

COPYRIGHT ROYALTY AND DISTRIBUTION REFORM ACT
OF 2003

JANUARY 30, 2004.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 1417]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1417) to amend title 17, United States Code, to replace copyright arbitration royalty panels with a Copyright Royalty Judge, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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THE AMENDMENT

The amendments are as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Copyright Royalty and Distribution Reform Act of 2003”.

SEC. 2. REFERENCE.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 17, United States Code.

SEC. 3. COPYRIGHT ROYALTY JUDGE AND STAFF.

(a) IN GENERAL.—Chapter 8 is amended to read as follows:

“CHAPTER 8—PROCEEDINGS BY COPYRIGHT ROYALTY JUDGES

“Sec.

“801. Copyright Royalty Judges; appointment and functions.

“802. Copyright Royalty Judgeships; staff.

“803. Proceedings of Copyright Royalty Judges.

“804. Institution of proceedings.

“805. General rule for voluntarily negotiated agreements.

“§ 801. Copyright Royalty Judges; appointment and functions

“(a) APPOINTMENT.—The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint one of the three as the Chief Copyright Royalty Judge. In making such appointments, the Librarian shall consult with the Register of Copyrights.

“(b) FUNCTIONS.—Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

“(1) 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. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

“(A) To maximize the availability of creative works to the public.

“(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

“(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

“(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

“(2) To make determinations concerning the adjustment of the copyright royalty rates under section 111 solely in accordance with the following provisions:

“(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect—

“(i) national monetary inflation or deflation; or

“(ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of October 19, 1976,

except that—

“(I) if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted; and

“(II) no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber.

The Copyright Royalty Judges may consider all factors relating to the maintenance of such level of payments, including, as an extenuating factor, whether the industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

“(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 8, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting

from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Judges shall consider, among other factors, the economic impact on copyright owners and users; except that no adjustment in royalty rates shall be made under this subparagraph with respect to any distant signal equivalent or fraction thereof represented by—

“(i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal; or

“(ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

“(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

“(D) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section, and the royalty rate specified therein shall not be subject to adjustment.

“(3) To authorize the distribution, under sections 111, 119, and 1007, of those royalty fees collected under sections 111, 119, and 1005, as the case may be, to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy. In cases where the Copyright Royalty Judges determine that controversy exists—

“(A) the Copyright Royalty Judges shall determine the distribution of such fees, in accordance with section 111, 119, or 1007, as the case may be; and

“(B) the Copyright Royalty Judges shall make a partial distribution of such fees during the pendency of the proceeding under subparagraph (A) if all participants under section 803(b)(2) in the proceeding—

“(i) agree to such partial distribution;

“(ii) sign an agreement obligating them to return any excess amounts to the extent necessary to comply with the final determination on the distribution of the fees made under subparagraph (A); and

“(iii) file the agreement with the Copyright Royalty Judges.

The Copyright Royalty Judges and any other officer or employee acting in good faith in distributing funds under subparagraph (B) shall not be held liable for the payment of any excess fees under subparagraph (B). The Copyright Royalty Judges shall, at the time the final determination is made, calculate any such excess amounts.

“(4) To accept or reject royalty claims filed under section 111, 119, and 1007, on the basis of timeliness or the failure to establish the basis for a claim.

“(5) To accept or reject rate adjustment petitions as provided in section 804 and petitions to participate as provided in section 803(b)(1) and (2).

“(6) To determine the status of a digital audio recording device or a digital audio interface device under sections 1002 and 1003, as provided in section 1010.

“(7)(A) To adopt as the basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding, except that—

“(i) the Copyright Royalty Judges shall provide to the other participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, distribution, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as the basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, as the case may be; and

“(ii) the Copyright Royalty Judges may decline to adopt the agreement as the basis for statutory terms and rates or as the basis for the distribution of statutory royalty payments, as the case may be, if any other participant described in subparagraph (A) objects to the agreement and the Copyright Royalty Judges find, based on the record before them, that the agreement is not likely to meet the statutory standard for setting the terms and rates, or for distributing the royalty payments, as the case may be.

“(B) License agreements voluntarily negotiated pursuant to section 112(e)(5), 114(f)(3), 115(c)(3)(E)(i), 116(c), or 118(b)(2) that do not result in statutory terms and rates shall not be subject to clauses (i) and (ii) of subparagraph (A).

“(c) RULINGS.—The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges. The Copyright Royalty Judges may consult with the Register of Copyrights in making any rulings under section 802(f)(1).

“(d) ADMINISTRATIVE SUPPORT.—The Librarian of Congress shall provide the Copyright Royalty Judges with the necessary administrative services related to proceedings under this chapter.

“(e) LOCATION IN LIBRARY OF CONGRESS.—The offices of the Copyright Royalty Judges and staff shall be in the Library of Congress.

“§ 802. Copyright Royalty Judgeships; staff

“(a) QUALIFICATIONS OF COPYRIGHT ROYALTY JUDGES.—Each Copyright Royalty Judge shall be an attorney who has at least 7 years of legal experience. The Chief Copyright Royalty Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. Of the other two Copyright Royalty Judges, one shall have significant knowledge of copyright law, and the other shall have significant knowledge of economics. An individual may serve as a Copyright Royalty Judge only if the individual is free of any financial conflict of interest under subsection (h). In this subsection, ‘adjudication’ has the meaning given that term in section 551 of title 5, but does not include mediation.

“(b) STAFF.—The Chief Copyright Royalty Judge shall hire 3 full-time staff members to assist the Copyright Royalty Judges in performing their functions.

“(c) TERMS.—The terms of the Copyright Royalty Judges shall each be 6 years, except of the individuals first appointed, the Chief Copyright Royalty Judge shall be appointed to a term of 6 years, and of the remaining Copyright Royalty Judges, one shall be appointed to a term of 2 years, and the other shall be appointed to a term of 4 years. An individual serving as a Copyright Royalty Judge may be reappointed to subsequent terms. The term of a Copyright Royalty Judge shall begin when the term of the predecessor of that Copyright Royalty Judge ends. When the term of office of a Copyright Royalty Judge ends, the individual serving that term may continue to serve until a successor is selected.

“(d) VACANCIES OR INCAPACITY.—

“(1) VACANCIES.—If a vacancy should occur in the position of Copyright Royalty Judge, the Librarian of Congress shall act expeditiously to fill the vacancy, and may appoint an interim Copyright Royalty Judge to serve until another Copyright Royalty Judge is appointed under this section. An individual appointed to fill the vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed shall be appointed for the remainder of that term.

“(2) INCAPACITY.—In the case in which a Copyright Royalty Judge is temporarily unable to perform his or her duties, the Librarian of Congress may appoint an interim Copyright Royalty Judge to perform such duties during the period of such incapacity.

“(e) COMPENSATION.—

“(1) JUDGES.—The Chief Copyright Royalty Judge shall receive compensation at the rate of basic pay payable for level AL–1 for administrative law judges pursuant to section 5372(b) of title 5, and each of the other two Copyright Royalty Judges shall receive compensation at the rate of basic pay payable for level AL–2 for administrative law judges pursuant to such section. The compensation of the Copyright Royalty Judges shall not be subject to any regulations adopted by the Office of Personnel Management pursuant to its authority under section 5376(b)(1) of title 5.

“(2) STAFF MEMBERS.—Of the staff members appointed under subsection (b)—

“(A) the rate of pay of one staff member shall be not more than the basic rate of pay payable for GS–15 of the General Schedule;

“(B) the rate of pay of one staff member shall be not less than the basic rate of pay payable for GS–13 of the General Schedule and not more than the basic rate of pay payable for GS–14 of such Schedule; and

“(C) the rate of pay for the third staff member shall be not less than the basic rate of pay payable for GS–8 of the General Schedule and not more than the basic rate of pay payable for GS–11 of such Schedule.

“(f) INDEPENDENCE OF COPYRIGHT ROYALTY JUDGE.—

“(1) IN MAKING DETERMINATIONS.—

“(A) IN GENERAL.—Subject to subparagraph (B), the Copyright Royalty Judges shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact. Any such consultations between the Copyright Royalty Judges and the Register of Copyright on any question of law shall be in writing or on the record.

“(B) NOVEL QUESTIONS.—(i) Notwithstanding the provisions of subparagraph (A), in any case in which the Copyright Royalty Judges in a proceeding under this title are presented with a novel question of law concerning an interpretation of those provisions of this title that are the subject of the proceeding, the Copyright Royalty Judges shall request the Register of Copyrights, in writing, to submit a written opinion on the resolution of such novel question. The Register shall submit and make public that opinion within such time period as the Copyright Royalty Judges may prescribe. Any consultations under this subparagraph between the Copyright Royalty Judges and the Register of Copyrights shall be in writing or on the record. The opinion of the Register shall not be binding on the Copyright Royalty Judges, but the Copyright Royalty Judges shall take the opinion of the Register into account in making the judges’ determination on the question concerned.

“(ii) In clause (i), a ‘novel question of law’ is a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a).

“(2) PERFORMANCE APPRAISALS.—

“(A) IN GENERAL.—Notwithstanding any other provision of law or any regulation of the Library of Congress, and subject to subparagraph (B), the Copyright Royalty Judges shall not receive performance appraisals.

“(B) RELATING TO SANCTION OR REMOVAL.—To the extent that the Librarian of Congress adopts regulations under subsection (h) relating to the sanction or removal of a Copyright Royalty Judge and such regulations require documentation to establish the cause of such sanction or removal, the Copyright Royalty Judge may receive an appraisal related specifically to the cause of the sanction or removal.

“(g) INCONSISTENT DUTIES BARRED.—No Copyright Royalty Judge may undertake duties inconsistent with his or her duties and responsibilities as Copyright Royalty Judge.

“(h) STANDARDS OF CONDUCT.—The Librarian of Congress shall adopt regulations regarding the standards of conduct, including financial conflict of interest and restrictions against ex parte communications, which shall govern the Copyright Royalty Judges and the proceedings under this chapter.

“(i) REMOVAL OR SANCTION.—The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability. Any such sanction or removal may be made only after notice and opportunity for a hearing, but the Librarian of Congress may suspend the Copyright Royalty Judge during the pendency of such hearing. The Librarian shall appoint an interim Copyright Royalty Judge during the period of any such suspension.

“§ 803. Proceedings of Copyright Royalty Judges

“(a) PROCEEDINGS.—

“(1) IN GENERAL.—The Copyright Royalty Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration royalty panel determinations, rulings by the Librarian of

Congress before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, prior determinations of Copyright Royalty Judges under this chapter, and decisions of the court in appeals under this chapter before, on, or after such effective date. Any participant in a proceeding under subsection (b)(2) may submit relevant information and proposals to the Copyright Royalty Judges.

“(2) JUDGES ACTING AS PANEL AND INDIVIDUALLY.—The Copyright Royalty Judges shall preside over hearings in proceedings under this chapter en banc. The Chief Copyright Royalty Judge may designate a Copyright Royalty Judge to preside individually over such collateral and administrative proceedings, and over such proceedings under paragraphs (1) through (5) of subsection (b), as the Chief Judge considers appropriate.

“(3) DETERMINATIONS.—Final determinations of the Copyright Royalty Judges in proceedings under this chapter shall be made by majority vote. A Copyright Royalty Judge dissenting from the majority on any determination under this chapter may issue his or her dissenting opinion, which shall be included with the determination.

“(b) PROCEDURES.—

“(1) INITIATION.—

“(A) CALL FOR PETITIONS TO PARTICIPATE.—(i) Promptly upon the filing of a petition for a rate adjustment or determination under section 804(a) or 804(b)(8), or by no later than January 5 of a year specified in section 804 for the commencement of a proceeding if a petition has not been filed by that date, the Copyright Royalty Judges shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter calling for the filing of petitions to participate in a proceeding under this chapter for the purpose of making the relevant determination under section 111, 112, 114, 115, 116, 118, 119, 1004 or 1007, as the case may be.

“(ii) Petitions to participate shall be filed by no later than 30 days after publication of notice of commencement of a proceeding, under clause (i), except that the Copyright Royalty Judges may, for substantial good cause shown and if there is no prejudice to the participants that have already filed petitions, accept late petitions to participate at any time up to the date that is 90 days before the date on which participants in the proceeding are to file their written direct statements.

“(B) PETITIONS TO PARTICIPATE.—Each petition to participate in a proceeding shall describe the petitioner’s interest in the subject matter of the proceeding. Parties with similar interests may file a single petition to participate.

“(2) PARTICIPATION IN GENERAL.—Subject to paragraph (4), a person may participate in a proceeding under this chapter, including through the submission of briefs or other information, only if—

“(A) that person has filed a petition to participate in accordance with paragraph (1) (either individually or as a group under paragraph (1)(B)), together with a filing fee of \$150;

“(B) the Copyright Royalty Judges have not determined that the petition to participate is facially invalid; and

“(C) the Copyright Royalty Judges have not determined, sua sponte or on the motion of another participant in the proceeding, that the person lacks a significant interest in the proceeding.

“(3) VOLUNTARY NEGOTIATION PERIOD.—

“(A) IN GENERAL.—Promptly after the date for filing of petitions to participate in a proceeding, the Copyright Royalty Judges shall make available to all participants in the proceeding a list of such participants and shall initiate a voluntary negotiation period among the participants.

“(B) LENGTH OF PROCEEDINGS.—The voluntary negotiation period initiated under subparagraph (A) shall be 3 months.

“(C) DETERMINATION OF SUBSEQUENT PROCEEDINGS.—At the close of the voluntary negotiation proceedings, the Copyright Royalty Judges shall, if further proceedings under this chapter are necessary, determine whether and to what extent paragraphs (4) and (5) will apply to the parties.

“(4) SMALL CLAIMS PROCEDURE IN DISTRIBUTION PROCEEDINGS.—

“(A) IN GENERAL.—If, in a proceeding under this chapter to determine the distribution of royalties, a participant in the proceeding asserts that the contested amount of the claim is \$10,000 or less, the Copyright Royalty Judges shall decide the controversy on the basis of the filing in writing of the initial claim, the initial response by any opposing participant, and one additional response by each such party. The participant asserting the claim shall not be required to pay the filing fee under paragraph (2).

“(B) BAD FAITH INFLATION OF CLAIM.—If the Copyright Royalty Judges determine that a participant asserts in bad faith an amount in controversy in excess of \$10,000 for the purpose of avoiding a determination under the procedure set forth in subparagraph (A), the Copyright Royalty Judges shall impose a fine on that participant in an amount not to exceed the difference between the actual amount distributed and the amount asserted by the participant.

“(5) PAPER PROCEEDINGS IN RATEMAKING PROCEEDINGS.—The Copyright Royalty Judges in proceedings under this chapter to determine royalty rates may decide, sua sponte or upon motion of a participant, to determine issues on the basis of initial filings in writing, initial responses by any opposing participant, and one additional response by each such participant. Prior to making such decision to proceed on such a paper record only, the Copyright Royalty Judges shall offer to all parties to the proceeding the opportunity to comment on the decision. The procedure under this paragraph—

“(A) shall be applied in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure; and

“(B) may be applied under such other circumstances as the Copyright Royalty Judges consider appropriate.

“(6) REGULATIONS.—

“(A) IN GENERAL.—The Copyright Royalty Judges may issue regulations to carry out their functions under this title. Not later than 120 days after Copyright Royalty Judges or interim Copyright Royalty Judges, as the case may be, are first appointed after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, such judges shall issue regulations to govern proceedings under this chapter.

“(B) INTERIM REGULATIONS.—Until regulations are adopted under subparagraph (A), the Copyright Royalty Judges shall apply the regulations in effect under this chapter on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, to the extent such regulations are not inconsistent with this chapter, except that functions carried out under such regulations by the Librarian of Congress, the Register of Copyrights, or copyright arbitration royalty panels that, as of such date of enactment, are to be carried out by the Copyright Royalty Judges under this chapter, shall be carried out by the Copyright Royalty Judges under such regulations.

“(C) REQUIREMENTS.—Regulations issued under subparagraph (A) shall include the following:

“(i) The written direct statements of all participants in a proceeding under paragraph (2) shall be filed by a date specified by the Copyright Royalty Judges, which may be no earlier than four months, and no later than five months, after the end of the voluntary negotiation period under paragraph (3). Notwithstanding the preceding sentence, a participant in a proceeding may, within 15 days after the end of the discovery period specified in clause (iii), file an amended written direct statement based on new information received during the discovery process.

“(ii)(I) Following the submission to the Copyright Royalty Judges of written direct statements by the participants in a proceeding under paragraph (2), the judges shall meet with the participants for the purpose of setting a schedule for conducting and completing discovery. Such schedule shall be determined by the Copyright Royalty Judges.

“(II) In this chapter, the term ‘written direct statements’ means witness statements, testimony, and exhibits to be presented in the proceedings, and such other information that is necessary to establish terms and rates, or the distribution of royalty payments, as the case may be, as set forth in regulations issued by the Copyright Royalty Judges.

“(iii) Hearsay may be admitted in proceedings under this chapter to the extent deemed appropriate by the Copyright Royalty Judges.

“(iv) Discovery in such proceedings shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders and disputes pending at the end of such period.

“(v) Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may, upon written notice, seek discovery of information and materials relevant and material to the proceeding. Any objection to any such discovery request shall be resolved

by a motion or request to compel discovery made to the Copyright Royalty Judges. Each motion or request to compel discovery shall be determined by the Copyright Royalty Judges, or by a Copyright Royalty Judge when permitted under subsection (a)(2), who may approve the request only if the evidence that would be produced is relevant and material. A Copyright Royalty Judge may refuse a request to compel discovery of evidence that has been found to be relevant and material, only upon good cause shown. For purposes of the preceding sentence, the basis for 'good cause' may only be that—

“(I) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive;

“(II) the participant seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

“(III) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues.

“(vi) The rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, relating to discovery in proceedings under this title to determine the distribution of royalty fees, shall continue to apply to such proceedings on and after such effective date.

“(vii) The Copyright Royalty Judges may issue subpoenas requiring the production of evidence or witnesses, but only if the evidence requested to be produced or that would be proffered by the witness is relevant and material.

“(viii) The Copyright Royalty Judges shall order a settlement conference among the participants in the proceeding to facilitate the presentation of offers of settlement among the participants. The settlement conference shall be held during a 21-day period following the end of the discovery period.

“(c) DETERMINATION OF COPYRIGHT ROYALTY JUDGES.—

“(1) TIMING.—The Copyright Royalty Judges shall issue their determination in a proceeding not later than 11 months after the conclusion of the 21-day settlement conference period under subsection (b)(3)(C)(vi), but, in the case of a proceeding to determine successors to rates or terms that expire on a specified date, in no event later than 15 days before the expiration of the then current statutory rates and terms.

“(2) REHEARINGS.—

“(A) IN GENERAL.—The Copyright Royalty Judges may, in exceptional cases, upon motion of a participant under subsection (b)(2), order a rehearing, after the determination in a proceeding is issued under paragraph (1), on such matters as the Copyright Royalty Judges determine to be appropriate.

“(B) TIMING FOR FILING MOTION.—Any motion for a rehearing under subparagraph (A) may only be filed within 15 days after the date on which the Copyright Royalty Judges deliver their initial determination concerning rates and terms to the participants in the proceeding.

“(C) PARTICIPATION BY OPPOSING PARTY NOT REQUIRED.—In any case in which a rehearing is ordered, any opposing party shall not be required to participate in the rehearing.

“(D) NO NEGATIVE INFERENCE.—No negative inference shall be drawn from lack of participation in a rehearing.

“(E) CONTINUITY OF RATES AND TERMS.—(i) If the decision of the Copyright Royalty Judges on any motion for a rehearing is not rendered before the expiration of the statutory rates and terms that were previously in effect, in the case of a proceeding to determine successors to rates and terms that expire on a specified date, then—

“(I) the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion shall be effective as of the day following the date on which the rates and terms that were previously in effect expire; and

“(II) in the case of a proceeding under section 114(f)(1)(C) or 114(f)(2)(C), royalty rates and terms shall, for purposes of section 114(f)(4)(B), be deemed to have been set at those rates and terms contained in the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion, as of the date of that determination.

“(ii) The pendency of a motion for a rehearing under this paragraph shall not relieve persons obligated to make royalty payments who would be affected by the determination on that motion from providing the statements of account and any reports of use, to the extent required, and paying the royalties required under the relevant determination or regulations.

“(iii) Notwithstanding clause (ii), whenever royalties described in clause (ii) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the motion for rehearing is resolved or, if the motion is granted, within 60 days after the rehearing is concluded, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates by the Copyright Royalty Judges.

“(3) CONTENTS OF DETERMINATION.—A determination of the Copyright Royalty Judges shall be accompanied by the written record, and shall set forth the facts that the Copyright Royalty Judges found relevant to their determination. Among other terms adopted in a determination, the Copyright Royalty Judges may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations.

“(4) CONTINUING JURISDICTION.—The Copyright Royalty Judges may amend the determination or the regulations issued pursuant to the determination in order to correct any technical errors in the determination or to respond to unforeseen circumstances that preclude the proper effectuation of the determination.

“(5) PROTECTIVE ORDER.—The Copyright Royalty Judges may issue such orders as may be appropriate to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public, except that any terms or rates of royalty payments or distributions may not be excluded.

“(6) PUBLICATION OF DETERMINATION.—The Librarian of Congress shall cause the determination, and any corrections thereto, to be published in the Federal Register. The Librarian of Congress shall also publicize the determination and corrections in such other manner as the Librarian considers appropriate, including, but not limited to, publication on the Internet. The Librarian of Congress shall also make the determination, corrections, and the accompanying record available for public inspection and copying.

“(d) JUDICIAL REVIEW.—

“(1) APPEAL.—Any determination of the Copyright Royalty Judges under subsection (c) may, within 30 days after the publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals for the District of Columbia Circuit, by any aggrieved participant in the proceeding under subsection (b)(2) who fully participated in the proceeding and who would be bound by the determination. If no appeal is brought within that 30-day period, the determination of the Copyright Royalty Judges shall be final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in paragraph (2).

“(2) EFFECT OF RATES.—

“(A) EXPIRATION ON SPECIFIED DATE.—When this title provides that the royalty rates and terms that were previously in effect are to expire on a specified date, any adjustment or determination by the Copyright Royalty Judges of successor rates and terms for an ensuing statutory license period shall be effective as of the day following the date of expiration of the rates and terms that were previously in effect, even if the determination of the Copyright Royalty Judges is rendered on a later date.

“(B) OTHER CASES.—In cases where rates and terms do not expire on a specified date or have not yet been established, successor or new rates or terms shall take effect on the first day of the second month that begins after the publication of the determination of the Copyright Royalty Judges in the Federal Register, except as otherwise provided in this title, and the rates and terms previously in effect, to the extent applicable, shall remain in effect until such successor rates and terms become effective.

“(C) OBLIGATION TO MAKE PAYMENTS.—(i) The pendency of an appeal under this subsection shall not relieve persons obligated to make royalty payments under section 111, 112, 114, 115, 116, 118, 119, or 1003, who would be affected by the determination on appeal, from providing the statements of account (and any report of use, to the extent required) and paying the royalties required under the relevant determination or regulations.

“(ii) Notwithstanding clause (i), whenever royalties described in clause (i) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the final resolution of the appeal, return any excess amounts previously paid (and interest thereon, if ordered pursuant to paragraph (3)) to the extent necessary to comply with the final determination of royalty rates on appeal.

“(3) JURISDICTION OF COURT.—If the court, pursuant to section 706 of title 5, modifies or vacates a determination of the Copyright Royalty Judges, the court may enter its own determination with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment. The court may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).

“(e) ADMINISTRATIVE MATTERS.—

“(1) DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM FILING FEES.—

“(A) DEDUCTION FROM FILING FEES.—The Librarian of Congress may, to the extent not otherwise provided under this title, deduct from the filing fees collected under subsection (b) for a particular proceeding under this chapter the reasonable costs incurred by the Librarian of Congress, the Copyright Office, and the Copyright Royalty Judges in conducting that proceeding, other than the salaries of the Copyright Royalty Judges and the 3 staff members appointed under section 802(b).

“(B) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to pay the costs of proceedings under this chapter not covered by the filing fees collected under subsection (b). All funds made available pursuant to this subparagraph shall remain available until expended.

“(2) POSITIONS REQUIRED FOR ADMINISTRATION OF COMPULSORY LICENSING.—Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.

“§ 804. Institution of proceedings

“(a) FILING OF PETITION.—With respect to proceedings referred to in paragraphs (1) and (2) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 111, 112, 114, 115, 116, 118, and 1004, during the calendar years specified in the schedule set forth in subsection (b), any owner or user of a copyrighted work whose royalty rates are specified by this title, or are established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests a determination or adjustment of the rate. The Copyright Royalty Judges shall make a determination as to whether the petitioner has such a significant interest in the royalty rate in which a determination or adjustment is requested. If the Copyright Royalty Judges determine that the petitioner has such a significant interest, the Copyright Royalty Judges shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter. With respect to proceedings under paragraph (1) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 112 and 114, during the calendar years specified in the schedule set forth in subsection (b), the Copyright Royalty Judges shall cause notice of commencement of proceedings under this chapter to be published in the Federal Register as provided in section 803(b)(1)(A).

“(b) TIMING OF PROCEEDINGS.—

“(1) SECTION 111 PROCEEDINGS.—(A) A petition described in subsection (a) to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (A) or (D) of section 801(b)(2) applies may be filed during the year 2004 and in each subsequent fifth calendar year.

“(B) In order to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (B) or (C) of section 801(b)(2) applies, within 12 months after an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform

Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests an adjustment of the rate. The Copyright Royalty Judges shall then proceed as set forth in subsection (a) of this section. Any change in royalty rates made under this chapter pursuant to this subparagraph may be reconsidered in the year 2005, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(3)(B) or (C), as the case may be. A petition for adjustment of rates under section 11(d)(1)(B) as a result of a change in the rules and regulations of the Federal Communications Commission shall set forth the change on which the petition is based.

“(2) CERTAIN SECTION 112 PROCEEDINGS.—Proceedings under this chapter shall be commenced in the year 2007 to determine reasonable terms and rates of royalty payments for the activities described in section 112(e)(1) relating to the limitation on exclusive rights specified by section 114(d)(1)(C)(iv), to become effective on January 1, 2009. Such proceedings shall be repeated in each subsequent fifth calendar year.

“(3) SECTION 114 AND CORRESPONDING 112 PROCEEDINGS.—

“(A) FOR ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES.—Proceedings under this chapter shall be commenced as soon as practicable after the effective date of the Copyright Royalty and Distribution Reform Act of 2003 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of eligible non-subscription transmission services and new subscription services, to be effective for the period beginning on January 1, 2006, and ending on December 31, 2010. Such proceedings shall next be commenced in January 2009 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2011. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

“(B) FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES.—Proceedings under this chapter shall be commenced in January 2006 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of preexisting subscription services, to be effective during the period beginning on January 1, 2008, and ending on December 31, 2012, and preexisting satellite digital audio radio services, to be effective during the period beginning on January 1, 2007, and ending on December 31, 2012. Such proceedings shall next be commenced in 2011 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2013. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

“(C)(i) Notwithstanding any other provision of this chapter, this subparagraph shall govern proceedings commenced pursuant to sections 114(f)(1)(C) and 114(f)(2)(C) concerning new types of services.

“(ii) Not later than 30 days after a petition to determine rates and terms for a new type of service that is filed by any copyright owner of sound recordings, or such new type of service, indicating that such new type of service is or is about to become operational, the Copyright Royalty Judges shall issue a notice for a proceeding to determine rates and terms for such service.

“(iii) The proceeding shall follow the schedule set forth in such subsections (b), (c), and (d) of section 803, except that—

“(I) the determination shall be issued by not later than 24 months after the publication of the notice under clause (ii); and

“(II) the decision shall take effect as provided in subsections (c)(2) and (d)(2) of section 803 and section 114(f)(4)(B)(ii) and (C).

“(iv) The rates and terms shall remain in effect for the period set forth in section 114(f)(1)(C) or 114(f)(2)(C), as the case may be.

“(4) SECTION 115 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment or determination of royalty rates as provided in section 115 may be filed in the year 2006 and in each subsequent fifth calendar year, or at such other times as the parties have agreed under section 115(c)(3)(B) and (C).

“(5) SECTION 116 PROCEEDINGS.—(A) A petition described in subsection (a) to initiate proceedings under section 801(b) concerning the determination of royalty rates and terms as provided in section 116 may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

“(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the

1-year period ending March 1, 1989, the Copyright Royalty Judges shall, upon petition filed under paragraph (1) within 1 year after such termination or expiration, commence a proceeding to promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the Copyright Royalty Judges, in accordance with section 803, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(b).

“(6) SECTION 118 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 118 may be filed in the year 2006 and in each subsequent fifth calendar year.

“(7) SECTION 1004 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment of reasonable royalty rates under section 1004 may be filed as provided in section 1004(a)(3).

“(8) PROCEEDINGS CONCERNING DISTRIBUTION OF ROYALTY FEES.—With respect to proceedings under section 801(b)(3) concerning the distribution of royalty fees in certain circumstances under section 111, 116, 119, or 1007, the Copyright Royalty Judges shall, upon a determination that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.

“§ 805. General rule for voluntarily negotiated agreements

“Any rates or terms under this title that—

“(1) are agreed to by participants to a proceeding under section 803(b)(2),

“(2) are adopted by the Copyright Royalty Judges as part of a determination under this chapter, and

“(3) are in effect for a period shorter than would otherwise apply under a determination pursuant to this chapter,

shall remain in effect for such period of time as would otherwise apply under such determination, except that the Copyright Royalty Judges shall adjust the rates pursuant to the voluntary negotiations to reflect national monetary inflation during the additional period the rates remain in effect.”

(b) CONFORMING AMENDMENT.—The table of chapters for title 17, United States Code, is amended by striking the item relating to chapter 8 and inserting the following:

“8. Proceedings by Copyright Royalty Judges 801”.

SEC. 4. DEFINITION.

Section 101 is amended by inserting after the definition of “copies” the following:

“A ‘Copyright Royalty Judge’ is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.”

SEC. 5. TECHNICAL AMENDMENTS.

(a) CABLE RATES.—Section 111(d) is amended—

(1) in paragraph (2), in the second sentence, by striking “a copyright arbitration royalty panel” and inserting “the Copyright Royalty Judges.”; and

(2) in paragraph (4)—

(A) in subparagraph (A), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”;

(B) in subparagraph (B)—

(i) in the first sentence, by striking “Librarian of Congress shall, upon the recommendation of the Register of Copyrights,” and inserting “Copyright Royalty Judges shall”;

(ii) in the second sentence, by striking “Librarian determines” and inserting “Copyright Royalty Judges determine”; and

(iii) in the third sentence—

(I) by striking “Librarian” each place it appears and inserting “Copyright Royalty Judges”; and

(II) by striking “convene a copyright arbitration royalty panel” and inserting “conduct a proceeding”; and

(C) in subparagraph (C), by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”.

(b) EPHEMERAL RECORDINGS.—Section 112(e) is amended—

(1) in paragraph (3)—

(A) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) shall cover the 5-year period beginning on January 1 of the second year following the year in which the proceedings are commenced, or such other period as the parties may agree.”; and

(B) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(2) in paragraph (4)—

(A) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under paragraphs (2) and (3), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree.”;

(B) by striking “copyright arbitration royalty panel” each subsequent place it appears and inserting “Copyright Royalty Judges”;

(C) in the fourth sentence, by striking “its decision” and inserting “their decision”; and

(D) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(3) in paragraph (5), by striking “or decision by the Librarian of Congress” and inserting “, decision by the Librarian of Congress, or determination by the Copyright Royalty Judges”; and

(4) by striking paragraph (6) and redesignating paragraphs (7), (8), and (9), as paragraphs (6), (7), and (8), respectively; and

(5) in paragraph (6)(A), as so redesignated, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”.

