

Before the
REGISTER OF COPYRIGHTS OF THE UNITED STATES OF AMERICA
Washington, D.C.

In the Matter of

Mechanical and Digital Phonorecord Delivery Rate
Adjustment Proceeding

Docket No. 2006-3 CRB DPRA

**RESPONSES OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
THE SONGWRITERS GUILD OF AMERICA AND
THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL
TO THE REGISTER OF COPYRIGHTS' REQUEST FOR PARTICIPANTS'
VIEWS REGARDING POSSIBLE LEGAL ERRORS CONTAINED IN THE
COPYRIGHT ROYALTY JUDGES' FINAL DETERMINATION**

National Music Publishers' Association, Inc., the Songwriters Guild of America and the Nashville Songwriters Association International (the "Copyright Owners") respectfully submit this response to the Register of Copyrights' January 8, 2009 Request for Participants' Views Regarding Possible Legal Errors Contained in the Copyright Royalty Judges' Final Determination.

Issue No. 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").

Response to Issue No. 1:

The Copyright Owners respectfully submit that the CRJs' decision not to refer the requests of DiMA and the RIAA to the Register was not a "material error" in "the resolution by the Copyright Royalty Judges of a material question of substantive law." 17 U.S.C. § 802(f)(1)(D).

In the first instance, the question of whether the CRJs properly determined not to refer such requests to the Register is one of procedure, and the Register is not authorized “to provide an interpretation of questions of procedure before the Copyright Royalty Judges.” *Id.* § 802(f)(1)(A)(ii). The statutory scheme embodied by 17 U.S.C. § 801 *et seq.* is carefully balanced to permit the CRJs “full independence” in their sphere—which includes matters of procedure—and to limit the participation of the Register in a rate-setting proceeding to certain questions of “substantive law.” *Id.* § 802(f)(1)(A)(i), (B), (D). As the very phrasing of this and the other questions posed by the Register itself indicates, any review of the CRJs’ determination in this proceeding must be confined to a question of “substantive law.” A decision whether or not to refer a matter for review by the Register is one of procedure, and thus not reviewable here.

Even if this were not the case, the statute further provides that the CRJs are required to refer only “a novel material question of substantive law.” *Id.* § 802(f)(1)(B)(i). The requests by DiMA and the RIAA did not present “a novel material question of substantive law.” Through amended proposed terms submitted to the CRJs, both the RIAA and DiMA sought clarification of the reproductions covered under Section 115. Specifically, the RIAA requested a term that would have provided that the Section 115 compulsory license extended to all rights “necessary to engage in the activities covered by the license, including 1) the making of reproductions by and for end users; 2) reproductions made on servers; and 3) incidental reproductions . . . including cached, network, and buffer reproductions.” Final Determination of Rates and Terms, Docket No. 2006-3 CRB DPRA at 64 (Nov. 24, 2008) (“CRJs’ Final Determination”). Similarly, DiMA sought a term that would have provided that the Section 115 license extended to

“all reproductions necessary to engage in the activities permitted by the license, including masters, reproductions on servers, cached, network and buffer reproductions, and the making of reproductions by and for the end users.” *Id.* at 67.

The CRJs were correct in declining to refer these requests because they necessarily turned on questions of fact. Resolving these requests would have required, for example, factual inquiries into the nature and number of “intermediate copies” that are made in delivering DPDs, the technological processes used to create such copies, and whether such copies are in fact required to make DPDs. In any event, the settlement agreement among the participants (the participants’ “settlement” or “agreement”) and the regulations adopted by the CRJs pursuant to that agreement resolved the above concern by treating copies made in the course of making a DPD as falling within the scope of the Section 115 compulsory license. *See* Joint Motion to Adopt Partial Settlement (Sept. 22, 2008); CRJs’ Final Determination at 101 (Section 385.16).

