CC–5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610, Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov/,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''— as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)— including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names. As a matter of discretion, the Commission tries to remove individual's home contact information from comments before placing them on *www.regulations.gov.*

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comments to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *www.regulations.gov*—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before May 13, 2019. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2019–04466 Filed 3–12–19; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–105600–18]

RIN 1545–BO62

Guidance Related to the Foreign Tax Credit, Including Guidance Implementing Changes Made by the Tax Cuts and Jobs Act; Cancellation of Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed regulations concerning guidance related to the Foreign Tax Credit, including guidance implementing changes made by the Tax Cuts and Jobs Act.

DATES: The public hearing, originally scheduled for Thursday, March 14, 2019 at 10:00 a.m. is cancelled.

ADDRESSES: The cancelled public hearing was originally scheduled to be held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Jeffrey P. Cowan, Office of Associate Chief Counsel (International) at (202) 317–4924 (not a toll-free number); concerning information on the cancelled hearing Regina Johnson at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The notice of proposed rulemaking appeared in the **Federal Register** on Friday, December 7, 2018 (83 FR 63200). The notice of hearing appeared in the **Federal Register** on Friday, March 1, 2018 (84 FR 6988). The subject of the public hearing concerned proposed regulations that provide guidance related to the Foreign Tax Credit, including guidance implementing changes made by the Tax Cuts and Jobs Act. The public comment period for these regulations ended on Tuesday, February 5, 2019.

The notice of hearing instructed those interested in testifying at the public hearing to submit an outline of the topics to be discussed. The outline of topics to be discussed was due by Friday, March 8, 2019. As of March 8, 2019, no one has requested to speak. Therefore, the public hearing scheduled for Thursday, March 14, 2019 at 10:00 a.m. is cancelled.

Martin V. Franks,

Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2019–04707 Filed 3–11–19; 11:15 am]

BILLING CODE 4830–01–P

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: Proposed rule.

SUMMARY: The Copyright Royalty Judges (Judges) propose 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 propose amendments to extant rules as required by the MMA. The Judges solicit comments on the proposed rules.

DATES: Comments are due no later than April 12, 2019.

ADDRESSES: You may submit comments and proposals, identified by docket

number 18–CRB–0012–RM, by any of the following methods:

CRB's electronic filing application: Submit comments and proposals online in eCRB at *https://app.crb.gov/.*

U.S. mail: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977; or

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

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

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

Instructions: Unless submitting online, commenters must submit an original, two paper copies, and an electronic version on a CD. All submissions must include a reference to the CRB and this docket number. All submissions will be posted without change to eCRB at *https://app.crb.gov/* including any personal information provided.

Docket: For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/* and search for docket number 18–CRB–0012–RM.

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

SUPPLEMENTARY INFORMATION: On November 5, 2018, the Copyright Royalty Judges (Judges) published a notification of inquiry (NOI) seeking recommendations regarding necessary and appropriate modifications and amendments that must or should be made to agency regulations following enactment of The Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Public Law 115–264, 132 Stat. 3676 (Oct. 11, 2018) (MMA), a new law regarding the music industry. *See* 83 FR 55334 (Nov. 5, 2018). In the NOI, the Judges requested input from persons and entities who reasonably believe they have a significant interest in the content of necessary or appropriate changes to the regulations in chapter III, title 37, Code of Federal Regulations (CFR) as a result of Congress's passage of the MMA.

The Judges requested input relating to interpretation and application of the changes the MMA makes to chapter 8 of the Copyright Act. Specifically, but not exclusively, the Judges requested comments regarding the following questions:

(1) What regulations in chapter III, title 37 CFR, if any, *must* be changed and how?

(2) What regulations in chapter III, title 37 CFR, if any, *should* be changed and how?

(3) What effect, if any, does the new language in subparagraph 8 of sec. 801(b) have on the Judges' ability to make necessary procedural or evidentiary rulings under secs. 801, 803, 804, and/or 805 of the Copyright Act, and, in particular, does the new language have the effect that the Judges are now required to adopt new regulations, notwithstanding their general authority under sec. 801(c)?

(4) If the new language in subparagraph 8 of sec. 801(b) affects the Judges' authority under other subsections of sec. 801, how does it change that authority or the procedures to exercise that authority?

The Judges also requested proposed new or modified regulatory language that may be necessary to fully implement the MMA. 83 FR at 55335.

The Judges received five comments in response to the NOI: A joint comment from The National Music Publishers Association (NMPA) and the Digital Music Association (DiMA) and single comments from SoundExchange, Inc. (SoundExchange), Iconic Artists LLC (Iconic),[1] Seattle Theatre Group (STG),[2] and George Johnson.[3]

NMPA and DiMA filed proposed regulatory language that would create a new part 355 of title 37 of the CFR focusing on procedural practices. They also recommended conforming amendments to parts 350 and 385. SoundExchange submitted comments regarding changes the MMA made that relate to the treatment of sound recordings fixed before February 15, 1972, under the secs. 112 and 114 statutory licenses and proposed changes to part 382.

In response to the comments and consistent with the Judges' obligations under the MMA, the Judges now publish proposed rules to implement the provisions of the MMA that affect the Judges' program.

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).

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).[4] The Judges may also

[1] Mr. Michael Flynn, Executive Director of Iconic, submitted comments focusing on security, fiduciary protections, and oversight of the operations of the MLC. Mr. Flynn made eleven suggestions regarding provisions in the MMA and about music licensing more generally (*e.g.,* fractional licenses, the need for an independent auditor to oversee digital service providers, the need for sound recording meta data, the structure of the MLC, the authority of MLC board members, desirability of a third-party fact checking service to aid the MLC). None of the Iconic suggestions is pertinent to the issues on which the Judges sought comments in the NOI or relevant to the task of the Judges (*i.e.,* to bring the Judges' rules into compliance with the MMA).

[2] STG submitted its comment through Josh Labelle, its Executive Director. Mr. Labelle's comment focuses on live performances of musical works and raises concerns about the amount of money artists are paid for working with Live Nation or AEG versus non-profit presenters. He also contends that organizations should have the right to audit organizations like ASCAP and BMI. Finally, he questions why STG should be required to pay ASCAP, BMI, and SESAC for every performance regardless of whether the artist has a contract with all three of these organizations. The Judges take no position on any of these issues, but note that each is outside the scope of the NOI and the task of the Judges.

[3] Mr. Johnson recommends that the Judges ''abolish the 'limited download' found in [37 CFR 385.10] and throughout subparts B and C.'' Johnson Comment at 2. The scope of the NOI is limited to changes that the Judges must or should appropriately make to their regulations to implement the provisions of the MMA. The Judges find no provision in the MMA that would authorize the Judges to abolish the limited download as Mr. Johnson recommends. Therefore, the Judges find that his comment is beyond the scope of the NOI and not relevant to the task of the Judges.

[4] 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).

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 MMA, to amend part 385 of title 37, CFR, ''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 addition, 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).

The MMA also adds a new section 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).

A. Discussion of Comments

1. NMPA/DiMA Joint Comments

NMPA and DiMA submitted joint comments proposing regulatory changes in three areas: A new part 355 to include procedures for MLC administrative assessment proceedings under sec. 115(d) (Proposed Procedures), modifications to part 385, the regulations relating to the phonorecords mechanical license, and minor changes to the Judges' general administrative provisions.

a. Proposed Regulations for MLC Administrative Assessment Proceedings

In its joint comment, NMPA/DiMA noted that

> the MMA establishes a new, streamlined procedure before the CRJs to establish an administrative assessment to be paid by digital music providers and significant nonblanket licensees in order to fund the MLC. Under the statute, administrative assessment proceedings, which are wholly separate from royalty ratesetting proceedings, are to be conducted under simplified, abbreviated procedures.

NMPA/DiMA Comment at 2.

According to NMPA/DiMA, the MMA

> expressly provides that the procedures set forth in Section 115(d) [of the Copyright Act] are to apply to administrative assessment proceedings, rather than the more complex procedures for royalty ratesetting and distribution proceedings set forth in Sections 801, 803, 804 and 805. Accordingly, the CRJs should establish new procedures and practices to govern administrative assessment proceedings that conform to the framework set forth in the MMA.

