

Oral Argument Not Yet Scheduled

INITIAL BRIEF

**In the United States Court of Appeals
for the District of Columbia Circuit**

Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179

INTERCOLLEGIATE BROADCAST SYSTEM, *et al.*,
Appellants,

v.

COPYRIGHT ROYALTY BOARD,
Appellee,

SOUNDEXCHANGE, INC.,
Intervenor,
NATIONAL ASSOCIATION OF BROADCASTERS,
Intervenor.

ON APPEAL OF AN ORDER OF THE
COPYRIGHT ROYALTY BOARD

**OPENING BRIEF OF COMMERCIAL WEBCASTERS
APPELLANTS DIGITAL MEDIA ASSOCIATION, ACCURADIO,
LLC, DIGITALLY IMPORTED, INC., RADIOIO.COM LLC, AND
RADIO PARADISE, INC.**

JONATHAN MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Road
Bethesda, Maryland 20817
(301) 915-0990
*Counsel for Digital Media
Association*

KENNETH L. STEINTHAL
WEIL, GOTSHAL & MANGES, LLP
201 Redwood Shores Parkway
Redwood Shores, California 94065
(650) 802-3100
*Counsel for Digital Media
Association*

DAVID D. OXENFORD
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. N.W.
Suite 200
Washington, D.C. 20006
(202) 973-4256
*Counsel for Small Commercial
Webcasters*

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Digital Media Association (Appellant in No. 07-1172), and AccuRadio, LLC, Digitally Imported, Inc., Radioio.com LLC, and Radio Paradise, Inc. (Appellants in No. 07-1174), hereby certify:

A. Parties

The parties to the proceeding before the Copyright Royalty Board were:

(i) the Digital Media Association and certain of its member companies: America Online, Inc., Yahoo! Inc., Microsoft, Inc., and Live365, Inc.;

(ii) certain radio broadcasters: Bonneville International Corp., Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee, and Susquehanna Radio Corp.;

(iii) certain companies participating collectively as the “Small Commercial Webcasters” (“SCWs”): AccuRadio, LLC, Digitally Imported, Inc., Radioio.com, Discombobulated, LLC, 3WK, LLC, and Radio Paradise, Inc.;

(iv) National Public Radio, Inc., Corporation for Public Broadcasting-Qualified Stations, National Religious Broadcasters Noncommercial Music

License Committee, Collegiate Broadcasters, Inc., Intercollegiate Broadcasting System, Inc., and Harvard Radio Broadcasting, Inc.;

(v) SBR Creative Media, Inc.;

(vi) Royalty Logic, Inc.; and

(vii) SoundExchange, Inc.

The parties in this Court include Intervenors SoundExchange, Inc. and the National Association of Broadcasters.

B. Ruling Under Review

The order under review is the Determination of Rates and Terms, Digital Performance Right in Sound recordings and Ephemeral Recordings, 72 Fed. Reg. 24084 (May 1, 2007) (codified at 37 CFR pt. 380).

C. Related Cases

This case has been consolidated with the following cases: D.C. Cir. Nos. 07-1123, 07-1168, 07-1173, 07-1174, and 07-1177 through -1179.

D. Deferred Appendix

A deferred appendix will be used, pursuant to this Court's Order of November 15, 2007.

Respectfully submitted,

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Road
Bethesda, MD 20817
(301) 915-0990
*Counsel for the Digital Media
Association*

KENNETH L. STEINTHAL
WEIL, GOTSHAL & MANGES, LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3100
*Counsel for the Digital Media
Association*

DAVID D. OXENFORD
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. N.W., Suite 200
Washington, D.C. 20006
(202) 973-4256
Counsel for Small Commercial Webcasters

DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

The Digital Media Association (“DiMA”) states that it is a national trade organization devoted primarily to the online audio and video industries, and more generally to commercially innovative digital media opportunities. It has no parent companies, and no publicly traded company holds a 10% or greater ownership interest. It has the following member companies: Amazon.com, AOL, Apple, Best Buy, CNET Networks, iMeem, Live365, Loudcity, MediaNet Digital, Microsoft, Motorola, MTV Networks, Muzak, Napster, Pandora Media, RealNetworks, Slacker, Sony Connect, Spatial Audio Solutions, TouchTunes, Yahoo!, and YouTube.

Accuradio, LLC states that it has no parent companies and that no publicly traded company holds a 10% or greater ownership interest in it.

Digitally Imported, Inc. states that it has no parent companies and that no publicly traded company holds a 10% or greater ownership interest in it.

Radioio.com is a service owned by Radio.com LLC, which is wholly owned by IOMedia World, Inc., a public company.

Radio Paradise, Inc. states that it has no parent companies and that no publicly traded company holds a 10% or greater ownership interest in it.

Respectfully submitted,

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Road
Bethesda, MD 20817
(301) 915-0990

KENNETH L. STEINTHAL
WEIL, GOTSHAL & MANGES, LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3100

DAVID D. OXENFORD
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. N.W., Suite 200
Washington, D.C. 20006
(202) 973-4256
Counsel for Small Commercial Webcasters

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GLOSSARY

APA means the Administrative Procedure Act.

ATH means “aggregate tuning hours,” which refers to total hours of programming transmitted to all listeners during the relevant period.

CARP means the Copyright Arbitration Royalty Panel, overseen by the Copyright Office of the Library of Congress.

CRB means the Copyright Royalty Board.

DiMA means the Digital Media Association.

DMCA means the Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (1998).

DPRA means the Digital Performance Right in Sound Recordings Act, Pub. L. 104-39, 109 Stat. 336 (1995).

ephemeral reproduction means a temporary server copy made to facilitate public performances of a copyrighted work.

Final Determination or “F.D.” means *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24,084 (May 1, 2007).

interactive webcasting means webcasting services that provide music programming selected by or on behalf of the listener or specially created for the listener

interactivity adjustment means a statistical calculation to account for the difference in license fees between interactive and non-interactive services.

MFN means a most-favored-nation provision in a contract.

musical work means the notes and lyrics of a song.

public performance right means the right to perform a copyrighted work to the public.

RIAA means the Recording Industry Association of America.

SCWs means the Small Commercial Webcasters, specifically AccuRadio, LLC, Digitally Imported, Inc., Radioio.com LLC, and Radio Paradise, Inc.

SDARS means satellite digital audio radio services.

sound recording means the fixation of a series of musical, spoken, or other sounds.

Statutory License means Sections 112 and 114 of the Copyright Act of 1976, as amended, 17 U.S.C. §§ 112, 114.

Webcaster I means the decision reported at 67 Fed. Reg. 45240 (2002).

**OPENING BRIEF OF COMMERCIAL WEBCASTERS
APPELLANTS DIGITAL MEDIA ASSOCIATION, ACCURADIO,
LLC, DIGITALLY IMPORTED, INC., RADIOIO.COM LLC, AND
RADIO PARADISE, INC.**

This brief is filed jointly by the Digital Media Association (“DiMA”) (Appellant in No. 07-1172), and AccuRadio, LLC, Digitally Imported, Inc., Radioio.com LLC, and Radio Paradise, Inc. (collectively, Small Commercial Webcasters, or “SCWs”) (Appellants in No. 07-1174).

STATEMENT OF JURISDICTION

On May 1, 2007, Appellee the Copyright Royalty Board (“CRB”) published its determination of the rates and terms for statutory licenses for the public performance of sound recordings under 17 U.S.C. §§ 112, 114. *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24,084 (May 1, 2007) (“Final Determination” or “F.D.”) (codified at 37 C.F.R. pt. 380). DiMA and the SCWs filed timely notices of appeal on May 30, 2007. This Court has jurisdiction over the instant appeals pursuant to 17 U.S.C. § 803(d).

STANDING

DiMA has standing because its members are subject to the invalid rates and terms imposed by the CRB. *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 567 (D.C.Cir. 2007). The SCWs have standing because they are also subject to the CRB’s rates and terms.

STATEMENT OF ISSUES

1. Whether the “minimum fee” provision of the CRB’s order (37 C.F.R. § 380.3(b)) is unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Whether the royalty rates the CRB adopted in 37 C.F.R. § 380.3(a)(1) are unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

3. Whether the terms for a 1.5% per month late payment fee (37 C.F.R. § 380.4(e)) and disclosure of confidential information to copyright holders (37 C.F.R. § 380.5(d)(3)) are unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

4. Whether the CRB’s refusal to permit small webcasters to pay royalties on a percentage-of-revenue basis is unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

RELEVANT STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

On March 2, 2007, the CRB issued an Initial Determination of the rates and terms at issue in this case. J.A. _____. The CRB denied motions for rehearing by Order of April 26, 2007. J.A. _____. The Final Determination was published in the Federal Register on May 1, 2007. J.A. _____.

On June 4, 2007, DiMA and the SCWs moved this Court to stay the Final Determination pending appeal. On July 11, 2007, this Court denied the motion.

STATEMENT OF FACTS

A. Introduction.

This case involves “online radio” or “webcasting” – that is, radio programming transmitted over the Internet or through wireless networks as digital audio signals. Several thousand webcasters offer Internet-only original programming for every conceivable taste. *See, e.g.*, www.music.yahoo.com/launchcast; www.radio.real.com; www.pandora.com; www.live365.com. Webcasting is not confined by radio spectrum limitations and provides a much more diverse range of content, featuring many more independent artists, than terrestrial radio. A typical over-the-air

station may cycle 40-100 songs through its playlist; a webcasting station might have over 1,000.¹

These consolidated appeals involve the copyright royalties payable by webcasting services under Sections 112 and 114 of the Copyright Act of 1976, as amended, 17 U.S.C. §§ 112, 114 (the “Statutory License”). The appeals arise from the very first proceeding conducted by the CRB, which was established by Congress as part of the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108-419, 118 Stat. 2341. The CRB is composed of three Article I copyright royalty judges. Their task is to determine the royalty rates applicable to various statutory licenses under the Copyright Act. Previously, such royalty rates were determined by the Copyright Royalty Tribunal and then by a Copyright Arbitration Royalty Panel (“CARP”), overseen by the Copyright Office of the Library of Congress.

On May 1, 2007, the CRB issued the Final Determination, which imposes a dramatic increase to 2.5 times existing royalty rates over the

¹ The webcasting services here are different from music download services like iTunes, or “interactive” (including on-demand) services that provide music programming “selected by or on behalf of the” listener or “specially created for” the listener.” 17 U.S.C. § 114(d)(2)(A)(i), (j)(7). Such services are ineligible for statutory licenses and must negotiate agreements to transmit copyrighted works directly with the copyright owners.

course of the 2006-2010 Statutory License term. The CRB misconstrued the statutory test enacted by Congress and ignored the interests of the webcasting community and listening public in favor of the proposals of SoundExchange, a digital music fee collection body created by the recording industry. The CRB's decision is inconsistent with this Court's decision in *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939 (D.C.Cir. 2005), and with the prior CARP decision in *Webcaster I*, 67 Fed. Reg. 45240 (2002), which is binding on the CRB.

The rates imposed by the CRB will cripple even the most successful webcasters. Its error is so grave that the parties already have been forced to negotiate privately a solution to one important aspect of the decision – the so-called “minimum fee” issue – to avoid the immediate shutdown of webcasting during this appeal. The remaining portions of the CRB's decision are equally invalid.

B. The Statutory Background

Section 102 of the Copyright Act provides copyright protection for a “musical work,” which refers to the notes and lyrics of a song, and for a “sound recording,” which results from “the fixation of a series of musical, spoken, or other sounds.” 17 U.S.C. §§ 101, 102(2), 102(7). Typically, a

record label owns the copyright in a sound recording and a music publisher owns the copyright in a musical work. F.D.9.

The Copyright Act draws a distinction between “musical works” and “sound recordings” with respect to the so-called “public performance” right (that is, the right to perform a copyrighted work to the public). The performance right extends to all categories of copyrighted works with one exception: sound recordings. Thus, a conventional over-the-air radio station need not pay *any* royalties to a record label for public performances of sound recordings when broadcasting songs over the airwaves.

Only *digital* transmissions of sound recordings are treated differently. Under the Digital Performance Right in Sound Recordings Act (“DPRA”), Pub. L. 104-39, 109 Stat. 336 (1995), copyright owners of sound recordings are granted a limited public performance right in their works “by means of a digital audio transmission.” 17 U.S.C. § 106(6). The DPRA authorized non-interactive subscription webcasting services and preexisting satellite digital audio radio services (known as “SDARS”) to make digital transmissions of sound recordings, upon payment of a statutory royalty and compliance with certain other statutory conditions. 17 U.S.C. § 114; *Beethoven.com*, 394 F.3d at 942.

