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U.S. Copyright Office

37 CFR Part 385

[Docket No. 2011-3 CRB]

Scope of the Register of Copyright's Exclusive Authority over Statements of Account under the Section 115 Compulsory License

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Order.

SUMMARY: The Copyright Royalty Judges, acting pursuant to statute, referred material questions of substantive law to the Register of Copyrights concerning the scope of the Register of Copyright's exclusive authority over Statements of Account under the section 115 Compulsory License. Specifically, the Copyright Royalty Board requested a decision by the Register of Copyrights regarding "whether the detail requirements set forth in 37 CFR as proposed § 385.12(e) (existing) and proposed § 385.22(d) (new) as well as the confidentiality requirement proposed for §§ 385.12(f) and 385.22(e) encroach upon the exclusive statutory domain of the Register under § 115 of the Act." The Register of Copyrights responded in a timely fashion by delivering a Memorandum Opinion to the Copyright Royalty Board on May 1, 2013.

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SUPPLEMENTARY INFORMATION: In the Copyright Royalty and Distribution Reform Act of 2004, Congress amended Title 17 to replace the Copyright Arbitration Royalty Panel ("CARP") with the Copyright Royalty Judges ("CRJs"). One of the functions of the CRJs is to make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119 and 1004 of the Copyright Act. The CRJs

have the authority to request from the Register of Copyrights (“Register”) an interpretation of any material question of substantive law that relates to the construction of provisions of Title 17 and arises out the course of the proceeding before the CRJs. *See* 17 U.S.C. 802(f)(1)(A)(ii).

On April 17, 2013, the CRJs delivered to the Register: (1) an Order referring material questions of substantive law; and (2) a brief filed with the CRJs by Settling Participants (identified below in the Register’s Memorandum Opinion). The CRJs’ delivery of the request for an interpretation triggered the 14–day response period prescribed in section 802 of the Copyright Act. This statutory provision states that the Register “shall deliver to the Copyright Royalty Judges a written response within 14 days after the receipt of all briefs and comments from the participants.” *See* 17 U.S.C. 802(f)(1)(A)(ii). The statute also requires that “[t]he Copyright Royalty Judges shall apply the legal interpretation embodied in the response of the Register of Copyrights if it is timely delivered, and [that] the response shall be included in the record that accompanies the final determination.” *Id.* On May 1, 2013 the Register responded in a Memorandum Opinion to the CRJs that addressed the material questions of law. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety, below.¹

Dated: May 9, 2013

Maria A. Pallante,
Register of Copyrights

[BILLING CODE: 1410-30-8]

¹ After the Memorandum Opinion was delivered, the CRJs noted an error in the second sentence of the last paragraph on the last page of the Memorandum Opinion. The Register clarified the error with the CRJs. The original sentence erroneously stated:
“As such, the proposed “detail requirements” do not encroach upon the Register’s authority with respect to statements of account as provided in 17 U.S.C. § 115(c)(5).”
The corrected sentence, as it now appears in the Memorandum Opinion below, states:
“As such, the proposed “confidentiality requirement” does not encroach upon the Register’s authority with respect to statements of account as provided in 17 U.S.C. § 115(c)(5).”

Before the

U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

In the Matter of)	
)	
Mechanical and Digital Phonorecord)	Docket No. 2011-3 CRB
)	(Phonorecords II)
Delivery Rate Adjustment Proceeding))	
_____))	

**MEMORANDUM OPINION
ON MATERIAL QUESTIONS OF SUBSTANTIVE LAW**

I. Procedural Background

On May 17, 2012, the Copyright Royalty Judges (“CRJs”) published for comment in the Federal Register proposed regulations for the section 115 compulsory license, which were the result of a settlement submitted to the CRJs on April 11, 2012. Notice of Proposed Rulemaking, Mechanical and Digital Phonorecord Delivery Compulsory License, Docket No. 2011–3 CRB Phonorecords II, 77 FR 29259 (May 17, 2012). The proposed regulations included “detail requirements” for 37 CFR 385.12(e) and 385.22(d), which would require statements of account filed by licensees to include each step of the royalty calculations, the type of licensed activity engaged in (in certain cases), and the number of plays or downloads. The proposed regulations also included a “confidentiality requirement” for 37 CFR 385.12(f) and 385.22(e), which would require copyright owners to maintain statements of account that they receive under the license to be maintained in confidence. *Id.*

