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Copyright Royalty Board

[Docket No 23-CRB-0012-WR (2026 – 2030)]

Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web VI)

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Notice announcing commencement of proceeding with request for petitions to participate.

SUMMARY: The Copyright Royalty Judges (Judges) announce commencement of a proceeding to determine reasonable rates and terms for two statutory licenses permitting the digital performance of sound recordings over the internet and the making of ephemeral recordings to facilitate those performances for the period beginning January 1, 2026, and ending December 31, 2030. The Judges also announce the date by which a party wishing to participate in the rate determination proceeding must file its Petition to Participate and pay the accompanying \$150 filing fee.

DATES: Petitions to Participate and the filing fee are due no later than [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The petition to participate form is available online in eCRB, the Copyright Royalty Board's online electronic filing application, at <https://app.crb.gov/>.

Instructions: The petition to participate process has been simplified. Interested parties file a petition to participate by completing and filing the petition to participate form in eCRB and paying the fee in eCRB. Do not upload a petition to participate document.

Docket: For access to the docket, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 23-CRB-0012-WR (2026 – 2030).

FOR FURTHER INFORMATION CONTACT: Anita Brown, CRB Program

Specialist, at (202) 707-7658 or crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

Under the Copyright Act, the Copyright Royalty Judges (Judges) must commence a proceeding every five years to determine reasonable rates and terms to license the digital transmission over the internet of sound recordings and the making of ephemeral recordings to facilitate those transmissions. *See* 17 U.S.C. 112 (e), 114(d)(2), 803(b)(1)(A)(i)(III), 804(b)(3)(A), 37 CFR 380. This notice commences the rate determination proceeding for the license period 2026-2030.

Scope of Proceeding

In addition to all other submissions and arguments required by the Act and the applicable regulations, and in addition to any other submissions or arguments that the Participants choose to make, there is an interest among certain Judges in receiving evidence, testimony, and argument relating to the allocation of the royalty payments required by the Judges' determination in this proceeding between the section 112 ephemeral recordings royalties and the section 114 sound recording royalties.¹

Accordingly, the Judges invite Participants, within their written direct statements, written rebuttal statements, proposed findings of fact, conclusions of law and briefing, through their witnesses and attorneys, as appropriate, to consider addressing the

¹ Nothing set forth in this section of the Notice of Commencement should be construed as a statement by the Judges as to how they will ultimately rule as to any evidence or testimony proffered with regard to, *inter alia*, admissibility, competency, relevancy, probative value or weight or dispositive effect, as to any issue, or whether they will or will not ultimately consider, accept, or adopt any argument made in response to this section. Additionally, nothing in this section should be construed as an indication that the Judges will or will not ultimately consider any of the issues set forth herein or addressed by the Participants in response to this invitation in any determination rendered by them. Further, by soliciting information regarding these issues, the Judges are not indicating that they have reached any preliminary decisions as to any of these issues.

Further, to avoid doubt, the interest among the Judges as expressed herein does not necessarily relate to any other statutory licenses.

following questions.

Question #1

Does the ephemeral license created by section 112 have economic value independent of any economic value in the digital public performance of sound recording license (“sound recording license”) created by section 114 and, reciprocally, does the sound recording license created by section 114 have economic value independent of any economic value in the ephemeral license created by section 112?

Regarding this Question #1, the Judges note the following language in the Web V

Determination:

SoundExchange and the Services are generally on the same page regarding ephemeral recordings, *except as to the question whether the right to make ephemeral recordings has independent economic value. Compare SX PFFCL ¶ 1570 (and sources cited therein) (“ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot, as a practical matter, properly function without those copies”) with Services RPFCL ¶ 1570 (and sources cited therein) (“While the Services do not dispute that ephemeral recording right is frequently needed, it does not have independent economic value.”).*

Web V Final Determination, 86 FR 59542, 59584 n. 351 (Oct. 27, 2021), *aff’d. National Religious Broadcasters Noncommercial License Committee v. Copyright Royalty Bd.*, 77 F.4th 949 (D.C. Cir. 2023) (emphasis added).

Among the Judges, there is an interest in obtaining the Participants’ positions on this Question #1 in the context of the *economic* characterization of the relationship between the section 112 ephemeral license and the section 114 sound recording license. In particular, the Judges inquire whether the parties identify these two licenses as perfect complements.²

² “Perfect complements” are goods that are always consumed together in fixed proportions. H. Varian, INTERMEDIATE MICROECONOMICS at 40 (8th ed. 2010). Thus, a purchaser of perfectly complementary goods “wants to consume the goods in the same ratio *regardless of their relative price.*” P. Krugman & R. Wells, MICROECONOMICS at 306 (3d ed. 2013) (emphasis added). (Each noninteractive service or New Subscription Service (“NSS”) requires both the section 112 ephemeral license and the section 112 sound recording license in order to transmit any sound recording, thus making the fixed proportion (ratio) equal to 1:1 for these licenses.) The irrelevancy of “relative price” between these perfect complements referenced by Krugman & Wells underscores the indeterminacy of the royalties attributable to each license which underlies the Judges’ present inquiries.

The Web V Determination indicates that participants in that proceeding were cognizant of the irrelevancy of the “relative price” (*i.e.*, the royalty) for these two licenses, and thus their perfect complementarity:

As to the specific allocation of royalties between the performance and ephemeral recording rights, *SoundExchange* notes that *this allocation has no effect on the Services*. See SX PFFCL ¶ 1574. ... “[T]he willing buyer” (*i.e.*, the music service) “is disinterested with respect to that allocation ...”

Web V Determination, 86 FR 59584 (emphasis added).

