

**Before the
U. S. Copyright Royalty Judges
Copyright Royalty Board
Library of Congress**

In the Matter of:

Electronic Filing of Documents

Docket No. 16-CRB-0015-RM

COMMENTS OF MUSIC COMMUNITY PARTICIPANTS

SoundExchange, Inc. (“SoundExchange”), the Recording Industry Association of America, Inc. (“RIAA”), the American Association of Independent Music (“A2IM”), the American Federation of Musicians of the United States and Canada (“AFM”), the Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”) and the National Music Publishers’ Associations (“NMPA,” and all of the foregoing collectively, the “Commenting Parties”) respectfully provide these Comments in response to the Copyright Royalty Judges’ Notice of Proposed Rulemaking (“NPRM”) concerning amendments to the Judges’ procedural regulations to allow for electronic filing. 81 Fed. Reg. 84,526 (Nov. 23, 2016).

The Commenting Parties view the Judges’ implementation of an electronic filing and case management system as a very important and positive development, and encourage use of the system both (1) as a means for substantially all participants to make filings and (2) to provide comprehensive public access to public versions of the complete docket in proceedings before the Judges. In these Comments, the Commenting Parties first address their significant interests in the subject of electronic filing in proceedings before the Judges. The Commenting Parties then address the Judges’ electronic filing initiative in general. Finally, the Commenting Parties turn

to specific details of the amendments to the Judges' procedural regulations that are set forth in the NPRM.

I. Interests of the Commenting Parties

SoundExchange is the nonprofit collective that the Judges have designated to receive statements of account, royalty payments and reports of use from licensees under Sections 112(e) and 114 of the Copyright Act and to distribute such royalty payments to copyright owners and performers. It currently has approximately 79,000 artist members and approximately 41,000 rights owner members (including both record companies and artists who own the copyrights in their own recordings). It is a participant in the *SDARS III* proceeding before the Judges (Docket No. 16-CRB-0001 SR/PSSR (2018-2022)), and it has participated in all previous proceedings under Sections 114 and 112(e) of the Copyright Act since jurisdiction over such proceedings was vested in the Judges.

RIAA is the trade association that supports and promotes the creative and financial vitality of the major music companies. Its members create, manufacture and/or distribute products accounting for approximately 85% of legitimate music distribution in the United States. RIAA and its members are represented on the board of directors of SoundExchange and currently participating directly in *SDARS III* as well. RIAA's member companies are participating as settling parties in the pending *Phonorecords III* proceeding (Docket No. 16-CRB-0003-PR (2018–2022)), and RIAA has participated in all past such proceedings since provisions were made for adjusting statutory mechanical royalty rates in the Copyright Act of 1976.

A2IM is a trade organization that promotes business opportunity and provides advocacy and representation for the independent label community. Its membership includes a diverse

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group of over 400 record labels of all sizes and staffing levels across the United States, representing all musical genres. A2IM is represented on the board of directors of SoundExchange and is currently participating directly in *SDARS III* as well.

AFM is the largest union in the world representing professional musicians. Musicians represented by the AFM record music for sound recordings, and include featured artists and non-featured musicians whose creative work is integral to the music business and who are recipients of the featured artist and non-featured musician shares of the royalties distributed pursuant to Section 114. The AFM and its members are represented on the board of directors of SoundExchange, and the AFM is currently participating directly in *SDARS III* as well.

SAG-AFTRA is the nation's largest labor union representing working entertainment and media artists. SAG-AFTRA represents more than 165,000 media professionals, including sound recording artists and singers. SAG-AFTRA sound recording artists and singers are recipients of the featured artist and non-featured vocalist shares of the royalties distributed pursuant to Section 114. SAG-AFTRA and its members are represented on the board of directors of SoundExchange, and SAG-AFTRA is currently participating directly in *SDARS III* as well.

