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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 350

[Docket No. 17-CRB-0013 RM]

Proceedings of the Copyright Royalty Board; Violation of Standards of Conduct

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed Rule.

SUMMARY: The Copyright Royalty Judges propose to adopt a new Copyright Royalty Board rule that would authorize the Judges to bar, either temporarily or permanently, certain individuals and entities from participating in proceedings before the Judges.

DATES: Comments are due no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The proposed rule is posted on the agency's website (www.loc.gov/crb) and at Regulations.gov (www.regulations.gov). Interested parties may submit comments via email to crb@loc.gov. Those who choose not to submit comments via email should see How to Submit Comments in the Supplementary Information section below for online and physical addresses and further instructions.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, Program Specialist, at (202) 707-7658 or crb@loc.gov.

SUPPLEMENTARY INFORMATION: Regulations of the Copyright Royalty Board (CRB), 37 CFR part 350 (CRB Rules), address proceedings conducted by the Copyright Royalty Judges (Judges) under chapter 8 of the Copyright Act. 17 U.S.C. 801-805. Proceedings before the

Judges are premised on the understanding that all participants, including party representatives, witnesses, attorneys, and agents, will provide only truthful evidence or testimony to the Board. For example, CRB Rule 351.10 (a) states that “[a]ll witnesses shall be required to take an oath or affirmation before testifying.” 37 CFR 351.10 (b). The oath or affirmation requires the witness to state that the evidence he or she is about to offer will be truthful. Neither Rule 351.10 nor any other CRB rule or provision of the Copyright Act specifies consequences for presenting to the CRB false or misleading information or testimony, or for filing false royalty claims.¹

In the few instances in which the Judges determined that a witness’s testimony was not truthful, the Judges exercised their authority under Section 801(c) to strike the testimony from the record or to take such other action as the Judges believed was warranted under the circumstances. In 2008, for example, the Judges found that an expert witness knowingly affirmed incorrect testimony on the record and in the presence of the Judges. *Order Striking Certain Witness Testimony and Refusing Witness as Expert* at 3, Docket No. 2006-3 CRB DPRA (Feb. 14, 2008). As a sanction for that false testimony, the Judges struck all of the witness’s testimony that offered “conclusions and opinions only admissible if presented as qualified expert testimony.” *Id.* at 4. At the Judges’ discretion, they retained portions of the witness’s testimony that were “merely reports or compilations of industry facts and data such as might have been presented by a lay witness familiar with the industry and having access to documents provided in discovery.” *Id.*

¹ See 18 U.S.C. 1621 re perjury.

Under the Copyright Arbitration Royalty Panel system,² a participant in Library of Congress royalty distribution proceedings, pled guilty to a count of mail fraud for making fraudulent submissions to the Copyright Office in which he used false aliases and fictitious business entities to claim entitlement to cable and satellite system retransmission royalties. *U.S. v. Galaz*, No. 02-230 (D.D.C. May 30, 2002); *U.S. v. Galaz*, CR 02-0230-01 (D.D.C. Dec. 23, 2002).

After serving a prison term, and with approval of the sentencing court, the sanctioned individual continued to represent claimants in proceedings before the CRB. In one such proceeding, the Judges found that the same individual did not testify truthfully. *Memorandum Opinion and Ruling on Validity and Categorization of Claims* at 8, Docket Nos. 2012-6 CRB CD 2004-09 (Phase II) and 2012-7 CRB SD 1999-2009 SD (Phase II) (March 13, 2015) (*Memorandum Opinion and Ruling*). In determining a sanction for the false testimony, the Judges analyzed whether they had authority to debar or otherwise disqualify a claimant representative for misconduct. The Judges concluded that “[a]ssuming, without deciding, that the Judges do possess the inherent authority to debar or otherwise disqualify a claimant representative for misconduct, the Judges find that it would be inappropriate to exercise that authority in the absence of regulations governing how, and under what circumstances they may do so.” *Id.* at 9. The Judges concluded that:

Participants are entitled to “official ... guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met or refuted, and what consequences will flow from misconduct if found.” Even though, in this particular

² The Copyright Arbitration Royalty Panels arbitrated royalty rate and distribution controversies prior to enactment of the Copyright Royalty and Distribution Reform Act of 2004, which initiated the Copyright Royalty Judges program.

instance, all of the participants know—or should know—that giving false testimony under oath in an official proceeding is serious misconduct, there is nevertheless no “official guidance” in either the Copyright Act or CRB Rules concerning the consequences of that misconduct. Sadly, this case highlights the urgent need for such official guidance.

Id., quoting *Gonzales v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964) (internal citation omitted).

