

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the matter of:)
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)
Modification and Amendment of) Docket No. 18-CRB-0012-RM
Regulations to Conform to the MMA)
)
_____)

**COMMENTS OF THE DIGITAL MEDIA ASSOCIATION IN RESPONSE
TO THE COPYRIGHT ROYALTY BOARD’S PROPOSED RULES**

The Digital Media Association (“DiMA”) submits these comments in response to the proposed Copyright Royalty Board (“CRB”) Regulations Regarding Procedures for Determination and Allocation of Assessment to Fund Mechanical Licensing Collective and Other Amendments Required by the Hatch-Goodlatte Music Modernization Act (“MMA”). 84 Fed. Reg. 9053 (Mar. 13, 2019) (the “Proposed Rules”).

DiMA appreciates the opportunity to participate in this process and the Copyright Royalty Judges’ (“CRJs”) willingness to consider and adopt significant aspects of Appendices A and B to the Joint Comments of the National Music Publishers’ Association and Digital Media Association submitted on December 10, 2018 (the “Joint Proposal”).

DiMA recognizes the importance of administrative assessment proceedings in ensuring that the MMA is successful as implemented, and the necessarily *sui generis* nature of those proceedings per the dictates of the MMA, particularly in the various ways that administrative assessment proceedings intentionally differ from rate and distribution proceedings before the CRJs and the compressed timeframe within which administrative assessment proceedings must be conducted and concluded. DiMA’s below comments and recommended amendments in response

to the CRJs' Proposed Rules seek to assist the CRJs in establishing a fair, efficient, and informative process for administrative assessment proceedings, answer the CRJs' specific questions regarding certain of the Proposed Rules, and ensure that the Proposed Rules are internally consistent, clear, and accurate.

For the CRJs' ease of review and for the sake of clarity, a redline of the Proposed Rules, showing each of the amendments and corrections suggested by DiMA, is attached as Appendix A.

I. The MLC and the DLC Serve Equally-Important Functions on Behalf of Their Respective Constituencies and Should Be Provided Equal Opportunities in Administrative Assessment Proceedings

Section 115(d)(5)(A) of the MMA defines the Digital Licensee Coordinator ("DLC") as a single entity that, among other things, "is endorsed by and enjoys substantial support from digital music providers and significant nonblanket licenses that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years." The DLC must be "designated by the Register of Copyrights, with the approval of the Librarian of Congress." *Id.*

Section 115(d)(3)(A) of the MMA defines the Mechanical Licensing Collective ("MLC") as a single entity that, among other things, "is endorsed by, and enjoys substantial support from, musical work copyright owners that together represent the greatest percentage of the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years." The MLC must be "designated by the Register of Copyrights, with the approval of the Librarian of Congress." *Id.*

Moreover, the MLC and the DLC are the only mandatory participants in administrative assessment proceedings, with all other participants having the choice to opt in. *See* 17 U.S.C. 115(d)(7)(D)(iii)(II) and (iv)(II).

The Congressional intent therefore is clear that the MLC and the DLC are to be created, designated, and approved to serve as proxies for the interests of their respective constituencies, with the MLC serving as the voice of musical work copyright owners/licensors and the DLC serving as the voice of digital music licensees. The very existence of the MLC and the DLC sets administrative assessment proceedings apart from other CRB proceedings (e.g., rate and distribution proceedings). The designation process under the MMA thus mitigates potential concerns about lack of representation and substantially increases the likelihood that administrative assessment proceedings will be as streamlined and efficient as possible, providing *equal* representation for musical work copyright owners/licensors (through the MLC) and digital music licensees (through the DLC).

Indeed, Regan A. Smith, the General Counsel and Associate Register of Copyrights, recently confirmed that the DLC “represents [the] interests of digital music providers with respect to the section 115 license.” See <https://blogs.loc.gov/copyright/2018/10/the-orrin-g-hatch-bob-goodlatte-music-modernization-act/>. And as further explained by the Copyright Office, the MMA “calls for the establishment of a [DLC] to carry out key functions under the new blanket license” and to “coordinat[e] the activities of the licensees,” empowering the DLC “to gather and provide documentation for, and participate in proceedings before, the [CRJs] to determine the administrative assessment to be paid by digital music providers.” Request for Information on Designation of Mechanical Licensing Collective and Digital Licensee Coordinator, 83 Fed. Reg. 65,747, 65,750 (Dec. 21, 2018). Consequently, the MLC and the DLC are equally vital to the successful operation of administrative assessment proceedings and should be provided equal stature in the process.

As currently drafted, certain of the Proposed Rules put the DLC in an inferior position as compared to the MLC, however, creating inequities that ultimately may undermine the overarching goal of the proceedings to establish the amount and terms of the administrative assessment based on a comprehensive, transparent record or to allow for the negotiation of a voluntary agreement among the two entities that represent the vast majority of their respective stakeholders.

A. The MLC and the DLC Should Be Provided with Equal Opportunities to Take Depositions

The disparate treatment between the MLC and the DLC is perhaps most pronounced in the section of the Proposed Rules that governs depositions in administrative assessment proceedings. Section 355.3(e) authorizes the MLC to notice and take up to five depositions during its discovery period and further authorizes the DLC, “interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees” to notice and take up to five depositions “collectively” during their discovery period.

The Proposed Rules thus permit the MLC to review whatever discovery it deems relevant, determine each of the five individuals it believes would be most advantageous to depose, determine the order in which it wishes to depose these individuals, and set the specific timing of those depositions within the discovery period, all at its sole discretion and in its sole judgment, unencumbered by the competing thoughts, ideas, and interests of other parties.

In contrast, the DLC would be required to share its five depositions with all other proceeding participants, including even interested copyright owners (who are not statutorily-obligated to pay the administrative assessment). The Proposed Rules constrain the DLC in its efforts to take depositions, requiring that it negotiate and compromise on every aspect of the deposition process with an as-yet unknown number of other participants, from the individuals who will ultimately be deposed, to the timing and order of those depositions, and even to the amount

of time the DLC will be allotted to examine each deponent, making the development of a coherent and efficient strategy for this important fact-finding process incredibly difficult.

Indeed, under the Proposed Rules, any proceeding participant other than the MLC could essentially hijack the first discovery period deposition process entirely by noticing all five depositions on the very first day of that discovery period, thereby blocking the DLC's ability to take depositions of potentially far more relevant individuals. Although this particular scenario is somewhat drastic, the open-ended nature of the deposition process in the Proposed Rules will inevitably create a number of disputes that the CRJs will be required to resolve (e.g., the individuals who will be deposed, the time allocations for examination of those witnesses, the timing of the depositions, etc.), resulting in significant inefficiencies within an already compressed discovery timeline.

Because the DLC is the designated proxy to represent the interests of digital music licensees, just as the MLC is the designated proxy to represent the interests of copyright owners/licensors, the DLC should be provided with equal access to the deposition process, and the Proposed Rules should be amended as reflected in Appendix A to permit the DLC to take up to five depositions under the same conditions as those provided to the MLC. In essence, DiMA urges the CRJs to reconsider and adopt the deposition process set forth in the Joint Proposal, which authorizes *both* the MLC *and* the DLC to notice and take up to five depositions each during their respective discovery periods, with a guaranteed time allotment of at least six hours to examine each deposition witness. *See* Joint Proposal, Appendix A at pages vi-vii.

DiMA acknowledges the need to ensure that the discovery process is likewise fair to other proceeding participants. To that end, DiMA recommends, and wholly supports, that the Proposed Rules be modified further to mandate a duty by the parties to cooperate in good faith in discovery

and to attempt to resolve disputes amongst themselves before availing themselves of the discovery disputes process outlined in section 355.3(h). *See* Appendix A. Additionally, to facilitate the taking of depositions by other participants to the extent the parties cannot agree without intervention of the CRJs, DiMA suggests modifying the Proposed Rules as reflected in Appendix A to make clear that other proceeding participants whose interests may not be fully represented by either the MLC or the DLC are permitted to take advantage of the discovery disputes process set forth in section 355.3(h) to request authorization from the CRJs to take any depositions they deem necessary and, upon a showing of good cause, be permitted to take those depositions.

In other words, to the extent a participant wishes to take a deposition (in addition to participation in the five depositions that will be noticed and taken by the DLC and the MLC), that participant will inform all other participants of its intent to do so and the parties will work together cooperatively to determine if this deposition can be taken on consent of the parties, without the need for intervention by the CRJs. The discovery disputes mechanism would be used only to the extent that the participants, after good faith consultation, do not agree on the proposed taking of a particular deposition.

The deposition process outlined above places the DLC on equal footing with the MLC, while at the same time providing meaningful opportunities to the optional proceeding participants to partake in the deposition process as well.

B. The First and Second Discovery Periods Should Be Substantively Identical

As contemplated and set out in the Joint Proposal, discovery during administrative assessment proceedings was intended to provide both sides with the ability to investigate and gather relevant facts in an efficient, logical, and equitable manner. After receipt of the MLC submission with concurrent production of documents and written disclosures, the *first* discovery

period was reserved for the DLC and other participants in the proceeding *other than the MLC* to provide those parties with the opportunity to examine the MLC's submission and to probe the veracity of its constituent parts in preparation for the DLC's and other participants' responsive submissions. Then, after receipt of responsive submissions and concurrent production of documents and written disclosures from the DLC and other participants, the *second* discovery period was reserved for the MLC to provide it with the opportunity to examine the responsive submissions and to probe the veracity of their constituent parts in preparation for the MLC's reply submission (if any). Under the Joint Proposal, the MLC would then have the option to file a reply submission after the second discovery period. *See* Joint Proposal, Appendix A at page iii.

A review of the Proposed Rules suggests that the CRJs agreed with this framework for discovery, but that a few ambiguities and inconsistencies within the Proposed Rules require clarification to ensure that discovery during administrative assessment proceedings is indeed efficient, logical, and equitable. As an initial matter, section 355.2(g)(1)(iii) of the Proposed Rules reserves the first discovery period “for the [DLC] and any other participant in the proceeding, *other than the [MLC]*, to serve discovery requests and complete discovery pursuant to § 355.3(d).” Section 355.3(d), in turn, states that “the [DLC], *interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees . . . and any other participant in the proceeding* may serve requests for additional documents” (emphasis added).

The italicized language in section 355.3(d) is problematic in that there are no statutorily-authorized “other participant[s] in the proceeding” other than the DLC, interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees, all of which are already enumerated within the same sentence (*see, e.g.*, 17 U.S.C. 115(d)(7)(D)(iii)(II)), making this language redundant at best and potentially opening the door to

discovery by the MLC during the first discovery period at worst, which is directly contrary to the language of section 355.2(g)(1)(iii). DiMA therefore recommends that the CRJs clarify section 355.3(d) to remove the “interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees” language and instead conform this language with the language from section 355.2(g)(1)(iii) (i.e., “the Digital Licensee Coordinator and any other participant in the proceeding, other than the Mechanical Licensing Collective”) to resolve this internal inconsistency and potential ambiguity. For the same reasons, DiMA also suggests that the identical language in section 355.3(f)(1) likewise be modified accordingly.

As presently drafted, sections 355.2(g)(1)(iii) and 355.3(d) also omit the ability of the DLC and other proceeding participants to take depositions during the first discovery period, which again appears to be an inadvertent oversight, since those depositions are clearly contemplated by, and discussed in, section 355.3(e). DiMA recommends that section 355.3(d) be amended to add a subsection (2) that substantively mirrors section 355.3(g)(2) (but with the reference to “note” corrected to “notice”), which addresses the MLC’s ability to take depositions during the second discovery period (i.e., “The Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities, acting collectively) and any other participant in the proceeding, other than the Mechanical Licensing Collective, may notice and take depositions as provided in paragraph (e) of this section.”).

Similarly, section 355.3(e) requires the correction of what appears to be a typographical error. The first sentence authorizes the noticing and taking of depositions during the first discovery period by the DLC and other proceeding participants. The second sentence then authorizes the noticing and taking of depositions by the MLC but inadvertently states that these depositions are

to be taken during the “first” rather than the “second” discovery period. Yet section 355.2(g)(1)(v) discusses the second discovery period in the proceeding, which provides for the MLC “to serve discovery requests and complete discovery of the [DLC] and any other participant in the proceeding pursuant to § 355.3(g).” Section 355.3(g), in turn, is titled “*Second discovery period.*” The general framework of discovery and other sections of the Proposed Rules therefore confirm that the second sentence of this subsection should instead read (proposed amendment in italics): “The Mechanical Licensing Collective may give notice of and take up to five depositions during the *second* discovery period.”

