

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

ELECTRONIC FILING OF DOCUMENTS

DOCKET NO. 16-CRB-0015-RM

**COMMENTS OF PERFORMING RIGHTS ORGANIZATIONS
REGARDING ELECTRONIC FILING OF DOCUMENTS**

On November 16, 2016, the Copyright Royalty Judges (the “Judges”) issued a Notice of Proposed Rulemaking and request for comments (the “Notice”) regarding the electronic filing of documents in proceedings before the Copyright Royalty Board (the “Board”). 81 Fed. Reg. 84526 (November 23, 2016). In the Notice, the Judges propose regulations to amend parts 301, 350, and 351 of Title 37 of the Code of Federal Regulations (“Proposed Regulations”) and solicit comments on the Proposed Regulations.

Broadcast Music, Inc. (“BMI”), the American Society of Composers, Authors and Publishers (“ASCAP”), and SESAC, Inc. (“SESAC”) are the three music performing rights organizations (“PROs”) operating in the United States whose principal roles are to license the public performing rights in musical works on behalf of their members and affiliates. BMI, ASCAP, and SESAC collectively are “Music Claimants” that regularly participate in distribution proceedings before the Judges, and are referred to herein as the “PROs.” The PROs hereby submit the following comments regarding the Proposed Regulations in response to the Notice.

RESPONSE TO THE NOTICE

The Proposed Regulations regarding the design and implementation of an electronic filing and case management system for the Board and the Judges do not specify the design and

features of that system. Without knowing the specific provisions and technical aspects of the awarded contract, it is exceedingly difficult to comment on certain proposed rules, including with regard to footers, exhibits, searchability, and appropriate electronic bookmarks. The comments below include certain suggestions for consultation with the vendor selected to design the system and for the system to include certain capabilities, which would obviate the need for certain of the proposed regulations. The PROs offer the following specific comments to address the Proposed Regulations, for the Judges' consideration.

The new electronic filing and case management system should be available to the public, consistent with other U.S. courts and tribunals. The proposed regulations indicate it will be available to claims filers and participants, the Board and Judges, and "other members of the public having business with the Board (e.g., persons wishing to comment on proposed regulations)." Any case management system that the Library develops and implements should also be accessible to the general public, such that all filings in all dockets be accessible at all times, except for any restricted documents filed under seal that are accessible electronically only to filers in the relevant proceeding.

Turning to the specific parts of Title 37 addressed in the Proposed Regulations:

- **350.3(a)(1)**: The final sentence states: "In addition, Parties must include a footer on each page that includes the name and posture of the filing party, e.g. [Party's] Motion, [Party's] Response in Opposition, etc." This is a new requirement for filers, which ought not be necessitated by the adoption of electronic filing. Most electronic filing systems automatically generate a legend on each page of the document that includes similar information. It is suggested that the Judges consult the vendor selected to design and implement the electronic filing and case management system ("Vendor") to format the filing system such that it automatically generates the requested footer when documents

are submitted, thereby obviating the need for the proposed regulation. In addition, the language of the proposed regulation is unclear as to if the requirement is limited to the main document or exhibits as well. To the extent the proposed regulation is maintained, and given the technological obstacles related to the creation of exhibits, it is suggested that the proposed regulation only apply to exhibits to the extent technologically feasible and through software programs available to the general public.

- **350.3(a)(2)**: The second sentence says: “Parties must assure that any exhibit or attachment to documents reflects the docket number of the proceeding in which it is filed and that all pages are numbered appropriately.” The comments to 350.3(a)(1) apply here as well. Most if not all electronic filing systems automatically create a legend on each page of a filed document that contains this legend. It is suggested that the Judges consult with the Vendor to ensure that the filing system automatically generate a legend including the docket number and page numbers for all pages, including exhibits and other attachments. The inclusion of such a legend when documents are submitted obviates the need for this proposed regulation. To the extent the proposed regulation is maintained, it is suggested that the requirements only apply to exhibits to the extent technologically feasible and through software programs available to the general public.
- **350.3(b)(5)**: The second sentence state: “All exhibits must be searchable.” As the Judges are aware, this is not always technically feasible. Notably, the preceding section, 350.3(b)(4), concerns documents saved electronically as PDFs, which are readily rendered searchable. However, proposed Section 350.3(b)(5) concerns only scanned pleadings, such as hard copies converted to electronic format, in which the ability to conduct word searches is dependent not only on the scanner used, but also on the nature of the original document – which may, for example, be too blurred or in too small a font

to ensure that optical character recognition (“OCR”) of the scanned document functions properly. As such, an unqualified requirement that all scanned documents be “searchable” poses a technical challenge and places parties at risk of violating the rules if a given document cannot readily be made searchable. It is suggested that this requirement be modified to “All documents must be searchable to the extent technologically feasible through software programs available to the general public.”

