The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

In the Matter of	}	
	}	
Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding	}	**Docket No. 2006-3 CRB DPRA**
	}	
	}	

Request for participants' views regarding possible legal errors contained in the Copyright Royalty Judge's final determination

Pursuant to 17 U.S.C. § 802(f)(1)(D), the Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges (CRJs) of material questions of substantive law under title 17 that underlie or are contained in a final determination of the CRJs. If the Register of Copyrights concludes, after taking into consideration the views of the participants in the proceeding, that any resolution reached by the CRJs was in material error, the Register of Copyrights shall issue a written decision correcting such legal error, which shall be made part of the record of the proceeding.

The Register has reviewed the CRJs' final determination as well as the views of the participants in the proceeding to the extent that they are revealed in the final determination of the CRJs. However, the Register has determined that it would be useful, in ascertaining the views of the participants, to advise the participants of particular questions of law that the Register is reviewing for possible legal error, and to solicit the views of the participants.

The issues being reviewed by the Register include:

1. Whether it was a material error of law for the CRJs to fail to refer to the Register as a novel question of substantive law the requests of the Digital Media Association ("DiMA") and the Recording Industry Association of America ("RIAA") for a determination as to the scope of the section 115 compulsory license with respect to intermediate copies made in the course of a digital phonorecord delivery ("DPD");

2. Whether it was a material error of law for the CRJs to fail to refer to the Register as a novel question of substantive law DiMA's request for a determination as to whether "interactive streaming" constitutes a DPD under Section 115;

3. Whether it was a material error of law for the CRJs to fail to refer to the Register as a novel question of substantive law RIAA's assertion that the CRJs are obligated to establish a catch-all, or general, rate for DPDs';

4. Whether it was a material error of law for the CRJs to conclude that they have no discretion over a settlement establishing rates and terms, even to the extent of determining whether the provisions are contrary to law, unless a participant files an objection;

5. Whether it was a material error of law for the CRJs to adopt a regulation in section 385.11, which states categorically that "An interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(c) and (D)" when such a provision appears to include transmissions that do not result in delivery of a phonorecord within the definition of DPDs;

6. Whether it was a material error of law for the CRJs to adopt a regulation in section 385.16, which provides that "A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, *solely* for the purpose of providing such licensed activity (*and no other purpose*)" (emphasis added), when 17 U.S.C. 115(a)(l) allows a person to obtain a compulsory license "if his or her *primary* purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery" (emphasis added);

7. When the previous rates appear to cover all DPDs including promotional DPDs (except perhaps for those that would be considered incidental DPDs), was it was a material error of law for the CRJs to adopt a regulation in section 385.14(e), which allows retroactive application of promotional royalty rates, when 17 U.S.C. 803(d)(2)(B) states that "In cases where rates and terms have not, prior to the inception of an activity, been established for that particular activity under the relevant license, such rates and terms shall be retroactive to the inception of activity under the relevant license covered by such rates and terms";

8. Whether it was a material error of law for the CRJs to adopt a regulation in section 385.15, which alters the timing of payments, when 17 U.S.C. 115(c)(5) states that "Royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding;" and

9. Whether it was a material error of law for the CRJs to adopt a regulation in section 385.12(b)(4), which allows for calculation of royalty payments in the absence of play information when 17 U.S.C. 115(c)(5) requires the Register to prescribe regulations "under which detailed cumulative annual statements of account" shall be filed, and that "regulations covering both the monthly and annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and distributed."

Any participant in the proceeding who wishes to offer views regarding these questions must submit its views in writing to the Office of the General Counsel of the Copyright Office no later than 5:00 p.m. on January 15, 2009. Any such submissions will be made part of the official record of the Office's review of the CRJs' final determination.

The participants' written views should be hand delivered to the Library of Congress, U.S. Copyright Office, Room 401, 101 Independence Avenue, SE, Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

For further information contact Stephen Ruwe, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380 Telefax: (202)-707- 8366. Email: sruwe@loc.gov

SO REQUESTED.

Marybeth Peters,
Register of Copyrights.

BY: Tanya M. Sandros
Tanya M. Sandros
Deputy General Counsel

DATED: January 8, 2009