Congress expanded the statutory license for digital audio transmissions of sound recordings in the Digital Millennium Copyright Act of 1998 (“DMCA”), Pub. L. 105-304, 112 Stat. 2860 (1998). The DMCA provides that nonsubscription webcasting is also subject to the Section 106(6) digital performance right. The statute distinguishes between *interactive* and *non-interactive* webcasting services. The former enjoy no statutory license; they must obtain the consent of, and negotiate fees with, individual sound recording owners. In contrast, non-interactive webcasting is eligible for a statutory license upon payment of statutory royalties. 17 U.S.C. § 114(d)(2) & (f)(2).

The statutory standard for determining rates and terms is what would “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 114(f)(2)(B). Further, Congress provided that the CRB “may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements.” *Id.*

Royalty rates for webcasting services between 1998 and 2002 were established by the Librarian of Congress in *Webcaster I*, 67 Fed. Reg. 45240 (2002)(J.A. ____), the only prior CARP case involving webcasting royalties. The Librarian halved the initial recommendation of the panel and set a per-

performance rate of \$.0007 for the period 1998-2002 (plus an additional 8.8% to cover “ephemeral reproduction rights,” i.e., temporary server copies made to facilitate performances). 67 Fed. Reg. at 45243, 45273(J.A. ____). This Court upheld the Librarian’s decision. *See Beethoven*, 394 F.3d 939.

Congress, concerned that royalties still remained too high, intervened and adopted a percentage-of-revenue approach in the Small Webcaster Settlement Act, Pub. L. 107-321, §1, 116 Stat. 2780. The Act authorized certain small commercial and non-commercial webcasters to execute contracts with SoundExchange allowing them to pay alternative royalty fees through December 31, 2004. *See* 17 U.S.C. § 114(f)(5)(A); 67 Fed. Reg. 78,510, 78,511 (2002). Congress required small commercial webcaster royalties to be based on “a percentage of revenue or expenses, or both” – as opposed to the Librarian’s per-performance fee. 17 U.S.C. § 114(f)(5)(A). Congress subsequently extended the Small Webcaster Act through 2005. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 6(b)(3), 118 Stat. 2341, 2370 (2004).

Meanwhile, in 2003, commercial webcasters and SoundExchange negotiated an agreement under which licensees would pay, at their option, \$.000762 per performance, inclusive of all ephemeral reproduction rights (less a 4% discount); for subscription webcasters, 10.9% of revenues, subject

to a minimum fee of 27 cents per subscriber; or 1.17 cents per aggregate tuning hour (“ATH”) (.88 cents for broadcast simulcasts).² 68 Fed. Reg. 27506, 27510 (2003). The Librarian established 2003-2004 royalty rates based on this agreement. 69 Fed. Reg. 5693, 5694-95 (2004). Congress then extended the rates through 2005 and directed the CRB to conduct the proceeding below to set rates for 2006-2010. 17 U.S.C. § 804(b)(3)(A); 118 Stat. at 2370.

C. The Procedural History of this Case.

The proceeding below was initiated October 31, 2005, by submission of written direct statements by DiMA, the SCWs, and other parties. On March 2, 2007, the CRB released its initial determination, which for present purposes set several categories of rates and terms:

(1) Minimum fee: The CRB imposed a \$500 annual “minimum fee” per “station” or “channel,” assertedly to compensate SoundExchange for administrative costs of collecting and distributing royalties. F.D. 49-50(J.A. ____). But the CRB imposed no cap on what multi-station licensees might be required to pay.

² “Aggregate tuning hours” refers to total hours of programming transmitted to all listeners during the relevant period. For example, one hour of programming transmitted to 20 simultaneous listeners would produce 20 ATH. “Performance” likewise is based on listeners: one song webcast to 20 listeners would constitute 20 compensable performances.

(2) Per-performance royalty rate: The CRB rejected the previous model allowing webcasters to elect the “lesser of” various royalty metrics. F.D. 18-26(J.A. ____). Instead, it adopted the proposal of SoundExchange’s expert witness, Dr. Michael Pelcovits, and set per-performance royalty rates according to a model extrapolated from certain licensee fees paid to the four major record companies by five interactive “on-demand” digital services. F.D. 33(J.A. ____). These per-performance rates start retroactively at \$.0008 for 2006 and multiply by 250% to \$.0019 for 2010. F.D. 47(J.A. ____) (\$.0011 for 2007, \$.0014 for 2008, \$.0018 for 2009).

(3) Other terms and conditions: The CRB doubled the previous late payment fee to 1.5% per month. F.D. 89-91(J.A. ____). It also eliminated protections for confidential information adopted in *Webcaster I* and allowed disclosure of confidential information to copyright holders. F.D. 93-96(J.A. ____).

(4) Provisions relating to small webcasters: The CRB rejected any special rules for small commercial webcasters and in particular rejected the existing percentage-of-revenue approach. F.D. 20(J.A. ____).

Appellants and other parties filed motions for rehearing, which, *inter alia*, requested the CRB to consider and clarify the “per station” and “per channel” component of the \$500 minimum fee and noted that in a

contemporaneous proceeding before the very same CRB, SoundExchange had abandoned one of Dr. Pelcovits' key statistical assumptions and adopted a contrary figure that had the effect of cutting the per-performance rate to one-third the level Dr. Pelcovits proposed. DiMA rehearing motion(J.A.____); DiMA Submission in response to CRB 3/20/07 Order(J.A. ____); Broadcaster rehearing motion(J.A. ____). The CRB denied rehearing in conclusory fashion without specifically addressing the primary objections. Order4/26/07(J.A. ____).

On June 4, 2007, DiMA and the SCWs moved this Court to stay the CRB's order pending appeal. Their motion showed that, for SCWs, royalties will increase from 11% of revenues under the pre-existing rate structure to 300% of revenues in 2006, 306.5% of revenues in 2007, and 345% in 2008 – increases of over 2,000%. For large webcasters like Yahoo!, Pandora, and Live365, royalties will amount to 48% of radio-related revenues in 2006, 62% in 2007, and substantially more than that for 2008-2010. On July 11, 2007, this Court denied a stay.

STANDARD OF REVIEW – A SUBSTANTIVE ISSUE IN THIS CASE

The standard of review for CRB determinations is the APA test of 5 U.S.C. § 706 – namely, whether an agency action is “unsupported by substantial evidence,” “arbitrary and capricious,” or “otherwise not in

accordance with law.” 17 U.S.C. § 803(d)(3). “[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 43 (1983). *E.g., Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604-05 (D.C.Cir. 2007); *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 810-13 (D.C.Cir. 2007).

This case, unlike many appeals, presents critical questions about the standard of review. Searching judicial review is appropriate because these appeals arise from the very first proceeding ever conducted by the CRB. The Board will benefit from clarification of the legal standard under which it operates.

Moreover, Congress deliberately stiffened the standard of judicial review for CRB appeals in 2004. Under the previous statutory scheme, a CARP rate determination was first reviewed by the Librarian of Congress, 17 U.S.C. § 802(f) (repealed), and this Court lacked authority to disturb that decision unless it found “on the basis of the record before the Librarian, that

the Librarian acted in an arbitrary manner.” 17 U.S.C. § 802(g) (repealed). This Court noted that this standard of review was “significantly more circumscribed” than APA review and afforded the Librarian “exceptional deference.” *NAB v. Librarian of Congress*, 146 F.3d 907, 918 (D.C.Cir. 1998).

Congress *rejected* this deferential standard in the Copyright Royalty and Distribution Reform Act of 2004 and deleted Section 802(g). H.R. Rep. No. 408, 108th Cong., 2nd Sess. (2004). Therefore, the APA standard of review should be accorded substantial weight in this case.

In addition, the standard of review is vital here given the CRB’s “all-or-nothing” approach. It adopted lock, stock, and barrel the per-performance royalty rate SoundExchange proposed, despite its manifold weaknesses. At the close of the proceeding, the CRB’s Chief Judge suggested that the Board did not have authority to set a specific rate somewhere between the parties’ competing proposals, i.e., “a rate that no one has proposed.” 12/21/06Tr.409-11(J.A. ____). This Court should make clear that nothing in the statute ties the CRB’s hands in this manner. In fact, in the only two prior litigated CARP proceedings under Section 114 – *Webcaster I* and a decision involving digital cable radio services, 63 Fed. Reg. 25394 (May 1998) – the CARP established rates within a “zone of reasonableness” falling between

the parties' competing proffers. *See generally Beethoven*, 394 F.3d at 949. The "zone of reasonableness" approach led to rates in both *Webcaster I* and the digital cable service proceeding that were approximately only one-sixth those proposed by the recording industry (on a per-performance and revenue basis, respectively). *See Webcaster I*, 67 Fed. Reg. at 45241-42(J.A. ____) (per-performance rate of \$.0007 after RIAA requested \$.004); *Digital Cable*, 63 Fed. Reg. at 25414 (6.5% of gross revenues after RIAA requested 41.5%). The CRB's departure from that approach in this case was error.

SUMMARY OF ARGUMENT

I. The CRB imposed a potentially Draconian uncapped "minimum fee" as part of the Statutory License, despite the absence of evidence of SoundExchange's administrative costs – the key rationale for the minimum fee. The CRB relied on prior regulations to support its decision, but misquoted them by omitting a critical \$2,500 per-licensee cap. Following this decision, DiMA, several of its members, and SoundExchange privately negotiated a solution to the urgent problem created by the uncapped fee. Appellants urge this Court to adopt that solution by modifying the CRB's regulation.

II. The CRB's per-performance royalty rates should be vacated. The CRB misconstrued 17 U.S.C. § 114(d)(2)(B). Instead of determining the

rate that would prevail in a competitive market, the CRB relied on inapposite contracts from a non-competitive, non-comparable market – so-called “on-demand” subscription digital services.

Even if the on-demand market had been an appropriate benchmark – which it was not – the CRB erred by adopting a statistical adjustment proposed by SoundExchange’s expert. That adjustment was inconsistent with the evidence in this case, and SoundExchange itself abandoned it in a contemporaneous proceeding involving satellite digital audio radio services (“SDARS,” i.e., Sirius and XM Radio). 73 Fed. Reg. 4080 (2008). The revised figure SoundExchange offered and the CRB adopted in the satellite radio case would have reduced royalties in this case by approximately 67%.

No “willing buyer” would *ever* agree to the ruinous per-performance rates imposed by the CRB, which will exceed 50% of many webcasters’ revenues. The CRB’s rates will also widen the already large gap between royalties paid by Internet radio and those applicable to satellite, cable and terrestrial radio stations. The aberrational nature of the rates is a clear sign of fundamental error. Indeed, the decision below cannot be squared with the CRB’s recent determination involving SDARS, which, like the webcasters here, operate under the Section 114 Statutory License.

III. The CRB erred by doubling the existing late payment fee to 1.5% per month. It also erred by eliminating the protections for confidential information adopted in *Webcaster I* and allowing disclosure of confidential information to copyright holders.

IV. The CRB arbitrarily and capriciously refused to define “small commercial webcasters” and to adopt a percentage-of-revenue royalty for them, even though such an approach is vital to their survival. Its decision ignores record evidence and is inconsistent with the percentage-of-revenue approach taken for SDARS.

ARGUMENT

I. THE “MINIMUM FEE” PROVISION SHOULD BE MODIFIED.

The CRB set the minimum fee at \$500 annually per station or channel, with *no cap per licensee*. F.D.49-50 n.39(J.A. ____). The CRB claimed that the fee was designed to compensate SoundExchange for its administrative costs. Yet the CRB offered only a single paragraph of explanation, which acknowledged that the Board was “provided with little evidence of the administrative cost per licensee.” F.D.49(J.A. ____). In fact, there was no evidence of SoundExchange’s administrative costs on a per-channel basis, no evidence that its costs increase linearly with each new “channel” offered by a licensee, and no evidence that administrative costs

ever exceed the prior \$2,500 cap per licensee. Licensees, not SoundExchange, incur the costs of aggregating data across multiple offerings. 6/6/06Tr.134-38(J.A. ____).

Given the absence of evidence, the CRB defaulted to the prior \$500 minimum fee, but *failed to retain the cap*. The CRB cited for support *Webcaster I* and the 2003 agreement between DiMA and the recording industry. F.D.50 n.38(J.A. ____). But it failed to incorporate the caps contained in these arrangements. The *Webcaster I* decision established a \$500 annual minimum fee *per licensee*, irrespective of the number of channels or stations operated by the licensee. 67 Fed. Reg. at 45274(J.A. ____). The 2003 agreement established a \$500 per station annual minimum fee *but with a cap of \$2,500 per licensee*. See 37 C.F.R. § 262.3(d)(2) (minimum fee for each licensee is “\$2,500, or \$500 per channel or station (excluding archived programs, but in no event less than \$500 per Licensee), *whichever is less*, for each calendar year”) (emphasis added).

