October 6, 2017.

ATTACHMENT A

Schedule for Rates and Terms Determination (Business Establishments III)

Case event	Date
Commencement of Voluntary Negotiation Period	October 6, 2017
End of Voluntary Negotiation Period	January 4, 2018
Participants' Notice of Settlement	January 10, 2018
IF PARTICIPANTS DO NOT SETTLE or if the Judges decline to adopt the settlement	
Order for Further Proceedings	January 12, 2018
Begin Preliminary Disclosure and Discovery	January 12, 2018
End Preliminary Disclosure and Discovery	January 26, 2018
Participants file Written Direct Statements Commencement of Discovery Period	May 14, 2018
End of Discovery Period	July 13, 2018
Settlement Conference Period	July 13 – August 3, 2018
Deadline for Joint Settlement Conference Report	August 6, 2018
IF PARTICIPANTS DO NOT SETTLE	
Deadline to file Written Rebuttal Statement ⁴	September 17, 2018
Hearing	commencing on October 1, 2018
Deadline to file Proposed Findings and Conclusions	TBD
Issuance of Determination	not later than December 14, 2018

⁴ During this interval, the Judges may schedule a prehearing conference. *See* 37 C.F.R. § 351.8.

PARTICIPANT LIST
DOCKET NUMBER: 17-CRB-0001-BER (2019-23)
Determination of Rates and Terms for Business Establishment Services III

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