U.S.C. 552a in §§ 1611.13, 1611.14, or 1611.15.

* * * * *

(b) Upon request, the appropriate Commission official shall make available an accounting of disclosures pursuant to 5 U.S.C. 552a(c)(3), unless that system is exempted from the requirements of 5 U.S.C. 552a in §§ 1611.13, 1611.14, or 1611.15.

* * * * *

■ 3. Section 1611.15 is added to read as follows:

§ 1611.15 Exemption—EEOC Personnel Security Files.

EEOC's system of records entitled EEOC Personnel Security Files contains records that document and support decisions regarding suitability, eligibility and fitness for service of applicants for EEOC employment and contract positions. The records include background investigation records. Pursuant to section (k)(5) of the Privacy Act, 5 U.S.C. 552a(k)(5), this system of records is exempt from the provisions of sections (c)(3) and (d)(1) of the Privacy Act, 5 U.S.C. 552a(c)(3) and (d)(1), but only to the extent that the accounting of disclosures or the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence.

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 2006–3 CRB DPRA]

Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges are announcing four modifications to the royalty terms previously adopted in their final determination of rates and terms for the mechanical and digital phonorecord delivery statutory license. These modifications are made to more clearly reflect the law as stated in the Register of Copyrights' decision of January 26, 2009.

DATES: *Effective Date:* March 1, 2009.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707–7658. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION: On November 24, 2008, the Copyright Royalty Judges (''Judges'') issued their final determination establishing rates and terms for the mechanical and digital phonorecord delivery statutory license found at 17 U.S.C. 115.[1] Rates and terms were promulgated for the use of musical works in physical phonorecords, permanent downloads, ringtones, limited downloads, interactive streaming and incidental digital phonorecord deliveries. Rates and terms for the latter three categories—limited downloads, interactive streaming and incidental digital phonorecord deliveries—were adopted pursuant to an agreement reached by all participants in the proceeding and presented to the Judges for adoption. After publishing the agreement in the **Federal Register** and allowing interested parties to comment as required by 17 U.S.C. 801(b)(7)(A), the Judges determined that the same section did not allow them to review or reject the agreement, or portions thereof, in the absence of an objection from one of the participants to the proceeding. Under the Judges' interpretation of the statute, if an objection is filed, the Judges may review the agreement for reasonableness. However, with no objection tendered, the agreement should be adopted *in toto*.

On January 26, 2009, the Register of Copyrights published a notice in the **Federal Register** pursuant to 17 U.S.C. 802(f)(1)(D). 74 FR 4537 (January 26, 2009). That section provides that the ''Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges.'' The Register faulted our adoption of the participants' agreement of rates and terms for limited downloads, interactive streaming and incidental digital phonorecord deliveries, concluding that ''it was legal error for the CRJs to conclude that the restrictions on its authority to review the reasonableness of specific valid terms and rates also precluded its review of the legality of the provisions of the agreement as a threshold matter.'' 74 FR at 4540. The Register further stated that her ''conclusion is consistent with the CRJs' decision that it had the authority to decline to adopt language in the participants' agreement that stated that the rates in the agreement have no precedential effect and may not be introduced or relied upon in any governmental or judicial proceeding.'' *Id., citing* 72 FR 61586 (October 31, 2007).[2]

It is evident from the Register's pronouncement that the Copyright Act grants the Judges considerably broader authority over review of agreements than discerned by the Judges in the statute. The Register stated that an agreement must pass a threshold review prior to the application of 17 U.S.C. 801(b)(7)(A). The Judges have the authority, and in fact the obligation, to review any and all provisions in an agreement. Provisions that are deemed legally erroneous may not be part of the codification based on the agreement; otherwise their adoption results in an error of law. *See* 74 FR at 4540. The Register stated that once the agreement is vetted for errors of law, the remaining portions of the agreement may be adopted as the agreement of the participants unless, of course, there is an objection from one or more of the participants in which case the procedures set forth in section 801(b)(7)(A) would apply.

The Register identified four provisions in the agreement adopted in the Code of Federal Regulations that contain errors of law. All four were in the participants' agreement. First, the Register concluded that the second sentence of the definition of an ''interactive stream'' contained in § 385.11 of the regulations was in error because it altered the statutory terms of the section 115 license regarding what constitutes a digital phonorecord delivery.[3] 74 FR at 4541. That sentence

[1] The Librarian of Congress, pursuant to 17 U.S.C. 803(c)(6), published the Judges' determination in the **Federal Register** on January 26, 2009. *See* 74 FR 4510.

[2] The cited proceeding established the rates and terms for preexisting subscription services making digital transmissions of sound recordings and ephemeral recordings. Docket No. 2006–1 CRB DSTRA. The Judges made two changes to the agreement submitted by the parties in that proceeding, changing the numbering of the proposed provisions to reflect their ultimate position in Chapter III of title 37 of the Code of Federal Regulations, and correcting a clerical error in the agreement for the location to submit notices of intention to audit preexisting subscription services. The Judges also eliminated a provision concerning the experimental and precedential effect and use of rates in an agreement in a proceeding to adjust the rates and terms for noncommercial educational broadcasting services under 17 U.S.C. 118. 72 FR 19138 (April 17, 2007). We declined to give such a term effect because it was outside the scope of our jurisdiction to set rates for the section 118 license. 72 FR at 19139 (''It is not our task to offer evaluations, limitations or characterizations of the rates and terms, or make statements about their use or value in proceedings other than this one.'').