Founded in 1917, NMPA is the principal trade association representing the U.S. music publishing and songwriting industry. NMPA protects and advances the interests of music publishers and songwriters in matters relating to both the domestic and global protection of music copyrights. NMPA represents publishers and songwriters of all catalog and revenue sizes, from large international corporations to small businesses and individuals. Taken together, compositions owned or controlled by NMPA members account for the vast majority of the market for musical composition licensing in the U.S. NMPA has represented the interests of music copyright owners in all proceedings to set royalty rates and terms for the compulsory

license under Section 115 of the Copyright Act, including the *Phonorecords III* proceeding currently pending before the Judges.

As frequent participants in proceedings before the Judges, the Commenting Parties value both the simplification of filing logistics and the improved access to docket information that eCRB has the potential to provide, so long as eCRB and the rules and procedures involving its use are workable and appropriately protective of participants' highly confidential information.

II. Electronic Filing and Case Management in General

The Commenting Parties applaud the Judges for implementing an electronic filing and case management system. The Commenting Parties view such implementation as a very important and positive development. Electronic filing promises to provide significant efficiencies for participants in proceedings before the Judges, and probably for the Judges and their staff as well. That is why electronic filing has become common among other federal agencies conducting administrative proceedings involving litigation procedures.¹ Other federal agencies also commonly provide for electronic filing in rulemaking proceedings involving notice and comment procedures.² Many of these other agency systems provide the public

¹ *E.g.*, Patent Trial and Appeal Board (<https://ptab.uspto.gov/#/login>), Trademark Trial and Appeal Board (<http://estta.uspto.gov/>), National Labor Relations Board (<https://apps.nlr.gov/eservice/efileterm.aspx>), Department of Labor Administrative Review Board (<https://www.dol.gov/arb/welcome.html>), Environmental Protection Agency Office of the Administrative Law Judges (https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf/HomePage?ReadForm), Department of Health and Human Services Departmental Appeals Board (<https://dab.efile.hhs.gov/>), Department of Justice Office Executive Office for Immigration Review (<https://www.justice.gov/eoir/electronic-filing>).

² *E.g.*, eRulemaking Program Management Office (<https://www.regulations.gov/>), Federal Communications Commission (<https://www.fcc.gov/ecfs/>).

comprehensive docket information going back over a period of years and include extensive search capabilities.

The Commenting Parties assume that the Judges plan to use eCRB not only to collect filings from participants and deliver them to other participants, but also to provide the public ready access to both public versions of filings by participants and decisions by the Judges, like the best of other agency systems. The Commenting Parties welcome and encourage use of eCRB for this purpose. While many participants and their counsel have a long history of participating in proceedings before the Judges and their predecessors, and thus have considerable institutional knowledge of past filings and decisions, and the Commenting Parties appreciate the docket information that the Judges have made available on their website, it is not always easy even for frequent participants to identify and locate particular filings and decisions in past proceedings. Having eCRB as a portal to search public filings and decisions in past proceedings will benefit participants in proceedings as well as the press, general public and probably the Judges and their staff.

In view of these significant potential advantages of eCRB, the Commenting Parties urge the Judges to do the following as they design eCRB and the administrative processes involved with it:

- On a going-forward basis, include in eCRB all of the Judges' orders, determinations and other communications, as well as opinions of the Register of Copyrights concerning referred questions of law or on review of the Judges' determinations, as provided in 17 U.S.C. § 802(f)(1) (a possibility that could be specifically contemplated by the Judges' rules of procedure).

- Upload to eCRB all public filings, decisions and Register’s opinions in proceedings predating implementation of eCRB, to enable public access to the filings and decisions in those dockets.
- Liberally promote use of eCRB, such as by providing *pro se* participants access to eCRB in the ordinary course.
- When the Judges receive paper filings that can be uploaded to eCRB (*e.g.*, filings by *pro se* participants without access to eCRB that can legibly be made available as PDF documents through eCRB), upload those filings to eCRB so that eCRB will reflect the substantially complete docket of each proceeding.

