

H.R. 6480 Internet Radio Fairness Act (Chaffetz) (9/21/2012)

This is a redline reflecting the changes that the Internet Radio Fairness Act would make to the Copyright Act. Words written in bold represent additions to the law, and words struck through represent deletions. This analysis omits certain non-substantive conforming amendments. For more information please visit www.publicknowledge.org.

17 U.S.C. 112(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 **1 or more copies or phonorecords embodying the performance or display, if—** ~~no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—~~

(A) the **copies or phonorecords are** ~~copy or phonorecord is~~ retained and used solely by the transmitting organization that made ~~them~~ **them, except as may be incidental to the operation of the transmission technology used by the transmitting organization;** and

(B) the **copies or phonorecords are** ~~copy or phonorecord is~~ used solely for the transmitting organization's own transmissions **originating in the United States,** ~~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.

17 U.S.C. 112(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— if the following conditions are satisfied:~~

(A) ~~The~~ **the** phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it, **except as may be incidental to the operation of the transmission technology used by the transmitting organization;**

(B) ~~The~~ **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), **or for purposes of archival preservation or security; and**

~~(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.~~

(C) (D) Phonorecords 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, **on a nonexclusive basis**, to negotiate, agree to, pay, or receive such royalty payments. **Nothing in this paragraph shall be construed to permit any copyright owners of sound recordings acting jointly, or any common agent or collective representing such copyright owners, to take any action that would prohibit, interfere with, or impede direct licensing by copyright owners of sound recordings in competition with licensing by any common agent or collective, and any such action that affects interstate commerce shall be deemed a contract, combination or conspiracy in restraint of trade in violation of section 1 of the Sherman Act (15 U.S.C. 1).**

(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.~~ **Such rates may include a minimum annual fee for each type of service offered by the transmitting organization.** 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).~~ **In establishing rates and terms under this paragraph, the Copyright Royalty Judges shall apply the objectives set forth in section 801(b)(1), in accordance with subparagraphs (C) and (D) of section 114(f)(1). In any proceeding under this paragraph, the burden of proof shall be on the copyright owners of sound recordings to establish that the fees and terms that they seek satisfy the requirements of this paragraph, and do not exceed the fees to which most copyright owners and users would agree under competitive market circumstances. To the extent the Copyright Royalty Judges consider marketplace benchmarks to be relevant, they shall limit those benchmarks to benchmarks reflecting the rates and terms that have been agreed to under competitive market circumstances by most copyright users.** 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. and be binding upon the parties to any such agreements in lieu of any determination by the Copyright Royalty Judges.~~

17 U.S.C. 114(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—

(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) [1] 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 **or simultaneous transmission of a broadcast transmission in any medium, which may include programming substituted for programming contained in the broadcast transmission with respect to which the transmitting entity lacks the requisite licenses or clearances to make the transmission in the medium, or for advertisements contained in the broadcast transmission, or the transmission of any programming previously included in a broadcast transmission as an archived program in conformance with clause (iii);** ~~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—~~

~~(f) 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~~

~~(H) 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, in writing~~ by means of an advance program schedule ~~or prior announcement,~~ the titles of the specific sound recordings to be transmitted, the ~~or~~ phonorecords embodying such sound recordings **to be transmitted at particular times,** ~~or, other than for illustrative purposes, the names of the featured recording artists,~~ except that this clause does not disqualify a transmitting entity that **publishes in writing—**

(AA) such a program schedule that identifies sound recordings, phonorecords or artists that will be featured within a period of time greater than 3 hours or within an unspecified future time period; or

(BB) an advance program schedule that is that is [sic] a schedule of classical music programming to be performed as part of a retransmission or simultaneous transmission of a broadcast transmission, which may include programming substituted for programming contained in the broadcast transmission with respect to which the transmitting entity lacks the requisite licenses or clearances to make the transmission in the medium, or for advertisements contained in the broadcast transmission;

~~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; **or**

(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; **or simultaneous transmission of a broadcast transmission, which may include programming substituted for programming contained in the broadcast transmission with respect to which the transmitting entity lacks the requisite licenses or clearances to make the transmission in the medium, or for advertisements contained in the broadcast transmission;**

(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 **apply to the extent that the transmitting entity does not have the technology or information necessary to provide such textual data.** ~~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.

17 U.S.C. 114(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.

(3) Nothing in this subsection shall be construed to permit any copyright owners of sound recordings acting jointly, or any common agent or collective representing such copyright owners, to take any action that would prohibit, interfere with, or impede direct licensing by copyright owners of sound recordings in competition with licensing by any common agent or collective, and any such action that affects interstate commerce shall be deemed a contract, combination or conspiracy in restraint of trade in violation of section 1 of the Sherman Act (15 U.S.C. 1).