The “detail requirements” provision proposed for § 385.12(e) states:

Accounting. The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information and belief of the licensee at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(5) and § 201.19 of this title. Without limitation, a licensee’s statements of account shall set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the

licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to §385.13 does or does not apply) and, for each offering reported, also indicate the type of licensed activity involved and the number of plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

Id. at 29267.

Section 385.22(d), which is proposed for Subpart C of the Settlement, is nearly identical to § 385.12(e), except for immaterial changes to conform it to its placement in proposed Subpart C.

The “confidentiality requirement” proposed for §§ 385.12(f) and 385.22(e) states:

Confidentiality. A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall be maintained in confidence by any copyright owner, authorized representative or agent that receives it, and shall solely be used by the copyright owner, authorized representative or agent for purposes of reviewing the amounts paid by the licensee and verifying the accuracy of any such payments, and only those employees of the copyright owner, authorized representative or agent who need to have access to such information for such purposes will be given access to such information; provided that in no event shall access be granted to any individual who, on behalf of a record company, is directly involved in negotiating or approving royalty rates in transactions authorizing third party services to undertake licensed activity with respect to sound recordings. A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall not be used for any other purpose, and shall not be disclosed to or used by or for any record company affiliate or any third party, including any third-party record company.

Id. at 29262.

After considering the proposed Settlement regulations and the comments received in response to them, on March 27, 2013, Chief Copyright Royalty Judge Suzanne Barnett proposed material questions of substantive law for referral to Register of Copyrights and invited participants to submit briefs to accompany the referral of questions to the Register of Copyrights, pursuant to the terms of 17 U.S.C. 802(f)(1)(A)(ii). The referral asked “whether the detail requirements set forth in 37 CFR as proposed § 385.12(e) (*existing*) and proposed § 385.22(d) (*new*) as well as the confidentiality requirement proposed for §§ 385.12(f) and 385.22(e) encroach upon the exclusive statutory domain of the Register under § 115 of the Act.” CRJ Order Referring Material Question of Substantive Law, Docket No. 2011-3 CRB (Mar. 27, 2013). After

receiving a brief filed jointly by the Settling Participants² regarding whether proposed terms encroach upon the exclusive statutory domain of the Register, the Chief Copyright Royalty Judge delivered the referred questions and the Settling Participants brief to the Register on April 17, 2013.

The Register understands that the referred inquiry, quoted above, poses the following two questions:

- 1) Whether the “detail requirements” proposed for 37 CFR 385.12(e) and 385.22(d) encroach upon the exclusive statutory domain of the Register under section 115 of the Copyright Act; and
- 2) Whether the “confidentiality requirement” proposed for 37 CFR 385.12(f) and 385.22(e) encroach upon the exclusive statutory domain of the Register under section 115 of the Copyright Act.

As required by 17 U.S.C. 802(f)(1)(A)(ii), the Register hereby responds to the CRJs.

II. Statutory Authority in Section 115 and Chapter 8 of Title 17

Prior to 1995, copyright law empowered the Copyright Royalty Tribunal and, subsequently, the Copyright Arbitration Royalty Panels (“CARPs”) and the Librarian of Congress, to set only the rates applicable to the section 115 license. This authority was modified in 1995 by the Digital Performance Right in Sound Recording Act of 1995 in which Congress added provisions to section 115 for “digital phonorecord deliveries.” The CARPs were authorized to set “reasonable terms and rates of royalty payments” for digital phonorecord deliveries (“DPDs”), and these rates and terms were subject to modification by the Librarian upon recommendation by the Register of Copyrights. The same legislation authorized the Librarian to “establish requirements by which copyright owners may receive reasonable notice of the use of