In the absence of official guidance on what consequences would flow from misconduct, the Judges denied the claimant representative presenting the witness the presumption of validity that each filed claim is compliant with the authority, veracity, and good faith standards now codified in 37 CFR 360.3(b)(1)(vi).³

The Judges have indicated they would “welcome petitions for rulemaking that discuss their authority to adopt, and recommend the content of, rules, if any, sanctioning misconduct on the part of counsel or parties in CRB proceedings.” *Memorandum Opinion and Ruling* at 9 n.7. The Judges received none. The Judges, therefore, propose these regulations to establish and publicize standards of conduct and to enumerate, without limitation, responses to violations of those standards.

³ In response to the Judges’ remedy, the claimant representative asserted that it could overcome the loss of the presumption of validity by simply appointing an agent to adjudicate the claims that it had been hired to represent. The Judges responded that “[g]iven the circumstances that have led to [the representative’s] loss of the ‘presumption of validity,’ such a transparent subterfuge could well constitute fresh and sufficient evidence to cast doubt on [the representative’s] representation, underscoring the need to place the burden on [the representative] to substantiate its claims.” *Memorandum Opinion and Ruling* at 12-13, n.14.

Nevertheless, in a subsequent distribution proceeding, the same representative assigned its right to represent claims to a family member doing business under a newly-registered business name, perhaps with the intention of avoiding the loss of the presumption of validity. *See, e.g., MPAA’s Motion for Disallowance of Claims Made by Multigroup Claimants* at 3, Docket Nos. 14-CRB-0010 CD and 14-CRB-0011 SD (2010-2013) (Oct. 11, 2016). Regardless of the motivation behind the party’s decision to replace itself as a claims representative with an affiliate in that particular proceeding, the claim representative’s actions (about which the Judges do not currently opine) highlight the importance of a mechanism to sanction parties, witnesses, and counsel that violate CRB rules or the Judges’ orders, or that otherwise engage in behavior that would warrant preventing them from future participation in proceedings before the Judges.

In designing procedures for imposing appropriate sanctions for fraud or misrepresentation to the CRB, the Judges stress the importance of providing more consistent guidance to individuals and entities that have business before the CRB. In addition, the Judges recognize the value of providing a mechanism that is less prone to evasion than the *ad hoc* approaches the Judges have employed in the past.⁴ The Judges intend the proposed new rule to supplement rather than replace the case-specific evidentiary rulings or sanctions they have imposed in the past. Consistent with these goals, the Judges propose a new CRB Rule 350.9: Violation of Standards of Conduct. The proposed new rule clarifies the expectation and requirement that all persons appearing in proceedings before the Judges act with integrity and in an ethical manner.

The proposed new rule language authorizes the Judges, after notice and an opportunity for hearing, to deny, either temporarily or permanently, to a person or entity that violates the expected standards of conduct the privilege of participating as a representative, agent, witness, or attorney in a CRB proceeding. In particular, the proposed new language would authorize the Judges to deny participation to any attorney who has been suspended or disbarred by a court of the United States or of any State or to any person whose license to practice as an accountant, engineer, or other professional or expert, has been revoked or suspended in any State.

Moreover, under the proposed rule, the Judges could bar participation by any person who has been convicted of a felony or a misdemeanor involving moral turpitude. The proposed new rule also would authorize the Judges to deny participation by any entity that employs or retains in any capacity any person described in paragraph (b)(1) to assist in administering the distribution of royalties to claimants or to submit or prepare royalty claims or evidence to be used in a proceeding before the Copyright Royalty Board.

⁴ In the past to address objectionable behavior, the Judges have imposed, for example, discovery sanctions, evidentiary burden shifting, and have declined to consider material offered for the record.

The proposed rule would authorize the Judges to deny participation by any person, agent, or attorney shown to be incompetent or disreputable. In addition, the proposed rule would authorize the Judges, after notice and opportunity for hearing, to deny participation by any person who knowingly or recklessly provides false oral or written testimony or who knowingly sponsors false documents under oath or affirmation in a proceeding. Finally, the proposed rule would authorize the Judges to deny participation by any person who has violated any CRB rule or regulation.

The proposed rule would allow a person denied participation in a CRB proceeding or barred as a witness to apply for reinstatement at any time. The Judges may, in their discretion, permit a hearing on the reinstatement application, but the suspension or disqualification would continue unless and until the Judges have reinstated the applicant for good cause shown.