Id. at 3, (footnote omitted). To that end, NMPA and DiMA proposed rules to govern administrative assessment proceedings that purport to track the requirements of the MMA, which, they assert, are efficient and fair ''while also avoiding unwarranted costs for the parties or undue administrative burden on the CRJs.'' *Id.*

According to NMPA/DiMA, the MMA requires the Judges to conduct administrative assessment proceedings under sec. 115(d) and not under the procedures described in secs. 801, 803, 804, or 805 of the Copyright Act. *Id.* at 4.

NMPA/DiMA state:

> Section 801(c), [provides] that the CRJs ''may make any necessary procedural or evidentiary rulings in any proceeding under this chapter [8] and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings. . . .'' By its terms, this provision applies to proceedings ''under'' chapter 8 that are ''commenced'' under chapter 8, while administrative assessment proceedings are commenced and conducted under chapter 1. Thus, while Section 801(c) provides the CRJs with authority to make procedural and evidentiary rulings in proceedings commenced and conducted under Section 801 *et seq.,* that authority does not extend to the administrative assessment proceedings.

NMPA/DiMA Comment at 6 (footnotes omitted).

NMPA/DiMA note, however, that the MMA affords the Judges broad authority to establish rules ''to govern the conduct of proceedings under [sec. 115(d)(7)]'' to set the administrative assessment. They opine that ''[a]ny such regulations can and should include rules to govern decisions on procedural and evidentiary matters.'' *Id.* at 7. NMPA/DiMA included, among other things, the substance of sec. 801(c) of the Copyright Act in their proposed regulatory language.

With respect to the specific regulations that the Judges should adopt to govern administrative assessment proceedings, NMPA/DiMA noted that the MMA

> requires the [Judges] to establish (1) ''a schedule for submission by the parties of information that may be relevant to establishing the administrative assessment, including actual and anticipated collective total costs of the mechanical licensing collective, actual and anticipated collections from digital music providers and significant nonblanket licensees, and documentation of voluntary contributions''; and (2) a schedule for further proceedings, which shall include a hearing, as the [Judges] determine appropriate.

NMPA/DiMA Comment at 11.

NMPA/DiMA proposed a set of procedures to effectuate the administrative assessment proceedings, modeled in some respects on summary judgment proceedings and on certain aspects of the Judges' procedures in other types of proceedings, albeit in a more compressed form. Specifically, NMPA/DiMA proposed to add a new part 355 to title 37, chapter III, subchapter B of the CFR (Proposed Procedures). NMPA/DiMA intended that the Proposed Procedures would apply solely to administrative assessment proceedings under sec. 115(d).

Under the Proposed Procedures, the initial administrative assessment proceeding would commence with the Judges' publication of a notice in the **Federal Register**. Subsequent proceedings to adjust the administrative assessment could be triggered by a petition of the MLC, the digital licensee coordinator (DLC), or another interested party. With respect to the process for the filing and acceptance of petitions, the Proposed Procedures would track the statutory requirements. NMPA/DiMA Comment at 11.

The MMA directs the Judges to set a schedule for administrative assessment proceedings and for a hearing and authorizes the Judges to ''adopt regulations to govern the conduct of [such] proceedings.'' 17 U.S.C. 115(d)(7)(D)(viii). NMPA/DiMA proposed a submission process presumably attempting to expedite discovery between the participating parties and still allow the Judges sufficient time to make their ultimate determination of the administrative assessment. Under the schedule that NMPA/DiMA proposed, the MLC's submission deadlines overlap with the voluntary negotiation periods required by the MMA, during which the MLC and DLC could reach a voluntary agreement that the Judges could adopt in lieu of a litigated determination of the administrative assessment.

NMPA/DiMA's apparent goal was to assure that the parties would complete and file all submissions in advance of a hearing, which, as they proposed, would be held within approximately eight months. NMPA/DiMA concluded that approximately four months would suffice for the Judges to make their determination. NMPA/DiMA Comment at 13. The procedures that NMPA/DiMA proposed also would authorize the Judges to modify the schedule, albeit without modifying the one-year statutory deadline to complete the determination of the administrative assessment. *Id.* at n.37.

Under the NMPA/DiMA Proposed Procedures, the MLC would file the first submission, followed by responsive submissions from the DLC and other participating parties, followed by a discretionary reply submission by the MLC. The Proposed Procedures also specify the content of these submissions in a manner that NMPA/DiMA contended is consistent with the statutory directives of the MMA. Specifically, they recommended that the submissions consist of a written statement supporting (or disputing) the proposed administrative assessment to fund reasonable collective total costs, as well as analysis to support (or dispute) the proposal's compliance with MMA requirements. NMPA/DiMA Comment at 13–14.

Under the Proposed Procedures, concurrently with the parties' submissions, the parties would produce to each other documents to demonstrate actual and anticipated reasonable collective total costs, among other elements specified in the MMA. NMPA/DiMA argued that the procedures they proposed would provide for an integrated discovery process that would require each party to produce at the outset, without document discovery requests, the documents necessary to demonstrate whether the submissions meet the requirements of the MMA. The Proposed Procedures would also allow parties to seek additional supporting documents from another party upon a showing that the documents are relevant and not unduly burdensome. *Id.* at 14.

Under the NMPA/DiMA proposal, the MLC and DLC also would be permitted to take a limited number of depositions during their respective discovery periods, with other participants able to attend and potentially examine deponents for a portion of the allotted time. *Id.* The proposal would allow participants to request rulings from the Judges in a manner that NMPA/DiMA envision as efficient and expedient for both the participants and the Judges.

The NMPA/DiMA proposal also included provisions to guide the hearing, which would be limited to oral argument addressed to the parties' submissions unless the Judges determined a need for examination of witnesses. The proposal also included procedures and timing for the Judges' ultimate determination of the administrative assessment that NMPA/DiMA propose to be consistent with the statutory requirements of the MMA. *Id.* at 15.

b. Proposed Modifications to Mechanical License Regulations

According to NMPA/DiMA, the MMA also requires consideration and adjustment of existing definitions in part 385 of 37 CFR to conform existing regulatory definitions to those in sec. 115(e) of the Copyright Act. NMPA/DiMA Comment at 3. NMPA/DiMA proposed amended definitions for the affected sections of part 385, as well as other changes that they contended are required for conformity with the MMA.[5] *Id.*

With respect to the most recent sec. 115 ratesetting proceeding, NMPA/DiMA suggested modifications to the Judges' recently adopted regulations in part 385 to conform definitions to the ones provided in the MMA. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 FR 1918 (Feb. 5, 2019). They stated that in a few cases where a definition in the MMA employs different terminology for the same concept, the Proposed Definitions would replace the CFR terminology with the MMA terminology. *Id.* at 9. For example, the MMA term ''Permanent Download'' and related definition would be substituted for the term ''Permanent Digital Download'' and definition in the current regulations.

Where an MMA term is conceptually similar to or employs similar terminology as, but is not fully congruent with, the CFR term—and could thus cause confusion or have an impact on the application of the ratesetting regulations—the definitions that NMPA/DiMA proposed would adopt separate nomenclature so that the distinction is maintained. *Id.* For example, because the definition of ''Limited Download'' [6] differs as between the MMA and the CFR, NMPA/DiMA proposed substituting the term ''Eligible Limited Download'' for ''Limited Download'' in the CFR provisions.

Similarly, the proposal would change the term ''Record Company'' in the regulations to ''Sound Recording Company'' because the CFR definition, while similar in some ways to the MMA definition, ''substantively departs from the MMA definition.'' [7] *Id.* NMPA/DiMA propose substituting the term ''Service Provider'' for the term ''Service'' throughout part 385.[8]

c. General Administrative Regulations

According to NMPA/DiMA, although administrative assessment proceedings are to be separate from and simpler than other types of CRJ proceedings, a number of the procedures that NMPA/DiMA propose are adapted from existing

[5] NMPA/DiMA assert that the Judges might need to modify other provisions within part 385 when the MLC becomes operational in 2021, such as ''provisions that govern the complex calculation of royalties due for streaming and other digital uses under section 115, and the related accounting provision.'' NMPA/DiMA Comment at 15. At this time, the Judges take no position on whether such additional modifications will be necessary or appropriate.

[6] The MMA defines limited download as ''a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening only for a limited amount of time or specified number of times.'' In *Phonorecords III,* the Judges adopted a two-pronged definition of Limited Download that is based on the amount of time that the sound recording is available to the end user or the number of times the end user plays the sound recording.