(c) SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.—Section 114(f) is amended—

(1) in paragraph (1)—

(A) in subparagraph (A)—

(i) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services shall cover the 5-year period beginning on January 1 of the year following the second year in which the proceedings are commenced, except where differential transitional periods are provided in section 804(b)(3), or such other period as the parties may agree.”; and

(ii) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(B) in subparagraph (B)—

(i) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraph (A), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), or such other date as the parties may agree.”; and

(ii) in the second sentence, by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and

(C) by amending subparagraph (C) to read as follows:

“(C) The procedures under subparagraphs (A) and (B) also shall be initiated pursuant to a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of transmission service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for subscription digital audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.”;

(2) in paragraph (2)—

- (A) in subparagraph (A)—
- (i) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible non-subscription transmissions and transmissions by new subscription services specified by subsection (d)(2) shall cover the 5-year period beginning on January 1 of the second year following the year in which the proceedings are commenced, except where different transitional periods are provided in section 804(b)(3)(A), or such other period as the parties may agree.”; and
 - (ii) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
- (B) in subparagraph (B)—
- (i) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraph (A), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period specified in subparagraph (A), or such other period as the parties may agree.”; and
 - (ii) by striking “copyright arbitration royalty panel” each subsequent place it appears and inserting “Copyright Royalty Judges”; and
- (C) by amending subparagraph (C) to read as follows:
- “(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services or preexisting satellite digital radio audio services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.”;
- (3) in paragraph (3), by striking “or decision by the Librarian of Congress” and inserting “, decision by the Librarian of Congress, or determination by the Copyright Royalty Judges”; and
- (4) in paragraph (4), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”.
- (d) PHONORECORDS OF NONDRAMATIC MUSICAL WORKS.—Section 115(c)(3) is amended—
- (1) in subparagraph (A)(ii), by striking “(F)” and inserting “(E)”;
 - (2) in subparagraph (B)—
 - (A) by striking “under this paragraph” and inserting “under this section; and
 - (B) by striking “subparagraphs (B) through (F)” and inserting “this subparagraph and subparagraphs (B) through (E)”;
 - (3) in subparagraph (C)—
 - (A) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to a petition filed under section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by this section shall cover the period beginning with the effective date of such terms and rates, but not earlier than January 1 of the second year following the year in which the petition is filed, and ending on the effective date of successor terms and rates, or such other period as the parties may agree.”; and
 - (B) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
 - (4) in subparagraph (D)—
 - (A) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraphs (B) and (C), the Copyright Royalty Judges shall commence proceedings pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period specified in sub-

- paragraph (C) or such other period as may be determined pursuant to subparagraphs (B) and (C), or such other period as the parties may agree.”;
- (B) in the third sentence, by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and
- (C) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
- (5) in subparagraph (E)—
- (A) in clause (i)—
- (i) in the first sentence, by striking “the Librarian of Congress” and inserting “a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judges”; and
- (ii) in the second sentence, by striking “(C), (D) or (F) shall be given effect” and inserting “(C) or (D) shall be given effect as to digital phonorecord deliveries”; and
- (B) in clause (ii)(I), by striking “(C), (D) or (F)” each place it appears and inserting “(C) or (D)”;
- (6) by striking subparagraph (F) and redesignating subparagraphs (G) through (L) as subparagraphs (F) through (K), respectively.
- (e) COIN-OPERATED PHONORECORD PLAYERS.—Section 116 is amended—
- (1) in subsection (b), by amending paragraph (2) to read as follows:
- “(2) CHAPTER 8 PROCEEDING.—Parties not subject to such a negotiation may have the terms and rates and the division of fees described in paragraph (1) determined in a proceeding in accordance with the provisions of chapter 8.”; and
- (2) in subsection (c)—
- (A) in the subsection heading, by striking “COPYRIGHT ARBITRATION ROYALTY PANEL DETERMINATIONS” and inserting “DETERMINATIONS BY COPYRIGHT ROYALTY JUDGES”; and
- (B) by striking “a copyright arbitration royalty panel” and inserting “the Copyright Royalty Judges”.
- (f) USE OF CERTAIN WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING.—Section 118 is amended—
- (1) in subsection (b)—
- (A) in paragraph (1)—
- (i) in the first sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
- (ii) by striking the second and third sentences;
- (B) in paragraph (2), by striking “the Librarian of Congress:” and all that follows through the end of the sentence and inserting “a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judge, if copies of such agreements are filed with the Copyright Royalty Judges within 30 days of execution in accordance with regulations that the Copyright Royalty Judges shall issue.”; and
- (C) in paragraph (3)—
- (i) in the second sentence—
- (I) by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and
- (II) by striking “paragraph (2).” and inserting “paragraph (2) or (3).”;
- (ii) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
- (iii) by striking “(3) In” and all that follows through the end of the first sentence and inserting the following:
- “(3) Voluntary negotiation proceedings initiated pursuant to a petition filed under section 804(a) for the purpose of determining a schedule of terms and rates of royalty payments by public broadcasting entities to copyright owners in works specified by this subsection and the proportionate division of fees paid among various copyright owners shall cover the 5-year period beginning on January 1 of the second year following the year in which the petition is filed. The parties to each negotiation proceeding shall bear their own costs.
- “(4) In the absence of license agreements negotiated under paragraph (2) or (3), the Copyright Royalty Judges shall, pursuant to chapter 8, conduct a proceeding to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Copyright Royalty Judges.”;
- (2) by striking subsection (c) and redesignating subsections (d) through (g) as subsections (c) through (f), respectively;

- (3) in subsection (c), as so redesignated, in the matter preceding paragraph (1)—
- (A) by striking “(b)(2)” and inserting “(b)(2) or (3)”;
 - (B) by striking “(b)(3)” and inserting “(b)(4)”;
 - (C) by striking “a copyright arbitration royalty panel” and inserting “the Copyright Royalty Judges”;
- (4) in subsection (d), as so redesignated—
- (A) by striking “in the Copyright Office” and inserting “with the Copyright Royalty Judges”; and
 - (B) by striking “Register of Copyrights” and inserting “Copyright Royalty Judges”;
- (5) in subsection (f), as so redesignated, by striking “(d)” and inserting “(c)”.
- (g) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—Section 119(b) is amended—
- (1) in paragraph (3), by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
 - (2) in paragraph (4)—
 - (A) in subparagraph (A), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”; and
 - (B) by amending subparagraphs (B) and (C) to read as follows:
 - “(B) DETERMINATION OF CONTROVERSY; DISTRIBUTIONS.—After the first day of August of each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.
 - “(C) WITHHOLDING OF FEES DURING CONTROVERSY.—During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, subject to any distributions made under section 801(b)(3).”.
- (h) DIGITAL AUDIO RECORDING DEVICES.—
- (1) ROYALTY PAYMENTS.—Section 1004(a)(3) is amended by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”.
 - (2) ENTITLEMENT TO ROYALTY PAYMENTS.—Section 1006(c) is amended by striking “Librarian of Congress shall convene a copyright arbitration royalty panel which” and inserting “Copyright Royalty Judges”.
 - (3) PROCEDURES FOR DISTRIBUTING ROYALTY PAYMENTS.—Section 1007 is amended—
 - (A) in subsection (a), by amending paragraph (1) to read as follows:
 - “(1) FILING OF CLAIMS.—During the first 2 months of each calendar year, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Copyright Royalty Judges a claim for payments collected during the preceding year in such form and manner as the Copyright Royalty Judges shall prescribe by regulation.”;
 - and
 - (B) by amending subsections (b) and (c) to read as follows:
 - “(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—After the period established for the filing of claims under subsection (a), in each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a). The Librarian of Congress shall, before such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.
 - “(c) RESOLUTION OF DISPUTES.—If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments. During the pendency of such a proceeding, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Librarian of Congress shall, before

such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.”.

(4) DETERMINATION OF CERTAIN DISPUTES.—(A) Section 1010 is amended to read as follows:

“§ 1010. Determination of certain disputes

“(a) SCOPE OF DETERMINATION.—Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to petition the Copyright Royalty Judges to determine whether such device is subject to section 1002, or the basis on which royalty payments for such device are to be made under section 1003.

“(b) INITIATION OF PROCEEDINGS.—The parties under subsection (a) shall file the petition with the Copyright Royalty Judges requesting the commencement of a proceeding. Within 2 weeks after receiving such a petition, the Chief Copyright Royalty Judge shall cause notice to be published in the Federal Register of the initiation of the proceeding.

“(c) STAY OF JUDICIAL PROCEEDINGS.—Any civil action brought under section 1009 against a party to a proceeding under this section shall, on application of one of the parties to the proceeding, be stayed until completion of the proceeding.

“(d) PROCEEDING.—The Copyright Royalty Judges shall conduct a proceeding with respect to the matter concerned, in accordance with such procedures as the Copyright Royalty Judges may adopt. The Copyright Royalty Judges shall act on the basis of a fully documented written record. Any party to the proceeding may submit relevant information and proposals to the Copyright Royalty Judges. The parties to the proceeding shall each bear their respective costs of participation.

“(e) JUDICIAL REVIEW.—Any determination of the Copyright Royalty Judges under subsection (d) may be appealed, by a party to the proceeding, in accordance with section 803(d) of this title. The pendency of an appeal under this subsection shall not stay the determination of the Copyright Royalty Judges. If the court modifies the determination of the Copyright Royalty Judges, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the determination of the Copyright Royalty Judges and remand the case for proceedings as provided in this section.”.

(B) The item relating to section 1010 in the table of sections for chapter 10 is amended to read as follows:

“1010. Determination of certain disputes.”.

SEC. 6. EFFECTIVE DATE AND TRANSITION PROVISIONS.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect 6 months after the date of the enactment of this Act, except that the Librarian of Congress shall appoint interim Copyright Royalty Judges under section 802(d) of title 17, United States Code, as amended by this Act, within 90 days after such date of enactment to carry out the functions of the Copyright Royalty Judges under title 17, United States Code, to the extent that Copyright Royalty Judges provided for in section 801(a) of title 17, United States Code, as amended by this Act, have not been appointed before the end of that 90-day period.

(b) TRANSITION PROVISIONS.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by this Act shall not affect any proceedings commenced, petitions filed, or voluntary agreements entered into before the enactment of this Act under the provisions of title 17, United States Code, amended by this Act, and pending on such date of enactment. Such proceedings shall continue, determinations made in such proceedings, and appeals taken therefrom, as if this Act had not been enacted, and shall continue in effect until modified under title 17, United States Code, as amended by this Act. Such petitions filed and voluntary agreements entered into shall remain in effect as if this Act had not been enacted.

(2) EFFECTIVE PERIODS FOR CERTAIN RATEMAKING PROCEEDINGS.—Notwithstanding paragraph (1), terms and rates in effect under section 114(f)(2) or 112(e) of title 17, United States Code, for new subscription services, eligible nonsubscription services, and services exempt under section 114(d)(1)(C)(iv) of such title for the period 2003 through 2004, and any rates published in the Federal Register under the authority of the Small Webcaster Settlement Act of 2002 for the years 2003 through 2004, shall be effective until the first applicable effective date for successor terms and rates specified in section 804(b)(2) or (3)(A) of title 17, United States Code, or until such later date as the parties may agree. Any proceeding commenced before the enactment of this Act pursuant to section 114(f)(2) and chapter 8 of title 17, United States Code, to adjust or de-

termine such rates and terms for periods following 2004 shall be terminated upon the enactment of this Act and shall be null and void.

(c) EXISTING APPROPRIATIONS.—Any funds made available in an appropriations Act before the date of the enactment of this Act to carry out chapter 8 of title 17, United States Code, shall be available to the extent necessary to carry out this section.

Amend the title so as to read:

A bill to amend title 17, United States Code, to replace copyright arbitration royalty panels with Copyright Royalty Judges, and for other purposes.

PURPOSE AND SUMMARY

H.R. 1417, the “Copyright Royalty and Distribution Reform Act,” would replace the existing administrative structure within the U.S. Copyright Office that determines copyright royalty rates and the distribution of royalties under various compulsory licenses.

BACKGROUND AND NEED FOR THE LEGISLATION

The Copyright Royalty Tribunal Reform Act of 1993¹ empowered the Librarian of Congress to convene Copyright Arbitration Royalty Panels, or “CARPs,” whenever private negotiations among affected parties fail to establish rates or distribute royalties governing the commercial use of certain copyrighted works like movies and music.

In brief, critics of the existing CARP system offer the same general complaints:

- CARP decisions are unpredictable and inconsistent.
- Arbitrators lack appropriate expertise to render decisions and frequently reflect either a “content” or “user” bias.
- The process is unnecessarily expensive.

In response to these and other criticisms, the Subcommittee on Courts, the Internet, and Intellectual Property conducted a June 2002 oversight hearing² regarding the CARP structure and process. The witnesses, including the Register of Copyrights, agreed that the system is dysfunctional and should be changed.³

Subsequent to the hearing, the Subcommittee and the Copyright Office convened a government-industry roundtable on the subject, which included 32 participants who offered recommendations for improving the current system. The contents of H.R. 1417 are based on many of these suggestions and the testimony taken at the oversight hearing. Because of the highly technical and detailed nature of this bill, most of the substantive discussion is contained in the sectional analysis portion of the report below.

HEARINGS

The Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on H.R. 1417 on March 27, 2003. Testimony was received from four witnesses, representing several organizations, with additional material submitted by 12 individuals and organizations.

¹Pub. L. No. 103–198.

²Hearings before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary: Copyright Arbitration Royalty Panel (CARP) Structure and Process, 107th Cong., 2nd Sess. (2002).

³See H. Rep. No. 78, 107th Cong., 2nd Sess., at 31 (2002).

COMMITTEE CONSIDERATION

On May 20, 2003, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill H.R. 1417, with an amendment, by voice vote, a quorum being present. On September 24, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 1417, with an amendment, by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during the committee consideration of H.R. 1417.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1417, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

OCTOBER 17, 2003.

Hon. F. JAMES SENSENBRENNER, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Melissa E. Zimmerman.
Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

H.R. 1417—Copyright Royalty and Distribution Reform Act of 2003

Summary: Under current law, the Copyright Office (within the Library of Congress) collects and distributes royalties for use of certain copyrighted material. H.R. 1417 would change the process for determining the rates and distribution of these royalties. CBO esti-

mates that implementing the bill would cost \$1 million in 2004 and \$5 million over the 2004–2008 period subject to appropriation of the necessary amounts. H.R. 1417 also would have an insignificant effect on direct spending. Enacting the bill would have no effect on revenues.

H.R. 1417 contains both an intergovernmental and a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the cost of complying with the mandate would be small and well below the relevant thresholds established by UMRA (\$59 million for intergovernmental mandates and \$117 million for private-sector mandates in 2003, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1417 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—				
	2004	2005	2006	2007	2008
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	1	1	1	1	1
Estimated Outlays	1	1	1	1	1

Basis of Estimate: Under current law, the use of certain copyrighted material by the public operates under a compulsory license. Users of copyrighted material do not need specific permission from owners to use material with a compulsory license, but must pay royalties and abide by certain conditions when using the material.

The Copyright Office collects royalties from users of compulsory licenses and then distributes the royalties to owners of copyrighted works using guidelines agreed upon in private negotiations between users and owners. Rates for these royalties are also determined by negotiation between interested parties. The majority of these royalties are for cable television signals, satellite television signals, and digital audio recording technology. For example, cable operators pay royalties to transmit distant broadcast signals to cable viewers, and satellite carriers pay royalties to retransmit distant network and superstation signals by satellite.

When users and owners of copyright material cannot settle on rates or how to distribute royalties, the Librarian of Congress has the authority to convene a Copyright Arbitration Royalty Panel (CARP) made up of three independent arbitrators. CARPs hear testimony from interested parties and then make a recommendation to the Librarian of Congress regarding a rate or plan of royalty distribution. The Librarian of Congress adopts the CARPs recommendation unless the Librarian determines that the findings are arbitrary or conflicting with copyright law.

H.R. 1417 would change the process used to determine royalty rates and distribution. Three full-time Copyright Royalty Judges (CRJs) would replace the CARPs and make determinations on rates and distribution of royalties when copyright users and carriers cannot settle on the rates or methods to distribute royalties in private negotiations.

Direct spending

Under current law, payments to the arbitrators for their services and administrative costs for CARP proceedings are deducted from the royalties collected from users of the copyrighted material. H.R. 1417 would change this by making the salaries of the CRJs under the new system subject to appropriation. Based on information from the Copyright Office, CBO estimates that this change would have an insignificant impact on the pattern (but not the amount) of direct spending.

Spending subject to appropriations

H.R. 1417 would require that the costs of compensation for the new CRJs, and the staff, and administrative costs for CARP proceedings come from appropriated funds. Based on information provided by the Copyright Office, CBO estimates that implementing H.R. 1417 would increase spending subject to appropriation by about \$1 million in 2004 and \$5 million over the 2004–2008 period. The bill also would require that each party wishing to participate in a proceeding before the CRJs pay a filing fee of \$150 which would partly offset the administrative cost for proceedings before the CRJs. Based on information provided by the Copyright Office, CBO estimates that such fees would amount to less than \$5,000 a year.

Intergovernmental and private-sector impact: H.R. 1417 would impose both an intergovernmental and a private-sector mandate, as defined in UMRA, because it would require state, local or tribal governments and entities in the private sector, if subpoenaed by the Copyright Royalty Judges, to appear or provide evidence.

Based on conversations with affected entities, CBO expects that the Judges would likely exercise their subpoena power sparingly and that the costs to comply with a subpoena would not be significant. Consequently, CBO estimates that the cost of complying with the mandate would be small and well below the relevant thresholds established by UMRA (\$59 million for intergovernmental mandates and \$117 million for private-sector mandates in 2003, adjusted annually for inflation).

Estimate prepared by: Federal Costs: Melissa E. Zimmerman; Impact on State, Local, and Tribal Governments: Sarah Puro; and Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Paul R. Cullinan, Chief for Human Resources Cost Estimate Unit, Budget Analysis Division.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee makes the following statement regarding performance goals and objectives. The Committee expects that H.R. 1417 will make the ratemaking and royalty distribution process less expensive and more expeditious and efficient.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following section by section analysis describes the bill as reported by the Committee on the Judiciary.

Section 1. Short title

The Act may be cited as the “Copyright Royalty and Distribution Reform Act of 2003”.

Section 2. Reference

Unless otherwise expressly provided for, any reference in this Act is to title 17, of the United States Code.

Section 3. Copyright Royalty Judge and staff

This section renames Chapter 8 of title 17 of the United States Code: “Proceedings by Copyright Royalty Judges.” It amends that chapter to read as described below.

Section 801. Copyright Royalty Judge; appointment and functions

(a) Appointment. The Librarian of Congress is to consult the Register of Copyrights and appoint three full-time Copyright Royalty Judges (CRJ). One judge will be designated as the Chief Copyright Royalty Judge.

In *Buckley v. Valeo*⁴, the Supreme Court considered, inter alia, the constitutionality of the Federal Election Commission’s (FEC) method of appointing its members. Although the FEC is an agency residing in the Legislative Branch, the Court ruled that some of the FEC’s functions are related to the Executive Branch functions; therefore, persons exercising those functions “must be appointed in accordance with Article II, Section 2, Clause 2 of the Constitution (the Appointments Clause).”⁵ In response to this decision, the Committee has chosen to vest the authority of appointing CRJs in the Librarian of Congress, an officer of the United States nominated by the President with the advice and consent of the Senate. The Committee does, however, acknowledge the expertise of the Copyright Office; and as such, is requiring that the Librarian consult with the Register.

Although parties have complained about the lack of stability and consistency with regard to the current system’s reliance on arbitrators instead of permanent judges, parties also expressed their belief that a significant strength of the existing system was that three individuals, rather than any one single person, was charged with decisionmaking authority. The Committee believes that vesting decisionmaking authority in three permanent judges will address the issues of stability, consistency, and potential bias.

(b) Functions. The functions of the CRJs are as follows.

(1) This section confers authority upon CRJs to set and adjust reasonable terms and rates of royalty payments for the §§ 112(e) (ephemeral recordings), 114 (limited performance rights under the Digital Performance in Sound Recording Act of 1995), 115 (mechanical compulsory license for certain uses of copyrighted musical compositions), 116 (public performance of musical works embodied in coin operated phonorecord players), 118 (published nondramatic

⁴ 424 U.S. 1 (1976).

⁵ 424 U.S. at 126.

musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting), 119 (retransmission of television broadcast signals by satellite carriers), and 1004 (devices set forth under the Audio Home Recordings Act) licenses.

Subsection 801(b)(1) further provides that the CRJs must specifically calculate rates under the §§ 114(f)(1)(B), 115, and 116 licenses in a manner that ensures maximum availability of creative works to the public, fairly compensates copyright owners for their work, and affords copyright users a fair income under existing economic conditions. The rate reflects the relative contributions of both a copyright owner and user in the product made publicly available and minimizes any disruptive impact on affected industries or generally prevailing industry practices.

Subsection 801(b)(2) governs the factors to be taken into account in adjusting compulsory license rates and the circumstances under which the § 111 cable license rates may be adjusted, is amended only to make those procedural changes necessary to substitute CRJs for arbitration panels.

Subsection 801(b)(3) grants authority to the CRJs to authorize the distribution of royalty fees collected under the § 111 cable license, the § 119 satellite license, and the § 1007 license (distributing royalty payments under the Audio Home Recording Act). Under the current law, the Copyright Office has the discretion to distribute royalties under the licenses in this subsection which are not in controversy prior to the time that distribution proceedings are final, even though there may be controversy as to distribution of remaining royalties in the distribution pool. Copyright owners consider these “partial distributions” to be particularly important since there is often a lengthy period of time between the payment of royalties by copyright users and the conclusion of the distribution proceedings.

This subsection amends the law to mandate that the CRJs make a partial distribution during the pendency of a distribution proceeding for the licenses listed in this subsection, whether they are in controversy or not, so long as all participants provide the CRJs with a signed written agreement obligating them to return any excess amounts necessary to comply with a final determination of a distribution proceeding. To alleviate concerns by employees of the licensing division of the Library of Congress that they would be personally liable for making partial distributions when the funds to be distributed are in controversy, this section has been amended to relieve them of any future liability with respect to such distributions. Instead, the CRJs shall be responsible for calculating any such excess amounts at the time a final determination is made.

Subsection 801(b)(4) gives authority to the CRJs to accept or reject royalty claims filed under §§ 111, 119, and 1007 on the basis of timeliness or the failure to establish the basis for a claim.

Subsection 801(b)(5) gives authority to the CRJs to accept or reject rate adjustment petitions as provided in § 804 and petitions to participate as provided in 17 U.S.C. §§ 803(b)(1)⁶ and (2).⁷

Subsection 801(b)(6) gives authority to the CRJs to determine the status of a digital audio recording device or a digital audio interface device under §§ 1002 and 1003, as provided for in § 1010. Section 1010 authorizes parties to request the commencement of an arbitration proceeding for the purpose of establishing whether a digital audio recording device or digital audio interface device is a device subject to §§ 1002 or 1003.

Subsection 801(b)(7) gives the CRJs the necessary authority to adopt as binding on all participants settlement agreements proposed by some or all of the participants in ratesetting or distribution proceedings. By facilitating and encouraging settlement agreements for determining royalty rates and establishing distribution of royalties, this section reduces the need to conduct full-fledged ratesetting and distribution proceedings. This will generate savings while expediting the disposition of proceedings. Clauses (i) and (ii) are designed specifically to address concerns about CRJs having authority to adopt as binding on all participants the terms of agreements proposed by subsets of participants. Clause (i) allows other participants in the relevant proceeding who would be bound by the proposed settlement to object to the CRJ's adoption of the agreement. When an objection has been registered pursuant to clause (i), clause (ii) gives the CRJs discretionary power to decline to adopt the proposed agreement if they find, based on the record before them, that the agreement is not likely to meet the relevant statutory standard. Because settlement agreements can be offered at any time before final disposition of a proceeding, the extent of the record before the CRJs may vary widely depending on the timing of the settlement agreement. Bearing in mind the objective of encouraging settlement, the CRJs are to use their best judgment as to whether the record before them indicates the proposed agreement is not likely to meet the relevant statutory standard.

(c) Rulings. This section gives authority to the CRJs to make any necessary procedural or evidentiary rulings in any proceeding under Chapter 8. In doing so, the CRJs may consult with the Register of Copyrights.

(d) Administrative Support. This section states that the Librarian of Congress must provide the CRJs with the necessary administrative services required to carry out their obligations as set forth under Chapter 8.

(e) Location in Library of Congress. This section provides that the offices of the CRJs and staff will be located within the Library of Congress. The current CARP system falls within the purview of the Library of Congress. The Staff, as well as the proceedings, have historically been seated in the Copyright Office, but the Committee intends that the CRJs will be separate and independent from the Copyright Office.

⁶Subsection 803(b)(1) sets forth the procedures for initiating a rate adjustment or determination proceeding as set out in Chapter 8.

⁷Subsection 803(b)(2) sets forth the requirements a person must meet in order to participate in a proceeding under Chapter 8.

Section 802. Copyright Royalty Judgeships; staff

(a) **Qualifications of Copyright Royalty Judges.** This subsection provides that there will be three CRJs, each of whom shall have at least seven years of legal experience. One of these judges will be designated the Chief Copyright Royalty Judge. This Judge must possess at least five years of experience in adjudications, arbitrations, or court trials. Of the other two CRJs, one must have significant knowledge of copyright law; the other must have a significant knowledge of economics.

The Committee wishes to create a system that leads to stability and predictability in the decisionmaking process. Parties have expressed concern to the Committee that often the arbitrators selected under the current CARP system do not have the training, education, or experience in relevant subject matter. Specifically, parties expressed concern that the evidence presented in the determination of a rate necessitates a significant mastery of economics and marketplace factors as well as considerable knowledge of copyright law. Recognizing that finding an individual who possesses substantial knowledge and experience in all of these areas would be difficult at best, the Committee believes that an appropriate resolution is to divide the requisite knowledge and experience among all three judges.

An individual may serve as a CRJ if he or she is free of any financial conflict of interest as defined by the Librarian of Congress under the authority granted in subsection (h). Subsection (h) grants the Librarian of Congress the authority to adopt regulations establishing CRJ standards of conduct. The definition of "conflict of interest" in this section sufficiently balances the competing interests of ensuring that individuals with considerable experience in the field of relevant subject matter to proceedings are not excluded for perceived bias while also ensuring that no monetary incentive exists by which a CRJ might otherwise improperly be influenced in their decisionmaking.

(b) **Staff.** This section provides that the Chief CRJ will hire three full-time staff members to assist the CRJs in performing their functions. The CRJs will directly supervise the staffers. The Copyright Royalty Judge system will be an autonomous body independent of the Copyright Office. This attribute will obviate the need of the Copyright Office to employ staff to work solely on CARP related matters.

(c) **Terms.** This section states that the CRJs will sit for six years, except the first individuals appointed to be CRJs shall have their terms staggered. The Committee intends that there be no more than one CRJ with less than two years experience ever sitting at one time. This will ensure that, except for the first individuals appointed, there will at all times be a sitting judge with prior experience as a CRJ.

A CRJ may be reappointed to subsequent terms. The Committee expects that by allowing individuals who have produced high quality work to remain, the goals of stability and predictability of the system will be furthered.

A sitting CRJ shall continue to serve in that capacity until a successor is selected.

(d) **Vacancies or Incapacity.** This section provides that if a CRJ becomes incapacitated or leaves, the Librarian of Congress must

quickly appoint an interim CRJ to serve out the remainder of the vacancy term.

(e) Compensation.

(1) Judges. This subsection provides that the Chief CRJ will be paid at the rate of basic pay payable for level AL-1 for administrative law judges pursuant to § 5372(b) of title 5. The other two CRJs will be compensated at the rate of basic pay payable for level AL-2 for administrative law judges pursuant to § 5372(b) of title 5. CRJs salaries are not subject to the regulations of the Office of Personnel Management.

(2) Staff. The CRJs will be staffed by three individuals, one of whom will be paid no more than the basic rate of pay payable for GS-15 of the General Schedule, the second of pay payable for GS-13, the third of pay payable for GS-11.

(f) Independence of Copyright Royalty Judge.

(1) In Making Determinations. Subsection 802(f)(1)(A) states that the CRJs are to have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing any other rulings under title 17 that pertain to the responsibilities of the CRJs set forth in § 801, except that the CRJs may consult with the Register of Copyrights on any matters other than questions of fact. Any consultations of this nature must be in writing or on the record.

In an attempt to balance the concerns of preserving independence in the role and decisionmaking of the CRJs against the benefit of having the ability to consult the expertise of the Copyright Office, this section allows the CRJs to consult with the Register of Copyrights on any matter which they have authority over under title 8, other than a question of fact. This section will help to effectuate the Committee's goal that the Copyright Office retain responsibility for creating and implementing copyright policy, while the CRJs will retain sole responsibility for making factual and legal determinations regarding matters before them in a proceeding.

Subsection 802(f)(1)(B) states that when presented with a novel question of law, a CRJ must request the Register of Copyrights, in writing, to submit a written opinion that is to be made public. The Committee defines a novel question of law as one that has not been determined in prior decisions, determinations, or rulings. The opinion of the Register will not be binding on the CRJ, but the CRJ must nonetheless take it into account.

Because the Committee is cognizant of concerns that ex parte communications should not occur between the Copyright Office and CRJs without the knowledge of proceeding participants, any consultations under this subparagraph between the CRJs and the Register of Copyrights must be in writing or on the record.

(2) Performance Appraisals.

Subsection 802(f)(2)(A) states that the CRJs will not receive performance appraisals.

Subsection 802(f)(2)(B) states, that if under subsection (h), which relates to the sanctioning and removal of a CRJ, those regulations require documentation to establish the cause of a sanction or removal, a CRJ may receive an appraisal relating specifically to the cause of the sanction or removal.

(g) *Inconsistent Duties Barred.* This section holds that no CRJ may undertake duties inconsistent with his or her duties and responsibilities as a CRJ.

(h) *Standards of Conduct.* This section requires the Librarian of Congress to adopt regulations regarding the standards of conduct, including financial conflict of interest and restrictions against *ex parte* communications, which will govern the CRJ and the proceedings under this chapter.

(i) *Removal or Sanction.* The Librarian of Congress may sanction or remove a CRJ for violation of standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability. Notice and an opportunity for a hearing must be given before a sanction or removal may occur. The Librarian shall appoint an interim Copyright Royalty Judge during the pendency of a suspension.

Section 803. Proceedings of Copyright Royalty Judges

(a) *Proceedings.* This section provides that the CRJs are to act in accordance with regulations they have issued, a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior Copyright Arbitration Royalty Panel Determinations, rulings by the Librarian of Congress before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, prior determinations of CRJs under this chapter, and appellate court decisions under this chapter before, on, or after such effective date.

These decisions are not necessarily controlling, but will be considered for their precedential value and may be distinguished.

Any participant in a proceeding under subsection 803(b)(2) may submit relevant information and proposals to the CRJs. Subsection 803(b)(2) sets forth the requirements a party must meet to become a participant in a proceeding. To ensure that only parties with legally protectable and tangible interests may take part in these processes, the Committee defines the term “participant.” The Committee intends that only those parties meeting the requirements of this definition may participate in the process as set forth in the new Chapter 8.

The Committee anticipates that the CRJs will adopt regulations to define the requisite “significant interest” that a party must demonstrate to participate in a proceeding. Such regulations should recognize that the Committee intends the “significant interest” requirement to restrict participation to those who have a stake in the outcome of the proceeding. In other words, to have a significant interest in a royalty rate, the participant must be a party directly affected by the royalty fee (e.g., as a copyright owner, a copyright user, or an entity or organization involved in the collection and distribution of royalties). As a copyright owner, one has a significant interest in a royalty rate because the rate determines how much the owner will receive in compulsory license fees from the use of his or her works. As a copyright user, one has a significant interest in a royalty rate because the rate determines how much that party must pay for the use of copyrighted works. Included in these categories are organizations and societies that represent the rights and interests of copyright owners and users.

(2) *Judges Acting as Panel and Individually.* The CRJs are to conduct hearings *en banc*, except that the Chief CRJ may, in his

or her discretion, designate a CRJ to sit individually over collateral and administrative proceedings under subsections 803(b)(1) through 803(b)(5).