[3] The Register asserts the faulty provision contained in the § 385.11 definition of an ''interactive stream'' is the product of the Judges'

provides that ''[a]n interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).'' Second, the Register determined that § 385.14(e) of the regulations, which establishes a promotional royalty rate for promotional interactive streams and limited downloads offered in the context of a free trial period for a digital music subscription service, amounts to impermissible retroactive rulemaking. *Id.* at 4542. Third, the Register concluded that § 385.15 of the regulations, which addresses the timing of royalty payments, was violative of the provisions of 17 U.S.C. 115(c)(5). *Id.* Fourth, the Register found error with the final sentence of § 385.14(a)(4), which provides that ''For the avoidance of doubt, however, except as provided in paragraph (a) of this section, statements of account under 17 U.S.C. 115 need not reflect interactive streams or limited downloads subject to the promotional royalty rate.'' She determined that this sentence is contrary to her authority to prescribe regulations for statements of account under the section 115 license. *Id.* at 4543.

Given the Register's legal determination that the Copyright Royalty Judges have broader powers of review of agreements submitted in royalty rate and distribution proceedings, the Judges are exercising their authority under 17 U.S.C. 803(c)(4) and are modifying the terms adopted in §§ 385.11, 385.14 and 385.15. Although the Register clearly recognizes that her decision identifying certain errors of copyright law is only binding as precedent upon the Judges in subsequent proceedings, the Register suggests certain of these legal errors may be within the Judges' discretion to correct even in the instant proceeding under the continuing jurisdiction provisions of 17 U.S.C. 803(c)(4).

That statutory provision establishes continuing jurisdiction under which the 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.'' 17 U.S.C. 803(c)(4) (emphasis added). The Register further interprets this provision of the statute as applicable even to the participants' partial agreement, notwithstanding the Judges' previously articulated view of the statutory limits on their review of such agreements. 74 FR at 4541, 4543.

Following the Register's view of the Judges' statutory discretion to ''correct'' agreements, though only binding as to future proceedings, offers a singular advantage in the instant proceeding to clarify potential confusion facing users of the license at issue (some of whom may not have been parties to the partial agreement). Because the Register's published decision has interpreted certain provisions of the partial agreement of the participants regarding limited downloads and interactive streaming in this proceeding as necessarily implicating errors of copyright law and, at the same time, because the partial agreement of the participants containing the offending terms were previously published as statutorily required together with the Judges' resolution of litigated issues, users of the license may well be confused as to the status of the currently codified terms. In order to clarify those terms by means of an updated codification and, thereby, to promote an efficient administration of the applicable license, we find, pursuant to the Register's statement of our discretion under 17 U.S.C. 803(c)(4), four terms which should be clarified by means of the issuance of amended regulations to more clearly reflect the law as stated in the Register's decision. Because they are contrary to law, the following are deleted: (1) The second sentence of the definition of an ''interactive stream'' in § 385.11; (2) § 385.14(e); (3) § 385.15; and (4) the last sentence of § 385.14(a)(4). The Judges act under the Register's determination that agreements of the participants may be modified to excise provisions that conflict with law and still be the agreement of the participants. The basis for the regulations in Subpart B is the agreement presented by the participants pursuant to 17 U.S.C. 801(b)(7)(A). The Judges decline to add provisions to the participants' agreement, as the Register suggests, to correct errors of law and still treat it as an agreement of the participants under section 801(b)(7)(A).

So ordered.

William J. Roberts, Jr.,
Copyright Royalty Judge.

Stanley C. Wisniewski,
Copyright Royalty Judge.

Dated: February 6, 2009.

Dissenting Opinion of Chief Copyright Royalty Judge Sledge

With utmost respect for my esteemed colleagues, Marybeth Peters, Register of Copyrights, and Copyright Royalty Judges Stanley C. Wisniewski and William J. Roberts, Jr., the Chief Copyright Royalty Judge, James Scott Sledge, dissents. The Copyright Royalty and Distribution Reform Act of 2004 is relatively new. This proceeding is the third rate determination proceeding tried to completion with a final determination under the new act. Appeals are pending on the first two rate proceedings. The Register of Copyrights, the Copyright Royalty Judges, the participants and the public are all trying to implement the new act and faithfully follow its provisions. Consistent with all new legislation, the implementation will evolve as the common law develops. I dissent from the amendment to the final determination, only because I feel an amendment is inappropriate and unwarranted. If an amendment is appropriate to be issued, I do not oppose any part of the analysis in the majority amendment. This dissenting opinion is the first instance that any order or ruling, written or oral, of the Copyright Royalty Judges has not been unanimous. We can be proud of our record of harmony and this dissent is made after careful deliberation.