The CRJs requested specific comments with regard to reply submissions of the MLC, voicing the concern that the Proposed Rules as currently written “would authorize the MLC to respond to submissions of the DLC and other opposing parties but the proposal would not authorize the MLC to seek discovery from those parties to support its submission.” 84 Fed. Reg. at 9057. This reading of the Proposed Rules was perhaps the result of the inconsistencies discussed above that, when resolved, make clear that the second discovery period, the discovery period specifically set aside for the MLC in both the Proposed Rules and in the Joint Proposal, occurs *after* the DLC and other participants provide their responsive submissions and concurrent document productions and written disclosures. The Proposed Rules thus already authorize the MLC to conduct discovery subsequent to the filing of responsive submissions by the DLC and other participants and prior to the filing of any reply submission by the MLC.¹

¹ The specific discovery and submissions framework set out above (with corrected inconsistencies) is also the framework that makes the most sense logically and that will provide the greatest efficiencies in administrative assessment proceedings. For example, if the MLC were permitted to take discovery during the first discovery period, on what specific subjects could it take discovery after the filing of its submission but prior to receipt of any substantive information or submissions from other proceeding participants, including the DLC? Separate discovery periods for the MLC and the DLC (and other proceeding participants) are furthermore necessary to avoid potential chaos within the already-compressed timeframes within which this discovery must be completed, so that participants are not simultaneously taking *and*

C. The MMA Makes Clear That Any Voluntary Agreement Must Be Agreed Upon Only by the MLC and the DLC, Without Mandatory Participation or Approval of Other Participants

The Proposed Rules as currently drafted permit broad participation in the voluntary negotiation process. The CRJs expressly requested comments as to whether their “proposal is consistent with the MMA and, if not, which provisions of the proposal should be changed to make the proposal consistent with the MMA.” 84 Fed. Reg. at 9057. Sections 355.4 and 355.6(d) of the Proposed Rules may be two such provisions, at least insofar as the spirit of the MMA’s goals is concerned. Although DiMA appreciates the CRJs’ desire to include participants other than the MLC and the DLC in the voluntary negotiation periods and in any voluntary agreement that ultimately may result from those negotiations, inclusion of such other participants is not mandated by the MMA and should be obviated by the MLC’s and the DLC’s roles as statutorily-designated representatives of their respective stakeholders.

Specifically, section 355.4 of the Proposed Rules requires the participation of “[t]he [MLC], the [DLC], *interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees*” (emphasis added) in both the initial and the second mandatory voluntary negotiation periods within an administrative assessment proceeding, and sets the commencement of the initial voluntary negotiation period for “the day after the [CRJs] give notice of all participants in the proceeding.” In explaining this provision and its timing, the CRJs noted that they “are loathe to encourage the MLC and the DLC, or other significant participants, to engage in negotiations for up to a month (or up to half the suggested negotiating period) before the [CRJs] identify and give notice of the full roster of participants.” 84 Fed. Reg. at 9057.

defending depositions and also propounding *and* responding to discovery requests within very short windows of time. Indeed, this is the general framework that already exists even in rate proceedings (e.g., the filing of direct cases, followed by discovery related to those cases, then followed by rebuttal cases, and then followed by discovery related to the rebuttal cases).

Section 355.6(d) likewise references the adoption by the CRJs of voluntary agreements “negotiated and agreed to by the [MLC] and the [DLC], *interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees*” (emphasis added).

The express language of the MMA does not require or encourage such broad participation, however. Instead, section 115(d)(7)(D)(v) states, in relevant part (emphasis added):

In lieu of reaching their own determination based on evaluation of relevant data, the [CRJs] *shall approve and adopt* a negotiated agreement to establish the amount and terms of the administrative assessment that has been agreed to by *the mechanical licensing collective and the digital licensee coordinator* (or if none has been designated, interested digital music providers and significant nonblanket licensees representing more than half of the market for uses of musical works in covered activities).²

The language of the MMA thus makes clear that *only* the MLC and the DLC must agree to any negotiated voluntary agreement, again recognizing the roles of the MLC and the DLC as proxies for their respective constituencies and further recognizing the fact that all other proceeding participants are optional rather than mandatory.³

DiMA consequently requests that the Proposed Rules be amended to remove “interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees” from the language of sections 355.4 and 355.6(d). Furthermore, because doing so will

² The Joint Proposal included the following MMA language to account for the possibility that a DLC may not be designated: “(or if none has been designated, interested digital music providers and significant nonblanket licensees representing more than half of the market for uses of musical works in covered activities).” For the sake of clarity and consistency with the MMA, DiMA recommends that this language be included throughout the Proposed Rules, as appropriate.

³ In yet another example of the unique nature of administrative assessment proceedings and the roles served by the MLC and the DLC in those proceedings, the MMA clearly contemplates the possibility of a negotiated, voluntary agreement between the MLC and the DLC (only), to which the entire industry is bound, because the MLC and the DLC are statutorily-designated entities that by their nature represent the broad majority of their respective constituencies. In contrast, the regulations governing settlements in royalty rate proceedings explicitly state that a settlement can be reached by “some or all of the parties,” and that participants who are not parties to the agreement can file objections to the adoption of any such agreement. *See* 37 C.F.R. § 351.2(b)(2).

negate the concern of the CRJs regarding the timing of the initial voluntary negotiation period and will provide more flexibility in the overall administrative assessment proceeding schedule as ultimately set by the CRJs, DiMA respectfully requests that the CRJs amend the Proposed Rules such that the initial voluntary negotiation period will begin on the date of commencement of the proceeding to determine or adjust the administrative assessment, as reflected in Appendix A.

II. The CRJs Should Be Provided with a Comprehensive, Transparent Set of Relevant Facts in a Streamlined, Efficient Manner to Achieve the Fundamental Goals of the Administrative Assessment Proceeding

DiMA supports the CRJs' ability to obtain robust information necessary to make a fully-informed determination and to do so in a manner that is streamlined and efficient. To that end, DiMA addresses below certain of the CRJs' specific requests for comment and other related matters.

A. Flexibility in Proceeding Scheduling and Related Timing

The CRJs requested comments as to whether their more flexible schedule proposal would allow them to conduct the administrative assessment proceeding "in a prompt and efficient manner." 84 Fed. Reg. at 9057. Evaluating the entirety of the Proposed Rules, and subject to the comments and concerns raised by DiMA in this submission, DiMA agrees that the CRJs' more flexible schedule proposal will allow the CRJs to adopt a tailored schedule for each proceeding based on all the circumstances of that proceeding, while at the same time retaining the overall structural framework of the proceeding as set out in the Proposed Rules.

In adopting the more flexible approach, however, DiMA requests that the CRJs consider the interplay of various proceeding deadlines when setting the schedule for any particular proceeding and ensure that the deadlines provide adequate notice and certainty to all proceeding participants. For example, the Proposed Rules do not specify the timing for filing of opening,

responsive, or reply submissions. *See* Proposed Rules at §§ 355.2(g)(1)(ii), (iv), (vii). Because the responsive and reply submissions will benefit from various discovery activities and the information gathered as part of those activities, the CRJs should allot sufficient time after the close of the first and second discovery periods for the parties to incorporate relevant facts obtained through discovery into those submissions, as well as to resolve any potential discovery disputes that may arise toward the end of the discovery period. Additionally, given the compressed timeframe within which administrative assessment proceedings must be conducted, and the fact that all participants will be providing documents and disclosures concurrently with their opening and responsive submissions, DiMA also requests that the CRJs consider incorporating a period of 3-5 days between the due date for opening and responsive submissions and the start of the first and second discovery periods to provide proceeding participants a few days to review the submissions and concurrent document productions and disclosures before launching into discovery activities.

Relatedly, the Joint Proposal contemplated a duration of 75 days for the first discovery period and a duration of 60 days for the second discovery period. Although the CRJs agreed with the 60-day duration for the second discovery period, the Proposed Rules provide for only 60 days for the first discovery period. *See* Proposed Rules at § 355.2(g)(1)(iii). As a practical matter, the first discovery period is shared among the DLC and all other proceeding participants but for the MLC. The first discovery period therefore requires a level of coordination and negotiation that the second discovery period does not (even with the changes DiMA proposes above). Indeed, the first discovery period may involve multiple participants requesting discovery at the same time, potential discovery disputes that may arise between those participants (whether ultimately resolved between the parties or by the CRJs), and efforts that will need to be undertaken to coordinate and schedule depositions among a number of different parties. In contrast, the second discovery period provides

the MLC with unfettered discretion to notice and take depositions essentially as it desires and to control fully the number and extent of any document requests that may be served. DiMA maintains that a longer first discovery period is necessary under the circumstances, and respectfully requests that the CRJs reconsider a duration of 75 days for the first discovery period.

B. Concurrent Expert Testimony

The CRJs also requested comments on their inclusion of an option for a “concurrent evidence” approach to expert testimony, with experts testifying concurrently on a common issue “before, after, or in lieu of the direct, cross, and redirect testimony of expert witnesses.” 84 Fed. Reg. at 9058-59.

DiMA supports the CRJs’ inclusion of the concurrent testimony option and agrees that this approach could assist the CRJs not only in creating a more comprehensive record upon which they can base their determination but also in answering any questions the CRJs may have and allowing the CRJs more latitude to address any concerns they may have with regard to the proposals then at issue. Engaging in concurrent expert testimony may also lead to efficiencies by allowing the experts to focus on the heart of the issues that remain in dispute, to explain their differing viewpoints on those issues, and to have the ability to examine those viewpoints in real time by the experts themselves, the CRJs, and counsel.

Additionally, concurrent expert testimony may be particularly useful where, as here, the proceeding will be very subject-matter specific and the issues addressed at the hearing will be fairly complex, technical, and nuanced. *See, e.g., Rovakat, LLC v. Comm’r*, 102 T.C.M. (CCH) 264 (U.S. Tax Ct. 2011) (“By engaging in this conversational testimony, the experts were able and allowed to speak to each other, to ask questions, and to probe weaknesses in any other expert’s testimony. The discussion that followed was highly focused, highly structured, and directed by the

Court.”). To the extent the CRJs or the parties elect to use the concurrent evidence approach in a particular proceeding, DiMA recommends that the CRJs consider how best to direct and focus such testimony to ensure that the process is efficient and orderly at the hearing.

DiMA moreover supports inclusion of concurrent expert testimony as an option for testimony at the hearing either in addition to or in lieu of “traditional” expert testimony, as the circumstances may dictate, while at the same time making clear that “traditional” expert testimony will remain the default process and structure in administrative assessment proceedings.

C. Necessity of Hearings

Section 355.5(a) of the Proposed Rules as currently drafted includes the option for the CRJs to issue a determination for the administrative assessment without a hearing: “. . . and shall, if they deem circumstances appropriate, consider *en banc* all filings submitted for a determination *without a hearing*” (emphasis added). This option is inconsistent with the MMA, however. Section 115(d)(7)(D)(iii)(III) makes clear that a hearing is a mandatory component of the administrative assessment proceeding: “. . . as well as a schedule for further proceedings, which *shall include a hearing*.”⁴ The Proposed Rules should therefore be amended to clarify that a hearing is a required phase of the administrative assessment proceeding unless a voluntary agreement is reached between the MLC and the DLC.

Separate and apart from the MMA’s hearing mandate, a hearing is likely to be instrumental to the CRJs’ ability to make a fully-informed determination of the amount and terms of the administrative assessment. For example, the CRJs requested comment on what recourse the CRJs would have available to them if they believed that the assessment proposed by the MLC was

⁴ The CRJs expressly requested comments as to whether their “proposal is consistent with the MMA and, if not, which provisions of the proposal should be changed to make the proposal consistent with the MMA.” 84 Fed. Reg. at 9057.

inconsistent with 17 U.S.C. 115(d)(7) and no other party presented an acceptable alternative assessment. In such a situation, the hearing would afford the CRJs the opportunity to examine whatever portions of the proposed assessment they found to be deficient or otherwise inconsistent and to gather the information needed to then make a determination consistent with 17 U.S.C. 115(d)(7) (including, for example, through the use of concurrent expert testimony).