Although parties expressed concern that the ad hoc nature of the CARP produces instability and inconsistency, other participants have stated that a significant strength of the existing system is that a panel of three individuals conducts hearings. In keeping with the tradition of checks and balances, the Committee believes that the interaction of at least three decisionmakers who have the ability to consider and to debate the many issues involved in rate-setting and distribution proceedings produces the most reasoned, supportable, and credible results. Still, the Committee acknowledges that there may be instances where a single judge could fairly and equitably preside over part of the hearing process; the legislation makes this allowance. The Committee does not intend, however, that individual CRJs should have the sole authority to render final decisions.

(3) Determinations. Final determinations of CRJs under proceedings in Chapter 8 require a majority vote. A dissenting CRJ's opinion is to be included with the determination.

The Committee expects that the majority vote requirement will ensure that a proper level of checks and balances in the proceedings is maintained.

(b) Procedures.

(1) Initiation.

(A) Call for Petitions to Participate. Subsection 803(b)(1)(A) requires that promptly upon a filing of a petition for a rate adjustment or determination as set forth under section 804(a)⁸ or 804(b),⁹ or by no later than January 5 of a year specified in section 804 for a hearing to begin, if a petition has not been filed by that date, the CRJs will publish in the Federal Register notice of the beginning of proceedings under Chapter 8 for the filing of Petitions to Participate in a proceeding under §§ 111, 112, 114, 115, 116, 118, 119, 1004, or 1007. No later than 30 days after this publication, petitions to participate must be filed; but CRJs may accept late petitions to participate up to 90 days before written direct statements are due if there is no prejudice to the parties and the petitioner can show good cause.

H.R. 1417 as reported out by the Subcommittee included a provision which required parties subject to statutory licenses to pay an interim rate equivalent to the old rate until a new one is determined.

The user community voiced concern that if these "interim fees" were not housed in an escrow account that the content community would have the ability to access the fees and fund their litigation pursuits against the user community. This concern stemmed from a provision in the Small Webcaster Settlement Act of 2002¹⁰ that allowed Sound Exchange, the designated receiving agent, to deduct its litigation expenses from the royalties collected.

The copyright community opposed an escrow account, claiming the interim funds were necessary for Sound Exchange to continue its operations. In an industry-wide agreement, both communities

⁸ 17 U.S.C. § 04(a) (Filing of Petition).

⁹ 17 U.S.C. § 04(b) (Timing of Proceedings).

¹⁰ Small Webcaster Settlement Act of 2002, P.L. No. 107-321.

adopted the position of the Copyright Office that the best solution was to implement ratesetting proceedings under chapter 8 far enough in advance so as to render certain there will always be a new rate in place prior to the expiration of an old rate. To ensure that this principle is maintained, this bill sets forth a specific timeline in which steps in the Chapter 8 proceedings must be completed. Since there may be instances in which a party may have a valid excuse for not complying, the bill will permit late filing of petitions to participate under limited circumstances.

Subsection 803(b)(1)(B) states that a petition to participate must describe a petitioner's interest in the subject matter. Parties with similar interests may file a single petition.

By requiring petitioners to set forth their "interest in the subject matter", CRJs will be better prepared to identify parties with legally protectable and tangible interests that qualify as participants.

Traditionally, as in the case of the performing rights societies, parties with a similar interest have always filed a single petition. The Committee believes this mechanism has worked successfully and should therefore continue to be utilized.

(2) Participation in General. This subsection requires that to participate in a proceeding under Chapter 8, a person must file a "facially valid" petition to participate setting forth his other significant interest in a proceeding, and pay a \$150 filing fee. Only participants subject to the small claims procedure in distribution proceedings under subsection (4) or paper proceedings in ratemaking proceedings under subsection 5 are exempt from the \$150 filing fee. This amount is identical to that required in 28 U.S.C. § 1914 for all litigants filing civil actions in U.S. district courts. The Committee intends that one filing fee be paid for each notice filed. The CRJs may decide on their own motion or on the motion of another participant in the proceeding that a party lacks a significant interest in a proceeding.

Under the current CARP system, parties are responsible for bearing the costs of the proceedings. The legislative history accompanying the Copyright Royalty Tribunal Reform Act of 1993,¹¹ as well as at least one reviewing court,¹² have indicated that the original intent behind the creation of the CARP system was to create a system which would, by its design, discourage parties from choosing to engage it. Both copyright owners and users have indicated that the CARP system has not accomplished this goal. Cognizant of both copyright owner and user concerns about the costs of ratesetting and distribution proceedings, this bill as reported provides for the majority of all administrative costs associated with these proceedings to be born by the government, save the de minimus \$150 filing fee. The Committee intends that this money will help defray in part these administrative costs as well as have the added benefit of perhaps discouraging the filing of frivolous claims.

(3) Voluntary Negotiation Period. This section requires that promptly after petitions to participate have been filed, the CRJs must make available to all participants in the proceeding a list of all other participants. Upon making available these names, the CRJs are to initiate a voluntary negotiation among the participants

¹¹ H. Rep. No. 103-286.

¹² *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F. 3d 907, 920 (D.C. Cir. 1998).

which is to last for three months. At the close of the voluntary negotiation proceedings, the CRJs are to determine whether and to what extent paragraphs (4) (small claims procedure in distribution proceedings) and (5) (paper proceedings in ratemaking proceedings).

In granting CRJs the necessary authority to adopt as binding on all participants settlement agreements proposed by some or all of the participants in rate-setting or distribution proceedings, the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates and the distribution of royalties throughout the Chapter 8 process. The Committee believes that by creating a formalized time period for encouraging settlement under the direction of the CRJs, parties will necessarily have to focus their attentions upon the Committee's goal of achieving settlements. The Committee intends that the CRJs during this time period act in a capacity similar to that of Federal judges during their scheduling conferences. The Committee expects the CRJs to act in a manner which ensures that the timetable for proceedings are adhered to, while helping to facilitate the ultimate goal of conflict resolution between participants. The Committee does not expect the CRJs to be present with parties during all discussions during this time period.

(4) Small Claims Procedure in Distribution Proceedings. If a participant in a proceeding under Chapter 8 asserts a contested claim of \$10,000 or less, the CRJs must decide the controversy on the basis of a written initial claim, an initial written response by any opposing participant, and one additional response by each party. Any participant subject to a proceeding under this subsection is exempt from paying the \$150 filing fee required under subsection (2).

The large claimants expressed concern that the current statutory mandate prescribing allocation of CARP costs in a "distribution proceeding in proportion to the royalty funds awarded to each party" has had the unfortunate effect of allowing those with small claims to inflate their claims and initiate litigation at the expense of other parties. The Copyright Office asserts that it lacks authority either to prevent these abuses or expedite decision-making. In contrast, small claimants expressed concern about the costs associated with distribution hearings and their inability to pay such costs.

The Committee expects that the creation of this small claims proceeding will streamline the resolution of small claims making the procedure more efficient to all participants involved. In arriving at the threshold amount by which a party may be subjected to a paper proceeding, the Committee looked to the threshold amount utilized by small claims courts (\$10,000).

Subsection 803(b)(4)(B) provides that if a CRJ decides that a participant has set forth an invalid amount in controversy to avoid settling the controversy through an all-paper small claims proceeding set forth in subsection 803(b)(4)(A), the CRJ must impose a fine on the participant in an amount not to exceed the difference between the actual amount distributed and the amount asserted by the participant.

The Committee has created this sanction with the goal of not allowing participants to circumvent the Committee's intent of cre-

ating a streamlined mechanism for resolving small claim disputes in a distribution hearing.

(5) Paper Proceedings in Ratemaking Proceedings. The CRJs have broad authority to determine royalty rates through abbreviated, paper-only proceedings. These paper proceedings allow each participant to make an initial filing in writing, an initial response, and one additional response.

Paper proceedings should further the overriding objectives of this legislation by resulting in less costly and far quicker rate-settings than those achieved through full-blown rate-setting proceedings. CRJs are required to conduct paper proceedings to determine rates in situations where (1) there is no genuine issue of material fact, (2) there is no need for evidentiary hearings, and (3) all participants to the proceeding agree in writing to conduct a paper proceeding. The CRJs may conduct paper proceedings in such other circumstances as they deem appropriate. It is anticipated that CRJs will choose to exercise their discretion to order paper proceedings in circumstances where, for instance, the cost of the proceeding would exceed the royalties likely to be collected, or where a class of participants may otherwise find it impossible to participate. The CRJ may choose to conduct paper proceedings either on their own initiative or in response to a motion of a participant. In either case, the CRJs must offer all parties to the proceeding the opportunity to comment on the decision to conduct a paper proceeding.

(6) Regulations.

Subsection 803(b)(6)(A) provides that the CRJs may issue regulations to carry out their functions under title 17. No later than 120 days after the CRJs or interim CRJs are appointed after the enactment of this bill, the CRJs must issue regulations to govern proceedings under this chapter.

Subsection 803(b)(6)(B) provides that until permanent regulations have been adopted, CRJs are to apply those regulations in effect under this chapter on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, which are not inconsistent with this chapter.

Subsection 803(b)(6)(C) requires that the CRJs must, at minimum, issue the regulations that include the following:

(i) A required date by which participants' written direct statements must be filed, which may be no earlier than four months and no later than five months after the end of the voluntary negotiation period, except that participants may, within 15 days after the end of the discovery period, file an amended written direct statement based on new information received during the discovery process. Prior to discovery under the current CARP system, parties are required simultaneously to submit and exchange in written form the direct testimony of each of their witnesses—lay and expert alike—together with every trial exhibit to be utilized. Some parties expressed concern that this is contrary to the Federal Rules of Evidence and effectively locks in their trial positions based upon limited information. Other parties expressed concern that if this sequencing was changed, it would yield the potential for open-ended discovery which would ultimately lead to abuse and exorbitant costs. Recognizing the importance of creating a full and accurate record at the fact-finding level, the Committee believes that the ad-

dition of the 15-day period is the proper amount of time for parties to amend their written statements that reflects additional information gained through the discovery process.

(ii)(I) The CRJs must meet with participants subsequent to their filing written direct statements to set a schedule for conducting and completing discovery. The CRJs will determine the schedule.

(II) Written direct statements means witness statements, testimony, and exhibits to be presented in proceedings, and such information as is necessary to establish terms and rates or the distribution of royalty payments. The Committee relied on the Federal Rule of Civil Procedure Rule 16 in creating this subsection. The Committee intends that the creation of this subsection will give CRJs early control of a proceeding, thereby ensuring that the proceedings will not be protracted as a result of mismanagement. The creation of a discovery schedule will minimize discovery costs by prohibiting participants from engaging in stall tactics and forcing participants to compress the amount of resources invested in the proceedings. The bill codifies the definition of “written direct statements” currently set forth under 37 CFR §251.43(b) and expands it by adding that other information deemed necessary to a proceeding under this chapter may be admitted.

(iii) Hearsay may be admitted in proceedings under this chapter to the extent deemed appropriate by the CRJ. The Committee intends that this subclause contemplates a more permissive approach to the admission of hearsay than the Federal Rules of Evidence. Instead of limiting admission of hearsay to certain specific instances, this subclause gives the CRJs full discretion as to the admissibility of hearsay. This subsection also gives the CRJs full discretion to decide how much credibility to accord any particular hearsay evidence. The Committee anticipates that the CRJs will exercise their discretion judiciously to ensure that the admission of hearsay leads to speedier, better supported, and less costly resolutions.

(iv) The discovery duration is 60 days, except when a CRJ orders otherwise in connection with the resolution, motions, orders, and disputes pending at the end of such period. As noted, the bill initiates ratesetting proceedings under chapter 8 far enough in advance so as to render certain there will always be a new rate in place prior to the expiration of an old rate. To achieve this objective, the substitute sets forth specific time periods for the various procedural and substantive steps participants complete throughout a ratesetting or distribution proceeding, (e.g., the 60-day discovery period). Concerns were expressed as to how motions that had been filed within the 60-day time period but remained pending after the 60-day time period should be resolved. Since the Committee’s intent is to create a complete and accurate record at the fact-finding level of the rate making and distribution process, this goal is best furthered by allowing timely-filed motions still pending at the conclusion of the 60-day discovery time period to be resolved.

(v) Any participant may, in writing, seek discovery of information and materials relevant and material to the proceeding. If the responding participant chooses not to comply, then the participant may request a CRJ to compel compliance. A CRJ may approve a request for compliance if the evidence that would be produced is relevant and material. Even if a request would produce relevant and material evidence, a CRJ may still refuse the request for good

cause shown. Good cause shown entails looking at such indicia as whether the discovery sought is unreasonably cumulative or duplicative, is obtainable from another more convenient source, is less burdensome, or is less expensive.

(vi) The rules in place under the current regulations for discovery are codified in this subsection. Parties involved in both the rate-making and distribution processes expressed to the Committee that there are substantial differences between the purposes of these two processes and therefore they should be treated separate and distinct. The Committee is cognizant of the inherent differences in the desired goal of each of these processes. For example, there has been a 25-year-plus history of cable royalty distribution proceedings among essentially the same participants in which a substantial body of precedent and practice has been established. This experience contrasts sharply with the recent § 114 proceedings designed to establish for the first time a rate for a new compulsory license. The Committee believes that the regulations for discovery currently in place function to achieve the desired goals of the Committee in relation to the distribution process.

(vii) The CRJs may issue subpoenas for the purpose of obtaining evidence that is relevant and material to the task of setting rates and terms of payment or making distributions to copyright owners and performers. The purpose of this provision is to give the decisionmakers a means to create a more complete record upon which to make their decisions. Historically, the process has allowed parties to circumscribe the type and amount of evidence considered by limiting discovery to documents underlying a party's direct case and by limiting the decisionmakers' authority to request additional evidence. Consequently, decisionmakers have set rates or made distributions in some instances without the benefit of the most probative evidence or access to witnesses that, for example, were better to explain to the intricacies of a study or explain the rationale for specific provisions in a negotiated agreement. The Committee believes that the grant of subpoena power to the CRJs will alleviate this problem by allowing the CRJs to subpoena additional witnesses and evidence when it is apparent the record is incomplete. The Committee does not anticipate that the use of subpoena power will become a common occurrence. The CRJs are expected to exercise this power judiciously and only in those instances where they believe a subpoena is necessary to obtain information that the parties have not provided and that the judges deem necessary to make their decision.

(viii) At the end of the discovery period the CRJs will order a 21-day settlement conference. In granting CRJs the necessary authority to adopt as binding on all participants settlement agreements proposed by some or all of the participants in rate-setting or distribution proceedings, the Committee intends that the bill will facilitate and encourage settlement agreements for determining royalty rates and establishing distribution of royalties throughout the entire process under Chapter 8. The Committee believes that by creating formalized time periods for encouraging settlement under the direction of the CRJs, parties will necessarily focus their attention on the goal of achieving a settlement. The Committee recognizes that information obtained during the discovery process may alter a pre-discovery position, making the affected party more like-

ly to engage in settlement negotiations. The Committee intends that the CRJs during this time period act in a capacity similar to that of federal judges during their FRCP Rule 16 scheduling conferences. The Committee expects CRJs to act in a manner which ensures that the timetable for proceedings as set forth in this bill as amended are adhered to, while helping to facilitate the ultimate goal of conflict resolution between participants. The Committee does not expect the CRJs to be present with parties during all discussions during this time period.

(c) Determination of Copyright Royalty Judges.

(1) Timing. Subsection 803(c)(1) states that CRJs must issue their determination within 11 months of the end of the 21-day settlement conference, except in the case of a ratemaking proceeding which expires on a specified date. In that case, a decision must be rendered within 15 days before the expiration of the then current statutory rates and terms.

This bill starts ratesetting proceedings under Chapter 8 far enough in advance to ensure certain there will always be a new rate in place prior to the expiration of an old rate. To achieve this objective, the substitute sets forth specific time periods for the various procedural and substantive steps participants must complete throughout a ratesetting or distribution proceeding. In keeping with this goal, this subsection ensures that decisions are rendered in a timely fashion.

(2) Rehearings. Subsection 803(c)(2)(A) provides that CRJs may, in exceptional cases, and upon the motion of a participant, order a rehearing after a determination has been issued. The Librarian of Congress believes that under existing law it is unclear whether he has the authority to correct errors or address unanticipated issues that have arisen subsequent to a determination. Many parties, including the Register of Copyrights, requested that the Committee provide the CRJs with continuing jurisdiction so that matters such as these could be addressed. The Committee expects that this provision will not be used as a “back door” for aggrieved parties to circumvent the process.

Subsection 803(c)(2)(B) provides that motions for rehearings must be filed within 15 days after the date on which the CRJs deliver their initial determination concerning rates and terms.

Subsection 803(c)(2)(C) states that any opposing party is not required to participate in a rehearing. Many parties voiced concerns that the rehearing mechanism in this substitute would force them to expend cost and time which, if given the option, they would choose not to do. Although the Committee believes that the CRJs should be given the first opportunity to address affected parties’ arguments, it also does not intend to impose rehearing proceedings upon participants.

Subsection 803(c)(2)(D) provides that no negative inference is to be drawn from lack of participation in a hearing.

(E) Continuity of Rates and Terms. Subsection 803(c)(2)(E)(i)(I) provides that if a rehearing decision in a rate making proceeding is not rendered before the expiration of the statutory license previously in effect, then the rates and terms set forth in the decision which are subject to the rehearing will remain in place until a final rehearing decision is rendered.

Subsection 803(c)(2)(E)(i)(II) states that in the case of a proceeding under § 114(f)(1)(C)¹³ or § 114(f)(2)(C),¹⁴ royalty rates and terms are, for purposes of § 114(f)(4)(B),¹⁵ deemed to have been set at those rates and terms contained in the initial determination of the CRJs that is the subject of the rehearing motion, as of the date of that determination.

Subsection 803(c)(2)(E)(ii) and (iii) provide that persons obligated to make royalty payments under the licenses which are the subject of determinations in a pending motion for a rehearing must continue to provide statements of account and any reports of use as well as make all royalty payments as required under the relevant regulations or determinations. When a copyright user or successor makes royalty payments to a person other than the Copyright Office, the entity designated by the CRJ to receive these royalties must return any excess amounts paid by those persons to the extent necessary to comply with a final determination by the CRJs. This must be done within 60 days after a motion for a rehearing is resolved or, if the motion is granted, within 60 days after the rehearing is concluded.

During the 107th Congress, a CARP was convened to set a rate for those licenses affecting webcasters and simulcasters. A rate was determined, and a situation arose where certain members of the webcasting and simulcasting market claimed that they could not pay that amount. More specifically, these parties argued that the prescribed rate exceeded their expectations and insufficient funds were therefore put aside.

Because of this complaint, the bill includes a provision that requires parties subject to statutory licenses to continue to fulfill their obligations under the applicable statute or regulation until new rates and terms have been established.

(3) Contents of Determination. A determination by the CRJs must be accompanied by the written record and set forth the facts that the CRJs found relevant to their determination. CRJs may specify notice and recordkeeping requirements for users of copyrights that apply in lieu of those that would otherwise apply under regulations.

¹³ 17 U.S.C. § 114(f)(1)(C) is amended in this substitute to state that procedures under subparagraphs §§ 114(f)(1)(A) and (B) are also to be initiated by a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining rates and terms of royalty payments with respect to those new types of services for the time period starting with the inception of such service and ending on the date on which the rates and terms for subscription digital audio transmission services most recently were determined under §§ 114(f)(1)(A) and (B), or such other period as the parties may agree.

¹⁴ 17 U.S.C. § 114(f)(2)(C) is amended in this substitute to state that procedures under subparagraphs §§ 114(f)(1)(A) and (B) are to be initiated by a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the time period starting with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services, as the case may be, most recently were determined under §§ 114(f)(1)(A) or (B), or such period as the parties may agree.

¹⁵ 17 U.S.C. § 114(f)(1)(B) is amended in this substitute to state that in the absence of license agreements negotiated under subparagraph § 114(f)(1)(A), which sets forth the dates by which voluntary negotiation proceedings initiated for the purpose of determining terms and rates for subscription transmission by preexisting subscription services and transmissions by preexisting satellite digital audio radio services, CRJs are to begin a proceeding pursuant to Chapter 8 to determine and publish in the Federal Register a schedule of rates and terms pertaining to these licenses.

Subsection 803(c)(3) addresses the need to preserve the facts as discovered for later potential “appealable” purposes as well as addresses concerns raised by various parties that under the current system, CARP decisions have been rendered without adequate explanations.

Although the CRJs’ core function with regard to rate making proceedings is to set rates and terms for statutory licenses, the issues relating to notice and recordkeeping or to notices of use are often integral to the issues of rates and terms of payment; therefore, the CRJs are best equipped to handle this task.

(4) Continuing Jurisdiction. Subsection 803(c)(4) allows CRJs to amend a determination or regulation issued pursuant to a determination to correct any technical errors in a determination or respond to unforeseen circumstances that preclude the proper effectuation of the determination.

The Copyright Office and other parties requested that a provision be included that afforded the CRJs with continuing jurisdiction, to correct actual errors and to respond to unforeseen circumstances. To illustrate, when the rates and terms for the §114 license were set in 2002, the question arose as to what would happen if the designated receiving agent were to go out of business. The Copyright Office took the position that the Librarian’s power to set rates and terms under the existing CARP system did not on its face include the power to amend the terms subsequent to a final determination. The inclusion of this provision now provides a mechanism under which such a potential circumstance might be addressed.

(5) Protective Order. Subsection 803(c)(5) provides that CRJs may issue orders to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public; except that all terms or rates of royalty payments or distributions must be published.

Participants expressed to the Committee the importance of protecting proprietary information during the course of a proceeding, after the official close of a proceeding, or in a final version of a report from the CRJs. Because parties to the proceedings depend on this continuing protection when they make the decision to produce sensitive commercial and financial information, they argued that they would be deterred from submitting that information as part of the proceeding record in the absence of continuing protection. Since an overarching goal of the Committee is to create a complete and full record, the Committee has included this provision to ensure that parties will submit all necessary information providing the CRJs the opportunity to make well-informed decisions based on a full and complete record of the contested issues in proceedings.

(6) Publication of Determination. Subsection 803(c)(6) mandates that the Librarian of Congress ensure that the CRJs determinations and corrections thereto are published in the Federal Register, published on the Internet, and made publicly available in any other manner which the Librarian considers appropriate. The Librarian must also make determinations, corrections, and the accompanying records available for public inspection and reproduction. Historically, the Librarian of Congress has been responsible for ensuring the publication of determinations in the Federal Register. In light

of *Buckley v. Valeo*,¹⁶ the Committee believes that the initial responsibility for publication should rest with the Librarian and that the Library may in its discretion delegate such responsibility.

(d) Judicial Review.

(1) Appeal. Subsection 803(d)(1) mandates that any determination by a CRJ may within 30 days after publication of the determination in the Federal Register, be appealed to the United States Court of Appeals for the District of Columbia Circuit by any aggrieved participant in the proceeding who fully participated in the proceeding and who would be bound by the determination. If no appeal is brought within that 30-day time period, the determination of the CRJs is final and the royalty fee or distribution determination is to take effect as set forth in subsection 803(d)(2). The United States Court of Appeals for the District of Columbia Circuit has historically been the court of review for many agency actions. The judges on that court are familiar with the standard of review for agency determinations and the often intricate body of law to which agencies are subject. As such, the Committee believes that these judges are best suited to review CRJ's determinations.

(2) Effect of Rates.

Subsection 803(d)(2)(A) states that where this title provides that royalty rates and terms expire on a certain date, any adjustment or determination by the CRJs of successor rates and terms will be effective as of the day following the date of expiration of previous rates and terms in effect, even if the determination of the CRJs are rendered on a later date.

Subsection 803(d)(2)(B) states that where rates and terms do not expire on a specified date or have not yet been established, successor rates or terms are to take effect on the first day of the second month that begins after publication of the CRJs determination in the Federal Register, unless this title provides otherwise. Rates and terms previously in effect are to remain in effect until successor rates and terms become effective.

Subsection 803(d)(2)(C)(i) provides that persons who are obligated to make royalty payments under §§ 111, 112, 114, 115, 116, 118, 119, or 1003 and who would be affected by a determination on appeal, must continue during the pendency of that appeal to provide statements of account, any report of use to the extent required, and pay royalties required under the relevant determination or regulations.

Subsection 803(d)(2)(C)(ii) provides that whenever a copyright user or its successor pays royalties to a person other than the Copyright Office, the entity designated by the CRJs to receive those royalties must, within 60 days after the final resolution of the appeal, return any excess amounts previously paid and any interest ordered by the Court of Appeal.

(3) Jurisdiction of Court. If the court, pursuant to § 706 of title 5, modifies or vacates a determination of the CRJs, the court may enter its own determination with respect to the amount or distribution of royalty fees and costs, and order the repayment of any ex-

¹⁶See Notes 3 and 4, *supra*. In *Buckley*, the Supreme Court ruled that a statute authorizing the President pro tempore of the Senate and the Speaker of the House of Representatives to appoint a majority of members of the FEC, was unconstitutional because some of the Commission's duties were Executive Branch functions. Consequently, a person exercising those functions "must be appointed in accordance with article II, sec. 2, clause 2 of the Constitution, the Appointments Clause." 424 U.S. at 126.

cess fees, the payment of any underpaid fees, and the payment of interest, in accordance with its final judgment. The court may also vacate the determination of the CRJ and remand the case to the CRJ for further proceedings. If a reviewing court finds that an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”¹⁷ that agency action is to be held unlawful and set aside. The Committee believes that § 706 of title 5 provides a clear statutory directive to the reviewing court.

(e) Administrative Matters.

(1) Deduction of Costs of Library of Congress and Copyright Office From Filing Fees.

Subsection 803(e)(1)(A) provides that the Librarian of Congress may, to the extent not otherwise provided for under this title, deduct from the \$150 filing fee generally required by participants for a particular proceeding under this chapter the reasonable costs incurred by the Librarian of Congress, the Copyright Office, the CRJ, and the three staff members. The Committee intends that the \$150 filing fee will be utilized to defray the administrative costs incurred by the Office in connection with proceedings under this chapter. Parties voiced concerns that it would be inequitable to use monies gained from the \$150 filing fees paid by parties in a particular proceeding to fund administrative costs accompanying another proceeding. As such, the Committee intends that monies collected from the \$150 filing fee be applied to the proceeding in which the parties who have paid that fee are participating.

Subsection 803(e)(1)(B) gives authorization for whatever funds are necessary to pay for the costs of proceedings under this chapter not covered by the monies collected from the \$150 filing fee generally required by participants. All funds made available under this subparagraph are to remain available until expended. Both copyright owners and users voiced serious concerns about the costs associated with the current CARP system. In particular, copyright owners noted that compulsory licenses allow the government to set prices for copyrighted works. They believe the CARP system compounds this burden by generating lower royalties.

The Committee intends that H.R. 1417 create a system responsible for ratesetting and distribution of funds for compulsory licenses that minimizes costs to participants. The Committee expects the participating parties to make good faith efforts to resolve their differences to the extent possible, either without engaging the process set forth in Chapter 8 or in the form of settlement during the process set forth in the bill as reported.

(2) Positions Required for Administration of Compulsory Licensing. Section 307¹⁸ of the Legislative Branch Appropriations Act does not apply to employee positions in the Library of Congress

¹⁷ 706 U.S.C. § 5(2)(C).

¹⁸ Section 307 of the Legislative Branch Appropriations Act states that the number of employee positions, on a full-time equivalent basis, for each covered entity shall be reduced by at least four percent from the level, other than those supported by gift and trust funds, as of September 30, 1992, or, with the approval of the Committee on Appropriations of the House of Representatives and the Committee on Appropriations of the Senate, as of a later date, but not later than September 30, 1993. At least 10 percent of the positions eliminated shall be positions the pay for which is equal to or greater than the annual rate of basic pay payable for grade GS-14 of the General Schedule. This required reduction shall be completed not later than September 30, 1995, with at least 62.5 percent of the reduction for each covered entity to be achieved by September 30, 1994. The Comptroller General shall carry out compliance reporting under this section.

that are required to be filled to carry out §§ 111, 112, 114, 115, 116, 118, or 119, or chapter 10.

Section 804. Institution and conclusion of proceedings

(a) Filing of Petition. Any owner or user of a copyrighted work whose royalty rates are subject to determinations and adjustments as provided in §§ 111, 112(e), 114, 115, 116, 118, 119, and 1004, or are established under this chapter before or after the enactment of H.R. 1417, may file a petition with the CRJs declaring that the petition requests a determination or adjustment of the rate during the calendar years specified in the schedule set forth in § 804(b). CRJs are to determine whether the petitioner has such a significant interest in the royalty rate in which a determination or adjustment is requested. If a petitioner is found to have a significant interest, the CRJs are to publish this determination with an accompanying explanation in the Federal Register. Responding specifically to the determination or adjustment of royalty rates in §§ 112 and 114, during the calendar years specified in § 804(b), the CRJ must notice commencement of proceedings under this chapter to be published in the Federal Register as provided in subsection 803(b)(1)(A).

By requiring the filing of petitions on dates certain, this mechanism ensures that ratesetting proceedings will be accomplished in a timely manner thereby ensuring that new rates are always in place prior to the expiration of old rates.

Some parties expressed concern that the current system subjects the Copyright Office and the arbitrators to an extreme workload fluctuation. They are either inundated with several proceedings at once or faced with periods where there is relatively little to do. To create a steady flow of work justifying the need for three CRJs and three professional staffers, as well as to alleviate the overwhelming burden of such immense workloads at given periods of time, H.R. 1417 changes the license period for all licenses to a five-year period, and staggers the actual dates at which they will be addressed. Filing petitions on dates certain will ensure that distribution and rate-making proceedings are conducted in a timely fashion.

(b) Timing of Proceedings.

(1) Section 111 proceedings. Rates for use of the cable license set forth in § 111 are to be considered under the new schedule in two different proceedings on two different timetables. In 2004, a petition to adjust the cable rates to reflect changes in national monetary inflation or deflation or changes in the rate charged for basic services may be filed with the CRJs, whereas consideration of the rates that reflect changes in rules and regulations of the Federal Communications Commission would take place the following year with the filing of a petition in 2005. Petitions to consider further adjustments to these rates may be initiated with the filing of a petition during each subsequent fifth calendar year.

(2) Certain § 112 proceedings. Two different schedules have been established for the consideration of the adjustments of rates and terms for use of the § 112 license for the making of ephemeral recordings to allow for the consideration of statutory rates with respect to different types of services. Petitions to adjust the rates of the § 112 license for use of the license by those services that are exempt from the digital performance right under § 114(d)(1)(C)(iv)

are to be filed in 2007 and each subsequent fifth calendar year, whereas those services that require a statutory license for making ephemeral recordings for the purpose of making digital transmissions of sound recordings under the statutory license set forth in § 114, are to file their petitions for consideration of the applicable § 112 rates concurrently with their petition to consider adjustment of the rates and terms for the § 114 license pursuant to § 804(b)(3), as explained below.

(3) Section 114 and corresponding 112 proceedings. The first rate adjustment proceeding scheduled to begin after the enactment of H.R. 1417 shall be for the reconsideration of the rates and terms for the use of the § 114 and § 112 licenses by nonsubscription transmission services and new subscription services. It shall commence immediately with the publication of a notice of commencement in the Federal Register in accordance with § 803(b)(1) and shall consider rates for the license period beginning on January 1, 2006 and ending on December 31, 2010. A petition requesting a proceeding to set rates and terms applicable to nonsubscription transmission services and new subscription services for the subsequent license periods may be filed with the CRJs in 2009, and in each fifth calendar year thereafter.

Similarly, petitions to consider the rates and terms for use of the §§ 112 and 114 licenses by preexisting subscription and satellite digital audio radio services may be filed in 2006 and again in 2011. Thereafter, proceedings to consider the §§ 112 and 114 licenses for use by preexisting subscription and satellite digital audio radio services may be filed in each subsequent fifth calendar year. However, the effective dates for these rates and terms differ for the first license period to accommodate the previous determinations made under the CARP system. Hence, the initial license period to be determined by the CRJs for the activities of the preexisting subscription services begins on January 1, 2008, and ends on December 31, 2012; and the license period for the preexisting satellite digital audio radio services begins on January 1, 2007, and ends on December 31, 2012, at which time, the license periods for the preexisting services become synchronized.