In addition, this issue of intermediate and other copies necessary to deliver DPDs was separately addressed by the Copyright Office in a rulemaking proceeding and also resolved in the form of an interim rule issued on November 7, 2008. *See* Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries: Interim Rule and Request for Comments, 73 Fed. Reg. 66173 (Nov. 7, 2008) (the “Interim Rule”). Consistent with the participants’ settlement, the Interim Rule confirms that such server and intermediate copies are properly included within the Section 115 license. *Id.* at 66180. The settlement expressly provides that the rates and terms included in the settlement are established “in accordance with the provisions of 17 U.S.C. 115.” 73 Fed. Reg. 57033, 57034 (Oct. 1, 2008). It further provides that licensees

making or authorizing limited downloads or interactive streams pursuant to Section 115 “shall comply with the requirements of that section, the rates and terms of this subpart, *and any other applicable regulations.*” *Id.* (emphasis added). Thus, by its very terms, the settlement is to be interpreted consistent with Section 115 and its implementing regulations, including the Interim Rule. *See also* CRJs’ Final Determination at 76 (Section 385.10).

In sum, to the extent that a question regarding the scope of Section 115 with respect to intermediate copies previously existed, even if it were properly subject to review by the Register, this question has been resolved by the participants’ settlement in a manner consistent with the Interim Rule, and the CRJs’ decision not to refer the question therefore could not constitute a material error of law.

Issue No. 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.

Response to Issue No. 2:

The Copyright Owners respectfully submit that the CRJs’ decision not to refer DiMA’s request for a determination as to whether “interactive streaming” constitutes a DPD under Section 115 was not a “material error” in “the resolution by the Copyright Royalty Judges of a material question of substantive law.” 17 U.S.C. § 802(f)(1)(D).

As a threshold matter, the question whether the CRJs properly determined not to refer DiMA’s request to the Register is one of procedure, and therefore, for the reasons discussed above, not properly subject to review by the Register.

Moreover, the CRJs are required to request a decision from the Register of Copyrights only upon the presentation of “a novel material question of substantive law concerning an interpretation of those provisions of this title.” *Id.* § 802(f)(1)(B)(i). The statute makes clear that to be subject to mandatory referral, the question must be one of law.

The CRJs not only followed the prescribed procedure for a participant’s referral motion, but also properly exposed DiMA’s purported legal question as one of fact not subject to referral. Specifically, the CRJs required the participants to fully brief DiMA’s motion to refer the question of whether “interactive streaming” constitutes a DPD under Section 115 and then heard argument on the issue on January 28, 2008.¹ As the Copyright Owners demonstrated, determining whether “interactive streaming” constitutes a DPD under Section 115 necessarily involves a factual inquiry into the varying technologies that provide streaming services. *See* Copyright Owners’ Opposition to DiMA’s Motion Requesting Referral of a Novel Material Question of Substantive Law to the Register of Copyrights, at 5-6 (Jan. 14, 2008) (explaining that the issue raised by DiMA involved answering questions such as whether the service delivers copies of music for storage on the user’s computer).

On February 4, 2008, the CRJs issued an order denying DiMA’s referral motion, having determined that the issue on which DiMA sought referral presented a question of fact and was thus beyond the scope of Section 802(f)(1)(B). *See* Order Denying Motion

¹ *See* Motion of the Digital Media Association Requesting Referral of a Novel Material Question of Substantive Law (Jan. 7, 2008); Copyright Owners’ Opposition to DiMA’s Motion Requesting Referral of a Novel Material Question of Substantive Law to the Register of Copyrights (Jan. 14, 2008); Reply of the Digital Media Association (Jan. 18, 2008); 1/28/08 Tr. at 6:6-55:4.

of the Digital Media Association for Referral of a Novel Material Question of Substantive Law, Docket No. 2006-3 CRB DPRA, at 2 (Feb. 4, 2008). Specifically, the CRJs ruled that the term “interactive streaming” was not “defined” or “mentioned” in the Copyright Act and that “[t]he Register could not render a determination as to whether ‘interactive streaming’ is a digital phonorecord without inquiring into the factual circumstances and types of activities that could be considered ‘interactive streaming,’ and the extent to which these factual circumstances and types of activities result in reproductions of musical works.” *Id.*; *see also* CRJs’ Final Determination at 9. Accordingly, the CRJs determined that the matter was one of fact and not one of substantive law, as the statute requires for the issue to be referable. Indeed, underscoring the factual nature of the inquiry, the CRJs issued an order requiring the participants to submit evidence regarding the nature of phonorecords made in the process of interactive streaming, which the participants did. *See* Order Requiring Additional Information, Docket No. 2006-3 CRB DPRA (Mar. 11, 2008).