Importantly, the CRJs are not bound to either accept or reject the proposal of the MLC or an alternative proposal of any other participant; the choice is not binary. Rather, the CRJs are to establish the amount and terms of the administrative assessment based “on their evaluation of the totality of the evidence before them.” Proposed Rules at § 355.6(a).⁵

D. Admissibility of Deposition Transcripts

The CRJs also requested comments regarding the admissibility of deposition transcripts wholesale for purposes of the hearing, and drafted Proposed Rules that instead allow the introduction of deposition transcripts pursuant to the rules and limitations set forth in Federal Rule of Civil Procedure 32. Consistent with the goals of the proceeding, which include streamlined efficiency and the creation of a robust record of relevant facts, DiMA agrees with the CRJs’ position on this issue, as submission of only the deposition testimony that is permitted under Federal Rule of Civil Procedure 32 will ensure that the CRJs receive these materials in a way that does not require them to wade through many exploratory lines of questioning common in discovery depositions and does not duplicate the live testimony of any hearing witnesses.

⁵ Because the hearing affords the CRJs the full opportunity to address this issue, and because the hearing is mandatory, the CRJs would not be required to request additional information or alternative assessment proposals/counterproposals from other participants at various other points during the proceeding. Instead, the CRJs could ask questions during the hearing to address and resolve any concerns they may have with regard to any proposal under consideration and likewise would have the opportunity to obtain additional information from the hearing participants as to any matters relevant to their post-hearing determination. The DLC’s submission of a counterproposal should therefore remain permissive rather than mandatory.

E. Witness Attendance at the Hearing and Review of Transcripts

Section 355.5(d) of the Proposed Rules states, in relevant part: “Unless the [CRJs], on motion of a participant, order otherwise, no witness, other than a person designated as a party representative for the proceeding, may listen to, or review a transcript of, testimony of another witness or witnesses prior to testifying.” DiMA has no objection to this provision as it applies to fact witnesses, but recommends the inclusion of an express carveout for expert witnesses, as the testimony of expert witnesses is inherently different in nature and often benefits from learning additional facts from which expert opinions can be formed or adjusted.

The ability of expert witnesses to attend the hearing and listen to the testimony of other witnesses (or to review transcripts of such testimony) will be especially beneficial in administrative assessment proceedings, particularly since hearings in these types of proceedings (unlike other proceedings before the CRJs) contemplate the possibility of concurrent expert testimony. Though expert testimony outside the concurrent testimony framework will also benefit from allowing expert attendance, given the nature of concurrent expert testimony, permitting experts to be fully-informed on all facts and hearing testimony prior to providing their own testimony will lead to a more robust concurrent testimony session that will best assist the CRJs in obtaining the information necessary to make their determination.

F. Scope of Mandatory Document Productions

Section 355.3(b) of the Proposed Rules (initial administrative assessment proceeding) requires the MLC to produce, concurrently with its opening submission, certain categories of documents, as enumerated in section 355.3(b)(2)(i)-(iv). Section 355.3(c) of the Proposed Rules (proceedings to adjust the administrative assessment) likewise requires the MLC to produce,

concurrently with its opening submission, certain categories of documents, as enumerated in section 355.3(c)(2)(i)-(v).

For good reason, the specific categories of documents differ slightly between those required in the initial administrative assessment proceeding and those required in proceedings to adjust the administrative assessment, as the latter include a mandate for the provision of historical data (i.e., information “for the preceding three calendar years”) that is not yet available for purposes of the initial administrative assessment proceeding. That said, the two provisions are inconsistent in that the categories of documents required to be produced for proceedings to adjust the administrative assessment also encompass future projections (i.e., “the three calendar years following thereafter”), whereas the categories of documents required for the initial administrative assessment do not include projections for this three-year “look forward.”

DiMA recommends that the Proposed Rules be amended to add this three-year projection requirement, beginning as of the license availability date, to section 355.3(b)(2) both for the sake of consistency between proceedings and to provide the CRJs with robust, relevant information that will be useful in making their ultimate determination. Specifically, mandating projections for at least three years will provide more accurate long-term cost information and will thus more likely result in an administrative assessment that will not require as much adjustment in future years.

DiMA also notes that the CRJs in sections 355.3(b)(2)(iii) and 355.3(c)(2)(v) of the Proposed Rules have included a new, specific category of documents for mandatory production by the MLC. These sections of the Proposed Rules require that the MLC produce documents that identify and demonstrate its:

processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and sub-contracting parties competitively (or by another method), including processes for ensuring the absence

of overlapping ownership or other overlapping economic interests between the [MLC] or its members and any selected contracting or sub-contracting party.

DiMA supports the CRJs' inclusion of this important and particularly useful category of documents, as these documents are directly relevant to the core question of "reasonable" costs and are vital to a determination that is fair, accurate, and consistent with 17 U.S.C. 115(d)(7).

III. DiMA's Responses to Other Requests for Comment

In addition to the various requests for comment addressed above, DiMA also provides comments with regard to a few other requests set out in the Proposed Rules, as follows:

- The CRJs elected not to "restate definitions or other language that is part of the MMA" in the Proposed Rules and seek comment on whether the Proposed Rules should nevertheless include "a restatement of the terms in the MMA." 84 Fed. Reg. at 9057. DiMA agrees with the CRJs' decision and does not have any significant concerns with references to the statutory provisions of the MMA in lieu of restatements of the language.
- Rather than modify part 350 to encompass administrative assessment proceedings, the CRJs instead re-designated sections 350.2-350.8 and transferred them into a newly-created part, part 303, intended to apply to all CRB proceedings. DiMA supports this proposed transfer and re-designation, and has no significant concerns with the CRJs' proposal.
- The CRJs requested comment as to whether adopting the proposed changes to the definitions in part 385 is "consistent with the [CRJs'] obligations under the MMA or whether one or more of the changes that the [CRJs] adopt would materially change the way in which those terms should be interpreted in the [CRJs'] regulations." 84 Fed. Reg. at 9057. In DiMA's view, on balance the definitional changes proposed by the

CRJs are consistent with the CRJs' obligations under the MMA. That said, the Proposed Rules contemplate a change to the numbering structure within the definition of "Purchased Content Locker Service" that appears to be an inadvertent error because, if the newly-numbered section "(1)" is removed, the definition would read as follows: "Purchased Content Locker Service means . . . (2) *qualifying seller* for purposes of this definition is the entity operating the Service Provider . . ." (emphasis added). The numbering structure should therefore be reverted such that the final rule makes no numbering change to this definition.

- The CRJs requested comment on "why the definitions of the terms 'end user' and 'stream' should uniquely be expressly limited to part 385 and whether the language the [Joint Proposal] propose[s] to add would accomplish that goal." 84 Fed. Reg. at 9057 n.10. The rationale for adding the language in question was to avoid the possibility that these definitions in part 385 could potentially be viewed to apply more broadly to the terms "end user" and "stream" as used (but not defined) in the MMA. The CRJs' Proposed Rules adequately and elegantly address this concern by adding the following introductory text before the definitions in part 385: "For the purposes of this part, the following definitions apply."

IV. Certain Additional Revisions to the Proposed Rules are Necessary for Consistency and Clarity

In reviewing the Proposed Rules, DiMA also noted certain internal inconsistencies and areas in need of potential clarification in addition to those expressly discussed above. To avoid ambiguities and future issues, DiMA's comments with respect to these matters are listed below for the CRJs' consideration:

- Sections 355.2(g)(1)(i) and 355.4(a): The Proposed Rules set the duration of the initial voluntary negotiation period for 45 days in section 355.2(g)(1)(i), but section 355.4(a) sets this same time period for a duration of 60 days, creating an internal inconsistency. For the reasons discussed in detail in Section (I)(C) above and elsewhere in these comments, the initial voluntary negotiation period, during which the MLC and DLC can negotiate a voluntary agreement, should commence earlier and last for a duration of 60 days to increase the probability of a negotiated resolution at the outset of the proceeding.
- Sections 355.2(g)(1)(iii) and (v): Section 355.2(g)(1)(iii) provides that the first discovery period in the administrative assessment proceeding will begin “on the date” the MLC files its opening submission. But section 355.2(g)(1)(v) provides that the second discovery period in the administrative assessment proceeding will begin “on the day after the due date” for filing responsive submissions. Moreover, section 303.7(a) states that, in computing “the due date for filing and delivering any document or performing any other act directed by an order” of the CRJs or the rules of the CRB, the “day of the act, event, or default that begins the period” is to be “excluded.” DiMA therefore requests that the CRJs resolve this internal inconsistency by amending section 355.2(g)(1)(iii) to state that the first discovery period will commence “five (5) days⁶ after the due date” for the filing of the MLC opening submission.
- Section 355.3(b)(2): The language of this section of the Proposed Rules requires the MLC to “file” with the CRJs the documents it is required to provide to the DLC and other participants in the proceeding concurrently with its opening submission, but the

⁶ See Section (II)(A) of this submission.

same “filing” requirement is absent from both the parallel provision for proceedings to adjust the administrative assessment (section 355.3(c)(2)) and the parallel provision for production of documents by the DLC and other participants concurrently with their responsive submissions (section 355.3(f)(2)). This internal inconsistency is likely the result of a typographical error. DiMA therefore recommends that the language of section 355.3(b)(2) be corrected to mirror that of sections 355.3(c)(2) and 355.3(f)(2), which correction would also be consistent with the spirit of other sections of the Proposed Rules and the CRJs’ stated desire for efficiency in administrative assessment proceedings, since the proceeding participants are likely to produce a broader scope of documents than the narrower, most directly-relevant subset of documents that they ultimately will attach as exhibits to their submissions or use at the hearing.

- Sections 355.3(b)(2)(iii) and 355.3(c)(2)(v): These sections reflect mirror provisions for an important category of documents the MLC must provide concurrently with its opening submission, with the first section addressing this requirement for the initial assessment proceeding and the second section addressing this requirement for proceedings to adjust the administrative assessment. Yet the language of these two sections slightly differs and thus creates an ambiguity. Specifically, the language of section 355.3(b)(2)(iii) states, in relevant part, “. . . sub-contracting parties competitively (or by another method); *ensuring* the absence of overlapping ownership . . .” (emphasis added) and the language of section 355.3(c)(2)(v) states, in relevant part, “. . . sub-contracting parties competitively (or by another method), *including processes for* ensuring the absence of overlapping ownership . . .” (emphasis added). Because the language of section 355.3(c)(2)(v) is clearer, DiMA recommends that this

language be adopted for section 355.3(b)(2)(iii) as well to resolve the ambiguity and inconsistency, as reflected in Appendix A.

- Section 355.3(c)(2)(i): This section of the Proposed Rules requires the MLC to produce documents that identify and demonstrate “costs, collections, and contributions as required by 17 U.S.C. 115(d)(7) . . . , *including Collective Total Costs*” (emphasis added). The addition of this italicized language is inconsistent with the equivalent provision in section 355.3(b)(2)(i) and creates an unnecessary ambiguity because it suggests that there may be other costs that are relevant to the determination of the administrative assessment, in addition to the Collective Total Costs as that term is defined by the MMA, which is not the case. *See* 17 U.S.C. 115(d)(7)(D)(i) (“The administrative assessment shall be used solely and exclusively to fund the collective total costs.”); *see also* 17 U.S.C. 115(e)(6). DiMA therefore recommends that the language italicized above be stricken from the Proposed Rules.
- Sections 355.3(b)(3), 355.3(c)(3), and 355.3(f)(3): Each of these sections addresses the mandatory written disclosures that the MLC, DLC, and other proceeding participants must provide concurrently with their submissions in the administrative assessment proceeding. Although the substance of the written disclosures requirement is generally consistent among the three subsections, the specific language of the Proposed Rules differs. Specifically, the language in section 355.3(b)(3) (written disclosures provided by the MLC in the initial administrative assessment proceeding) sets forth the written disclosures requirement in two enumerated parts, whereas the language in sections 355.3(c)(3) and 355.3(f)(3) (written disclosures provided by the MLC in proceedings to adjust the administrative assessment and written disclosures provided by the DLC

and other proceeding participants) sets forth the same written disclosures requirement in paragraph form and with the elements of the mandatory disclosures organized differently. DiMA recommends that the language of these three written disclosures provisions be harmonized as reflected in Appendix A, tracking the language currently set forth in section 355.3(b)(3), as that version is clearest in its directive.