[7] The MMA defines the term record company as an entity that invests in, produces, and markets sound recordings of musical works, and distributes such sound recordings for remuneration through multiple sales channels, including a corporate affiliate of such an entity engaged in distribution of sound recordings. In *Phonorecords III,* the Judges adopted the following definition of record company: 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 the common law or statutes of any State, 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.

[8] The MMA defines the term ''service'' as follows: ''The term 'service', as used in relation to covered activities, means any site, facility, or offering by or through which sound recordings of musical works are digitally transmitted to members of the public.'' 17 U.S.C. 115(e)(29). Section 385.2 defines ''service'' as 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 Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service 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. 37 CFR 385.2.

regulations that apply to other of the Judges' procedures in Parts 351 and 352 of Title 37, Chapter III, Subchapter B of the CFR. NMPA/DiMA Comment at 12. Moreover, a proposed revision to 37 CFR 350.1 purportedly would make clear that a series of existing general administrative provisions in part 350, including provisions relating to document formats and electronic filing via eCRB, would still apply to administrative assessment proceedings. NMPA/DiMA Comment at 12.

d. Judges' Response to the NMPA/DiMA Proposals and Request for Comments

The Judges found NMPA/DiMA's response to the NOI to be helpful in formulating rules to satisfy the requirements of the MMA. As a result, the rules that the Judges now propose incorporate many elements of that proposal. The Judges' proposal, however, varies in certain respects. Nevertheless, the Judges seek comments generally on whether the Judges' proposal is consistent with the MMA and if not, which provisions of the proposal should be changed to make the proposal consistent with the MMA.

As an overarching proposition, the Judges' proposed regulations do not restate definitions or other language that is part of the MMA because, preliminarily, the Judges believe that such restatement is superfluous and are concerned that slight variations from the statutory language could give rise to unnecessary debate. Nevertheless, the Judges seek comment on whether the rules they propose should include a restatement of terms in the MMA, and if so, which provisions should be restated and why.

The Judges preliminarily agree with NMPA/DiMA as regards modification of some of the regulatory language in part 385. Defined terms in the Judges' rules should conform to the terms Congress used in the MMA for the same purpose. Hence, the Judges propose to add ''Eligible'' before defined terms ''Interactive Stream'' and ''Limited Download.'' [9] In part 385, the Judges' used the term ''Record Company;'' whereas the term in the MMA is ''Sound Recording Company.'' The Judges have proposed using the term Sound Recording Company. Likewise, the Judges propose using the term ''Service Provider'' rather than the term ''Service'' to distinguish the entities envisioned in the Judges' rules from those referenced in the MMA. The MMA refers to Permanent Downloads for the licensed activity the Judges called ''Permanent Digital Download'' or ''PDD.'' The Judges propose, with few modifications,[10] the changes in the definitions that NMPA/DiMA propose but seek comment on whether adopting those definitions is consistent with the Judges' obligations under the MMA or whether one or more of the changes that the Judges adopt would materially change the way in which those terms should be interpreted in the Judges' regulations.

With regard to the specifics of the Proposed Procedures, the Judges decline to codify a strict schedule for each stage in the administrative assessment proceeding. The Judges acknowledge the prescribed statutory timeline for commencement, adjudication, and completion of the proceeding. With that timeline in mind, the Judges will best be able to assess when and how the stages of these administrative assessment proceedings interface with other matters (also prescribed by statute) on their calendar and will decide how much time is necessary and appropriate to reach a determination by the statutory deadline.

Preliminarily, the Judges believe that NMPA/DiMA's Proposed Procedures attempted to achieve an efficiency that is not possible. For example, NMPA/DiMA suggested that the initial negotiation period commence simultaneously with the Judges' notice of commencement of the proceeding. A notice of commencement sets a time (usually, but not necessarily, 30 days) for interested parties to file a petition to participate in the proceeding. The Judges 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.

The Judges seek comment on whether the Judges' more flexible timing proposal will allow the Judges to conduct an assessment proceeding in a prompt and efficient manner or whether the Judges should instead incorporate a more structured schedule such as the one NMPA/DiMA proposed. The Judges also seek comment on a specific aspect of the proposal that relates to proposed new § 355.3, which would require the MLA to submit an opening submission that includes reasons why the proposed initial assessment fulfills the requirements in 17 U.S.C. 115(d)(7). The proposed rule would then authorize parties such as the DLC that oppose the initial assessment to submit evidence in opposition. Presumably in a proceeding to adjust the assessment, if the Judges found that the MLA's proposal did not fulfill the requirements of 17 U.S.C. 115(d)(7), the Judges could simply retain the extant assessment. But what course would the Judges have available to them if they found that the initial assessment that the MLC proposed were not consistent with 17 U.S.C. 115(d)(7) and no other party presented an acceptable alternative proposed assessment? Would the Judges be required to request additional information and assessment proposals from the parties, or would another alternative be available? If so, what would that alternative be? For example, should the DLC be required (rather than permitted) to submit and support a counterproposal? Should this scenario be addressed in the Judges regulations? If so, why? If not, why not?

The Judges also seek specific comments on proposed new § 355.3(i) regarding reply submissions of the MLC. The proposal currently 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. Should the Judges adopt a discovery provision authorizing the MLC to conduct discovery subsequent to submission of oppositions to the MLC's opening submission? If so, why would such supplemental discovery be beneficial? What limitations, if any, should the Judges place on such discovery? If the Judges should not authorize a subsequent discovery, why not?

Another area in which the rules the Judges propose differs from the Proposed Procedures suggested by NMPA/DiMA is in the conduct of discovery depositions. The Judges believe it is appropriate to limit the

[9] The Judges, however, decline to include NMPA/DiMA's proposed addition of a new sentence at the end of the definition of ''Eligible Interactive Stream,'' stating ''[a]n Eligible Interactive Stream is a digital phonorecord delivery.'' ''Digital phonorecord delivery'' is defined in 17 U.S.C. 115(d). Eligible Interactive Streams are digital phonorecord deliveries if, and only if they conform to the statutory definition. To the extent the proposed language confirms this fact, it is unnecessary. To the extent the proposed language seeks to expand the statutory definition, it is impermissible.

[10] One such proposed modification that the Judges preliminarily decline to adopt is the insertion of the phrase ''for the purposes of this part 385'' in the current definitions of the terms ''end user'' and ''stream''. Generally, the Judges do not believe that such language is necessary and might raise the question of whether the other definitions where the phrase does not appear are intended to be read to apply more broadly across regulations. Nevertheless, the Judges seek comment on why the definitions of the terms ''end user'' and ''stream'' should uniquely be expressly limited to part 385 and whether the language that NMPA/DiMA propose to add would accomplish that goal.

number of depositions. The Judges preliminarily find that the NMPA/DiMA proposal is overly restrictive in that they provided that the MLC and the DLC may take depositions and that ''other participants may attend . . . and *except as otherwise agreed by those attending the deposition,* shall be provided an opportunity to examine the deponent during the final hour of the deposition.'' NMPA/DiMA Comment, App. A, vi–vii (proposed § 355.3(e) regarding discovery on initial submission). The Judges are concerned that under the NMPA/DiMA proposal certain parties could possess veto power over the ability of other parties to conduct discovery through depositions. To address this concern, the Judges propose that the parties agree among themselves regarding the allocation of time for the taking of depositions and, if they are unable to agree, to file a motion with the Judges seeking relief in the form of an order setting a particularized discovery schedule.

In the Proposed Procedures, NMPA/DiMA clearly intended depositions to be for purposes of discovery relevant to the parties' submissions. In their proposed § 355.5(c), however, NMPA/DiMA proposed that the Judges admit into evidence the parties' written submissions ''as well as deposition transcripts . . . .'' NMPA/DiMA Comment, App. A, at x (proposed § 355.5(c)). The Judges recognize the value of discovery depositions in narrowing issues for adjudication. A discovery deposition is exploratory, however, and differs in scope from a deposition intended to preserve testimony of a witness whose sponsor cannot assure a timely appearance at trial.

In discovery, the parties note objections for the record and the questioning proceeds. In a preservation deposition, the participants must make evidentiary objections to avoid waiver, and the record should contain argument of counsel relating to the objection. In some critical instances, the participants may require a contemporaneous ruling, *e.g.,* by telephone, before continuing with questioning. The participants may submit the preservation deposition transcript for evidentiary rulings before offering the transcript for admission.