However, the Commenting Parties caution that it will be important for eCRB – perhaps even more than some other federal electronic filing and case management systems – to have strong protection for confidential business information. Proceedings before the Judges are unusual in the extent to which filings regularly incorporate highly-confidential business information. The Judges benefit from such filings by having a rich record on which to base their decisions. However, as Congress recognized when it vested responsibility for statutory royalty rate determination in the Judges, maintaining strong protection for confidential information is essential to obtaining the access to information necessary to develop a complete record in proceedings before the Judges. H.R. Rep. No. 108-408, at 36 (Jan. 20, 2004). That observation remains true today, and it will remain true when eCRB is implemented. Companies regularly make choices about what sensitive information they are prepared to place into the record of a proceeding before the Judges, and much of the information included in filings with the Judges is of a type that companies would not normally make available in easily-digestible form through a web portal (even one with limited access). If participants and their constituents are not confident

that eCRB will preserve the confidentiality of their sensitive information, they will not place that information into evidence in proceedings before the Judges.

Because of the importance of protecting confidential information in proceedings before the Judges, the Commenting Parties appreciate that proposed Section 350.5(i) appears to contemplate that (1) the Judges will continue to issue protective orders as contemplated by 17 U.S.C. § 803(c)(5), and (2) eCRB will include functionality for identifying filed documents as “restricted” pursuant to a protective order. The Commenting Parties assume this means that eCRB will be designed to deliver restricted filings to, and permit access to restricted filings by, only the Judges, their staff, and outside counsel subject to the protective order in the relevant proceeding, and not other persons who might be on the service list for the proceeding or the general public.

However, an electronic filing and case management system introduces into the Judges’ proceedings new possibilities for the unauthorized disclosure of confidential information, whether through “hacking,” systems issues, user errors by other participants or the Judges’ staff, or user errors by a participant’s own counsel or their staff. To further protect confidential information, the Commenting Parties urge the Judges to do the following as they design eCRB and the administrative processes involved with it:

- Emphasize in the design and operation of eCRB the inclusion and maintenance of robust security measures to protect highly sensitive information against the threat of unauthorized access. Toward that end, the Judges and their contractor should obtain from information security professionals advice concerning security best practices tailored to the specific architecture of eCRB.

- Test the functionality of eCRB for handling restricted information, including the functionality for identifying and serving restricted documents and the functionality for serving and publishing public versions of documents, with outside users (but not real confidential information) before eCRB goes live during the transition period contemplated by proposed Section 350.5(a)(1).
- Provide user prompts in eCRB to ensure that users uploading filings to eCRB designate as restricted in eCRB all information that should be treated as restricted.
- Provide a brief waiting period, such as five business days, before the general public is provided access to the public versions of filed documents or the Judges' decisions, so participants have a reasonable opportunity to object if any of their restricted information is included in another participant's public filing, prior to the time that the filing is made publicly available.
- Do not include in eCRB functionality that provides access to a filing to the general public until a member of the Judges' staff has given at least a cursory review to the filing to ensure that it facially appears to be a proper public document that the Judges would wish to disseminate publicly. A document should not be made available to the general public without consulting the filing participant if it does not appear to be a public document properly filed in the proceeding, such as in the case of a document that is (1) marked as restricted or confidential within the document (even if not identified as restricted in eCRB), (2) an agreement or the financial statement of a private company that would not typically be made available on a public basis, or (3) seemingly unrelated to the proceeding in which it was filed.

So long as eCRB provides appropriate protection for the confidential information passing through it, the Commenting Parties welcome the opportunity to use it, and believe it will contribute meaningfully to the conduct of, and public knowledge of, proceedings before the Judges.

III. Proposed Regulations

The Commenting Parties also generally support the amendments to the Judges' procedural regulations that are set forth in the NPRM. Those amendments address comprehensively the issues raised by electronic filing, and they generally do so in a way that seems workable. However, the Commenting Parties believe that the proposed amendments would benefit from refinement in a few respects, which we address in more detail below.

A. Footer

Proposed Section 350.3(a)(1) requires a footer "on each page" of a filed document with a short version of the document heading. Such a footer would be redundant on the first page of a document, because the same provision requires the first page to contain a heading describing the document. Accordingly, the Commenting Parties believe the requirement of a document footer should apply to pages after the first.