The CRB paraphrased the 2003 agreement, but omitted the critical language, “whichever is less.” F.D.50 n.38(J.A. ____). This decision to impose an uncapped fee apparently was premised on a misreading of the pertinent regulation.

The CRB created the danger that the uncapped fee could reach astronomical levels for webcasters deemed to have a large number of “channels” or “stations.” For example, “aggregator” webcast services such as Live365 consist of as many as 10,000 “hobbyist” and other broadcasters. LamWDT ¶¶1,4,8(J.A. ____); 6/20/06Tr.19(J.A. ____). In addition, webcasting under the Statutory License includes not just pre-programmed radio services such as traditional “Top 40” stations or “80s” channels, but also services that allow listeners to “rank” favorite artists and songs and thus provide a limited degree of input. RobackWDT ¶¶7-13(J.A. ____). Webcasters – by using databases and computer algorithms – then generate playlists of tracks inspired by the works of “ranked” artists or otherwise influenced to some extent by preferences expressed by listeners (while conforming to the Statutory License’s programming requirements). 6/21/06Tr.13-58(J.A. ____); *id.* at 53(J.A. ____) (“each user has a station”); 11/9/06Tr.45(J.A. ____) (Yahoo! has 5 million listeners and 350-380 million streams monthly).

It was obvious that, if each playlist were deemed to be a separate “station” or “channel,” the \$500 “minimum” fee could reach *tens or even hundreds of millions of dollars* for certain services. Yet the CRB failed to cap the minimum fee and left the terms “station” and “channel” undefined.

It blithely described the minimum fee as “low” and predicted it was “likely to have a declining financial impact [over the course of] the term of the license.” F.D.50(J.A. ____). The CRB denied the motions for rehearing *without saying one word* about the uncapped minimum fee.

The CRB’s decision created an unacceptable situation for many webcasters. As a result, DiMA entered into private negotiations with SoundExchange. On August 23, 2007, DiMA, certain of its member companies, and SoundExchange reached an agreement to cap the annual minimum fee at \$50,000 per licensee. DiMA and SoundExchange agreed to support such a cap before this Court, the CRB, and Congress.

Pursuant to its agreement with SoundExchange, DiMA submits that the minimum fee determination should be modified to provide that no licensee shall pay a minimum fee royalty of more than \$50,000 per year. The existing uncapped fee is arbitrary and capricious, unsupported by any evidence, and contrary to law. Indeed, the CRB’s minimum fee determination is symptomatic of a larger pattern of error in its decision.

II. THE ROYALTY RATES SHOULD BE VACATED.

Congress directed the CRB to establish rates and terms that would “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C.

§ 114(f)(2)(B). Congress provided that the CRB “may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements.” *Id.*

The CRB misconstrued the statutory test. As its “benchmark” for royalty rate-setting, the CRB looked to license fees negotiated in agreements between the four major record labels and five subscription *on-demand* services. This benchmark was legal error for two reasons: (1) the on-demand market is not competitive, and (2) it is not “comparable” to the *non-interactive* webcasting at issue here.

“[A]n order may not stand if the agency has misconceived the law.” *Teva Pharm. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C.Cir. 2006) (citation omitted). Because these consolidated cases represent the first time a royalty determination by the CRB has been subject to appellate review, it is important that this Court clarify the proper statutory standard.

A. The CRB Adopted A Non-Competitive Benchmark.

1. The CRB Adopted The Wrong Legal Test.

The CRB failed to fulfill its fundamental statutory obligation to establish fees at levels that would prevail in a *competitive* market.

Webcaster I, which is binding on the CRB,³ explained that “the rates [to be set] should be those that a willing buyer and a willing seller would have agreed upon in a hypothetical marketplace.” 67 Fed. Reg. at 45244(J.A. ____). *Webcaster I* explained that such a market would be characterized by a “diversity of buyers and sellers,” so that “one would expect ‘a range of negotiated rates.’” *Id.* *Webcaster I* opined that “the statutory standard” requires the setting of “‘rates to which, absent special circumstances, most willing buyers and willing sellers would agree’ in a *competitive* marketplace.” *Id.* at 45244-45(J.A. ____) (emphasis added). This Court affirmed the same principle in the *Webcaster I* decision. *Beethoven*, 394 F.3d at 943-44, 947. In particular, this Court endorsed an analysis of whether the chosen benchmark was “competitive.” *Id.* at 952.

The need for a competitive benchmark is the sine qua non of license fee setting. In the context of musical works performance rights, for example, the ASCAP and BMI rate courts have interpreted a “willing buyer-willing seller” standard as implying the “the rate or range of rates that approximates the rates that would be set in a competitive market.” *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 576 (2d Cir. 1990).

³ See 17 U.S.C. § 803(a)(1) (requiring the CRB to act “on the basis of ... prior determinations and interpretations of the ... Librarian of Congress”).

See also id. at 569 (“Fair market value is a factual matter, albeit a hypothetical one. It is the price that a willing buyer and a willing seller would agree to in an arm’s length transaction.”); *United States v. BMI*, 426 F.3d 91, 95 (2d Cir. 2005) (“The rate court is responsible for establishing the fair market value of the music rights, in other words, the price that a willing buyer and a willing seller would agree to in an arm’s length transaction.”) (internal citations and quotations omitted).

Congress did not intend to depart from this body of law. The legislative history of the “willing buyer-willing seller” standard explained that the CRB should adopt “reasonable rates and terms.” H.R. Rep. No. 105-796, at 86 (1998) (Conf. Rep.). In fact, in Section 114(e), Congress refused to shield collective fee negotiations from antitrust scrutiny because of concerns about record company monopoly power. 2001JaffeWDT¶12(J.A. ____). Thus, Section 114 should be interpreted consistently with the traditional principles of rate-setting, which direct agencies to determine “just and reasonable” rates. *E.g., Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 698 (D.C.Cir. 2007); *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C.Cir. 2006). The “willing buyer-willing seller” standard is also historically tethered to a “fair market value” inquiry. *E.g., Bucheit v. Palestine Liberation Organization*, 388 F.3d 346,

350 (D.C.Cir. 2004) (conversion damages); *Reservation Eleven Assocs. v. District of Columbia*, 420 F.2d 153, 155 (D.C.Cir. 1969) (eminent domain); 2001FisherWRT¶¶3-19(J.A. ____).

The CRB took a completely different approach. It held that its duty was not to determine fees that would be set in a hypothetical competitive market, but rather fees that would result in the hypothetical market that would exist “in the absence of the statutory license constraint.” F.D.30(J.A. ____). The CRB opined that the statute does not “require a perfectly competitive benchmark market because that would not be comparable to circumstances in the target market.” F.D.36(J.A. ____). The CRB’s approach was legal error, for several reasons.

First, the CRB failed to fulfill its core obligation to construct a competitive benchmark market. Its statement that the statute does not require a “perfectly competitive” benchmark, F.D.36(J.A. ____), was a strawman. A key principle of rate-setting is the benchmark must not be infected by substantial market power from concentration or other competitive defects, putting aside the question of a theoretical construct of perfect competition. *E.g.*, *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870-71 (D.C.Cir. 1993) (market was “sufficiently competitive” where seller could not “exercis[e] significant market power”). The CRB failed to follow

that principle. In fact, it effectively gave the record labels a credit for their substantial market power, by holding the statute required that royalties approximate those that would be set in the existing target market unaffected by the Statutory License. 5/15/06Tr.154-59,169-72,182-83(J.A. ____).

The inconsistency between the CRB's decision and *Webcaster I* is illustrated by the CRB's reliance on some of the very same agreements between record labels and on-demand services that previously were *rejected* in *Webcaster I*. 67 Fed. Reg. at 45257(J.A. ____). *Webcaster I* also rejected 25 out of 26 recording-industry-proffered-agreements as benchmarks precisely because "the rates in these licenses reflect above-marketplace rates due to the superior bargaining position of RIAA or the licensee's immediate need for a license due to unique circumstances." *Id.* at 45248(J.A. ____). Notably, one agreement rejected as above-market contained a royalty rate of only 11 percent of revenues, CARP Report 56-57(J.A. ____) – a far cry from the Draconian rates the CRB imposed.

Next, the CRB erred by putting the burden on webcasters to prove that the on-demand benchmark was "not adequately competitive." F.D.36(J.A. ____). Given the importance of setting the price for a hypothetical competitive target market, SoundExchange should have been required to demonstrate that its proposed benchmark was in fact competitive and that

the agreements between the four major record labels and five on-demand services reflected competitive prices. *Cf. Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 269-71, 276 (1994) (under APA, proponent of rule or order has burden of proof and persuasion). SoundExchange offered no evidence in this regard. Indeed, Dr. Pelcovits, its own expert, conceded that record companies have “far greater bargaining power” than on-demand services. 5/16/06Tr.160(J.A. ____); *see also id.* 144-46,172,177(J.A. ____). Another SoundExchange expert, Dr. Brynjolfsson, agreed that “record labels have substantially more bargaining power than the webcasters,” 5/8/06Tr.281,283(J.A. ____), and urged the CRB to set royalties to reward labels for their leverage. 5/8/06Tr.303-04,316-17(J.A. ____); 11/21/06Tr.201-02(J.A. ____).

This market power arises because the on-demand services considered by the CRB (unlike webcasting services, *see* Part II-B-1, *infra*) need licenses from all four major record companies in order to offer a full catalogue of music. They “must obtain licenses from *all* of the major record labels in order to operate effectively” in a marketplace where subscribers expect – in exchange for a significant monthly payment – all the music they want, whenever they want it. JaffeWRT5(J.A. ____) (emphasis in original). Lawrence Kenswil of Universal agreed that on-demand services, to be

commercially competitive, had to have licenses from all four majors. 6/7/06Tr.67-68; *see also* KenswilDBJR-2at71(J.A. ____). Other SoundExchange witnesses acknowledged that on-demand services had licenses from all four. 5/15/06Tr.118-119(J.A. ____)(Pelcovits); 11/30/06Tr.101-02(J.A. ____)(Eisenberg). Even SoundExchange’s counsel admitted that “[t]he testimony is that you’d need all four,” although he attempted to speculate otherwise. 11/08/06Tr.118(J.A. ____).

The need of on-demand services for licenses from all major labels precludes effective price competition between labels in the interactive market. JaffeWRT4-7(J.A. ____). In economic terms, the products of the record labels are complements, not substitutes, and hence each label enjoys market power in the on-demand market. 11/8/06Tr.15-24(J.A. ____); JaffeWRT8-11(J.A. ____). Any theoretical possibility that some sort of “independent” on-demand service might be able to operate without a license from all of the majors was irrelevant because Dr. Pelcovits did not include a license agreement from any such service in his benchmark analysis. JaffeWRT, Figure 1(J.A. ____). The services he considered uniformly sought to offer a comprehensive listener experience, with all major hits and artists. 5/15/06Tr.126-27(J.A. ____). Thus, the only agreements in Dr. Pelcovits’ analysis were those with supra-competitive fees. The CRB’s fee

model was built on “what are essentially monopoly prices.”
11/8/96Tr.20(J.A. ____).

2. The CRB’s Decision Is Unsupported By The Evidence.

The CRB compounded its fundamental legal error by ignoring irrefutable evidence that the on-demand benchmark was non-competitive. On the seller side, the recording industry has a Herfindahl-Hirschman Index (HHI) of over 2150. JaffeWRT8-9(J.A. ____). The FTC Merger Guidelines regard any market in excess of 1800 as “highly concentrated.” JaffeWRT9(J.A. ____);11/8/96Tr.34-35(J.A. ____). Antitrust regulators in both the U.S. and the E.U. have expressed significant concern with the recording industry. JaffeWRT9-11(J.A. ____); 11/8/06Tr.33-35,40-41(J.A. ____); 11/30/96Tr.74-76(J.A. ____); 5/15/06Tr.204(J.A. ____); 6/5/06Tr.272-73(J.A. ____). Even SoundExchange’s expert Pelcovits conceded that record labels do not compete significantly on the basis of price. 5/16/06Tr.172,177(J.A. ____).

