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Copyright Royalty Board

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March 31, 2017



United States Copyright Royalty Judges
Library of Congress
James Madison Memorial Building
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Re: In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III), Dkt No. 16-CRB-001-SR/PSSR (2018-2022)

To the United States Copyright Royalty Judges:

I write on behalf of the Services, Sound Exchange and George Johnson. As we anticipated during the pre-hearing conference on March 24, 2017, the participants have reached an agreement on exhibits and we attach a word version of a revised Proposed Order on Hearing Schedule reflecting that agreement, as well as a redline showing the changes since the participants’ last submission. The Proposed Order contains several additional proposed modifications, all as outlined below.

1. Exhibits

As set forth in paragraphs 15 and 16 of the revised Proposed Order, the participants have worked collectively to design a process that we hope will streamline the handling of exhibits at the hearing. Essentially, in accordance with the Judges’ February 22, 2017 Rebuttal Discovery Schedule, the participants will exchange exhibit lists on April 3, then will confer to eliminate duplicate exhibits and to prepare a joint exhibit/objections list. However, rather than limiting the list to exhibits that will be offered on direct examination, the participants propose that the exhibit lists include all exhibits that a participant intends to offer into evidence – whether on direct examination or cross examination – up to a pre-set limit. Participants may reserve a portion of their exhibits to add exhibits during the hearing as needed, subject to both a total limit and a per-day limit. It is the participants’ intention to avoid unduly long and over-inclusive exhibit lists, and to avoid burdensome amendments during the hearing.

2. Motions

Section V of the revised Proposed Order includes the provisions for prehearing orders discussed during the March 24 conference, but the participants respectfully request two departures from the proposal set forth in the Judges' March 27 letter. First, in order to prevent the need to burden the Judges with omnibus or placeholder motions objecting to exhibits, the participants suggest that objections to exhibits on the joint exhibit list should be treated as sufficient, without the need to raise these objections in a prehearing motion. Paragraph 18 of the Proposed Order requires the participants to confer with one another to attempt to reach agreement that would permit a stipulation as to the admissibility of certain documents where possible, and the participants are committed to working to narrow objections before exhibits are presented. Accordingly, the highlighted language in paragraph 23 would allow objections to exhibits to be set forth on the joint exhibit list, limiting the need for prehearing motion practice and ensuring that the Judges need only consider objections that the participants have been unable to resolve to exhibits that are actually being offered into evidence. In addition, it sets forth a proposal for a procedure that would allow the participants to raise and discuss objections to discrete lines or paragraphs of the written testimony of fact witnesses shortly before the testimony is offered into evidence, obviating the need for the participants to burden the joint exhibit list with line-by-line objections to written fact testimony and likely reducing the number of total objections that the participants and the Judges must address.

Second, while we understand that the need to file prehearing motions sufficiently in advance of the proceeding, the participants respectfully submit that the proposed April 7 prehearing motion deadline would require the parties to serve their motions virtually immediately. The participants are in the midst of depositions and many of the witnesses who are potentially the subject of a pretrial motion have not yet been deposed. If the Judges were to extend the deadline to April 14, as we request, the completion of depositions would enable the participants to make better decisions about bringing pretrial motions and enable them to streamline such motions as they decide to make.

3. Briefing Schedule and Closing Arguments

As set forth in the Judges' March 27 letter, paragraph 28 clarifies that there will be no pretrial briefs. And as discussed during the March 24 conference, the proposed changes to paragraph 30 enables the Judges to set a convenient date to hear closing arguments following completion of post-hearing briefing.

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We thank the Judges for their consideration of this Proposed Order. The participants are available to discuss any part of it should Your Honors desire.

Respectfully submitted,

R. Bruce Rich ^{13M4}

R. Bruce Rich

cc: All participants (by email)