- Section 355.3(e): The provisions of this subsection addressing deposition notices contain an ambiguity that DiMA recommends be clarified, as follows (proposed amendments in italics): “The initial notice of deposition under this paragraph (e) must be delivered by email or other electronic means to all participants in the proceeding, *and such notice shall be sent no later than seven days prior to the scheduled deposition date, unless the deposition is scheduled to occur less than seven days after the date of the notice by agreement of the parties and the deponent.*”
- Section 350.1: As written, this section of the Proposed Rules creates ambiguity because it implies that the administrative assessment proceedings under part 355 are not proceedings pursuant to 17 U.S.C. 801(b), but they are, as set forth in 17 U.S.C. 801(b)(8) (“Subject to the provisions of this chapter, the functions of the [CRJs] shall be as follows: . . . (b) . . . (8) To determine the administrative assessment to be paid by digital music providers under section 115(d). . .”). DiMA therefore recommends that the language of this subsection be amended as follows (proposed amendments in italics): “The procedures set forth in part 355 of this subchapter shall govern administrative assessment proceedings pursuant to 17 U.S.C. 115(d) *and 801(b)(8)*, and the procedures set forth in parts 351 through 354 of this subchapter shall govern all *other* proceedings pursuant to 17 U.S.C. 801(b).”

- Section 385.21(d): The CRJs declined to adopt the changes to section 385.21(d) of the regulations set out in the Joint Proposal. The proposed changes to this section were intended to mitigate the need for future updates to part 385, which will almost certainly be required after the Copyright Office adopts new regulations with respect to statements of account and the content and format of usage data that will be required to be reported to the MLC after the license availability date (as defined in the MMA). For example, while the per play calculation is currently performed by the service providers, that responsibility is expected to shift to the MLC (based on data reported by the service providers) once the blanket license becomes available.

The redline attached as Appendix A also reflects a few additional, minor, self-explanatory corrections to the Proposed Rules for the CRJs' consideration. *See, e.g.*, § 303.5.

V. Conclusion

DiMA appreciates the opportunity to assist the CRJs in crafting the regulations for proceedings to determine and adjust the administrative assessment, with the goal of ensuring that these proceedings are streamlined and efficient while at the same time providing the CRJs with a comprehensive and transparent record from which their determination can be made. Should the CRJs have any questions or further requests for comment regarding the Proposed Rules or any related matter, DiMA welcomes the opportunity to provide any additional input it may have, and is hopeful that the comments provided in this submission are helpful to the CRJs' continued evaluation of the Proposed Rules and its efforts to implement the MMA.

[Signature on following page]

This 12th day of April, 2019.

Respectfully submitted,

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APPENDIX A

- 303.6 Filing and delivery.
303.7 Time.
303.8 Construction and waiver.

Authority: 17 U.S.C. 803.

§ 303.1 [Reserved]

§ 303.2 Representation.

Individual parties in proceedings before the Judges may represent themselves or be represented by an attorney. All other parties must be represented by an attorney. Cf. Rule 49(c)(11) of the Rules of the District of Columbia Court of Appeals. The appearance of an attorney on behalf of any party constitutes a representation that the attorney is a member of the bar, in one or more states, in good standing.

§ 303.3 Documents: format and length.

(a) *Format* —(1) *Caption and description.* Parties filing pleadings and documents in a proceeding before the Copyright Royalty Judges must include on the first page of each filing a caption that identifies the proceeding by proceeding type and docket number, and a heading under the caption describing the nature of the document. In addition, to the extent technologically feasible using software available to the general public, Parties must include a footer on each page after the page bearing the caption that includes the name and posture of the filing party, *e.g.*, [Party's] Motion, [Party's] Response in Opposition, etc.

(2) *Page layout.* Parties must submit documents that are typed (double spaced) using a serif typeface (*e.g.*, Times New Roman) no smaller than 12 points for text or 10 points for footnotes and formatted for 8 1/2 by 11 inch pages with no less than 1 inch margins. Parties must assure that, to the extent technologically feasible using software available to the general public, any exhibit or attachment to documents reflects the docket number of the proceeding in which it is filed and that all pages are numbered appropriately. Any party submitting a document to the Copyright Royalty Board in paper format must submit it unfolded and produced on opaque 8 1/2 by 11 inch white paper using clear black text, and color to the extent the document uses color to convey information or enhance readability.

(3) *Binding or securing.* Parties submitting any paper document to the Copyright Royalty Board must bind or secure the document in a manner that will prevent pages from becoming separated from the document. For example, acceptable forms of binding or securing include: Ring binders; spiral binding; comb binding; and for

documents of fifty pages or fewer, a binder clip or single staple in the top left corner of the document. Rubber bands and paper clips are not acceptable means of securing a document.

(b) *Additional format requirements for electronic documents* —(1) *In general.* Parties filing documents electronically through eCRB must follow the requirements of paragraphs (a)(1) and (2) of this section and the additional requirements in paragraphs (b)(2) through (10) of this section.

(2) *Pleadings; file type.* Parties must file all pleadings, such as motions, responses, replies, briefs, notices, declarations of counsel, and memoranda, in Portable Document Format (PDF).

(3) *Proposed orders; file type.* Parties filing a proposed order as required by § 303.4 must prepare the proposed order as a separate Word document and submit it together with the main pleading.

(4) *Exhibits and attachments; file types.* Parties must convert electronically (not scan) to PDF format all exhibits or attachments that are in electronic form, with the exception of proposed orders and any exhibits or attachments in electronic form that cannot be converted into a usable PDF file (such as audio and video files, files that contain text or images that would not be sufficiently legible after conversion, or spreadsheets that contain too many columns to be displayed legibly on an 8 1/2 x 11 page). Participants must provide electronic copies in their native electronic format of any exhibits or attachments that cannot be converted into a usable PDF file. In addition, participants may provide copies of other electronic files in their native format, in addition to PDF versions of those files, if doing so is likely to assist the Judges in perceiving the content of those files.

(5) *No scanned pleadings.* Parties must convert every filed document directly to PDF format (using "print to pdf" or "save to pdf"), rather than submitting a scanned PDF image. The Copyright Royalty Board will NOT accept scanned documents, except in the case of specific exhibits or attachments that are available to the filing party only in paper form.

(6) *Scanned exhibits.* Parties must scan exhibits or other documents that are only available in paper form at no less than 300 dpi. All exhibits must be searchable. Parties must scan in color any exhibit that uses color to convey information or enhance readability.

(7) *Bookmarks.* Parties must include in all electronic documents appropriate electronic bookmarks to designate the

List of Subjects

37 CFR Part 303

Administrative practice and procedure, Copyright, Lawyers.

37 CFR Part 350

Administrative practice and procedure, Copyright.

37 CFR Part 355

Administrative assessment, Administrative practice and procedure, Copyright.

37 CFR Parts 370 and 380

Copyright, Sound recordings.

37 CFR Parts 382 and 383

Copyright, Digital audio transmissions, Performance right, Sound recordings.

37 CFR Part 384

Copyright, Digital audio transmissions, Ephemeral recordings, Performance right, Sound recordings.

37 CFR Part 385

Copyright, Phonorecords, Recordings.
For the reasons stated in the preamble, the Copyright Royalty Judges propose to amend 37 CFR chapter III as set forth below:

Subchapter A—General Provisions

- 1. Add part 303 to read as follows:

PART 303—GENERAL ADMINISTRATIVE PROVISIONS

Sec.

- 303.1 [Reserved]
303.2 Representation.
303.3 Documents: format and length.
303.4 Content of motion and responsive pleadings.
303.5 Electronic filing system (eCRB).

tabs and/or tables of contents that would appear in a paper version of the same document.

(8) *Page rotation.* Parties must ensure that all pages in electronic documents are right side up, regardless of whether they are formatted for portrait or landscape printing.

(9) *Signature.* The signature line of an electronic pleading must contain “/s/” followed by the signer’s typed name. The name on the signature line must match the name of the user logged into eCRB to file the document.

(10) *File size.* The eCRB system will not accept PDF or Word files that exceed 128 MB, or files in any other format that exceed 500 MB. Parties may divide excessively large files into multiple parts if necessary to conform to this limitation.

(c) *Length of submissions.* Whether filing in paper or electronically, parties must adhere to the following space limitations or such other space limitations as the Copyright Royalty Judges may direct by order. Any party seeking an enlargement of the applicable page limit must make the request by a motion to the Copyright Royalty Judges filed no fewer than three days prior to the applicable filing deadline. Any order granting an enlargement of the page limit for a motion or response shall be deemed to grant the same enlargement of the page limit for a response or reply, respectively.

(1) *Motions.* Motions must not exceed 20 pages and must not exceed 5,000 words (exclusive of cover pages, tables of contents, tables of authorities, signature blocks, exhibits, and proof of delivery).

(2) *Responses.* Responses in support of or opposition to motions must not exceed 20 pages and must not exceed 5,000 words (exclusive of cover pages, tables of contents, tables of authorities, signature blocks, exhibits, and proof of delivery).

(3) *Replies.* Replies in support of motions must not exceed 10 pages and must not exceed 2,500 words (exclusive of cover pages, tables of contents, tables of authorities, signature blocks, exhibits, and proof of delivery).

§ 303.4 Content of motion and responsive pleadings.

A motion, responsive pleading, or reply must, at a minimum, state concisely the specific relief the party seeks from the Copyright Royalty Judges, and the legal, factual, and evidentiary basis for granting that relief (or denying the relief sought by the moving party). A motion, or a

responsive pleading that seeks alternative relief, must be accompanied by a proposed order.

§ 303.5 Electronic filing system (eCRB).

(a) *Documents to be filed by electronic means* — ~~(1) Transition period. For the period commencing with the initial deployment of the Copyright Royalty Board’s electronic filing and case management system (eCRB) and ending January 1, 2018, all parties having the technological capability must file all documents with the Copyright Royalty Board through eCRB in addition to filing paper documents in conformity with applicable Copyright Royalty Board rules. The Copyright Royalty Board must announce the date of the initial deployment of eCRB on the Copyright Royalty Board website (www.loc.gov/crb), as well as the conclusion of the dual system transition period. (2) Subsequent to transition period~~ Except as otherwise provided in this chapter, all attorneys must file documents with the Copyright Royalty Board through eCRB. Pro se parties may file documents with the Copyright Royalty Board through eCRB, subject to § 303.4(c)(2).

(b) *Official record.* The electronic version of a document filed through and stored in eCRB will be the official record of the Copyright Royalty Board.

(c) *Obtaining an electronic filing password* — (1) *Attorneys.* An attorney must obtain an eCRB password from the Copyright Royalty Board in order to file documents or to receive copies of orders and determinations of the Copyright Royalty Judges. The Copyright Royalty Board will issue an eCRB password after the attorney applicant completes the application form available on the CRB website.

(2) *Pro se parties.* A party not represented by an attorney (a pro se party) may obtain an eCRB password from the Copyright Royalty Board with permission from the Copyright Royalty Judges, in their discretion. To obtain permission, the pro se party must submit an application on the form available on the CRB website, describing the party’s access to the internet and confirming the party’s ability and capacity to file documents and receive electronically the filings of other parties on a regular basis. If the Copyright Royalty Judges grant permission, the pro se party must complete the eCRB training provided by the Copyright Royalty Board to all electronic filers before receiving an eCRB password. Once the Copyright Royalty Board has issued an eCRB password to a pro se party, that party must make all subsequent filings by electronic means through eCRB.

(3) *Claimants.* Any person desiring

to file a claim with the Copyright Royalty Board for copyright royalties may obtain an eCRB password for the limited purpose of filing claims by completing the application form available on the CRB website.

(a) *Use of an eCRB password.* An eCRB password may be used only by the person to whom it is assigned, or, in the case of an attorney, by that attorney or an authorized employee or agent of that attorney’s law office or organization. The person to whom an eCRB password is assigned is responsible for any document filed using that password.

(b) *Signature.* The use of an eCRB password to login and submit documents creates an electronic record. The password operates and serves as the signature of the person to whom the password is assigned for all purposes under this chapter.