(4) In order to obtain the benefits of paragraph (1), a common agent or collective representing copyright owners of sound recordings must make available at no charge through publicly accessible computer access through the Internet the most current available list of sound recording copyright owners represented by the organization and the most current list of sound recordings licensed by the organization.

17 U.S.C. 114(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. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation and may take into account the different characteristics of such services, and may include a minimum annual fee of not more than \$500 for each provider of services that is subject to such rates and terms, which may be the only minimum fee for such provider and may be assessed only once annually to that provider. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Copyright Royalty Judges for consideration in such rate-setting proceedings licenses covering such non-interactive sound recording performances.~~ 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)~~ **paragraph (2)**, 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).~~ **In establishing rates and terms under this paragraph, the Copyright Royalty Judges shall apply the objectives set forth in section 801(b)(1) and may also consider the rates and terms for noninteractive digital audio transmission services under voluntary license agreements described in subparagraph (A) that were entered into under competitive market circumstances. In any proceeding under this subsection, the burden of proof shall be on the copyright owners of sound recordings to establish that the fees and terms that they seek satisfy the requirements of this subsection, and do not exceed the fees to which most copyright owners and users would agree under competitive market circumstances.**

(C)

(i) In construing the objectives set forth in section 801(b)(1), the Copyright Royalty Judges shall take into consideration—

(I) the public’s interest in both the creation of new sound recordings of musical works and in fostering online and other digital performances of sound recordings; and

(II) the income necessary to provide a reasonable return on all relevant investments, including investments in prior periods for which returns have not been earned.

(ii) To the extent the Copyright Royalty Judges consider marketplace benchmarks to be relevant, the Copyright Royalty Judges shall limit those

benchmarks to benchmarks reflecting the rates and terms that have been agreed under competitive market circumstances by most copyright users.

(D) In applying the objectives set forth in section 801(b)(1), the Copyright Royalty Judges—

(i) shall not disfavor percentage of revenue-based fees;

(ii) shall establish license fee structures that foster competition among the licensors of sound recording performances and between sound recording performances and other programming, including per-use or per-program fees, or percentage of revenue or other fees that include carve-outs on a pro-rata basis for sound recordings the performance of which have been licensed either directly with the copyright owner or at the source, or for which a license is not necessary;

(iii) shall give full consideration for the value of any promotional benefit or other non-monetary benefit conferred on the copyright owner by the performance;

(iv) shall give full consideration to the contributions made by the digital audio transmission service to the content and value of its programming; and

(v) shall not take into account either the rates and terms provided in licenses for interactive services or the determinations rendered by the Copyright Royalty Judges prior to the enactment of the Internet Radio Fairness Act of 2012.

~~(C)~~ **(E) The procedures under subparagraphs (A) and (B) may 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 or any entity performing sound recordings affected by this paragraph, indicating that a new type of subscription digital audio transmission service engaged in the public performance of sound recordings 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 the most comparable 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 [2] 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 their 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 eligible nonsubscription services and new subscription 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.~~

(2) (3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings **or their authorized representatives** 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.~~ **and be binding upon the parties to any such agreements in lieu of any determination by the Copyright Royalty Judges.**

(3) (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.

(4) (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 commercial webcasters or noncommercial webcasters for a period of not more than 11 years

beginning on January 1, 2005, 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 the Copyright Royalty Judges. Any such agreement for commercial webcasters may 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 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 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 Copyright Royalty Judges 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 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). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.~~

~~(C) (D)~~ Nothing in the Webcaster Settlement Act of 2008, the Webcaster Settlement Act of 2009, 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 Copyright Royalty Judges of May 1, 2007, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(D) ~~(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.

(E) The rates and terms of any settlements made pursuant to the amendments made by the Webcaster Settlement Act of 2009 (Public Law 111-36; 123 Stat. 1926) that were to expire before December 31, 2015, shall be extended through December 31, 2015, according to the rates and terms applicable to 2014.

~~(F) The authority to make settlements pursuant to subparagraph (A) shall expire at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009.~~

17 U.S.C. 114(j) Definitions.—

(4) “Competitive market circumstances” are circumstances in which a licensee enters into a license for the noninteractive performance of sound recordings with a licensor that does not possess market power resulting from the aggregation of copyrights, either by a licensing collective or individual copyright owners.