The Judges believe that wholesale admission of discovery deposition transcripts could shift to them the process of separating the wheat from the chaff and refining the parties' issues. In general, in litigation, parties may use deposition transcripts for any purpose at trial. *See* Fed. R. Civ. P. 32. The Judges are not eager to burden the record with the parties' back and forth in discovery. Therefore, the Judges decline to propose this provision presented by NMPA/DiMA but seek comment on the need or usefulness of such transcripts.

The Judges also propose to expand the scope of the NMPA/DiMA proposal regarding the allowable methods of receiving oral testimony from expert witnesses. In particular, the Judges propose the allowable use, in the Judges' discretion, of a ''concurrent evidence'' approach. More particularly, before, after or in lieu of the direct, cross and redirect testimony of expert witnesses, the experts testifying as to a common issue would be required to testify concurrently, responding to questions posed by the Judges and/or counsel (at the Judges' discretion). Under the Judges' proposal, an expert witness could address questions to another expert witness, and the latter would be required to respond to the question, with the expert-to-expert colloquy subject to the control of the Judges and to valid objections by counsel. The Judges could permit the expert witnesses to make an opening statement summarizing his or her testimony. The Judges anticipate that this concurrent evidence approach, in appropriate circumstances, would allow for a fuller and more probing presentation and defense of expert opinions and the bases for those opinions.

Rules regarding the procedure for examination of witnesses typically do not distinguish between the examination of lay witnesses and expert witnesses. However, there is a fundamental difference between the two types of witnesses. Whereas lay witnesses are essentially fact witnesses, expert witnesses do not proffer otherwise admissible facts, but rather testify in support of theories and data on which they may properly rely (even if based on hearsay or not otherwise admissible). Experts are permitted to testify as to these matters because their qualifications allow them to assist the trier of fact.

Accordingly, the use of additional or alternative procedures for receiving the testimony of expert witnesses—other than only the typical direct, cross and redirect forms of examination—is appropriate if it can assist the Judges in understanding and applying or rejecting expert testimony and reports. In fact, a number of jurisdictions and adjudicatory authorities have adopted a ''concurrent evidence'' approach. For example, the approach has been utilized in courts in Canada, the United Kingdom, Australia, and Northern Ireland, as well as in arbitrations conducted under the rules of the International Bar Association. Further, the concurrent evidence approach has been found particularly appropriate when used by specialized courts, administrative judges, regulatory boards and valuation agencies. This is the additional or alternative approach set forth in this proposed regulation.

A core element in the concurrent evidence approach is the use of *immediately sequential expert testimony* to answer questions, whether from counsel and/or the Judges. The process can be differentiated in individual cases, based upon the interests of the parties and the Judges. This flexibility is made explicit in the language of the proposed regulation, including the flexibility *not* to utilize a concurrent evidence approach and, at the other end of the spectrum, to *substitute* this approach for the traditional approach to witness examination. The ultimate decision would be made only after input from counsel in connection with the drafting of a Scheduling Order regarding witness questioning. Further, the proposed regulation does not presume that any particular form of expert witness questioning is appropriate for a given proceeding, or should serve as a default procedure.

Participants in concurrent evidence proceedings, as well as legal scholars and experts, have identified a number of benefits associated with the use of a concurrent evidence approach to receiving testimony from expert witnesses. These benefits include (without limitation): (1) Narrowing and clarifying issues; (2) immediate correction of testimony by one expert when mistakes are identified by another expert; (3) explicit identification of implicit assumptions; (4) highlighting of alternative and tactical ''framing'' of issues; (5) promotion of scholarly consensus; (6) encouragement of fuller testimony by virtue of the relative informality of the process, compared with the rigidity of traditional witness examination; and (7) immediate ability for counsel and judges to use one witness's hearing testimony to challenge or impeach another witness, rather than uncover the issue after-the-fact by reading hearing transcripts. The Judges recognize from their own experience that such benefits are not necessarily as likely to be realized through the use of only the traditional form of witness examination.

The Judges do not suggest that the concurrent evidence approach is a panacea. In such a proceeding, a relatively more charismatic or dominating expert may overwhelm other experts. Further, an expert may

use the process for advocacy on behalf of a party rather than solely to provide expert opinion. Additionally, any wealth/income disparity between or among the parties may allow one party to engage experts better-suited to participate in a concurrent evidence proceeding. Finally, the Judges are not overly sanguine that scholarly consensus will regularly arise, particularly when the academic and professional communities from which experts are selected do not demonstrate such a consensus. However, all of these imperfections also arise under the traditional method of receiving expert witness testimony. Thus, the real issue is whether the availability of the concurrent evidence alternative improves, *on the margin,* the Judges' ability to utilize expert testimony to make better findings of fact without adding undue cost or complexity to the proceeding.

The Judges also underscore that they continue to recognize the significant value of traditional witness examination by litigation counsel, via direct, cross, redirect and any further examination by counsel the Judges find to be necessary. In particular, an adverse counsel's skillful cross-examination can reveal weaknesses in testimony that non-attorneys may fail to notice. For this reason, the proposed regulation continues to provide the option for maintaining the use of the traditional method for examining expert witnesses, either as the exclusive method or in combination with the concurrent evidence approach.

The Judges seek comment on the efficacy of the proposed concurrent evidence approach. In particular, the Judges seek comment on whether the proposed approach would be more likely than not to yield a more fulsome record upon which the Judges can base their determination than the approach the Judges employ in ratemaking and distribution proceedings. The Judges also seek comments on whether the likely benefits of making the concurrent evidence approach an available option on a case-by-case basis, as the proposed regulation provides, would—whenever that option was exercised—inevitably create additional costs, in terms of money, time and inconvenience to the parties and the witnesses, that would outweigh, in all proceedings, the benefits of creating the concurrent evidence option.

Inspired by the NMPA/DiMA comments focusing on rules of general application, the Judges propose redesignating the general administrative provisions currently located in part 350 to keep them separate from rules specific to the types of proceedings the Judges oversee. These provisions would be transferred to a new part 303 and redesignated. The Judges seek comment in support of or in opposition to this proposed transfer and redesignation.

2. SoundExchange's Comment

In its comment, SoundExchange noted that the MMA made changes relevant to the treatment of sound recordings fixed before February 15, 1972 (pre-1972 recordings) under the secs. 112 and 114 statutory licenses. SoundExchange suggested three groups of changes to the Judges' regulations under sections 112 and 114 that it asserted are appropriate under the MMA:

- Clarifying in chapter III of title 37 CFR that a ''copyright owner'' of sound recordings should be more broadly defined to include a ''rights owner'' as defined in 17 U.S.C. 1401(l)(2);
- Generalizing scattered references to ''copyright'' or ''protection under copyright law'' in chapter III of title 37 CFR to include the protection provided by 17 U.S.C. 1401; and
- Deleting the provisions of new part 382 subpart C concerning adjustment of statutory royalty payments for SDARS to reflect use of pre-1972 recordings.

SoundExchange Comment at 2.

a. Definition of ''Copyright Owner''

SoundExchange noted that the MMA added to title 17 of the U.S. Code a new section 1401 that federalizes protection of pre-1972 recordings in a manner that is not technically copyright protection, but that, in SoundExchange's view, substantially parallels copyright protection. As such, SoundExchange recommended that the Judges amend their regulations in chapter III of title 37 CFR to reflect that a ''copyright owner'' includes a ''rights owner'' of pre-1972 recordings as defined in 17 U.S.C. 1401(l)(2). *Id.* at 2–3.

According to SoundExchange, under sec. 1401, when a digital music service makes an ephemeral reproduction of a pre-1972 recording or publicly performs a pre-1972 recording, the provider engages in ''covered activity'' as defined in sec. 1401(l)(1). SoundExchange stated that engaging in that covered activity ''without the consent of the rights owner'' is a violation of sec. 1401(a) subjecting the user ''to the remedies provided in sections 502 through 505 . . . to the same extent as an infringer of copyright.'' SoundExchange Comment at 3, quoting 17 U.S.C. 1401(a). According to SoundExchange, a user of pre-1972 recordings may make the types of uses subject to statutory licensing under secs. 112 and 114 without violating sec. 1401(a) if it pays the statutory royalty for the transmission or reproduction pursuant to the rates and terms adopted under secs. 112(e) and 114(f), and complies with other obligations, in the same manner as required by regulations adopted by the Judges under secs. 112(e) and 114(f) for sound recordings that are fixed on or after February 15, 1972. SoundExchange Comment at 3.