In sum, the question raised by DiMA’s referral motion was not one of substantive law and could not be answered in a factual vacuum absent an understanding of the breadth of technologies that offer interactive streaming services. Accordingly, even if the referral decision were reviewable by the Register (which we respectfully submit it is not), the CRJs’ determination not to refer the matter to the Register was correct.

Finally, the settlement agreement among the participants and the regulations adopted by the CRJs pursuant to that agreement set rates and terms for “interactive streaming” under Section 115. *See* Joint Motion to Adopt Partial Settlement; CRJs’ Final Determination at 76 (Section 385.11). The Interim Rule recently adopted by the

Copyright Office confirms that this was appropriate. Interim Rule, 73 Fed. Reg. 66173, 66180 (“there is no dispute that . . . certain streaming services involve the making of legally recognizable copies that fit within the definition of a DPD”). Thus, to the extent that a question regarding whether “interactive streaming” is properly subject to licensing under Section 115 previously existed, this question has been resolved by the participants’ settlement and the Interim Rule.

Issue No. 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.

Response to Issue No. 3:

The Copyright Owners respectfully submit that the CRJs’ decision not to refer to the Register the RIAA’s assertion that the CRJs were obligated to establish a catch-all rate for DPDs was not a “material error” in “the resolution by the Copyright Royalty Judges of a material question of substantive law.” 17 U.S.C. § 802(f)(1)(D).

Again, in the first instance, the question of whether the CRJs properly determined not to refer this request to the Register is one of procedure and not subject to the Register’s review. Even if it were, as the CRJs properly concluded, their obligation is to set reasonable rates and terms as set forth in Section 115(c)(3)(C). *See* CRJs’ Final Determination at 61. The plain language of the statute is clear. The CRJs must “determine reasonable rates and terms of royalty payments for the activities specified by this section.” 17 U.S.C. § 115(c)(3)(C). Thus, the statute requires the CRJs to set rates for the creation and distribution of physical phonorecords, DPDs and incidental DPDs. The CRJs, in fact, set or adopted through the participants’ settlement rates for all physical phonorecords, DPDs and incidental DPDs with respect to which evidence was presented

to them by the participants in the proceeding. *See id.* at 1-2; *see generally* Joint Motion to Adopt Partial Settlement. As the CRJs noted in their Final Determination, no evidence was presented at the proceeding to demonstrate the existence of any other phonorecord, DPD or incidental DPD for which rates could have been set. *See* CRJs' Final Determination at 62.

Further, the RIAA's request that the CRJs set a catch-all rate for hypothetical DPDs does not present "a novel material question of substantive law" that required referral to the Register. *See* 17 U.S.C. § 802(f)(1)(B)(i). As the text of the statute makes clear, the CRJs must refer only questions of *law* that are novel and material. The RIAA's request, however, presents a question of fact as to whether the CRJs have, in fact, set rates for all known activities under Section 115. The CRJs properly answered that factual question, determining that they had fulfilled their obligation to set rates under Section 115 for all known activities under Section 115 based on the record before them.

The RIAA's purported need for a catch-all rate for DPDs—namely, to avoid delays in the introduction of new activities—is, in fact, already addressed in Section 803(d)(2)(B), which provides that rates and terms for new activities are to be established in subsequent rate-setting proceedings and applied retroactively. Specifically, Section 803(d)(2)(B) states: "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." Accordingly, the statutory structure providing for rate-setting proceedings every five years with retroactive application of rates for newly-licensed activities addresses the very concern suggested by the RIAA's

request. The Copyright Owners further note that to the extent that the RIAA sought to avoid delay resulting from possible future disputes between the participants as to *whether* a particular activity is covered by Section 115, a catch-all rate would have no bearing on that dispute.