Solicitation of Comments

The Judges seek comments on the proposed new rule. Preliminarily, the Judges believe the proposed rule is necessary to allow them to carry out their responsibilities under the Copyright Act and is consistent with the Judges' goal to provide consistent guidance to people and entities regarding the Judges' expectations of conduct in Copyright Royalty Board proceedings and other dealings with the Copyright Royalty Board. The Judges seek comments on whether they should adopt the proposed rule. Any commenter that does not believe the proposed rule is necessary or appropriate, must discuss any alternatives that the Judges have available that would allow them to continue to preserve the integrity of Copyright Royalty Board proceedings.

The Judges also seek comments on whether the categories described in the proposed rule are sufficient for the Judges to achieve the goal of preserving the integrity of Copyright Royalty

Board proceedings or whether additional categories also should be included. If so, which categories should be added? Should any of the proposed categories be removed from the proposal? If so, which categories and why? Should time limits be placed on any or all of the categories? For example, if a person violated a CRB rule in the distant past (*e.g.*, 5 years ago? 10 years ago?), should that person still be subject to a denial of participation in future proceedings? What criteria should the Judges' consider in determining whether a denial of participation should be temporary or permanent? If a claims representative is barred from participation in proceedings before the Judges, how should the claims that that person or entity represented be treated? For example, should the claimants be required to represent themselves (either individually or jointly) or should they be allowed to select a new representative? In the alternative, should the Judges assign the claims of a barred representative to another claims representative already participating in the proceeding?

With respect to reinstatement applications, does the proposal provide a sufficient means for persons or entities to seek reinstatement? If not, what other means should be available? If the Judges deny a reinstatement application, when, if ever, should the applicant be permitted to file a subsequent application? For example, should there be a "cooling off" period between applications? If so, how long should that period be? In considering subsequent reinstatement applications, should the Judges apply the same standard as they applied in considering the first application or should a different standard apply (*e.g.*, a showing of new evidence, other than the mere passage of time, subsequent to the initial application denial)?

How to Submit Comments

Interested members of the public must submit comments to only one of the following addresses. If not submitting by email or online, commenters must submit an original of their

comments, five paper copies, and an electronic version in searchable PDF format on a CD.

Email: crb@loc.gov; or

Online: <http://www.regulations.gov>; or

U.S. mail: Copyright Royalty Board, PO Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE, Washington, DC 20559-6000. Deliver to: Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

List of Subjects in 37 CFR Part 350

Administrative practice and procedure, Copyright.

For the reasons set forth in the preamble, the Copyright Royalty Board proposes to amend 37 CFR part 350 as follows:

PART 350—GENERAL ADMINISTRATIVE PROVISIONS

1. The authority citation for part 350 continues to read as follows:

AUTHORITY: 17 U.S.C. 803.

2. Add § 350.9 to read as follows:

§ 350.9 Violation of standards of conduct.

(a) *Standards of conduct.* All persons appearing in proceedings before the Copyright Royalty Board are expected to act with integrity and in an ethical manner.

(b) *Suspension and debarment.* After notice and opportunity for hearing, the Copyright Royalty Judges may deny, temporarily or permanently, the privilege of participating as a representative, agent, attorney, or witness in a proceeding before the Copyright Royalty Board to:

(1) Any attorney who has been suspended or disbarred by a court of the United States or of any State; any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude. A disbarment, suspension, revocation, or conviction within the meaning of this section shall be deemed to have occurred when the disbarring, suspending, revoking, or convicting agency or tribunal enters its judgment or order, including a judgment or order on a plea of *nolo contendere*, regardless of whether the person has taken or could take an appeal of the judgment or order.

(2) Any entity that employs or retains in any capacity any person described in paragraph (b)(1) of this section to assist in administering the distribution of royalties to claimants or to submit or prepare royalty claims or evidence to be used in a proceeding before the Copyright Royalty Board.

(3) Any person, agent, or attorney shown to be incompetent or disreputable.

(4) Any person who knowingly or recklessly provides false oral or written testimony or who knowingly sponsors false documents under oath or affirmation in a proceeding before the Copyright Royalty Board.

(5) Any person who has violated any Copyright Royalty Board rules or regulations.

(c) *Reinstatement.* A person denied the privilege of participating in a Copyright Royalty Board proceeding or barred as a witness under this rule may apply for reinstatement at any time, but no more often than once in a 12-month period measured from the time of disposition of an

application. The Copyright Royalty Judges may, in their discretion, permit a hearing on the application. The suspension or disqualification shall continue unless and until the Judges have reinstated the applicant for good cause shown.

Dated: April 7, 2017.

Suzanne M. Barnett
Chief Copyright Royalty Judge

[FR Doc. 2017-07403 Filed: 4/19/2017 8:45 am; Publication Date: 4/20/2017]