As a result of these provisions, SoundExchange asserted that statutory licensees will commence making statutory royalty payments for pre-1972 recordings (to the extent they were not already paying such royalties), and that SoundExchange will handle those payments in the same manner that it handles statutory royalties paid with respect to post-1972 recordings.

SoundExchange does not contend that the Judges must amend chapter III of title 37 CFR to reflect that a rights owner under sec. 1401(l)(2) is to be treated the same as a copyright owner. Nonetheless, in SoundExchange's view, it would be most accurate and clearer if the term copyright owner were defined to include a rights owner under sec. 1401(l)(2) for all relevant purposes of chapter III. SoundExchange Comment at 3–4.

Toward that end, SoundExchange proposed adding a new definition of ''copyright owners'' in § 370.1 that would state, ''*Copyright owners* means sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.'' SoundExchange suggested that the existing definitions of ''copyright owner'' in §§ 380.7, 380.21, 380.31, 382.1, 383.2(b),[11] and 384.2 of the Judges' rules similarly should include a reference to rights owners. SoundExchange Comment at 4.

SoundExchange also noted that various other scattered references to ''copyright'' in chapter III of title 37 CFR should be ''generalized to contemplate the protection provided by Section 1401.'' SoundExchange Comment at 4. SoundExchange did not assert that these references must be changed to reflect the MMA, because, according to SoundExchange, sec. 1401(b) specifies that pre-1972 recordings are subject to statutory licensing on the same terms as post-1972 recordings. Nevertheless,

[11] In its comment SoundExchange identified the applicable rule as Rule 383.3(b), but the ''Copyright Owner'' definition currently resides in Rule 383.2(b). The related definitions in the other rules are plural. To make the definitions consistent, the Judges propose to amend the definition in Rule 383.2(b) to make it plural also.

SoundExchange believed that ''it would be most accurate and clearer if the regulations reflected Section 1401(b)'' and therefore proposed revisions to the following rules: 37 CFR 370.4 (Definition of Aggregate Tuning Hours); 37 CFR 370.4 (Definition of Performance, paragraph (1)); 37 CFR 380.7 (Definition of Performance, paragraph (1)); 37 CFR 380.21 (Definition of ATH); 37 CFR 380.21 (Definition of Performance, paragraph (1)); and 37 CFR 384.3(a) (relating to the term *Basic royalty rate*). SoundExchange Comment at 5–6.

b. Pre-1972 Recordings

SoundExchange also stated that the provisions of subpart C of part 382 concerning adjustment of statutory royalty payments for SDARS relating to use of sound recordings fixed before February 15, 1972, have become inoperative by their terms. To avoid confusion, SoundExchange recommended that the Judges delete those provisions.

SoundExchange stated that § 382.23(b) contains a formula for reducing an SDARS provider's statutory royalty payment based on its use of ''Pre-1972 Recordings.'' [12] According to SoundExchange, the term ''Pre-1972 Recording'' as used in that provision is defined in § 382.20 as ''a sound recording fixed before February 15, 1972, *that is not a restored work as defined in 17 U.S.C. 104A(h)(6) or otherwise subject to protection under title 17, United States Code.*'' SoundExchange Comment at 6–7 (emphasis from SoundExchange). According to SoundExchange, with the enactment of the MMA, all sound recordings fixed before February 15, 1972 are now ''subject to protection under title 17, United States Code.'' *See* 17 U.S.C. 1401(a). Therefore, SoundExchange concluded that there is no longer such a thing as a ''Pre-1972 Recording'' as defined in § 382.20. According to SoundExchange, therefore, applying the formula in § 382.23(b)(2) will always yield a ''Pre-1972 Recording Share'' of zero. SoundExchange contended that is precisely the right result under the MMA, because a service making use of pre-1972 recordings under the statutory licenses is to:

> Pay[ ] the statutory royalty for the transmission or reproduction pursuant to the rates and terms adopted under sections 112(e) and 114(f), and compl[y] with other obligations, in the same manner as required by regulations adopted by the Copyright Royalty Judges under sections 112(e) and 114(f) for sound recordings that are fixed on or after February 15, 1972.

SoundExchange Comment at 7 (quoting 17 U.S.C. 1401(b)).

SoundExchange reasoned that, if the definition of Pre-1972 Recording in § 382.20 had not anticipated the possibility of protection such as that now provided by sec. 1401, it would have been necessary to eliminate the adjustment in § 382.23(b).

SoundExchange noted that the definition of Pre-1972 Recording in § 382.20 *does* accommodate the protection now provided by sec. 1401. Accordingly, SoundExchange concluded, it is not necessary to change subpart C of part 382 to provide for payment of statutory royalties for use of pre-1972 recordings. However, SoundExchange concluded that enactment of the MMA makes that definition and the formula in § 382.23(b) superfluous. Additionally, SoundExchange noted, § 382.23(a)(3) establishes the priority between the pre-1972 deduction and a parallel adjustment for direct licenses, which remains operative. SoundExchange reasoned that because there can never be a pre-1972 deduction, § 382.23(a)(3) is also superfluous. To avoid confusion, SoundExchange contended that these provisions should all be deleted. SoundExchange Comment at 8.

c. Judges' Response to SoundExchange's Proposals

As with the NMPA/DiMA comment, the Judges found SoundExchange's comment to provide useful insights into how the Judges should approach implementing provisions of the MMA.

SoundExchange proposed adding the definition of ''copyright owner'' in part 370, relating to notice and recordkeeping requirements, and enlarging the definition of ''copyright owner'' in numerous other places in chapter III. The MMA is carefully crafted to bestow certain rights on owners of Pre-1972 Recordings without extending (or in some cases resuscitating) a copyright.

Preliminarily, the Judges are sympathetic to SoundExchange's desire to adjust the Judges' rules to make them consistent with applicable provisions of the MMA. Nevertheless, the Judges believe that doing so requires caution and should be done in a way that avoids unintended consequences. As a result, although the Judges propose the amendments that SoundExchange recommends, they seek specific comments on, and alternatives to, each of SoundExchange's proposed changes to ensure that the proposed amendments will achieve the desired goal of enhancing clarity without creating uncertainty regarding how the rules should be interpreted in practice. In particular, the Judges seek detailed comment on, and alternatives to, the proposal to add a new definition of ''copyright owners'' to § 370.1, which would include rights owners in pre-1972 sound recordings, and make corresponding changes to the ''copyright owners'' definitions in §§ 380.7, 380.21, 380.31, 382.1, 383. 2(b), and 384.2 and references to ''copyright'' in §§ 370.4 (definitions of ''Aggregate Tuning Hours'' and ''Performance''), 380.7 (definition of ''Performance''), 380.21 (definitions of ''ATH'' and ''Performance''), and 384.3(a) (relating to the term ''Basic Royalty Rate''). *See* SoundExchange Comment at 4. As SoundExchange correctly notes, the MMA did not extend copyright owner status to owners of pre-1972 sound recordings. Do the amendments that SoundExchange proposed to the definition of ''copyright owners'' and related changes to ''copyright'' imply a broader right to rights owners than Congress intended to grant? If so, what are the ramifications of such a broadened right? The Judges note that ''copyright owner'' is a defined term in section 101 of the Copyright Act. Is the definition of ''copyright owners'' proposed by SoundExchange consistent or compatible with the statutory term? Are there other alternatives that the Judges should consider to make the Judges' rules with respect to pre-1972 sound recordings consistent with the applicable provisions of the MMA? SoundExchange contends that none of the changes it proposes in this regard are necessary under the MMA? Is that correct? If so, should the Judges leave the current rules regarding pre-1972 sound recordings as they are?