The CRB asserted that there was no evidence of “collusion” among record companies, F.D.38(J.A. ____), ignoring the fact that “collusion” was hardly necessary to render on-demand contracts a non-competitive benchmark. The CRB surmised that “most favored nation” (“MFN”) provisions in on-demand licensing agreements – whereby record companies

obtain the benefit of higher prices negotiated with the service by another record label – were not signs of record company market power. F.D.38(J.A. ____). But this speculation was contradicted by the unrebutted evidence, JaffeWRT6-7(J.A. ____), 11/8/06Tr.28-33(J.A. ____), as well as by the decision of the Northern District of California, which specifically cited the uniform presence of MFN clauses as effectively eliminating price competition between the four major record companies and as a sign of record company market power. 5/15/06Tr.203-09(J.A. ____); ExhibitsDBJR7,11(J.A. ____).

On the buyer side, the CRB asserted that many of the buyers in the on-demand and non-interactive markets are the same. F.D.37(J.A. ____). That is untrue. The buyers are completely different. 5/15/06Tr.239-41(J.A. ____). For example, several on-demand services are owned by major record companies. Fully seven out of the 17 agreements considered by Dr. Pelcovits were non-arms-length deals between record companies and *their own affiliates*. 5/15/06Tr.130-33(J.A. ____); JaffeWRT12-13(J.A. ____). An additional agreement was modeled on an affiliate deal. JaffeWRT12(J.A. ____). These agreements were the subject of Justice Department investigations involving anti-competitive conduct. JaffeWRT10-11(J.A. ____); ExhibitsDBJR-7,8(J.A. ____). Most of the

remaining agreements were between the major record companies and small music service providers, which had no choice but to accept the terms of the original affiliate contracts. As the 2001 CARP explained in disregarding these agreements, “[t]he actions of the marginal economic entities which are fated to disappear in the process ... are economically inconsequential and offer virtually no probative value as benchmarks for setting future royalty rates.” CARP Final Report at 52(J.A. ____). The Librarian agreed, 67 Fed. Reg. 45248(J.A. ____), as did a SoundExchange witness below. BrynjolfssonWDT6(J.A. ____).

In short, on-demand services occupy a small, niche market, and the rates they negotiate with their record label parents should have no relevance for mass-market non-interactive services. “The transactions for interactive digital audio transmissions take place between a small number of buyers and sellers in a highly concentrated industry that has a history of interdependent actions. To an economist, such evidence suggests that the prices observed in the market will not mirror the competitive level that is envisioned by the statute.” JaffeWDT7-8(J.A. ____).

B. The CRB Adopted A Non-Comparable Benchmark.

Section 114(f)(2)(B) authorizes the CRB to consider evidence from other services only if they are “comparable.” *See Beethoven*, 394 F.3d at

952. In a recent proceeding setting royalties for satellite services (SDARS) operating under the same Statutory License as webcasters, the CRB explained that “‘comparability’ is a key issue in gauging the relevance of any proffered benchmarks.” 73 Fed. Reg. 4080, 4088 (2008). The CRB committed legal error in departing from that principle here.

1. The Subscription On-Demand Market Is Not “Comparable” To The Webcasting Market.

Subscription on-demand services differ from non-interactive webcasting in several critical respects. First, on-demand services allow subscribers to listen to a specific track when they want it, to control the precise order of the music they hear, and potentially to listen to the same selection(s) again and again. 6/5/06Tr.158-59(J.A. ____); ServicesExhibit42, p. 4(J.A. ____). On-demand services are comparable to listening to CDs or digital downloads. 11/8/06Tr.49, 89(J.A. ____).

By comparison, non-interactive services offer a radio-like experience in which a consumer listens to songs programmed by the service on a non-subscription basis. JaffeWRT18(J.A. ____). The Statutory License does not permit non-interactive webcasters to tell their listeners what songs will be played when. Listeners “can’t select a particular song and listen to it,” 6/5/06Tr.162(J.A. ____); there is no sound recording “available to you to use at your option.” 5/2/06Tr.76(J.A. ____). Although on-demand services

require subscriptions, non-interactive webcasters generally do not. Approximately 90% of the non-interactive audience listens to free, ad-supported, non-subscription webcasting. 5/15/06Tr.235-36(J.A. ____); RobackWDT4,14(J.A. ____).

While on-demand services effectively need licenses from all four major record companies, non-interactive webcasters do not. As a Universal Records witness testified, “you could program very good radio stations from a much smaller supply of music than the entire universe of music and have a very satisfying program service.” 5/15/06Tr.174-76(J.A. ____); 5/8/06Tr.291(J.A. ____); ServicesExhibit22, at 71,73-74(J.A. ____). The CRB itself noted testimony that for over a year Yahoo! was able to operate a webcasting service under the Statutory License without music from Universal, the largest of the four major labels. F.D.37n.24(J.A. ____); 11/9/06Tr.11-13,17-18(J.A. ____). The CRB miscited this testimony as supporting its decision. In fact, it proved that non-interactive webcasting is entirely different from the CRB’s chosen benchmark.

Moreover, record companies recognize that on-demand and non-interactive services have very different effects on record sales. SoundExchange’s own witnesses agreed that on-demand services are more likely to “substitute” for CD music sales than is webcasting under the

Statutory License. 5/11/06Tr.110-12(J.A. ____)(Eisenberg); /15/06Tr.243(J.A. ____)(Pelcovits); ExhibitsDBJR-16,17(J.A. ____); 11/8/06Tr.89-93(J.A. ____). The record companies acknowledged they set license fees accordingly – higher royalties for on-demand and substitutional services, lower royalties for non-interactive and less substitutional services. 6/7/06Tr.16-17,81-84, 88(J.A. ____); 5/11/06Tr.148-151,180(J.A. ____); BryanWDT13(J.A. ____); 6/5/06Tr.229-31(J.A. ____). The Statutory License reflects the same concern, which is why on-demand services are ineligible for it. 11/8/06Tr.220-21(J.A. ____).

The critical differences between on-demand and non-interactive services made it legal error for the CRB to rely on the former as a benchmark. The CRB’s decision is inconsistent with *Webcaster I*, which rejected the *very same* on-demand agreements on which the CRB relied. *Webcaster I* explained that these on-demand contracts were inapposite because “the rates in those agreements were for [interactive music performance] rights beyond those granted under the statutory license.” 67 Fed. Reg. at 45257(J.A. ____). The CRB did not explain this inconsistency with *Webcaster I*.

2. The CRB Ignored Mandatory Statutory Factors.

The CRB's failure to consider the differences between the on-demand and non-interactive services led to further legal error. Congress mandated the CRB, in setting rates, to consider additional statutory factors including "whether use of the service may substitute for or may promote the sales of phonorecords." 17 U.S.C. § 114(f)(2)(B). The CRB held it did not need to analyze this factor separately because there was "no empirical evidence to suggest a net substitution/promotion difference between the interactive and non-interactive marketplaces." F.D.45(J.A. ____). Yet the record labels themselves acknowledged that they negotiated higher license fees for interactive services based precisely on such a difference. *See* Part II-B-1, *supra*. The CRB's failure to apply the mandatory statutory factor was thus an additional form of legal error.

3. The CRB Failed To Consider Comparable Benchmarks.

At the same time it adopted subscription on-demand services as its benchmark, the CRB refused to consider evidence from voluntary license agreements involving much more "comparable" services, as provided in 17 U.S.C. § 114(f)(2)(B).

For example, the CRB ignored an agreement with markedly lower royalty amounts that Yahoo! entered into with Universal in November 2004,

regarding Yahoo!'s webcasting service that permits listeners some degree of input into generating playlists (*see* Part I, *supra*). ServicesDirectExhibit140(J.A. ____); RobackWRT¶¶3-7(J.A. ____); 11/9/06Tr.20-21(J.A. ____). This agreement was much more relevant to the CRB's decision than were on-demand services. After all, the Yahoo! agreement involved services eligible for the Statutory License, while SoundExchange's on-demand evidence did not.⁴

The CRB also disregarded Yahoo! agreements containing lower royalty rates with hundreds of smaller independent record labels covering the same services at issue here: webcasting under the Statutory License. RobackWRT¶¶8-9(J.A. ____), Exhibits1,2,3(J.A. ____). The contracts involved companies with significant independent market share and hit releases, as well as aggregators like the Independent Online Distribution Alliance (IODA) that collectively represent dozens of smaller independent labels. RobackWRT¶8(J.A. ____).

The CRB's refusal to consider the Yahoo! deals is particularly arbitrary given the record companies' concession (6/7/06Tr.135-38(J.A.

⁴ A verdict returned by a jury in the Southern District of New York on April 27, 2007, determined that the Yahoo! somewhat "customized" webcasting service is eligible for the Statutory License. The judgment is on appeal. *Arista Records v. Launch Media*, No. 07-2576-cv (2d Cir.).

____)), and *Webcaster I*'s holding, that a previous Yahoo! agreement was relevant to setting webcasting rates. *See* 67 Fed. Reg. 45245(J.A. ____). This Court affirmed the CARP's reliance on the previous Yahoo! agreement. *Beethoven*, 394 F.3d at 948, 952. The CRB provided no explanation for its change in course.

In addition, the CRB failed to consider fees negotiated by satellite and cable radio services operating under the Statutory License. Even a SoundExchange witness conceded that such services are "much closer substitutes" for webcasting than are on-demand services. 5/15/06Tr.243-44(J.A. ____); *see also* 11/27/06Tr.147(J.A. ____). Yet the CRB refused to consider a 2003 voluntary agreement between record companies and satellite digital audio services. 5/4/06Tr.300-02(J.A. ____); ServicesExhibit14, p.4(J.A. ____). That voluntary agreement was a flat-fee arrangement representing between 3% and 7% of revenue of the satellite services. SoundExchangeExhibit210DP p.36(J.A. ____). Nor did the CRB consider another 2003 voluntary agreement between the record companies and digital audio cable services (Music Choice, Muzak, and DMX), which are delivered to residential consumers along with satellite/digital cable TV programming subscriptions. Under this agreement, digital audio cable services agreed to pay 7.00% of their wholesale revenues received from cable operators for

80(J.A. ____). The CRB’s refusal to consider these agreements involving comparable services, while simultaneously relying on the non-comparable on-demand benchmark, is further confirmation of its fundamental legal error.

C. Even If The On-Demand Market Were An Appropriate Benchmark, The CRB’s Statistical Adjustment Was Flawed.

The CRB claimed that the critical differences between on-demand and non-interactive services could be addressed by a statistical adjustment made by Dr. Pelcovits based on a mathematical regression analysis (the Pelcovits “interactivity adjustment”). F.D.33(J.A. ____). Of course, the very need for an “adjustment” was simply a confession that the on-demand market did not meet the statutory requirement of comparability.

The Pelcovits “interactivity adjustment” was fatally flawed for reasons addressed in the Commercial Broadcasters’ brief, which is hereby incorporated in relevant part. For example, Dr. Pelcovits relied on entirely pay-subscription services to calculate an adjustment based on what consumers “pay,” and applied it to the non-subscription webcasting market, where 90% of listeners *don’t pay* for their service – but instead listen to free, ad-supported webcasting. JaffeWRT16-23(J.A. ____). Tellingly, in the

recent SDARS decision, the CRB rejected Dr. Pelcovits' testimony in that case as "lack[ing] ... a solid foundation, in fact or in theory." 73 Fed. Reg. at 4091 n.29. The CRB should have leveled the same criticism in the instant case.

Indeed, after rebuttal evidence was submitted to the CRB in this proceeding, SoundExchange itself (in the SDARS case) abandoned the very Pelcovits "interactivity adjustment" on which the CRB relied below. Instead, SoundExchange offered a different expert who proposed a different "interactivity adjustment" – *one that calculated a differential between interactive and non-interactive services that was three times greater than Dr. Pelcovits' differential and one that was in fact the same differential value as a DiMA expert had calculated in the proceeding below based on the record companies' own evidence.*⁵ Compare PelcovitsWDT40(J.A. ____) (determining non-interactive subscription rates are 55% of interactive subscription rates, necessitating downward adjustment of 45% from benchmark), with SDARS Decision, 73 Fed. Reg. at 4093 (adopting SoundExchange's changed view that non-interactive rates are only 18.75%

⁵ ServicesTrialExhibit41(J.A. ____); 6/07/06Tr.60-61,112-13(J.A. ____) (Universal license rates for "pre-programmed" online streaming of music videos to Yahoo!, AOL, and other DiMA companies (where service rather than user selects titles) are only 18.75% of on-demand streaming rates).

of interactive rates, necessitating downward adjustment of 81.25% from benchmark), and JaffeWRT24(J.A. ____) (proposing *same* downward adjustment of 81.25%).