17 U.S.C. 801(a) Appointment.—

Appointment.— The ~~Librarian of Congress~~ **President of the United States, by and with the advice and consent of the Senate**, shall appoint 3 full-time Copyright Royalty Judges, and shall appoint 1 of the 3 as the Chief Copyright Royalty Judge. ~~The Librarian shall make appointments to such positions after consultation with the Register of Copyrights.~~

17 U.S.C. 802(a) Qualifications of Copyright Royalty Judges.—

(1) In general.— ~~Each Copyright Royalty Judge shall be an attorney who has at least 7 years of legal experience. The Chief Copyright Royalty Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. Of the other 2 Copyright Royalty Judges, 1 shall have significant knowledge of copyright law, and the other shall have significant knowledge of economics. Each Copyright Royalty Judge shall be an attorney who has not fewer than 10 years of legal experience and has significant experience in adjudicating arbitrations or court trials. The Chief Copyright Royalty Judge shall not have fewer than 7 years of experience in adjudicating court trials in civil cases.~~ An individual may serve as a Copyright Royalty Judge only if the individual is free of any financial conflict of interest under subsection (h).

17 U.S.C. 802(d) Administrative Support.—

(d) Vacancies or Incapacity.—

(1) Vacancies.— ~~If a vacancy should occur in the position of Copyright Royalty Judge, the Librarian of Congress shall act expeditiously to fill the vacancy, and may appoint an interim Copyright Royalty Judge to serve until another Copyright Royalty Judge is appointed under this section.~~ **President of the United States shall act expeditiously to fill the vacancy.** An individual appointed to fill the vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed shall be appointed for the remainder of that term.

(2) Incapacity.— In the case in which a Copyright Royalty Judge is temporarily unable to perform his or her duties, the ~~Librarian of Congress~~ **President of the United States, by and with the advice and consent of the Senate**, may appoint an interim Copyright Royalty Judge to perform such duties during the period of such incapacity.

17 U.S.C. 803(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.~~ **In carrying out the purposes set forth in**

section 801, all proceedings of the Copyright Royalty Judges shall be conducted in accordance with this title and, unless contrary to a procedure set forth in subsection (b), according to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. 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. **Notwithstanding the preceding sentence, in any rate-setting proceeding under section 112(e)(4) or section 114(f)(2)(B), the Copyright Royalty Judges may only consider as precedent and act in accordance with determinations and interpretations that are made under the objectives set forth in section 801(b) for the statutory licenses under section 112(e) and 114(d)(2).**

(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.

17 U.S.C. 803(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 and are subject to judicial review pursuant to chapter 7 of title 5, except as set forth in subsection (d). 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 Requirements in Cases Not Involving Digital Performances of Sound Recordings.— In proceedings other than proceedings to determine terms and rates of royalty payments under section 112 or 114, 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 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.

(D) Requirements in Proceedings Involving Digital Performances of Sound Recordings.— In proceedings to determine terms and rates of royalty payments under section 112 or 114, the following shall apply:

(i) Initial Disclosures.— Not later than 30 days after the date on which the voluntary negotiation period is initiated pursuant to paragraph (3)(A)(i), each participant shall make an initial disclosure to the other participants by providing copies—

(I) of all license agreements entered into by that participant, its members, or any licensor or licensee represented in the proceeding by that participant during the applicable 5-year period or covering any portion of the period for which the rates are to be set, relating to—

(aa) in a proceeding under section 112, the making of ephemeral recordings; or

(bb) in a proceeding under section 114, the public performance of musical works, sound recordings, or audiovisual works incorporating recorded musical works; or

(II) of any other license agreement or document upon which the participant intends to rely, in whole or in part, in its ratemaking proposal, as well as all license agreements entered into by the participant, its members, or any licensor or licensee represented in the proceeding by that participant for the same or similar rights during the applicable 5-year period or covering any portion of the period for which the rates are to be set.

(ii) Protective Order; Sanctions.— Disclosures under clause (i) and other confidential information produced by a participant or third party during discovery, or used during the proceeding, shall be subject to a protective order, entered by the Copyright Royalty Judges in the proceeding, that prohibits use of the disclosures and the confidential information for any purpose other than the proceeding and that prohibits disclosure of the licenses or other documents included in the disclosure or of other

confidential information to any person that is not counsel of record in the proceeding. The Copyright Royalty Judges may impose appropriate sanctions for failure to comply in a timely manner with the matters required to be disclosed under clause (i).

(iii) Statements of the Case.— Statements of the case shall be filed by a date specified by the Copyright Royalty Judges, which for licensor participants shall be no earlier than the end of the 90-day period beginning on the date on which the voluntary negotiation period concludes, and for licensee participants shall be no earlier than the end of the 60-day period beginning on the date on which the statements of the case are required to be submitted by licensor participants.