B. Identification of Exhibits

Proposed Section 350.3(a)(2) generally requires that exhibits reflect the docket number of the proceeding in which they are filed and be numbered appropriately. The Commenting Parties do not generally object to these requirements, if the Judges believe that they would be helpful. However, those requirements may not be workable for exhibits in non-traditional formats, such as those that proposed Section 350.3(b)(2) permits filing in their native (non-PDF) formats. The Music Community Participants' Comments

Commenting Parties urge the Judges to consider an exception to the requirements of Section 350.3(a)(2) for such exhibits.

C. File Type

The first sentence of proposed Section 350.3(b)(2) generally requires filings in PDF format, with a specific exception for proposed orders. The provision has two further sentences addressing types of files that can be provided in native formats. Those two sentences may have been intended as further exceptions to the requirement of PDF filing. However, they are not explicitly stated as such, and instead seem to contemplate filing of copies in native format in addition to PDF copies. For some of these items (*e.g.*, PowerPoint presentations and image files), conversion to PDF would be possible, and typically would produce legible copies. For others (*e.g.*, audio and video files) conversion to PDF is simply impossible. In addition, those two sentences appear to be limited to the particular types of files enumerated therein, while the Commenting Parties' experience with electronic discovery indicates that a broader range of complex types of electronic documents could potentially be provided as exhibits to future filings in proceedings before the Judges. Accordingly, the Commenting parties suggest revising proposed Section 350.3(b)(2) to extend it to the full range of file types that cannot usefully be provided in PDF format and to state clearly that such files do not need to be delivered in PDF format. Proposed regulatory language is set forth in Exhibit A.

D. Electronic Filing by Signing Attorney

Proposed Section 350.3(b)(8) requires “the name on the signature line [of a pleading to] match the name of the user logged into eCRB to file the document.” However, entities participating materially in proceedings before the Judges are typically represented by teams of

attorneys performing different roles in the proceeding. Law firms appearing before the Judges often may wish to have pleadings signed by the partner responsible for its content. For example, in the case of the Commenting Parties' counsel, the policy of Jenner & Block is to that effect. However, that person may not be the person in the firm who is most familiar with use of eCRB and the logistics of making filings in proceedings before the Judges. Accordingly, the Commenting parties appreciate that proposed Section 350.5(d) would allow an authorized associate attorney, paralegal or other firm employee to log in with the partner's password to make the filing.

However, from the perspective of information security, the Commenting Parties question whether it is desirable to adopt a rule that is likely to make such sharing of passwords the norm. To be able to tie use to a particular individual, the Commenting Parties believe it would be preferable to issue eCRB passwords liberally to persons associated with a firm appearing in a proceeding, and allow filings to be uploaded by an eCRB user other than the signing attorney, so long as the signer and uploader are part of the same firm. Accordingly, the Commenting Parties suggest retaining proposed Section 350.5(d), but also suggest revising proposed Section 350.3(b)(8) to allow separation of responsibility for the content of a pleading and its filing between members of a litigation team. Proposed regulatory language is set forth in Exhibit B.

E. Contents of Motions and Pleadings

Proposed Section 350.4 requires each "motion, responsive pleading, or reply" filed with the Judges to include certain content and conform to a certain format, as set forth in the subsections of Section 350.4. The Commenting Parties wish to provide the Judges with documents that contain the content they desire, and that are formatted in the way they desire. Accordingly, the Commenting Parties are very open to receiving guidance from the Judges

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concerning these matters. However, the Commenting Parties believe that proposed Section 350.4 may benefit from some refinement.

As an initial matter, the Commenting Parties do not find the requirements of proposed Section 350.4 to be entirely clear. The caption and text of Section 350.4 refer to a “pleading” or “responsive pleadings.” However, the documents filed with the Judges do not include the types of documents typically considered to be pleadings in federal litigation. *See* Fed. R. Civ. P. 7(a) (listing the pleadings allowed in federal district court litigation). Subsections 350.4(a)-(d) each state specific requirements for “[t]he pleading,” while Subsection 350.4(e) seems more generally applicable to various types of documents. Use of the specific term “pleading” in Subsections 350.4(a)-(d), when read in juxtaposition to the broader language in the caption and preamble of Section 350.4 and in Subsection 350.4(e), raises a question whether Subsections 350.4(a)-(d) were intended to apply to motions and replies as well as responsive pleadings. Similarly, the reference to format requirements in the preamble might have been intended to require separate sections of responsive pleadings, and perhaps motions and replies as well, that address the matters identified in the various subsections, although that interpretation seems more applicable to Subsections 350.4(a)-(c) (relief requested, statement of facts, and statement of issues) than Subsections 350.4(d) and (e) (citation of evidence and legal authority). To obtain documents written as they want, the Judges may wish to make their intentions in these regards clearer.