In the case of a new type of digital audio transmission service, a petition may be filed to set rates and terms for use of the § 114 license and the corresponding § 112 license. The CRJs must then publish a notice in the Federal Register to commence a rate adjustment proceeding for such service, and do so not later than 30 days after the filing of the petition.

(4) Section 115 proceedings. Petitions concerning the adjustment or determinations of rates for the making and distribution of phonorecords may be filed in 2006 and each subsequent fifth calendar year, or at such other times as the parties have agreed under § 115(c)(3)(B) and (C). Congress first granted the power to vary the rate setting schedule to the parties with respect to digital phonorecord deliveries (“DPDs”) in 1995, when it amended § 115 and adopted a mechanism to set rates for digital download on a five-year cycle. Congress chose this approach because it recognized the rapid pace at which digital technology was developing and the potential need to revisit the issue more frequently than once every 10 years as provided for the physical phonorecords.

However, with the advent of new and continually emerging business models, the distinction between physical phonorecords and DPDs has become less meaningful since 1995. Consequently, the bill as reported adjusts the schedule for setting physical phonorecords, providing for a single proceeding, the purpose of which will be to set rates for both physical phonorecords and DPDs and adopts a five-year cycle for reviewing these rates. Moreover, the Committee finds the market to be in a state of flux and acknowledges the need to maintain a degree of flexibility with respect to the schedule for reviewing the rates. Thus, the Committee has chosen to retain the provision whereby parties may vary the schedule in order to respond to changing technology and to meet marketplace demand.

(5) Section 116 proceedings. The amendment to § 116 maintains the prior mechanism for setting rates for § 116, including the provision for the filing of a petition to establish rates for the public performance of nondramatic musicals work by means of a coin-operated phonorecord player within one year of the expiration or termination of a negotiated license authorized by § 116. Because the rates for the § 116 license have been established through voluntary license agreements since 1990 and continue to be set in this manner, no statutory schedule has been established for the reconsideration of such rates.

(6) Section 118 proceedings. Parties with a significant interest in the § 118 rates may petition the CRJs to initiate a proceeding to reexamine the rates for the use of certain works in connection with noncommercial broadcasting in 2006 and in each subsequent fifth calendar year.

(7) Section 1004 proceedings. Subsection 804(b)(7) incorporates by reference the procedures specified in § 1004(a)(3) for initiating a proceeding to consider an adjustment to the royalty rates for the importation and distribution of, or the manufacture and distribution of, any digital audio recording device or digital audio recording media pursuant to § 1004.

(8) Proceedings concerning distribution of royalty fees. Proceedings concerning the distribution of royalty fees collected by the Copyright Office pursuant to §§ 111, 116, 119, and 1007 are not restricted to a set schedule. However, once the CRJs have determined that a controversy exists with respect to a particular distribution, they shall cause to be published in the Federal Register a notice announcing the commencement of a proceeding to determine the distribution of those funds that are in controversy.

Section 805. General rule for voluntarily negotiated agreements

Any rates or terms under this title that are agreed to by participants, adopted by the CRJs, and are in effect for a period shorter than would otherwise apply under a determination pursuant to this chapter are to remain in effect for the time period that would otherwise apply under a determination, except that the CRJ will adjust the rates pursuant to voluntary negotiations to reflect national monetary inflation during the additional period the rates remain in effect.

In addition, by extending the license periods subject to the proceedings under this chapter to five-year periods, the Committee believes that parties will resolve disputes in the marketplace or via

settlement, that might otherwise be dealt with through the process set forth in this chapter. While the Committee does not wish to restrict parties' ability to resolve disputes among themselves, it also believes that to engage the process as set out in this chapter prior to every five years would be a waste of government funding as well as contrary to the overall goal of eliminating participants costs.

Section 4. Definition

Section 101 is amended by inserting after the definition of copies, a CRJ is a CRJ appointed under section 802 of this title, and includes any individual serving as an interim CRJ.

Section 5. Technical Amendments

In general, §5 makes the necessary technical amendments to title 17 to confer authority on the CRJs to conduct proceedings to set rates and, as required, terms of payment, for use of the statutory licenses set forth in §§ 111, 112, 114, 115, 116, 118, 119, and chapter 10, and proceedings to determine the distribution of royalty fees collected under §§ 111, 119, and 1005. In conjunction with these responsibilities, the technical amendments grant specific authorization to the CRJs to accept or reject royalty claims filed under §§ 111, 119 and 1007; to make distributions of the royalty fees deposited with the Copyright Office (including partial distributions under certain circumstances); to prescribe regulations governing the proceedings, the filing of claims, and notice and record-keeping activities; and to make determinations whether a digital audio recording device or a digital audio interface device is subject to § 1002 and requires payment of the royalty fee under § 1003.

Previously, the Register of Copyrights prescribed regulations setting forth rules for providing notice of use of copyrighted works to the rightful owners. However, such terms have no direct bearing on copyright law or policy and, therefore, do not require the expertise of the Register for their formulation. Rather, such information is required only to insure the proper use of the license and to insure payment to the proper parties. For these reasons, the responsibility for establishing regulations governing notice and record of use has been given to the CRJs thus requiring amendment of §§ 112(e)(4), 114(f)(4)(A), 115(c)(3)(D), and 118(b)(3).

The CRJs also now have the responsibility for considering the status of digital audio technology devices and media and whether a specific device or media is subject to the royalty fees to be made under § 1003. Formerly, parties could agree to binding arbitration and have the matter decided by an independent panel of three arbitrators who considered the matter according to their own rules. However, such a process does not insure continuity in the decision making process, nor does it allow any agency or tribunal to develop a level of expertise with respect to the highly specialized nature of the inquiry. Consequently, the CRJs are vested with the authority to consider these questions, thereby allowing for the development of a consistent body of law on the question of what constitutes a digital audio technology device or media for purposes of chapter 10. Necessary technical amendments have been made to § 1010 to effectuate this change.

In 1995, Congress passed the Digital Performance Right in Sound Recording Act which, inter alia, amended § 115 to create a

new statutory license for the making and distribution of nondramatic musical works by means of a digital transmission. As part of that license, Congress included an antitrust exemption with respect to collective negotiations and agreements related to the new statutory license. However, the provision did not extend to negotiations and agreements related to the traditional mechanical license. Consequently, § 115(c)(3)(B) has been amended to cover collective negotiations and agreements relating to statutory licenses, in order to harmonize the licensing practices covered by section 115 and conform those practices with similar practices found elsewhere in the law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 17, UNITED STATES CODE

Chap.		Sec.
	1. Subject Matter and Scope of Copyright	101
	* * * * *	
	[8. Copyright Arbitration Royalty Panels	801]
	8. Proceedings by Copyright Royalty Judges	801
	* * * * *	

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

* * * * *

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An “anonymous work” is a work on the copies or phonorecords of which no natural person is identified as author.

* * * * *

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

A “*Copyright Royalty Judge*” is a *Copyright Royalty Judge* appointed under section 802 of this title, and includes any individual serving as an interim *Copyright Royalty Judge* under such section.

* * * * *

§ 111. Limitations on exclusive rights: Secondary transmissions

(a) * * *

* * * * *

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) * * *

(2) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Librarian of Congress in the event no controversy over distribution exists, or by **[a copyright arbitration royalty panel]** *the Copyright Royalty Judges* in the event a controversy over such distribution exists.

* * * * *

(4) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to statutory license fees for secondary transmissions shall file a claim with the **[Librarian of Congress]** *Copyright Royalty Judges*, in accordance with requirements that the **[Librarian of Congress]** *Copyright Royalty Judges* shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the **[Librarian of Congress]** shall, upon the recommendation of the Register of Copyrights, **[Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty fees. If the [Librarian determines] Copyright Royalty Judges determine that no such controversy exists, the Librarian shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled to such fees, or to their designated agents. If the [Librarian] Copyright Royalty Judges finds the existence of a controversy, the [Librarian] Copyright Royalty Judges shall, pursuant to chapter 8 of this title, [convene a copyright arbitration royalty panel] conduct a proceeding to determine the distribution of royalty fees.**

(C) During the pendency of any proceeding under this subsection, the **[Librarian of Congress]** *Copyright Royalty Judges* shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a con-

trov­er­sy exists, but shall have dis­cre­tion to proceed to dis­trib­ute any amounts that are not in con­tro­ver­sy.

* * * * *

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a) * * *

* * * * *

(e) STATUTORY LICENSE.—(1) * * *

* * * * *

(3) **[No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) of this subsection during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree.]** *Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) shall cover the 5-year period beginning on January 1 of the second year following the year in which the proceedings are commenced, or such other period as the parties may agree.* Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the **[Librarian of Congress]** *Copyright Royalty Judges* licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(4) **[In the absence of license agreements negotiated under paragraph (2), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (3), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree.]** *In the absence of license agreements negotiated under paragraphs (2) and (3), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree.* Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The **[copyright arbitration royalty panel]** *Copyright Royalty Judges* shall establish

rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the **copyright arbitration royalty panel** *Copyright Royalty Judges* shall base **its** *their* decision on economic, competitive, and programming information presented by the parties, including—

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the **copyright arbitration royalty** *Copyright Royalty Judges* panel may consider the rates and terms under voluntary license agreements negotiated as provided in paragraphs (2) and (3). The **Librarian of Congress** *Copyright Royalty Judges* shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

(5) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any determination by a copyright arbitration royalty panel **or decision by the Librarian of Congress**, *decision by the Librarian of Congress, or determination by the Copyright Royalty Judges.*

[(6)] Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (3) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1), during a 60-day period commencing on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be concluded in accordance with section 802.]

[(7)] (6)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

(i) by complying with such notice requirements as the **Librarian of Congress** *Copyright Royalty Judges* shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

* * * * *

[(8)] (7) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

[(9)] (8) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under sections 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

* * * * *

§ 114. Scope of exclusive rights in sound recordings

(a) * * *

* * * * *

(f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.—

(1)(A) [No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2001, or, if a copyright arbitration royalty panel is convened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel's determination).] *Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services shall cover the 5-year period beginning on January 1 of the year following the second year in which the proceedings are commenced, except where differential transitional periods are provided in section 804(b)(3), or such other period as the parties may agree. Such terms and*

rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the **【Librarian of Congress】** *Copyright Royalty Judges* licenses covering such subscription transmissions with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) **【**In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph.**】** *In the absence of license agreements negotiated under subparagraph (A), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), or such other date as the parties may agree.* In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the **【**copyright arbitration royalty panel**】** *Copyright Royalty Judges* may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in subparagraph (A).

【(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—

【(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational; and

【(II) in the first week of January 2001, and at 5-year intervals thereafter.

【(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

【(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I) of this subparagraph; or

[(II) on July 1, 2001, and at 5-year intervals thereafter.

[(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.]

(C) The procedures under subparagraphs (A) and (B) also shall be initiated pursuant to a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of transmission service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for subscription digital audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(2)(A) [No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree.] *Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) shall cover the 5-year period beginning on January 1 of the second year following the year in which the proceedings are commenced, except where different transitional periods are provided in section 804(b)(3)(A), or such other period as the parties may agree.* Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the [Librarian of Congress] *Copyright Royalty Judges* licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) [In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on

all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree.】 *In the absence of license agreements negotiated under subparagraph (A), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period specified in subparagraph (A), or such other period as the parties may agree.* Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, 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. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the 【copyright arbitration royalty panel】 *Copyright Royalty 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. In determining such rates and terms, the 【copyright arbitration royalty panel】 *Copyright Royalty Judges* shall base its decision on economic, competitive and programming information presented by the parties, including—

- (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
- (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the 【copyright arbitration royalty panel】 *Copyright Royalty Judges* may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).

【(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated in accordance with regulations that the Librarian of Congress shall prescribe—

- 【(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational; and

[(II) in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

[(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

[(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I); or

[(II) on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

[(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.]

(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services or preexisting satellite digital radio audio services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel [or decision by the Librarian of Congress], *decision by the Librarian of Congress, or determination by the Copyright Royalty Judges.*

(4)(A) The [Librarian of Congress] *Copyright Royalty Judges* shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

(i) by complying with such notice requirements as the [Librarian of Congress] *Copyright Royalty Judges* shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

* * * * *

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) * * *

* * * * *

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) * * *

* * * * *

(3)(A) A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance of the sound recording under section 106(6) of this title or of any nondramatic musical work embodied therein under section 106(4) of this title. For every digital phonorecord delivery by or under the authority of the compulsory licensee—

(i) * * *

(ii) on or after January 1, 1998, the royalty payable by the compulsory licensee shall be the royalty prescribed under subparagraphs (B) through **[(F)]** *(E)* and chapter 8 of this title.

(B) Notwithstanding any provision of the antitrust laws, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments **[(under this paragraph)]** *under this section* and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay or receive such royalty payments. Such authority to negotiate the terms and rates of royalty payments includes, but is not limited to, the authority to negotiate the year during which the royalty rates prescribed under **[(subparagraphs (B) through (F)]** *this subparagraph and subparagraphs (B) through (E)* and chapter 8 of this title shall next be determined.

(C) **[(During the period of June 30, 1996, through December 31, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subparagraph (A) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as the parties may agree.)]** *Voluntary negotiation proceedings initiated pursuant to a petition filed under section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by this sec-*

tion shall cover the period beginning with the effective date of such terms and rates, but not earlier than January 1 of the second year following the year in which the petition is filed, and ending on the effective date of successor terms and rates, or such other period as the parties may agree. Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may submit to the **【Librarian of Congress】** *Copyright Royalty Judges* licenses covering such activities. The parties to each negotiation proceeding shall bear their own costs.

(D) **【In the absence of license agreements negotiated under subparagraphs (B) and (C), upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C).】** *In the absence of license agreements negotiated under subparagraphs (B) and (C), the Copyright Royalty Judges shall commence proceedings pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period specified in subparagraph (C) or such other period as may be determined pursuant to subparagraphs (B) and (C), or such other period as the parties may agree.* Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the **【copyright arbitration royalty panel】** *Copyright Royalty Judges* may consider rates and terms under voluntary license agreements negotiated as provided in subparagraphs (B) and (C). The royalty rates payable for a compulsory license for a digital phonorecord delivery under this section shall be established de novo and no precedential effect shall be given to the amount of the royalty payable by a compulsory licensee for digital phonorecord deliveries on or before December 31, 1997. The **【Librarian of Congress】** *Copyright Royalty Judges* shall also 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.

(E)(i) License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by **the Librarian of Congress** *a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judges*. Subject to clause (ii), the royalty rates determined pursuant to subparagraph **[(C), (D) or (F)]** shall be given effect *(C) or (D) shall be given effect as to digital phonorecord deliveries* in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under paragraphs (1) and (3) of section 106 or commits another person to grant a license in that musical work under paragraphs (1) and (3) of section 106, to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.

(ii) The second sentence of clause (i) shall not apply to—

(I) a contract entered into on or before June 22, 1995, and not modified thereafter for the purpose of reducing the royalty rates determined pursuant to subparagraph **[(C), (D) or (F)]** *(C) or (D)* or of increasing the number of musical works within the scope of the contract covered by the reduced rates, except if a contract entered into on or before June 22, 1995, is modified thereafter for the purpose of increasing the number of musical works within the scope of the contract, any contrary royalty rates specified in the contract shall be given effect in lieu of royalty rates determined pursuant to subparagraph **[(C), (D) or (F)]** *(C) or (D)* for the number of musical works within the scope of the contract as of June 22, 1995; and

* * * * *

[(F)] The procedures specified in subparagraphs (C) and (D) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe, in each fifth calendar year after 1997, except to the extent that different years for the repeating and concluding of such proceedings may be determined in accordance with subparagraphs (B) and (C).**]**

[(G)] *(F)* Except as provided in section 1002(e) of this title, a digital phonorecord delivery licensed under this paragraph shall be accompanied by the information encoded in the sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

[(H)] *(G)(i)* A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, unless—

(I) * * *

* * * * *

【(I)】 *(H)* The liability of the copyright owner of a sound recording for infringement of the copyright in a nondramatic musical work embodied in the sound recording shall be determined in accordance with applicable law, except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the nondramatic musical work.

【(J)】 *(I)* Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, paragraph (6), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.

【(K)】 *(J)* Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under sections 106(4) and 106(6), (ii) except for compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under sections 106(1) and 106(3), including by means of a digital phonorecord delivery, or (iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

【(L)】 *(K)* The provisions of this section concerning digital phonorecord deliveries shall not apply to any exempt transmissions or retransmissions under section 114(d)(1). The exemptions created in section 114(d)(1) do not expand or reduce the rights of copyright owners under section 106(1) through (5) with respect to such transmissions and retransmissions.

* * * * *

§ 116. Negotiated licenses for public performances by means of coin-operated phonorecord players

(a) * * *

(b) NEGOTIATED LICENSES.—

(1) * * *

【(2) ARBITRATION.—Parties not subject to such a negotiation may determine, by arbitration in accordance with the provisions of chapter 8, the terms and rates and the division of fees described in paragraph (1).】

(2) *CHAPTER 8 PROCEEDING.—Parties not subject to such a negotiation may have the terms and rates and the division of fees described in paragraph (1) determined in a proceeding in accordance with the provisions of chapter 8.*

(c) LICENSE AGREEMENTS SUPERIOR TO **【COPYRIGHT ARBITRATION ROYALTY PANEL DETERMINATIONS】** *DETERMINATIONS BY COPYRIGHT ROYALTY JUDGES*.—License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, which are negotiated in accordance with subsection (b), shall be given effect in lieu of any otherwise applicable determination by **【a copyright arbitration royalty panel】** *the Copyright Royalty Judges*.

* * * * *

§ 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting

(a) * * *

(b) Notwithstanding any provision of the antitrust laws, any owners of copyright in published nondramatic musical works and published pictorial, graphic, and sculptural works and any public broadcasting entities, respectively, may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive payments.

(1) Any owner of copyright in a work specified in this subsection or any public broadcasting entity may submit to the **【Librarian of Congress】** *Copyright Royalty Judges* proposed licenses covering such activities with respect to such works. **【The Librarian of Congress shall proceed on the basis of the proposals submitted as well as any other relevant information. The Librarian of Congress shall permit any interested party to submit information relevant to such proceedings.】**

(2) License agreements, voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by **【the Librarian of Congress: *Provided*, That copies of such agreements are filed in the Copyright Office within thirty days of execution in accordance with regulations that the Register of Copyrights shall prescribe.】** *a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judge, if copies of such agreements are filed with the Copyright Royalty Judges within 30 days of execution in accordance with regulations that the Copyright Royalty Judges shall issue.*

【(3) In the absence of license agreements negotiated under paragraph (2), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Librarian of Congress.】

(3) Voluntary negotiation proceedings initiated pursuant to a petition filed under section 804(a) for the purpose of determining a schedule of terms and rates of royalty payments by public broadcasting entities to copyright owners in works specified by this subsection and the proportionate division of fees paid among various copyright owners shall cover the 5-year pe-

riod beginning on January 1 of the second year following the year in which the petition is filed. The parties to each negotiation proceeding shall bear their own costs.

(4) In the absence of license agreements negotiated under paragraph (2) or (3), the Copyright Royalty Judges shall, pursuant to chapter 8, conduct a proceeding to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Copyright Royalty Judges. In establishing such rates and terms the [copyright arbitration royalty panel] Copyright Royalty Judges may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2) or (3). The [Librarian of Congress] Copyright Royalty Judges shall also 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 by public broadcasting entities.

[(c) The initial procedure specified in subsection (b) shall be repeated and concluded between June 30 and December 31, 1997, and at five-year intervals thereafter, in accordance with regulations that the Librarian of Congress shall prescribe.]

[(d)] (c) Subject to the terms of any voluntary license agreements that have been negotiated as provided by subsection (b)(2) or (3), a public broadcasting entity may, upon compliance with the provisions of this section, including the rates and terms established by [a copyright arbitration royalty panel] the Copyright Royalty Judges under subsection [(b)(3)] (b)(4), engage in the following activities with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works:

(1) * * *

* * * * *

[(e)] (d) Except as expressly provided in this subsection, this section shall have no applicability to works other than those specified in subsection (b). Owners of copyright in nondramatic literary works and public broadcasting entities may, during the course of voluntary negotiations, agree among themselves, respectively, as to the terms and rates of royalty payments without liability under the antitrust laws. Any such terms and rates of royalty payments shall be effective upon filing [in the Copyright Office] with the Copyright Royalty Judges, in accordance with regulations that the [Register of Copyrights] Copyright Royalty Judges shall prescribe.

[(f)] (e) Nothing in this section shall be construed to permit, beyond the limits of fair use as provided by section 107, the unauthorized dramatization of a nondramatic musical work, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works, or the unauthorized use of any portion of an audiovisual work.

[(g)] (f) As used in this section, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or or-

ganization engaged in the activities described in paragraph (2) of subsection [(d)] (c).

§ 119. Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing

(a) * * *

(b) STATUTORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE HOME VIEWING.—

(1) * * *

* * * * *

(3) PERSONS TO WHOM FEES ARE DISTRIBUTED.—The royalty fees deposited under paragraph (2) shall, in accordance with the procedures provided by paragraph (4), be distributed to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the [Librarian of Congress] *Copyright Royalty Judges* under paragraph (4).

(4) PROCEDURES FOR DISTRIBUTION.—The royalty fees deposited under paragraph (2) shall be distributed in accordance with the following procedures:

(A) FILING OF CLAIMS FOR FEES.—During the month of July in each year, each person claiming to be entitled to statutory license fees for secondary transmissions for private home viewing shall file a claim with the [Librarian of Congress] *Copyright Royalty Judges*, in accordance with requirements that the [Librarian of Congress] *Copyright Royalty Judges* shall prescribe by regulation. For purposes of this paragraph, any claimants may agree among themselves as to the proportionate division of statutory license fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

[(B) DETERMINATION OF CONTROVERSY; DISTRIBUTIONS.—After the first day of August of each year, the Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Librarian of Congress finds the existence of a controversy, the Librarian of Congress shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty fees.]

[(C) WITHHOLDING OF FEES DURING CONTROVERSY.—During the pendency of any proceeding under this subsection, the Librarian of Congress shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.]

(B) *DETERMINATION OF CONTROVERSY; DISTRIBUTIONS.*—After the first day of August of each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) *WITHHOLDING OF FEES DURING CONTROVERSY.*—During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, subject to any distributions made under section 801(b)(3).

* * * * *

[CHAPTER 8—COPYRIGHT ARBITRATION ROYALTY PANELS

[Sec.

[801. Copyright arbitration royalty panels: Establishment and purpose.

[802. Membership and proceedings of copyright arbitration royalty panels.

[803. Institution and conclusion of proceedings.

[§ 801. Copyright arbitration royalty panels: Establishment and purpose

[(a) **ESTABLISHMENT.**—The Librarian of Congress, upon the recommendation of the Register of Copyrights, is authorized to appoint and convene copyright arbitration royalty panels.

[(b) **PURPOSES.**—Subject to the provisions of this chapter, the purposes of the copyright arbitration royalty panels shall be as follows:

[(1) To make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 114, 115, 116, and 119, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

[(A) To maximize the availability of creative works to the public;

[(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

[(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

[(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

[(2) To make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

[(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act: *Provided*, That if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted: *And provided further*, That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The copyright arbitration royalty panels may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

[(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the copyright arbitration royalty panels shall consider, among other factors, the economic impact on copyright owners and users: *Provided*, That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

[(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

[(D) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment.

[(3) To distribute royalty fees deposited with the Register of Copyrights under sections 111, 116, 119(b), and 1003, and to determine, in cases where controversy exists, the distribution of such fees.

[(c) RULINGS.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel, including—

[(1) authorizing the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Librarian has found are not subject to controversy; and

[(2) accepting or rejecting royalty claims filed under sections 111, 119, and 1007 on the basis of timeliness or the failure to establish the basis for a claim.

[(d) SUPPORT AND REIMBURSEMENT OF ARBITRATION PANELS.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter, and shall reimburse the arbitrators presiding in distribution proceedings at such intervals and in such manner as the Librarian shall provide by regulation. Each such arbitrator is an independent contractor acting on behalf of the United States, and shall be hired pursuant to a signed agreement between the Library of Congress and the arbitrator. Payments to the arbitrators shall be considered reasonable costs incurred by the Library of Congress and the Copyright Office for purposes of section 802(h)(1).

[(§ 802. Membership and proceedings of copyright arbitration royalty panels

[(a) COMPOSITION OF COPYRIGHT ARBITRATION ROYALTY PANELS.—A copyright arbitration royalty panel shall consist of 3 arbitrators selected by the Librarian of Congress pursuant to subsection (b).

[(b) SELECTION OF ARBITRATION PANEL.—Not later than 10 days after publication of a notice in the Federal Register initiating an arbitration proceeding under section 803, and in accordance with

procedures specified by the Register of Copyrights, the Librarian of Congress shall, upon the recommendation of the Register of Copyrights, select 2 arbitrators from lists provided by professional arbitration associations. Qualifications of the arbitrators shall include experience in conducting arbitration proceedings and facilitating the resolution and settlement of disputes, and any qualifications which the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt by regulation. The 2 arbitrators so selected shall, within 10 days after their selection, choose a third arbitrator from the same lists, who shall serve as the chairperson of the arbitrators. If such 2 arbitrators fail to agree upon the selection of a third arbitrator, the Librarian of Congress shall promptly select the third arbitrator. The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt regulations regarding standards of conduct which shall govern arbitrators and the proceedings under this chapter.

[(c) ARBITRATION PROCEEDINGS.—Copyright arbitration royalty panels shall conduct arbitration proceedings, subject to subchapter II of chapter 5 of title 5, for the purpose of making their determinations in carrying out the purposes set forth in section 801. The arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c). Any copyright owner who claims to be entitled to royalties under section 111, 112, 114, 116, or 119, any transmitting organization entitled to a statutory license under section 112(g), any person entitled to a statutory license under section 114(d), any person entitled to a compulsory license under section 115, or any interested copyright party who claims to be entitled to royalties under section 1006, may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party, and any other person participating in arbitration proceedings may submit such relevant information and proposals to the arbitration panel conducting the proceedings. In ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct. In distribution proceedings, the parties shall bear the cost in direct proportion to their share of the distribution.

[(d) PROCEDURES.—Effective on the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, the Librarian of Congress shall adopt the rules and regulations set forth in chapter 3 of title 37 of the Code of Federal Regulations to govern proceedings under this chapter. Such rules and regulations shall remain in effect unless and until the Librarian, upon the recommendation of the Register of Copyrights, adopts supplemental or superseding regulations under subchapter II of chapter 5 of title 5.

[(e) REPORT TO THE LIBRARIAN OF CONGRESS.—Not later than 180 days after publication of the notice in the Federal Register initiating an arbitration proceeding, the copyright arbitration royalty panel conducting the proceeding shall report to the Librarian of Congress its determination concerning the royalty fee or distribution of royalty fees, as the case may be. Such report shall be accompanied by the written record, and shall set forth the facts that the arbitration panel found relevant to its determination.

[(f) ACTION BY LIBRARIAN OF CONGRESS.—Within 90 days after receiving the report of a copyright arbitration royalty panel under subsection (e), the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel. The Librarian shall adopt the determination of the arbitration panel unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title. If the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of an additional 30-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be. The Librarian shall cause to be published in the Federal Register the determination of the arbitration panel, and the decision of the Librarian (including an order issued under the preceding sentence). The Librarian shall also publicize such determination and decision in such other manner as the Librarian considers appropriate. The Librarian shall also make the report of the arbitration panel and the accompanying record available for public inspection and copying.

[(g) JUDICIAL REVIEW.—Any decision of the Librarian of Congress under subsection (f) with respect to a determination of an arbitration panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. If no appeal is brought within such 30-day period, the decision of the Librarian is final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in the decision. When this title provides that the royalty rates or terms that were previously in effect are to expire on a specified date, any adjustment by the Librarian of those rates or terms shall be effective as of the day following the date of expiration of the rates or terms that were previously in effect, even if the Librarian's decision is rendered on a later date. The pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under sections 111, 112, 114, 115, 116, 118, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections. The court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner. If the court modifies the decision of the Librarian, the court shall have jurisdiction to enter its own determination with respect to the amount or distribution of royalty fees and costs, to order the repayment of any excess fees, and to order the payment of any unpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the decision of the arbitration panel and remand the case to the Librarian for arbitration proceedings in accordance with subsection (c).

[(h) ADMINISTRATIVE MATTERS.—

[(1) DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM ROYALTY FEES.—The Librarian of Congress and the Register of Copyrights may, to the extent not otherwise provided under this title, deduct from royalty fees deposited or collected under this title the reasonable costs in-

curred by the Library of Congress and the Copyright Office under this chapter. Such deduction may be made before the fees are distributed to any copyright claimants. In addition, all funds made available by an appropriations Act as offsetting collections and available for deductions under this subsection shall remain available until expended. In ratemaking proceedings, the reasonable costs of the Librarian of Congress and the Copyright Office shall be borne by the parties to the proceedings as directed by the arbitration panels under subsection (c).

[(2) POSITIONS REQUIRED FOR ADMINISTRATION OF COMPULSORY LICENSING.—Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.

[(§ 803. Institution and conclusion of proceedings

[(a)(1) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 112, 114, 115 and 116, and with respect to proceedings under subparagraphs (A) and (D) of section 801(b)(2), during the calendar years specified in the schedule set forth in paragraphs (2), (3), (4) and (5), any owner or user of a copyrighted work whose royalty rates are specified by this title, established by the Copyright Royalty Tribunal before the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, or established by a copyright arbitration royalty panel after such date of enactment, may file a petition with the Librarian of Congress declaring that the petitioner requests an adjustment of the rate. The Librarian of Congress shall, upon the recommendation of the Register of Copyrights, make a determination as to whether the petitioner has such a significant interest in the royalty rate in which an adjustment is requested. If the Librarian determines that the petitioner has such a significant interest, the Librarian shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter.

[(2) In proceedings under section 801(b)(2)(A) and (D), a petition described in paragraph (1) may be filed during 1995 and in each subsequent fifth calendar year.

[(3) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, a petition described in paragraph (1) may be filed in 1997 and in each subsequent tenth calendar year or as prescribed in section 115(c)(3)(D).

[(4)(A) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 116, a petition described in paragraph (1) may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

[(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year pe-

riod ending March 1, 1989, the Librarian of Congress shall, upon petition filed under paragraph (1) within 1 year after such termination or expiration, convene a copyright arbitration royalty panel. The arbitration panel shall promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of non-dramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the arbitration panel, in accordance with section 802, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(b).

[(5) With respect to proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 112 or 114, the Librarian of Congress shall proceed when and as provided by those sections.

[(b) With respect to proceedings under subparagraph (B) or (C) of section 801(b)(2), following an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established by the Copyright Royalty Tribunal or the Librarian of Congress, may, within twelve months, file a petition with the Librarian declaring that the petitioner requests an adjustment of the rate. In this event the Librarian shall proceed as in subsection (a) of this section. Any change in royalty rates made by the Copyright Royalty Tribunal or the Librarian of Congress pursuant to this subsection may be reconsidered in 1980, 1985, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(2)(B) or (C), as the case may be.

[(c) With respect to proceedings under section 801(b)(1), concerning the determination of reasonable terms and rates of royalty payments as provided in section 118, the Librarian of Congress shall proceed when and as provided by that section.

[(d) With respect to proceedings under section 801(b)(3) or (4), concerning the distribution of royalty fees in certain circumstances under section 111, 116, 119, or 1007, the Librarian of Congress shall, upon a determination that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.]

CHAPTER 8—PROCEEDINGS BY COPYRIGHT ROYALTY JUDGES

Sec.

801. *Copyright Royalty Judges; appointment and functions.*

802. *Copyright Royalty Judgeships; staff.*

803. *Proceedings of Copyright Royalty Judges.*

804. *Institution of proceedings.*

805. *General rule for voluntarily negotiated agreements.*

§801. Copyright Royalty Judges; appointment and functions

(a) *APPOINTMENT.—The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint one of the three as the Chief Copyright Royalty Judge. In making such appointments, the Librarian shall consult with the Register of Copyrights.*

(b) *FUNCTIONS.*—Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

(1) 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. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

(2) To make determinations concerning the adjustment of the copyright royalty rates under section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect—

(i) national monetary inflation or deflation; or

(ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of October 19, 1976,

except that—

(I) if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted; and

(II) no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber.

