



The Register of Copyrights of the United States of America
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The Honorable Patrick Leahy
Chairman, Subcommittee on Intellectual Property
Senate Judiciary Committee
United States Senate
437 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Thom Tillis
Ranking Member, Subcommittee on Intellectual Property
Senate Judiciary Committee
United States Senate
113 Dirksen Senate Office Building
Washington, D.C. 20510

November 25, 2022

Dear Chairman Leahy and Ranking Member Tillis:

Thank you for your letter of July 25, 2022, regarding concerns raised by groups representing songwriters and composers regarding participation in Copyright Royalty Board (“CRB”)¹ proceedings. These groups are urging that steps be instituted to promote and facilitate greater participation. We appreciate and share your interest in this matter.

The Copyright Office (“Office”) believes that the copyright system should be understandable, accessible, and fair for all,² which includes affording interested parties a reasonable opportunity to be heard before the CRB. Currently, the Copyright Act’s provisions can make full participation in CRB proceedings challenging. Proceedings can be time-consuming and expensive, involving detailed written submissions to support a party’s proposed rates and terms, complex legal briefs, discovery, expert evidence, and live adversarial hearings. We support finding paths to facilitate broader participation in ratesetting proceedings. At the same time, relaxing certain requirements could have negative effects on CRB proceedings, including their management. Any reforms in this area—whether statutory or regulatory—will require careful balancing.

¹ The term “Copyright Royalty Board” refers to the institutional entity in the Library of Congress that houses the “Copyright Royalty Judges.” 37 C.F.R. § 301.1.

² These principles are reflected in the Office’s Strategic Plan, as a part of our goal of “Copyright for All.” U.S. COPYRIGHT OFFICE, STRATEGIC PLAN 2022–2026: FOSTERING CREATIVITY & ENRICHING CULTURE (Jan. 2022), <https://www.copyright.gov/reports/strategic-plan/USCO-strategic2022-2026.pdf>.

Your letter asked for the views of the Office and CRB on four specific questions. Because the CRB is an independent body within the Library of Congress, and not part of the Copyright Office, our responses below are limited to the Office's views. The CRB is responding separately.

1. In the view of the USCO and the CRB, what is the current opportunity for and scope of permissible commentary by non-participants³ in CRB proceedings (other than in regard to comments on proposed settlement agreements in rate setting proceedings)? Can non-participants submit and have comments considered by the CRB in its deliberations and decisions related to those proceedings?

The Office defers to the CRB with respect to what its current regulations and procedures allow, but it is our understanding that the current opportunity for and scope of permissible commentary by non-participants in CRB proceedings is limited by statute and the CRB's regulations. Outside of the proposed settlement context addressed in Question #2, the Office is not aware of any standing procedural mechanism through which non-participants may submit and have comments considered by the CRB in its ratesetting proceedings. However, as discussed below in response to Question #4, the Office believes that the CRB has authority under the current statute to permit a certain degree of broader non-participant commentary.

2. In the view of the USCO and the CRB, what is the current opportunity for and scope of permissible commentary by non-participants in CRB proceedings, specifically pertaining to proposed settlement agreements in rate setting proceedings? Can non-participants submit and have comments considered by the CRB in its deliberations and decisions related to those proceedings?

One of the CRB's functions is "[t]o adopt as a basis for statutory terms and rates . . . , an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding." 17 U.S.C. § 801(b)(7)(A). The purpose of this provision is to facilitate and encourage settlement agreements to determine statutory royalty rates and terms. H.R. REP. NO. 108-408, at 30 (2004). Congress anticipated that doing so would reduce the need to conduct full-fledged ratesetting proceedings, leading to cost savings and faster resolution. *Id.* at 24, 33. Congress further expected that parties would make good-faith efforts to resolve their differences, to the extent possible, either without engaging the CRB process or through settlement during the process. *Id.* at 38.

The statute requires the CRB to provide an opportunity for both participants and interested non-participants to comment on proposed settlements. 17 U.S.C. § 801(b)(7)(A)(i). However, only an actual participant, within the meaning of the statute, can object to the proposed settlement⁴

³ The Office assumes that "non-participants" is intended to refer to parties (*e.g.*, authors, copyright owners, or licensees) who wish to be heard in CRB proceedings without being "participants" or engaging in "participation" within the meaning of the statute. *See* 17 U.S.C. § 803(b)(2).