² The National Music Publishers' Association, Inc., the Songwriters Guild of America, the Nashville Songwriters Association International, the Church Music Publishers Association, the Recording Industry Association of America, Inc., the Digital Media Association, CTIA - The Wireless Association, RealNetworks, Inc., Rhapsody International Inc., Cricket Communications, Inc., and Rdio, Inc.

their works..., and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.” 17 U.S.C. 115(c)(3)(D) (1996). With respect to physical phonorecords, the CARPs’ authority was limited to setting rates; there was no statutory authorization to set “terms.” *See* 17 U.S.C. 801(b)(1) (1996). However, the Register of Copyrights had the authority to issue regulations concerning payment. Section 115(c)(5) provided (and continues to provide), in pertinent part:

Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.
17 U.S.C. 115(c)(5).

In 2004, Congress passed the Copyright Royalty and Distribution Reform Act (“CRDRA”). This legislation created the CRJs and empowered them to set “terms and rates of royalty payments” under section 115. *See* 17 U.S.C. 801(b)(1). It also amended section 115 to provide that the CRJs had authority to set “reasonable rates and terms of royalty payments” for use of works under the license as well as “requirements by which records of such use shall be kept and made available.” 17 U.S.C. 115(c)(3)(D). However, the statutory provisions authorizing the Register to regulate notice of intention to obtain the section 115 license and requirements regarding monthly payment and monthly and annual statements of account remained in place. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (2004).

III. Register’s Determination in Response to Previously Referred Question

On August 8, 2008, the Register responded to the CRJs Referred Questions regarding the division of authority in the administration of section 115. The Register determined that Congress intentionally split the administration of the license between the CRJs and the Register of

Copyrights. The result of this division of authority is that the CRJs may issue regulations that supplant currently applicable regulations, including those heretofore issued by the Librarian of Congress, solely in the areas of notice of use and recordkeeping. 17 U.S.C. 803(c)(3). However, the scope of the CRJs' authority in the areas of notice of use and recordkeeping for the section 115 license must be construed in light of Congress' more specific delegation of responsibility to the Register of Copyrights, which includes the authority to issue regulations regarding notice of intention to obtain the section 115 license as well as those regarding monthly payment and monthly and annual statements of account. Register's Division of Authority Decision, Docket No. RF 2008-1 CRB, 73 FR 48396 (Aug. 19, 2008); *see* 17 U.S.C. 115(b)(1) and 115(c)(5).

The Register recounted that in the CRDRA, Congress amended section 115(c)(3)(D) to authorize the CRJs to "establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries." Register's Division of Authority Decision, Docket No. RF 2008-1 CRB, 73 FR 48396, 48397 (Aug. 19, 2008). The CRDRA also added a new section 803(c)(3), which allowed the CRJs to "specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations." 17 U.S.C 803(c)(3). The Register acknowledged that on its face it may appear as if the CRJs are empowered to supplant all current regulations in the area of notice and recordkeeping. However, the Register noted that the CRJs' authority to issue regulations in the areas of notice and recordkeeping must be construed in light of the specific grants of responsibility over the section 115 license to the Register of Copyrights. Register's Division of Authority Decision, Docket No. RF 2008-1 CRB, 73 FR 48396, 48397-98 (Aug. 19, 2008) (*citing Simpson v. United States*, 435 U.S. 6, 15 (1978)).

The Register concluded that the CRJs' authority to issue regulations on notice of use and recordkeeping is limited by the Register's specific grant of authority to issue regulations regarding statements of account. The Register acknowledged that that it may be conceivable that

the CRJs may determine that licensees should be required to provide some information related to notice of use that is not addressed in either the notice of intention to obtain the section 115 license or the statements of account. The Register noted that if the CRJs are able to identify such information that is not addressed in either the notice of intention to obtain the section 115 license or the statements of account, then the CRJs may require that a licensee include that type of information in a notice of use (but not in the statement of account) to be served on the copyright owner. Additionally, the Register noted that a recommendation by the CRJs to the Register to amend the regulations governing statements of account to include additional information presumably would likely meet with a favorable response. *Id.* at 48398.

