LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2015–02]

Scope of the Copyright Royalty Judges' Continuing Jurisdiction

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

ACTION: Final order.

SUMMARY: The Copyright Royalty Judges ("CRJs"), acting pursuant to statute, referred novel material questions of substantive law to the Register of Copyrights for resolution. Those questions concerned the scope of the CRJs' authority, under the statutory grant of continuing jurisdiction over ratemaking determinations, to issue a clarifying interpretation of regulations adopted pursuant to such a determination. The Register resolved those questions in a written decision that was transmitted to the CRJs. That decision is reproduced below.

DATES: Effective Date: April 8, 2015.

FOR FURTHER INFORMATION CONTACT: Stephen Ruwe, Assistant General Counsel, U.S. Copyright Office, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8350.

SUPPLEMENTARY INFORMATION: The Copyright Royalty Judges are tasked with determining and adjusting terms and rates of royalty payments of statutory licenses under the Copyright Act. *See* 17 U.S.C. 801. If, in the course of proceedings before the CRJs, novel material questions of substantive law concerning the interpretation of provisions of title 17 arise,

the CRJs are required by statute to refer those questions to the Register of Copyrights for resolution. 17 U.S.C. 802(f)(1)(B).

On March 9, 2015, the CRJs, acting pursuant to 17 U.S.C. 802(f)(1)(B), referred novel material questions of substantive law to the Register, concerning the CRJs' authority to issue a clarifying interpretation of regulations adopted in a prior ratesetting determination. On April 8, 2015, the Register resolved those questions in a Memorandum Opinion that she transmitted to the CRJs. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety below.

Dated: April 28, 2015

_____

Maria A. Pallante,

Register of Copyrights and Director of the U.S. Copyright Office

BILLING CODE 1410-30-P

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

In the Matter of	**)**	
Determination of Rates and Terms	**)**	**Docket No. 2006-1 CRB DSTRA**
for Preexisting Subscription Services	**)**	**(SDARS I)**
and Satellite Digital Audio	**)**	
Radio Services	**)**	
_____	**)**	

MEMORANDUM OPINION
ON A NOVEL QUESTION OF LAW

In relation to the above-captioned proceeding before the Copyright Royalty Judges ("CRJs" or "Judges"), questions have arisen about the proper interpretation of 17 U.S.C. 803(c)(4), which provides the CRJs with "continuing jurisdiction" in certain circumstances to amend a written determination after it has issued. The CRJs determined that these were novel material questions of substantive law and, as required by section 802(f)(1)(B), referred them to the Register of Copyrights for resolution. The Register hereby resolves those referred questions.

I. Procedural Background

On January 24, 2008, the CRJs published final royalty rates and terms under the section 112(e) and 114 statutory licenses for the period 2007 through 2012 for preexisting satellite digital audio radio services ("SDARS I"). 73 FR 4080 (Jan. 24, 2008).[1] In that proceeding, the CRJs set a royalty rate as a percentage of the "Gross Revenues" of the satellite services. 73 FR at 4084. The definition of "Gross Revenues" adopted by the CRJs excluded several categories of revenues received by satellite services, such as revenues from channels and programming that are "exempt from any license requirement or [are] separately licensed," and revenues attributable to channels and programming that are "offered for a

[1] The CRJs' determination in SDARS I was appealed to the U.S. Court of Appeals for the District of Columbia Circuit. The court affirmed the determination in all but one respect, remanding to the CRJs the single matter of specifying a royalty for the use of the section 112 statutory license. *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220 (D.C. Cir. 2009). That last issue was resolved by the CRJs in further proceedings. 75 FR 5513 (Feb. 3, 2010).

separate charge" and "use only incidental performances of sound recordings." 73 FR at 4102; 37 CFR 382.11 (2008) (paragraph (3)(vi)(B) & (D) of Gross Revenues definition).