Accordingly, the Judges invite the Participants to address this Question #1 in their proffered evidence, testimony, and/or arguments.

Question #2

Are agreements in the interactive marketplace or other unregulated markets informative (and, if so, to what extent) as to the allocation of royalties between the section 112 ephemeral license and the section 114 sound recording license?

Regarding this Question #2, the Judges are mindful of the absence of any statutory requirement in unregulated markets that specifies percentages of the sound recording royalties to be distributed to sound recording artists, non-featured vocalists and musicians, and (if Letters of Direction are issued) to producers, mixers and sound engineers.

In prior proceedings, evidence was proffered regarding such agreements. The Judges take note of the following portion of the Web V Determination:

“Most of these agreements do not set a distinct rate for those ephemeral copies, incorporating them instead into the overall rate that the [music services] pay[] for the combined ephemeral copy rights and performance rights.” *Id.* at 11-12. Dr. Ford also testified that to the extent marketplace agreements do set a royalty rate for ephemeral recordings they generally express that rate as a percentage of an overall bundled rate for both performances and ephemerals. See Ford Des. WDT at 12-14.

SoundExchange also offers several direct licenses in the record of this proceeding as evidence that marketplace agreements do not set distinct rates (as distinguished from bundled rates) for ephemeral recordings. See, *e.g.*, Trial Ex. 4035 at 11-12, 16-19 (2015 Agreement ...); Trial Ex. 5037 at 3-4, 5-9 (2017 Agreement ...)

Web V Determination, 86 FR 59584.

Accordingly, the Judges invite the Participants to address this Question #2 in their proffered evidence, testimony, and/or arguments.

Question #3

Can and should the Judges rely on agreements containing provisions regarding splits of royalties between the section 112 ephemeral license and the section 114 sound recording license if the agreements described by witnesses or referenced in other documents are not proffered as evidence in this proceeding?

This question is of interest because, in Web V, the Judges received evidence and testimony that such an agreement existed as between the sound recording companies and the performing artists' representatives, but that agreement was not proffered and thus not record evidence. Specifically on this issue, the Web V Determination describes the testimony of a SoundExchange witness:

[T]he SoundExchange board of directors, which is comprised of record company and performing artist representatives “adopted a resolution reflecting agreement that 5% of the royalties for the bundle of rights should be attributable to the Section 112(e) ephemeral royalties, with the rest being allocated to the Section 114 performance royalties.” Bender WDT ¶ 56. SoundExchange avers that “[a]s a result, a 95%-5% split ‘credibly represents the result that would in fact obtain in a hypothetical marketplace negotiation between a willing buyer and the interested willing sellers under the relevant constraints.’”

Web V Determination, 86 FR 59584.

However, the Judges noted in the Web V Determination that “[t]he SoundExchange Board resolution reflecting the agreement between artists and copyright owners *is not in the record* [and] testimony concerning the agreement, therefore, is hearsay, but the Judges exercise their discretion under 37 CFR 351.10(a) to admit and consider this hearsay testimony.” Web V Determination, 86 FR 59584 n.352.

This Question #3 raises the following subsidiary questions:

Is an internal resolution by SoundExchange an “agreement”?

If the resolution references an agreement, should both the resolution and the agreement, if memorialized in writing, be proffered as evidence?

Is an agreement made by members of the SoundExchange Board of Directors a marketplace agreement between willing parties?

Is such an agreement reflective of a process in which the parties to the agreement have bargaining power sufficient to generate an agreement reflective of effective competition?

Do the Board members voting on the agreement and resolution on behalf of the sound recording companies have a sufficient number of votes to approve or defeat the agreement and resolution if they all voted identically?

Do the Board members voting on the agreement and resolution on behalf of the artists and others entitled to a share of the section 114 royalties have a sufficient number of votes to approve or defeat the resolution if they all voted identically?

Should the Judges exercise their discretion to admit hearsay testimony regarding such agreements and resolutions, or should the Judges require production of the agreements and resolutions?

Does the Best Evidence Rule require production of the actual agreements and resolutions described above?

Accordingly, the Judges invite the Participants to address this Question #3 in their proffered evidence, testimony, and/or arguments.

Question #4

Does the marketplace evidence indicate how the Judges should consider allocation of royalties as between the section 112 ephemeral license and the section 114 sound recording license, including allocations to sound recording artists, non-featured vocalists and musicians, or to producers, mixers and sound engineers, pursuant to section 114? Among the Judges, there is a concern whether – with section 114, unlike section 112, providing for an allocation of 50% of the section 114 royalties to artists (and others, in certain circumstances), as described above -- evidence and the law may lead the Judges to apportion royalties as between the section 112 and 114 licenses in a manner that

effectuates the section 114-mandated split of royalties in a manner that is legally and economically appropriate.

Accordingly, the Judges invite the Participants to address this Question #4 in their proffered evidence, testimony, and/or arguments.

Petitions to Participate

Parties with a significant interest in the outcome of the rate proceeding must provide the information required by § 351.1(b) of the Judges' regulations by completing and filing the Petition to Participate form in eCRB. Parties must pay the \$150 filing fee when filing each Petition to Participate form. Parties must use the form in eCRB instead of uploading a document and must comply with the requirements of § 351.1(b)(1) of the Copyright Royalty Board's regulations. 37 CFR 351.1(b)(1).

Only attorneys admitted to the bar in one or more states or the District of Columbia who are members in good standing will be allowed to represent parties before the Judges. Only individuals may represent themselves and appear without legal counsel. 37 CFR 303.2.

The Judges will address scheduling and further procedural matters after receiving petitions to participate.

Dated December 20, 2023.

David P. Shaw,
Chief Copyright Royalty Judge.

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