The Judges also seek comments on SoundExchange's proposals regarding part 382, subpart C, concerning adjustment of statutory royalty payments for SDARS to reflect use of sound recordings fixed before February 15, 1972, which, SoundExchange contends, ''have become inoperative by their terms.'' *See* SoundExchange Comment at 6 (proposed elimination of the formula in § 382.23(b) (''Reduction for Pre-72 Recording Share''), the related definition of ''Pre-1972 Recording'' in § 382.20, and § 382.23(a)(3), which ''establishes the priority between the pre-1972 deduction and a parallel adjustment for direct licenses,'' which

[12] SoundExchange noted that the capitalized term ''Pre-1972 Recordings'' is used herein as it is used in part 382, subpart C. SoundExchange stated that that term is narrower than what are otherwise referred to in its comment as lower-case ''pre-1972 recordings.'' SoundExchange Comment at 6 n.3.

SoundExchange contends is now superfluous). *See id.* at 7.3. Specifically, the Judges seek comments on the effect, if any, the proposal would have on computation of royalties when an SDARS plays pre-1972 sound recordings that have fallen into the public domain (*e.g.,* foreign sound recordings that were given protection under 17 U.S.C. 104A, which protection has since expired in their country of origin, or, after January 1, 2022, pre-1923 U.S. sound recordings).

3. Comments of Other Parties

The Judges do not promulgate any regulations or propose any modifications to regulations based on the comments of Iconic, STG, and George Johnson because their comments were not relevant to the Judges' task in this rulemaking proceeding.

List of Subjects

37 CFR Part 303

Administrative practice and procedure, Copyright, Lawyers.

37 CFR Part 350

Administrative practice and procedure, Copyright.

37 CFR Part 355

Administrative assessment, Administrative practice and procedure, Copyright.

37 CFR Parts 370 and 380

Copyright, Sound recordings.

37 CFR Parts 382 and 383

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

37 CFR Part 384

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

37 CFR Part 385

Copyright, Phonorecords, Recordings.

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

Subchapter A—General Provisions

■ 1. Add part 303 to read as follows:

PART 303—GENERAL ADMINISTRATIVE PROVISIONS

Sec.

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 ½ 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 ½ 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 ½ ″ 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 the Copyright Royalty Judges may direct by order. Any party seeking an enlargement of the applicable page limit must make the request by a motion to the Copyright Royalty Judges filed no fewer than three days prior to the applicable filing deadline. Any order granting an enlargement of the page limit for a motion or response shall be deemed to grant the same enlargement of the page limit for a response or reply, respectively.

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

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

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

§ 303.4 Content of motion and responsive pleadings.

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

§ 303.5 Electronic filing system (eCRB).

(a) *Documents to be filed by electronic means*—(1) *Transition period.* For the period commencing with the initial deployment of the Copyright Royalty Board's electronic filing and case management system (eCRB) and ending January 1, 2018, all parties having the technological capability must file all documents with the Copyright Royalty Board through eCRB in addition to filing paper documents in conformity with applicable Copyright Royalty Board rules. The Copyright Royalty Board must announce the date of the initial deployment of eCRB on the Copyright Royalty Board website (*www.loc.gov/crb*), as well as the conclusion of the dual-system transition period.

(2) *Subsequent to transition period.* Except as otherwise provided in this chapter, all attorneys must file documents with the Copyright Royalty Board through eCRB. Pro se parties may file documents with the Copyright Royalty Board through eCRB, subject to § 303.4(c)(2).

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

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

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

(3) *Claimants.* Any person desiring to file a claim with the Copyright Royalty Board for copyright royalties may obtain an eCRB password for the limited purpose of filing claims by completing the application form available on the CRB website.

(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.

(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 website (*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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 303.7 Time.

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

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

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

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

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

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

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

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

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

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

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

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

(1) The date on which the action or submission is due;

(2) The length of the extension sought;

(3) The date on which the action or submission would be due if the extension were allowed;

(4) The reason or reasons why there is good cause for the delay;

(5) The justification for the amount of additional time being sought; and

(6) The attempts that have been made to obtain consent from the other parties to the proceeding and the position of the other parties on the motion.

§ 303.8 Construction and waiver.

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

Subchapter B—Copyright Royalty Judges Rules and Procedures

■ 2. Revise part 350 to read as follows:

PART 350–SCOPE

Sec.
350.1 Scope.
350.2–350.4 [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 the procedures set forth in parts 351 through 354 of this subchapter shall govern all proceedings pursuant to 17 U.S.C. 801(b).

§§ 350.2–350.4 [Reserved]

■ 4. Add part 355 to read as follows:

PART 355—ADMINISTRATIVE ASSESSMENT PROCEEDINGS

Sec.
355.1 Proceedings in general.
355.2 Commencement of proceedings.

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

§ 355.1 Proceedings in general.

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

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

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

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

(2) Rule on objections and motions.

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

§ 355.2 Commencement of proceedings.

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

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

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

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

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

(1) A filing fee of $150;

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

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

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

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

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

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

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

(iii) A period of 60 days, beginning on 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 voluntary negotiation period of 14 days, commencing on the day after the end of the Mechanical Licensing Collective's discovery period;

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

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

(ix) A hearing on the record.

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

§ 355.3 Submissions and discovery.

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

(b) *Submission by the Mechanical Licensing Collective in the initial*

Administrative Assessment proceeding. (1) The Mechanical Licensing Collective shall file an opening submission, in accordance with the schedule the Copyright Royalty Judges adopt pursuant to § 355.2(g), setting forth and supporting the Mechanical Licensing Collective's proposed initial Administrative Assessment. The opening submission shall consist of a written statement, including any written testimony and accompanying exhibits, and include reasons why the proposed initial Administrative Assessment fulfills the requirements in 17 U.S.C. 115(d)(7).

(2) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall file with the Copyright Royalty Judges and 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);

(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); ensuring the absence of overlapping ownership or other overlapping economic interests between the Collective or its members and any selected contracting or sub-contracting party; and

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

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

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

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

(c) *Submission by the Mechanical Licensing Collective in proceedings to adjust the Administrative Assessment.* (1) The Mechanical Licensing Collective shall file an opening submission according to the schedule the Copyright Royalty Judges adopt pursuant to § 355.2(g). The opening submission shall set forth and support the Mechanical Licensing Collective's proposal to maintain or adjust the Administrative Assessment, including reasons why the proposal fulfills the requirements in 17 U.S.C. 115(d)(7). The opening submission shall include a written statement, any written testimony and accompanying exhibits, including financial statements from the three most recent years' operations of the Mechanical Licensing Collective with annual budgets as well as annual actual income and expense statements.

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

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

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

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

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

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

(3) Concurrently with the filing of the opening submission, the Mechanical Licensing Collective shall provide electronically and deliver by email to the other participants in the proceeding a list of individuals with material knowledge of the proposed adjusted Administrative Assessment, including the subject(s) of his or her knowledge and availability to provide testimony regarding the proposal.

(d) *First discovery period.* During the first discovery period, the Digital Licensee Coordinator, interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees, acting separately, or represented jointly to the extent permitted by the concurrence of their interests, and any other participant in the proceeding may serve requests for additional documents on the Mechanical Licensing Collective and any other participant in the proceeding. Any document request shall be limited to documents that are Discoverable.

(e) *Depositions.* The Digital Licensee Coordinator, interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees, acting separately, or represented jointly to the extent permitted by the concurrence of their interests, may give notice of and take up to five depositions collectively during the first discovery period. The Mechanical Licensing Collective may give notice of and take up to five depositions during the first discovery period. Any deposition under this paragraph (e) shall be no longer than seven hours in duration (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. Any parties to the proceeding may attend any depositions and shall have a right, but not an obligation, to examine the deponent, 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 no later than seven days prior to the scheduled deposition date, absent agreement of the deponent or good cause shown. 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 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, interested copyright owners, interested digital music providers, or interested Significant Nonblanket Licensees shall consist of a written statement, including any written testimony and accompanying exhibits, stating the extent to which the filing participant

agrees with the Administrative Assessment proposed by the Mechanical Licensing Collective. If the filing participant disagrees with all or part of the Administrative Assessment proposed by the Mechanical Licensing Collective, then the written statement, including any written testimony and accompanying exhibits, shall include analysis necessary to demonstrate why the Administrative Assessment proposed by the Mechanical Licensing Collective does not fulfill the requirements set forth in 17 U.S.C. 115(d)(7).

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

(3) Concurrently with the filing of responsive submission(s), the filing participant shall electronically provide by email to the other participants in the proceeding a list of individuals with material knowledge of 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). The filing participant shall describe the subject(s) of each listed individual's knowledge and state his or her availability to provide testimony.