(c) *Originals of sworn documents.* The electronic filing of a document that contains a sworn declaration, verification, certificate, statement, oath, or affidavit certifies that the original signed document is in the possession of the attorney or pro se party responsible for the filing and that it is available for review upon request by a party or by the Copyright Royalty Judges. The filer must file through eCRB a scanned copy of the signature page of the sworn document together with the document itself.

(d) *Consent to delivery by electronic means.* An attorney or pro se party who obtains an eCRB password consents to electronic delivery of all documents, subsequent to the petition to participate, that are filed by electronic means through eCRB. Counsel and pro se parties are responsible for monitoring their email accounts and, upon receipt of notice of an electronic filing, for retrieving the noticed filing. Parties and their counsel bear the responsibility to keep the contact information in their eCRB profiles current.

(e) *Accuracy of docket entry.* A person filing a document by electronic means is responsible for ensuring the accuracy of the official docket entry generated by the eCRB system, including proper identification of the proceeding, the filing party, and the description of the document. The Copyright Royalty Board will maintain on its website (www.loc.gov/crb) appropriate guidance regarding naming protocols for eCRB filers.

(f) *Documents subject to a protective order.* A person filing a document by electronic means must ensure, at the time of filing, that any documents subject to a protective order are identified to the eCRB system as “restricted” documents. This requirement is in addition to any requirements detailed in the applicable

protective order. Failure to identify documents as “restricted” to the eCRB system may result in inadvertent publication of sensitive, protected material.

(g) *Exceptions to requirement of electronic filing* — (1) *Certain exhibits or attachments.* Parties may file in paper form any exhibits or attachments that are not in a format that readily permits electronic filing, such as oversized documents; or are illegible when scanned into electronic format. Parties filing paper documents or things pursuant to this paragraph must deliver legible or usable copies of the documents or things in accordance with § 303.6(a)(2) and must file electronically a notice of filing that includes a certificate of delivery.

(2) *Pro se parties.* A pro se party may file documents in paper form and must deliver and accept delivery of documents in paper form, unless the pro se party has obtained an eCRB password.

(h) *Privacy requirements.* (1) Unless otherwise instructed by the Copyright Royalty Judges, parties must exclude or redact from all electronically filed documents, whether designated “restricted” or not:

(i) *Social Security numbers.* If an individual’s Social Security number must be included in a filed document for evidentiary reasons, the filer must use only the last four digits of that number.

(ii) *Names of minor children.* If a minor child must be mentioned in a document for evidentiary reasons, the filer must use only the initials of that child.

(iii) *Dates of birth.* If an individual’s date of birth must be included in a pleading for evidentiary reasons, the filer must use only the year of birth.

(iv) *Financial account numbers.* If a financial account number must be included in a pleading for evidentiary reasons, the filer must use only the last four digits of the account identifier.

(2) Protection of personally identifiable information. If any information identified in paragraph (k)(1) of this section must be included in a filed document, the filing party must treat it as confidential information subject to the applicable protective order. In addition, parties may treat as confidential, and subject to the applicable protective order, other personal information that is not material to the proceeding.

(i) *Incorrectly filed documents.* (1) The Copyright Royalty Board may direct an eCRB filer to re-file a document that has been incorrectly filed, or to correct an erroneous or inaccurate docket entry.

(2) ~~After the transition period, if an~~

attorney or a pro se party who has been issued an eCRB password inadvertently presents a document for filing in paper form, the Copyright Royalty Board may direct the attorney or pro se party to file the document electronically. The document will be deemed filed on the date it was first presented for filing if, no later than the next business day after being so directed by the Copyright Royalty Board, the attorney or pro se participant files the document electronically. If the party fails to make the electronic filing on the next business day, the document will be deemed filed on the date of the electronic filing.

(j) *Technical difficulties.* (1) A filer encountering technical problems with an eCRB filing must immediately notify the Copyright Royalty Board of the problem either by email or by telephone, followed promptly by written confirmation.

(2) If a filer is unable due to technical problems to make a filing with eCRB by an applicable deadline, and makes the notification required by paragraph (m)(1) of this section, the filer shall use electronic mail to make the filing with the CRB and deliver the filing to the other parties to the proceeding. The filing shall be considered to have been made at the time it was filed by electronic mail. The Judges may direct the filer to refile the document through eCRB when the technical problem has been resolved, but the document shall retain its original filing date.

(3) The inability to complete an electronic filing because of technical problems arising in the eCRB system may constitute “good cause” (as used in § 303.6(b)(4)) for an order enlarging time or excusable neglect for the failure to act within the specified time, provided the filer complies with paragraph (m)(1) of this section. This section does not provide authority to extend statutory time limits.

§ 303.6 Filing and delivery.

(a) *Filing of pleadings* — (1) *Electronic filing through eCRB.* Except as described in § 303.5(l)(2), any document filed by electronic means through eCRB in accordance with § 303.5 constitutes filing for all purposes under this chapter, effective as of the date and time the document is received and timestamped by eCRB.

(2) *All other filings.* For all filings not submitted by electronic means through eCRB, the submitting party must deliver an original, five paper copies, and one electronic copy in Portable Document Format (PDF) on an optical data storage medium such as a CD or DVD, a flash memory device, or an external hard disk drive to the Copyright Royalty Board in accordance with the provisions described in § 301.2 of this chapter. In no case will

the Copyright Royalty Board accept any document by facsimile transmission or electronic mail, except with prior express authorization of the Copyright Royalty Judges.

(b) *Exhibits.* Filers must include all exhibits with the pleadings they support. In the case of exhibits not submitted by electronic means through eCRB, whose bulk or whose cost of reproduction would unnecessarily encumber the record or burden the party, the Copyright Royalty Judges will consider a motion, made in advance of the filing, to reduce the number of required copies. See § 303.5(j).

(c) *English language translations.* Filers must accompany each submission that is in a language other than English with an English-language translation, duly verified under oath to be a true translation. Any other party to the proceeding may, in response, submit its own English-language translation, similarly verified, so long as the responding party’s translation proves a substantive, relevant difference in the document.

(d) *Affidavits.* The testimony of each witness must be accompanied by an affidavit or a declaration made pursuant to 28 U.S.C. 1746 supporting the testimony. See § 303.5(f).

(e) *Subscription* — (1) *Parties represented by counsel.* Subject to § 303.5(e), all documents filed electronically by counsel must be signed by at least one attorney of record and must list the attorney’s full name, mailing address, email address (if any), telephone number, and a state bar identification number. See § 303.5(e). Submissions signed by an attorney for a party need not be verified or accompanied by an affidavit. The signature of an attorney constitutes certification that the contents of the document are true and correct, to the best of the signer’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances and:

(i) The document is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(ii) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(iii) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(iv) The denials of factual contentions are warranted by the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(2) *Parties representing themselves.* The original of all paper documents filed by a party not represented by counsel must be signed by that party and list that party's full name, mailing address, email address (if any), and telephone number. The party's signature will constitute the party's certification that, to the best of his or her knowledge and belief, there is good ground to support the document, and that it has not been interposed for purposes of delay.

(f) *Responses and replies.* Responses in support of or opposition to motions must be filed within ten days of the filing of the motion. Replies to responses must be filed within five days of the filing of the response.

(g) *Participant list.* The Copyright Royalty Judges will compile and distribute to those parties who have filed a valid petition to participate the official participant list for each proceeding, including each participant's mailing address, email address, and whether the participant is using the eCRB system for filing and receipt of documents in the proceeding. For all paper filings, a party must deliver a copy of the document to counsel for all other parties identified in the participant list, or, if the party is unrepresented by counsel, to the party itself. Parties must notify the Copyright Royalty Judges and all parties of any change in the name or address at which they will accept delivery and must update their eCRB profiles accordingly.

(h) *Delivery method and proof of delivery* — (1) *Electronic filings through eCRB.* Electronic filing of any document through eCRB operates to effect delivery of the document to counsel or pro se participants who have obtained eCRB passwords, and the automatic notice of filing sent by eCRB to the filer constitutes proof of delivery. Counsel or parties who have not yet obtained eCRB passwords must deliver and receive delivery as provided in paragraph (h)(2) of this section. Parties making electronic filings are responsible for assuring delivery of all filed documents to parties that do not use the eCRB system.

(2) *Other filings.* During the course of a proceeding, each party must deliver all documents that they have filed other than through eCRB to the other parties or their counsel by means no slower than overnight express mail sent on the same day they file the documents, or by such other means as the parties may agree in writing among themselves. Parties must include a proof of delivery with any document delivered in

accordance with this paragraph.

§ 303.7 Time.

(a) *Computation.* To compute the due date for filing and delivering any document or performing any other act directed by an order of the Copyright Royalty Judges or the rules of the Copyright Royalty Board:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and Federal holidays when the period is less than 11 days, unless computation of the due date is stated in calendar days.

(3) Include the last day of the period, unless it is a Saturday, Sunday, Federal holiday, or a day on which the weather or other conditions render the Copyright Royalty Board's office inaccessible.

(4) As used in this rule, "Federal holiday" means the date designated for the observance of New Year's Day, Inauguration Day, Birthday of Martin Luther King, Jr., George Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day declared a Federal holiday by the President or the Congress.

(5) Except as otherwise described in this chapter or in an order by the Copyright Royalty Judges, the Copyright Royalty Board will consider documents to be timely filed only if:

(i) They are filed electronically through eCRB and time-stamped by 11:59:59 p.m. Eastern time on the due date;

(ii) They are sent by U.S. mail, are addressed in accordance with § 301.2(a) of this chapter, have sufficient postage, and bear a USPS postmark on or before the due date;

(iii) They are hand-delivered by private party to the Copyright Office Public Information Office in accordance with § 301.2(b) of this chapter and received by 5:00 p.m. Eastern time on the due date; or

(iv) They are hand-delivered by commercial courier to the Congressional Courier Acceptance Site in accordance with § 301.2(c) of this chapter and received by 4:00 p.m. Eastern time on the due date.

(6) Any document sent by mail and dated only with a business postal meter will be considered filed on the date it is actually received by the Library of Congress.

(b) *Extensions.* A party seeking an extension must do so by written motion. Prior to filing such a motion, a party must attempt to obtain consent from the other parties to the proceeding. An extension motion must

state:

- (1) The date on which the action or submission is due;
- (2) The length of the extension sought;
- (3) The date on which the action or submission would be due if the extension were allowed;
- (4) The reason or reasons why there is good cause for the delay;
- (5) The justification for the amount of additional time being sought; and
- (6) The attempts that have been made to obtain consent from the other parties to the proceeding and the position of the other parties on the motion.

§ 303.8 Construction and waiver.

The regulations of the Copyright Royalty Judges in this chapter are intended to provide efficient and just administrative proceedings and will be construed to advance these purposes. For purposes of an individual proceeding, the provisions of subchapters A and B may be suspended or waived, in whole or in part, upon a showing of good cause, to the extent allowable by law.

Subchapter B—Copyright Royalty Judges Rules and Procedures

■ 2. Revise part 350 to read as follows:

PART 350—SCOPE

Sec.
350.1 Scope.
350.2–350.84
[Reserved]

Authority: 17 U.S.C. 803.

§ 350.1 Scope.

This subchapter governs procedures applicable to proceedings before the Copyright Royalty Judges in making determinations and adjustments pursuant to 17 U.S.C. 115(d) and 801(b). The procedures set forth in part 355 of this subchapter shall govern administrative assessment proceedings pursuant to 17 U.S.C. 115(d) and 801(b)(8), and the procedures set forth in parts 351 through 354 of this subchapter shall govern all other proceedings pursuant to 17 U.S.C. 801(b).

§§ 350.2–350.84 [Reserved]

■ 4. Add part 355 to read as follows:

PART 355—ADMINISTRATIVE ASSESSMENT PROCEEDINGS

Sec.
355.1 Proceedings in general.
355.2 Commencement of proceedings.
355.3 Submissions and discovery.
355.4 Voluntary negotiation periods.
355.5 Hearing procedures.
355.6 Determinations.
355.7 Definitions.

Authority: 17 U.S.C. 801; 17 U.S.C. 115.

§ 355.1 Proceedings in general.

(a) *Scope.* This section governs proceedings before the Copyright Royalty Judges to determine or adjust the Administrative Assessment pursuant to the Copyright Act, 17 U.S.C. 115(d), including establishing procedures to enable the Copyright Royalty Judges to make necessary evidentiary or procedural rulings.