If the CRB had applied the SDARS interactivity adjustment in this case, its royalty calculations would have been radically different and *would have resulted in a per-performance royalty that was approximately 67% smaller*. By itself, this arbitrariness in the CRB's decision requires that the royalty rates be vacated, even if the on-demand market were deemed to be a valid benchmark. The CRB should be directed on remand to adopt rates no higher than those permitted by the revised interactivity adjustment used in the SDARS proceeding.

D. The CRB's Rates Are Crushing And Disproportionate.

The proof of the CRB's error lies in the pudding. The CRB took existing per-performance rates – which were stable from 1998 to 2005 – and directed an astonishing increase to 2.5 times existing rates beginning in 2006. The previous CARP rates already swallowed an unacceptable portion of music-related revenues – for some services almost 100% – and resulted in business losses no “willing buyer” would countenance. 6/19/06Tr.149-69(J.A. ____); 6/19/06Tr.262-264(J.A. ____); 6/21/06Tr.136-137,141(J.A. ____); 11/9/06Tr.85-86(J.A. ____); RobackWDT¶¶4-5,20(J.A. ____);

RobackRevisedWRT¶¶11,19(J.A. ____); 6/19/06Tr.133-135(J.A. ____);
6/20/06Tr.38-39,43-44(J.A. ____); SilberWDT¶¶11-15(J.A. ____);
6/26/06Tr.48,56-57(J.A. ____); SilberWRT¶¶1-7(J.A. ____);
WinstonWDT¶¶24-25,28(J.A. ____); FancherWRT¶¶8(J.A. ____). The prior
rates led webcasters to restrict their offerings and cease promotions.
6/15/06Tr.65-66, 68, 77-78(J.A. ____); 6/19/06Tr.62-63(J.A. ____);
6/20/06Tr.19-20(J.A. ____); 6/20/06Tr.143-144(J.A. ____);
RobackWDT¶¶25(J.A. ____).

Webcasters came before the CRB anticipating relief from these onerous rates. The CRB’s decision to *raise rates* even further will have a crippling impact. The statute directs the CRB to apply a “willing buyer-willing seller” standard for determining rates. No “willing buyers” would ever agree to such ruinous rates.

Further confirmation that the CRB went seriously off track is the vast disparity between rates imposed on webcasters and those applicable to other digital audio services. For example, the CRB took a completely different approach in the SDARS proceeding. In contrast to the harsh per-play royalty imposed on webcasters, the CRB granted the SDARS a percentage-of-gross-revenues royalty of 6% for 2007 and 2008, gradually increasing to 8% for 2012, with no adjustments for inflation. 73 Fed. Reg. at 4098.

Although the statutory factors prescribed for SDARS rates differ in some respects from the standard applicable here, that difference cannot explain the substantial discrepancy in results between the two proceedings.⁶ The record companies themselves have endorsed the principle of parity among digital audio royalty schemes. ExhibitDBJR-18, at 1-4(J.A. ____). The radical decision in the instant case cannot be squared with the CRB’s approach in the SDARS proceeding.

III. THE TERMS FOR LATE PAYMENTS AND CONFIDENTIAL INFORMATION SHOULD BE VACATED.

The CRB imposed a late payment fee of 1.5% per month, F.D.89-91(J.A. ____), which is double the previous rate of .75% per month codified in 37 C.F.R. § 262.4(e) (2006). Yet the evidence showed that the previous arrangement operated efficiently, with no need for a punitive increase in late fees. SoundExchange records covering January 2004 through June 2006 demonstrate that the top ten webcasters (which pay over 90% of the royalties collected by SoundExchange, 6/8/06Tr.75-78(J.A. ____)) have consistently submitted royalty payments prior to the due date (45 days after the end of

⁶ The SDARS rate factors are set forth in 17 U.S.C. § 801(b)(1)(A-D). In the SDARS proceeding the CRB also considered “agreements for comparable types of digital audio transmission services,” and the “willing buyer-willing seller” standard as part of the Section 112 reproduction license rate embodied within Section 114. 73 Fed. Reg. at 4084.

the payment period). Since 2004, the average number of days late that SoundExchange has received payment is 1 day. 11/28/06Tr.60-68(J.A. ____); ServicesRebuttalExhibit37(J.A. ____).

The CRB cited several agreements containing late fee payments averaging 1.5% per month. F.D.89(J.A. ____). However, evidence of industry custom showed that, in practice, rates of such magnitude are very rarely, if ever, imposed. 11/14/06Tr.30-31,34,37-38(J.A. ____); LevinWRT¶7-8(J.A. ____). The CRB erred by failing to abide by the course of dealing of willing buyers and sellers in commercial relationships. *Century Steel Erectors, Inc. v. Dole*, 888 F.2d 1399, 1404-05 (D.C.Cir. 1989) (reversing agency for failing to consider industry custom and practice).

In addition, the CRB improperly eliminated protections for confidential information adopted in *Webcaster I*, 67 Fed. Reg. at 45275(J.A. ____). The prior regulations provided that confidential information contained in statements of account could not be used “for any purpose other than royalty collection and distribution,” with the exception that SoundExchange may disclose information in aggregate form to copyright owners and performers, information in connection with bona fide royalty

disputes, and the identities of services not current in their obligations to pay minimum fees. 37 C.F.R. § 262.5(c), (d).

The CRB eliminated these protections and allowed disclosure of statement of account information to copyright owners and performers, as well as their agents and representatives. F.D.96(J.A. ____). Yet such statements include competitively sensitive information regarding total royalty payment, total listening minutes, aggregate tuning hours, and other business details. LevinWRT¶¶26-27(J.A. ____); 11/14/06Tr.47-48(J.A. ____). An individual copyright owner has no legitimate claim to full access to the entire statement of account, which encompasses much more information than is necessary to protect the owner's interest. In the event of genuine disputes, the prior rules provided for disclosure. Marketplace agreements containing confidentiality provisions showed that willing buyers and willing sellers routinely protect each other's competitively sensitive information. SXExhibit3DR§10(b)(J.A. ____); SXExhibit4DR§10.01(J.A. ____); SXExhibit6DR§8.1(J.A. ____); SXExhibit14DR§6(J.A. ____); SXExhibit17DR§5(b) (J.A. ____). The CRB's elimination of protection for confidential information adopted in *Webcaster I* was therefore arbitrary and capricious.

IV. THE BOARD ARBITRARILY AND CAPRICIOUSLY REFUSED TO DEFINE “SMALL COMMERCIAL WEBCASTERS” AND TO ADOPT A PERCENTAGE-OF-REVENUE ROYALTY FOR THEM

The CRB’s decision must be vacated as the Board refused to seriously consider a percentage-of-revenue royalty for SCWs. This decision ignored record evidence, and relied upon arbitrary and capricious findings that, notwithstanding the importance of such a royalty to SCWs’ continued existence, they were “unconcerned with [the royalty’s] actual structure” and cared only about its overall amount. F.D. at 24088(J.A. ____). This decision is not only directly contradicted by record evidence, but defies logic because only a percentage-of-revenues metric can ensure the royalties SCWs owe do not fatally exceed the revenues that they generate.

A. The CRB Improperly Ignored Record Evidence

Findings regarding the SCWs’ ambivalence toward a percentage-of-revenue royalty distort the record. The SCWs’ witness made clear at the outset (preceded only by identifying the SCWs and explaining their unique characteristics) that:

[I]t is critical for these small companies ... to have a royalty based on a reasonable percentage of their revenues. Fees based on the numbers of listeners, or the number of performances ... simply will not allow these independent companies to operate.

HansonWDTat3(J.A. ____). The testimony also stated SCWs “would, and could, not be ‘willing buyers’ of a performance right ... unless there was a reasonable percentage-of-revenue option.”⁷ It then provided a mathematical explanation of why the economics of SCWs necessitate a percentage-of-revenue royalty, *id.*, and concluded that the “most important point” was that “for both the health of the companies involved” and “consumers who benefit from their existence,” there must “exist a royalty rate ... is in the ... form of a *percentage of revenues.*” *Id.* at 19(J.A. ____) (emphasis original). Live testimony made clear that SCWs were able to stay in business due only to the Small Webcaster Settlement Act’s percentage-of-revenues royalty. Vol.33Tr.42(J.A. ____). The CRB’s conclusion regarding supposed lack of interest by SCWs in a percentage-of-revenues option “does not withstand review because [it] entirely ignored relevant evidence.” *Morall v. DEA*, 412 F.3d 165, 178 (D.C.Cir. 2005). *Cf. David Ortiz Radio Corp. v. FCC*, 941

⁷ *Id.* at 4(J.A. ____). The record is replete with statements to this effect. *See id.* at 11(J.A. ____) (“without ... [a] ‘percentage-of-revenues’-based royalty rate ... virtually all [SCWs] ... would be defunct” because “the statutory royalty rate ... would near or exceed 100% of total webcasting revenues”); *id.* at 12(J.A. ____) (“if the ... royalty ALONE nears or exceeds 100% of revenues ... it would be impossible ... to build a viable business”); Vol.33Tr.49-50(J.A. ____) (nascent “pure webcasting” has low revenues on per-listener-hours basis and is unsustainable absent a percentage-of-revenue option). *Cf. id.* at 50(J.A. ____) (percentage-of-revenues benefits both webcasters and copyright-holders as revenue increases).

F.2d 1253, 1260 (D.C.Cir. 1991) (“ignoring important arguments and evidence” renders agency order arbitrary and capricious).

The CRB’s contrary conclusion derives from a single footnote in the SCW testimony. F.D. 24088(J.A. ____). The footnote recognized that, mathematically speaking, a performance-based royalty could be set at an extremely low rate that would not put SCWs out of business, but the testimony then stated that such a royalty would have to be a fraction of that under consideration. HansonWDT4n.2(J.A. ____). The Board’s focus on this indisputable but irrelevant statement ignored testimony repeatedly emphasizing that a percentage-of-revenue royalty was absolutely necessary for SCWs, as the performance-based rate being considered would bankrupt them. The record precludes any reasonable conclusion SCWs were “unconcerned” regarding availability of percentage-of-revenue options.

B. The Citation of Illusory Impediments was Arbitrary and Capricious

The CRB’s further reasons for not adopting an SCW percentage-of-revenue option cannot withstand scrutiny. The CRB asserted that it was too difficult to define “small commercial webcaster” and that it would be too complicated to identify their revenues from which to extract a royalty percentage. F.D. 24089(J.A. ____). But the record reflects the distinction between “large” and “small” webcasters could rest on a single, self-selecting

criteria – specifically, willingness to be subject to percentage-of-revenue royalties calculated on *gross revenues*.

Unlike large webcasters whose audio services represent but a tiny proportion of their overall Internet presence and online revenue, SCWs focus almost exclusively on online audio services. HansonWDT2(J.A. ____). They accordingly would accept a percentage-of-revenue royalty based on gross revenue from all sources, as these derive solely or principally using copyrighted works for which the royalty is paid.⁸ Indeed, defining “small webcasters” this way also ensures a percentage-of-revenue royalty avoids the other pitfall the Board cited, *i.e.*, “measurement difficulties” in “identifying the relevant ... revenues.” F.D. 24089(J.A. ____). A royalty based on percentage-of-gross-revenues from all sources readily presents a “clear definition of revenue” that “properly relate[s] the fee to the value of rights being provided.”⁹

⁸ SCW Motion for Rehearing at 2-3(J.A. ____). The SCWs argued that larger online entities and broadcasters, with non-webcasting revenues dwarfing those from webcasting, would not subject their non-webcasting revenues to a webcasting royalty.

⁹ *Id.* A self-selecting SCW definition that requires accepting a percentage-of-revenue royalty based on gross receipts also renders moot concerns that “[s]ervices would be forced to share revenues not attributable to music use.” F.D. at 24090(J.A. ____).

Soon after the Final Decision, the CRB adopted a percentage-of-revenue royalty in the *SDARS* proceeding where the above concerns with percentage-of-revenue metrics disappeared. Discussing its refusal to adopt percentage-of-revenue royalties in the instant case, the CRB “solved” what it called “one of the more intractable problems associated with ... revenue-based metrics” of “disagreement concerning the definition of revenue,” by simply observing in *SDARS* that no party claimed it was “impossible” to comply with revenue-based metrics. 73 Fed. Reg. at 4087. Significantly, no party made any such claim in the instant proceeding.