The Judges are not required to amend the final determination unless the Court of Appeals reverses and orders changes. The Judges have full independence in making initial determinations of copyright royalty rates and terms, subject only to a Register's decision following a referral of a novel question or a request for an interpretation of a material question of substantive law in title 17. 17 U.S.C. 802(f)(1)(A) and (B). A review of the Judges' final

failure to refer to her under 17 U.S.C. 802(f)(1)(B) the question of what constitutes a digital phonorecord delivery as defined in 17 U.S.C. 115(d), 74 FR at 4539 (''Failure to refer the question of what constitutes a DPD to the Register has led to the adoption of a regulation that, on its face, overstates the scope of the section 115 license with respect to interactive streams''), leading her to conclude that there are two errors of law on the same matter. *Id.* (''The CRJs' failure to refer a novel material question of substantive law is itself an erroneous legal resolution of 'a material question of substantive law under [title 17] that underlies or is contained in a final determination of the [CRJs],' '' *citing* 17 U.S.C. 802(f)(1)(D)). As discussed *infra*, we are removing the second sentence from the definition of an interactive stream contained in § 385.11 of the regulations. We cannot discern authority in the cited section 802(f)(1)(D), or any other section of the Copyright Act, that a procedural decision—to refer or not to refer—is itself an error of substantive law, particularly where the procedural matter is neither contained in nor underlies our final determination.

The statutory scheme embodied in 17 U.S.C. 801 *et seq.*, specifically limits the participation of the Register in a rate-setting proceeding to certain questions of ''substantive law.'' 17 U.S.C. 802(f)(1)(A), (B), (D). A decision whether or not to refer a matter for review by the Register is one of procedure and, thus, not reviewable by the Register under the Act. Therefore, the error of law that underlies and is indeed contained in our final determination is the second sentence of the definition of an interactive stream as codified in § 385.11 of the regulations, which is being removed in this amendment to the determination.

determination for legal error by the Register is precedent in subsequent proceedings under Chapter 8. 17 U.S.C. 802(f)(1)(D). The Register does not claim the authority to direct amendments in the determination and regulations, like a remand, and her corrections to the legal errors she found are suggestions to the Judges.

The Judges are not authorized to make the corrections suggested by the Register. Section 803(c)(4) only permits an amendment to a final determination to correct technical or clerical errors or to modify terms in response to unforeseen circumstances that would frustrate the proper implementation of the determination. The Register's suggested changes are substantive changes of rates and terms. A determination of what constitutes a technical or clerical error is not a material question of substantive law in title 17 that is subject to the Register's authority in section 802(f)(1)(D). If any correction suggested by the Register is an unforeseen circumstance, one must conclude that it is unreasonable or unforeseeable for the Register to review a determination and find legal error.

The Judges should not make the suggested changes to the determination as they are not consistent with Chapter 8. The change to the agreement presented by all the participants discourages settlements. The procedure in proceedings throughout section 803 encourages settlements. Section 801(b)(7)(A) encourages settlements and does not include the threshold requirement suggested by the Register for a review to delete any provision that is contrary to law. The suggested change would adopt an agreement of the participants after provisions are deleted and new provisions added, notwithstanding the non-severability restrictions in the agreement. This practice discourages settlements. The changes hinder judicial efficiency by encouraging parties that are disgruntled or losing arguments in a proceeding to make last-minute requests to refer novel questions of law to the Register. Also, the Judges would be reviewing agreements for legal error after the record is closed and shortly before the determination is required to be issued, which was the timing of the agreement in this case. The changes involve the Register in procedural issues in a proceeding. An order granting or denying a motion to refer a novel question of law is a procedural, interlocutory order that is not subject to Register review, section 802(f)(1)(A)(ii), and is not a material question of law under title 17 that underlies or is contained in a final determination. The changes undermine the statutorily conferred independence of the Judges, section 802(f)(1)(A).

Rather than amend the determination, I would hold that the determination and regulations should remain as published.

James Scott Sledge,
Chief U.S. Copyright Royalty Judge.
Dated: February 6, 2009.

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Final Regulation

■ For the reasons set forth in the preamble, the Copyright Royalty Judges are further amending Part 385 of Chapter III of title 37 of the Code of Federal Regulations as published January 26, 2009, at 74 FR 4510 as follows:

PART 385—RATES AND TERMS USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

■ 1. The authority citation for part 385 continues to read:

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

§ 385.11 [Amended]

■ 2. Section 385.11 is amended by removing the last sentence from the definition of ''Interactive stream''.

§ 385.14 [Amended]

■ 3. Section 385.14 is amended as follows:

■ a. In paragraph (a)(4), by removing the last sentence; and

■ b. By removing paragraph (e).

§ 385.15 [Removed and Reserved]

■ 4. Remove and reserve § 385.15.

Dated: February 6, 2009.

James Scott Sledge,
Chief U.S. Copyright Royalty Judge.

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