(b) *Rulings.* The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings during any proceeding under this section and may, before commencing a proceeding under this section, make any rulings that will apply to proceedings to be conducted under this section.

(c) *Role of Chief Judge.* The Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Copyright Royalty Judge, shall:

(1) Administer an oath or affirmation to any witness; and

(2) Rule on objections and motions.

(d) *Failure to designate Digital Licensee Coordinator.* Any reference to actions of the Digital Licensee Coordinator in this section shall be without effect unless and until the Register of Copyrights designates a Digital Licensee Coordinator in accordance with 17 U.S.C. 115(d)(5).

§ 355.2 Commencement of proceedings.

(a) *Commencement of initial Administrative Assessment proceeding.* The Copyright Royalty Judges shall commence a proceeding to determine the initial Administrative Assessment by publication no later than July 8, 2019, of a notice in the **Federal Register** seeking the filing of petitions to participate in the proceeding.

(b) *Adjustments of the Administrative Assessment.* Following the determination of the initial Administrative Assessment, the Mechanical Licensing Collective, the Digital Licensee Coordinator, if any, and interested copyright owners, Digital Music Providers, or Significant Nonblanket Licensees may file a petition with the Copyright Royalty Judges to commence a proceeding to adjust the Administrative Assessment. Any petition for adjustment of the Administrative Assessment must be filed during the month of May and may not be filed earlier than 1 year following the most recent publication in the **Federal Register** of a determination of the Administrative Assessment by the Copyright Royalty Judges. The Copyright Royalty Judges shall accept a

properly filed petition under this paragraph (b) as sufficient grounds to commence a proceeding to adjust the Administrative Assessment and shall publish a notice in the **Federal Register** in the month of June seeking petitions to participate in the proceeding.

(c) *Required participants.* The Mechanical Licensing Collective and the Digital Licensee Coordinator, if any, shall each file a petition to participate and shall participate in each Administrative Assessment proceeding under this section.

(d) *Other eligible participants.* A copyright owner, Digital Music Provider, or Significant Nonblanket Licensee may file a petition to participate in a proceeding under paragraph (a) or (b) of this section. The Copyright Royalty Judges shall accept petitions to participate filed under this paragraph (d) unless the Judges find that the petitioner lacks a significant interest in the proceeding.

(e) *Petitions to participate.* Each petition to participate filed under this section must include:

(1) A filing fee of \$150;

(2) The full name, address, telephone number, and email address of the petitioner;

(3) The full name, address, telephone number, and email address of the person filing the petition and of the petitioner's representative, if either differs from the filer; and

(4) Factual information sufficient to establish that the petitioner has a significant interest in the determination of the Administrative Assessment.

(f) *Notice of identity of petitioners.* The Copyright Royalty Judges shall give notice to all petitioners of the identity of all other petitioners.

(g) *Schedules for submissions and hearing.* (1) The Copyright Royalty Judges shall establish a schedule for the proceeding, which shall include dates for:

(i) An initial voluntary negotiation period of ~~60~~45 days;

(ii) Filing of the opening submission by the Mechanical Licensing Collective described in § 355.3(b) or (c), with concurrent production of required documents and disclosures;

(iii) A period of ~~75~~60 days, beginning ~~on five (5) days after the due date for the~~ ~~the date the~~ Mechanical Licensing Collective ~~files to file~~ its opening submission, for the Digital Licensee Coordinator and any other participant in the proceeding, other than the Mechanical Licensing Collective, to serve discovery requests and complete discovery pursuant to § 355.3(d);

(iv) Filing of responsive submissions by the Digital Licensee Coordinator and any other participant in the proceeding, with concurrent production of required documents and disclosures;

(v) A period of 60 days, beginning ~~five (5) days on the day~~ after the due date for filing responsive submissions, for the Mechanical Licensing Collective to serve discovery requests and complete discovery of the Digital Licensee Coordinator and any other participant in the proceeding pursuant to § 355.3(g);

(vi) A second voluntary negotiation period of 14 days, commencing on the day after the end of the Mechanical Licensing Collective's discovery period;

(vii) Filing of a reply submission, if any, by the Mechanical Licensing Collective;

(viii) Filing of a joint pre-hearing submission by the Mechanical Licensing Collective, the Digital Licensee Coordinator, and any other participant in the hearing; and

(ix) A hearing on the record.

(2) The Copyright Royalty Judges may, for good cause shown and upon reasonable notice to all participants, modify the schedule, except no participant in the proceeding may rely on a schedule modification as a basis for delaying the scheduled hearing date. The Copyright Royalty Judges may alter the hearing schedule only upon a showing of extraordinary circumstances. No alteration of the schedule shall change the due date of the determination.

§ 355.3 Submissions and discovery.

(a) *Protective orders.* During the initial voluntary negotiation period, the Mechanical Licensing Collective, the Digital Licensee Coordinator, and any other participants that are represented by counsel shall negotiate and agree upon a written protective order to preserve the confidentiality of any confidential documents, depositions, or other information exchanged or filed by the participants in the proceeding. No later than 15 days after the Judges' identification of participants, proponents of a protective order shall file with the Copyright Royalty Judges a motion for review and approval of the order. No participant in the proceeding shall distribute or exchange confidential documents, depositions, or other information with any other participant in the proceeding until the receiving participant affirms in writing its consent to the protective order governing the proceeding.

(b) *Submission by the Mechanical Licensing Collective in the initial administrative Assessment proceeding.*

(1) The Mechanical Licensing Collective shall file an opening submission, in accordance with the schedule the

Copyright Royalty Judges adopt pursuant to § 355.2(g), setting forth and supporting the Mechanical Licensing Collective's proposed initial Administrative Assessment. The opening submission shall consist of a written statement, including any written testimony and accompanying exhibits, and include reasons why the proposed initial Administrative Assessment fulfills the requirements in 17 U.S.C. 115(d)(7).

(2) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall ~~file with the Copyright Royalty Judges and produce electronically and~~ deliver by email to the other participants in the proceeding documents that identify and demonstrate:

(i) Costs, collections, and contributions as required by 17 U.S.C. 115(d)(7) through the License Availability Date and for the three calendar years following thereafter;

(ii) The reasonableness of the Collective Total Costs;

(iii) The Collective's processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and sub-contracting parties competitively (or by another method), including processes for; ensuring the absence of overlapping ownership or other overlapping economic interests between the Collective or its members and any selected contracting or sub-contracting party; and

(iv) The reasons why the proposal fulfills the requirements in 17 U.S.C. 115(d)(7).

(3) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall provide electronically and deliver by email to the other participants in the proceeding written disclosures that:

(i) List the individuals with material knowledge of, and availability to provide testimony concerning, the proposed initial Administrative Assessment; and

(ii) For each listed individual, describe the subject(s) of his or her knowledge.

(c) Submission by the Mechanical Licensing Collective in proceedings to adjust the Administrative Assessment.

(1) The Mechanical Licensing Collective shall file an opening submission according to the schedule the Copyright Royalty Judges adopt pursuant to § 355.2(g). The opening submission shall set forth and support the Mechanical Licensing Collective's proposal to maintain or adjust the Administrative Assessment, including reasons why the proposal fulfills the requirements in 17 U.S.C. 115(d)(7). The

opening submission shall include a written statement, any written testimony and accompanying exhibits, including financial statements from the three most recent years' operations of the Mechanical Licensing Collective with annual budgets as well as annual actual income and expense statements.

(2) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall produce electronically and deliver by email to the other participants in the proceeding documents that identify and demonstrate:

(i) Costs, collections, and contributions as required by 17 U.S.C. 115(d)(7) for the preceding three calendar years and the three calendar years following thereafter, ~~including Collective Total Costs;~~

(ii) For the preceding three calendar years, the amount of actual Collective Total Costs that was not sufficiently funded by the prior Administrative Assessment, or the amount of any surplus from the prior Administrative Assessment after funding actual Collective Total Costs;

(iii) Actual collections from Digital Music Providers and Significant Nonblanket Licensees for the preceding three calendar years and anticipated collections for the three calendar years following thereafter;

(iv) The reasonableness of the Collective Total Costs; and

(v) The Collective's processes for requesting proposals, inviting bids, ranking and selecting the proposals and bids of potential contracting and sub-contracting parties competitively (or by another method), including processes for ensuring the absence of overlapping ownership or other overlapping economic interests between the Collective or its members and any selected contracting or sub-contracting party.

(3) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall provide electronically and deliver by email to the other participants in the proceeding written disclosures that:

~~(i) A list of the~~ individuals with material knowledge of, and availability to provide testimony concerning, the proposed adjusted Administrative Assessment; and ~~(ii) For each listed individual, including describe~~ the subject(s) of his or her knowledge ~~and availability to provide testimony regarding the proposal.~~

(d) *First discovery period.* ~~(1)~~ During the first discovery period, the Digital Licensee Coordinator, ~~interested copyright owners,~~

~~interested Digital Music Providers, and interested Significant Nonblanket Licensees and any other participant in the proceeding, other than the Mechanical Licensing Collective,~~ acting separately, or represented jointly to the extent permitted by the concurrence of their interests, ~~and any other participant in the proceeding,~~ may serve requests for additional documents on the Mechanical Licensing Collective and any other participant in the proceeding. Any document request shall be limited to documents that are Discoverable.

(2) The Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities, acting collectively) and any other participant in the proceeding, other than the Mechanical Licensing Collective, may notice and take depositions as provided in paragraph (e) of this section.

(e) *Depositions.* The Digital Licensee Coordinator ~~(or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities, acting collectively), interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees, acting separately, or represented jointly to the extent permitted by the concurrence of their interests,~~ may give notice of and take up to five depositions ~~collectively~~ during the first discovery period. To the extent any other participant eligible to take discovery during the first discovery period and whose interests may not be fully represented by either the Mechanical Licensing Collective or the Digital Licensee Coordinator, seeks to notice and take a deposition, that participant shall first notify all other proceeding participants and the participants shall attempt, in good faith, to accommodate by agreement of the parties any deposition for which good cause is shown. If, after good faith discussions, the participants are unable to agree with respect to any such additional deposition, the participant seeking to take the deposition may file a motion pursuant to paragraph (h) of this section. The Mechanical Licensing Collective may give notice of and take up to five depositions during the ~~first~~ second discovery period. Any deposition under this paragraph (e) shall be no longer than seven hours in

duration on the record (exclusive of adjournments for lunch and other personal needs), with each deponent subject to a maximum of one seven-hour deposition in any Administrative Assessment proceeding, except as otherwise extended in this part, or upon a motion demonstrating good cause to extend the hour and day limits. In addition to the party noticing the deposition, aAny other parties to the proceeding may attend any depositions and shall have a right, but not an obligation, to examine the deponent during the final hour of the deposition (except as that allocation of time may otherwise be stipulated by agreement of all participants attending the deposition), provided that any participant exercising its right to examine a deponent provides notice of that intent no later than two days prior to the scheduled deposition date. The initial notice of deposition under this paragraph (e) must be delivered by email or other electronic means to all participants in the proceeding, and such notice shall be sent no later than seven days prior to the scheduled deposition date, ~~absent agreement of the deponent or good cause shown unless the deposition is scheduled to occur less than seven days after the date of the notice by agreement of the parties and the deponent.~~ An individual is properly named as a deponent if that individual likely possesses information that meets the standards for document production under this part.

(f) *Responsive submissions by the Digital Licensee Coordinator and other participants.* The Digital Licensee Coordinator and any other participant in the proceeding shall file responsive submissions with the Copyright Royalty Judges in accordance with the schedule adopted by the Copyright Royalty Judges.

(1) Responsive submissions of the Digital Licensee Coordinator and any other participant in the proceeding, interested copyright owners, interested digital music providers, or interested Significant Nonblanket Licensees shall consist of a written statement, including any written testimony and accompanying exhibits, stating the extent to which the filing participant agrees with the Administrative Assessment proposed by the Mechanical Licensing Collective. If the filing participant disagrees with all or part of the Administrative Assessment proposed by the Mechanical Licensing Collective, then the written statement, including any written

testimony and accompanying exhibits, shall include analysis necessary to demonstrate why the Administrative Assessment proposed by the Mechanical Licensing Collective does not fulfill the requirements set forth in 17 U.S.C. 115(d)(7).