The Copyright Royalty Judges may consider all factors relating to the maintenance of such level of payments, including, as an extenuating factor, whether the industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 8, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to insure that the rates for the additional

distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Judges shall consider, among other factors, the economic impact on copyright owners and users; except that no adjustment in royalty rates shall be made under this subparagraph with respect to any distant signal equivalent or fraction thereof represented by—

(i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal; or

(ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section, and the royalty rate specified therein shall not be subject to adjustment.

(3) To authorize the distribution, under sections 111, 119, and 1007, of those royalty fees collected under sections 111, 119, and 1005, as the case may be, to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy. In cases where the Copyright Royalty Judges determine that controversy exists—

(A) the Copyright Royalty Judges shall determine the distribution of such fees, in accordance with section 111, 119, or 1007, as the case may be; and

(B) the Copyright Royalty Judges shall make a partial distribution of such fees during the pendency of the proceeding under subparagraph (A) if all participants under section 803(b)(2) in the proceeding—

(i) agree to such partial distribution;

(ii) sign an agreement obligating them to return any excess amounts to the extent necessary to comply with

the final determination on the distribution of the fees made under subparagraph (A); and

(iii) file the agreement with the Copyright Royalty Judges.

The Copyright Royalty Judges and any other officer or employee acting in good faith in distributing funds under subparagraph (B) shall not be held liable for the payment of any excess fees under subparagraph (B). The Copyright Royalty Judges shall, at the time the final determination is made, calculate any such excess amounts.

(4) To accept or reject royalty claims filed under section 111, 119, and 1007, on the basis of timeliness or the failure to establish the basis for a claim.

(5) To accept or reject rate adjustment petitions as provided in section 804 and petitions to participate as provided in section 803(b)(1) and (2).

(6) To determine the status of a digital audio recording device or a digital audio interface device under sections 1002 and 1003, as provided in section 1010.

(7)(A) To adopt as the basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding, except that—

(i) the Copyright Royalty Judges shall provide to the other participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, distribution, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as the basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, as the case may be; and

(ii) the Copyright Royalty Judges may decline to adopt the agreement as the basis for statutory terms and rates or as the basis for the distribution of statutory royalty payments, as the case may be, if any other participant described in subparagraph (A) objects to the agreement and the Copyright Royalty Judges find, based on the record before them, that the agreement is not likely to meet the statutory standard for setting the terms and rates, or for distributing the royalty payments, as the case may be.

(B) License agreements voluntarily negotiated pursuant to section 112(e)(5), 114(f)(3), 115(c)(3)(E)(i), 116(c), or 118(b)(2) that do not result in statutory terms and rates shall not be subject to clauses (i) and (ii) of subparagraph (A).

(c) RULINGS.—The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges. The Copyright Royalty Judges may consult with the Register of Copyrights in making any rulings under section 802(f)(1).

(d) ADMINISTRATIVE SUPPORT.—The Librarian of Congress shall provide the Copyright Royalty Judges with the necessary administrative services related to proceedings under this chapter.

(e) *LOCATION IN LIBRARY OF CONGRESS.*—The offices of the Copyright Royalty Judges and staff shall be in the Library of Congress.

§ 802. Copyright Royalty Judgeships; staff

(a) *QUALIFICATIONS OF COPYRIGHT ROYALTY JUDGES.*—Each Copyright Royalty Judge shall be an attorney who has at least 7 years of legal experience. The Chief Copyright Royalty Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. Of the other two Copyright Royalty Judges, one shall have significant knowledge of copyright law, and the other shall have significant knowledge of economics. An individual may serve as a Copyright Royalty Judge only if the individual is free of any financial conflict of interest under subsection (h). In this subsection, “adjudication” has the meaning given that term in section 551 of title 5, but does not include mediation.

(b) *STAFF.*—The Chief Copyright Royalty Judge shall hire 3 full-time staff members to assist the Copyright Royalty Judges in performing their functions.

(c) *TERMS.*—The terms of the Copyright Royalty Judges shall each be 6 years, except of the individuals first appointed, the Chief Copyright Royalty Judge shall be appointed to a term of 6 years, and of the remaining Copyright Royalty Judges, one shall be appointed to a term of 2 years, and the other shall be appointed to a term of 4 years. An individual serving as a Copyright Royalty Judge may be reappointed to subsequent terms. The term of a Copyright Royalty Judge shall begin when the term of the predecessor of that Copyright Royalty Judge ends. When the term of office of a Copyright Royalty Judge ends, the individual serving that term may continue to serve until a successor is selected.

(d) *VACANCIES OR INCAPACITY.*—

(1) *VACANCIES.*—If a vacancy should occur in the position of Copyright Royalty Judge, the Librarian of Congress shall act expeditiously to fill the vacancy, and may appoint an interim Copyright Royalty Judge to serve until another Copyright Royalty Judge is appointed under this section. An individual appointed to fill the vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed shall be appointed for the remainder of that term.

(2) *INCAPACITY.*—In the case in which a Copyright Royalty Judge is temporarily unable to perform his or her duties, the Librarian of Congress may appoint an interim Copyright Royalty Judge to perform such duties during the period of such incapacity.

(e) *COMPENSATION.*—

(1) *JUDGES.*—The Chief Copyright Royalty Judge shall receive compensation at the rate of basic pay payable for level AL-1 for administrative law judges pursuant to section 5372(b) of title 5, and each of the other two Copyright Royalty Judges shall receive compensation at the rate of basic pay payable for level AL-2 for administrative law judges pursuant to such section. The compensation of the Copyright Royalty Judges shall not be subject to any regulations adopted by the Office of Personnel Management pursuant to its authority under section 5376(b)(1) of title 5.

(2) *STAFF MEMBERS.*—Of the staff members appointed under subsection (b)—

(A) the rate of pay of one staff member shall be not more than the basic rate of pay payable for GS-15 of the General Schedule;

(B) the rate of pay of one staff member shall be not less than the basic rate of pay payable for GS-13 of the General Schedule and not more than the basic rate of pay payable for GS-14 of such Schedule; and

(C) the rate of pay for the third staff member shall be not less than the basic rate of pay payable for GS-8 of the General Schedule and not more than the basic rate of pay payable for GS-11 of such Schedule.

(f) *INDEPENDENCE OF COPYRIGHT ROYALTY JUDGE.*—

(1) *IN MAKING DETERMINATIONS.*—

(A) *IN GENERAL.*—Subject to subparagraph (B), the Copyright Royalty Judges shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact. Any such consultations between the Copyright Royalty Judges and the Register of Copyrights on any question of law shall be in writing or on the record.

(B) *NOVEL QUESTIONS.*—(i) Notwithstanding the provisions of subparagraph (A), in any case in which the Copyright Royalty Judges in a proceeding under this title are presented with a novel question of law concerning an interpretation of those provisions of this title that are the subject of the proceeding, the Copyright Royalty Judges shall request the Register of Copyrights, in writing, to submit a written opinion on the resolution of such novel question. The Register shall submit and make public that opinion within such time period as the Copyright Royalty Judges may prescribe. Any consultations under this subparagraph between the Copyright Royalty Judges and the Register of Copyrights shall be in writing or on the record. The opinion of the Register shall not be binding on the Copyright Royalty Judges, but the Copyright Royalty Judges shall take the opinion of the Register into account in making the judges' determination on the question concerned.

(ii) In clause (i), a "novel question of law" is a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a).

(2) *PERFORMANCE APPRAISALS.*—

(A) *IN GENERAL.*—Notwithstanding any other provision of law or any regulation of the Library of Congress, and subject to subparagraph (B), the Copyright Royalty Judges shall not receive performance appraisals.

(B) *RELATING TO SANCTION OR REMOVAL.*—To the extent that the Librarian of Congress adopts regulations under subsection (h) relating to the sanction or removal of a Copy-

right Royalty Judge and such regulations require documentation to establish the cause of such sanction or removal, the Copyright Royalty Judge may receive an appraisal related specifically to the cause of the sanction or removal.

(g) *INCONSISTENT DUTIES BARRED.*—No Copyright Royalty Judge may undertake duties inconsistent with his or her duties and responsibilities as Copyright Royalty Judge.

(h) *STANDARDS OF CONDUCT.*—The Librarian of Congress shall adopt regulations regarding the standards of conduct, including financial conflict of interest and restrictions against *ex parte* communications, which shall govern the Copyright Royalty Judges and the proceedings under this chapter.

(i) *REMOVAL OR SANCTION.*—The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability. Any such sanction or removal may be made only after notice and opportunity for a hearing, but the Librarian of Congress may suspend the Copyright Royalty Judge during the pendency of such hearing. The Librarian shall appoint an interim Copyright Royalty Judge during the period of any such suspension.

§ 803. Proceedings of Copyright Royalty Judges

(a) *PROCEEDINGS.*—

(1) *IN GENERAL.*—The Copyright Royalty Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration royalty panel determinations, rulings by the Librarian of Congress before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, prior determinations of Copyright Royalty Judges under this chapter, and decisions of the court in appeals under this chapter before, on, or after such effective date. Any participant in a proceeding under subsection (b)(2) may submit relevant information and proposals to the Copyright Royalty Judges.

(2) *JUDGES ACTING AS PANEL AND INDIVIDUALLY.*—The Copyright Royalty Judges shall preside over hearings in proceedings under this chapter *en banc*. The Chief Copyright Royalty Judge may designate a Copyright Royalty Judge to preside individually over such collateral and administrative proceedings, and over such proceedings under paragraphs (1) through (5) of subsection (b), as the Chief Judge considers appropriate.

(3) *DETERMINATIONS.*—Final determinations of the Copyright Royalty Judges in proceedings under this chapter shall be made by majority vote. A Copyright Royalty Judge dissenting from the majority on any determination under this chapter may issue his or her dissenting opinion, which shall be included with the determination.

(b) *PROCEDURES.*—

(1) INITIATION.—

(A) CALL FOR PETITIONS TO PARTICIPATE.—(i) Promptly upon the filing of a petition for a rate adjustment or determination under section 804(a) or 804(b)(8), or by no later than January 5 of a year specified in section 804 for the commencement of a proceeding if a petition has not been filed by that date, the Copyright Royalty Judges shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter calling for the filing of petitions to participate in a proceeding under this chapter for the purpose of making the relevant determination under section 111, 112, 114, 115, 116, 118, 119, 1004 or 1007, as the case may be.

(ii) Petitions to participate shall be filed by no later than 30 days after publication of notice of commencement of a proceeding, under clause (i), except that the Copyright Royalty Judges may, for substantial good cause shown and if there is no prejudice to the participants that have already filed petitions, accept late petitions to participate at any time up to the date that is 90 days before the date on which participants in the proceeding are to file their written direct statements.

(B) PETITIONS TO PARTICIPATE.—Each petition to participate in a proceeding shall describe the petitioner's interest in the subject matter of the proceeding. Parties with similar interests may file a single petition to participate.

(2) PARTICIPATION IN GENERAL.—Subject to paragraph (4), a person may participate in a proceeding under this chapter, including through the submission of briefs or other information, only if—

(A) that person has filed a petition to participate in accordance with paragraph (1) (either individually or as a group under paragraph (1)(B)), together with a filing fee of \$150;

(B) the Copyright Royalty Judges have not determined that the petition to participate is facially invalid; and

(C) the Copyright Royalty Judges have not determined, sua sponte or on the motion of another participant in the proceeding, that the person lacks a significant interest in the proceeding.

(3) VOLUNTARY NEGOTIATION PERIOD.—

(A) IN GENERAL.—Promptly after the date for filing of petitions to participate in a proceeding, the Copyright Royalty Judges shall make available to all participants in the proceeding a list of such participants and shall initiate a voluntary negotiation period among the participants.

(B) LENGTH OF PROCEEDINGS.—The voluntary negotiation period initiated under subparagraph (A) shall be 3 months.

(C) DETERMINATION OF SUBSEQUENT PROCEEDINGS.—At the close of the voluntary negotiation proceedings, the Copyright Royalty Judges shall, if further proceedings under this chapter are necessary, determine whether and to what extent paragraphs (4) and (5) will apply to the parties.

(4) SMALL CLAIMS PROCEDURE IN DISTRIBUTION PROCEEDINGS.—

(A) *IN GENERAL.*—If, in a proceeding under this chapter to determine the distribution of royalties, a participant in the proceeding asserts that the contested amount of the claim is \$10,000 or less, the Copyright Royalty Judges shall decide the controversy on the basis of the filing in writing of the initial claim, the initial response by any opposing participant, and one additional response by each such party. The participant asserting the claim shall not be required to pay the filing fee under paragraph (2).

(B) *BAD FAITH INFLATION OF CLAIM.*—If the Copyright Royalty Judges determine that a participant asserts in bad faith an amount in controversy in excess of \$10,000 for the purpose of avoiding a determination under the procedure set forth in subparagraph (A), the Copyright Royalty Judges shall impose a fine on that participant in an amount not to exceed the difference between the actual amount distributed and the amount asserted by the participant.

(5) *PAPER PROCEEDINGS IN RATEMAKING PROCEEDINGS.*—The Copyright Royalty Judges in proceedings under this chapter to determine royalty rates may decide, *sua sponte* or upon motion of a participant, to determine issues on the basis of initial filings in writing, initial responses by any opposing participant, and one additional response by each such participant. Prior to making such decision to proceed on such a paper record only, the Copyright Royalty Judges shall offer to all parties to the proceeding the opportunity to comment on the decision. The procedure under this paragraph—

(A) shall be applied in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure; and

(B) may be applied under such other circumstances as the Copyright Royalty Judges consider appropriate.

(6) *REGULATIONS.*—

(A) *IN GENERAL.*—The Copyright Royalty Judges may issue regulations to carry out their functions under this title. Not later than 120 days after Copyright Royalty Judges or interim Copyright Royalty Judges, as the case may be, are first appointed after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, such judges shall issue regulations to govern proceedings under this chapter.

(B) *INTERIM REGULATIONS.*—Until regulations are adopted under subparagraph (A), the Copyright Royalty Judges shall apply the regulations in effect under this chapter on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, to the extent such regulations are not inconsistent with this chapter, except that functions carried out under such regulations by the Librarian of Congress, the Register of Copyrights, or copyright arbitration royalty panels that, as of such date of enactment, are to be carried out by the Copyright Royalty Judges under this chapter, shall be carried out by the Copyright Royalty Judges under such regulations.

(C) *REQUIREMENTS.*—Regulations issued under subparagraph (A) shall include the following:

(i) *The written direct statements of all participants in a proceeding under paragraph (2) shall be filed by a date specified by the Copyright Royalty Judges, which may be no earlier than four months, and no later than five months, after the end of the voluntary negotiation period under paragraph (3). Notwithstanding the preceding sentence, a participant in a proceeding may, within 15 days after the end of the discovery period specified in clause (iii), file an amended written direct statement based on new information received during the discovery process.*

(ii)(I) *Following the submission to the Copyright Royalty Judges of written direct statements by the participants in a proceeding under paragraph (2), the judges shall meet with the participants for the purpose of setting a schedule for conducting and completing discovery. Such schedule shall be determined by the Copyright Royalty Judges.*

(II) *In this chapter, the term “written direct statements” means witness statements, testimony, and exhibits to be presented in the proceedings, and such other information that is necessary to establish terms and rates, or the distribution of royalty payments, as the case may be, as set forth in regulations issued by the Copyright Royalty Judges.*

(iii) *Hearsay may be admitted in proceedings under this chapter to the extent deemed appropriate by the Copyright Royalty Judges.*

(iv) *Discovery in such proceedings shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders and disputes pending at the end of such period.*

(v) *Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may, upon written notice, seek discovery of information and materials relevant and material to the proceeding. Any objection to any such discovery request shall be resolved by a motion or request to compel discovery made to the Copyright Royalty Judges. Each motion or request to compel discovery shall be determined by the Copyright Royalty Judges, or by a Copyright Royalty Judge when permitted under subsection (a)(2), who may approve the request only if the evidence that would be produced is relevant and material. A Copyright Royalty Judge may refuse a request to compel discovery of evidence that has been found to be relevant and material, only upon good cause shown. For purposes of the preceding sentence, the basis for “good cause” may only be that—*

(I) *the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another*

source that is more convenient, less burdensome, or less expensive;

(II) the participant seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(II) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues.

(vi) The rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, relating to discovery in proceedings under this title to determine the distribution of royalty fees, shall continue to apply to such proceedings on and after such effective date.

(vii) The Copyright Royalty Judges may issue subpoenas requiring the production of evidence or witnesses, but only if the evidence requested to be produced or that would be proffered by the witness is relevant and material.

(viii) The Copyright Royalty Judges shall order a settlement conference among the participants in the proceeding to facilitate the presentation of offers of settlement among the participants. The settlement conference shall be held during a 21-day period following the end of the discovery period.

(c) DETERMINATION OF COPYRIGHT ROYALTY JUDGES.—

(1) TIMING.—The Copyright Royalty Judges shall issue their determination in a proceeding not later than 11 months after the conclusion of the 21-day settlement conference period under subsection (b)(3)(C)(vi), but, in the case of a proceeding to determine successors to rates or terms that expire on a specified date, in no event later than 15 days before the expiration of the then current statutory rates and terms.

(2) REHEARINGS.—

(A) IN GENERAL.—The Copyright Royalty Judges may, in exceptional cases, upon motion of a participant under subsection (b)(2), order a rehearing, after the determination in a proceeding is issued under paragraph (1), on such matters as the Copyright Royalty Judges determine to be appropriate.

(B) TIMING FOR FILING MOTION.—Any motion for a rehearing under subparagraph (A) may only be filed within 15 days after the date on which the Copyright Royalty Judges deliver their initial determination concerning rates and terms to the participants in the proceeding.

(C) PARTICIPATION BY OPPOSING PARTY NOT REQUIRED.—In any case in which a rehearing is ordered, any opposing party shall not be required to participate in the rehearing.

(D) NO NEGATIVE INFERENCE.—No negative inference shall be drawn from lack of participation in a rehearing.

(E) CONTINUITY OF RATES AND TERMS.—(i) If the decision of the Copyright Royalty Judges on any motion for a re-

hearing is not rendered before the expiration of the statutory rates and terms that were previously in effect, in the case of a proceeding to determine successors to rates and terms that expire on a specified date, then—

(I) the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion shall be effective as of the day following the date on which the rates and terms that were previously in effect expire; and

(II) in the case of a proceeding under section 114(f)(1)(C) or 114(f)(2)(C), royalty rates and terms shall, for purposes of section 114(f)(4)(B), be deemed to have been set at those rates and terms contained in the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion, as of the date of that determination.

(ii) The pendency of a motion for a rehearing under this paragraph shall not relieve persons obligated to make royalty payments who would be affected by the determination on that motion from providing the statements of account and any reports of use, to the extent required, and paying the royalties required under the relevant determination or regulations.

(iii) Notwithstanding clause (ii), whenever royalties described in clause (ii) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the motion for rehearing is resolved or, if the motion is granted, within 60 days after the rehearing is concluded, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates by the Copyright Royalty Judges.

(3) CONTENTS OF DETERMINATION.—A determination of the Copyright Royalty Judges shall be accompanied by the written record, and shall set forth the facts that the Copyright Royalty Judges found relevant to their determination. Among other terms adopted in a determination, the Copyright Royalty Judges may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations.

(4) CONTINUING JURISDICTION.—The Copyright Royalty Judges may amend the determination or the regulations issued pursuant to the determination in order to correct any technical errors in the determination or to respond to unforeseen circumstances that preclude the proper effectuation of the determination.

(5) PROTECTIVE ORDER.—The Copyright Royalty Judges may issue such orders as may be appropriate to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public, except that any terms or rates of royalty payments or distributions may not be excluded.

(6) PUBLICATION OF DETERMINATION.—The Librarian of Congress shall cause the determination, and any corrections there-

to, to be published in the Federal Register. The Librarian of Congress shall also publicize the determination and corrections in such other manner as the Librarian considers appropriate, including, but not limited to, publication on the Internet. The Librarian of Congress shall also make the determination, corrections, and the accompanying record available for public inspection and copying.

(d) JUDICIAL REVIEW.—

(1) APPEAL.—Any determination of the Copyright Royalty Judges under subsection (c) may, within 30 days after the publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals for the District of Columbia Circuit, by any aggrieved participant in the proceeding under subsection (b)(2) who fully participated in the proceeding and who would be bound by the determination. If no appeal is brought within that 30-day period, the determination of the Copyright Royalty Judges shall be final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in paragraph (2).

(2) EFFECT OF RATES.—

(A) EXPIRATION ON SPECIFIED DATE.—When this title provides that the royalty rates and terms that were previously in effect are to expire on a specified date, any adjustment or determination by the Copyright Royalty Judges of successor rates and terms for an ensuing statutory license period shall be effective as of the day following the date of expiration of the rates and terms that were previously in effect, even if the determination of the Copyright Royalty Judges is rendered on a later date.

(B) OTHER CASES.—In cases where rates and terms do not expire on a specified date or have not yet been established, successor or new rates or terms shall take effect on the first day of the second month that begins after the publication of the determination of the Copyright Royalty Judges in the Federal Register, except as otherwise provided in this title, and the rates and terms previously in effect, to the extent applicable, shall remain in effect until such successor rates and terms become effective.

(C) OBLIGATION TO MAKE PAYMENTS.—(i) The pendency of an appeal under this subsection shall not relieve persons obligated to make royalty payments under section 111, 112, 114, 115, 116, 118, 119, or 1003, who would be affected by the determination on appeal, from providing the statements of account (and any report of use, to the extent required) and paying the royalties required under the relevant determination or regulations.

(ii) Notwithstanding clause (i), whenever royalties described in clause (i) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the final resolution of the appeal, return any excess amounts previously paid (and interest thereon, if ordered pursuant to paragraph (3)) to the extent necessary to

comply with the final determination of royalty rates on appeal.

(3) *JURISDICTION OF COURT.*—*If the court, pursuant to section 706 of title 5, modifies or vacates a determination of the Copyright Royalty Judges, the court may enter its own determination with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment. The court may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).*

(e) *ADMINISTRATIVE MATTERS.*—

(1) *DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM FILING FEES.*—

(A) *DEDUCTION FROM FILING FEES.*—*The Librarian of Congress may, to the extent not otherwise provided under this title, deduct from the filing fees collected under subsection (b) for a particular proceeding under this chapter the reasonable costs incurred by the Librarian of Congress, the Copyright Office, and the Copyright Royalty Judges in conducting that proceeding, other than the salaries of the Copyright Royalty Judges and the 3 staff members appointed under section 802(b).*

(B) *AUTHORIZATION OF APPROPRIATIONS.*—*There are authorized to be appropriated such sums as may be necessary to pay the costs of proceedings under this chapter not covered by the filing fees collected under subsection (b). All funds made available pursuant to this subparagraph shall remain available until expended.*

(2) *POSITIONS REQUIRED FOR ADMINISTRATION OF COMPULSORY LICENSING.*—*Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.*

§ 804. Institution of proceedings

(a) *FILING OF PETITION.*—*With respect to proceedings referred to in paragraphs (1) and (2) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 111, 112, 114, 115, 116, 118, and 1004, during the calendar years specified in the schedule set forth in subsection (b), any owner or user of a copyrighted work whose royalty rates are specified by this title, or are established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests a determination or adjustment of the rate. The Copyright Royalty Judges shall make a determination as to whether the petitioner has such a significant interest in the royalty rate in which a determination or adjustment is requested. If the Copyright Royalty Judges determine that the petitioner has such a significant interest, the Copyright Royalty Judges shall cause notice of this determination, with the reasons therefor, to be published in the Fed-*

eral Register, together with the notice of commencement of proceedings under this chapter. With respect to proceedings under paragraph (1) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 112 and 114, during the calendar years specified in the schedule set forth in subsection (b), the Copyright Royalty Judges shall cause notice of commencement of proceedings under this chapter to be published in the Federal Register as provided in section 803(b)(1)(A).

(b) TIMING OF PROCEEDINGS.—

(1) SECTION 111 PROCEEDINGS.—(A) A petition described in subsection (a) to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (A) or (D) of section 801(b)(2) applies may be filed during the year 2004 and in each subsequent fifth calendar year.

(B) In order to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (B) or (C) of section 801(b)(2) applies, within 12 months after an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests an adjustment of the rate. The Copyright Royalty Judges shall then proceed as set forth in subsection (a) of this section. Any change in royalty rates made under this chapter pursuant to this subparagraph may be reconsidered in the year 2005, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(3)(B) or (C), as the case may be. A petition for adjustment of rates under section 11(d)(1)(B) as a result of a change in the rules and regulations of the Federal Communications Commission shall set forth the change on which the petition is based.

(2) CERTAIN SECTION 112 PROCEEDINGS.—Proceedings under this chapter shall be commenced in the year 2007 to determine reasonable terms and rates of royalty payments for the activities described in section 112(e)(1) relating to the limitation on exclusive rights specified by section 114(d)(1)(C)(iv), to become effective on January 1, 2009. Such proceedings shall be repeated in each subsequent fifth calendar year.

(3) SECTION 114 AND CORRESPONDING 112 PROCEEDINGS.—

(A) FOR ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES.—Proceedings under this chapter shall be commenced as soon as practicable after the effective date of the Copyright Royalty and Distribution Reform Act of 2003 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of eligible nonsubscription transmission services and new subscription services, to be effective for the period beginning on January 1, 2006, and ending on December 31, 2010. Such proceedings shall next be commenced in January 2009 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2011. There-

after, such proceedings shall be repeated in each subsequent fifth calendar year.

(B) *FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES.*—Proceedings under this chapter shall be commenced in January 2006 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of preexisting subscription services, to be effective during the period beginning on January 1, 2008, and ending on December 31, 2012, and preexisting satellite digital audio radio services, to be effective during the period beginning on January 1, 2007, and ending on December 31, 2012. Such proceedings shall next be commenced in 2011 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2013. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

(C)(i) Notwithstanding any other provision of this chapter, this subparagraph shall govern proceedings commenced pursuant to sections 114(f)(1)(C) and 114(f)(2)(C) concerning new types of services.

(ii) Not later than 30 days after a petition to determine rates and terms for a new type of service that is filed by any copyright owner of sound recordings, or such new type of service, indicating that such new type of service is or is about to become operational, the Copyright Royalty Judges shall issue a notice for a proceeding to determine rates and terms for such service.

(iii) The proceeding shall follow the schedule set forth in such subsections (b), (c), and (d) of section 803, except that—

(I) the determination shall be issued by not later than 24 months after the publication of the notice under clause (ii); and

(II) the decision shall take effect as provided in subsections (c)(2) and (d)(2) of section 803 and section 114(f)(4)(B)(ii) and (C).

(iv) The rates and terms shall remain in effect for the period set forth in section 114(f)(1)(C) or 114(f)(2)(C), as the case may be.

(4) *SECTION 115 PROCEEDINGS.*—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment or determination of royalty rates as provided in section 115 may be filed in the year 2006 and in each subsequent fifth calendar year, or at such other times as the parties have agreed under section 115(c)(3)(B) and (C).

(5) *SECTION 116 PROCEEDINGS.*—(A) A petition described in subsection (a) to initiate proceedings under section 801(b) concerning the determination of royalty rates and terms as provided in section 116 may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such

works performed on coin-operated phonorecord players during the 1-year period ending March 1, 1989, the Copyright Royalty Judges shall, upon petition filed under paragraph (1) within 1 year after such termination or expiration, commence a proceeding to promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the Copyright Royalty Judges, in accordance with section 803, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(b).

(6) SECTION 118 PROCEEDINGS.—*A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 118 may be filed in the year 2006 and in each subsequent fifth calendar year.*

(7) SECTION 1004 PROCEEDINGS.—*A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment of reasonable royalty rates under section 1004 may be filed as provided in section 1004(a)(3).*

(8) PROCEEDINGS CONCERNING DISTRIBUTION OF ROYALTY FEES.—*With respect to proceedings under section 801(b)(3) concerning the distribution of royalty fees in certain circumstances under section 111, 116, 119, or 1007, the Copyright Royalty Judges shall, upon a determination that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.*

§ 805. General rule for voluntarily negotiated agreements

Any rates or terms under this title that—

(1) are agreed to by participants to a proceeding under section 803(b)(2),

(2) are adopted by the Copyright Royalty Judges as part of a determination under this chapter, and

(3) are in effect for a period shorter than would otherwise apply under a determination pursuant to this chapter,

shall remain in effect for such period of time as would otherwise apply under such determination, except that the Copyright Royalty Judges shall adjust the rates pursuant to the voluntary negotiations to reflect national monetary inflation during the additional period the rates remain in effect.

* * * * *

CHAPTER 10—DIGITAL AUDIO RECORDING DEVICES AND MEDIA

SUBCHAPTER A—DEFINITIONS

Sec.
1001. Definitions.

* * * * *

SUBCHAPTER D—PROHIBITION ON CERTAIN INFRINGEMENT ACTIONS,
REMEDIES, AND ARBITRATION

1008. Prohibition on certain infringement actions.

* * * * *

[1010. Arbitration of certain disputes.]

1010. *Determination of certain disputes.*

* * * * *

SUBCHAPTER C—ROYALTY PAYMENTS

* * * * *

§ 1004. Royalty payments

(a) DIGITAL AUDIO RECORDING DEVICES.—

(1) * * *

* * * * *

(3) LIMITS ON ROYALTIES.—Notwithstanding paragraph (1) or (2), the amount of the royalty payment for each digital audio recording device shall not be less than \$1 nor more than the royalty maximum. The royalty maximum shall be \$8 per device, except that in the case of a physically integrated unit containing more than 1 digital audio recording device, the royalty maximum for such unit shall be \$12. During the 6th year after the effective date of this chapter, and not more than once each year thereafter, any interested copyright party may petition the **[Librarian of Congress]** *Copyright Royalty Judges* to increase the royalty maximum and, if more than 20 percent of the royalty payments are at the relevant royalty maximum, the **[Librarian of Congress]** *Copyright Royalty Judges* shall prospectively increase such royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum; however the amount of any such increase as a percentage of the royalty maximum shall in no event exceed the percentage increase in the Consumer Price Index during the period under review.

* * * * *

§ 1006. Entitlement to royalty payments

(a) * * *

* * * * *

(c) ALLOCATION OF ROYALTY PAYMENTS WITHIN GROUPS.—If all interested copyright parties within a group specified in subsection (b) do not agree on a voluntary proposal for the distribution of the royalty payments within each group, the **[Librarian of Congress]** shall convene a copyright arbitration royalty panel which *Copyright Royalty Judges* shall, pursuant to the procedures specified under section 1007(c), allocate royalty payments under this section based on the extent to which, during the relevant period—

(1) * * *

* * * * *

§ 1007. Procedures for distributing royalty payments

(a) FILING OF CLAIMS AND NEGOTIATIONS.—

[(1) FILING OF CLAIMS.—During the first 2 months of each calendar year after calendar year 1992, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Librarian of Congress a claim for payments collected during the preceding year in such form and manner as the Librarian of Congress shall prescribe by regulation.]

(1) FILING OF CLAIMS.—*During the first 2 months of each calendar year, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Copyright Royalty Judges a claim for payments collected during the preceding year in such form and manner as the Copyright Royalty Judges shall prescribe by regulation.*

* * * * *

[(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—After the period established for the filing of claims under subsection (a), in each year after 1992, the Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.]

[(c) RESOLUTION OF DISPUTES.—If the Librarian of Congress finds the existence of a controversy, the Librarian shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty payments. During the pendency of such a proceeding, the Librarian of Congress shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Librarian of Congress shall, before authorizing the distribution of such royalty payments, deduct the reasonable administrative costs incurred by the Librarian under this section.]

(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—*After the period established for the filing of claims under subsection (a), in each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a). The Librarian of Congress shall, before such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.*

(c) RESOLUTION OF DISPUTES.—*If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments. During the pendency of such a proceeding, the Copyright Royalty Judges shall withhold*

from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Librarian of Congress shall, before such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.

