



LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Parts 303, 350, 355, 370, 380, 382, 383, 384, and 385

[Docket No. 18-CRB-0012 RM]

Copyright Royalty Board 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

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges (Judges) adopt regulations governing proceedings to determine the reasonableness of, and allocate responsibility to fund, the operating budget of the Mechanical Licensing Collective authorized by the Music Modernization Act (MMA). The Judges also adopt proposed amendments to extant rules as required by the MMA.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

SUPPLEMENTARY INFORMATION:

On March 13, 2019, the Copyright Royalty Judges (Judges) published proposed regulations governing proceedings to determine the reasonableness of, and allocate responsibility to fund, the operating budget of the Mechanical Licensing Collective authorized by the Music Modernization Act (MMA). The Judges also proposed

amendments to extant rules as required by the MMA. 84 FR 9053. The Judges received comments from the Digital Music Association (DiMA), The National Music Publishers Association (NMPA), and SoundExchange, Inc.¹ The commenters generally support the Judges' proposal while recommending certain adjustments, many of which the Judges accept as improvements to the rules as originally proposed. The Judges hereby adopt the proposed rules as amended.

Background

The MMA amended title 17 of the United States Code (Copyright Act) to authorize, among other things, designation by the Register of Copyrights (with the approval of the Librarian of Congress) of a Mechanical Licensing Collective (MLC). 17 U.S.C. 115(d)(3)(A)(iv) and 17 U.S.C. 115(d)(3)(B)(i). The MLC is to be a nonprofit entity created by copyright owners to carry out responsibilities set forth in sec. 115 of the Copyright Act. 17 U.S.C. 115(d)(3)(A)(i). The Copyright Act sets forth the governance of the MLC, which shall include representatives of songwriters and music publishers (with nonvoting members representing licensees of musical works and trade associations). 17 U.S.C. 115(d)(3)(D). The MLC is authorized expressly to carry out several functions under the Copyright Act, including offering and administering blanket licenses and collecting and distributing royalties. 17 U.S.C. 115(d)(3)(C)(i) and (iii).

Section 115(d)(5)(A) of the MMA defines a second entity, the Digital Licensee Coordinator ("DLC"), a single nonprofit entity not owned by any other entity, created to carry out responsibilities under the MMA. The DLC must be endorsed by and enjoy substantial support from digital music providers and significant nonblanket licensees that

¹ The proposal was further to a Notice of Inquiry that the Judges published on November 5, 2018. 83 FR 55334.

together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding three calendar years. 17 U.S.C. 115(d)(5)(A). The DLC will be designated by the Register, with the approval of the Librarian, and is authorized to perform certain functions under the Copyright Act, including establishing a governance structure, criteria for membership, and dues to be paid by its members.² The DLC is also authorized to engage in efforts to enforce notice and payment obligations with respect to the administrative assessment, including by receiving information from and coordinating with the MLC. The DLC is also authorized to initiate and participate in proceedings before the Judges to establish the administrative assessment. 17 U.S.C. 115(d)(5)(B)-(C).

The MMA provides that the Judges must, within 270 days of the effective date of the MMA, commence a proceeding to determine an initial administrative assessment that digital music providers and any significant nonblanket licensees shall pay to fund the operations of the MLC. 17 U.S.C. 115(d)(7)(D)(iii)(I).³ The Judges may also conduct periodic proceedings to adjust the administrative assessment. 17 U.S.C.

115(d)(7)(D)(iv). In the proceedings to determine the initial and adjusted administrative assessments, the Judges must determine an assessment “in an amount that is calculated to defray the reasonable collective total costs.” 17 U.S.C. 115(d)(7)(D)(ii)(II).

Creation of the MLC and the other statutory changes in the MMA require or authorize modification of the Judges’ regulations relating to sec. 115. For example, sec. 102(d) of the MMA requires the Judges, not later than 270 days after enactment of the

² The Register may decline to designate a DLC if she is unable to identify an entity that fulfills the qualifications for the DLC set forth in the MMA. 17 U.S.C. 115(d)(5)(B)(iii).

³ The assessment may also be paid through voluntary contributions from digital music providers and significant nonblanket licensees as may be agreed with copyright owners. 17 U.S.C. 115(d)(7)(A)(ii).

MMA, to amend 37 CFR part 385, “to conform the definitions used in such part to the definitions of the same terms described in sec. 115(e) of title 17, United States Code, as added by” sec. 102(a) of the MMA. That provision also directs the Judges to “make adjustments to the language of the regulations as necessary to achieve the same purpose and effect as the original regulations with respect to the rates and terms previously adopted by the [Judges].”

In that regard, the MMA also adds a new sec. 801(b)(8) to the Copyright Act, which authorizes the Judges “to determine the administrative assessment to be paid by digital music providers under section 115(d)” and states that “[t]he provisions of section 115(d) shall apply to the conduct of proceedings by the [Judges] under section 115(d) and not the procedures in this section, or section 803, 804, or 805.” 17 U.S.C. 801(b)(8). To discharge this duty, the MMA authorizes the Judges to adopt regulations concerning proceedings to set the administrative assessment established by the statute to fund the MLC. 17 U.S.C. 115(d)(7)(D)(viii) and 115(d)(12)(A).

A. Discussion of Comments

As noted above, the three sets of comments the Judges received were generally supportive of the Judges’ proposal, much of which responded to comments that the Judges had received in response to their Notice of Inquiry (NOI). Some comments, however, raised issues with particular aspects of the proposal, which the Judges address below. The comments of DiMA and NMPA overlapped on many issues. Therefore, the Judges discuss the respective comments of these two commenters in a single section. SoundExchange’s comments are addressed in a separate section.

1. DiMA and NMPA Comments

According to DiMA, Congressional intent in adopting the MMA is 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. DiMA Comment at 3. DiMA believes, however, that as currently drafted, certain of the proposed rules put the DLC in an inferior position as compared to the MLC, creating inequities that ultimately may undermine the perceived goal of the assessment 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 MLC and DLC, which DiMA asserts, represent the vast majority of their respective stakeholders. *Id.* at 4. DiMA points out perceived disparities between the MLC and the DLC in three areas, discussed below.