- **350.3(b)(6)**: The requirement that documents must include “appropriate electronic bookmarks” is not typical of other tribunals’ electronic filing systems, and creates a burden that is not warranted in light of the response and reply deadlines of 350.6(f) and the page limitations of 350.3(c). It is suggested that this proposed regulation be eliminated or, alternatively, limited to documents exceeding 20 pages in length, where such bookmarks are more apt to be useful to the Judges and to recipients of the electronic pleading.
- **350.3(c)(1)-(3)**: These sections provide for page and word limits “exclusive of exhibits, proof of delivery, and the like.” Use of “and the like” is ambiguous. Most tribunals’ electronic filing manuals are more specific. The proposed regulation should specify if page or word limit extends, for example, to any additional components of a filed document, including declarations, affidavits, tables of contents, tables of authorities, proposed or issued orders, signature blocks, title pages, and case captions. Particularity would be useful to the parties in order to avoid disputes on technicalities and to ensure that filers comply with such page and word limits.
- **350.4**: The provision in this section requiring filings to “conform to the following format,” which is followed by a list of five sections, is ambiguous in its meaning and could be interpreted in a manner that will impair the clear presentation of motions and

responsive pleadings. As to ambiguity, it is unclear whether this section requires that all filings must always include these specific five sections within a pleading, as opposed to, for example, merely requiring the inclusion of the content specified. It also is unclear whether these five sections must be presented in this precise order, whether the filing's internal headings must conform to the language of the rule, and whether any additional sections are permitted. Substantively, the content and ordering of these sections is, in some respects, inconsistent with the format typical of motions and responsive briefs in filings made in proceedings before the Judges. For example, the information described as required by the "Evidence relied upon" section ordinarily would be folded into a "Statement of facts" section, which currently is presented as a section occurring earlier in the brief. The proposed a "Statement of issues" section is not believed to be useful or appropriate to most typical motions and responsive filings before the Judges, as the content described in the proposed rule will typically be presented in introduction and argument sections. Similarly, the "Relief requested" is not typically presented as a separate section in motion briefing in Board proceedings, but rather typically is presented at the outset as part of an introduction and in a conclusion, and, if appropriate, in a proposed order. Furthermore, the proposed "Relief requested" section appears duplicative in this respect and redundant in light of the requirement to submit a proposed order, as stated in proposed Section 350.3(b)(3)). It is suggested that this proposed regulation be deleted in its entirety or, alternatively, (1) deleting the words "and conform to the following format," (2) deleting the "Statement of issues", (3) deleting subsection (d) ("Evidence relied upon") and moving the content of that subsection (in whole or part) to subsection (b) ("Statement of Facts"), and (4) moving the "Relief requested" section to the end of Section 350.4 and cross-reference the proposed order required by 350.3(b)(3).

- **350.5(h)**: This section imposes an obligation on the filer to “ensure the accuracy” of the docket, but it contains no explanation as to whether or how the filer has the ability to control or cause revisions to the docket if errors are found. If retained, it is suggested that this section include an explanatory statement or clarification as to how corrections may be made by the filer if docketing inaccuracies are identified by the filer and any applicable time frame for doing so.
- **350.5(i)**: The first sentences states: “A person filing a document by electronic means is responsible for ensuring, at the time of filing, that any documents subject to a protective order are identified to the eCRB system as ‘restricted’ documents.” It is unclear from this sentence how such restricted documents should be “identified” by the filer. For example, the proposed language does not state whether the filing itself should be marked or designated in some manner, and if so, how. Notably, most if not all electronic filing systems have a means to designate the document as being filed “under seal” at the time of filing. It is suggested that the Judges consult with the Vendor to allow for an “under seal” designation at the time of filing. If that designation will be available to filers at the time of filing, this section should be revised to clarify that, for purposes of this regulation, “identification,” is achieved by using the eCRB system’s sealed-filing function as well as any separate requirements set forth in the applicable protective order.

CONCLUSION

The PROs commend the Judges for undertaking this rulemaking and soliciting public input on the forthcoming electronic filing system, including from those who regularly practice before the Judges. The PROs would be pleased to discuss any of these comments in greater detail with the Judges or the Board.

Respectfully submitted,

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