SUBCHAPTER D—PROHIBITION ON CERTAIN
INFRINGEMENT ACTIONS, REMEDIES, AND ARBITRATION

* * * * *

§ 1010. Arbitration of certain disputes

[(a) SCOPE OF ARBITRATION.—Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to binding arbitration for the purpose of determining whether such device is subject to section 1002, or the basis on which royalty payments for such device are to be made under section 1003.

[(b) INITIATION OF ARBITRATION PROCEEDINGS.—Parties agreeing to such arbitration shall file a petition with the Librarian of Congress requesting the commencement of an arbitration proceeding. The petition may include the names and qualifications of potential arbitrators. Within 2 weeks after receiving such a petition, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of an arbitration proceeding. Such notice shall include the names and qualifications of 3 arbitrators chosen by the Librarian of Congress from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Librarian of Congress shall select, and from potential arbitrators listed in the parties' petition. The arbitrators selected under this subsection shall constitute an Arbitration Panel.

[(c) STAY OF JUDICIAL PROCEEDINGS.—Any civil action brought under section 1009 against a party to arbitration under this section shall, on application of one of the parties to the arbitration, be stayed until completion of the arbitration proceeding.

[(d) ARBITRATION PROCEEDING.—The Arbitration Panel shall conduct an arbitration proceeding with respect to the matter concerned, in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record. Any party to the arbitration may submit relevant information and proposals to the Panel. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

[(e) REPORT TO LIBRARIAN OF CONGRESS.—Not later than 60 days after publication of the notice under subsection (b) of the initiation of an arbitration proceeding, the Arbitration Panel shall report to the Librarian of Congress its determination concerning whether the device concerned is subject to section 1002, or the basis on which royalty payments for the device are to be made under section 1003. Such report shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination.

[(f) ACTION BY THE LIBRARIAN OF CONGRESS.—Within 60 days after receiving the report of the Arbitration Panel under subsection (e), the Librarian of Congress shall adopt or reject the determination of the Panel. The Librarian of Congress shall adopt the determination of the Panel unless the Librarian of Congress finds that the determination is clearly erroneous. If the Librarian of Congress rejects the determination of the Panel, the Librarian of Congress shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting forth the Librarian's decision and the reasons therefor. The Librarian of Congress shall cause to be published in the Federal Register the determination of the Panel and the decision of the Librarian of Congress under this subsection with respect to the determination (including any order issued under the preceding sentence).

[(g) JUDICIAL REVIEW.—Any decision of the Librarian of Congress under subsection (f) with respect to a determination of the Arbitration Panel may be appealed, by a party to the arbitration, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. The pendency of an appeal under this subsection shall not stay the decision of the Librarian of Congress. The court shall have jurisdiction to modify or vacate a decision of the Librarian of Congress only if it finds, on the basis of the record before the Librarian of Congress, that the Arbitration Panel or the Librarian of Congress acted in an arbitrary manner. If the court modifies the decision of the Librarian of Congress, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the decision of the Librarian of Congress and remand the case for arbitration proceedings as provided in this section.]

§ 1010. Determination of certain disputes

(a) SCOPE OF DETERMINATION.—*Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to petition the Copyright Royalty Judges to determine whether such device is subject to section 1002, or the basis on which royalty payments for such device are to be made under section 1003.*

(b) INITIATION OF PROCEEDINGS.—*The parties under subsection (a) shall file the petition with the Copyright Royalty Judges requesting the commencement of a proceeding. Within 2 weeks after receiving such a petition, the Chief Copyright Royalty Judge shall cause notice to be published in the Federal Register of the initiation of the proceeding.*

(c) STAY OF JUDICIAL PROCEEDINGS.—*Any civil action brought under section 1009 against a party to a proceeding under this section shall, on application of one of the parties to the proceeding, be stayed until completion of the proceeding.*

(d) PROCEEDING.—*The Copyright Royalty Judges shall conduct a proceeding with respect to the matter concerned, in accordance with such procedures as the Copyright Royalty Judges may adopt. The Copyright Royalty Judges shall act on the basis of a fully docu-*

mented written record. Any party to the proceeding may submit relevant information and proposals to the Copyright Royalty Judges. The parties to the proceeding shall each bear their respective costs of participation.

(e) *JUDICIAL REVIEW.*—Any determination of the Copyright Royalty Judges under subsection (d) may be appealed, by a party to the proceeding, in accordance with section 803(d) of this title. The pendency of an appeal under this subsection shall not stay the determination of the Copyright Royalty Judges. If the court modifies the determination of the Copyright Royalty Judges, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the determination of the Copyright Royalty Judges and remand the case for proceedings as provided in this section.

* * * * *

The Committee met, pursuant to notice, at 11 a.m., in room 1241, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A quorum is present.

The first item on the agenda is H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003. The Chair recognizes the gentleman from Texas, Mr. Smith, for a motion.

Mr. SMITH. Thank you, Mr. Chairman.

The Subcommittee on Courts, the Internet and Intellectual property reports favorably the bill H.R. 1417, with a single amendment in the nature of a substitute, and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point. The Subcommittee amendment in the nature of a substitute, which the members have before them, will be considered as read, considered as the original text for purposes of amendment, and open for amendment at any point.

Without objection all members' opening statements will be placed in the record.

[The amendment in the nature of a substitute follows:]

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Royalty and Distribution Reform Act of 2003".

SEC. 2. REFERENCE.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 17, United States Code.

SEC. 3. COPYRIGHT ROYALTY JUDGE AND STAFF.

(a) *IN GENERAL.*—Chapter 8 is amended to read as follows:

CHAPTER 8—PROCEEDINGS BY COPYRIGHT ROYALTY JUDGES

"Sec.

"801. Copyright Royalty Judges; appointment and functions.

"802. Copyright Royalty Judgeships; staff.

"803. Proceedings of Copyright Royalty Judges.

"804. Institution and conclusion of proceedings.

"805. Interim royalty payments.

"806. General rule for voluntarily negotiated agreements.

“§ 801. Copyright Royalty Judge; appointment and functions

“(a) APPOINTMENT.—The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint one of the three as the Chief Copyright Royalty Judge. In making such appointments, the Librarian may consult with the Register of Copyrights.

“(b) FUNCTIONS.—Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

“(1) To make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 114, 115, 119, and 1004.

“(2) To make determinations as to reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, and 118. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

“(A) To maximize the availability of creative works to the public.

“(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

“(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

“(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

“(3) To make determinations concerning the adjustment of the copyright royalty rates under section 111 solely in accordance with the following provisions:

“(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect—

“(i) national monetary inflation or deflation; or

“(ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of October 19, 1976,

except that—

“(I) if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted; and

“(II) no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber.

The Copyright Royalty Judges may consider all factors relating to the maintenance of such level of payments, including, as an extenuating factor, whether the industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

“(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 8, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Judges shall consider, among other factors, the economic impact on copyright owners and users; except that no adjustment in royalty rates shall be made under this subparagraph with respect to any distant signal equivalent or fraction thereof represented by—

“(i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal; or

“(ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

“(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

“(D) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section, and the royalty rate specified therein shall not be subject to adjustment.

“(4) To authorize the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Copyright Royalty Judges have found are not subject to controversy, in accordance with those sections, and to determine, in cases where controversy exists, the distribution of such fees, in accordance with those sections.

“(5) To accept or reject royalty claims filed under section 111, 119, and 1007, on the basis of timeliness or the failure to establish the basis for a claim.

“(6) To determine the status of a digital audio recording device or a digital audio interface device under sections 1002 and 1003, as provided in section 1010.

“(7) To adopt any agreement on terms and rates of royalty payments made pursuant to voluntary negotiation proceedings under section 112(e), 114, 115, 116, 118, and agreements made among the parties regarding the distribution of royalty payments under section 111, 119, or 1007, except that—

“(A) the Copyright Royalty Judges shall provide an opportunity to any party that would be bound by the terms, rates, or distribution set by the agreement to comment on the agreement; and

“(B) if any party described in the subparagraph (A) objects to the agreement, the Copyright Royalty Judges shall reject the agreement.

“(c) **RULINGS.**—The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges. The Copyright Royalty Judges may consult with the Register of Copyrights in making any rulings under this subsection.

“(d) **ADMINISTRATIVE SUPPORT.**—The Librarian of Congress shall provide the Copyright Royalty Judges with the necessary administrative services related to proceedings under this chapter.

“(e) **LOCATION IN LIBRARY OF CONGRESS.**—The offices of the Copyright Royalty Judges shall be in the Library of Congress.

“§ 802. Copyright Royalty Judgeships; staff

“(a) **QUALIFICATIONS OF COPYRIGHT ROYALTY JUDGES.**—Each Copyright Royalty Judge shall be an attorney who has at least 7 years of legal experience. The Chief Copyright Royalty Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. Of the other two Copyright Royalty Judges, one shall have significant knowledge of copyright law, and the other shall have significant knowledge of economics. An individual may serve as a Copyright Royalty Judge only if the individual is free of any financial conflict of interest under subsection (h). In this subsection, ‘adjudication’ has the meaning given that term in section 551 of title 5, but does not include mediation.

“(b) **STAFF.**—The Chief Copyright Royalty Judge shall hire 3 full-time staff members to assist the Copyright Royalty Judges in performing their functions.

“(c) **TERMS.**—The terms of the Copyright Royalty Judges shall each be 6 years, except of the individuals first appointed, the Chief Copyright Royalty Judge shall be appointed to a term of 6 years, and of the remaining Copyright Royalty Judges, one shall be appointed to a term of 2 years, and the other shall be appointed to a term of 4 years. An individual serving as a Copyright Royalty Judge may be reappointed to subsequent terms. The term of the Copyright Royalty Judge shall begin when the term of the predecessor of that Judge ends. When the term of office of a Copyright Royalty Judge ends, the individual serving that term may continue to serve until a successor is selected.

“(d) **VACANCIES OR INCAPACITY.**—

“(1) **VACANCIES.**—If a vacancy should occur in the position of Copyright Royalty Judge, the Librarian of Congress shall act expeditiously to fill the vacancy, and may appoint an interim Copyright Royalty Judge to serve until another

Copyright Royalty Judge is appointed under this section. An individual appointed to fill the vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed shall be appointed for the remainder of that term.

“(2) INCAPACITY.—In the case in which a Copyright Royalty Judge is temporarily unable to perform his or her duties, the Librarian of Congress may appoint an interim Copyright Royalty Judge to perform such duties during the period of such incapacity.

“(e) COMPENSATION.—The Chief Copyright Royalty Judge shall receive compensation at the rate of basic pay payable for level AL–1 for administrative law judges pursuant to section 5372(b) of title 5, each of the other two Copyright Royalty Judges shall receive compensation at the rate of basic pay payable for level AL–2 for administrative law judges pursuant to such section. The staff members appointed under subsection (b) shall each be paid at a rate of pay determined by the Librarian of Congress, except that—

“(1) the rate of pay for two of the staff members shall be not less than the basic rate of pay payable for GS–13 of the General Schedule and not more than the basic rate of pay payable for GS–14 of such Schedule; and

“(2) the rate of pay for the third staff member shall be not less than the basic rate of pay payable for GS–8 of the General Schedule and not more than the basic rate of pay payable for GS–11 of such Schedule.

The compensation of the Copyright Royalty Judges shall not be subject to any regulations adopted by the Office of Personnel Management pursuant to its authority under section 5376(b)(1) of title 5.

“(f) INDEPENDENCE OF COPYRIGHT ROYALTY JUDGE.—

“(1) IN MAKING DETERMINATIONS.—

“(A) IN GENERAL.—Subject to subparagraph (B), the Copyright Royalty Judges shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims and rate adjustment petitions, and in issuing rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights in making such determinations.

“(B) NOVEL QUESTIONS.—(i) In any case in which the Copyright Royalty Judges in a proceeding under this title are presented with a novel question concerning an interpretation of those provisions of this title that are the subject of the proceeding, the Copyright Royalty Judges shall request the Register of Copyrights, in writing, to submit a written opinion on the resolution of such novel question. The Register shall submit and make public that opinion within such time period as the Copyright Royalty Judges may prescribe. The opinion of the Register shall not be binding on the judges, but the Copyright Royalty Judges shall take the opinion of the Register into account in making the judges’ determination on the question concerned.

“(ii) In clause (i), a ‘novel’ question is a question that has not been determined in prior decisions, determinations, and rulings described in section 803(a).

“(2) PERFORMANCE APPRAISALS.—

“(A) IN GENERAL.—Notwithstanding any other provision of law or any regulation of the Library of Congress, and subject to subparagraph (B), the Copyright Royalty Judges shall not receive performance appraisals.

“(B) RELATING TO SANCTION OR REMOVAL.—To the extent that the Librarian of Congress adopts regulations under subsection (h) relating to the sanction or removal of a Copyright Royalty Judge and such regulations require documentation to establish the cause of such sanction or removal, the Copyright Royalty Judge may receive an appraisal related specifically to the cause of the sanction or removal.

“(g) INCONSISTENT DUTIES BARRED.—No Copyright Royalty Judge may undertake duties inconsistent with his or her duties and responsibilities as Copyright Royalty Judge.

“(h) STANDARDS OF CONDUCT.—The Librarian of Congress shall adopt regulations regarding the standards of conduct, including financial conflict of interest and restrictions against ex parte communications, which shall govern the Copyright Royalty Judges and the proceedings under this chapter.

“(i) REMOVAL OR SANCTION.—The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability. Any such sanction or removal may be made only after notice and opportunity for a hearing, but the Librarian of Congress may suspend the Copyright Roy-

alty Judge during the pendency of such hearing. The Librarian shall appoint an interim Copyright Royalty Judge during the period of any such suspension.

“§ 803. Proceedings of Copyright Royalty Judges

“(a) PROCEEDINGS.—

“(1) **IN GENERAL.**—The Copyright Royalty Judges shall conduct proceedings in accordance with subchapter II of chapter 5 of title 5, for the purpose of making determinations in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, and prior determinations of Copyright Royalty Judges under this chapter. Any person participating in proceedings under this chapter may submit relevant information and proposals to the Copyright Royalty Judges.

“(2) **JUDGES ACTING AS PANEL AND INDIVIDUALLY.**—The Copyright Royalty Judges shall preside over hearings in proceedings under this chapter en banc, but the Chief Copyright Royalty Judge may designate a Copyright Royalty Judge to preside individually over such collateral and administrative proceedings, and over such proceedings under paragraphs (2) and (3) of subsection (b), as the Chief Judge considers appropriate.

“(3) **DETERMINATIONS.**—Final determinations of the Copyright Royalty Judges in proceedings under this chapter shall be made by majority vote. A Copyright Royalty Judge dissenting from the majority on any determination under this chapter may issue his or her dissenting opinion, which shall be included with the determination.

“(b) PROCEDURES.—

“(1) **PARTICIPATION IN GENERAL.**—Subject to paragraph (2), a person may participate in proceedings under this chapter, including through the submission of briefs or other information, only if that person files with the Copyright Royalty Judges, in such form and manner as the Copyright Royalty Judges may by regulation prescribe, a notice of intent to participate in the proceedings, together with a filing fee of \$150, before the proceedings commence.

“(2) SMALL CLAIMS PROCEDURE IN DISTRIBUTION PROCEEDINGS.—

“(A) **IN GENERAL.**—If the amount in controversy that a party to a proceeding under this chapter to determine the distribution of royalties asserts is \$10,000 or less, the Copyright Royalty Judges shall decide the controversy on the basis of the filing in writing of the initial claim, initial response by any opposing party, and one additional response by each such party. The party asserting the claim shall not be required to pay the filing fee under paragraph (1).

“(B) **BAD FAITH INFLATION OF CLAIM.**—If the Copyright Royalty Judges determine that a party asserts in bad faith an amount in controversy in excess of \$10,000 for the purpose of avoiding a determination under the procedure set forth in subparagraph (A), the Copyright Royalty Judges shall impose a fine on that party, in an amount not to exceed the difference between the actual amount distributed and the amount asserted by the party.

“(3) **PAPER PROCEEDINGS IN RATEMAKING PROCEEDINGS.**—The Copyright Royalty Judges in proceedings under this chapter to determine royalty rates may decide, sua sponte or upon motion of a party, to determine issues on the basis of initial filings in writing, initial responses by any opposing party, and one additional response by each such party. Prior to making such decision, the judges shall offer to all parties to the proceeding the opportunity to comment on the decision. The procedure under this paragraph would apply in cases in which a small amount of royalties are involved, there is no genuine issue of material fact, there is no need for evidentiary hearings, and under such other circumstances as the judges consider appropriate.

“(4) REGULATIONS.—

“(A) **IN GENERAL.**—The Copyright Royalty Judges shall, not later than 120 days after the effective date of the Copyright Royalty and Distribution Reform Act of 2003, issue regulations to govern proceedings under this chapter.

“(B) **INTERIM REGULATIONS.**—Until regulations are adopted under subparagraph (A), the Copyright Royalty Judges shall apply the regulations in effect under this chapter on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, to the extent such regulations are not inconsistent with this chapter, except that functions carried out under such regulations by the Librarian of Congress, the Register of Copyrights, or copyright arbitration royalty panels that, as of such date of

enactment, are to be carried out by the Copyright Royalty Judges under this chapter, shall be carried out by the Copyright Royalty Judges under such regulations.

“(C) REQUIREMENTS.—Regulations issued under subparagraph (A) shall include the following:

“(i) The Federal Rules of Evidence with respect to hearsay shall apply to proceedings under this chapter.

“(ii) Discovery in such proceedings shall be permitted for a period of 60 days.

“(iii) The Copyright Royalty Judges shall order a settlement conference among the parties for the presentation of offers of settlement among the parties. The settlement conference shall be held during a 21-day period following the end of the discovery period and before the submission in writing to the judges of the testimony, witnesses, and exhibits to be presented in the proceedings. Copyright Royalty Judges may accept settlement agreements until the end of that 21-day period.

“(iv) A defending party to a claim in a proceeding to determine the distribution of royalties may, not later than the day on which the settlement conference under clause (iii) ends, serve upon an adverse party, with notice thereof to the Chief Copyright Royalty Judge, an offer to allow for a determination to be made against the adverse party for the claimed money or property or other specified amount. If before the day on which hearings in the proceeding begin an offer under this clause is accepted, the parties shall file the offer and notice of acceptance of the offer with the Copyright Royalty Judges, who shall enter their determination pursuant thereto. If the final determination in the proceeding is not more favorable to the offeree than the offer made under this clause, then the Copyright Royalty Judges shall order the offeree to pay the reasonable attorney’s fees of the defending party who made the offer that is attributable to the offer.

“(v) Each request to compel discovery in proceedings to determine royalty rates must be approved by a Copyright Royalty Judge, who may approve the request only if the evidence that would be produced is relevant and material. A Copyright Royalty Judge may refuse a request to compel discovery of evidence that has been found to be relevant and material, only upon good cause shown.

“(vi) The Copyright Royalty Judges may issue subpoenas requiring the production of evidence or witnesses, but only if the evidence requested to be produced or that would be proffered by the witness is relevant and material.

“(c) DETERMINATION OF COPYRIGHT ROYALTY JUDGES.—

“(1) TIMING.—Not later than 6 months after the date on which the settlement conference convened under subsection (b)(3)(C)(iii) begins, the Copyright Royalty Judges shall issue their determination in the proceeding, except that the Copyright Royalty Judges may extend that 6-month period to a period of up to 1 year for that proceeding if the Copyright Royalty Judges determine such extension to be necessary.

“(2) REHEARINGS.—The Copyright Royalty Judges may, in exceptional cases, upon motion of a party to proceedings under this chapter, order a rehearing on such matters as the judges determine to be appropriate. In the case in which a rehearing is ordered, any opposing party shall not be required to participate in the rehearing.

“(3) CONTENTS OF DETERMINATION.—The determination of the Copyright Royalty Judges shall be accompanied by the written record, and shall set forth the facts that the Copyright Royalty Judges found relevant to their determination.

“(4) CORRECTION OF ERRORS.—The Copyright Royalty Judges may, after the determination is issued, correct any technical errors in the determination and correct any error in the determination that would prevent the determination from becoming effective.

“(5) PROTECTIVE ORDER.—The Copyright Royalty Judges may issue an order excluding confidential information from the record of the determination that is published or made available to the public, except that any terms or rates of royalty payments or distributions may not be excluded.

“(6) PUBLICATION OF DETERMINATION.—The Chief Copyright Royalty Judge shall cause the determination, and any corrections thereto, to be published in the Federal Register. The Chief Copyright Royalty Judge shall also publicize the determination and corrections in such other manner as the Chief Copyright Royalty Judge considers appropriate, including, but not limited to, publication on the official website of the Copyright Office. The Chief Copyright Royalty

Judge shall also make the determination and corrections and the accompanying record available for public inspection and copying.

“(d) JUDICIAL REVIEW.—

“(1) APPEAL.—Any determination of the Copyright Royalty Judges under subsection (c) may, within 30 days after the publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals for the District of Columbia Circuit, by any party who would be bound by the determination, who, under subsection (b)(1), filed a notice of intent to participate in the proceeding pursuant to which the determination was made, and who submitted in writing to the Copyright Royalty Judges the testimony, witnesses, and exhibits to be presented in the proceeding. If no appeal is brought within that 30-day period, the determination of the Copyright Royalty Judges is final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in the determination of the Copyright Royalty Judges.

“(2) EFFECT OF RATES.—When this title provides that the royalty rates or terms that were previously in effect are to expire on a specified date, any adjustment by the Copyright Royalty Judges of those rates or terms shall be effective as of the day following the date of expiration of the rates or terms that were previously in effect, even if the Copyright Royalty Judges’ determination is rendered on a later date. The pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under section 111, 112, 114, 115, 116, 118, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections.

“(3) JURISDICTION OF COURT.—The court shall have jurisdiction to modify or vacate a determination of the Copyright Royalty Judges only if it finds, on the basis of the record before the Copyright Royalty Judges, that the Copyright Royalty Judges acted in an arbitrary or capricious manner. If the court modifies the determination of the Copyright Royalty Judges, the court shall have jurisdiction to enter its own determination with respect to the amount or distribution of royalty fees and costs, to order the repayment of any excess fees, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for proceedings in accordance with subsection (a).

“(e) ADMINISTRATIVE MATTERS.—

“(1) DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM FILING FEES.—

“(A) DEDUCTION FROM FILING FEES.—The Librarian of Congress may, to the extent not otherwise provided under this title, deduct from the filing fees collected under subsection (b) for a particular proceeding under this chapter the reasonable costs incurred by the Librarian of Congress, the Copyright Office, and the Copyright Royalty Judges in conducting that proceeding, other than the salaries of the Copyright Royalty Judges and the 3 staff members appointed under section 802(b).

“(B) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to pay the costs of proceedings under this chapter not covered by the filing fees collected under subsection (b). All funds made available pursuant to this subparagraph shall remain available until expended.

“(2) POSITIONS REQUIRED FOR ADMINISTRATION OF COMPULSORY LICENSING.—Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.

“§ 804. Institution and conclusion of proceedings

“(a) FILING OF PETITION.—With respect to proceedings under paragraphs (1) and (2) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 111, 112, 114, 115, 116, 118, and 1004, during the calendar years specified in the schedule set forth in subsection (b), any owner or user of a copyrighted work whose royalty rates are specified by this title, or are established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests a determination or adjustment of the rate. The Copyright Royalty Judges shall make a determination as to whether the petitioner has such a significant interest in the royalty rate in which a determination or adjustment is requested. If the Copyright Royalty Judges determine that the peti-

tioner has such a significant interest, the Copyright Royalty Judges shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter.

“(b) TIMING OF PETITIONS.—

“(1) SECTION 111 PROCEEDINGS.—(A) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 111 to which subparagraph (A) or (D) of section 801(b)(3) applies, a petition described in subsection (a) may be filed during the year 2005 and in each subsequent fifth calendar year.

“(B) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 111 to which subparagraph (B) or (C) of section 801(b)(3) applies, within 12 months after an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests an adjustment of the rate. The Copyright Royalty Judges shall then proceed as set forth in subsection (a) of this section. Any change in royalty rates made under this chapter pursuant to this subparagraph may be reconsidered in the year 2005, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(3)(B) or (C), as the case may be.

“(2) SECTION 115 PROCEEDINGS.—In proceedings under section 801(b)(1) or (2) concerning the adjustment or determination of royalty rates as provided in section 115, a petition described in paragraph (1) may be filed in the year 2007 and in each subsequent fifth calendar year or as prescribed in section 115(c)(3)(B), (C), or (D).

“(3) SECTION 116 PROCEEDINGS.—(A) In proceedings under section 801(b)(2) concerning the determination of royalty rates and terms as provided in section 116, a petition described in paragraph (1) may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

“(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending March 1, 1989, the Copyright Royalty Judges shall, upon petition filed under paragraph (1) within 1 year after such termination or expiration, commence a proceeding to promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the Copyright Royalty Judges, in accordance with section 803, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(b).

“(4) SECTION 112 AND 114.—With respect to proceedings under section 801(b)(2) concerning the determination of reasonable terms and rates of royalty payments as provided in section 112 or 114, the Librarian of Congress and the Copyright Royalty Judges shall proceed when and as provided by those sections.

“(5) SECTION 118 PROCEEDINGS.—With respect to proceedings under section 801(b)(2) concerning the determination of reasonable terms and rates of royalty payments as provided in section 118, the Librarian of Congress and the Copyright Royalty Judges shall proceed when and as provided by that section.

“(6) PROCEEDINGS CONCERNING DISTRIBUTION OF ROYALTY FEES.—With respect to proceedings under section 801(b)(5) concerning the distribution of royalty fees in certain circumstances under section 111, 116, 119, or 1007, the Copyright Royalty Judges shall, upon a determination that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.

“§ 805. Interim royalty payments

“Whenever royalty rates or terms provided in this title expire before new rates and terms are provided in this title to replace the expired rates and terms, persons obligated to make such payments shall continue to make the payments under the expired rates and terms until the new rates and terms take effect. If the new rates and terms require lower payments, refunds of the overpayments shall be made retroactively to the date the new terms and rates are effective. If the new terms

and rates require higher payments, the Copyright Royalty Judges shall specify the time within which the persons obligated to make such payments must pay the difference between the expired rates and terms and the new rates and terms for such period that the new rates and terms are applied retroactively.

“§ 806. General rule for voluntarily negotiated agreements

“Any rates or terms under this title that—

“(1) are agreed to during the voluntary negotiation periods provided for under this title,

“(2) are adopted by the Copyright Royalty Judges as part of a determination under this chapter, and

“(3) are in effect for a period shorter than would otherwise apply under a determination pursuant to this chapter,

shall remain in effect for such period of time as would otherwise apply under such determination, except that the Copyright Royalty Judges shall adjust the rates pursuant to the voluntary negotiations to reflect national monetary inflation during the additional period the rates remain in effect.”

(b) CONFORMING AMENDMENT.—The table of chapters for title 17, United States Code, is amended by striking the item relating to chapter 8 and inserting the following:

“8. PROCEEDINGS OF COPYRIGHT ROYALTY JUDGE 801”.

SEC. 4. DEFINITION.

Section 101 is amended by inserting after the definition of “copies” the following:

“A ‘Copyright Royalty Judge’ is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.”

SEC. 5. TECHNICAL AMENDMENTS.

(a) CABLE RATES.—Section 111(d) is amended—

(1) in paragraph (2), in the second sentence, by striking “a copyright royalty panel” and inserting “the Copyright Royalty Judges.”; and

(2) in paragraph (4)—

(A) in subparagraph (A), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”;

(B) in subparagraph (B)—

(i) in the first sentence, by striking “Librarian of Congress shall, upon the recommendation of the Register of Copyrights,” and inserting “Copyright Royalty Judges shall”;

(ii) in the second sentence, by striking “Librarian determines” and inserting “Copyright Royalty Judges determine”; and

(iii) in the third sentence—

(I) by striking “Librarian” each place it appears and inserting “Copyright Royalty Judges”; and

(II) by striking “convene a copyright arbitration royalty panel” and inserting “conduct a proceeding”; and

(C) in subparagraph (C), by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”.

(b) EPHEMERAL RECORDINGS.—Section 112(e) is amended—

(1) in paragraph (3)—

(A) by amending the first sentence to read as follows: “During the first week of January 2007, the Chief Copyright Royalty Judge shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) during the period beginning on January 1, 2007, and ending on December 31, 2011, or such other date as the parties may agree.”; and

(B) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(2) in paragraph (4)—

(A) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under paragraph (2), during the 60-day period beginning on the date that is 6 months after publication of the notice specified in paragraph (3), and upon the filing of a petition in accordance with section 804(a), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection

during the 5-year period specified in paragraph (3), or such other date as the parties may agree.”;

(B) by striking “copyright arbitration royalty panel” each subsequent place it appears and inserting “Copyright Royalty Judges”;

(C) in the fourth sentence, by striking “its decision” and inserting “their decision”; and

(D) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(3) in paragraph (5), by striking “or decision by the Librarian of Congress” and inserting “, decision by Librarian of Congress, or determination by the Copyright Royalty Judges”; and

(4) in paragraph (6)—

(A) in the first sentence—

(i) by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”; and

(ii) by striking “January 2000, and at 2-year” and inserting “January 2012, and at 5-year”;

(B) in the second sentence—

(i) by striking “803(a)(1)” and inserting “804(a)”; and

(ii) by striking “July 1, 2000, and at 2-year” and inserting “July 1, 2012, and at 5-year”; and

(C) in the last sentence, by striking “802” and inserting “803”; and

(5) in paragraph (7)(A), by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”.

(c) SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.—Section 114(f) is amended—

(1) in paragraph (1)—

(A) in subparagraph (A)—

(i) by amending the first sentence to read as follows: “During the first week of January 2006, the Chief Copyright Royalty Judge shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) during the period beginning on January 1, 2006, and ending on December 31, 2010, or such other date as the parties may agree.”; and

(ii) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(B) in subparagraph (B)—

(i) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraph (A), during the 60-day period beginning on the date that is 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 804(a), the Copyright Royalty Judges shall commence proceedings pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph.”; and

(ii) in the second sentence, by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and

(C) in subparagraph (C)—

(i) in clause (i)—

(I) by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and

(II) in subclause (II), by striking “2001” and inserting “2011”;

(ii) in clause (ii)—

(I) by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(II) by striking “803(a)(1)” and inserting “804(a)”; and

(III) in subclause (II), by striking “2001” and inserting “2011”; and

(iii) in clause (iii), by striking “802” and inserting “803”;

(2) in paragraph (2)—

(A) in subparagraph (A)—

(i) by amending the first sentence to read as follows: “During the first week of January 2007, the Chief Copyright Royalty Judge shall cause notice to be published in the Federal Register of the initiation of vol-

untary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on January 1, 2007, and ending on December 31, 2011, or such other date as the parties may agree.”; and

(ii) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(B) in subparagraph (B)—

(i) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraph (A), during the 60-day period beginning on the date that is 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 804(a), the Copyright Royalty Judges shall commence proceedings pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period beginning on January 1, 2007, and ending on December 31, 2011, or such other date as the parties may agree.”; and

(ii) by striking “copyright arbitration royalty panel” each subsequent place it appears and inserting “Copyright Royalty Judges”;

(C) in subparagraph (C)—

(i) in clause (i)—

(I) by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and

(II) in subclause (II), by striking “January 2000, and at 2-year” and inserting “January 2012, and at 5-year”;

(ii) in clause (ii)—

(I) by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(II) by striking “803(a)(1)” and inserting “804(a)”; and

(III) in subclause (II), by striking “July 1, 2000, and at 2-year” and inserting “July 1, 2012, and at 5-year”; and

(iii) in clause (iii), by striking “802” and inserting “803”;

(3) in paragraph (3), by striking “or decision by the Librarian of Congress” and inserting “, decision by the Librarian of Congress, or determination by the Copyright Royalty Judges”; and

(4) in paragraph (4), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”.