(a) DiMA Believes the MLC and the DLC Should Be Provided with Equal Opportunities to Take Depositions

DiMA notes that proposed § 355.3(e) would authorize the MLC to notice and take up to five depositions during its discovery period and would authorize the DLC, together with “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.

According to DiMA, the proposed rules thus permit the MLC to review whatever discovery it deems relevant, determine the five individuals it believes would be most advantageous to depose and the order in which it wishes to depose these individuals, and

set the timing of those depositions within the discovery period, unencumbered by the other parties. DiMA Comment at 4.

In contrast, DiMA notes, the DLC would be required to share its five depositions with the other proceeding participants. As a result, DiMA believes that the proposed rules would constrain the DLC in its efforts to take depositions, requiring that it negotiate and compromise on the deposition process with other participants, making the development of a coherent and efficient strategy for this process incredibly difficult.

DiMA asserts that under the proposed rules, any proceeding participant other than the MLC could essentially “hijack” the first discovery period deposition process 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. DiMA believes that the perceived open-ended nature of the deposition process in the proposed rules would create disputes that the CRJs would be required to resolve over areas such as the individuals who would be deposed, the time allocations for examination of those witnesses, and the timing of the depositions, resulting in significant inefficiencies within the discovery timeline. DiMA Comment at 5.

DiMA believes that the DLC should be provided with access to the deposition process equal to that of the MLC, and the proposed rules should be amended to permit the DLC to take up to five depositions under the same conditions as those provided to the MLC.

DiMA acknowledges the need to ensure that the discovery process is also fair to other proceeding participants. To that end, DiMA recommends that the proposed rules be modified to mandate a duty requiring these other parties to cooperate with DiMA and

each other in good faith in discovery and to attempt to resolve disputes amongst themselves before availing themselves of the discovery disputes process outlined in proposed § 355.3(h). DiMA also suggests that the Judges modify the proposed rules to make clear that 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 proposed § 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. DiMA Comment at 6.

DiMA believes that the deposition process outlined above would place the DLC on equal footing with the MLC, while at the same time providing meaningful opportunities to other proceeding participants to partake in the deposition process as well. *Id.*

The Judges believe that DiMA's proposed modifications to § 355.3(e) and (h) are reasonable and appropriate and therefore adopt DiMA's recommended modifications.⁴

(b) DiMA Believes that the First and Second Discovery Periods Should be Substantively Identical

In the Joint Proposal that DiMA and the NMPA submitted in response to the Judges' Notice of Inquiry, NMPA/DiMA recommended that administrative assessment proceedings have two discovery periods. According to DiMA, the first discovery period

⁴ DiMA recommended that the Judges insert a lengthy phrase throughout proposed § 355 each time the term Digital Licensee Coordinator appears to account for the possibility that the Register does not designate a DLC (*i.e.*, 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). As a more efficient alternative, the Judges define the term Digital Licensee Coordinator to include either the entity that the Register designates or, if the Register does not designate a DLC, 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. As a corresponding change to the new definition of DLC, the Judges also removed paragraph (d) of section 355.1.

would be reserved for the DLC and other participants in the proceeding, other than the MLC, to allow those parties to examine the MLC's submission and probe its constituent parts in preparation for the DLC's and other participants' responsive submissions. The second discovery period would be reserved for the MLC to allow it to examine the responsive submissions and to probe their constituent parts in preparation for the MLC's reply submission, which, under the Joint Proposal, the MLC would have the option to file after the second discovery period. DiMA Comment at 7.

DiMA contends that the proposed rules contain several ambiguities and inconsistencies that require clarification to ensure that discovery during administrative assessment proceedings is efficient, logical, and equitable. *Id.* For example, DiMA notes that § 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).” DiMA further notes that § 355.3(d) 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 by DiMA).

According to DiMA, the italicized language in § 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, making this language redundant at best and potentially opening the door to discovery by the MLC during the first discovery period at worst, which, DiMA contends,

is directly contrary to the language of proposed § 355.2(g)(1)(iii). DiMA Comment at 8. DiMA therefore recommends that the Judges clarify § 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 § 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 identical language in § 355.3(f)(1) likewise be modified accordingly. DiMA Comment at 8. The Judges believe DiMA’s proposed modifications are reasonable and appropriate and therefore adopt them.

DiMA further notes that as presently drafted, proposed §§ 355.2(g)(1)(iii) and 355.3(d) fail to set forth the right of the DLC and other proceeding participants to take depositions during the first discovery period, which, DiMA contends, appears to be an inadvertent oversight, since those depositions are clearly contemplated by, and discussed in, § 355.3(e). DiMA recommends that § 355.3(d) be amended to add a subsection (2) that substantively mirrors § 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 [DLC] (or if no [DLC] 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 [MLC], may notice and take depositions as provided in paragraph (e) of this section.”). DiMA Comment at 8.

DiMA also asserts that § 355.3(e) requires the correction of what appears to be a typographical error. According to DiMA, the first sentence of that section 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 § 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.*” According to DiMA, the general framework of discovery and other sections of the proposed rules confirm that the second sentence of this subsection should instead read (proposed amendment in italics): “The [MLC] may give notice of and take up to five depositions during the *second* discovery period.” DiMA Comment at 9.

DiMA notes that the Judges 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.” DiMA Comment at 9, quoting 84 FR at 9057.

DiMA posits that 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. According to DiMA, the proposed rules 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. DiMA Comment at 9.

For its part, NMPA “observes that the Proposed Rule could be read as unfairly limiting the scope of discovery in the second discovery period for the MLC as compared to the scope of discovery in the first period applicable to the DLC and additional parties.” NMPA Comment at 8. NMPA notes that proposed § 355.3(d) states that in the first discovery period, “[a]ny document request shall be limited to documents that are Discoverable” whereas proposed § 355.3(g)(1) states, with respect to the second discovery period, “requests shall be limited to documents that are Discoverable and relevant to consideration of whether any counterproposal fulfills the requirements of 17 U.S.C. 115(d)(7) or one or more of the elements of this part.” NMPA Comment at 8.⁵ NMPA also requests that the Judges change paragraph (2) in the definition of Discoverable in proposed § 355.7 to read “(2) Relevant to consideration of whether a proposal or response thereto fulfills the requirements in 17 U.S.C. 115(d)(7).” According to NMPA, these requested changes should eliminate confusion concerning the MLC’s ability to take discovery of the DLC and other parties regarding their respective responses to the MLC’s proposal. NMPA Comment at 9.