In sum, the CRJs are not charged with setting rates and terms for hypothetical activities not yet in the marketplace; nor could they fairly or reasonably do so. They are charged with setting rates and terms for activities with respect to which evidence is presented by the participants—an obligation that was fulfilled by the CRJs in this proceeding.

Issue No. 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.

Response to Issue No. 4:

The Copyright Owners respectfully submit that the CRJs' conclusion that they lack the discretion to review a settlement among the participants in this proceeding was not a "material error" in "the resolution by the Copyright Royalty Judges of a material question of substantive law." 17 U.S.C. § 802(f)(1)(D).

The Copyright Act, as amended by the Copyright and Royalty Distribution Reform Act ("CRDRA"), compels the CRJs to accept settlements presented by the participants except in limited circumstances that are absent here. The relevant provision of the CRDRA, in unambiguous language, empowers the CRJs

[t]o adopt as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the

participants in a proceeding at any time during the proceeding, except that —

(i) the Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates; and

(ii) the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, *if any participant described in clause (i) objects to the agreement* and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

Id. § 801(b)(7)(A) (emphasis added); *accord* 37 C.F.R. § 351.2(b)(2). As the CRJs correctly concluded, the plain language of the statute makes clear that the CRJs “may decline to adopt” a settlement agreement *only* if a participant first “objects to the agreement” *and* the agreement “does not provide a reasonable basis for setting statutory terms or rates.” *See* CRJs’ Final Determination at 19. None of the participants in this proceeding has objected to any portion of the settlement. On the contrary, all participants in the proceeding are parties to the settlement. Under such circumstances, the CRJs had no discretion to refuse to adopt any portion of the participants’ settlement agreement. *Id.*

The Register likewise lacks the authority to review any aspect of the participants’ settlement or the regulations that the CRJs adopted pursuant to the agreement. The Register is empowered only to “review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under [Title 17 of the U.S. Code] that underlies or is contained in a final determination.” 17 U.S.C. § 802(f)(1)(D).

As the CRJs correctly concluded, they had “no choice but to adopt [the settlement] as the basis for the necessary statutory rates and terms applicable to the corresponding licensing activities.” CRJs’ Final Determination at 19. The terms of the settlement were agreed by the parties, and were not decided by the CRJs. The settlement terms therefore do not represent “a resolution of the Judges of a material question of substantive law,” and accordingly are not reviewable by the Register. *Id.* at 20.²

Compelling policy reasons underlie the CRJs’ and Register’s limited discretion to review settlements. The CRDRA was strongly oriented toward promoting settlements of proceedings and embodies a strong presumption that such settlements will be adopted. *See* H.R. Rep. No. 108-408, at 33 (2004) (“the Committee intends that the bill will facilitate and encourage settlement agreements for determining royalty rates . . . throughout the entire process under Chapter 8”); *accord id.* at 30; *see also* CRJs’ Final Determination at 19 (“Chapter 8 of the Copyright Act encourages settlement among the parties”). Thus, for example, Congress provided a negotiation period at the outset of every proceeding, 17 U.S.C. § 803(b)(3), as well as a settlement conference later in the proceeding, *id.* § 803(b)(6)(C)(x). Perhaps most important, the CRDRA eliminated the

² The Register’s limited scope of review under the current statutory scheme stands in stark contrast with the regime that was in place prior to the existence of the CRJs, when royalty rate-setting proceedings took place before Copyright Arbitration Royalty Panels (“CARPs”). The CARPs were subject to much more stringent oversight than the CRJs. After a CARP issued a rate determination, the Register provided a recommendation to the Librarian of Congress to “adopt or reject the determination,” and the Librarian was in turn free to reject the panel’s determination if it was deemed to be “arbitrary or contrary to the applicable provisions of [Title 17 of the U.S. Code].” 17 U.S.C. § 802(f) (2004). When the system of CRJs was created, in 2005, the Librarian lost the authority to “adopt or reject” rate determinations, and, instead, the Register was granted the more modest authority to “review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law.” *Id.* § 802(f)(1)(D).

former procedure of adopting settlements only after a full notice and comment rulemaking that allowed persons who had chosen not to participate in a proceeding to object to a settlement. Congress did this by establishing a process to determine a known universe of participants in each proceeding, *id.* § 803(b)(1), (2), eliminating previous impediments to participation such as the requirement that participants pay for arbitrators to hear their case, and providing a strong presumption that if the participants could resolve their differences through negotiation, their settlements would be adopted.