On April 17, 2013, the CRJs adjusted the royalty rates and terms for satellite radio for the period 2013 through 2017 ("SDARS II"). 78 FR 23054 (Apr. 17, 2013) *as modified*, 78 FR 31842 (May, 28, 2013). In the course of that proceeding, SoundExchange criticized the manner in which Sirius XM had been excluding revenues in reliance on the SDARS I regulations, including its practice of excluding revenues attributable to sound recordings made before February 15, 1972, which are generally not subject to federal copyright protection, and thus do not fall within the section 112(e) and 114 statutory licenses.[2] 78 FR at 23071. In SDARS II, the CRJs maintained the exclusions from gross revenues it had adopted in SDARS I, but added a new provision specifically addressing the proper treatment of pre-1972 sound recordings. 78 FR at 23079-81.

After the CRJs' determination in SDARS II, SoundExchange brought suit against Sirius XM on August 25, 2013 in the U.S. District Court for the District of Columbia, alleging that for the time period covered by SDARS I (2007 through 2012), Sirius XM had underpaid royalties by improperly excluding certain revenues from its gross revenue calculations, including revenues attributable to pre-1972 sound recordings. *SoundExchange, Inc. v. Sirius XM Radio, Inc*., -- F. Supp. 3d --, 2014 WL 4219591, *3-*5 (D.D.C. Aug. 26, 2014).

Rather than seeking to have the district court to resolve the dispute itself, Sirius XM asked the court to refer the issues to the CRJs under the administrative law doctrine of "primary jurisdiction" because they "involve interpreting and applying the [CRJs'] regulations on gross revenues." *Id.* at *3. As explained by the D.C. Circuit, under that doctrine, when a court is "adjudicating a claim [that] would 'require[] the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body,'" the court can "suspend the judicial process 'pending referral of such issues to the administrative body for its view.'" *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 837 (D.C. Cir. 2012) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)).

[2] *See generally* U.S. Copyright Office, *Copyright and the Music Marketplace* 53-54 (Feb. 2014).

SoundExchange disagreed that the doctrine applied, responding that the relevant regulatory definitions were unambiguous, and that the district court should therefore decide the case. *SoundExchange*, 2014 WL 4219591 at *4.

The district court agreed with Sirius XM, concluding that "the gross revenue exclusions are ambiguous and do not, on their face, make clear whether Sirius XM's approaches were permissible under the regulations," and that referral to the CRJs under the primary jurisdiction doctrine was therefore appropriate. *Id.* In response to SoundExchange's related concern that the CRJs lacked authority to resolve the issues, the district court pointed to 17 U.S.C. 803(c)(4). *Id.* at *5. Section 803(c)(4) provides as follows:

> **Continuing jurisdiction.—** The Copyright Royalty Judges may issue an amendment to a written determination to correct any technical or clerical errors in the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination. Such amendment shall be set forth in a written addendum to the determination that shall be distributed to the participants of the proceeding and shall be published in the Federal Register.

17 U.S.C. 803(c)(4). The district court concluded that "[n]either party is asking for a change to rates; only a clarification of the terms," and that such a clarification "is within the [CRJs'] continuing jurisdiction." *SoundExchange*, 2014 WL 4219591 at *5. Accordingly, the court stayed its proceedings pending a decision by the CRJs clarifying the meaning of the regulations defining Gross Revenues.

On November 24, 2014, SoundExchange petitioned the CRJs to clarify the definition of Gross Revenues adopted in SDARS I. On December 9, 2014, the CRJs reopened the SDARS I proceedings, observing that SoundExchange's petition raised a threshold jurisdictional question that potentially constituted a novel material question of substantive law that, by statute, must be referred to the Register. In the order reopening proceedings, the CRJs asked the parties to file briefs addressing the CRJs' authority to issue a clarifying interpretation of its regulations. Sirius XM took the position that the Copyright Act or, in the alternative, the Administrative Procedure Act ("APA"), gave the CRJs such authority. SoundExchange disagreed, arguing that no statute gave the CRJs authority to clarify the regulations, and that the case should therefore be returned to the district court for resolution.