⁵ As discussed further below, NMPA does not believe that independent counterproposals are appropriate in the context of assessment proceedings. NMPA Comment at 8. As a result, NMPA requests that the Judges remove from proposed § 355.3(g)(1) the language “and relevant to consideration of whether any counterproposal fulfills the requirements of 17 U.S.C. 115(d)(7) or one or more of the elements of this part.” NMPA Comment at 8-9.

The Judges find that DiMA's and NMPA's respective recommended modifications to the proposed rules in this area are reasonable and appropriate and therefore adopt them.

(c) DiMA Believes that Any Voluntary Agreement Must Be Agreed Upon Only by the MLC and the DLC without Mandatory Participation or Approval of Other Participants

DiMA avers that §§ 355.4 and 355.6(d) of the proposed rules may not be consistent with the MMA because they include participants other than the MLC and the DLC in the negotiation periods and in any voluntary agreement that ultimately may result from those negotiations. According to DiMA, 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. DiMA Comment at 10.

DiMA notes that § 355.4 of the proposed rules requires the participation of not only “[t]he [MLC] [and] the [DLC],” but also the participation of “*interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees*” (emphasis added by DiMA) in both negotiation periods within an administrative assessment proceeding, and sets the commencement of the first negotiation period for “the day after the [Judges] give notice of all participants in the proceeding.” DiMA notes that in explaining this provision and its timing, the Judges stated 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 [Judges] identify and give notice of the full roster of participants.” DiMA Comment at 10, quoting the Judges’ Rule Proposal, 84 FR at 9057.

DiMA notes that § 355.6(d) of the proposed rules likewise references 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 by DiMA).

DiMA contends, however, that the MMA does not require or encourage such broad participation. According to DiMA, under the MMA *only* the MLC and the DLC must agree to any negotiated voluntary agreement. DiMA consequently requests that the Judges modify the proposed rules to remove “interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees” from proposed §§ 355.4 and 355.6(d).⁶ DiMA also requests that the Judges modify the proposed rules such that the first negotiation period will begin on the date of commencement of the proceeding to determine or adjust the administrative assessment. DiMA Comment at 12.⁷

The Judges believe that involvement in the settlement discussions between the MLC and DLC by other participants is appropriate and permitted—though not mandated—under the statute. At the same time, the Judges agree with DiMA’s

⁶ DiMA contends that the MMA clearly contemplates the possibility of a negotiated, voluntary agreement between the MLC and the DLC (only), to which the entire industry would be bound, because, according to DiMA, the MLC and the DLC are statutorily-designated entities that by their nature represent the broad majority of their respective constituencies. DiMA avers that this aspect of the MMA contrasts with regulations governing settlements in royalty rate proceedings which, DiMA notes, 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. DiMA Comment at n. 3, citing 37 C.F.R. 351.2(b)(2).

⁷ DiMA notes that 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).” DiMA recommends that this language be included throughout the proposed rules, as appropriate. DiMA Comment at n.2. As discussed in note 4 above, as an alternative, the Judges have defined the term Digital Licensee Coordinator to include the group of parties that DiMA suggests if the Register does not designate a DLC.

interpretation of the statute that only the MLC and DLC must agree to a voluntary settlement. Nevertheless, the Judges believe that the views of other participants may be helpful, and perhaps essential, for the Judges to determine whether good cause exists to exercise their discretion to reject a settlement. The Judges, therefore, have modified section 355.4 to clarify that participants other than the MLC and DLC may participate in settlement negotiations and may comment on any resulting settlement. In keeping with the accelerated timeline for administrative assessment proceedings, the Judges have imposed tight space limitations for comments, and abbreviated deadlines for comments and any reply by the settling parties. These limitations are subject to the general rules governing requests for enlargement in sections 303.3(c) and 303.7(b). The Judges have made a conforming change to section 303.3(c) to ensure that the rule governing requests for enlargement of space applies to space limitations set in section 355.4 and other provisions of subchapter B.

(d) Issues Relating to Fact Finding in Administrative Assessment

Proceedings

DiMA's set of comments also addressed six areas regarding the fact finding process: (1) flexibility in scheduling of the proceedings and related timing; (2) concurrent expert testimony; (3) necessity of hearings; (4) admissibility of deposition transcripts; (5) witness attendance at the hearing and review of transcripts; and (6) scope of mandatory document productions. NMPA's comment also addressed some of these areas. The Judges address each area in turn.

Flexibility in Proceeding Scheduling and Related Timing

DiMA agrees that the Judges' scheduling proposal, which DiMA views as more flexible than that DiMA and the NMPA proposed in their Joint Comment on the NOI, will allow the Judges to adopt a tailored schedule for each proceeding based on the circumstances of that proceeding and still retain the structural framework of the proceeding. DiMA Comment at 12. Likewise, NMPA states that it understands the Judges' desire for flexibility and agrees that a less structured schedule can still allow the Judges to conduct proceedings in a timely and efficient manner. NMPA believes that the Judges can establish the schedule in each particular proceeding with an eye toward commencing and completing the proceeding in accordance with the overall timetable set forth in the MMA. NMPA Comment at 3.

DiMA requests, however, that the Judges 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 and to resolve discovery disputes that may arise. *Id.* at 13. DiMA also requests that the Judges 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 document productions and disclosures before commencing discovery activities. *Id.*

DiMA also notes that the Judges propose 60 days for the first discovery rather than the 75 days that the DiMA/NMPA Joint Comment had proposed. *See* proposed § 355.2(g)(1)(iii). The second discovery period would also be 60 days. DiMA asserts that there is justification for a longer first discovery period because the DLC will have to coordinate and negotiate with other parties involved in the first discovery period, whereas

the MLC will be the lone party directing the second discovery period and will not be hindered by competing interests regarding noticing and taking depositions and deciding the number and extent of document requests. DiMA Comment at 13-14. DiMA contends that a longer discovery period is necessary and requests that the Judges reconsider a 75-day period for the first discovery period.