Importantly for present purposes, the Board concluded in *SDARS* that:

focusing on gross revenues ... derived in connection with the use of music in the [royalty-payors’] programming ... *provides a straightforward method of relating music fees to the value of the rights being provided.*

Id. (emphasis added) This conclusion is exactly the point SCWs made to the CRB.¹⁰ In cases like this, where an agency appears to speak out of both

¹⁰ The Board also proved in *SDARS* that it can readily define “revenues” in levying percentage-of-revenue royalties, even when the parties cannot agree. *See id.* at 4087-88. *Cf. Cablevision Sys. Dev. Co. v. MPAA*, 836 F.3d 599 (D.C.Cir. 1988) (reversing in part for failure to “defer to the Copyright Office’s regulations as to what revenues make up ‘gross receipts’”). In fact, the SCWs’ formulation of gross revenues – *i.e.*, all those from any source – is much less complex than what the Board confronted in *SDARS*. *See* 73 Fed. Reg. at 4088 (“gross revenues would exclude both subscription and [ad] revenues associated with ... only ‘incidental’ performances”). It also moots

sides of its mouth, the expertise to which courts normally defer “becomes dubious [because] the expert cannot make up its ... mind.” *New York City Health and Hosp. Corp. v. Perales*, 954 F.2d 854, 861-62 (2d Cir. 1992). The Board cannot “justify seeming inconsistencies in its approach” and must be reversed. *Purepac Pharm. Co. v. Thompson*, 354 F.3d 877, 884 (D.C.Cir. 2004).

C. The Board Misapplied the Willing-Seller/Willing Buyer Standard

The CRB’s refusal to adopt a percentage-of-revenue royalty rate for SCWs must be vacated for statutory reasons as well. The CRB must establish rates and terms under a willing-buyer/willing-seller standard. *Beethoven.com*, 394 F.3d at 951-52 (quoting 17 U.S.C. § 114(f)(2)(B)). Yet refusal to tailor a rate to the SCWs’ unique circumstances yielded a royalty that would bankrupt most of them, to which no “willing buyer” would agree. Concluding that SCWs were “unconcerned” about the royalty structure, when anything but percentage-of-revenues would drive them from the market, was not a “facially plausible” interpretation of the record. *Id.* at 952. A royalty that *requires* SCWs to lose money does not reflect “a full

“difficult questions [of] auditing and enforcement,” F.D. at 24089(J.A. ___), insofar as SCWs track and report gross revenues for other purposes as well, such as income taxes.

understanding of the structure and purposes that underlie” the statute, nor does it “avoid[] obvious pitfalls, *Cablevision*, 836 F.2d at 610,612, so as to permit a conclusion that the Board reached a “reasonable interpretation of the statutory language ... entitled to the deference of this court.” *RIAA v. CRT*, 662 F.2d 1, 3 (D.C.Cir. 1981).

The Board itself recognized that “statutory licenses are designed to achieve efficiencies ... the marketplace cannot,” F.D.24102(J.A. ____), especially where “neither sellers nor buyers can be said to be ‘willing’ partners ... if they are coerced to agree to a price through the exercise of overwhelming market power.” F.D.24091(J.A. ____). *See* Parts II-A-1 & II-D, *supra*. Here, the Board did not reconcile the copyright holders’ “overwhelming market power” vis-à-vis SCWs, but rather imposed prices at which SCWs would not be “willing buyers.”

CONCLUSION

Under 17 U.S.C. § 803(d)(3), this Court has the authority to “enter its own determination with respect to the amount or distribution of royalty fees and costs.” In addition, the statute provides this Court “may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings” 17 U.S.C. § 803(d)(3).

DiMA and the SCWs request the following relief:

(1) With respect to “minimum fees,” this Court should modify 37 C.F.R. § 380.3(b) to provide that no licensee shall pay a minimum fee royalty of more than \$50,000 per year. In the alternative, this Court also has the power under 17 U.S.C. § 803(d)(3) to vacate 37 C.F.R. § 380.3(b) and remand the minimum fee issue to the CRB with a specific direction that the Board conduct a proceeding regarding the modification of 37 C.F.R. § 380.3(b) and publish a new version in the Federal Register within a time certain. In the event of such a remand, DiMA and SoundExchange will present a joint submission to the CRB to modify the minimum fee to include an annual cap of \$50,000 per licensee.

(2) The royalty rates adopted by the CRB in 37 C.F.R. § 380.3(a)(1) should be vacated. At minimum, the CRB should be directed on remand to adopt rates no higher than those permitted by the revised interactivity adjustment in the SDARS proceeding.

(3) The terms for 1.5% per month late payment fees (37 C.F.R. § 380.4(e)) and disclosure of confidential information to copyright holders (37 C.F.R. § 380.5(d)(3)) should be vacated.

(4) The CRB should be directed to adopt a percentage-of-revenue royalty applicable to small webcasters.

Respectfully submitted.

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Road
Bethesda, MD 20817
(301) 915-0990
*Counsel for the Digital Media
Association*

KENNETH L. STEINTHAL
WEIL, GOTSHAL & MANGES, LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3100
*Counsel for the Digital Media
Association*

DAVID D. OXENFORD
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. N.W., Suite 200
Washington, D.C. 20006
(202) 973-4256
Counsel for Small Commercial Webcasters

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and this Court's order of November 15, 2007 because this brief contains 9,982 words (as determined by the Microsoft Word 2003 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of D.C. Circuit Rule 32(a)(1) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2003 word-processing system in 14-point Times New Roman font.

March 10, 2008

JONATHAN MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Road
Bethesda, Maryland 20817
(301) 915-0990
Counsel for Digital Media Association

CERTIFICATE OF SERVICE

I certify that on this 10th day of March 2008, service of two copies of the foregoing Opening Brief Of Commercial Webcasters Appellants Digital Media Association, Accuradio, LLC, Digitally Imported, Inc., Radioio.Com LLC, And Radio Paradise, Inc. has been made by email and also by first-class mail, postage pre-paid, on the following:

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>PAUL M. SMITH DAVID A. HANDZO THOMAS J. PERRELLI JENNER & BLOCK 601 13th Street NW, Suite 1200 South Washington, DC 20005 (202) 639-6000 <i>Counsel for SoundExchange, Inc.</i></p> | <p>SCOTT R. MCINTOSH MARK FREEMAN Civil Division, Appellate Staff U.S. Department of Justice 950 Pennsylvania Avenue NW Room 7248 Washington, DC 20530-0001 (202) 514-4821 <i>Counsel for Copyright Royalty Board</i></p> |
| <p>DAVID D. OXENFORD DAVIS WRIGHT TREMAINE LLP 1919 Pennsylvania Avenue NW, Suite 200 Washington, DC 20006 (202) 973-4499 <i>Counsel for AccuRadio, LLC et al.</i></p> | <p>WILLIAM R. MALONE MILLER & VAN EATON 1155 Connecticut Avenue NW, Suite 1000 Washington, DC 20036-4306 (202) 785-0600 <i>Counsel for Intercollegiate Broadcast System, Inc.</i></p> |
| <p>SETH GREENSTEIN CONSTANTINE CANNON, PC 1627 Eye Street NW, 10th Floor Washington, DC 20006 (202) 204-3508 <i>Counsel for Collegiate Broadcasters, Inc.</i></p> | <p>BRUCE G. JOSEPH KARYN K. ABLIN WILEY REIN LLP 1776 K Street NW, 11th Floor Washington, DC 20006-2359 <i>Counsel for National Religious Broadcasters, Noncommercial Music License Committee</i></p> |

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>CARTER G. PHILLIPS R. CLARK WADLOW JAMES P. YOUNG JENNIFER TATEL SIDLEY AUSTIN LLP 1501 K Street NW Washington, DC 20005 (202) 736-8000 <i>Counsel for Bonneville International Corp. and the National Religious Broadcasters Music License Committee and Intervenor the National Association of Broadcasters</i></p> | <p>KENNETH D. FREUNDLICH SCHLEIMER & FREUNDLICH, LLP 9100 Wilshire Blvd., Suite 615 East Beverly Hills, CA 90212 (310) 273-9807 <i>Counsel for Royalty Logic, Inc.</i></p> |
| <p>WILLIAM B. COLITRE ROYALTY LOGIC, INC. 21122 Erwin Street Woodland Hills, CA 91367 (818) 558-1400 <i>Counsel for Royalty Logic, Inc.</i></p> | <p>KENNETH L. STEINTHAL WEIL, GOTSHAL & MANGES, LLP 201 Redwood Shores Parkway Redwood Shores, California 94065 (650) 802-3100 <i>Counsel for National Public Radio</i></p> |

March 10, 2008

JONATHAN MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Road
Bethesda, Maryland 20817
(301) 915-0990
Counsel for Digital Media Association

STATUTORY ADDENDUM

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

17 U.S.C. § 112

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if--

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if--

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if--

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if--

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) **Statutory license.--**(1) A transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f) is entitled to a statutory license, under the conditions specified by this subsection, to make

no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more), if the following conditions are satisfied:

(A) The phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it.

(B) The phonorecord is used solely for the transmitting organization's own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

(C) Unless preserved exclusively for purposes of archival preservation, the phonorecord is destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord.

(D) Phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the phonorecord under this subsection from a phonorecord lawfully made and acquired under the authority of the copyright owner.

(2) Notwithstanding any provision of the antitrust laws, any copyright owners of sound recordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(3) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for the activities specified by paragraph (1) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Copyright Royalty Judges licenses covering such activities with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(4) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (5), be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including--

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms under voluntary license agreements described in paragraphs (2) and (3). The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

(5) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.

(6)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)--

(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

(7) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

(8) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical

work, including by means of a digital phonorecord delivery, under sections 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if--

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if--

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(g) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.

17 U.S.C. § 114

§ 114. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) **Limitations on exclusive right.**--Notwithstanding the provisions of section 106(6)--

(1) **Exempt transmissions and retransmissions.**--The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of--

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission--

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however--

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(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are--

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories--

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522(12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

(2) Statutory licensing of certain transmissions.--The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if--

(A)(i) the transmission is not part of an interactive service;

(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service--

(i) the transmission does not exceed the sound recording performance complement; and

(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998--

(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless--

(I) the broadcast station makes broadcast transmissions--

(aa) in digital format that regularly exceed the sound recording performance complement; or

(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement as provided in this clause;

(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

(iii) the transmission--

(I) is not part of an archived program of less than 5 hours duration;

(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

(III) is not part of a continuous program which is of less than 3 hours duration; or

(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at--

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration,

except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.

(3) Licenses for transmissions by interactive services.--

(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided*, however, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if--

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services: *Provided*, however, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided*, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if--

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph--

(i) a “licensor” shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

(ii) a “performing rights society” is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

(4) Rights not otherwise limited.--

(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

(B) Nothing in this section annuls or limits in any way--

(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

(iii) any other rights under any other clause of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(e) Authority for Negotiations.--

(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement--

(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided*, That each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: *Provided*, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

(f) Licenses for certain nonexempt transmissions.--

(1)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, except in the case of a different transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to

the objectives set forth in section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

(C) The procedures under subparagraphs (A) and (B) also shall be initiated pursuant to a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of transmission service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for subscription digital audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(2)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmission services and new subscription services specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, except in the case of a different transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Copyright Royalty Judges licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base its decision on economic, competitive and programming information presented by the parties, including-

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services or preexisting satellite digital radio audio services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.

(4)(A) The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings. The notice and recordkeeping rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 shall remain in effect unless and until new regulations are promulgated by the Copyright Royalty Judges. If new regulations are promulgated under this subparagraph, the Copyright Royalty Judges shall take into account the substance and effect of the rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 and shall, to the extent practicable, avoid significant disruption of the functions of any designated agent authorized to collect and distribute royalty fees.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording--

(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

(5)(A) Notwithstanding section 112(e) and the other provisions of this subsection, the receiving agent may enter into agreements for the reproduction and performance of sound recordings under section 112(e) and this section by any 1 or more small commercial webcasters or noncommercial webcasters during the period beginning on October 28, 1998, and ending on December 31, 2004, that, once published in the Federal Register pursuant to subparagraph (B), shall be binding on all copyright owners of sound recordings and other persons entitled to payment under this section, in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress. Any such agreement for small commercial webcasters shall include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by small commercial webcasters or noncommercial webcasters. The receiving agent shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement.

(B) The Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A). Such publication shall include a statement containing the substance of subparagraph (C). Such agreements shall not be included in the Code of Federal Regulations. Thereafter, the terms of such agreement shall be available, as an option, to any small commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.