After considering the parties' responses, on March 9, 2015, the CRJs, acting pursuant to 17 U.S.C. 802(f)(1)(B), referred the following novel material questions of substantive law to the Register, enclosing the briefs the parties had filed:

(1) Do the Judges have jurisdiction under title 17, or authority otherwise, to interpret the regulations adopted in the captioned proceeding?
(2) If the Judges have authority to interpret regulations adopted in the course of a rate determination proceeding, is that authority time-limited?
(3) Would the answer regarding the Judges' jurisdiction or authority be different if the terms at issue regulated a current, as opposed to a lapsed, rate period?

II. Summary of Parties' Arguments

The parties' dispute is focused on around the first referred question. The Register understands this question to ask, in essence, whether the CRJs have the power to issue a clarifying interpretation of their regulations.

SoundExchange asserts that the provision cited by the district court, 17 U.S.C. 803(c)(4), does not give the CRJs authority to clarify the regulations at issue here. First, SoundExchange argues that resolution of legal ambiguity cannot properly be characterized as a correction of a "technical or clerical" error. Second, SoundExchange urges that the separate authority in section 803(c)(4) to "modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination" does not apply to this case. In particular, it argues that any modification of the definition of "Gross Revenues" would affect the *rates* of royalty payments, not the terms under which those payments are made, and that the definition of "Gross Revenues" is accordingly not a "term." In addition, SoundExchange asserts that Sirius XM's decision to exclude certain revenues from its gross revenue calculation was not an "unforeseen circumstance[]" that would "frustrate the proper implementation of [the] determination."

Sirius XM, in contrast, asserts that section 803(c)(4) empowers the CRJs to interpret the SDARS I regulations, and amend them to prevent an interpretation that is at odds with copyright law or the intent of its earlier determination. According to Sirius XM, such an amendment can either be considered a "technical amendment" that prevents a mistaken interpretation of their determination, or a "modification"

of the terms of the royalty payment in response to unforeseen circumstances. In response to SoundExchange's point that a modification of the Gross Revenues definition would constitute an impermissible change in rates, Sirius XM urges that "rates" refers only to the percentage-of-revenue rate in the CRJs' determination, and "terms" refers broadly to "other aspects of the determination required to implement the rates."

In the alternative, Sirius XM argues that if section 803(c)(4) did not give the CRJs sufficient authority to clarify the meaning of the regulations, the APA independently authorizes the CRJs to do so. Sirius XM notes that section 803(a)(1) instructs the CRJs to act in accordance with the APA, and that the APA includes a provision authorizing agencies to "issue a declaratory order to terminate a controversy or remove uncertainty" as part of formal adjudications. 5 U.S.C. 554(e). SoundExchange disputes that contention on the ground that, within the meaning of the APA, the CRJs engage in rulemakings, not adjudications, and therefore 5 U.S.C. 554(e) does not apply.

With respect to the remaining two questions, the parties agree that if the CRJs have authority to interpret regulations adopted in the course of a rate determination proceeding, that authority would not be time limited. In addition, they agree that the CRJs' continuing jurisdiction does not depend on whether a rate period is current or lapsed.

III. Register's Determination

Having considered the relevant statutory language and the input from the parties, the Register determines that the CRJs have jurisdiction under section 803(c)(4) of Title 17 to clarify the meaning of the regulations adopted in SDARS I. The Register also determines that this authority is not time-limited, and that the CRJs' authority is the same whether the regulations at issue apply to a current or lapsed rate period.

A. The CRJs' Continuing Jurisdiction Encompasses the Authority to Issue Clarifying Amendments to Written Determinations.

As noted above, under section 803(c)(4), the CRJs "may issue an amendment to a written determination to correct any technical or clerical errors in the determination or to modify the terms, but

not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination." 17 U.S.C. 803(c)(4). As an initial matter, the Register accepts the district court's conclusion that the meaning of the relevant regulatory provisions, and the application of those provisions to the particular fact pattern presented here, is uncertain. *See SoundExchange*, 2014 WL 4219591, at *4 ("[T]he gross revenue exclusions are ambiguous and do not, on their face, make clear whether Sirius XM's approaches were permissible under the regulations.").