After careful consideration, the Judges decline to adopt DiMA's requests to lengthen the first discovery period and delay the commencement of the discovery periods. The timing provisions in the MMA for determining the Administrative Assessment are particularly compressed. The Judges believe that 60 days is a reasonable amount of time for discovery and that a longer period would only serve to restrict further an already short time frame for determining an Administrative Assessment.

Concurrent Expert Testimony

DiMA and NMPA each responded to the Judges' proposal regarding concurrent expert testimony. DiMA supports the Judges' inclusion of the concurrent testimony option and believes that this approach could assist the Judges in creating a more comprehensive record upon which they can base their determination and in answering questions the Judges may have. DiMA also believes that a concurrent testimony approach could allow the Judges more latitude to address any concerns they may have with regard to the proposals then at issue. According to DiMA, engaging in concurrent expert testimony may 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 Judges, and counsel.

Additionally, DiMA avers that 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. To the extent the Judges or the parties elect to use the concurrent evidence approach in a particular proceeding, DiMA recommends that the Judges consider how best to direct and focus such testimony to ensure that the process is efficient and orderly at the hearing. DiMA also 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, in the absence of a specific ruling to the contrary, “traditional” (*i.e.* non-concurrent) expert testimony will remain the default process and structure in administrative assessment proceedings.

DiMA Comment at 13-14.

NMPA believes a concurrent evidence approach could help to narrow and clarify issues and permit immediate correction of testimony by one expert when another expert identifies mistakes in the first expert’s testimony. Accordingly, NMPA does not object to the inclusion of language within proposed rule § 355.5(d) to permit a concurrent evidence procedure.

In light of uncertainties concerning the equities in particular proceedings, however, should the Judges adopt this approach, NMPA believes it would be helpful if, in any given proceeding, the Judges would solicit the views of the parties before requiring participation in a concurrent evidence procedure. NMPA Comment at 12-13.

The Judges adopt the concurrent evidence provision as proposed, but, consistent with NMPA’s recommendation, will consider the views of any party regarding the

implementation of a concurrent evidence approach in any particular Administrative Assessment proceeding. The Judges also confirm, consistent with DiMA's comment, that "traditional" expert testimony will remain the default process and structure in administrative assessment proceedings, *i.e.*, absent any ruling by the Judges establishing a concurrent form of receiving expert testimony.

Necessity of Hearings

DiMA notes that current proposed § 355.5(a) allows the Judges to issue a determination for the administrative assessment without a hearing. DiMA Comment at 15. DiMA believes that this option is inconsistent with the MMA. In particular, DiMA references sec. 115(d)(7)(D)(iii)(III), which, DiMA contends, mandates a hearing. DiMA Comment at 15. As a result, DiMA contends that the proposed rules should be modified 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. In addition to what DiMA believes is a statutory mandate, DiMA also believes that a hearing would afford the Judges the opportunity to examine whatever portions of the proposed assessment they found to be deficient or otherwise inconsistent with the MMA and to make a determination consistent with 17 U.S.C. 115(d)(7). DiMA Comment at 16.

As a practical matter, the Judges agree that, absent a settlement, a hearing will be beneficial for developing a record as a foundation for an Administrative Assessment determination. Therefore, the Judges accept DiMA's recommendation to amend proposed § 355.5(a) to remove references to the Judges' consideration of filings submitted for a determination without a hearing.

Admissibility of Deposition Transcripts

As DiMA notes, the Judges' proposed rules allow the introduction of deposition transcripts pursuant to the rules and limitations of Federal Rule of Civil Procedure 32. 84 FR at 9058; proposed § 355.5(c). DiMA agrees with the Judges' position on this issue because, according to DiMA, submission of only the deposition testimony that is permitted under FRCP 32 will ensure that the Judges receive these materials in a way that does not require them to wade through many exploratory lines of questioning in discovery depositions and does not duplicate the live testimony of any hearing witnesses. DiMA Comment at 16. NMPA noted that "the Joint Comments proposed that complete transcripts be admitted so relevant portions would be available as needed during the hearing without undue burden or delay. At the same time, NMPA understands the concerns articulated by the [Judges]. What is critical is that pertinent deposition testimony be available for use by the parties as necessary during a hearing." NMPA Comment at 13. The Judges acknowledge NMPA's desire to have pertinent deposition testimony available during a hearing and believe that the current proposal will permit such access. As a practical matter, the Judges note that during an Administrative Assessment proceeding parties may submit deposition transcripts (and other exhibits) to the Judges. Once they are marked for identification, the entire transcript or a subset of it thereafter may be offered for admission into evidence during the hearing. Such submission is consistent with the current proposal. Therefore, the Judges adopt the rules in this area as proposed.

Witness Attendance at the Hearing and Review of Transcripts

As DiMA notes, proposed § 355.5(d) generally prohibits a witness, other than a party representative, from listening to or reviewing a transcript of another witness prior to

testifying. DiMA Comment at 17. DiMA does not object to this provision with respect to fact witnesses but recommends a carve-out 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.” *Id.* DiMA believes such a carve-out is particularly useful where the Judges contemplate the possibility of concurrent expert testimony.

The Judges believe that a carve-out for expert witnesses is reasonable and appropriate and therefore adopt it.

Scope of Mandatory Document Productions

DiMA notes that proposed § 355.3(b), which deals with the initial Administrative Assessment proceeding, is inconsistent with proposed § 355.3(c), which deals with proceedings to adjust the Administrative Assessment, in that the latter requires the MLC to produce a three-year projection of costs, collections, and contributions whereas the former does not. DiMA recommends that the Judges modify the proposed rules to add the three-year projection requirement, beginning as of the license availability date, to § 355.3(b) both for the sake of consistency between proceedings and to provide the Judges with “robust, relevant information that will be useful in making their ultimate determination.” DiMA Comment at 18. DiMA believes that “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.” *Id.* The Judges accept DiMA’s request as appropriate and reasonable and adopt the modification as suggested.

DiMA also notes that the Judges have included in §§ 355.3(b)(2)(iii) and 355.3(c)(2)(v) a new, specific category of documents for mandatory production by the MLC (*i.e.*, 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). *Id.* at 18-19. DiMA supports this inclusion “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).” *Id.* at 19.