Concerning the substance of Section 350.4, some possible readings of the proposed rule indicate a format and level of formality that seems appropriate for certain documents filed with the Judges but not others. For example, the range of motions commonly filed with the Judges includes ones addressing procedural matters like adjustment of schedules and adoption of protective orders. Such matters do not typically involve much in the way of facts, issues or

evidence, and typically could be presented in a more compact motion, and in the rare circumstances in which such motions are contested be addressed in a more compact reply, without the formality suggested by the proposed rule. Likewise, the proposed requirements do not seem uniformly applicable to motions and replies addressing matters such as the adoption of a settlement, referral of a question of law to the Register of Copyrights, or to compel discovery. The Judges also receive other kinds of documents, such as petitions to participate and notices of appearance, that do not necessarily implicate the subject matter of the subsections of Section 350.4. Accordingly, the Commenting Parties suggest that it may make sense for the Judges to provide guidance for the preparation of documents that is outside the rules or drafted in less mandatory terms, or to qualify mandatory requirements with a statement such as “to the extent applicable.”

F. Filing in Dockets That Are Not Established or Active

Proposed Section 350.5(a)(2) requires that all documents filed with the Judges by attorneys (with limited exceptions) be filed through eCRB. The Commenting Parties generally support that process. However, the Commenting Parties note that it is occasionally necessary to file documents with the Judges that do not relate to an active proceeding with an established docket number. For example, SoundExchange has on at least two occasions filed with the Judges petitions to commence rulemakings relating to notice and recordkeeping issues, and on another occasion SoundExchange filed with the Judges a petition that led to the reopening of the *SDARS I* rate proceeding years after that proceeding had concluded. Either the functionality of eCRB should permit filings without an active, assigned docket number or the procedural rules should permit attorneys to make such filings in paper form.

G. eCRB Training

Proposed Section 350.5(c)(1) seems effectively to require all attorneys appearing before the CRB to complete eCRB training. The Commenting Parties do not object to such a requirement. However, such a requirement puts a premium on having such training readily available, including for counsel outside the Washington D.C. area or who may appear in a limited role, such as filing comments in a rulemaking proceeding. Perhaps the Judges contemplate on-demand online training, as in the case of training in use of the federal judiciary's Case Management/Electronic Case Files and PACER systems. That would be a very good solution to the problem of teaching use of eCRB to the constantly-changing universe of attorneys involved in various kinds of proceedings before the Judges. Otherwise, the Judges should make provisions for frequent and readily-available training in use of eCRB by other means.

H. Access to eCRB

Proposed Section 350.5(c)(2) provides the Judges discretion as to whether to provide access to eCRB to *pro se* participants in proceedings. The Commenting Parties do not object to such an arrangement, if the Judges view it as important to protect the integrity of the eCRB system or accommodate the possibility of *pro se* participants with limited technological capabilities. However, the Commenting Parties urge the Judges to grant such access liberally. As described above, eCRB is an important and valuable development. For the same reasons, non-use of eCRB, once it becomes available, would burden participants who are represented by counsel, as well as the Judges and their staff, by requiring special filing and service procedures outside of eCRB for non-users. In the past, *pro se* participants have at least generally either accepted and wanted to make service by electronic mail, or been uncommunicative. *Pro se* participants also should be expected to have a certain level of sophistication if they are going to

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do the things the rules require of a participant such as filing a direct statement (37 C.F.R. § 351.4(a)) and participating in discovery (37 C.F.R. § 351.5). At a time when Internet access has become nearly ubiquitous, it should be expected that any person capable of participating meaningfully in a proceeding on a *pro se* basis will have the capability to use eCRB.