(iv) Subpoena Powers.— The Copyright Royalty Judges shall have the power to issue subpoenas at the request of a participant to non-participants, subject to the Federal Rules of Civil Procedure. Orders by the Copyright Royalty Judges to enforce such subpoenas may be enforced by the requesting participant in an action in the district court in which the subpoenaed party resides.

(v) Scheduling Conference.— The Copyright Royalty Judges shall order a scheduling conference no sooner than 45 days following the submission to the Copyright Royalty Judges of the statement of the case of the licensee participants. Participants shall submit jointly a proposed discovery plan no later than 21 days before the conference. Following the conference, the Copyright Royalty Judges shall issue an initial scheduling order governing pretrial procedures, and permitting discovery that is reasonable and sufficient, giving due consideration to the proposals of the participants and the magnitude of the potential royalty payments at issue during the license period covered by the proceeding. The period to conduct discovery shall be no shorter than 90 days, plus the time needed to complete discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders, and disputes pending at the end of such period.

(vi) Settlement Conference.— 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 the 21-day period beginning on the day after the last day of the discovery period ordered pursuant to clause (iv) and shall take place outside the presence of the Copyright Royalty Judges.

(vii) Joint Pretrial Order.— If the conference required in clause (v) does not result in a settlement among all parties, not later than 60 days after the last day of the settlement conference, the remaining participants shall propose a joint pretrial order—

(I) stating the rates and terms proposed by each participant and setting forth, in detail, the grounds for such proposals;

(II) setting forth admissions and stipulations about facts and documents;

(III) avoiding unnecessary proof and cumulative evidence and limiting the use of testimony under rule 702 of the Federal Rules of Evidence;

(IV) identifying the witnesses to be offered by each party, and attaching all witness statements, testimony, and exhibits to be presented in the proceeding and such other information that is necessary to establish terms and rates;

(V) listing the evidence to be offered by each party, and identifying any objections to any such evidence;

(VI) identifying any pending motions, including motions in limine and attaching any such motions that have not yet been filed;

(VII) proposing a reasonable limit on the time allowed to present evidence; and

(VIII) proposing other ways to facilitate the just, speedy, and inexpensive disposition of the proceeding.

(viii) Pretrial Order.— The Copyright Royalty Judges shall hold a prehearing conference to address the issues set forth in the proposed joint pretrial order, and shall issue an order reciting the action taken. The order shall allocate to the licensor participants and licensee participants sufficient, reasonable, and equal time in which to present their respective cases, and shall afford each set of participants an opportunity for rebuttal. The order issued by the Copyright Royalty Judges under this clause shall control the course of the action unless the Judges modify it.

(ix) Definitions.— In this subparagraph:

(I) Applicable 5-Year Period.— The term “applicable 5-year period” means—

(aa) the period of 5 calendar years preceding the year in which the applicable voluntary negotiation period begins; and

(bb) the period of the current calendar year through the date on which the initial disclosure under clause (i) is made.

(II) Licensee.— The term “licensee” means a person or entity that exercises rights under a statutory license under section 112 or 114.

(III) Licensee Participant.— The term “licensee participant” means a participant that is, or is an authorized representative of, a licensee.

(IV) Licensor.— The term “licensor” means a person or entity entitled to receive royalty payments under section 112 or 114.

(V) Licensor Participant.— The term “licensor participant” means a participant that is, or that is an authorized representative of, a licensor.

(VI) Statement of the Case.— The term “statement of the case” means a short and plain statement that—

(aa) identifies all participants and licensors or licensees on whose behalf the statement is being submitted;

(bb) states the proposed rate or rates and terms of the participants for each right at issue in the proceeding and sets forth in detail the basis of each such proposed rate and term;

(cc) identifies each witness that the participant intends to call in support of its rate and terms proposal and summarizes the anticipated testimony of each witness and

(dd) includes any reports, including expert reports, and any documents upon which the participant relies.

17 U.S.C. 803(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)~~ **subparagraph (C)(x) or (D)(v) of subsection (b)(6) (as the case may be)**, 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.

17 U.S.C. 803(d) Judicial Review. —

(3) Jurisdiction of court. — ~~Section 706 of title 5 shall apply with respect to review by the court of appeals under this subsection.~~ **Conclusions of law, and determinations of rates in which the Copyright Royalty Judges are required to apply the facts of record to the objectives set forth in section 801(b) shall be subject to de novo review. Findings of fact by the Copyright Royalty Judges shall be subject to review for clear error. All other actions by the Copyright Royalty Judges shall be subject to review for abuse of discretion.** 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).