NMPA, on the contrary, believes that the proposed provision seems unnecessary and potentially onerous. NMPA Comment at 10. NMPA believes that the proposed provision, which was not included in the Joint Comments of NMPA and DiMA, could be interpreted to require production of materials concerning virtually every contract of the MLC no matter how small. *Id.* NMPA also suggests that some of the proposed language concerning “overlapping economic interests” could be read to suggest an expansion of the Judges’ role beyond what is contemplated under the MMA. NMPA requests that the Judges modify the proposed language (*i.e.*, first clause of proposed §§ 355.3(b)(2)(iii) and (c)(2)(v) concerning the MLC’s choice of vendors) at the very least to include a materiality threshold of ten percent of the MLC’s annual budget. NMPA Comment at 10-11. As currently proposed, NMPA fears that the provisions could be read as requiring that the MLC would need to produce every contract, proposal and bid—no matter how trivial or immaterial. NMPA Comment at 10. NMPA maintains that such a requirement

would be enormously burdensome and could threaten timely completion of the proceeding. NMPA Comment at 10-11.

NMPA is also concerned about the second clause of proposed § 355.3(b)(2)(iii) and (c)(2)(v), which is addressed to “ensuring the absence of overlapping ownership or other overlapping economic interests...”. NMPA Comment at 11. NMPA believes that this proposed language could be interpreted as suggesting that the Judges “are somehow responsible for policing the policies and practices of the MLC with respect to conflicts of interest.” *Id.* NMPA believes that the policies and practices of the MLC are adequately addressed in the MMA (*e.g.*, requirements of an annual report detailing the MLC’s operations and expenditures and periodic audits to guard against “fraud, abuse, waste, and the unreasonable use of funds”). NMPA Comment at 11 and n.9. NMPA notes that the MMA does not confer authority or responsibility to the Judges to enforce these provisions. NMPA contends that the Judges’ authority under the MMA is limited to establishing the Administrative Assessment for the MLC in accordance with the criteria set forth in 17 U.S.C. 115(d)(7). NMPA Comment at 11. As a result, NMPA requests that the Judges eliminate the second clause of proposed § 355.3(b)(2)(iii) and (c)(2)(v).

As a preliminary matter, the Judges acknowledge NMPA’s concerns regarding the costs of gathering and providing information with respect to the MLC’s operations, but the Judges believe that the NMPA is reading the proposal’s requirement with respect to vendors too broadly. The Judges do not seek the type of granular information that NMPA’s broad reading of proposed § 355.3(b)(2)(iii) and (c)(2)(v) implies. Rather, the proposal should be read more literally as requiring the MLC to produce information about the *processes* it employs in requesting proposals, inviting bids, ranking and

selecting the proposals and bids of potential contracting and sub-contracting parties competitively (or by another method), and the *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. In other words, when the MLC is seeking to employ a vendor, will it submit requests for proposals and choose the lowest bid? Will the MLC create a list of preferred vendors and employ one or more of them on an as-needed basis? Or will the MLC use another process for conducting its operations? The Judges believe that such information is well within the Judges' authority to carry out its obligations under the MMA to determine whether the MLC's costs are reasonable. Additionally, even if such information will be contained in the MLC's annual report, that document will not necessarily be completed and available for the Judges to consider. Going forward, in future assessment adjustment proceedings, if the required information is fully set forth in the most recent annual report, the MLC could submit the relevant pages from that document and confirm they remain applicable, in an attempt to satisfy this required document production. Accordingly, the Judges decline to adopt NMPA's proposed revisions.

(e) Responses to Other Requests for Comments

DiMA correctly pointed out that the Judges erred in the numbering of the subparagraphs of the definition of Purchased Content Locker Service in § 385.2. DiMA Comment at 19-20. The Judges modify the definition to revert the numbering of this definition to the numbering in the extant definition.

DiMA also noted an inconsistency in the proposal regarding the duration of the first negotiation period (*i.e.*, 45 days in proposed § 355.2(g)(1)(i) versus 60 days in

proposed § 355.4(a)). DiMA supports a 60-day period.⁸ In its comment NMPA noted the same discrepancy, and speculated that it might relate to the Judges' belief that the negotiation period should commence after the parties to the proceeding have been determined, rather than at the commencement of the proceeding as NMPA and DiMA had recommend in their Joint Proposal. NMPA Comment at 7.

The Judges are sympathetic to DiMA's concerns that there be adequate time to negotiate and therefore expand the first negotiation period to 60 days, but the Judges note their desire that all parties have the opportunity to play a meaningful role in the negotiation process and therefore will direct the MLC and the DLC, if any, to monitor the list of parties filing petitions to participate⁹ and to include all petitioners in any ongoing negotiations.

DiMA notes what it believes is an internal inconsistency in the beginning of the first discovery period set forth in proposed § 355.2(g)(1)(iii) and the second discovery period set forth in proposed § 355.2(g)(1)(v) and the procedure for calculating due dates generally, set forth in proposed § 303.7(a). DiMA recommends a modification to § 355.2(g)(1)(iii). DiMA Comment at 21. The Judges believe that this recommendation is reasonable and appropriate and modify proposed § 355.2(g)(1) to enhance its clarity.

DiMA also highlights three parallel provisions in the proposed rules regarding the production of documents by the MLC concurrent with its opening submission in the initial administrative assessment proceeding (proposed § 355.3(b)(2)), in proceedings to

⁸ NMPA likewise noted the discrepancy but did not advocate for a particular duration for the negotiation period. *See* NMPA Comment at 7.

⁹ The Copyright Royalty Board's electronic filing and case management system, eCRB, maintains a list of participants for each proceeding. That list is updated automatically each time a petition to participate is accepted for filing.

adjust the assessment (proposed §355.3(c)(2)) and by the DLC and other participants concurrent with their responsive submissions (proposed §355.3(f)(2)). The first provision would require that the documents be filed with the Judges, while the second and third provision would not require such filing. DiMA believes that none of the provisions should require filing with the Judges and therefore recommends that the Judges modify proposed § 355.3(b)(2) to remove the filing requirement, which DiMA contends would help to promote efficiency in Administrative Assessment proceedings since the participants are likely to produce a broader scope of documents than the narrower subset of documents they ultimately will attach as exhibits to their submissions or use at the hearing. DiMA Comment at 21-22. In the interests of promoting such efficiency, the Judges accept DiMA’s recommendation and modify proposed § 355.3(b)(2) to mirror the related provisions that DiMA references.