(d) PHONORECORDS OF NONDRAMATIC MUSICAL WORKS.—Section 115(c)(3) is amended—

(1) in subparagraph (C)—

(A) by amending the first sentence to read as follows: “During the period of June 30, 2006, through December 31, 2006, the Chief Copyright Royalty Judge shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subparagraph (A) during the period beginning January 1, 2008, and ending on the effective date of any new terms and rates established pursuant to this subparagraph or subparagraph (D) or (F), or such other date (regarding digital phonorecord deliveries) as the parties may agree.”; and

(B) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(2) in subparagraph (D)—

(A) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraphs (B) and (C), upon the filing of a petition in accordance with section 804(a), the Copyright Royalty Judges shall commence proceedings pursuant to chapter 8 to determine and publish in the Federal Register a schedule or rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of non-dramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 2008, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C) or (F) or this subparagraph, or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C).”;

- (B) in the third sentence, by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and
- (C) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
- (3) in subparagraph (E)(i), in the first sentence, by striking “the Librarian of Congress” and inserting “a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judges”; and
- (4) in subparagraph (F)—
 - (A) by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
 - (B) by striking “1997” and inserting “2002”.
- (e) COIN-OPERATED PHONORECORD PLAYERS.—Section 116 is amended—
 - (1) in subsection (b), by amending paragraph (2) to read as follows:
 - “(2) CHAPTER 8 PROCEEDING.—Parties not subject to such a negotiation may have the terms and rates and the division of fees described in paragraph (1) determined in a proceeding in accordance with the provisions of chapter 8.”; and
 - (2) in subsection (c)—
 - (A) in the subsection heading, by striking “COPYRIGHT ARBITRATION ROYALTY PANEL DETERMINATIONS” and inserting “DETERMINATIONS BY COPYRIGHT ROYALTY JUDGES”; and
 - (B) by striking “a copyright arbitration royalty panel” and inserting “the Copyright Royalty Judges”.
 - (f) USE OF CERTAIN WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING.—Section 118 is amended—
 - (1) in subsection (b)—
 - (A) in paragraph (1)—
 - (i) in the first sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
 - (ii) by striking the second and third sentences;
 - (B) in paragraph (2), by striking “the Librarian of Congress:” and all that follows through the end of the sentence and inserting “a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judge, if copies of such agreements are filed with the Copyright Royalty Judges within 30 days of execution in accordance with regulations that the Copyright Royalty Judges shall issue.”; and
 - (C) in paragraph (3)—
 - (i) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under paragraph (2), the Copyright Royalty Judges shall, pursuant to chapter 8, conduct a proceeding to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Copyright Royalty Judges.”;
 - (ii) in the second sentence, by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and
 - (iii) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
 - (2) in subsection (c)—
 - (A) by striking “1997” and inserting “2007”; and
 - (B) by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
 - (3) in subsection (d), by striking “a copyright arbitration royalty panel” and inserting “the Copyright Royalty Judges”; and
 - (4) in subsection (e)—
 - (A) by striking “in the Copyright Office” and inserting “with the Copyright Royalty Judges”; and
 - (B) by striking “Register of Copyrights” and inserting “Copyright Royalty Judges”.
 - (g) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—Section 119(b) is amended—
 - (1) in paragraph (3), by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
 - (2) in paragraph (4)—
 - (A) in subparagraph (A), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”; and
 - (B) by amending subparagraphs (B) and (C) to read as follows:
 - “(B) DETERMINATION OF CONTROVERSY; DISTRIBUTIONS.—After the first day of August of each year, the Copyright Royalty Judges shall determine

whether there exists a controversy concerning the distribution of royalty fees. If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

“(C) WITHHOLDING OF FEES DURING CONTROVERSY.—During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to authorize the distribution of any amounts that are not in controversy.”

(h) DIGITAL AUDIO RECORDING DEVICES.—

(1) ROYALTY PAYMENTS.—Section 1004(a)(3) is amended by amending the third sentence to read as follows: “Not more than once each year, any interested copyright party may petition the Copyright Royalty Judges to increase the royalty maximum and, if more than 20 percent of the royalty payments are at the relevant royalty maximum, the Copyright Royalty Judges shall prospectively increase such royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum; however the amount of any such increase as a percentage of the royalty maximum shall in no event exceed the percentage increase in the Consumer Price Index during the period under review.”

(2) ENTITLEMENT TO ROYALTY PAYMENTS.—Section 1006(c) is amended by striking “Librarian of Congress shall convene a copyright arbitration royalty panel which” and inserting “Copyright Royalty Judges”.

(3) PROCEDURES FOR DISTRIBUTING ROYALTY PAYMENTS.—Section 1007 is amended—

(A) in subsection (a), by amending paragraph (1) to read as follows:

“(1) FILING OF CLAIMS.—During the first 2 months of each calendar year, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Copyright Royalty Judges a claim for payments collected during the preceding year in such form and manner as the Copyright Royalty Judges shall prescribe by regulation.”; and

(B) by amending subsections (b) and (c) to read as follows:

“(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—After the period established for the filing of claims under subsection (a), in each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a). The Librarian of Congress shall, before such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.

“(c) RESOLUTION OF DISPUTES.—If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments. During the pendency of such a proceeding, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Librarian of Congress shall, before such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.”

(5) DETERMINATION OF CERTAIN DISPUTES.—(A) Section 1010 is amended to read as follows:

“§ 1010. Determination of certain disputes

“(a) SCOPE OF DETERMINATION.—Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to petition the Copyright Royalty Judges to determine whether such device is subject to section 1002, or the basis on which royalty payments for such device are to be made under section 1003.

“(b) INITIATION OF PROCEEDINGS.—The parties under subsection (a) shall file the petition with the Copyright Royalty Judges requesting the commencement of a proceeding. Within 2 weeks after receiving such a petition, the Chief Copyright Royalty

Judge shall cause notice to be published in the Federal Register of the initiation of the proceeding.

“(c) STAY OF JUDICIAL PROCEEDINGS.—Any civil action brought under section 1009 against a party to a proceeding under this section shall, on application of one of the parties to the proceeding, be stayed until completion of the proceeding.

“(d) PROCEEDING.—The Copyright Royalty Judges shall conduct a proceeding with respect to the matter concerned, in accordance with such procedures as the Copyright Royalty Judges may adopt. The Copyright Royalty Judges shall act on the basis of a fully documented written record. Any party to the proceeding may submit relevant information and proposals to the Copyright Royalty Judges. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Copyright Royalty Judges shall direct.

“(e) JUDICIAL REVIEW.—Any determination of the Copyright Royalty Judges under subsection (d) may be appealed, by a party to the proceeding, in accordance with section 803(d) of this title. The pendency of an appeal under this subsection shall not stay the determination of the Copyright Royalty Judges. If the court modifies the determination of the Copyright Royalty Judges, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the determination of the Copyright Royalty Judges and remand the case for proceedings as provided in this section.”

(B) The item relating to section 1010 in the table of sections for chapter 10 is amended to read as follows:

“1010. Determination of certain disputes.”

SEC. 6. EFFECTIVE DATE AND TRANSITION PROVISIONS.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect 30 days after the date of the enactment of this Act, except that the Librarian of Congress shall appoint interim Copyright Royalty Judges under section 802(d) of title 17, United States Code, as amended by this Act, within that 30-day period to carry out the functions of the Copyright Royalty Judges under title 17, United States Code, to the extent that Copyright Royalty Judges provided for in section 801(a) of title 17, United States Code, as amended by this Act, have not been appointed before the end of that 30-day period.

(b) TRANSITION PROVISIONS.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by this Act shall not affect any proceedings commenced before the enactment of this Act under the provisions of title 17, United States Code, amended by this Act, and pending on such date of enactment. Such proceedings shall continue, determinations made in such proceedings, and appeals taken therefrom, as if this Act had not been enacted, and shall continue in effect until modified under title 17, United States Code, as amended by this Act.

(2) EFFECTIVE PERIODS FOR CERTAIN RATEMAKING PROCEEDINGS.—Notwithstanding paragraph (1), terms and rates determined under proceedings under section 114(f)(2) or 112(e) of title 17, United States Code, commenced in 2002 shall be effective for an additional period of 3 years, or until such later date as the parties may agree, in lieu of the 2-year period otherwise provided for under such sections.

Chairman SENSENBRENNER. The Chair recognizes the gentleman from Texas, Mr. Smith, to strike the last word.

Mr. SMITH. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized.

Mr. SMITH. Mr. Chairman, today's legislation represents a bipartisan effort to reform the ratemaking and royalty distribution system for compulsory and statutory licenses, a task currently performed by the Copyright Arbitration Royalty Panels, called CARPs.

For more than 20 years, Congress has struggled to develop the appropriate mechanism to govern the copyright royalty ratemaking and distribution process. Congress created the Copyright Royalty Tribunals in 1976, but abolished them in 1993 in response to criticism voiced by the Copyright Office and other interested parties. The tribunals gave way to the present CARP system, but we are faced yet again with the task of reforming a system that forces parties to participate on costly, laborious proceedings that often result in contentious decisions and additional litigation.

The existing CARP process with its attorneys fees, arbiter fees, Copyright Office fees and expert fees, is a very costly experience for participants. The discovery aspect of the CARP proceeding is restrictive. The scope of the discovery is limited to written testimony, with access to official documents not available to shed more light on a particular issue, and because CARPs have no subpoena powers, the arbitrators are left with no real mechanism to gain the information they often need to make a fair and balanced decision.

In response to these concerns, the subcommittee conducted an oversight hearing and subsequently convened a government-industry roundtable on this subject, which included 32 participants who offered recommendations for improving the current system. H.R. 1417 reflects the suggestions made at the hearing and at the roundtable discussions.

Along with ranking member Howard Berman, I will offer a substitute amendment that improves the underlying bill. I urge my colleagues to support both the amendment and the bill, and I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. Mr. Chairman, I think you are to be commended for pushing H.R. 1417 through Committee before the October recess. What October recess? There is now a realistic possibility that it will become law during the 108th Congress.

You are also to be commended for ensuring that the bill remedies the substantial procedural defects of the CARP process, but does not stray into substantive copyright law issues that would surely waylay its adoption.

I also thank you and Subcommittee Chairman Smith for working so closely with me and my staff in drafting this bill and its various iterations.

There is widespread agreement among copyright owners and users alike that the CARP process is broken. The costs involved often are so high that parties cannot either afford to participate or find out that the costs outweigh any potential royalties or efficiencies. The decisions often take too long to issue and, thus, create uncertainty and confusion among licensors and licensees alike.

Finally, even when the decisions do issue, they are often overturned or modified, are inconsistent with precedence, and can't be effectively implemented until corresponding rulemakings are completed. The bill reported by the subcommittee will go a long way to remedying the defects of the CARP process.

The amendment that Chairman Smith, ranking member Conyers and I offer today is intended to further perfect the reported bill. While I would not profess to 100 percent satisfaction with each provision included within the reported bill and amendment, I wholeheartedly support the overall product. Thus, I ask my colleagues to both support our amendment and vote to report the bill favorably, as amended.

The amendment before us today contains a wide variety of changes designed to address some lingering concerns about the bill as reported by subcommittee. These changes further solidify the consensus support for this bill among all interested parties. While the changes are too copious to list in total, I would like to highlight

a few of the improvements to be made through this amendment, and I do so in part because the distribution of the amendment in the nature of a substitute was rather late in the day.

The subcommittee bill generated some concerns, legitimate in my eyes, that the new Copyright Royalty Judges would not be able to draw on and benefit from the substantial expertise of the Copyright Office in this area. To remedy these concerns, the amendment now requires that the librarian consult with the Registrar of Copyrights when appointing CRJs. Furthermore, the amendment allows the CRJs to consult on the record with the Registrar of Copyrights on all matters other than questions of fact.

The series of interrelated changes ensures that all rates and terms for statutory licenses will be set prospectively, not retroactively, and eliminate, therefore, the possibility that a time period covered by a statutory license will commence before the establishment of rates and terms. As these changes eliminate the need for interim royalty payments, the amendment deletes the provisions regarding interim payments.

The amendment reflects our ongoing effort to bridge differences regarding the evidentiary and discovery rules that will adhere in statutory licensing proceedings. The amendment allows admission of hearsay "to the extent deemed appropriate" by the CRJ, rather than according to the Federal Rules of Evidence, and allows CRJs to issue subpoenas for relevant and material information.

It directs the CRJs to conduct discovery conferences for the purpose of setting a schedule for completing discovery. The amendment clarifies and provides assurance that the discovery rules in distribution proceedings will mirror those currently in use.

For rate-setting proceedings, the amendment limits discovery to relevant and material information, and allows the CRJs to deny discovery for good cause. The circumstances that constitute good cause include whether the discovery requests are unreasonably cumulative or duplicative, easily obtainable from another source, or the burden of expense outweighs its likely benefit.

While the amendment's rules of discovery may not wholly satisfy Chairman Smith or myself, they reflect a good faith accommodation. The amendment expands the continuing jurisdiction of the CRJs to ensure that they "have the ability to respond to unforeseen circumstances that preclude the proper effectuation of the determination," again in quotes.

It also ensures that only parties who have fully participated in the proceeding and are bound by its determination will have the right to appeal that determination.

Finally, Mr. Chairman, the amendment addresses a concern that the reported bill would vitiate the ability of section 115, licensors and licensees, to agree to out-of-cycle rate determinations through voluntary agreements adopted by the CRJs. The substitute amendment restores this ability to section 115 participants, but allows the CRJs to reject such out-of-cycle determinations if workload concerns so merit.

I think H.R. 1417 and the proposed amendment will substantially improve the CARP process and I ask my colleagues to support both.

Chairman SENSENBRENNER. The gentleman's time has expired. Are there amendments?

The gentleman from Texas.

Mr. SMITH. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

Without objection, the amendment is considered as read and open for amendment at any point. The gentleman from Texas is recognized for five quick minutes, because we're about ready to vote and have a reporting quorum.

[The amendment of Mr. Smith follows:]

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Royalty and Distribution Reform Act of 2003".

SEC. 2. REFERENCE.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 17, United States Code.

SEC. 3. COPYRIGHT ROYALTY JUDGE AND STAFF.

(a) IN GENERAL.—Chapter 8 is amended to read as follows:

CHAPTER 8—PROCEEDINGS BY COPYRIGHT ROYALTY JUDGES

"Sec.

"801. Copyright Royalty Judges; appointment and functions.

"802. Copyright Royalty Judgeships; staff.

"803. Proceedings of Copyright Royalty Judges.

"804. Institution of proceedings.

"805. General rule for voluntarily negotiated agreements.

"§ 801. Copyright Royalty Judge; appointment and functions

"(a) APPOINTMENT.—The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint one of the three as the Chief Copyright Royalty Judge. In making such appointments, the Librarian shall consult with the Register of Copyrights.

"(b) FUNCTIONS.—Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

"(1) 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. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

"(A) To maximize the availability of creative works to the public.

"(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

"(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

"(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

"(2) To make determinations concerning the adjustment of the copyright royalty rates under section 111 solely in accordance with the following provisions:

"(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect—

"(i) national monetary inflation or deflation; or

"(ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of October 19, 1976,

except that—

"(I) if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted; and

“(II) no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber.

The Copyright Royalty Judges may consider all factors relating to the maintenance of such level of payments, including, as an extenuating factor, whether the industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

“(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 8, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Judges shall consider, among other factors, the economic impact on copyright owners and users; except that no adjustment in royalty rates shall be made under this subparagraph with respect to any distant signal equivalent or fraction thereof represented by—

“(i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal; or

“(ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

“(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

“(D) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section, and the royalty rate specified therein shall not be subject to adjustment.

“(3) To authorize the distribution, under sections 111, 119, and 1007, of those royalty fees collected under sections 111, 119, and 1005, as the case may be, to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy. In cases where the Copyright Royalty Judges determine that controversy exists—

“(A) the Copyright Royalty Judges shall determine the distribution of such fees, in accordance with section 111, 119, or 1007, as the case may be; and

“(B) the Copyright Royalty Judges shall make a partial distribution of such fees during the pendency of the proceeding under subparagraph (A) if all participants under section 803(b)(2) in the proceeding—

“(i) agree to such partial distribution;

“(ii) sign an agreement obligating them to return any excess amounts to the extent necessary to comply with the final determination on the distribution of the fees made under subparagraph (A); and

“(iii) file the agreement with the Copyright Royalty Judges.

The Copyright Royalty Judges and any other officer or employee acting in good faith in distributing funds under subparagraph (B) shall not be held liable for the payment of any excess fees under subparagraph (B). The Copyright Royalty Judges shall, at the time the final determination is made, calculate any such excess amounts.

“(4) To accept or reject royalty claims filed under section 111, 119, and 1007, on the basis of timeliness or the failure to establish the basis for a claim.

“(5) To accept or reject rate adjustment petitions as provided in section 804 and petitions to participate as provided in section 803(b)(1) and (2).

“(6) To determine the status of a digital audio recording device or a digital audio interface device under sections 1002 and 1003, as provided in section 1010.

“(7)(A) To adopt as the basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding, except that—

“(i) the Copyright Royalty Judges shall provide to the other participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, distribution, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as the basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, as the case may be; and

“(ii) the Copyright Royalty Judges may decline to adopt the agreement as the basis for statutory terms and rates or as the basis for the distribution of statutory royalty payments, as the case may be, if any other participant described in subparagraph (A) objects to the agreement and the Copyright Royalty Judges find, based on the record before them, that the agreement is not likely to meet the statutory standard for setting the terms and rates, or for distributing the royalty payments, as the case may be.

“(B) License agreements voluntarily negotiated pursuant to section 112(e)(5), 114(f)(3), 115(c)(3)(E)(i), 116(c), or 118(b)(2) that do not result in statutory terms and rates shall not be subject to clauses (i) and (ii) of subparagraph (A).

“(c) RULINGS.—The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges. The Copyright Royalty Judges may consult with the Register of Copyrights in making any rulings under section 802(f)(1).

“(d) ADMINISTRATIVE SUPPORT.—The Librarian of Congress shall provide the Copyright Royalty Judges with the necessary administrative services related to proceedings under this chapter.

“(e) LOCATION IN LIBRARY OF CONGRESS.—The offices of the Copyright Royalty Judges and staff shall be in the Library of Congress.

“§ 802. Copyright Royalty Judgeships; staff

“(a) QUALIFICATIONS OF COPYRIGHT ROYALTY JUDGES.—Each Copyright Royalty Judge shall be an attorney who has at least 7 years of legal experience. The Chief Copyright Royalty Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. Of the other two Copyright Royalty Judges, one shall have significant knowledge of copyright law, and the other shall have significant knowledge of economics. An individual may serve as a Copyright Royalty Judge only if the individual is free of any financial conflict of interest under subsection (h). In this subsection, ‘adjudication’ has the meaning given that term in section 551 of title 5, but does not include mediation.

“(b) STAFF.—The Chief Copyright Royalty Judge shall hire 3 full-time staff members to assist the Copyright Royalty Judges in performing their functions.

“(c) TERMS.—The terms of the Copyright Royalty Judges shall each be 6 years, except of the individuals first appointed, the Chief Copyright Royalty Judge shall be appointed to a term of 6 years, and of the remaining Copyright Royalty Judges, one shall be appointed to a term of 2 years, and the other shall be appointed to a term of 4 years. An individual serving as a Copyright Royalty Judge may be reappointed to subsequent terms. The term of a Copyright Royalty Judge shall begin when the term of the predecessor of that Copyright Royalty Judge ends. When the term of office of a Copyright Royalty Judge ends, the individual serving that term may continue to serve until a successor is selected.

“(d) VACANCIES OR INCAPACITY.—

“(1) VACANCIES.—If a vacancy should occur in the position of Copyright Royalty Judge, the Librarian of Congress shall act expeditiously to fill the vacancy, and may appoint an interim Copyright Royalty Judge to serve until another Copyright Royalty Judge is appointed under this section. An individual appointed to fill the vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed shall be appointed for the remainder of that term.

“(2) INCAPACITY.—In the case in which a Copyright Royalty Judge is temporarily unable to perform his or her duties, the Librarian of Congress may appoint an interim Copyright Royalty Judge to perform such duties during the period of such incapacity.

“(e) COMPENSATION.—

“(1) JUDGES.—The Chief Copyright Royalty Judge shall receive compensation at the rate of basic pay payable for level AL-1 for administrative law judges pursuant to section 5372(b) of title 5, and each of the other two Copyright Royalty Judges shall receive compensation at the rate of basic pay payable for level AL-2 for administrative law judges pursuant to such section. The compensation of the Copyright Royalty Judges shall not be subject to any regulations adopted by the Office of Personnel Management pursuant to its authority under section 5376(b)(1) of title 5.

“(2) STAFF MEMBERS.—Of the staff members appointed under subsection (b)—

“(A) the rate of pay of one staff member shall be not more than the basic rate of pay payable for GS-15 of the General Schedule;

“(B) the rate of pay of one staff member shall be not less than the basic rate of pay payable for GS-13 of the General Schedule and not more than the basic rate of pay payable for GS-14 of such Schedule; and

“(C) the rate of pay for the third staff member shall be not less than the basic rate of pay payable for GS-8 of the General Schedule and not more than the basic rate of pay payable for GS-11 of such Schedule.

“(f) INDEPENDENCE OF COPYRIGHT ROYALTY JUDGE.—

“(1) IN MAKING DETERMINATIONS.—

“(A) IN GENERAL.—Subject to subparagraph (B), the Copyright Royalty Judges shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title, except that the Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact. Any such consultations between the Copyright Royalty Judges and the Register of Copyright on any question of law shall be in writing or on the record.

“(B) NOVEL QUESTIONS.—(i) Notwithstanding the provisions of subparagraph (A), in any case in which the Copyright Royalty Judges in a proceeding under this title are presented with a novel question of law concerning an interpretation of those provisions of this title that are the subject of the proceeding, the Copyright Royalty Judges shall request the Register of Copyrights, in writing, to submit a written opinion on the resolution of such novel question. The Register shall submit and make public that opinion within such time period as the Copyright Royalty Judges may prescribe. Any consultations under this subparagraph between the Copyright Royalty Judges and the Register of Copyrights shall be in writing or on the record. The opinion of the Register shall not be binding on the Copyright Royalty Judges, but the Copyright Royalty Judges shall take the opinion of the Register into account in making the judges’ determination on the question concerned.

“(ii) In clause (i), a ‘novel question of law’ is a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a).

“(2) PERFORMANCE APPRAISALS.—

“(A) IN GENERAL.—Notwithstanding any other provision of law or any regulation of the Library of Congress, and subject to subparagraph (B), the Copyright Royalty Judges shall not receive performance appraisals.

“(B) RELATING TO SANCTION OR REMOVAL.—To the extent that the Librarian of Congress adopts regulations under subsection (h) relating to the sanction or removal of a Copyright Royalty Judge and such regulations require documentation to establish the cause of such sanction or removal, the Copyright Royalty Judge may receive an appraisal related specifically to the cause of the sanction or removal.

“(g) INCONSISTENT DUTIES BARRED.—No Copyright Royalty Judge may undertake duties inconsistent with his or her duties and responsibilities as Copyright Royalty Judge.

“(h) STANDARDS OF CONDUCT.—The Librarian of Congress shall adopt regulations regarding the standards of conduct, including financial conflict of interest and restrictions against ex parte communications, which shall govern the Copyright Royalty Judges and the proceedings under this chapter.

“(i) REMOVAL OR SANCTION.—The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability. Any such sanction or removal may be made only after notice and opportunity for a hearing, but the Librarian of Congress may suspend the Copyright Roy-

alty Judge during the pendency of such hearing. The Librarian shall appoint an interim Copyright Royalty Judge during the period of any such suspension.

“§ 803. Proceedings of Copyright Royalty Judges

“(a) PROCEEDINGS.—

“(1) IN GENERAL.—The Copyright Royalty Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration royalty panel determinations, rulings by the Librarian of Congress before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, prior determinations of Copyright Royalty Judges under this chapter, and decisions of the court in appeals under this chapter before, on, or after such effective date. Any participant in a proceeding under subsection (b)(2) may submit relevant information and proposals to the Copyright Royalty Judges.

“(2) JUDGES ACTING AS PANEL AND INDIVIDUALLY.—The Copyright Royalty Judges shall preside over hearings in proceedings under this chapter en banc. The Chief Copyright Royalty Judge may designate a Copyright Royalty Judge to preside individually over such collateral and administrative proceedings, and over such proceedings under paragraphs (1) through (5) of subsection (b), as the Chief Judge considers appropriate.

“(3) DETERMINATIONS.—Final determinations of the Copyright Royalty Judges in proceedings under this chapter shall be made by majority vote. A Copyright Royalty Judge dissenting from the majority on any determination under this chapter may issue his or her dissenting opinion, which shall be included with the determination.

“(b) PROCEDURES.—

“(1) INITIATION.—

“(A) CALL FOR PETITIONS TO PARTICIPATE.—(i) Promptly upon the filing of a petition for a rate adjustment or determination under section 804(a) or 804(b)(8), or by no later than January 5 of a year specified in section 804 for the commencement of a proceeding if a petition has not been filed by that date, the Copyright Royalty Judges shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter calling for the filing of petitions to participate in a proceeding under this chapter for the purpose of making the relevant determination under section 111, 112, 114, 115, 116, 118, 119, 1004 or 1007, as the case may be.

“(ii) Petitions to participate shall be filed by no later than 30 days after publication of notice of commencement of a proceeding, under clause (i), except that the Copyright Royalty Judges may, for substantial good cause shown and if there is no prejudice to the participants that have already filed petitions, accept late petitions to participate at any time up to the date that is 90 days before the date on which participants in the proceeding are to file their written direct statements.

“(B) PETITIONS TO PARTICIPATE.—Each petition to participate in a proceeding shall describe the petitioner’s interest in the subject matter of the proceeding. Parties with similar interests may file a single petition to participate.

“(2) PARTICIPATION IN GENERAL.—Subject to paragraph (4), a person may participate in a proceeding under this chapter, including through the submission of briefs or other information, only if—

“(A) that person has filed a petition to participate in accordance with paragraph (1) (either individually or as a group under paragraph (1)(B)), together with a filing fee of \$150;

“(B) the Copyright Royalty Judges have not determined that the petition to participate is facially invalid; and

“(C) the Copyright Royalty Judges have not determined, sua sponte or on the motion of another participant in the proceeding, that the person lacks a significant interest in the proceeding.

“(3) VOLUNTARY NEGOTIATION PERIOD.—

“(A) IN GENERAL.—Promptly after the date for filing of petitions to participate in a proceeding, the Copyright Royalty Judges shall make available to all participants in the proceeding a list of such participants and shall initiate a voluntary negotiation period among the participants.

“(B) LENGTH OF PROCEEDINGS.—The voluntary negotiation period initiated under subparagraph (A) shall be 3 months.

“(C) DETERMINATION OF SUBSEQUENT PROCEEDINGS.—At the close of the voluntary negotiation proceedings, the Copyright Royalty Judges shall, if further proceedings under this chapter are necessary, determine whether and to what extent paragraphs (4) and (5) will apply to the parties.

“(4) SMALL CLAIMS PROCEDURE IN DISTRIBUTION PROCEEDINGS.—

“(A) IN GENERAL.—If, in a proceeding under this chapter to determine the distribution of royalties, a participant in the proceeding asserts that the contested amount of the claim is \$10,000 or less, the Copyright Royalty Judges shall decide the controversy on the basis of the filing in writing of the initial claim, the initial response by any opposing participant, and one additional response by each such party. The participant asserting the claim shall not be required to pay the filing fee under paragraph (2).

“(B) BAD FAITH INFLATION OF CLAIM.—If the Copyright Royalty Judges determine that a participant asserts in bad faith an amount in controversy in excess of \$10,000 for the purpose of avoiding a determination under the procedure set forth in subparagraph (A), the Copyright Royalty Judges shall impose a fine on that participant in an amount not to exceed the difference between the actual amount distributed and the amount asserted by the participant.

“(5) PAPER PROCEEDINGS IN RATEMAKING PROCEEDINGS.—The Copyright Royalty Judges in proceedings under this chapter to determine royalty rates may decide, *sua sponte* or upon motion of a participant, to determine issues on the basis of initial filings in writing, initial responses by any opposing participant, and one additional response by each such participant. Prior to making such decision to proceed on such a paper record only, the Copyright Royalty Judges shall offer to all parties to the proceeding the opportunity to comment on the decision. The procedure under this paragraph—

“(A) shall be applied in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure; and

“(B) may be applied under such other circumstances as the Copyright Royalty Judges consider appropriate.

“(6) REGULATIONS.—

“(A) IN GENERAL.—The Copyright Royalty Judges may issue regulations to carry out their functions under this title. Not later than 120 days after Copyright Royalty Judges or interim Copyright Royalty Judges, as the case may be, are first appointed after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, such judges shall issue regulations to govern proceedings under this chapter.

“(B) INTERIM REGULATIONS.—Until regulations are adopted under subparagraph (A), the Copyright Royalty Judges shall apply the regulations in effect under this chapter on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, to the extent such regulations are not inconsistent with this chapter, except that functions carried out under such regulations by the Librarian of Congress, the Register of Copyrights, or copyright arbitration royalty panels that, as of such date of enactment, are to be carried out by the Copyright Royalty Judges under this chapter, shall be carried out by the Copyright Royalty Judges under such regulations.

“(C) REQUIREMENTS.—Regulations issued under subparagraph (A) shall include the following:

“(i) The written direct statements of all participants in a proceeding under paragraph (2) shall be filed by a date specified by the Copyright Royalty Judges, which may be no earlier than four months, and no later than five months, after the end of the voluntary negotiation period under paragraph (3). Notwithstanding the preceding sentence, a participant in a proceeding may, within 15 days after the end of the discovery period specified in clause (iii), file an amended written direct statement based on new information received during the discovery process.

“(ii)(I) Following the submission to the Copyright Royalty Judges of written direct statements by the participants in a proceeding under paragraph (2), the judges shall meet with the participants for the purpose of setting a schedule for conducting and completing discovery. Such schedule shall be determined by the Copyright Royalty Judges.

“(II) In this chapter, the term ‘written direct statements’ means witness statements, testimony, and exhibits to be presented in the proceedings, and such other information that is necessary to establish terms and rates, or the distribution of royalty payments, as the case

may be, as set forth in regulations issued by the Copyright Royalty Judges.

“(iii) Hearsay may be admitted in proceedings under this chapter to the extent deemed appropriate by the Copyright Royalty Judges.

“(iv) Discovery in such proceedings shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders and disputes pending at the end of such period.

“(v) Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may, upon written notice, seek discovery of information and materials relevant and material to the proceeding. Any objection to any such discovery request shall be resolved by a motion or request to compel discovery made to the Copyright Royalty Judges. Each motion or request to compel discovery shall be determined by the Copyright Royalty Judges, or by a Copyright Royalty Judge when permitted under subsection (a)(2), who may approve the request only if the evidence that would be produced is relevant and material. A Copyright Royalty Judge may refuse a request to compel discovery of evidence that has been found to be relevant and material, only upon good cause shown. For purposes of the preceding sentence, the basis for ‘good cause’ may only be that—

“(I) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive;

“(II) the participant seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

“(III) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the importance of the proposed discovery in resolving the issues.

“(vi) The rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2003, relating to discovery in proceedings under this title to determine the distribution of royalty fees, shall continue to apply to such proceedings on and after such effective date.

“(vii) The Copyright Royalty Judges may issue subpoenas requiring the production of evidence or witnesses, but only if the evidence requested to be produced or that would be proffered by the witness is relevant and material.

“(viii) The Copyright Royalty Judges shall order a settlement conference among the participants in the proceeding to facilitate the presentation of offers of settlement among the participants. The settlement conference shall be held during a 21-day period following the end of the discovery period.

“(c) DETERMINATION OF COPYRIGHT ROYALTY JUDGES.—

“(1) TIMING.—The Copyright Royalty Judges shall issue their determination in a proceeding not later than 11 months after the conclusion of the 21-day settlement conference period under subsection (b)(3)(C)(vi), but, in the case of a proceeding to determine successors to rates or terms that expire on a specified date, in no event later than 15 days before the expiration of the then current statutory rates and terms.

“(2) REHEARINGS.—

“(A) IN GENERAL.—The Copyright Royalty Judges may, in exceptional cases, upon motion of a participant under subsection (b)(2), order a rehearing, after the determination in a proceeding is issued under paragraph (1), on such matters as the Copyright Royalty Judges determine to be appropriate.