⁴ In some cases, even participants cannot object. *Id.* § 803(b)(1)(A)(ii) ("[P]etitioners 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 . . . and any objection filed by such a petitioner shall not be taken into account by the Copyright Royalty Judges.").

and the CRB cannot reject a settlement under this provision unless a participant objects. *Id.* § 801(b)(7)(A)(ii) (in which case the CRB may reject the settlement where it concludes that it does not provide a reasonable basis for setting statutory terms or rates). If there is an objecting participant, nothing in the statute prohibits the CRB from relying, even solely, on non-participant comments to reject the settlement.

It is noteworthy that allowing non-participants to submit comments on proposed settlements, but not to object, was an intentional decision when Congress passed the Copyright Royalty and Distribution Bill of 2004, which established the CRB. The bill in its early drafts restricted input on proposed settlements to participants only. *See* H.R. 1417, 108th Cong. § 3 (2004) (as referred in Senate, Mar. 3, 2004). However, before passage, it was amended to permit non-participant comments as outlined above.⁵ Accordingly, any changes to the settlement process laid out in section 801(b)(7) would require amendment through legislation.

Importantly, section 801(b)(7) is not the only mechanism through which the CRB can reject a proposed settlement. The Office previously concluded that the CRB has independent authority to reject all or part of a proposed settlement if it is contrary to law, even without a participant’s objection. 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009) (finding that the CRB committed legal error by failing to review the legality of a proposed settlement as a threshold matter); 73 Fed. Reg. 9143, 9145–46 (Feb. 19, 2008) (finding that the CRB committed legal error by adopting an unopposed settlement that was contrary to law). This means that the CRB can reject a settlement based solely on non-participant comments identifying such an error—or even *sua sponte*.

3. What do the USCO and CRB each consider to be the scope of the USCO’s authority under the U.S. Copyright Act to promulgate rules that might economically and administratively promote more thorough and effective participation by representatives of American music creators in proceedings before the CRB?

The Office does not believe that it possesses such regulatory authority. Under the Copyright Act, the Office is not empowered to govern the CRB’s procedures. Rather, the Act confers that authority upon the CRB. 17 U.S.C. § 803(b)(6)(A).

At the same time, there are certain duties tasked to the Office under the statute in connection with the activities of the CRB, two of which permit non-participant involvement in some aspects of ratesetting proceedings. First, the CRB must refer novel material questions of substantive law to the Office⁶ and, as part of that process, the statute provides that proceeding participants must

⁵ *See, e.g.*, 150 CONG. REC. H9848, H9857 (Nov. 17, 2004) (statement of Rep. Berman) (“[T]he Senate amendments altered to a certain degree the ability of affected parties to object to negotiated settlements of royalty rates. In essence, the Senate amendments give all parties bound by proposed rates the ability to comment, but only allows participants in a proceeding to actually object to the proposed rates.”); *see also* 150 CONG. REC. S10488, S10503 (Oct. 6, 2004) (statement of Sen. Hatch) (referring to the Senate amendments more generally as a “recently-reached compromise”).

⁶ The CRB is also permitted, but not required, to refer material questions that are not novel. 17 U.S.C. § 802(f)(1)(A)(ii).

have a reasonable opportunity to submit comments. *Id.* § 802(f)(1)(B)(i).⁷ Second, the Office is authorized to review CRB final determinations for material legal error and the statute provides that the Office must “tak[e] into consideration the views of the participants in the proceeding.” *Id.* § 802(f)(1)(D). While these provisions refer to “participants,” we view that language as a minimum requirement that does not prohibit the Office from voluntarily seeking and considering additional briefing from interested non-participant commenters. The Office has previously requested such briefing and intends to do so in the future. *See* U.S. Copyright Office, Order for Supplemental Briefing Concerning Novel Material Question of Substantive Law (Oct. 14, 2015), <https://www.copyright.gov/rulemaking/web-iv/webiv-usco-order.pdf>.

4. What do the USCO and CRB each consider to be the scope of the CRB’s authority under the U.S. Copyright Act and USCO Regulations to promulgate new or modified rules that might economically and administratively promote more thorough and effective participation by representatives of American music creators in proceedings before the CRB?

The Office believes that the CRB has authority under the current statute to permit a limited degree of broader non-participant commentary in ratesetting proceedings. It is also our view that all comments, whether from participants or non-participants, can and should be considered by the CRB in its deliberations and decisions regarding proposed ratesetting settlements. As discussed above in response to Question #2, however, the statute expressly limits non-participant involvement in the context of proposed settlements. As the CRB cannot override the statute, our response to this question focuses on non-participant involvement outside of the settlement context.