DiMA also highlights two parallel provisions in proposed §§ 355.3(b)(2)(iii) and 355.3(c)(2)(v) regarding documents the MLC must provide concurrently with its opening submission in the initial Administrative Assessment proceeding and in proceedings to adjust the Administrative Assessment. DiMA opines that the language in the two sections should be identical but that it currently varies and that such variation creates ambiguity and inconsistency. DiMA believes that the applicable language in proposed § 355.3(c)(2)(v) is clearer and should apply to proposed § 355.3(b)(2)(iii) also. DiMA Comment at 22-23. The Judges agree and accept DiMA’s recommended modification.¹⁰

¹⁰ The revised provision states: “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”. Proposed § 355.3(b)(2)(iii).

DiMA also highlights a phrase in proposed § 355.3(c)(2)(i) relating to the MLC's obligation 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*". DiMA Comment at 23 (emphasis added by DiMA). DiMA asserts that the addition of the italicized phrase is inconsistent with an equivalent provision in proposed § 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 Collective Total Costs as that term is defined by the MMA. DiMA contends that there are no such other costs. As a result, DiMA recommends that the Judges strike the italicized language from proposed § 355.3(c)(2)(i). In the interests of avoiding ambiguity, the Judges accept the recommended change.

DiMA also highlights three sections of the rule proposal that address the mandatory written disclosures that the MLC, DLC, and other proceeding participants must provide concurrently with their submissions in the Administrative Assessment proceeding (*i.e.*, proposed §§ 355.3(b)(3), 355.3(c)(3), and 355.3(f)(3)). DiMA points out that although the substance of the written disclosures is generally consistent among the three subsections, the specific language of the proposed rules differs. DiMA recommends that the language of the three sections be harmonized and believes that the language of § 355.3(b)(3) is the clearest and therefore should be the model for each of the sections. DiMA Comment at 23-24. The Judges support the goal of harmonization of comparable provisions and therefore accept DiMA's recommended modifications.

DiMA also recommended that proposed § 355.3(e) addressing deposition notices be clarified by removing an ambiguity. DiMA Comment at 24. The Judges believe the

recommended modification is appropriate and reasonable and therefore accept DiMA's recommended modification.¹¹

DiMA also recommends that proposed § 350.1 be modified to clarify that Administrative Assessment proceedings are proceedings pursuant to 17 U.S.C. 801(b). The Judges believe that DiMA's recommended modification is appropriate and reasonable and therefore they accept DiMA's recommended modification.¹²

DiMA comments that the Judges declined in the proposal to adopt certain changes to extant § 385.21(d), which DiMA contends would mitigate the need for future updates to part 385 which DiMA believes will likely 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) (*e.g.*, while the per-play calculation is currently performed by the service providers, DiMA anticipates that that responsibility will shift to the MLC (based on data reported by the service providers) once the blanket license becomes available). DiMA Comment at 25. The Judges believe that the proposed changes to extant rule 385.21(d) are reasonable and appropriate and therefore adopt them.

DiMA also recommended certain technical updates to proposed § 303.5 and related provisions that the Judges believe are appropriate and therefore adopt them.

¹¹ The modified sentence states: "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." Proposed § 355.3(e).

¹² The modified sentence states: "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)." Proposed § 350.1.

NMPA correctly noted that the Judges proposed, incorrectly, to omit 385.31(d) regarding “unauthorized use.” NMPA Comment at 17. This provision will be unchanged from the extant provision.

NMPA also cautioned the Judges that an observation that the Judges made in the notice of proposed rulemaking regarding retaining the extant assessment if the Judges found that the MLC’s proposal did not fulfill the requirements of 17 U.S.C. 115(d)(7) “would seem to be inconsistent with the responsibilities entrusted to the [Judges] by Congress in relation to the administrative assessment.” NMPA Comment at 3. NMPA states that the Judges must establish the Administrative Assessment in an amount that meets the requirements set forth in 17 U.S.C. 115(d)(7). According to NMPA, “[i]f the correct amount happens to be the extant assessment, then retaining that assessment would be appropriate if it fulfills the requisite statutory criteria—but if it does not fulfill such criteria, then retaining the extant amount would be erroneous.” NMPA Comment at 4. The Judges recognize that no matter what amount they choose as the Administrative Assessment, that choice must be consistent with the Judges’ obligations under the Copyright Act as amended by the MMA and supported by evidence in the record.

In the Notice, the Judges also asked whether the DLC should be required (rather than permitted) to submit and support a counterproposal. 84 FR at 9057. NMPA believes that such a provision “is not only unnecessary, but would be counterproductive.” NMPA Comment at 5. NMPA contends that the DLC should comment on and respond to the MLC’s proposal rather than submit a wholly separate one. *Id.* NMPA states that under the MMA, it is the MLC and not the DLC or any other party that is charged with the responsibility of ensuring that it fulfills its statutory duties. *Id.* NMPA contends that

“any legitimate proposal has to be based on the needs and budget of the MLC *as reasonably determined by the MLC* and supported by evidence offered in the administrative assessment proceeding.” NMPA Comment at 6, emphasis by NMPA.¹³

As a result, NMPA supports proposed § 355.3(f) in its current form, which, according to NMPA, reflects the approach in the Joint Comments of NMPA and DiMA by requiring the DLC and other parties to respond to the MLC’s proposal rather than submit competing proposals. NMPA Comment at 6. NMPA requests, however, that the Judges modify the proposed definition of “Discoverable” in proposed § 355.7 “to ensure that it permits discovery of information relevant to both a proposal *or response thereto*.” NMPA Comment at 6, emphasis original. NMPA also asks that the Judges eliminate the restriction in proposed § 355.3(g) that limits the scope of discovery taken by the MLC to discovery regarding counterproposals. NMPA states the “[i]n order to reply to concerns raised by the DLC or others, the MLC must be permitted to take discovery on their *responsive submissions*, regardless of the precise nature or characterization of those responses.” NMPA Comment at 6, emphasis original.