I. Identification of Restricted Information

Proposed Section 350.5(i) addresses handling of restricted material subject to a protective order. As described above, proper handling of restricted information is important to participants, and necessary to development of a complete record in proceedings before the Judges.

Accordingly, it is appropriate to address in the procedural rules how restricted information is to be treated in eCRB. For the same reasons, the Commenting Parties appreciate the suggestion in this provision that eCRB will have functionality for uploading users to identify restricted versions of filings, and will handle restricted filings in accordance with any applicable protective order.

However, it is important to recognize that filings made by participants in proceedings often include restricted information obtained from other participants, as well as the uploading participant's own restricted information. In view of that, the Commenting Parties believe that proposed Section 350.5(i) is stated in more passive terms than appropriate for a provision providing important protection to other participants. While most provisions of the proposed rules are stated in mandatory terms, Section 350.5(i) merely addresses *responsibility* for identification of restricted information. Perhaps the Judges assume that their protective orders themselves would provide the requirement to protect other participants' confidential information through identification in eCRB of filings containing restricted material. Even if so, the

Commenting Parties believe that Section 350.5(i) should be stated in mandatory terms like other provisions of the proposed rules. Proposed regulatory language is set forth in Exhibit C.

J. Personal Information

Proposed Section 350.5(k) contains provisions limiting use of personal information in filings (even if restricted). While it is not often necessary to include personal information of the kinds identified in the proposed rule in filings made with the Judges, the Commenting Parties support addressing protection of personal information in the rules. In the Commenting Parties' experience, participants commonly have sought to protect an even broader range of personal information, including names of individuals who are not materially connected to the subject matter of a proceeding, payments to individuals, and contact details, by treating it as restricted. If implementation of eCRB will provide greater public access to filings than in the past, it will be even more important to protect personal information that is not relevant to disputed issues in a proceeding.

The Commenting Parties are particularly uneasy about the requirement to include in filings the information called for by proposed Section 350.5(k), unless it is necessary for identification and treated as restricted. We are aware that similar requirements have been applied in other contexts.³ However, the subject matter of proceedings before the Judges is much more limited than the range of cases before the federal judiciary, and unlike some other agencies, proceedings before the Judges do not primarily pertain to individuals. It is not apparent why it would ever be necessary to include even four digits of a social security number

³ *E.g.*, D.C. Circuit Administrative Order Regarding Electronic Case Filing, Rule ECF-9; Occupational Safety and Health Review Commission, Instructions For Electronic Filing, § 16, available at http://www.oshrc.gov/publications/instructions_elecfileing.html.

or financial account number in a public filing with the Judges. And academic research has established that it is possible to predict a social security number with reasonable accuracy given its last four digits and commonly-available information about a person's state and date of birth.⁴ Accordingly, the commenting parties encourage the Judges to provide even greater protection for personal information when they finalize the proposed rule. Suggested regulatory language is set forth in Exhibit D.

K. System Issues

Proposed Section 350.5(l)(3) provides that “[t]he inability to complete an electronic filing because of technical problems arising in the eCRB system may constitute ‘good cause’ (as used in § 350.6(b)(4)) for an order enlarging time or excusable neglect for the failure to act within the specified time.” The Commenting Parties appreciate the Judges’ sensitivity to the possibility that eCRB systems issues could at times make electronic filings impossible. Even if hosting arrangements for eCRB may be different from those that caused an extended outage of other important Library of Congress systems last year,⁵ system issues have to be viewed as a realistic possibility. For example, unlike most federal court litigation, proceedings before the Judges have deadlines where all participants make large filings on the same day, and frequently all at roughly the same time at the end of the day. Experience suggests that systems issues are particularly likely when there are such surges in usage. Accordingly, the Commenting Parties

⁴ Alessandro Acquisti & Ralph Gross, Predicting Social Security Numbers from Public Data, 106 Proc. Nat’l Acad. Science 10,975 (July 2009), *available at* <http://www.pnas.org/content/106/27/10975.full>.