The Register concludes that the CRJs' power to "correct any technical . . . errors" in determinations encompasses the power to resolve ambiguity in the meaning of regulations adopted pursuant to those determinations.[3] Such a correction is "technical" in the sense that it merely clarifies existing regulations to ensure they are applied in the manner intended by the CRJs. As the district court appreciated, the CRJs are in the best position to provide this type of interpretive guidance, given their familiarity with the extensive record on which the regulations are based and their general "technical and policy expertise." *SoundExchange*, 2014 WL 4219591 at *4. This approach is also consistent with general principles of administrative law, under which courts regularly defer to agencies' reasonable interpretations of ambiguous regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Section 803(c)(4) provides the administrative mechanism by which the CRJs can issue such interpretations.

This understanding of section 803(c)(4) also comports with the Register's prior reading of that provision. Specifically, the Register has construed section 803(c)(4) as providing the CRJs the authority to amend their regulations to conform with the Register's interpretation of the Copyright Act. In 2009, after the CRJs issued a determination setting the rates and terms of royalty payments for making and distribution of phonorecords of musical works under 17 U.S.C. 115, the Register exercised her statutory

[3] As explained above, Sirius XM argues that the CRJs' power to "modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination" provides an alternate source of authority to clarify the SDARS I regulations. 17 U.S.C. 803(c)(4). SoundExchange contends, however, that the definition of "Gross Revenues" is not a "term." For its part, the district court concluded that the definition was a term. *SoundExchange*, 2014 WL 4219591 at *5 ("Neither party is asking for a change to rates; only a clarification of terms."). The Register need not resolve this issue, because the CRJs' separate power to "correct any technical . . . errors" provides a sufficient basis for the CRJs to act in this case. For the same reason, the Register need not address whether the APA separately authorizes the CRJs to clarify the SDARS I regulations.

authority to correct certain legal errors in that determination. 74 FR 4537 (Jan. 6, 2009). In particular, the Register concluded that a number of regulatory terms that the CRJs had adopted were inconsistent with the Copyright Act, including certain terms related to digital phonorecord deliveries and the retroactivity of promotional royalty rates. *See* 73 FR at 4541-42. Although the Register lacked the authority actually to amend the regulations adopted by the CRJs, she concluded that the CRJs could "codify the corrections identified and made herein by the Register" by exercising their authority under section 803(c)(4). *Id.* at 4543. The CRJs subsequently relied on that authority to amend the regulations and excise the erroneous regulatory provisions. 74 FR 6832, 6833 (Feb. 11, 2009). The CRJs explained that doing so would "clarify potential confusion facing users of the license at issue" and "promote an efficient administration of the applicable license." *Id.* These same rationales apply with equal force here.

B. The CRJs' Continuing Jurisdiction is Not Subject to Time Limits, and Extends to Both Current and Lapsed Rate Periods.

The Register agrees with the parties that the CRJs' continuing jurisdiction authority is not subject to a time limit. Nothing in the text of section 803(c)(4) indicates a time limit. And, no other provision in Title 17 would otherwise impose a time limit on the CRJs' exercise of that authority. Furthermore, the scope of the CRJs' continuing jurisdiction authority is the same whether the terms at issue concern a current or lapsed rate period. Nothing in the text of section 803(c)(4), or any other provision in Title 17, differentiates between current and lapsed rate periods for purposes of the CRJs' exercise of continuing jurisdiction.

April 8, 2015

_____

Maria A. Pallante,
Register of Copyrights and Director of the United States Copyright Office

[FR Doc. 2015-10305 Filed: 5/1/2015 08:45 am; Publication Date: 5/4/2015]