If the CRJs' and the Register's scope of review were not thus limited, it would threaten the ability of parties to reach the types of settlements that Congress sought to promote. As the participants noted in their joint motion before the CRJs to adopt the settlement, the agreement was "submitted on the understanding that its various provisions are not severable." Joint Motion to Adopt Partial Settlement at 2. A settlement is a compromise; participants need to be able to rely on the consideration they receive in the process of compromising. In the instant case, if the CRJs or Register could review the settlement and alter or reject provisions as they saw fit, it would threaten the integrity of the entire, interdependent arrangement that was painstakingly negotiated by the participants and could easily lead to the unraveling of the settlement in its entirety. Such an outcome would squander the enormous time and resources that the participants expended to negotiate the complex settlement at issue here.

Moreover, even if the Register reaches the conclusion that the CRJs had the discretion to review the settlement, which they do not, the CRJs did not improperly fail to exercise such discretion. As set forth herein, the Register has not identified any provision

of the settlement agreement that is contrary to law. *See infra*, Responses to Issue Nos. 5-9.

Issue No. 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.

Response to Issue No. 5:

The Copyright Owners respectfully submit that the CRJs’ adoption of the regulation in Section 385.11 was not a “material error” in “the resolution by the Copyright Royalty Judges of a material question of substantive law.” 17 U.S.C. § 802(f)(1)(D).

As explained in Response to Issue No. 4, both the CRJs and the Register lack the authority to review the participants’ settlement under the circumstances presented here.

Moreover, the Register may review a CRJ determination only for error with respect to “question[s] of substantive law.” 17 U.S.C. § 802(f)(1)(D). This “issue” presents a question—whether an interactive stream “include[s] transmissions that do not result in delivery of a phonorecord within the definition of DPDs”—that is an issue of fact or, at best, a mixed issue of fact and law, as explained in Response to Issue No. 2 and as the CRJs correctly concluded in their February 4, 2008 Order and in their Final Determination. *See* Order Denying Motion of the Digital Media Association for Referral of a Novel Material Question of Substantive Law, Docket No. 2006-3 CRB DPRA, at 2 (Feb. 4, 2008); CRJs’ Final Determination at 9. Because this does not qualify as an issue of substantive law, the Register lacks the authority under Section 802(f)(1)(D) to examine it.

Finally, the CRJs did not err in adopting Section 385.11, which categorizes interactive streams as incidental DPDs, because Section 115(c)(3)(C) requires the terms and rates to distinguish between “incidental digital phonorecord deliveries and digital phonorecord deliveries in general.” The term in question therefore fulfills a statutory requirement. Moreover, the settlement expressly provides that the rates and terms included in the settlement are established in accordance with Section 115 and that any licensees making or authorizing limited downloads and interactive streams under Section 115 shall “comply with the requirements” of Section 115 and “any other applicable regulations.” 73 Fed. Reg. at 57034. As discussed above, the Interim Rule recently adopted by the Copyright Office pursuant to Section 115 addresses the question of copies made in the course of interactive streaming. By its terms, the settlement is to be interpreted consistent with Section 115 and its implementing regulations. Accordingly, any perceived concern with respect to Section 385.11 has already been addressed by the Copyright Office in issuing the Interim Rule.

Issue No. 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)(1) 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).

Response to Issue No. 6:

The Copyright Owners respectfully submit that the CRJs’ adoption of the regulation in Section 385.16 was not a “material error” in “the resolution by the

Copyright Royalty Judges of a material question of substantive law.” 17 U.S.C. § 802(f)(1)(D).

As explained in Response to Issue No. 4, both the CRJs and the Register lack the authority to review the participants’ settlement under the circumstances presented here.