⁵ *E.g.*, U.S. Copyright Office, Copyright Registration Systems Are Back Online (Sept. 6, 2015), *available at* <https://copyright.gov/newsnet/2015/592.html>.

believe the proposed rules should do more to address the possibility of system problems, in two respects.⁶

First, in the case of a systems issue, particularly one discovered by a participant or counsel only after the end of the work day for the Judges' staff, it is cold comfort to know that the system issue "may" constitute good cause for a late filing. If a problem really "aris[es] in the eCRB system," and the would-be uploader does what proposed Section 350.5(1)(3) requires ("immediately notify the Copyright Royalty Board of the problem either by email or by telephone, followed promptly by written confirmation"), the Commenting Parties believe that the Judges should consider the systems issue to be good cause for a delay.

Second, the proposed rule notes that certain statutory deadlines apply in proceedings before the Judges. While there are few if any absolute deadlines applicable to the Commenting Parties' participation in rate-setting proceedings,⁷ the Commenting Parties nonetheless believe that it is unfair for the Judges' rules to require filing through eCRB and provide no alternative when a systems issue would cause a party to miss a statutory deadline that the Judges cannot extend. Accordingly, the Commenting Parties propose that where a statutory deadline applies and a systems issue would prevent meeting that deadline, either the notification required by Section 350.5(1)(3) should be considered the time of filing, or the Judges should accept filing by means of electronic mail.

Proposed regulatory language addressing both of these points is set forth in Exhibit E.

⁶ In addition, the cross reference in proposed Section 350.5(1)(3) should be to 350.7(b)(4) rather than 350.6(b)(4). It also would be appropriate to cross-reference Section 350.8, which includes a relevant reference to the concept of good cause.

⁷ See, e.g., 17 U.S.C. § 803(b)(1)(A)(ii) (permitting the Judges to accept late petitions to participate "for substantial good cause shown").

L. Delivery

There are references in various parts of the proposed rules, including Section 350.6, to “delivery” of documents. These references seem to correspond to what the current rules refer to as “service.” *See* 37 C.F.R. § 350.4(h). Similarly, the proposed rules variously seem to use the terms “proof of delivery” and “certificate of delivery” to refer to what the current rules refer to as “proof of service,” 37 C.F.R. § 350.4(g), and what is commonly referred to as a “certificate of service.” The Commenting Parties believe that this change in usage is confusing, both because it is unusual,⁸ and because service is ordinarily effected by *sending* the thing to be served, while as a matter of ordinary English usage, delivery might be understood as requiring *receipt*. While participants can be expected to file their papers through eCRB (and thereby make them available for delivery by eCRB) or send them for overnight delivery as the proposed rules require where a filing is not made through eCRB, actual delivery is within the control of eCRB or the courier, not the sending participant. It is not fair to require participants to affirm that delivery has been made, when the most they can do is send the relevant document by the means required by the rules. Accordingly, the Commenting Parties believe that Judges’ rules should continue to refer to service by that name.

M. Documents to Be Served But Not Filed Through eCRB

Proposed Section 350.6(h)(2) refers broadly to documents that are not filed through eCRB, and thus may apply more broadly than its predecessor provision 37 C.F.R. § 350.4(h). In particular, the new provision might be read as applying to discovery responses that are served on

⁸ For example, the Federal Rules of Civil Procedure use the term service to refer to sending a document to other parties in a case. *See* Fed. R. Civ. P. 5.

other participants and not filed at all, although the caption of proposed Section 350.6(h)(2) and the reference therein to filing of “the pleading” militate against that interpretation. The Commenting Parties do not believe that it is necessary to address service of discovery responses in a section of the rules primarily addressing filing. Accordingly, the Commenting Parties have included in Exhibit F proposed regulatory language clarifying that this provision applies only to filed documents.

III. Conclusion

The Commenting Parties appreciate this opportunity to address the Judges’ proposed amendments to their rules of procedure, and urge the Judges to revise the proposed rules as described herein.