IV. Summary of Parties' Arguments

In the sole brief submitted in relation to the referral of questions to the Register, the Settling Participants acknowledge that, pursuant to section 115(c)(5), the Register has authority to set requirements for the form, content, and manner of certification of statement of account. They note the Register's current regulations includes a requirement that "[e]ach step in computing the monthly payment, including the arithmetical calculations involved in each step, shall be set out in detail in the Monthly Statement." Brief of Settling Participants, Docket No. 2011-3 CRB Phonorecords II (Apr. 5, 2013) at 8-12, citing 37 CFR 201.19(e)(4)(iii).

The Settling Participants conclude that because the proposed "detail requirements" are consistent with the Register's current statement of account regulations the "detail requirements" do not encroach on the Register's authority. They also acknowledge the Register's 2008 Division of Authority Decision. But they argue that the Division of Authority Decision was directed toward proposed terms that would have been inconsistent with and would have supplanted the Register's rules regarding statements of account. They assert that therefore that the Division of Authority Decision should not properly be read to preclude regulations proposed as part of a settlement that are wholly consistent with and merely amplify and clarify the application of the

Register's regulations to specific fee calculations. Brief of Settling Participants, Docket No. 2011-3 CRB Phonorecords II (Apr. 5, 2013) at 8-12.

The Settling Participants also acknowledge the Register's statements regarding division of authority in the Register's 2009 Review of the CRJs' previous determination of rates and terms for the section 115 license stating that the "CRJ s cannot alter requirements issued by the Register regarding statements of account." *Id.* at 10 (*citing* Review of Copyright Royalty Judges Determination, Docket No. 2009-1, 74 FR 4537, 4543 (Jan. 26, 2009)).

The Settling Participants then consider the question of what should happen to effectuate accounting when the CRJs properly adopt a new rate structure different than that contemplated by the statement of account regulations. They acknowledge the Register's prior answer to such a concern as stated in the 2008 Division of Authority Decision. There, the Register offered that the CRJs had two options: first, "require that a licensee include that type of information in a notice of use (but not in the statement of account)" or second, make "a recommendation... to the Register to amend the regulations governing statements of account to include additional information." *Id.* at 11 (*citing* 73 FR at 48,398). Despite the Register's recitation of the two options, the Settlement Participants opine that it does not appear that the Register had in mind the possibility of an entirely new rate structure. *Id.* They assert that while in theory having the Register update the statement of account regulations may seem like a better alternative, waiting for the Register to issue new statement of account regulations will require an inconvenient lag time before appropriate statement of account regulations can be effectuated. The Settling Participants conclude that while the Register is authorized to set forth statement of account regulations, it is most consistent with the overall operation of the section 115 license to allow the CRJs to specify additional data elements to be included in statements of account, and that the Register should find such detail requirements permissible. *Id.*

The Settling Participants again acknowledge the Register's express statutory grant of authority is to prescribe the "form, content, and manner of certification." *Id.* at 13, citing 17

U.S.C. 115(c)(5). However, they state that while the “confidentiality requirement” might in some sense be considered to relate to statements of account, the “confidentiality requirement” does not have anything to do with the form, content or manner of certification of statements of account. They conclude therefore that the “confidentiality requirement” does not does not encroach on the Office's power with respect to statements of account as provided in section 115(c)(5). The Settling Participants accurately state that the “confidentiality requirement” does not add to, subtract from or otherwise alter the content of the statement, modify the form of the statement, or affect certification, in any way. The Settling Participants assert that the “confidentiality requirement” merely specifies what a copyright owner may do (or not do) with information in a statement of account after that statement has been prepared and served in accordance with the Office's regulations. *Id.*

The Settling Participants further elaborate their views that the “confidentiality requirement” was an integral part of the Settlement which represents a comprehensive compromise, designed to protect sensitive business information, and that all parties agreed the provision was in the best interests of all participants, the industry generally, and the public. They state that the “confidentiality requirement” does not add to or subtract from, modify or change the timing or manner of service of statements of account, in any way and that such entirely additional and non-intrusive provisions do not in any way impinge on the Office’s unique power to prescribe the form, content and manner of certification of statements of account. The Settling Participants also address concerns that the “confidentiality requirement” may impede litigation by noting that use of statements of account in litigation could be accommodated by being shielded from disclosure via a protective order. *Id.* at 13-14.