The general rule under chapter 8 is that to “participate” in a ratesetting proceeding before the CRB, one must be a “participant.” Under section 803(b)(2), “a person may participate in a proceeding under [chapter 8], including through the submission of briefs or other information, only if” certain requirements are met, including having a significant interest in the proceeding and filing a timely and valid petition to participate. 17 U.S.C. § 803(b)(2).

The statute then sets out a number of activities that are restricted to participants. In ratesetting proceedings, being a participant both confers certain benefits and imposes certain obligations:

- Participants participate in the statutory voluntary negotiation period at the beginning of the proceeding. *Id.* § 803(b)(3).
- Participants file written direct statements⁸ and written rebuttal statements. *Id.* § 803(b)(6)(C)(i).

⁷ The corresponding provision about referring non-novel questions contains similar language. *Id.* (“reasonable provision shall be made to permit participants in the proceeding to comment”; “briefs and comments from the participants”).

⁸ 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.” 17 U.S.C. § 803(b)(6)(C)(ii)(II).

- Participants “may request of an opposing participant nonprivileged documents directly related to the written direct statement or written rebuttal statement of that participant.” *Id.* § 803(b)(6)(C)(v).
- Participants can take a limited number of depositions and secure responses to a limited number of interrogatories. *Id.* § 803(b)(6)(C)(vii).
- Participants can be subpoenaed “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.” *Id.* § 803(b)(6)(C)(ix).
- Participants participate in the statutory settlement conference following the end of discovery. *Id.* § 803(b)(6)(C)(x).
- Participants can move for rehearing. *Id.* § 803(c)(2)(A).
- Participants “who fully participated in the proceeding and who would be bound by the determination” can appeal CRB determinations to the D.C. Circuit.⁹ *Id.* § 803(d)(1).

While the statute focuses on participants, it also addresses non-participants. For example, it permits the CRB to take affirmative steps to subpoena information from non-participants regarding issues of fact material to the ratesetting. *Id.* § 803(b)(6)(C)(ix). The Office believes that this provision offers the CRB a means to obtain input from non-participants who have an interest in the proceedings, although it is not an avenue that non-participants can initiate.

Turning to the ability of the CRB to adopt rules governing the acceptance and consideration of input from non-participants, the statute provides that “[t]he Copyright Royalty Judges may issue regulations to carry out their functions under [title 17],” and “shall issue regulations to govern proceedings under [chapter 8 of title 17].” *Id.* § 803(b)(6)(A). This is a broad grant of authority to the CRB to run their proceedings as they see fit within the boundaries of what Congress provided in chapter 8. Since nothing in chapter 8 expressly forecloses the possibility of additional non-participant involvement in ratesetting proceedings, we believe that the CRB’s authority includes permitting additional non-participant involvement. At the same time, we recognize that the CRB’s authority has limits. Permitting non-participants to engage in the specific activities expressly reserved under chapter 8 for participants would conflict with the text of the statute and collapse the distinction between participants and non-participants. Beyond that, however, the CRB has significant discretion in this area.

Based on the above, we believe that this is an area ripe for the CRB to explore through a rulemaking proceeding where it can receive public input from interested parties. For example, nothing in the statute would prohibit the CRB from soliciting and taking into consideration comments from non-participants on a proposed order and ruling before an initial determination is

⁹ Though, “[a]ny participant that did not participate in a rehearing may not raise any issue that was the subject of that rehearing at any stage of judicial review of the hearing determination.” 17 U.S.C. § 803(d)(1).

issued, provided that participants are given an opportunity to respond. The statute would, however, prevent the CRB from entertaining a motion for rehearing from a non-participant.¹⁰ The Office defers to the CRB regarding the impact of any such changes on its proceedings, including the practical impact on its resources.

Ultimately, the CRB possesses authority under current law to provide a greater opportunity for non-participant involvement in ratesetting proceedings, but legislation may be necessary for more sweeping change.

* * *

We hope this input is helpful. The Office would support further consideration of these issues and would be happy to discuss them further at your convenience.

Sincerely,



Shira Perlmutter
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United States Copyright Office

¹⁰ Separately, it is worth noting that the CRB is also empowered to conduct paper proceedings. Under current law, the CRB “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.” 17 U.S.C. § 803(b)(5). The CRB may apply this procedure under any circumstances it “consider[s] appropriate.” *Id.* § 803(b)(5)(B). Congress called this authority “broad” and “anticipated that [the CRB] will choose to exercise their discretion to order paper proceedings in circumstances . . . where a class of participants may otherwise find it impossible to participate.” H.R. REP. NO. 108-408, at 31.