(C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

(D) Nothing in the Small Webcaster Settlement Act of 2002 or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Librarian of Congress of July 8, 2002, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph--

(i) the term “noncommercial webcaster” means a webcaster that--

(I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes;

(ii) the term “receiving agent” shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002; and

(iii) the term “webcaster” means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor to make eligible nonsubscription transmissions and ephemeral recordings.

(F) The authority to make settlements pursuant to subparagraph (A) shall expire December 15, 2002, except with respect to noncommercial webcasters for whom the authority shall expire May 31, 2003.

(g) Proceeds from licensing of transmissions.--

(1) Except in the case of a transmission licensed under a statutory license in accordance with subsection (f) of this section--

(A) a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

(2) An agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2 1/2 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

(C) 2 1/2 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

(3) A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than copyright owners and performers who have elected to receive royalties from another designated agent and have notified such nonprofit agent in writing of such election, the reasonable costs of such agent incurred after November 1, 1995, in--

(A) the administration of the collection, distribution, and calculation of the royalties;

(B) the settlement of disputes relating to the collection and calculation of the royalties; and

(C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(4) Notwithstanding paragraph (3), any designated agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such agent incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such agent a contractual relationship that specifies that such costs may be deducted from such royalty receipts.

(h) Licensing to Affiliates.--

(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses--

(A) an interactive service; or

(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(i) **No effect on royalties for underlying works.**--License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

(j) **Definitions.**--As used in this section, the following terms have the following meanings:

(1) An “affiliated entity” is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock.

(2) An “archived program” is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.

(3) A “broadcast” transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

(4) A “continuous program” is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.

(5) A “digital audio transmission” is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

(6) An “eligible nonsubscription transmission” is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(7) An “interactive service” is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

(8) A “new subscription service” is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(9) A “nonsubscription” transmission is any transmission that is not a subscription transmission.

(10) A “preexisting satellite digital audio radio service” is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(11) A “preexisting subscription service” is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(12) A “retransmission” is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as provided in this section, a transmission qualifies as a “retransmission” only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

(13) The “sound recording performance complement” is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than--

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings--

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

(14) A “subscription” transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

(15) A “transmission” is either an initial transmission or a retransmission.

17 U.S.C. § 803

§ 803. Proceedings of Copyright Royalty Judges

(a) Proceedings.--

(1) In general.--The Copyright Royalty Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to section 802(f)(1)(A) or (B), or with a decision of the Register of Copyrights pursuant to section 802(f)(1)(D)), under this chapter, and decisions of the court of appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.

(2) Judges acting as panel and individually.--The Copyright Royalty Judges shall preside over hearings in proceedings under this chapter en banc. The Chief Copyright Royalty Judge may designate a Copyright Royalty Judge to preside individually over such collateral and administrative proceedings, and over such proceedings under paragraphs (1) through (5) of subsection (b), as the Chief Judge considers appropriate.

(3) Determinations.--Final determinations of the Copyright Royalty Judges in proceedings under this chapter shall be made by majority vote. A Copyright Royalty Judge dissenting from the majority on any determination under this chapter may issue his or her dissenting opinion, which shall be included with the determination.

(b) Procedures.--

(1) Initiation.--

(A) Call for petitions to participate.--**(i)** The Copyright Royalty Judges shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter, calling for the filing of petitions to participate in a proceeding under this chapter for the purpose of making the relevant determination under section 111, 112, 114, 115, 116, 118, 119, 1004, or 1007, as the case may be--

(I) promptly upon a determination made under section 804(a);

(II) by no later than January 5 of a year specified in paragraph (2) of section 804(b) for the commencement of proceedings;

(III) by no later than January 5 of a year specified in subparagraph (A) or (B) of paragraph (3) of section 804(b) for the commencement of proceedings, or as otherwise provided in subparagraph (A) or (C) of such paragraph for the commencement of proceedings;

(IV) as provided under section 804(b)(8); or

(V) by no later than January 5 of a year specified in any other provision of section 804(b) for the filing of petitions for the commencement of proceedings, if a petition has not been filed by that date, except that the publication of notice requirement shall not apply in the case of proceedings under section 111 that are scheduled to commence in 2005.

(ii) Petitions to participate shall be filed by no later than 30 days after publication of notice of commencement of a proceeding under clause (i), except that the Copyright Royalty Judges may, for substantial good cause shown and if there is no prejudice to the participants that have already filed petitions, accept late petitions to participate at any time up to the date that is 90 days before the date on which participants in the proceeding are to file their written direct statements. Notwithstanding the preceding sentence, petitioners whose petitions are filed more than 30 days after publication of notice of commencement of a proceeding are not eligible to object to a settlement reached during the voluntary negotiation period under paragraph (3), and any objection filed by such a petitioner shall not be taken into account by the Copyright Royalty Judges.

(B) Petitions to participate.--Each petition to participate in a proceeding shall describe the petitioner's interest in the subject matter of the proceeding. Parties with similar interests may file a single petition to participate.

(2) Participation in general.--Subject to paragraph (4), a person may participate in a proceeding under this chapter, including through the submission of briefs or other information, only if--

(A) that person has filed a petition to participate in accordance with paragraph (1) (either individually or as a group under paragraph (1)(B));

(B) the Copyright Royalty Judges have not determined that the petition to participate is facially invalid;

(C) the Copyright Royalty Judges have not determined, sua sponte or on the motion of another participant in the proceeding, that the person lacks a significant interest in the proceeding; and

(D) the petition to participate is accompanied by either--

(i) in a proceeding to determine royalty rates, a filing fee of \$150; or

(ii) in a proceeding to determine distribution of royalty fees--

(I) a filing fee of \$150; or

(II) a statement that the petitioner (individually or as a group) will not seek a distribution of more than \$1000, in which case the amount distributed to the petitioner shall not exceed \$1000.

(3) Voluntary negotiation period.--

(A) Commencement of proceedings.--

(i) **Rate adjustment proceeding.**--Promptly after the date for filing of petitions to participate in a proceeding, the Copyright Royalty Judges shall make available to all participants in the proceeding a list of such participants and shall initiate a voluntary negotiation period among the participants.

(ii) **Distribution proceeding.**--Promptly after the date for filing of petitions to participate in a proceeding to determine the distribution of royalties, the Copyright Royalty Judges shall make available to all participants in the proceeding a list of such participants. The initiation of a voluntary negotiation period among the participants shall be set at a time determined by the Copyright Royalty Judges.

(B) **Length of proceedings.**--The voluntary negotiation period initiated under subparagraph (A) shall be 3 months.

(C) **Determination of subsequent proceedings.**--At the close of the voluntary negotiation proceedings, the Copyright Royalty Judges shall, if further proceedings under this chapter are necessary, determine whether and to what extent paragraphs (4) and (5) will apply to the parties.

(4) Small claims procedure in distribution proceedings.--

(A) **In general.**--If, in a proceeding under this chapter to determine the distribution of royalties, the contested amount of a claim is \$10,000 or less, the Copyright Royalty Judges shall decide the controversy on the basis of the filing of the written direct statement by the participant, the response by any opposing participant, and 1 additional response by each such party.

(B) **Bad faith inflation of claim.**--If the Copyright Royalty Judges determine that a participant asserts in bad faith an amount in controversy in excess of \$10,000 for the purpose of avoiding a determination under the procedure set forth in subparagraph (A), the Copyright Royalty Judges shall impose a fine on that participant in an amount not to exceed the difference between the actual amount distributed and the amount asserted by the participant.

(5) **Paper proceedings.**--The Copyright Royalty Judges in proceedings under this chapter may decide, sua sponte or upon motion of a participant, to determine issues on the basis of the filing of the written direct statement by the participant, the response by any opposing participant, and one additional response by each such participant. Prior to making such decision to proceed on such a paper record only, the Copyright Royalty

Judges shall offer to all parties to the proceeding the opportunity to comment on the decision. The procedure under this paragraph--

(A) shall be applied in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure; and

(B) may be applied under such other circumstances as the Copyright Royalty Judges consider appropriate.

(6) Regulations.--

(A) In general.--The Copyright Royalty Judges may issue regulations to carry out their functions under this title. All regulations issued by the Copyright Royalty Judges are subject to the approval of the Librarian of Congress. Not later than 120 days after Copyright Royalty Judges or interim Copyright Royalty Judges, as the case may be, are first appointed after the enactment of the Copyright Royalty and Distribution Reform Act of 2004, such judges shall issue regulations to govern proceedings under this chapter.

(B) Interim regulations.--Until regulations are adopted under subparagraph (A), the Copyright Royalty Judges shall apply the regulations in effect under this chapter on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004, to the extent such regulations are not inconsistent with this chapter, except that functions carried out under such regulations by the Librarian of Congress, the Register of Copyrights, or copyright arbitration royalty panels that, as of such date of enactment, are to be carried out by the Copyright Royalty Judges under this chapter, shall be carried out by the Copyright Royalty Judges under such regulations.

(C) Requirements.--Regulations issued under subparagraph (A) shall include the following:

(i) The written direct statements and written rebuttal statements of all participants in a proceeding under paragraph (2) shall be filed by a date specified by the Copyright Royalty Judges, which, in the case of written direct statements, may be not earlier than 4 months, and not later than 5 months, after the end of the voluntary negotiation period under paragraph (3). Notwithstanding the preceding sentence, the Copyright Royalty Judges may allow a participant in a proceeding to file an amended written direct statement based on new information received during the discovery process, within 15 days after the end of the discovery period specified in clause (iv).

(ii)(I) Following the submission to the Copyright Royalty Judges of written direct statements and written rebuttal statements by the participants in a proceeding under paragraph (2), the Copyright Royalty Judges, after taking into consideration the views of the participants in the proceeding, shall determine a schedule for conducting and completing discovery.

(II) In this chapter, the term “written direct statements” means witness statements, testimony, and exhibits to be presented in the proceedings, and such other information

that is necessary to establish terms and rates, or the distribution of royalty payments, as the case may be, as set forth in regulations issued by the Copyright Royalty Judges.

(iii) Hearsay may be admitted in proceedings under this chapter to the extent deemed appropriate by the Copyright Royalty Judges.

(iv) Discovery in connection with written direct statements shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders, and disputes pending at the end of such period. The Copyright Royalty Judges may order a discovery schedule in connection with written rebuttal statements.

(v) Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may request of an opposing participant nonprivileged documents directly related to the written direct statement or written rebuttal statement of that participant. Any objection to such a request shall be resolved by a motion or request to compel production made to the Copyright Royalty Judges in accordance with regulations adopted by the Copyright Royalty Judges. Each motion or request to compel discovery shall be determined by the Copyright Royalty Judges, or by a Copyright Royalty Judge when permitted under subsection (a)(2). Upon such motion, the Copyright Royalty Judges may order discovery pursuant to regulations established under this paragraph.

(vi)(I) Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may, by means of written motion or on the record, request of an opposing participant or witness other relevant information and materials if, absent the discovery sought, the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired. In determining whether discovery will be granted under this clause, the Copyright Royalty Judges may consider--

(aa) whether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues;

(bb) whether the requested information or materials would be unreasonably cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome, or less expensive; and

(cc) whether the participant seeking discovery has had ample opportunity by discovery in the proceeding or by other means to obtain the information sought.

(II) This clause shall not apply to any proceeding scheduled to commence after December 31, 2010.

(vii) In a proceeding under this chapter to determine royalty rates, the participants entitled to receive royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories, and the participants obligated to pay royalties shall collectively be permitted to take no more than 10 depositions and

secure responses to no more than 25 interrogatories. The Copyright Royalty Judges shall resolve any disputes among similarly aligned participants to allocate the number of depositions or interrogatories permitted under this clause.

(viii) The rules and practices in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004, relating to discovery in proceedings under this chapter to determine the distribution of royalty fees, shall continue to apply to such proceedings on and after such effective date.

(ix) In proceedings to determine royalty rates, the Copyright Royalty Judges may issue a subpoena commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things, if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things. Such subpoena shall specify with reasonable particularity the materials to be produced or the scope and nature of the required testimony. Nothing in this clause shall preclude the Copyright Royalty Judges from requesting the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact.

(x) The Copyright Royalty Judges shall order a settlement conference among the participants in the proceeding to facilitate the presentation of offers of settlement among the participants. The settlement conference shall be held during a 21-day period following the 60-day discovery period specified in clause (iv) and shall take place outside the presence of the Copyright Royalty Judges.

(xi) No evidence, including exhibits, may be submitted in the written direct statement or written rebuttal statement of a participant without a sponsoring witness, except where the Copyright Royalty Judges have taken official notice, or in the case of incorporation by reference of past records, or for good cause shown.