The Judges believe NMPA’s proposed modifications are reasonable and appropriate and therefore adopt them. However, although the NMPA correctly notes that it is the MLC that has a *responsibility* under the MMA to identify its “needs and budget,” the DLC and the users of the musical works have a *commensurate* obligation under the MMA to bear the costs associated with operating the MLC. Nothing in the rules adopted

¹³ The NMPA asserts that the Administrative Assessment proceeding is fundamentally different from a royalty rate proceeding, in which the Judges typically consider competing proposals to determine the rate that best reflects the probable outcome of market-based negotiations. NMPA states that the Administrative Assessment is not meant to emulate market negotiations or choose between competing rates but is instead meant to capture the actual costs of operating the MLC. NMPA Comment at n.5.

herein prohibits the DLC (or any other participant that would bear any or all of the costs assessed) from proposing in its (or their) submissions, *on an itemized basis corresponding with the items in the MLC's proposal*, a rejection of, or substitution for, one or more of the provisions in the MLC proposal.

NMPA also suggests that the Judges add the word “relevant” to the current definitions of “end user” and “stream” in § 385.2 to avoid confusion regarding the usage of those terms in the regulation versus how those terms are used in the MMA, which, according to NMPA are used differently and in a less specific manner in the MMA than they are in part 385. NMPA Comment at 15-16.¹⁴ The Judges believe that the current proposed regulations are sufficiently clear and therefore decline to adopt NMPA’s suggested modifications to the definitions of end user and stream.

2. SoundExchange’s Comment¹⁵

SoundExchange generally supports the proposed rules as they relate to pre-1972 recordings under secs. 112 and 114 of the Copyright Act and believes that the Judges should adopt these provisions substantially as proposed. SoundExchange Comment at 2.¹⁶ Most of SoundExchange’s comment addressed the definition of copyright owner and the SDARS Pre-1972 royalty deduction, which are discussed in turn below.¹⁷

¹⁴ NMPA also notes that the Judges declined to add a sentence to the definition of “eligible interactive stream” that states: “An Eligible Interactive Stream is a digital phonorecord delivery.” NMPA Comment at 16. NMPA defers to the Judges’ conclusion that such an addition is not necessary or helpful but notes that “NMPA and DiMA understand ‘Eligible Interactive Streams’ to be digital phonorecord deliveries as per the MMA definition, and therefore subject to licensing under section 115.” *Id.*

¹⁵ SoundExchange did not address aspects of the proposed rules relating to the sec. 115 compulsory license. SoundExchange Comment at n.1.

¹⁶ SoundExchange also encourages the Judges to approve its pending proposal, unrelated to the current rulemaking, to grant SoundExchange the authority to use proxy data to distribute statutory royalties in cases in which a licensee never provides a usable report of use. SoundExchange Comment at n.2.

¹⁷ SoundExchange also recommended two technical changes to the proposed rules, both of which the Judges adopt as recommended.

(a) Definition of Copyright Owner

With respect to the definition of copyright owner in the proposed rules, SoundExchange addresses a concern that the Judges raised about potential unintended consequences that could occur by including “rights owner” as defined in sec. 1401(1)(2) of the Copyright Act in the definition of “copyright owners.” SoundExchange states that sec. 1401 is “quite clear about what rights do, and do not, come with being a rights owner under sec. 1401(1)(2).” Moreover, SoundExchange “does not believe that anyone could reasonably see the references to both copyright owners and rights owners within [the proposed definitions] and infer that those two concepts are redundant and mean the same thing for all purposes under the Copyright Act.” SoundExchange Comment at 4. Nevertheless, SoundExchange suggests a proposed modification to the definition of Copyright Owners in § 370.1 to distinguish between copyright owners under 17 U.S.C. 101 and rights owners under 17 U.S.C. 1401(1)(2).¹⁸ The Judges believe the modification SoundExchange suggests addresses the concern of unintended consequences or confusion over the use of the term copyright owners to refer to copyright owners and rights owners. Therefore the Judges adopt the suggested modification.

(b) SDARS Pre-1972 Deduction

SoundExchange also addressed the proposed amendments to part 382, subpart C, concerning adjustment of statutory royalty payment for SDARS to reflect use of sound recordings fixed before February 15, 1972, which SoundExchange contended in its

¹⁸ As an alternative that SoundExchange sees as less satisfactory, SoundExchange suggests that the Judges could adopt a new term that is neither copyright owner nor rights owner to refer to a group that includes both. The Judges agree that such an alternative would be less satisfaction than the first alternative that SoundExchange proposes.

comment to the NOI “have become inoperative by their terms.” 84 FR at 9060, quoting SoundExchange Comment on Notice of Inquiry at 6. Although the Judges proposed the amendments as SoundExchange had recommended, the Judges requested comment on the effect, if any, the proposed modifications would have on computation of royalties when an SDARS plays pre-1972 sound recordings that have fallen into the public domain. 84 FR at 9060. SoundExchange acknowledges that beginning in 2022, there will be sound recordings in the public domain. Nevertheless, SoundExchange believes that because these sound recordings will be roughly a century or more old when that occurs that the possibility of Sirius XM using public domain recordings seems more theoretical than real. SoundExchange Comment at 6. SoundExchange tried to identify such recordings used by Sirius XM in a recent month and found that of the million sound recording plays during the month, only a “handful of plays” seemed potentially to involve recordings originally released before 1923. *Id.* at 8. By contrast, the extant pre-1972 deduction addressed 10-15% of Sirius XM’s actual usage when the Judges adopted it in 2013. SoundExchange Comment at 9, citing *SDARS II*, 78 FR 23054, 23071 (Apr. 17, 2013). SoundExchange notes that the pre-1972 deduction is inoperative today and will have no material effect during the current rate period. SoundExchange Comment at 9. Moreover, SoundExchange is concerned that Sirius XM could misapply any permissible deduction and that the extant regulations could be misread as allowing a royalty deduction for recordings “fixed before February 15, 1972” when no such deduction is available through 2021, and in 2022 and 2023 a deduction would only apply to original recordings published before 1923. *Id.*

The Judges believe that SoundExchange has adequately addressed concerns over an SDARS use of recordings that will enter the public domain and therefore adopt the regulations related to pre-1972 sound recordings as proposed.