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

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

(h) *Discovery disputes.* (1) 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. 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.

(2) 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.

(3) Absent unusual circumstances, the Copyright Royalty Judges will rule on the dispute within three business days of the filing of the responsive brief. Upon reasonable notice to the participants, the Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Copyright Royalty Judge may consider and rule on any discovery dispute in a telephone conference with the relevant participants.

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

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

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

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

§ 355.4 Voluntary negotiation periods.

(a) *Initial voluntary negotiation period.* The Mechanical Licensing Collective, the Digital Licensee Coordinator, interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees shall participate in good faith in an initial voluntary negotiation, commencing on the day after the Copyright Royalty Judges give notice of all participants in the proceeding and lasting 60 days. By the close of the initial voluntary negotiation period, the parties shall file a joint written notification with the Copyright Royalty Judges indicating whether they have reached a settlement, in whole or in part, with respect to determination of the Administrative Assessment.

(b) *Second voluntary negotiation period.* The Mechanical Licensing Collective, the Digital Licensee Coordinator, interested copyright owners, interested Digital Music Providers, and Significant Nonblanket Licensees shall participate in good faith in a second voluntary negotiation period commencing on a date set by the Copyright Royalty Judges and lasting 14 days. By the close of the second voluntary negotiation period, the parties shall file a joint written notification with the Copyright Royalty Judges indicating whether they have reached a settlement, in whole or in part, with respect to determination of the Administrative Assessment, identifying and describing any issues as to which they have reached a settlement.

§ 355.5 Hearing procedures.

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

(b) *Attendance and participation.* The Mechanical Licensing Collective, through an authorized officer or other managing agent, and the Digital Licensee Coordinator, if any, through an authorized officer or other managing agent, shall attend and participate in the hearing. Any other entity that has filed a valid Petition to Participate and that the Copyright Royalty Judges have not found to be disqualified shall participate in an Administrative Assessment proceeding hearing. If the Copyright Royalty Judges find, *sua sponte* or upon motion of a participant, that a participant has failed substantially to comply with any of the requirements of this part, the Copyright Royalty Judges may exclude that participant from participating in the hearing; provided, however, that the Mechanical Licensing Collective and the Digital Licensee Coordinator shall not be subject to exclusion.

(c) *Admission of written submissions, deposition transcripts, and other documents.* Subject to any valid objections of a participant, the Copyright Royalty Judges shall admit into evidence at an Administrative Assessment hearing the complete initial, responsive, and reply submissions that the participants have filed. Participants shall not file deposition transcripts, but may utilize deposition transcripts for the purposes and under the conditions described in Fed. R. Civ. P. 32 and interpreting case law. Any participant may expand upon excerpts at the hearing or counter-designate excerpts in the written record to the extent

necessary to provide appropriate context for the record. During the hearing, upon the oral request of any participant, any document proposed as an exhibit by any participant shall be admitted into evidence so long as that document was produced previously by any participant, subject only to a valid evidentiary objection.

(d) *Argument and examination of witnesses.* An Administrative Assessment hearing shall consist of the oral testimony of witnesses at the hearing and arguments addressed to the written submissions and oral testimony proffered by the participants, except that the Copyright Royalty Judges may, *sua sponte* or upon written or oral request of a participant, find good cause to dispense with the oral direct, cross, or redirect examination of a witness, and rely, in whole or in part, on that witness's written testimony. The Copyright Royalty Judges may, at their discretion, and in a format they describe in a prehearing Scheduling Order, require expert witnesses to be examined concurrently by the Judges and/or the attorneys. If the Judges so order, the expert witnesses may then also testify through a colloquy among themselves, including questions addressed to each other, as limited and directed by the Judges and subject to valid objections by counsel and ruled upon by the Judges. Only witnesses who have submitted written testimony or who were deposed in the proceeding may be examined at the hearing. A witness's oral testimony shall not exceed the subject matter of his or her written or deposition testimony. Unless the Copyright Royalty Judges, on motion of a participant, order otherwise, no witness, other than a person designated as a party representative for the proceeding, may listen to, or review a transcript of, testimony of another witness or witnesses prior to testifying.

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

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

§ 355.6 Determinations.

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

(b) *Timing.* The Copyright Royalty Judges shall issue and publish their determination in the **Federal Register** not later than one year after commencement of the proceeding under § 355.2(a) or, in a proceeding commenced under § 355.2(b), during June of the calendar year following the commencement of the proceeding.

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

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

(d) *Adoption of voluntary agreements.* In lieu of reaching and publishing a determination, the Copyright Royalty Judges shall approve and adopt the amount and terms of an Administrative Assessment that has been negotiated and agreed to by the Mechanical Licensing Collective and the Digital Licensee Coordinator, interested copyright owners, interested Digital Music Providers, and interested Significant Nonblanket Licensees pursuant to § 355.4. Notwithstanding the voluntary negotiation of an agreed Administrative Assessment, however, the Copyright Royalty Judges may, for good cause shown, reject an agreement. If the Copyright Royalty Judges reject a negotiated agreed Administrative Assessment, they shall proceed with adjudication in accordance with the schedule in place in the proceeding. Rejection by the Copyright Royalty Judges of a negotiated agreed Administrative Assessment shall not prejudice the parties' ability to continue to negotiate and submit to the Copyright Royalty Judges an alternate agreed Administrative Assessment or resubmit an amended prior negotiated agreement that addresses the Judges' reasons for initial rejection at any time, including during a hearing or after a hearing at any time before the Copyright Royalty Judges issue a determination.

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

§ 355.7 Definitions.

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

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

(1) Nonprivileged;

(2) Relevant to consideration of whether a proposal fulfills the requirements in 17 U.S.C. 115(d)(7); and

(3) Proportional to the needs of the proceeding, considering the importance of the issues at stake in the proceeding, the requested participant's relative access to responsive information, the participants' resources, the importance of the document or deposition request in resolving or clarifying the issues presented in the proceeding, and whether the burden or expense of producing the requested document or deposition testimony outweighs its likely benefit. Documents or deposition testimony need not be admissible in evidence to be Discoverable.

Subchapter D—Notice and Recordkeeping Requirements for Statutory Licenses

PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

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

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

■ 6. In § 370.1:
■ a. Remove the alphabetical paragraph designations;
■ b. Remove the word ''A'' at the beginning of each definition;
■ c. Place the definitions in alphabetical order; and
■ d. Add the definition of ''Copyright Owners'' in alphabetical order.

The addition reads as follows:

§ 370.1 General definitions.

* * * * *

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

* * * * *

§ 370.4 [Amended]

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

Subchapter E—Rates and Terms for Statutory Licenses

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

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

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

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

The addition and revision read as follows:

§ 380.7 Definitions.

For purposes of this subpart, the following definitions apply:

* * * * *

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

* * * * *

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

The revision reads as follows:

§ 380.21 Definitions.

* * * * *

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

* * * * *

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

§ 380.31 Definitions.

* * * * *

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

* * * * *

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

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

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

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

§ 382.1 Definitions.

* * * * *

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

* * * * *

§ 382.20 [Amended]

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

§ 382.23 [Amended]

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

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

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

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

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

§ 383.2 Definitions.

* * * * *

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

* * * * *

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

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

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

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

§ 384.2 Definitions.

* * * * *

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

* * * * *

§ 384.3 [Amended]

■ 22. In § 384.3:
■ a. In paragraph (a)(1), remove the word ''copyrighted'' and add the phrase ''subject to protection under title 17, United States Code'' after the word ''recordings'';

■ b. In paragraph (a)(2) introductory text:
■ i. Remove the word ''copyrighted'' in the first sentence and add the phrase ''subject to protection under title 17, United States Code,'' after the word ''recordings''; and
■ ii. Remove the word ''copyrighted'' in the second sentence and add the phrase ''subject to protection under title 17, United States Code,'' after the word ''recordings''; and
■ c. In paragraphs (a)(2)(i) and (ii), remove the word ''copyrighted'' each time it appears and add the phrase ''subject to protection under title 17, United States Code,'' after the word ''recordings'' each time it appears.