December 23, 2016

Respectfully submitted,



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Exhibit A
To SoundExchange's and RIAA's Comments
In Docket No. 16-CRB-0015-RM

The Commenting Parties propose revising proposed Section 350.3(b)(2) to read as follows:

- (2) *File type.* Parties must file all pleadings and documents in Portable Document Format (PDF), with the following exceptions –
- (i) Proposed orders must be filed in Word form, as required by paragraph (b)(3) of this section, rather than in PDF format; and
 - (ii) Documents that cannot be converted to PDF format, or that would be difficult to read or view in PDF format, including audio files, video files, databases, executable files, large Excel workbooks, and PowerPoint presentations with embedded speaker notes, must be filed in their native formats rather than in PDF format.

Exhibit B
To SoundExchange's and RIAA's Comments
In Docket No. 16-CRB-0015-RM

The Commenting Parties propose revising proposed Section 350.3(b)(8) to read as follows:

(8) *Signature.* The signature line of an electronic pleading must contain “/s/” followed by the signer’s typed name. The name on the signature line must match the name of the user logged into eCRB to file the document, or be the name of an attorney in the same law office or organization as the user logged into eCRB to file the document. Parties with the capability may also sign documents with a verifiable electronic signature.

Exhibit C
To SoundExchange's and RIAA's Comments
In Docket No. 16-CRB-0015-RM

The Commenting Parties propose revising proposed Section 350.5(i) to read as follows:

(i) *Documents subject to a protective order.* A person filing through eCRB a document containing confidential information subject to a protective order issued by the Judges must, at the time of filing, use the relevant features of eCRB to identify the document as a “restricted” document. This requirement is in addition to any requirements detailed in the applicable protective order. Failure to use the features of eCRB to identify documents as “restricted” may result in inadvertent publication of sensitive, protected material.

Exhibit D
To SoundExchange's and RIAA's Comments
In Docket No. 16-CRB-0015-RM

The Commenting Parties propose revising proposed Section 350.5(k) to read as follows:

(k) *Privacy requirements.* (1) Unless otherwise instructed by the Copyright Royalty Judges, parties must exclude or redact from all filed documents, whether designated "restricted" or not:

(i) *Social Security Numbers.* If an individual's Social Security number must be included in a filed document for evidentiary reasons, the filer must use only the last four digits of that number.

(ii) *Names of minor children.* If a minor child must be included in a filed document for evidentiary reasons, the filer must use only the initials of that child.

(iii) *Dates of birth.* If an individual's date of birth must be included in a filed document for evidentiary reasons, the filer must use only the year of birth.

(iv) *Financial account numbers.* If a financial account number must be included in a filed document for evidentiary reasons, the filer must use only the last four digits of the account identifier.

(2) *Protection of personally identifiable information.* If any information identified in paragraph (k)(1) of this section must be included in a filed document, the filing party must treat it as confidential information subject to the applicable protective order. Parties may treat as confidential information subject to the applicable protective order other personal information that is not material to the proceeding.

Exhibit E
To SoundExchange's and RIAA's Comments
In Docket No. 16-CRB-0015-RM

The Commenting Parties propose replacing proposed Section 350.5(1)(3) with the following:

(3) A filer encountering technical problems with an eCRB filing must immediately notify the Copyright Royalty Board of the problem either by telephone, followed promptly by written confirmation, or by email. If a filer does so, the inability to complete an electronic filing because of technical problems arising in the eCRB system shall constitute "good cause" (as used in § 350.7(b)(4) and § 350.8) for an order enlarging time or excusable neglect for the failure to act within the specified time. This rule does not provide authority to extend statutory time limits.

(4) In any case in which a statutory time limit applies, and a filer makes the notification required by paragraph (1)(3) of this section but is otherwise unable to make a filing within such limit due to technical problems with an eCRB filing, the filer shall make the filing as directed by the Judges, and such filing shall be considered to have been made as of the time of the notification.

Exhibit F
To SoundExchange's and RIAA's Comments
In Docket No. 16-CRB-0015-RM

The Commenting Parties propose revising proposed Section 350.6(h)(2) to read as follows:

(2) *Paper filings.* During the course of a proceeding, each party must serve all documents that are filed other than through eCRB on the other parties or their counsel by means no slower than overnight express mail sent on the same day the documents are filed, or by such other means as the parties may agree in writing among themselves. Parties must include a certificate of service with any document served in accordance with this paragraph.