The Settling Participants conclude by offering that the Register should conclude that the CRJs have authority to adopt both the “detail requirements” and the “confidentiality requirement” as part of the Settlement. They also state that if the Register does not agree with their recommendation, then the Copyright Office should incorporate the provisions into its statement

of account regulations, and the Register should announce the intention to do so as part of the Register's decision on this referral. *Id.* at 16.

IV. Register's Determination

A. Whether the "detail requirements" proposed for 37 CFR 385.12(e) and 385.22(d) encroach upon the exclusive statutory domain of the Register under section 115 of the Act.

As the Settling Participants acknowledge, pursuant to section 115(c)(5), the Register has authority to set requirements for the form, content, and manner of certification of statement of account. The "detail requirements" proposed for 37 CFR 385.12(e) and 385.22(d) clearly attempt to set forth requirements addressing the content that licensees must include in statements of account, as opposed to requirements addressing the content that licensees must include in a notice of use. As such, the proposed "detail requirements" encroach upon the exclusive statutory domain of the Register to issue regulations regarding statements of account set forth in 17 U.S.C. 115(b)(1) and 115(c)(5).

The proposed "detail requirements" represent an encroachment on the Register's authority regardless of whether or not they conflict with the Register's current regulations for statements of account. The Settling Participants accurately state that the Register's current regulations include a requirement that "[e]ach step in computing the monthly payment, including the arithmetical calculations involved in each step, shall be set out in detail in the Monthly Statement." 37 CFR 201.19(e)(4)(iii). This provision is consistent with the "detail requirements" proposed for 37 CFR 385.12(e) and 385.22(d). The fact that the "detail requirements" are consistent with the Register's current regulations does not diminish the Register's exclusive authority regarding statements of account.

While the Register is reluctant to state an intended outcome in its ongoing rulemaking regarding amendments to the regulations regarding statements of account, the Register is actively considering the possibility of including in the Office's updated regulations provisions that would enhance or expand upon the details required for including all steps in rate calculation. *See* Notice

of Proposed Rulemaking, Mechanical and Digital Phonorecord Delivery Compulsory License 77 FR 44179 (July 27, 2012).

B. Whether the “confidentiality requirement” proposed for 37 CFR 385.12(f) and 385.22(e) encroach upon the exclusive statutory domain of the Register under § 115 of the Act.

As the Settling Participants accurately set forth, the “confidentiality requirement” does not address the form, content, and manner of certification of statements of account. As such, the proposed “confidentiality requirement” does not encroach upon the Register’s authority with respect to statements of account as provided in 17 U.S.C. 115(c)(5). Furthermore, the Register is not aware that the “confidentiality requirement” conflicts with any other authority reserved for the Register. However, the Register also notes that it is unclear whether the CRJs have any independent authority to issue regulations such as the proposed “confidentiality requirement” which would impose obligations on a copyright owner with regard to what he or she is able to do with a statement of account received by a licensee. The Register, suggests that the question of whether the CRJs have authority to issue regulations imposing requirements on what a *copyright owner* (as opposed to a licensee) may do (or not do) with information in a statement of account after that statement has been prepared and served in accordance with the Office's regulations, represents a novel question of law that may be separately referred to the Register. If such a novel question is referred to the Register, the Register submits that the participants should be afforded an opportunity to brief that specific issue, which was not adequately addressed in the participants’ brief on the instant referral. If such a novel question is referred, the Register encourages the participants to cite specific sources supporting the view that the CRJs enjoy such authority.

May 1, 2013

Maria A. Pallante,
Register of Copyrights.

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