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

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

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

■ 24. In § 385.2:
■ a. Add introductory text:
■ b. Revise the definitions of ''Accounting Period'' and ''Affiliate'';
■ c. In the definition of ''Bundled Subscription Offering'', add the term ''Eligible'' before the term ''Limited Downloads'' and remove the comma at the end of the definition and add a period in its place;
■ d. In the definition of ''Digital Phonorecord'', remove ''or DPD'' and remove ''17 U.S.C. 115(d)'' and add in its place ''17 U.S.C. 115(e)'';
■ e. Add definitions for ''Eligible Interactive Stream'' and ''Eligible Limited Download'' in alphabetical order;
■ f. Revise the definition for ''Free Trial Offering'';
■ g. Remove the definition of ''Interactive Stream'';
■ h. In the definition for ''Licensed Activity'':
■ i. Remove the word ''Digital'' between the words ''Permanent'' and ''Downloads'';
■ ii. Add the word ''Eligible'' before the term ''Interactive Streams''; and
■ iii. Add the word ''Eligible'' before the term ''Limited Downloads'';
■ i. Remove the definition for ''Limited Download'';
■ j Revise the definition for ''Limited Offering'';
■ k. In the definition for ''Locker Service'':
■ i. Add the term ''Eligible'' before the term ''Interactive Streams'';
■ ii. Remove the term ''Digital'' between the terms ''Permanent'' and ''Downloads''; and
■ iii. Remove the term ''the Service'' and add in its place ''the Service Provider'' each time it appears; and
■ iv. Remove the term ''Service's'' and add in its place ''Service Provider's'';
■ l. In the definition of ''Mixed Service Bundle'':
■ i. Remove the term ''Digital'' between the terms ''Permanent'' and ''Downloads''; and
■ ii. Remove the term ''a Service'' and add in its place ''a Service Provider'';
■ m. In the definition for ''Music Bundle'':
■ i. Remove the term ''Digital'' between the words ''Permanent'' and ''Downloads'';
■ ii. Remove the term ''Service'' and add in its place the term ''Service Provider'' each time it appears; and
■ iii. Remove the term ''Record Company'' and add in its place the term ''Sound Recording Company'';
■ n. In the definition for ''Offering'' remove the term ''Service's'' and add in its place the term ''Service Provider's'';
■ o. In the definition of ''Paid Locker Service'', remove the term ''the Service'' and add in its place the term ''the Service Provider'';
■ p. Remove the definition of ''Permanent Digital Download'';
■ q. Add a definition for ''Permanent Download'' in alphabetical order;
■ r. In the definition for ''Play'':
■ i. Add the term ''Eligible'' before the term ''Interactive Stream'' each time it appears; and
■ ii. Remove the term ''a Limited Download'' and add in its place the term ''an Eligible Limited Download'' each time it appears;
■ s. Revise the definitions for ''Promotional Offering'' and ''Purchased Content Locker Service'';
■ t. Remove the definition for ''Record Company'';
■ u. In the definition of ''Relevant Page'':
■ i. In the first sentence, remove the term ''Service's'' and add in its place the term ''Service Provider's'' and add the term ''Eligible'' before the term ''Limited Downloads''; and
■ ii. In the second sentence, add the term ''Eligible'' before the term ''Limited Download'' and before the term ''Interactive Stream'';
■ v. In the definition of ''Restricted Download'', remove the term ''a Limited Download'' add in its place the term ''an Eligible Limited Download'';
■ w. Remove the definition of ''Service'';
■ x. Add the definitions for ''Service Provider'' and ''Service Provider Revenue'' in alphabetical order;
■ y. Remove the definition for ''Service Revenue'';
■ z. Add the definition for ''Sound Recording Company'' in alphabetical order;
■ aa. In the definition of ''Streaming Cache Reproduction'', remove the term ''Service'' and add in its place the term ''Service Provider'' each time it appears; and
■ bb. In the definition of ''Total Cost of Content'':
■ i. Remove the term ''Service'' and add in its place the term ''Service Provider'' each time it appears;
■ ii. Remove the term ''interactive streams'' and add in its place the term ''Eligible Interactive Streams'';
■ iii. Remove the term ''limited downloads'' and add in its place the term ''Eligible Limited Downloads''; and
■ iv. Remove the terms ''Record Company'' and ''record company'' and add in their place the term ''Sound Recording Company'' each time they appear.

The additions and revisions read as follows:

§ 385.2 Definitions.

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

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

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

* * * * *

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

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

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection,

reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

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

* * * * *

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

(1) Neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering;

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

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

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

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

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

* * * * *

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

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

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

* * * * *

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

* * * * *

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

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

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

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

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

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

Purchased Content Locker Service means:

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

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

(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.

* * * * *

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

(1) Contracts with or has a direct relationship with End Users or

otherwise controls the content made available to End Users;

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

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

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

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

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

(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.

(2) Service Provider Revenue shall:

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

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

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

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

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

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

Sound Recording Company means a person or entity that:

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

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

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

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

* * * * *

§ 385.3 [Amended]

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

§ 385.4 [Amended]

■ 26. In § 385.4:

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

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

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

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

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

§ 385.11 Royalty rates.

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

* * * * *

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

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

■ 30. Revise § 385.20 to read as follows:

§ 385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

■ 31. In § 385.21:

■ a. In paragraph (b):

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

■ ii. Remove the term ''Service's'' and add in its place the term ''Service Provider's'';

■ b. In paragraph (b)(4):

■ i. Revise the second sentence; and

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

■ c. In paragraph (d), remove the statutory citation ''17 U.S.C.115(c)(5)'' and add in its place ''17 U.S.C. 115(c)(2)(I), 17 U.S.C. 115(d)(4)(A)(i),''.

The revision reads as follows:

§ 385.21 Royalty rates and calculations.

* * * * *

(b) * * *

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

* * * * *

§ 385.22 [Amended]

■ 31. In § 385.22:

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

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

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

■ 32. Revise § 385.30 to read as follows:

§ 385.30 Scope.

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

■ 33. Revise § 385.31 to read as follows:

§ 385.31 Royalty rates.

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

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

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

Dated: March 1, 2019.

Jesse M. Feder,

Chief Copyright Royalty Judge.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1986–0005; FRL–9990–14–Region 2]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the Robintech, Inc./National Pipe Co. Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notification of intent.

SUMMARY: The Environmental Protection Agency (EPA) Region 2 is concurrently issuing this Notice of Intent for Partial Deletion (NOIPD) and a Notice of Partial Deletion (NOPD) of the Robintech, Inc./National Pipe Co. Superfund site (Site), located in the Town of Vestal, New York. The Site includes an approximately 12.7-acre parcel of property (hereinafter, ''Property'') and areas that have been affected by the release or threat of release of hazardous substances to the west of the Property extending toward the Susquehanna River (hereinafter, ''Off-Property''). Because no further response actions under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), other than groundwater monitoring, periodic IC verification, and five-year reviews, as well as O&M activities, as necessary, are needed for the Property's overburden soil and overburden groundwater and an approximately 9.7-acre portion of the bedrock aquifer underlying the Property, EPA is issuing this NOIPD of this area of the Site from the National Priorities List (NPL) and requests public comments on this proposed action.

DATES: Comments must be received by April 12, 2019.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1986–0005, by mail to Mark Granger, Remedial Project Manager, Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 20th Floor, New York, NY 10007–1866. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Granger at the address noted above; telephone at 212–637–3351; or by email at *granger.mark@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' section of this issue of the **Federal Register**, EPA is publishing a direct final Notice of Partial Deletion (NOPD) of the Site concurrently with this NOIPD because EPA views this as a noncontroversial revision and anticipates no adverse comment. EPA has explained its reasons for this partial deletion in the preamble to the direct final Notice of Partial Deletion. If EPA receives no adverse comment(s) on this NOIPD or the direct final NOPD, EPA will proceed with the partial deletion without further action on this NOIPD. If EPA receives adverse comment(s), EPA will withdraw the direct final NOPD, and it will not take effect. EPA will, as appropriate, address all public comments in a subsequent final NOPD based on this NOIPD. EPA will not institute a second comment period on this NOIPD. Any parties interested in commenting must do so at this time. For additional information, see the direct final NOPD, which is located in the ''Rules and Regulations'' section of this **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: October 18, 2018.

Peter D. Lopez,

Regional Administrator, EPA Region 2.

Editorial note: This document was received for publication by the Office of the Federal Register on March 7, 2019.

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