(2) Concurrently with the filing of a responsive submission indicating disagreement with the Administrative Assessment proposed by the Mechanical Licensing Collective, the filing participant shall produce electronically and deliver by email to the participants in and parties to the proceeding documents that demonstrate why the Administrative Assessment proposed by the Mechanical Licensing Collective does not fulfill the requirements set forth in 17 U.S.C. 115(d)(7).

(3) Concurrently with the filing of responsive submission(s), the filing participant shall provide electronically ~~provide and deliver~~ by email to the other participants in the proceeding, written disclosures that:

- (i) L-a list of the individuals with material knowledge of, and availability to provide testimony concerning, the reasons why the Administrative Assessment proposed by the Mechanical Licensing Collective does not fulfill the requirements set forth in 17 U.S.C. 115(d)(7); and
- (ii) For each listed individual, The filing participant shall describe the subject(s) of each listed individual's knowledge and state his or her availability to provide testimony his or her knowledge.

(g) *Second discovery period.* (1)

During the discovery period described in § 355.2(g)(1)(v), the Mechanical Licensing Collective may serve requests for additional documents on the Digital Licensee Coordinator and other parties to the proceeding. Such requests shall be limited to documents that are Discoverable and relevant to consideration of whether any counter-proposal fulfills the requirements of 17 U.S.C. 115(d)(7) or one or more of the elements of this part.

(2) The Mechanical Licensing Collective may notice and take depositions as provided in paragraph (e) of this section.

(h) *Discovery disputes.* (1) Prior to invoking the procedures set forth in this paragraph (h), any participant that seeks intervention of the Copyright Royalty Judges to resolve a discovery dispute must first attempt in good faith to resolve the dispute between it and the other proceeding participant(s). All proceeding participants have a duty to, and shall, cooperate in good faith to

resolve any such disputes without involvement of the Copyright Royalty Judges to the extent possible.

(2) In the event that two or more participants are unable to resolve a discovery dispute after good-faith consultation, a participant requesting discovery may file a motion and brief of no more than 1,500 words with the Copyright Royalty Judges. The motion must include a certification that the participant filing the motion attempted to resolve the dispute at issue in good faith, but was unable to do so. For a dispute involving the provision of documents or deposition testimony, the brief shall detail the reasons why the documents or deposition testimony are Discoverable.

(3) The responding participant may file a responsive brief of no more than 1,500 words within two business days of the submission of the initial brief.

(4) Absent unusual circumstances, the Copyright Royalty Judges will rule on the dispute within three business days of the filing of the responsive brief.

Upon reasonable notice to the participants, the Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Copyright Royalty Judge may consider and rule on any discovery dispute in a telephone conference with the relevant participants.

(i) *Reply submissions by the Mechanical Licensing Collective.* The Mechanical Licensing Collective may file a written reply submission addressed only to the issues raised in any responsive submission(s) filed under paragraph (f) of this section in accordance with the schedule adopted by the Copyright Royalty Judges, which reply may include written testimony, documentation, and analysis addressed only to the issues raised in responsive submission(s).

(j) *Joint pre-hearing submission.* No later than 14 days prior to the commencement of the hearing, the Mechanical Licensing Collective, the Digital Licensee Coordinator, and any other parties to the proceeding shall file jointly a written submission with the Copyright Royalty Judges, stating:

(1) Specific areas of agreement between the parties; and

(2) A concise statement of issues remaining in dispute with respect to the determination of the Administrative Assessment.

§ 355.4 Voluntary negotiation periods.

(a) *Initial voluntary negotiation period.* The Mechanical Licensing Collective and the Digital Licensee Coordinator, (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities) interested copyright owners, interested Digital Music

~~Providers, and interested Significant Nonblanket Licensees~~ shall participate in good faith in an initial voluntary negotiation, commencing on the day ~~after the Copyright Royalty Judges give notice of all participants in the proceeding of commencement under section 355.2(a) or (b), as applicable,~~ and lasting 60 days. By the close of the initial voluntary negotiation period, the parties shall file a joint written notification with the Copyright Royalty Judges indicating whether they have reached a settlement, in whole or in part, with respect to determination of the Administrative Assessment.

(b) ~~Second voluntary negotiation period.~~ The Mechanical Licensing Collective ~~and~~, the Digital Licensee Coordinator ~~(or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities), interested copyright owners, interested Digital Music Providers, and Significant Nonblanket Licensees~~ shall participate in good faith in a second voluntary negotiation period commencing on a date set by the Copyright Royalty Judges and lasting 14 days. By the close of the second voluntary negotiation period, the parties shall file a joint written notification with the Copyright Royalty Judges indicating whether they have reached a settlement, in whole or in part, with respect to determination of the Administrative Assessment, identifying and describing any issues as to which they have reached a settlement.

§ 355.5 Hearing procedures.

(a) *En banc panel.* The Copyright Royalty Judges shall preside *en banc* over any hearing to determine the reasonableness of, and the allocation of responsibility to contribute to, the Administrative Assessment ~~and shall, if they deem circumstances appropriate, consider en banc all filings submitted for a determination without a hearing.~~

(b) *Attendance and participation.* The Mechanical Licensing Collective, through an authorized officer or other managing agent, and the Digital Licensee Coordinator, if any, through an authorized officer or other managing agent, shall attend and participate in the hearing. Any other entity that has filed a valid Petition to Participate and that the Copyright Royalty Judges have not found to be disqualified shall participate in an Administrative Assessment proceeding

hearing. If the Copyright Royalty Judges find, *sua sponte* or upon motion of a participant, that a participant has failed substantially to comply with any of the requirements of this part, the Copyright Royalty Judges may exclude that participant from participating in the hearing; provided, however, that the Mechanical Licensing Collective and the Digital Licensee Coordinator shall not be subject to exclusion.

(c) *Admission of written submissions, deposition transcripts, and other documents.* Subject to any valid objections of a participant, the Copyright Royalty Judges shall admit into evidence at an Administrative Assessment hearing the complete initial, responsive, and reply submissions that the participants have filed. Participants shall not file deposition transcripts, but may utilize deposition transcripts for the purposes and under the conditions described in Fed. R. Civ. P. 32 and interpreting case law. Any participant may expand upon excerpts at the hearing or counter-designate excerpts in the written record to the extent necessary to provide appropriate context for the record. During the hearing, upon the oral request of any participant, any document proposed as an exhibit by any participant shall be admitted into evidence so long as that document was produced previously by any participant, subject only to a valid evidentiary objection.

(d) *Argument and examination of witnesses.* An Administrative Assessment hearing shall consist of the oral testimony of witnesses at the hearing and arguments addressed to the written submissions and oral testimony proffered by the participants, except that the Copyright Royalty Judges may, *sua sponte* or upon written or oral request of a participant, find good cause to dispense with the oral direct, cross, or redirect examination of a witness, and rely, in whole or in part, on that witness's written testimony. The Copyright Royalty Judges may, at their discretion, and in a format they describe in a prehearing Scheduling Order, require expert witnesses to be examined concurrently by the Judges and/or the attorneys. If the Judges so order, the expert witnesses may then also testify through a colloquy among themselves, including questions addressed to each other, as limited and directed by the Judges and subject to valid objections by counsel and ruled upon by the Judges. Only witnesses who have submitted written testimony or who were deposed in the proceeding may be examined at the hearing. A witness's oral testimony shall not exceed the subject matter of his or her written or deposition testimony.

Unless the Copyright Royalty Judges, on motion of a participant, order otherwise, no witness, other than a person designated as a party representative for the proceeding ~~or a person designated as an expert on behalf of any proceeding participant,~~ may listen to, or review a transcript of, testimony of another witness or witnesses prior to testifying.

(e) *Objections.* Participants may object to evidence on any proper ground, by written or oral objection, including on the ground that a participant seeking to offer evidence for admission has failed without good cause to produce the evidence during the discovery process. The Copyright Royalty Judges may, but are not required to, admit hearsay evidence to the extent they deem it appropriate.

(f) *Transcript and record.* The Copyright Royalty Judges shall designate an official reporter for the recording and transcribing of hearings. Anyone wishing to inspect the transcript of a hearing, to the extent the transcript is not restricted under a protective order, may do so when the hearing transcript is filed in the Copyright Royalty Judges' electronic filing and case management system, eCRB, at <https://app.crb.gov> after the hearing concludes. The availability of restricted portions of any transcript shall be described in the protective order. Any participant desiring daily or expedited transcripts shall make separate arrangements with the designated court reporter.

§ 355.6 Determinations.

(a) *How made.* The Copyright Royalty Judges shall determine the amount and terms of the Administrative Assessment in accordance with 17 U.S.C. 115(d)(7). The Copyright Royalty Judges shall base their determination on their evaluation of the totality of the evidence before them, including oral testimony, written submissions, admitted exhibits, designated deposition testimony, the record associated with any motions and objections by participants, the arguments presented, and prior determinations and interpretations of the Copyright Royalty Judges (to the extent those prior determinations and interpretations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to 17 U.S.C. 802(f)(1)(A) or (B), or with a decision of the Register of Copyrights made pursuant to 17 U.S.C. 802(f)(1)(D), or with a decision of the U.S. Court of Appeals for the D.C. Circuit).

(b) *Timing.* The Copyright Royalty Judges shall issue and publish their determination in the **Federal Register** not later than one year after commencement of the proceeding under

§ 355.2(a) or, in a proceeding commenced under § 355.2(b), during June of the calendar year following the commencement of the proceeding.

(c) *Effectiveness.* (1) The initial Administrative Assessment determined in the proceeding under § 355.2(a) shall be effective as of the License Availability Date and shall continue in effect until the Copyright Royalty Judges determine or approve an adjusted Administrative Assessment under § 355.2(b).

(2) Any adjusted Administrative Assessment determined in a proceeding under § 355.2(b) shall take effect January 1 of the year following its publication in the **Federal Register**.

(d) *Adoption of voluntary agreements.*

In lieu of reaching and publishing a determination, the Copyright Royalty Judges shall approve and adopt the amount and terms of an Administrative Assessment that has been negotiated and agreed to by the Mechanical Licensing Collective and the Digital Licensee Coordinator ([or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities](#)), ~~interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees~~

pursuant to § 355.4. Notwithstanding the voluntary negotiation of an agreed Administrative Assessment, however, the Copyright Royalty Judges may, for good cause shown, reject an agreement. If the Copyright Royalty Judges reject a negotiated agreed Administrative Assessment, they shall proceed with adjudication in accordance with the schedule in place in the proceeding. Rejection by the Copyright Royalty Judges of a negotiated agreed Administrative Assessment shall not prejudice the parties' ability to continue to negotiate and submit to the Copyright Royalty Judges an alternate agreed Administrative Assessment or resubmit an amended prior negotiated agreement that addresses the Judges' reasons for initial rejection at any time, including during a hearing or after a hearing at any time before the Copyright Royalty Judges issue a determination.

(e) *Continuing authority to amend.* The Copyright Royalty Judges shall retain continuing authority to amend a determination of an Administrative Assessment to correct technical or clerical errors, or modify the terms of implementation, for good cause shown, with any amendment to be

published in the **Federal Register**.

§ 355.7 Definitions.

Capitalized terms in this part that are defined terms in 17 U.S.C. 115(e) shall have the same meaning as set forth in 17 U.S.C. 115(e). In addition, for purposes of this part, the following definitions apply:

Discoverable documents or deposition testimony are documents or deposition testimony that are:

- (1) Nonprivileged;
- (2) Relevant to consideration of whether a proposal fulfills the requirements in 17 U.S.C. 115(d)(7); and
- (3) Proportional to the needs of the proceeding, considering the importance of the issues at stake in the proceeding, the requested participant's relative access to responsive information, the participants' resources, the importance of the document or deposition request in resolving or clarifying the issues presented in the proceeding, and whether the burden or expense of producing the requested document or deposition testimony outweighs its likely benefit. Documents or deposition testimony need not be admissible in evidence to be Discoverable.

Subchapter D—Notice and Recordkeeping Requirements for Statutory Licenses

PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

■ 5. The authority citation for part 370 continues to read as follows:

Authority: 17 U.S.C. 112(e)(4), 114(f)(4)(A).

- 6. In § 370.1:
 - a. Remove the alphabetical paragraph designations;
 - b. Remove the word "A" at the beginning of each definition;
 - c. Place the definitions in alphabetical order; and
 - d. Add the definition of "Copyright Owners" in alphabetical order.
 The addition reads as follows:

§ 370.1 General definitions.