“(B) TIMING FOR FILING MOTION.—Any motion for a rehearing under subparagraph (A) may only be filed within 15 days after the date on which the Copyright Royalty Judges deliver their initial determination concerning rates and terms to the participants in the proceeding.

“(C) PARTICIPATION BY OPPOSING PARTY NOT REQUIRED.—In any case in which a rehearing is ordered, any opposing party shall not be required to participate in the rehearing.

“(D) NO NEGATIVE INFERENCE.—No negative inference shall be drawn from lack of participation in a rehearing.

“(E) CONTINUITY OF RATES AND TERMS.—(i) If the decision of the Copyright Royalty Judges on any motion for a rehearing is not rendered before the expiration of the statutory rates and terms that were previously in ef-

fect, in the case of a proceeding to determine successors to rates and terms that expire on a specified date, then—

“(I) the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion shall be effective as of the day following the date on which the rates and terms that were previously in effect expire; and

“(II) in the case of a proceeding under section 114(f)(1)(C) or 114(f)(2)(C), royalty rates and terms shall, for purposes of section 114(f)(4)(B), be deemed to have been set at those rates and terms contained in the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion, as of the date of that determination.

“(ii) The pendency of a motion for a rehearing under this paragraph shall not relieve persons obligated to make royalty payments who would be affected by the determination on that motion from providing the statements of account and any reports of use, to the extent required, and paying the royalties required under the relevant determination or regulations.

“(iii) Notwithstanding clause (ii), whenever royalties described in clause (ii) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the motion for rehearing is resolved or, if the motion is granted, within 60 days after the rehearing is concluded, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates by the Copyright Royalty Judges.

“(3) CONTENTS OF DETERMINATION.—A determination of the Copyright Royalty Judges shall be accompanied by the written record, and shall set forth the facts that the Copyright Royalty Judges found relevant to their determination. Among other terms adopted in a determination, the Copyright Royalty Judges may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations.

“(4) CONTINUING JURISDICTION.—The Copyright Royalty Judges may amend the determination or the regulations issued pursuant to the determination in order to correct any technical errors in the determination or to respond to unforeseen circumstances that preclude the proper effectuation of the determination.

“(5) PROTECTIVE ORDER.—The Copyright Royalty Judges may issue such orders as may be appropriate to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public, except that any terms or rates of royalty payments or distributions may not be excluded.

“(6) PUBLICATION OF DETERMINATION.—The Librarian of Congress shall cause the determination, and any corrections thereto, to be published in the Federal Register. The Librarian of Congress shall also publicize the determination and corrections in such other manner as the Librarian considers appropriate, including, but not limited to, publication on the Internet. The Librarian of Congress shall also make the determination, corrections, and the accompanying record available for public inspection and copying.

“(d) JUDICIAL REVIEW.—

“(1) APPEAL.—Any determination of the Copyright Royalty Judges under subsection (c) may, within 30 days after the publication of the determination in the Federal Register, be appealed, to the United States Court of Appeals for the District of Columbia Circuit, by any aggrieved participant in the proceeding under subsection (b)(2) who fully participated in the proceeding and who would be bound by the determination. If no appeal is brought within that 30-day period, the determination of the Copyright Royalty Judges shall be final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in paragraph (2).

“(2) EFFECT OF RATES.—

“(A) EXPIRATION ON SPECIFIED DATE.—When this title provides that the royalty rates and terms that were previously in effect are to expire on a specified date, any adjustment or determination by the Copyright Royalty Judges of successor rates and terms for an ensuing statutory license period shall be effective as of the day following the date of expiration of the rates and terms that were previously in effect, even if the determination of the Copyright Royalty Judges is rendered on a later date.

“(B) OTHER CASES.—In cases where rates and terms do not expire on a specified date or have not yet been established, successor or new rates or

terms shall take effect on the first day of the second month that begins after the publication of the determination of the Copyright Royalty Judges in the Federal Register, except as otherwise provided in this title, and the rates and terms previously in effect, to the extent applicable, shall remain in effect until such successor rates and terms become effective.

“(C) OBLIGATION TO MAKE PAYMENTS.—(i) The pendency of an appeal under this subsection shall not relieve persons obligated to make royalty payments under section 111, 112, 114, 115, 116, 118, 119, or 1003, who would be affected by the determination on appeal, from providing the statements of account (and any report of use, to the extent required) and paying the royalties required under the relevant determination or regulations.

“(ii) Notwithstanding clause (i), whenever royalties described in clause (i) are paid to a person other than the Copyright Office, the entity designated by the Copyright Royalty Judges to which such royalties are paid by the copyright user (and any successor thereto) shall, within 60 days after the final resolution of the appeal, return any excess amounts previously paid (and interest thereon, if ordered pursuant to paragraph (3)) to the extent necessary to comply with the final determination of royalty rates on appeal.

“(3) JURISDICTION OF COURT.—If the court, pursuant to section 706 of title 5, modifies or vacates a determination of the Copyright Royalty Judges, the court may enter its own determination with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment. The court may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).

“(e) ADMINISTRATIVE MATTERS.—

“(1) DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM FILING FEES.—

“(A) DEDUCTION FROM FILING FEES.—The Librarian of Congress may, to the extent not otherwise provided under this title, deduct from the filing fees collected under subsection (b) for a particular proceeding under this chapter the reasonable costs incurred by the Librarian of Congress, the Copyright Office, and the Copyright Royalty Judges in conducting that proceeding, other than the salaries of the Copyright Royalty Judges and the 3 staff members appointed under section 802(b).

“(B) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to pay the costs of proceedings under this chapter not covered by the filing fees collected under subsection (b). All funds made available pursuant to this subparagraph shall remain available until expended.

“(2) POSITIONS REQUIRED FOR ADMINISTRATION OF COMPULSORY LICENSING.—Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.

“§ 804. Institution and conclusion of proceedings

“(a) FILING OF PETITION.—With respect to proceedings referred to in paragraphs (1) and (2) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 111, 112, 114, 115, 116, 118, and 1004, during the calendar years specified in the schedule set forth in subsection (b), any owner or user of a copyrighted work whose royalty rates are specified by this title, or are established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests a determination or adjustment of the rate. The Copyright Royalty Judges shall make a determination as to whether the petitioner has such a significant interest in the royalty rate in which a determination or adjustment is requested. If the Copyright Royalty Judges determine that the petitioner has such a significant interest, the Copyright Royalty Judges shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter. With respect to proceedings under paragraph (1) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 112 and 114, during the calendar years specified in the schedule set forth in subsection (b), the Copyright Royalty Judges shall cause notice of commencement of proceedings under this chapter to be published in the Federal Register as provided in section 803(b)(1)(A).

“(b) TIMING OF PROCEEDINGS.—

“(1) SECTION 111 PROCEEDINGS.—(A) A petition described in subsection (a) to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (A) or (D) of section 801(b)(2) applies may be filed during the year 2004 and in each subsequent fifth calendar year.

“(B) In order to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (B) or (C) of section 801(b)(2) applies, within 12 months after an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2003, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests an adjustment of the rate. The Copyright Royalty Judges shall then proceed as set forth in subsection (a) of this section. Any change in royalty rates made under this chapter pursuant to this subparagraph may be reconsidered in the year 2005, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(3)(B) or (C), as the case may be. A petition for adjustment of rates under section 11(d)(1)(B) as a result of a change is the rules and regulations of the Federal Communications Commission shall set forth the change on which the petition is based.

“(2) CERTAIN SECTION 112 PROCEEDINGS.—Proceedings under this chapter shall be commenced in the year 2007 to determine reasonable terms and rates of royalty payments for the activities described in section 112(e)(1) relating to the limitation on exclusive rights specified by section 114(d)(1)(C)(iv), to become effective on January 1, 2009. Such proceedings shall be repeated in each subsequent fifth calendar year.

“(3) SECTION 114 AND CORRESPONDING 112 PROCEEDINGS.—

“(A) FOR ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES.—Proceedings under this chapter shall be commenced as soon as practicable after the effective date of the Copyright Royalty and Distribution Reform Act of 2003 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of eligible non-subscription transmission services and new subscription services, to be effective for the period beginning on January 1, 2006, and ending on December 31, 2010. Such proceedings shall next be commenced in January 2009 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2011. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

“(B) FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES.—Proceedings under this chapter shall be commenced in January 2006 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of preexisting subscription services, to be effective during the period beginning on January 1, 2008, and ending on December 31, 2012, and preexisting satellite digital audio radio services, to be effective during the period beginning on January 1, 2007, and ending on December 31, 2012. Such proceedings shall next be commenced in 2011 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2013. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

“(C)(i) Notwithstanding any other provision of this chapter, this subparagraph shall govern proceedings commenced pursuant to sections 114(f)(1)(C) and 114(f)(2)(C) concerning new types of services.

“(ii) Not later than 30 days after a petition to determine rates and terms for a new type of service that is filed by any copyright owner of sound recordings, or such new type of service, indicating that such new type of service is or is about to become operational, the Copyright Royalty Judges shall issue a notice for a proceeding to determine rates and terms for such service.

“(iii) The proceeding shall follow the schedule set forth in such subsections (b), (c), and (d) of section 803, except that—

“(I) the determination shall be issued by not later than 24 months after the publication of the notice under clause (ii); and

“(II) the decision shall take effect as provided in subsections (c)(2) and (d)(2) of section 803 and section 114(f)(4)(B)(ii) and (C).

“(iv) The rates and terms shall remain in effect for the period set forth in section 114(f)(1)(C) or 114(f)(2)(C), as the case may be.

“(4) SECTION 115 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment or determination of royalty rates as provided in section 115 may be filed in the year

2006 and in each subsequent fifth calendar year, or at such other times as the parties have agreed under section 115(c)(3)(B) and (C).

“(5) SECTION 116 PROCEEDINGS.—(A) A petition described in subsection (a) to initiate proceedings under section 801(b) concerning the determination of royalty rates and terms as provided in section 116 may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

“(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending March 1, 1989, the Copyright Royalty Judges shall, upon petition filed under paragraph (1) within 1 year after such termination or expiration, commence a proceeding to promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the Copyright Royalty Judges, in accordance with section 803, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(b).

“(6) SECTION 118 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 118 may be filed in the year 2006 and in each subsequent fifth calendar year.

“(7) SECTION 1004 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment of reasonable royalty rates under section 1004 may be filed as provided in section 1004(a)(3).

“(8) PROCEEDINGS CONCERNING DISTRIBUTION OF ROYALTY FEES.—With respect to proceedings under section 801(b)(3) concerning the distribution of royalty fees in certain circumstances under section 111, 116, 119, or 1007, the Copyright Royalty Judges shall, upon a determination that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.

“§ 805. General rule for voluntarily negotiated agreements

“Any rates or terms under this title that—

“(1) are agreed to by participants to a proceeding under section 803(b)(2),

“(2) are adopted by the Copyright Royalty Judges as part of a determination under this chapter, and

“(3) are in effect for a period shorter than would otherwise apply under a determination pursuant to this chapter,

shall remain in effect for such period of time as would otherwise apply under such determination, except that the Copyright Royalty Judges shall adjust the rates pursuant to the voluntary negotiations to reflect national monetary inflation during the additional period the rates remain in effect.”

(b) CONFORMING AMENDMENT.—The table of chapters for title 17, United States Code, is amended by striking the item relating to chapter 8 and inserting the following:

“8. PROCEEDINGS OF COPYRIGHT ROYALTY JUDGE 801”.

SEC. 4. DEFINITION.

Section 101 is amended by inserting after the definition of “copies” the following:

“A ‘Copyright Royalty Judge’ is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.”

SEC. 5. TECHNICAL AMENDMENTS.

(a) CABLE RATES.—Section 111(d) is amended—

(1) in paragraph (2), in the second sentence, by striking “a copyright royalty panel” and inserting “the Copyright Royalty Judges.”; and

(2) in paragraph (4)—

(A) in subparagraph (A), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”;

(B) in subparagraph (B)—

(i) in the first sentence, by striking “Librarian of Congress shall, upon the recommendation of the Register of Copyrights,” and inserting “Copyright Royalty Judges shall”;

- (ii) in the second sentence, by striking “Librarian determines” and inserting “Copyright Royalty Judges determine”; and
 - (iii) in the third sentence—
 - (I) by striking “Librarian” each place it appears and inserting “Copyright Royalty Judges”; and
 - (II) by striking “convene a copyright arbitration royalty panel” and inserting “conduct a proceeding”; and
 - (C) in subparagraph (C), by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”.
- (b) EPHEMERAL RECORDINGS.—Section 112(e) is amended—
- (1) in paragraph (3)—
 - (A) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) shall cover the 5-year period beginning on January 1 of the second year following the year in which the proceedings are commenced, or such other period as the parties may agree.”; and
 - (B) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
 - (2) in paragraph (4)—
 - (A) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under paragraphs (2) and (3), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree.”;
 - (B) by striking “copyright arbitration royalty panel” each subsequent place it appears and inserting “Copyright Royalty Judges”;
 - (C) in the fourth sentence, by striking “its decision” and inserting “their decision”; and
 - (D) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
 - (3) in paragraph (5), by striking “or decision by the Librarian of Congress” and inserting “, decision by the Librarian of Congress, or determination by the Copyright Royalty Judges”; and
 - (4) by striking paragraph (6) and redesignating paragraphs (7), (8), and (9), as paragraphs (6), (7), and (8), respectively; and
 - (5) in paragraph (6)(A), as so redesignated, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”.
- (c) SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.—Section 114(f) is amended—
- (1) in paragraph (1)—
 - (A) in subparagraph (A)—
 - (i) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services shall cover the 5-year period beginning on January 1 of the year following the second year in which the proceedings are commenced, except where differential transitional periods are provided in section 804(b)(3), or such other period as the parties may agree.”; and
 - (ii) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
 - (B) in subparagraph (B)—
 - (i) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraph (A), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), or such other date as the parties may agree.”; and
 - (ii) in the second sentence, by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and
 - (C) by amending subparagraph (C) to read as follows:

“(C) The procedures under subparagraphs (A) and (B) also shall be initiated pursuant to a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of transmission service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for subscription digital audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree”;

(2) in paragraph (2)—

(A) in subparagraph (A)—

(i) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible non-subscription transmissions and transmissions by new subscription services specified by subsection (d)(2) shall cover the 5-year period beginning on January 1 of the second year following the year in which the proceedings are commenced, except where different transitional periods are provided in section 804(b)(3)(A), or such other period as the parties may agree.”; and

(ii) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

(B) in subparagraph (B)—

(i) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraph (A), the Copyright Royalty Judges shall commence a proceeding pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period specified in subparagraph (A), or such other period as the parties may agree.”; and

(ii) by striking “copyright arbitration royalty panel” each subsequent place it appears and inserting “Copyright Royalty Judges”; and

(C) by amending subparagraph (C) to read as follows:

“(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services or preexisting satellite digital radio audio services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.”;

(3) in paragraph (3), by striking “or decision by the Librarian of Congress” and inserting “, decision by the Librarian of Congress, or determination by the Copyright Royalty Judges”; and

(4) in paragraph (4), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”.

(d) PHONORECORDS OF NONDRAMATIC MUSICAL WORKS.—Section 115(c)(3) is amended—

(1) in subparagraph (B), by striking “under this paragraph” and inserting “under this section”;

(2) in subparagraph (C)—

(A) by amending the first sentence to read as follows: “Voluntary negotiation proceedings initiated pursuant to a petition filed under section 804(a) for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by this section shall cover the period beginning with the effective date of such terms and rates, but not earlier than January 1 of the second year following the year in which the petition is filed, and ending on the effective date of successor terms and rates, or such other period as the parties may agree.”; and

(B) in the third sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;

- (3) in subparagraph (D)—
- (A) by amending the first sentence to read as follows: “In the absence of license agreements negotiated under subparagraphs (B) and (C), the Copyright Royalty Judges shall commence proceedings pursuant to chapter 8 to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period specified in subparagraph (C) or such other period as may be determined pursuant to subparagraphs (B) and (C), or such other period as the parties may agree.”;
- (B) in the third sentence, by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and
- (C) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”;
- (2) in subparagraph (E)—
- (A) in clause (i)—
- (i) in the first sentence, by striking “the Librarian of Congress” and inserting “a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judges”; and
- (ii) in the second sentence, by striking “(C), (D), or (F) shall be given effect” and inserting “(C) or (D) shall be given effect as to digital phonorecord deliveries”; and
- (B) in clause (ii)(I), by striking “(C), (D), or (F)” each place it appears and inserting “(C) or (D)”;
- (5) by striking subparagraph (F) and redesignating subparagraphs (G) through (L) as subparagraphs (F) through (K), respectively.
- (e) COIN-OPERATED PHONORECORD PLAYERS.—Section 116 is amended—
- (1) in subsection (b), by amending paragraph (2) to read as follows:
- “(2) CHAPTER 8 PROCEEDING.—Parties not subject to such a negotiation may have the terms and rates and the division of fees described in paragraph (1) determined in a proceeding in accordance with the provisions of chapter 8.”; and
- (2) in subsection (c)—
- (A) in the subsection heading, by striking “COPYRIGHT ARBITRATION ROYALTY PANEL DETERMINATIONS” and inserting “DETERMINATIONS BY COPYRIGHT ROYALTY JUDGES”; and
- (B) by striking “a copyright arbitration royalty panel” and inserting “the Copyright Royalty Judges”.
- (f) USE OF CERTAIN WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING.—Section 118 is amended—
- (1) in subsection (b)—
- (A) in paragraph (1)—
- (i) in the first sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
- (ii) by striking the second and third sentences;
- (B) in paragraph (2), by striking “the Librarian of Congress:” and all that follows through the end of the sentence and inserting “a copyright arbitration royalty panel, the Librarian of Congress, or the Copyright Royalty Judge, if copies of such agreements are filed with the Copyright Royalty Judges within 30 days of execution in accordance with regulations that the Copyright Royalty Judges shall issue.”; and
- (C) in paragraph (3)—
- (i) in the second sentence—
- (I) by striking “copyright arbitration royalty panel” and inserting “Copyright Royalty Judges”; and
- (II) by striking “paragraph (2).” and inserting “paragraph (2) or (3).”;
- (ii) in the last sentence, by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and
- (ii) by striking “(3) In” and all that follows through the end of the first sentence and inserting the following:
- “(3) Voluntary negotiation proceedings initiated pursuant to a petition filed under section 804(a) for the purpose of determining a schedule of terms and rates of royalty payments by public broadcasting entities to copyright owners in works specified by this subsection and the proportionate division of fees paid among various copyright owners shall cover the 5-year period beginning on January 1 of the second year following the year in which the petition is filed. The parties to each negotiation proceeding shall bear their own costs.
- “(4) In the absence of license agreements negotiated under paragraph (2) or (3), the Copyright Royalty Judges shall, pursuant to chapter 8, conduct a pro-

ceeding to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Copyright Royalty Judges.”;

(2) by striking subsection (c) and redesignating subsections (d) through (g) as subsections (c) through (f), respectively;

(3) in subsection (c), as so redesignated, in the matter preceding paragraph (1)—

(A) by striking “(b)(2)” and inserting “(b)(2) or (3)”;

(B) by striking “(b)(3)” and inserting “(b)(4)”;

(C) by striking “a copyright arbitration royalty panel” and inserting “the Copyright Royalty Judges”;

(4) in subsection (d), as so redesignated—

(A) by striking “in the Copyright Office” and inserting “with the Copyright Royalty Judges”; and

(B) by striking “Register of Copyrights” and inserting “Copyright Royalty Judges”; and

(5) in subsection (f), as so redesignated, by striking “(d)” and inserting “(c)”.

(g) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—Section 119(b) is amended—

(1) in paragraph (3), by striking “Librarian of Congress” and inserting “Copyright Royalty Judges”; and

(2) in paragraph (4)—

(A) in subparagraph (A), by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”; and

(B) by amending subparagraphs (B) and (C) to read as follows:

“(B) DETERMINATION OF CONTROVERSY; DISTRIBUTIONS.—After the first day of August of each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

“(C) WITHHOLDING OF FEES DURING CONTROVERSY.—During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, subject to any distributions made under section 801(b)(3).”.

(h) DIGITAL AUDIO RECORDING DEVICES.—

(1) ROYALTY PAYMENTS.—Section 1004(a)(3) is amended by striking “Librarian of Congress” each place it appears and inserting “Copyright Royalty Judges”.

(2) ENTITLEMENT TO ROYALTY PAYMENTS.—Section 1006(c) is amended by striking “Librarian of Congress shall convene a copyright arbitration royalty panel which” and inserting “Copyright Royalty Judges”.

(3) PROCEDURES FOR DISTRIBUTING ROYALTY PAYMENTS.—Section 1007 is amended—

(A) in subsection (a), by amending paragraph (1) to read as follows:

“(1) FILING OF CLAIMS.—During the first 2 months of each calendar year, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Copyright Royalty Judges a claim for payments collected during the preceding year in such form and manner as the Copyright Royalty Judges shall prescribe by regulation.”; and

(B) by amending subsections (b) and (c) to read as follows:

“(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—After the period established for the filing of claims under subsection (a), in each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a). The Librarian of Congress shall, before such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.

“(c) RESOLUTION OF DISPUTES.—If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments. During the pendency of such a proceeding, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Librarian of Congress shall, before such royalty payments are distributed, deduct the reasonable administrative costs incurred by the Librarian under this section.”.

(4) DETERMINATION OF CERTAIN DISPUTES.—(A) Section 1010 is amended to read as follows:

“§ 1010. Determination of certain disputes

“(a) SCOPE OF DETERMINATION.—Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to petition the Copyright Royalty Judges to determine whether such device is subject to section 1002, or the basis on which royalty payments for such device are to be made under section 1003.

“(b) INITIATION OF PROCEEDINGS.—The parties under subsection (a) shall file the petition with the Copyright Royalty Judges requesting the commencement of a proceeding. Within 2 weeks after receiving such a petition, the Chief Copyright Royalty Judge shall cause notice to be published in the Federal Register of the initiation of the proceeding.

“(c) STAY OF JUDICIAL PROCEEDINGS.—Any civil action brought under section 1009 against a party to a proceeding under this section shall, on application of one of the parties to the proceeding, be stayed until completion of the proceeding.

“(d) PROCEEDING.—The Copyright Royalty Judges shall conduct a proceeding with respect to the matter concerned, in accordance with such procedures as the Copyright Royalty Judges may adopt. The Copyright Royalty Judges shall act on the basis of a fully documented written record. Any party to the proceeding may submit relevant information and proposals to the Copyright Royalty Judges. The parties to the proceeding shall each bear their respective costs of participation.

“(e) JUDICIAL REVIEW.—Any determination of the Copyright Royalty Judges under subsection (d) may be appealed, by a party to the proceeding, in accordance with section 803(d) of this title. The pendency of an appeal under this subsection shall not stay the determination of the Copyright Royalty Judges. If the court modifies the determination of the Copyright Royalty Judges, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the determination of the Copyright Royalty Judges and remand the case for proceedings as provided in this section.”.

(B) The item relating to section 1010 in the table of sections for chapter 10 is amended to read as follows:

“1010. Determination of certain disputes.”.

SEC. 6. EFFECTIVE DATE AND TRANSITION PROVISIONS.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect 6 months after the date of the enactment of this Act, except that the Librarian of Congress shall appoint interim Copyright Royalty Judges under section 802(d) of title 17, United States Code, as amended by this Act, within 90 days after such date of enactment to carry out the functions of the Copyright Royalty Judges under title 17, United States Code, to the extent that Copyright Royalty Judges provided for in section 801(a) of title 17, United States Code, as amended by this Act, have not been appointed before the end of that 90-day period.

(b) TRANSITION PROVISIONS.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by this Act shall not affect any proceedings commenced, petitions filed, or voluntary agreements entered into before the enactment of this Act under the provisions of title 17, United States Code, amended by this Act, and pending on such date of enactment. Such proceedings shall continue, determinations made in such proceedings, and appeals taken therefrom, as if this Act had not been enacted, and shall continue in effect until modified under title 17, United States Code, as amended by this Act. Such petitions filed and voluntary agreements entered into shall remain in effect as if this Act had not been enacted.

(2) EFFECTIVE PERIODS FOR CERTAIN RATEMAKING PROCEEDINGS.—Notwithstanding paragraph (1), terms and rates in effect under section 114(f)(2) or 112(e) of title 17, United States Code, for new subscription services, eligible nonsubscription services, and services exempt under section 114(d)(1)(C)(iv) of such title for the period 2003 through 2004, and any rates published in the Fed-

eral Register under the authority of the Small Webcaster Settlement Act of 2002 for the years 2003 through 2004, shall be effective until the first applicable effective date for successor terms and rates specified in section 804(b)(2) or (3)(A) of title 17, United States Code, or until such later date as the parties may agree. Any proceeding commenced before the enactment of this Act pursuant to section 114(f)(2) and chapter 8 of title 17, United States Code, to adjust or determine such rates and terms for periods following 2004 shall be terminated upon the enactment of this Act and shall be null and void.

(c) EXISTING APPROPRIATIONS.—Any funds made available in an appropriations Act before the date of the enactment of this Act to carry out chapter 8 of title 17, United States Code, shall be available to the extent necessary to carry out this section.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, following our subcommittee markup, members and other interested parties continued to offer constructive recommendations to improve H.R. 1417. The substitute I am offering with Mr. Berman incorporates necessary tweaks on a number of issues that will improve the operations of the new ratemaking and distribution system. Mr. Berman has mentioned a couple of those tweaks and I will mention a couple more.

Briefly, the substitute includes the following revisions: first, to preserve the integrity of privately-negotiated agreements and maintain the uniformity of the five-year extension of licensing periods. The substitute staggers the licenses accordingly.

Second, parties and their petitions to participate must provide sufficient evidence demonstrating that they have a significant interest in the proceeding. This will ensure that only parties with standing become actual participants.

Third, in the interest of uniformity, the Copyright Royalty Judges will conduct discovery conferences to ensure that the discovery process is conducted in a timely and consistent manner.

Fourth, upon motion by participants or the Copyright Royalty Judge, a ratemaking determination may be conducted as an all-paper proceeding under specified conditions.

Fifth, participants in a ratemaking proceeding may seek discovery of relevant and material information. A Copyright Royalty Judge may deny a discovery request for good cause shown that includes such factors as whether the discovery sought is unreasonable.

Lastly, the substitute clarifies that Copyright Royalty Judges may consult the Copyright Office on any questions other than issues of fact. All questions of law, including novel questions, will remain as part of the proceedings record.

Mr. Chairman, these and other provisions of the substitute were painstakingly negotiated over many weeks. Like the underlying text of H.R. 1417, the substitute is a product of compromise that reflects a bipartisan consensus on how best to improve the bill.

I urge its adoption and yield back the balance of my time.

Chairman SENSENBRENNER. Are there amendments? If not, the question is on the amendment in the nature of a substitute. Those in favor will say aye. Opposed, no. The ayes appear to have it. The ayes have it and the amendment in the nature of a substitute is agreed to.

A reporting quorum is present. The question now occurs on the motion to report the bill, H.R. 1417, favorably as amended. Those in favor will say aye. Opposed, no. The ayes appear to have it. The ayes have it and the motion to report favorably is adopted.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendment adopted here today. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all members will be given two days pursuant to the rules in which to submit additional dissenting, supplemental, or minority views.

[Statements of Hon. John Conyers, Jr. and Hon. Sheila Jackson-Lee follows:]

STATEMENT OF HON. JOHN CONYERS, JR.

I would like to speak in favor of this legislation. It has been a year since the Committee held a hearing on concerns with the CARP, the system that sets royalty rates for copyrighted content. People on both sides, the owners and buyers, agree that the current system needs changes. Based on that hearing, Chairman Smith, Ranking Member Berman, and I introduced legislation, H.R. 1417, that would make substantial procedural changes.

We heard the current system is costly because the copyright owners and users have to pay for the arbitrators. Our bill creates three Copyright Royalty Judges who would be paid from appropriated funds to carry out functions related to setting royalty rates and distributing royalty fees.

Another complaint was that the CARP does not have adequate rules on how to address hearsay evidence. This bill explicitly requires that the Judges treat hearsay evidence in the same manner that it is treated in federal court.

This bill also alters the terms for which certain royalty rates are in effect. Rates that are determined by the Copyright Royalty Judge will be in effect for five years. This should create some predictability and uniformity for those who rely on the Judge's determinations.

Finally, parties on both sides argued that the substantive standards that the CARP uses to set royalty rates should be changed somehow. In an effort to reach a compromise and pass a bill that does not alter any substantive rights, this bill changes only the procedure for rate settings and distributions.

There will be a substitute amendment to the bill that was worked out by the majority, minority, and all groups interested in the CARP process. I hope we can continue to work on resolving any outstanding issues and moving this bill through the full House and the Senate.

I urge my colleagues to vote "Yes" on this bill as amended.

STATEMENT OF CONGRESSWOMAN SHEILA JACKSON-LEE

Mr. Chairman and Mr. Ranking Member, I thank you for convening this markup to amend several bills, including H.R. 1417, the "Copyright Royalty and Distribution Reform Act." Mr. Smith, Mr. Berman, and Ranking Member Conyers, thank you for your hard work in crafting this legislation.

The bill would replace the existing administrative procedures within the U.S. Copyright Office that determine copyright royalty rates and the distribution of related royalties under various compulsory licenses.

Under the Copyright Royalty Tribunal Reform Act of 1993, the Librarian of Congress has the authority to convene Copyright Arbitration Royalty Panels, or "CARPs," to resolve failed private negotiations between parties that fail to establish rates or to distribute royalties regarding the commercial use of movies, music and other specified copyrighted works.

For years, the CARP system has been criticized for rendering unpredictable and inconsistent decisions, employing arbitrators lacking the expertise to render sound decisions, and for being unnecessarily expensive.

H.R. 1417 is a reasonable bill to cure these concerns and is based on the input and recommendations of government and industry experts.

H.R. 1417 addresses the problem of lack of arbitrator expertise by appointing a "Copyright Judge" to preside over the new process. The Copyright Judge will be appointed by the Librarian of Congress, have full adjudicatory responsibility, and have the authority to make rulings on both the law and rates. The Copyright Judge will select two professional staff members with knowledge of economics, business, and finance. These staff qualifications will also improve the quality of the decisions rendered.

H.R. 1417 redefines the role of the Copyright Office. Presently, acts as an intake agency answering initial case intake questions, as well as an appellate court for CARP decisions by advising the Librarian on cases. This dual role forces the Copyright Office to often decline to answer threshold intake questions for fear of having to review its own decisions at the appellate stage. Under H.R. 1417, the Copyright Office's appellate responsibilities will be removed and the Office will only act in an administrative and advisory capacity by counseling the Copyright Judge on substantive issues as requested.

For small claimants who participate in the CARP process, the substantial expenses are practically preclusive. H.R. 1417 contains provisions to make the process more accessible. First, claimants must declare an "amount in controversy" during a distribution determination phase of the proceedings. If the dollar figure is \$500 or less, the claimant will be assigned to the small claims process which is a less expensive, "all-paper" claim resolution method.

Another provision of H.R. 1417, that benefits both large and small claimants requires the filing of a "notice of intent to participate" in either a rate-making or distribution proceeding. This requirement will discourage entities from disrupting the process by participating at the last minute. If a party failure to file in a timely manner or failure to pay the required fee, they will be an exclusion of either written or oral participation in that determination. Those exempted as small claimants would not be affected by this requirement.

H.R. 1417 contains several procedural changes to make the claim resolution process more convenient for the parties. H.R. 1417 expands the duration of the discovery phase from 45 to 60 days to give parties more time to file their claims. Additionally, the 180-day time-frame for completing the CARP hearing process is amended to require parties complete the hearing phase of a rate-making or distribution determination in six months. The Copyright Judge, at their discretion, could extend this period up to a maximum of six additional months.

Mr. Chairman and Mr. Ranking Member, H.R. 1417 makes changes to the CARP system that benefit the parties as well as the agents of the copyright adjudication system. I support H.R. 1417, and I urge my colleagues on the Judiciary Committee to do likewise.

