

**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DETERMINATION OF ROYALTY RATES AND  
TERMS FOR EPHEMERAL RECORDING AND  
WEBCASTING DIGITAL PERFORMANCE OF  
SOUND RECORDINGS (Web-IV)**

**Docket No. 14-CRB-0001-WR  
(2016-2020)**

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**ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW  
AND SETTING BRIEFING SCHEDULE**

The Copyright Royalty Judges (Judges) concluded the hearing in the above-captioned proceeding with closing arguments of counsel on July 21, 2015. The Determination is due on or before December 15, 2015. In the course of their deliberations, the Judges have identified a novel material question of substantive law, *i.e.*, a question concerning the interpretation of provisions of the Copyright Act (Act) that has not been determined in any prior decision, determination, or ruling. *See* 17 U.S.C. § 802(f)(1)(B).

**Discussion**

Section 802(f)(1) of the Act permits the Judges to refer material questions of substantive law to the Register of Copyrights (Register) for the Register’s interpretation. Referral to the Register is mandatory if the question is a “novel material question of substantive law concerning an interpretation of those provisions of [the Act] that are the subject of the proceeding ....” 17 U.S.C. § 802(f)(1)(B). The Act defines a “novel question of law” as a “question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a).”<sup>1</sup> 17 U.S.C. § 802(f)(1)(B)(ii); *see also* 37 C.F.R. § 354.2(a).

Section 114(f)(2)(B) of the Act states that the Judges “shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” That section also states that “[s]uch rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation ... such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.” The last sentence of subparagraph (B) provides: “In establishing such rates and terms, the [Judges] may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements ....”

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<sup>1</sup> Section 803(a) proceedings include rate determination proceedings such as the present matter.

Section 114 does not directly address whether the rates and terms the Judges are required to adopt under that section shall or may distinguish among different types or categories of *licensors*. Cf. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, 67 *Fed. Reg.* 45240, 45250 (July 8, 2002) (“there is no precedent in the statutory licensing scheme anywhere in the Copyright Act that would support alternative rates for the same right.”) The Register reviewed the CARP decision not to adopt alternative fee structures (*i.e.*, per-performance rates for some services and percentage-of-revenue rates for other services) and concluded that “the statute does not require the CARP to offer alternative fee structures”. *Id.*

Notwithstanding the Register’s language regarding alternative rates for the same right, her interpretation of the Act addresses a different issue than the one on which the Judges now seek guidance (*i.e.*, whether the Judges may set rates and terms that distinguish between different types of copyright owners as opposed to distinguishing between different types of copyright users). Further, the present issue raises the question whether the Judges *may* set rates that reflect marketplace differences among licensors, and not only whether the Judges *are required to* set differing rates, which was the issue the Register resolved. Thus, the issue in the present proceeding has not been determined in any prior decision, determination, or ruling. Accordingly, the Judges conclude that it is a “novel material question of substantive law” necessitating a referral to the Register.

### **Referral**

Based on the foregoing, the Judges refer the following novel material question of substantive law to the Register:

Does Section 114 of the Act (or any other applicable provision of the Act) prohibit the Judges from setting rates and terms that distinguish among different types or categories of licensors, assuming a factual basis in the evidentiary record before the Judges demonstrates such a distinction in the marketplace?

### **Briefing Schedule**

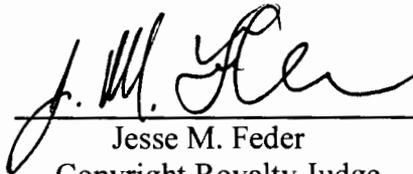
The Act and the Judges’ regulations afford interested parties an opportunity to submit legal memoranda regarding a referral. In accordance with 37 C.F.R. §§ 354.2(b) and 354.1(b)(1), the Judges establish the following briefing schedule:

**Initial briefs filed with the Judges:            September 25, 2015**  
**Responsive briefs filed with the Judges:    October 2, 2015**

Parties shall deliver copies of their submissions to all other counsel of record in this proceeding concurrently with filing. Unless they order otherwise, the Judges will not allow or accept reply briefs

The Judges remind the participants that this referral is one of a novel material question of substantive *law*, not of *facts*. Briefs should not include documents, affidavits, and other factual materials, but should include citations to pertinent legal authorities.

**SO ORDERED.**

  
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Jesse M. Feder  
Copyright Royalty Judge

DATED: September 11, 2015.