In any event, there is, in fact, no tension between Section 115(a)(1) and Section 385.16. As noted above, by its terms, the settlement is to be interpreted consistent with Section 115 and its implementing regulations. Specifically, Section 385.10 provides that the regulations adopted pursuant to the settlement “establish[] rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115” and requires that a licensee engaging in such activities “comply with the requirements of that section.” CRJs’ Final Determination at 76.

Section 115(a)(1) sets forth the conditions under which a user is eligible to obtain a compulsory license—*i.e.*, “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.” Accordingly, as is apparent from the incorporation of that requirement into the settlement by virtue of Section 385.10, the effect of Section 385.16 is merely to clarify the scope of a compulsory license for streaming and downloading activities *once the license has been obtained by* a service that meets the requirements of Section 115. Section 385.16 simply clarifies that the license so obtained covers all reproductions and distributions necessary for provision of the licensed Section 115 activity and solely for the purpose of that licensed activity.

Far from altering the “primary purpose test”—which is clearly imported into the settlement by Section 385.10—Section 385.16 represents a different, essential, condition of the settlement that is of particular concern to the Copyright Owners. Section 385.16 protects owners of musical works from the circumstance where a service might seek a compulsory Section 115 license and (whether the service actually engaged in Section 115 activities or not) attempt improperly to rely upon the license for non-Section 115 activities. For example, a service should not be able to use server copies licensed under Section 115 to operate a business-to-business music service, which is clearly outside of Section 115 (notably, because it does not meet the “primary purpose” test). Without the important clarifying language embodied in Section 385.16, the Copyright Owners would not have been comfortable agreeing to the settlement.

Issue No. 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 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.”

Response to Issue No. 7:

The Copyright Owners respectfully submit that the CRJs’ adoption of the regulation in Section 385.14(e) was not a “material error” in “the resolution by the Copyright Royalty Judges of a material question of substantive law.” 17 U.S.C. § 802(f)(1)(D).

As explained in Response to Issue No. 4, both the CRJs and the Register lack the authority to review the participants’ settlement under the circumstances presented here.

Moreover, the retroactive application of promotional royalty rates directed in Section 385.14(e) is entirely consistent with Section 803(d)(2)(B). The promotional rates provided for in Section 385.14(e) are applicable only to limited downloads and interactive streaming, not permanent downloads. The statute provides for the retroactive application of rates and terms “[i]n cases where rates and terms have not, prior to the inception of an activity, been established.” 17 U.S.C. § 803(d)(2)(B). The preexisting DPD rate applied only to permanent downloads. *See* CRJs’ Final Determination at 17. Because there have never been rates and terms under Section 115 for interactive streaming or limited downloads, any rates and terms for these activities set in the proceeding—including rates for interactive streaming and limited downloads for promotional purposes—would necessarily be “retroactive to the inception of activity.” 17 U.S.C. § 803(d)(2)(B). For these reasons, the retroactive application of promotional royalty rates in Section 385.14(e) is unexceptional and, in fact, fully consistent with the effective date for rates required by Section 803(d)(2)(B) in the absence of a settlement.

Issue No. 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.”

Response to Issue No. 8:

The Copyright Owners respectfully submit that the CRJs’ adoption of the regulation in Section 385.15 was not a “material error” in “the resolution by the Copyright Royalty Judges of a material question of substantive law.” 17 U.S.C. § 802(f)(1)(D). For the reasons explained in our Response to Issue No. 4, both the CRJs

and the Register lack the authority to review the participants' settlement under the circumstances presented here.

Issue No. 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.”

Response to Issue No. 9:

The Copyright Owners respectfully submit that the CRJs' adoption of the regulation in Section 385.12(b)(4) was not a “material error” in “the resolution by the Copyright Royalty Judges of a material question of substantive law.” 17 U.S.C. § 802(f)(1)(D). For the reasons explained in our Response to Issue No. 4, both the CRJs and the Register lack the authority to review the participants' settlement under the circumstances presented here.

Dated: January 15, 2009

Respectfully submitted,

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ASSOCIATION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2009, I caused true and correct copies of the Copyright Owners' Responses to the Register of Copyrights' Request for Participants' Views Regarding Possible Legal Errors Contained in the Copyright Royalty Judges' Final Determination to be served via electronic mail on the following parties:

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