(c) Determination of Copyright Royalty Judges.--

(1) Timing.--The Copyright Royalty Judges shall issue their determination in a proceeding not later than 11 months after the conclusion of the 21-day settlement conference period under subsection (b)(6)(C)(x), but, in the case of a proceeding to determine successors to rates or terms that expire on a specified date, in no event later than 15 days before the expiration of the then current statutory rates and terms.

(2) Rehearings.--

(A) In general.--The Copyright Royalty Judges may, in exceptional cases, upon motion of a participant in a proceeding under subsection (b)(2), order a rehearing, after the determination in the proceeding is issued under paragraph (1), on such matters as the Copyright Royalty Judges determine to be appropriate.

(B) Timing for filing motion.--Any motion for a rehearing under subparagraph (A) may only be filed within 15 days after the date on which the Copyright Royalty Judges deliver to the participants in the proceeding their initial determination.

(C) Participation by opposing party not required.--In any case in which a rehearing is ordered, any opposing party shall not be required to participate in the rehearing, except that nonparticipation may give rise to the limitations with respect to judicial review provided for in subsection (d)(1).

(D) No negative inference.--No negative inference shall be drawn from lack of participation in a rehearing.

(E) Continuity of rates and terms.--(i) If the decision of the Copyright Royalty Judges on any motion for a rehearing is not rendered before the expiration of the statutory rates and terms that were previously in effect, in the case of a proceeding to determine successors to rates and terms that expire on a specified date, then--

(I) the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion shall be effective as of the day following the date on which the rates and terms that were previously in effect expire; and

(II) in the case of a proceeding under section 114(f)(1)(C) or 114(f)(2)(C), royalty rates and terms shall, for purposes of section 114(f)(4)(B), be deemed to have been set at those rates and terms contained in the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion, as of the date of that determination.

(ii) The pendency of a motion for a rehearing under this paragraph shall not relieve persons obligated to make royalty payments who would be affected by the determination on that motion from providing the statements of account and any reports of use, to the extent required, and paying the royalties required under the relevant determination or regulations.

(iii) Notwithstanding clause (ii), whenever royalties described in clause (ii) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the motion for rehearing is resolved or, if the motion is granted, within 60 days after the rehearing is concluded, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates by the Copyright Royalty Judges. Any underpayment of royalties resulting from a rehearing shall be paid within the same period.

(3) Contents of determination.--A determination of the Copyright Royalty Judges shall be supported by the written record and shall set forth the findings of fact relied on by the Copyright Royalty Judges. Among other terms adopted in a determination, the Copyright Royalty Judges may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations.

(4) Continuing jurisdiction.--The Copyright Royalty Judges may issue an amendment to a written determination to correct any technical or clerical errors in the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination.

Such amendment shall be set forth in a written addendum to the determination that shall be distributed to the participants of the proceeding and shall be published in the Federal Register.

(5) Protective order.--The Copyright Royalty Judges may issue such orders as may be appropriate to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public, except that any terms or rates of royalty payments or distributions may not be excluded.

(6) Publication of determination.--By no later than the end of the 60-day period provided in section 802(f)(1)(D), the Librarian of Congress shall cause the determination, and any corrections thereto, to be published in the Federal Register. The Librarian of Congress shall also publicize the determination and corrections in such other manner as the Librarian considers appropriate, including, but not limited to, publication on the Internet. The Librarian of Congress shall also make the determination, corrections, and the accompanying record available for public inspection and copying.

(7) Late payment.--A determination of the Copyright Royalty Judges may include terms with respect to late payment, but in no way shall such terms prevent the copyright holder from asserting other rights or remedies provided under this title.

(d) Judicial review.--

(1) Appeal.--Any determination of the Copyright Royalty Judges under subsection (c) may, within 30 days after the publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals for the District of Columbia Circuit, by any aggrieved participant in the proceeding under subsection (b)(2) who fully participated in the proceeding and who would be bound by the determination. Any participant that did not participate in a rehearing may not raise any issue that was the subject of that rehearing at any stage of judicial review of the hearing determination. If no appeal is brought within that 30-day period, the determination of the Copyright Royalty Judges shall be final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in paragraph (2).

(2) Effect of rates.--

(A) Expiration on specified date.--When this title provides that the royalty rates and terms that were previously in effect are to expire on a specified date, any adjustment or determination by the Copyright Royalty Judges of successor rates and terms for an ensuing statutory license period shall be effective as of the day following the date of expiration of the rates and terms that were previously in effect, even if the determination of the Copyright Royalty Judges is rendered on a later date. A licensee shall be obligated to continue making payments under the rates and terms previously in effect until such time as rates and terms for the successor period are established. Whenever royalties pursuant to this section are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the

copyright user (and any successor thereto) shall, within 60 days after the final determination of the Copyright Royalty Judges establishing rates and terms for a successor period or the exhaustion of all rehearings or appeals of such determination, if any, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates. Any underpayment of royalties by a copyright user shall be paid to the entity designated by the Copyright Royalty Judges within the same period.

(B) Other cases.--In cases where rates and terms have not, prior to the inception of an activity, been established for that particular activity under the relevant license, such rates and terms shall be retroactive to the inception of activity under the relevant license covered by such rates and terms. In other cases where rates and terms do not expire on a specified date, successor rates and terms shall take effect on the first day of the second month that begins after the publication of the determination of the Copyright Royalty Judges in the Federal Register, except as otherwise provided in this title, or by the Copyright Royalty Judges, or as agreed by the participants in a proceeding that would be bound by the rates and terms. Except as otherwise provided in this title, the rates and terms, to the extent applicable, shall remain in effect until such successor rates and terms become effective.

(C) Obligation to make payments.--

(i) The pendency of an appeal under this subsection shall not relieve persons obligated to make royalty payments under section 111, 112, 114, 115, 116, 118, 119, or 1003, who would be affected by the determination on appeal, from--

(I) providing the applicable statements of account and reports of use; and

(II) paying the royalties required under the relevant determination or regulations.

(ii) Notwithstanding clause (i), whenever royalties described in clause (i) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the final resolution of the appeal, return any excess amounts previously paid (and interest thereon, if ordered pursuant to paragraph (3)) to the extent necessary to comply with the final determination of royalty rates on appeal. Any underpayment of royalties resulting from an appeal (and interest thereon, if ordered pursuant to paragraph (3)) shall be paid within the same period.

(3) Jurisdiction of court.--Section 706 of title 5 shall apply with respect to review by the court of appeals under this subsection. If the court modifies or vacates a determination of the Copyright Royalty Judges, the court may enter its own determination with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment. The court may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).

(e) Administrative matters.--

(1) Deduction of costs of Library of Congress and Copyright Office from filing fees.-

(A) Deduction from filing fees.--The Librarian of Congress may, to the extent not otherwise provided under this title, deduct from the filing fees collected under subsection (b) for a particular proceeding under this chapter the reasonable costs incurred by the Librarian of Congress, the Copyright Office, and the Copyright Royalty Judges in conducting that proceeding, other than the salaries of the Copyright Royalty Judges and the 3 staff members appointed under section 802(b).

(B) Authorization of appropriations.--There are authorized to be appropriated such sums as may be necessary to pay the costs incurred under this chapter not covered by the filing fees collected under subsection (b). All funds made available pursuant to this subparagraph shall remain available until expended.

(2) Positions required for administration of compulsory licensing.--Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.

17 U.S.C. § 804

§ 804. Institution of proceedings

(a) Filing of petition.--With respect to proceedings referred to in paragraphs (1) and (2) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 111, 112, 114, 115, 116, 118, 119, and 1004, during the calendar years specified in the schedule set forth in subsection (b), any owner or user of a copyrighted work whose royalty rates are specified by this title, or are established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2004, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests a determination or adjustment of the rate. The Copyright Royalty Judges shall make a determination as to whether the petitioner has such a significant interest in the royalty rate in which a determination or adjustment is requested. If the Copyright Royalty Judges determine that the petitioner has such a significant interest, the Copyright Royalty Judges shall cause notice of this determination, with the reasons for such determination, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter. With respect to proceedings under paragraph (1) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 112 and 114, during the calendar years specified in the schedule set forth in subsection (b), the Copyright Royalty Judges shall cause notice of commencement of proceedings under this chapter to be published in the Federal Register as provided in section 803(b)(1)(A).

(b) Timing of proceedings.--

(1) Section 111 proceedings.--**(A)** A petition described in subsection (a) to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (A) or (D) of section 801(b)(2) applies may be filed during the year 2005 and in each subsequent fifth calendar year.

(B) In order to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (B) or (C) of section 801(b)(2) applies, within 12 months after an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2004, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests an adjustment of the rate. The Copyright Royalty Judges shall then proceed as set forth in subsection (a) of this section. Any change in royalty rates made under this chapter pursuant to this subparagraph may be reconsidered in the year 2005, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(2)(B) or (C), as the case may be. A petition for adjustment of rates established by section 111(d)(1)(B) as a result of a change in the rules and regulations of the Federal Communications Commission shall set forth the change on which the petition is based.

(C) Any adjustment of royalty rates under section 111 shall take effect as of the first accounting period commencing after the publication of the determination of the Copyright Royalty Judges in the Federal Register, or on such other date as is specified in that determination.

(2) Certain section 112 proceedings.--Proceedings under this chapter shall be commenced in the year 2007 to determine reasonable terms and rates of royalty payments for the activities described in section 112(e)(1) relating to the limitation on exclusive rights specified by section 114(d)(1)(C)(iv), to become effective on January 1, 2009. Such proceedings shall be repeated in each subsequent fifth calendar year.

(3) Section 114 and corresponding 112 proceedings.--

(A) For eligible nonsubscription services and new subscription services.--Proceedings under this chapter shall be commenced as soon as practicable after the date of enactment of the Copyright Royalty and Distribution Reform Act of 2004 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of eligible nonsubscription transmission services and new subscription services, to be effective for the period beginning on January 1, 2006, and ending on December 31, 2010. Such proceedings shall next be commenced in January 2009 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2011. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

(B) For preexisting subscription and satellite digital audio radio services.--Proceedings under this chapter shall be commenced in January 2006 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of preexisting subscription services, to be effective during the period beginning on January 1, 2008, and ending on December 31, 2012, and preexisting satellite digital audio radio services, to be effective during the period beginning on January 1, 2007, and ending on December 31, 2012. Such proceedings shall next be commenced in 2011 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2013. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

(C)(i) Notwithstanding any other provision of this chapter, this subparagraph shall govern proceedings commenced pursuant to section 114(f)(1)(C) and 114(f)(2)(C) concerning new types of services.

(ii) Not later than 30 days after a petition to determine rates and terms for a new type of service is filed by any copyright owner of sound recordings, or such new type of service, indicating that such new type of service is or is about to become operational, the Copyright Royalty Judges shall issue a notice for a proceeding to determine rates and terms for such service.

(iii) The proceeding shall follow the schedule set forth in subsections (b), (c), and (d) of section 803, except that--

(I) the determination shall be issued by not later than 24 months after the publication of the notice under clause (ii); and

(II) the decision shall take effect as provided in subsections (c)(2) and (d)(2) of section 803 and section 114(f)(4)(B)(ii) and (C).

(iv) The rates and terms shall remain in effect for the period set forth in section 114(f)(1)(C) or 114(f)(2)(C), as the case may be.

(4) Section 115 proceedings.--A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment or determination of royalty rates as provided in section 115 may be filed in the year 2006 and in each subsequent fifth calendar year, or at such other times as the parties have agreed under section 115(c)(3) (B) and (C).

(5) Section 116 proceedings.--(A) A petition described in subsection (a) to initiate proceedings under section 801(b) concerning the determination of royalty rates and terms as provided in section 116 may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending March 1, 1989, the Copyright Royalty Judges shall, upon petition filed under paragraph (1) within 1 year after such termination or expiration, commence a proceeding to promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the Copyright Royalty Judges, in accordance with section 803, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(b).

(6) Section 118 proceedings.--A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 118 may be filed in the year 2006 and in each subsequent fifth calendar year.

(7) Section 1004 proceedings.--A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment of reasonable royalty rates under section 1004 may be filed as provided in section 1004(a)(3).

(8) Proceedings concerning distribution of royalty fees.--With respect to proceedings under section 801(b)(3) concerning the distribution of royalty fees in certain circumstances under section 111, 119, or 1007, the Copyright Royalty Judges shall, upon a determination that a controversy exists concerning such distribution, cause to be

published in the Federal Register notice of commencement of proceedings under this chapter.