(c) Proposed Technical Corrections

SoundExchange also recommended two technical corrections, both of which the Judges find reasonable and appropriate and adopt. In particular, SoundExchange correctly noted that the authority citation for part 370 should reference sec. 114(f)(3)(A) rather than 114(f)(4)(A) to reflect the renumbering of the paragraphs of sec. 114(f) in the MMA. SoundExchange also noted that the definition of “Copyright Owner” in § 383.2(b) should refer to a copyright owner *or* (as opposed to *and* in the current proposal) a rights owner under sec. 1401(1)(2). SoundExchange Comment at 10.

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 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).

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 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 set forth in subchapter B or 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 5000 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 5000 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 2500 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.* 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 Web site.

(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. 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 Web site.

(d) *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.

(e) *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 III.

(f) *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.

(g) *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.

(h) *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 Web site (www.loc.gov/crb) appropriate guidance regarding naming protocols for eCRB filers.

(i) *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.

(j) *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.

(k) *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.

(1) *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) 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.

(m) *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(1)(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 - 350.4 [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 - 350.4 [Reserved]

3. 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 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.

§ 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 designated by the Register of Copyrights in accordance with 17 U.S.C. 115(d)(5) 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) *Proceeding Schedule.* (1) The Copyright Royalty Judges shall establish a schedule for the proceeding, which shall include dates for:

(i) A first negotiation period of 60 days, beginning on the date of commencement of the proceeding;

(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 60 days, beginning on the day after the date the Mechanical Licensing Collective files 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 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 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 first 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 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;

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

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

(d) *First discovery period.* (1) During the first discovery period, the Digital Licensee Coordinator 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, 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 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 may give notice of and take up to five depositions 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 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, any 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, 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, 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 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 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, describe the subject(s) of 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.

(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 Negotiation periods.

(a) *First negotiation period.* The Mechanical Licensing Collective and the Digital Licensee Coordinator shall, and other participants may, participate in good faith in a first negotiation period in an attempt to reach an agreement with respect to any issues in dispute regarding the Administrative Assessment, commencing on the day of commencement under § 355.2(a) or (b), as applicable, and lasting 60 days. The Mechanical Licensing Collective shall advise the other participants, via email, about the

negotiations and invite them to participate, as those participants appear in the participant list in eCRB.

(b) *Second negotiation period.* The Mechanical Licensing Collective and the Digital Licensee Coordinator shall, and all other participants may, participate in good faith in a second negotiation period commencing on a date set by the Copyright Royalty Judges and lasting 14 days.

(c) *Written notification regarding result of negotiations.* By the close of a negotiation period, the Mechanical Licensing Collective and the Digital Licensee Coordinator shall file in eCRB a joint written notification indicating

(1) Whether they have reached an agreement, in whole or in part, with respect to issues in dispute regarding the Administrative Assessment,

(2) The details of any agreement,

(3) A description of any issues as to which they have not reached agreement, and

(4) A list of other participants that intend to join in any proposed settlement resulting from the agreement of the Mechanical Licensing Collective and the Digital Licensee Coordinator. Participants, other than the settling parties, may, within five days following the filing of a proposed settlement, file in eCRB comments (not to exceed ten pages and not to exceed 2500 words exclusive of cover pages, tables of contents, tables of authorities, signature blocks, exhibits, and proof of delivery) about the proposed settlement. The settling parties may, within five days following the comment deadline, file in eCRB a joint response to any comments.

§ 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.

(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 procedure the Judges describe in a prehearing Scheduling Order, and after consideration of the positions of counsel for the participants, require expert witnesses to be examined concurrently by the Judges and/or the attorneys. If the Judges so order, the expert witnesses may then 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. The concurrent examination procedure may be utilized in conjunction with, or in lieu of, traditional direct, cross, redirect and (with leave of the Judges) further direct or cross examination. In the absence of any order directing the use of concurrent examination, only the traditional form of examination described above shall be utilized. 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 an expert witness or 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.

(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 cause their determination to be published 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 pursuant to § 355.4. Notwithstanding the 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:

Digital Licensee Coordinator shall mean the entity the Register of Copyrights designates as the Digital Licensee Coordinator pursuant to 17 U.S.C. 115(d)(5)(B)(iii), or if the Register makes no such designation, 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.

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

(1) Nonprivileged;

(2) Relevant to consideration of whether a proposal or response thereto 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

4. The authority citation for part 370 is revised to read as follows:

Authority: 17 U.S.C. 112(e)(4), 114(f)(3)(A).

5. In § 370.1:

- a. Remove the paragraph designations;
- b. Remove the word "A" at the beginning of each definition;
- c. Arrange 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 under 17 U.S.C. 101, 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]

6. 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**

7. The authority citation for part 380 continues to read:

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

8. 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 revisions 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.

* * * * *

9. In § 380.21:

- a. In the definition of “ATH”, remove “United States copyright law” and add in its place “title 17, United States Code”; and
- 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).

* * * * *

10. 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

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

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

12. 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]

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

§ 382.23 [Amended]

14. 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 EMPHEMERAL RECORDINGS BY CERTAIN
NEW SUBSCRIPTION SERVICES**

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

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

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

§ 383.2 Definitions.

* * * * *

(b) *Copyright Owner* means a sound recording copyright owner, or 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**

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

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

18. 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]

19. 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

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

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

21. 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 Delivery” 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 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.

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

(i) 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

(ii) 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.

(2) [Reserved]

* * * * *

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]

22. 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]

23. 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.

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

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

25. 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.

* * * * *

26. 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.

27. 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.

28. 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):

- i. Remove “of the Licensee”;
- ii. Remove “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),”; and
- iii. Revise the second sentence.

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. *

* *

* * * * *

(d) * * * Without limitation, statements of account shall set forth each step of the calculations with sufficient information to allow the assessment of the accuracy and manner in which the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a royalty floor pursuant to § 385.22 does or does not apply) were determined and, for each Offering reported, also indicate the type of Licensed Activity involved and the number of Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

§ 385.22 [Amended]

29. 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”.

30. 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.

31. In § 385.31, revise paragraphs (a) through (c) 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: June 10, 2019.

Jesse M. Feder,
Chief United States Copyright Royalty Judge.

Approved by:

Carla Hayden,
Librarian of Congress.

[FR Doc. 2019-13292 Filed: 7/5/2019 8:45 am; Publication Date: 7/8/2019]