* * * * *
Copyright Owners means sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.
 * * * * *

§ 370.4 [Amended]

- 7. In § 370.4(b):
 - a. In the definition of "Aggregate Tuning Hours", remove "United States copyright law" and add in its place "title 17, United States Code"; and
 - b. In paragraph (i) of the definition of "Performance", remove "copyrighted" and add in its place "subject to protection under title 17, United States Code".

Subchapter E—Rates and Terms for Statutory Licenses

PART 380—RATES AND TERMS FOR TRANSMISSIONS BY ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

■ 8. The authority citation for part 380 continues to read:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

- 9. In § 380.7:
 - a. Add introductory text;
 - b. Revise the definition of "Copyright Owners"; and
 - c. In paragraph (1) of the definition of "Performance", remove "copyrighted" and add in its place "subject to protection under title 17, United States Code".

The addition and revision read as follows:

§ 380.7 Definitions.

For purposes of this subpart, the following definitions apply:

* * * * *
Copyright Owners means sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.
 * * * * *

- 10. In § 380.21:
 - a. In the definition of "ATH", remove "United States copyright law" and add in its place "title 17, United States Code";
 - b. Revise the definition of "Copyright Owners"; and
 - c. In paragraph (1) of the definition of "Performance", remove "copyrighted" and add in its place "subject to protection under title 17, United States Code".
 The revision reads as follows:

§ 380.21 Definitions.

* * * * *
Copyright Owners are sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made under

this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

* * * * *

■ 11. In § 380.31 revise the definition of “Copyright Owners” to read as follows:

§ 380.31 Definitions.

* * * * *

Copyright Owners are Sound Recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

* * * * *

PART 382—RATES AND TERMS FOR TRANSMISSIONS OF SOUND RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

■ 12. The authority citation for part 382 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114 and 801(b)(1).

■ 13. In § 382.1, revise the definition of “Copyright Owners” to read as follows:

§ 382.1 Definitions.

* * * * *

Copyright Owners means sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

* * * * *

§ 382.20 [Amended]

■ 14. In § 382.20, remove the definition of “Pre-1972 Recording”.

§ 382.23 [Amended]

■ 15. In § 382.23, remove paragraphs (a)(3) and (b) and redesignate paragraph (c) as paragraph (b).

PART 383—RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY CERTAIN NEW SUBSCRIPTION SERVICES

■ 16. The authority citation for part 383 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114, and 801(b)(1).

■ 17. In § 383.2, revise paragraph (b) to read as follows:

§ 383.2 Definitions.

* * * * *

(b) *Copyright Owner* means a sound recording copyright owner, and a rights owner under 17 U.S.C. 1401(l)(2), who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

* * * * *

PART 384—RATES AND TERMS FOR THE MAKING OF EPHEMERAL RECORDINGS BY BUSINESS ESTABLISHMENT SERVICES

■ 19. The authority citation for part 384 continues to read as follows:

Authority: 17 U.S.C. 112(e), 801(b)(1).

■ 21. In § 384.2, revise the definition of “Copyright Owners” to read as follows:

§ 384.2 Definitions.

* * * * *

Copyright Owners are sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made under this part pursuant to the statutory license under 17 U.S.C. 112(e).

* * * * *

§ 384.3 [Amended]

■ 22. In § 384.3:

■ a. In paragraph (a)(1), remove the word “copyrighted” and add the phrase “subject to protection under title 17, United States Code” after the word “recordings”;

■ b. In paragraph (a)(2) introductory text:

■ i. Remove the word “copyrighted” in the first sentence and add the phrase “subject to protection under title 17, United States Code,” after the word “recordings”; and

■ ii. Remove the word “copyrighted” in the second sentence and add the phrase “subject to protection under title 17, United States Code,” after the word “recordings”; and

■ c. In paragraphs (a)(2)(i) and (ii), remove the word “copyrighted” each time it appears and add the phrase “subject to protection under title 17, United States Code,” after the word “recordings” each time it appears.

PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

■ 23. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

■ 24. In § 385.2:

■ a. Add introductory text:

■ b. Revise the definitions of “Accounting Period” and “Affiliate”;

■ c. In the definition of “Bundled Subscription Offering”, add the term “Eligible” before the term “Limited Downloads” and remove the comma at the end of the definition and add a period in its place;

■ d. In the definition of “Digital Phonorecord”, remove “or DPD” and remove “17 U.S.C. 115(d)” and add in its place “17 U.S.C. 115(e)”;

■ e. Add definitions for “Eligible Interactive Stream” and “Eligible Limited Download” in alphabetical order;

■ f. Revise the definition for “Free Trial Offering”;

■ g. Remove the definition of “Interactive Stream”;

■ h. In the definition for “Licensed Activity”:

■ i. Remove the word “Digital” between the words “Permanent” and “Downloads”;

■ ii. Add the word “Eligible” before the term “Interactive Streams”; and

■ iii. Add the word “Eligible” before the term “Limited Downloads”;

■ i. Remove the definition for “Limited Download”;

■ j. Revise the definition for “Limited Offering”;

■ k. In the definition for “Locker Service”:

■ i. Add the term “Eligible” before the term “Interactive Streams”;

■ ii. Remove the term “Digital” between the terms “Permanent” and “Downloads”; and

■ iii. Remove the term “the Service” and add in its place “the Service Provider” each time it appears; and

■ iv. Remove the term “Service’s” and add in its place “Service Provider’s”;

■ l. In the definition of “Mixed Service Bundle”:

■ i. Remove the term “Digital” between the terms “Permanent” and “Downloads”; and

■ ii. Remove the term “a Service” and add in its place “a Service Provider”;

■ m. In the definition for “Music Bundle”:

■ i. Remove the term “Digital” between the words “Permanent” and “Downloads”;

■ ii. Remove the term “Service” and add in its place the term “Service Provider” each time it appears; and

■ iii. Remove the term “Record Company” and add in its place the term “Sound Recording Company”;

■ n. In the definition for “Offering” remove the term “Service’s” and add in its place the term “Service Provider’s”;

■ o. In the definition of “Paid Locker Service”, remove the term “the Service”

- and add in its place the term “the Service Provider”;
- p. Remove the definition of “Permanent Digital Download”;
 - q. Add a definition for “Permanent Download” in alphabetical order;
 - r. In the definition for “Play”:
 - i. Add the term “Eligible” before the term “Interactive Stream” each time it appears; and
 - ii. Remove the term “a Limited Download” and add in its place the term “an Eligible Limited Download” each time it appears;
 - s. Revise the definitions for “Promotional Offering” and “Purchased Content Locker Service”;
 - t. Remove the definition for “Record Company”;
 - u. In the definition of “Relevant Page”:
 - i. In the first sentence, remove the term “Service’s” and add in its place the term “Service Provider’s” and add the term “Eligible” before the term “Limited Downloads”; and
 - ii. In the second sentence, add the term “Eligible” before the term “Limited Download” and before the term “Interactive Stream”;
 - v. In the definition of “Restricted Download”, remove the term “a Limited Download” add in its place the term “an Eligible Limited Download”;
 - w. Remove the definition of “Service”;
 - x. Add the definitions for “Service Provider” and “Service Provider Revenue” in alphabetical order;
 - y. Remove the definition for “Service Revenue”;
 - z. Add the definition for “Sound Recording Company” in alphabetical order;
 - aa. In the definition of “Streaming Cache Reproduction”, remove the term “Service” and add in its place the term “Service Provider” each time it appears; and
 - bb. In the definition of “Total Cost of Content”:
 - i. Remove the term “Service” and add in its place the term “Service Provider” each time it appears;
 - ii. Remove the term “interactive streams” and add in its place the term “Eligible Interactive Streams”;
 - iii. Remove the term “limited downloads” and add in its place the term “Eligible Limited Downloads”; and
 - iv. Remove the terms “Record Company” and “record company” and add in their place the term “Sound Recording Company” each time they appear.

The additions and revisions read as follows:

§ 385.2 Definitions.

For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

Free Trial Offering means a subscription to a Service Provider’s transmissions of sound recordings embodying musical works when:

(1) Neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of

any of them receives any monetary consideration for the Offering;

(2) The free usage does not exceed 30 consecutive days per subscriber per two-year period;

(3) In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;

(4) Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;

(5) The Free Trial Offering is made available to the End User free of any charge; and

(6) The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service Provider.

Limited Offering means a subscription plan providing Eligible Interactive Streams or Eligible Limited Downloads for which—

(1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Permanent Download has the same meaning as in 17 U.S.C. 115(e).

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

(1) A Sound Recording Company is

lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

(2) For Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;

(3) For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);

(4) The Promotional Offering is made available to an End User free of any charge; and

(5) The Service Provider provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.

Purchased Content Locker Service means: ~~(1)~~ **a** Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

~~(2)~~ **A** qualifying seller for purposes of this definition is the entity operating the Service Provider, including affiliates, predecessors, or successors in interest, or—

~~(1)~~ **In** the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the

locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or ~~(iii)~~ **(2)** In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

* * * * *

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

(1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, Service Provider Revenue shall mean:

(i) All revenue from End Users recognized by a Service Provider for the provision of any Offering;

(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party “in-stream” or “in-download” advertising as part of any Offering, *i.e.*, advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and

(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that

directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.

(2) Service Provider Revenue shall:

(i) Include revenue recognized by the Service Provider, or by any associate, affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and

(ii) Include the value of any barter or other nonmonetary consideration; and

(iii) Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.

(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.

(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

(5) In instances in which a Service Provider provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition shall be the lesser of the revenue recognized from End Users for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

Sound Recording Company means a person or entity that:

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording,

under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

* * * * *

§ 385.3 [Amended]

■ 25. In § 385.3, remove the phrase “after the due date established in 17 U.S.C. 115(c)(5)” and add in its place “after the due date established in 17 U.S.C. 115(c)(2)(I) or 115(d)(4)(A)(i), as applicable”.

§ 385.4 [Amended]

■ 26. In § 385.4:

■ a. In paragraph (a), add the term “Eligible” before each of the terms “Interactive Streams” and “Limited Downloads”; and

■ b. In paragraph (b), remove the term “Service” and add in its place the term “Service Provider” each time it appears.

■ 27. Revise the heading for subpart B to read as follows:

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

■ 28. In § 385.11, revise paragraph (a) to read as follows:

§ 385.11 Royalty rates.

(a) *Physical phonorecord deliveries and Permanent Downloads.* For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

* * * * *

■ 29. Revise the heading for subpart C to read as follows:

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

■ 30. Revise § 385.20 to read as follows:

§ 385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17

U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

■ 31. In § 385.21:

■ a. In paragraph (b):

■ i. Remove the term “Service” each time it appears and add in its place the term “Service Provider”; and

■ ii. Remove the term “Service’s” and add in its place the term “Service Provider’s”;

■ b. In paragraph (b)(4):

■ i. Revise the second sentence; and

■ ii. Remove the phrase “methodology used by the Service for making royalty payment allocations” and add in its place “methodology used for making royalty payment allocations”; and

■ c. In paragraph (d), remove the statutory citation “17 U.S.C.115(c)(5)” and add in its place “17 U.S.C.

115(c)(2)(I), 17 U.S.C.115(d)(4)(A)(i).”.

■ The revision reads as follows:

§ 385.21 Royalty rates and calculations.

(b) * * *

(4) * * * To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. * * *

§ 385.22 [Amended]

■ 31. In § 385.22:

■ a. In paragraph (a)(1), add the term “Eligible” before the term “Interactive Streams”;

■ b. In paragraph (a)(2), add the term “Eligible” before the term “Interactive Streams” and add the term “Eligible” before the term “Limited Downloads” each time it appears; and

■ c. In paragraph (a)(3), add the term “Eligible” before the term “Interactive Streams” and add the term “Eligible” before the term “Limited Downloads”.

■ 32. Revise § 385.30 to read as follows:

§ 385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

■ 33. Revise § 385.31 to read as follows:

§ 385.31 Royalty rates.

(a) *Promotional Offerings.* For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.

(b) *Free Trial Offerings.* For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.

(c) *Certain Purchased Content Locker Services.* For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.

Dated: March 1, 2019.

Jesse M. Feder,

Chief Copyright Royalty Judge.

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