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Copyright Royalty Board

37 CFR Part 385

[Docket No. 16-CRB-0003-PR]

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); Subpart A Configurations of the Mechanical License

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges publish final regulations that set continued, unaltered rates and terms for subpart A configurations subject to the statutory license to use nondramatic musical works to make and distribute phonorecords of those works (the Mechanical License). In addition, the Judges correct an outdated cross-reference in the regulations.

DATES: *Effective Date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Anita Blaine, Program Specialist, by telephone at (202) 707-7658 or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Copyright Royalty Judges (Judges) received a Motion to Adopt Settlement (Motion) from UMG Recordings, Inc. (UMG)¹ and Warner Music, Inc. (WMG),² in their respective capacities as licensees of nondramatic musical works. The Motion sought approval of a partial settlement of the license rate proceeding before the Judges titled *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, Docket No. 16-CRB-0003-PR. UMG and WMG reported that they reached the settlement with “a significant portion of the sound recording and music publishing industries” to continue unaltered the currently existing rates and terms in subpart A of 37 CFR part 385 for the “Mechanical License”, i.e., the statutory license for the use of nondramatic musical works in the making and distributing of phonorecords. *See* 17 U.S.C. 115.

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided the settling parties submit the negotiated rates and terms to the Judges for approval. That provision directs the Judges to provide those who would be bound by the negotiated rates and terms an opportunity to comment on the agreement.

The Judges published the proposed settlement in the **Federal Register** and requested comments from the public.³ 81 FR 48371 (July 25, 2016). The Judges received comments from three entities: American Association of Independent Music (A2IM), Sony Music Entertainment (SME), and George D. Johnson dba GEO Music (Mr. Johnson). A2IM urged adoption of the

¹ UMG Recordings, Inc. includes its successors and affiliates that engage in the production and distribution of recorded music, including Capitol Christian Music group, Inc., and Capitol Records, LLC.

² Warner Music, Inc. includes its successors and affiliates that engage in the production and distribution of recorded music.

³ The notice of settlement included a proposed rule that purported to limit the license rates at issue to the time period 2018 to 2022. *See* 81 FR 48371 (Jul. 25, 2016). In fact, the license rates adopted in this Final Rule will remain in effect until superseded by a subsequent rulemaking. *See* 17 U.S.C. 115(c)(3)(C).

agreed settlement. SME did not oppose continuing the existing royalty rates, but opposed adoption of one portion of the proposed regulation, *viz.*, the late fee provision. Mr. Johnson opposed adoption of the settlement.

The National Music Publishers' Association (NMPA) and the Nashville Songwriters Association International (NSAI) (together, Copyright Owners) filed a motion seeking leave to respond to the SME comment and partial objection to the settlement. The Judges granted the Copyright Owners' motion and extended the initial comment period to permit interested parties to submit responsive comments. *See* 81 FR 71657 (Oct. 18, 2016). The Judges thus considered Copyright Owners' responsive comments, which they had attached to their motion for leave to respond. During the extended comment period, the Judges received a comment in support of the proposed settlement from "Anonymous."⁴

On or about October 28, 2016, the Judges received a Motion to Adopt Settlement Industry-Wide (Second Motion). In the Second Motion, the Copyright Owners reported an agreement between Copyright Owners and SME, resolving all issues SME raised in its partial objection to the proposed settlement. According to the Second Motion, the parties agreed that: (1) SME would withdraw its objection to the proposed rule, (2) Copyright Owners would withdraw their response to SME's objection, (3) the parties to the settlement would request that the Judges adopt the settlement industry-wide, and (4) SME would withdraw from the proceeding, except to support adoption of the settlement or, if the settlement were not adopted, to litigate matters relating to the subpart A regulations.

⁴ Without more information, the Judges cannot determine whether "Anonymous" is a participant in this proceeding. As "Anonymous" made no objection, however, participant status is irrelevant.

By its terms, the partial settlement applied originally only to UMG, WMG, and the unnamed “significant portion of the . . . music publishing industries” with whom the licensees had agreed. The Second Motion expanded the settlement to include SME as a licensee subject to the settlement rates and terms.

The Judges “may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,” only “if any participant [in the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.” 17 U.S.C. 801(b)(7)(A)(ii).

Mr. Johnson’s Objections to the Settlement

George Johnson, dba GEO Music, appears in this proceeding as a *pro se* participant. Mr. Johnson’s comment opposing the proposed settlement rates and terms filed August 24, 2016, incorporated by reference “two Opposition Motions” filed concurrently with his Comments in the rulemaking. The exact identity of the two “Opposition Motions” Mr. Johnson cites is unclear.

Mr. Johnson submitted: (1) Opposition to Parties Motion to Adopt Settlement, dated June 27, 2016 (Opposition); (2) Second Opposition Motion to NMPA, NSAI, WMG, and UMG’s Reply to Adopt Settlement as Statutory Rates and Terms, dated July 7, 2016 (Second Opposition); (3) Objection to Comments and Objections of Sony Music Entertainment Concerning Proposed Settlement, dated August 29, 2016 (Objection); and (4) Objection and

Response to NMPA and NSAI's Response to SME's Comments and Objections Concerning Proposed § 385.3 Settlement, dated August 31, 2016 (Second Objection).⁵

Mr. Johnson filed an opposition to the Second Motion on November 3, but amended his filing twice. He submitted his final version November 8, 2016.⁶ The objections Mr. Johnson made in response to the Second Motion were a reprise of his earlier objections. Nothing in the parties' agreement addresses Mr. Johnson's grievances.

In each of his filings, Mr. Johnson objects to adoption of the settlement rates and terms, whether for the settling parties alone, or as a basis for statutory licenses industry-wide. The bases for his objections are that the proposed settlement:

(1) "violates copyright owners' *exclusive rights*";⁷

(2) creates a "substantive competitive disadvantage for *every American independent songwriter and music publisher*, as well as, every co-writer and co-publisher within the Universal Music Publishing (UMP) ... and Warner-Chappell Publishing (WCP) catalogs;"⁸

⁵ These papers were filed with the Judges on July 7, 2016, July 11, 2016, September 28, 2016, and September 28, 2016, respectively.

⁶ CRB procedural rules require responses to motions to be filed within five business days after the motion is filed. *See* 37 CFR 350.4(f). Five business days after October 28, 2016, was November 4, 2016. As Mr. Johnson's later filings consisted of amendments to the original, timely filing and as Mr. Johnson is appearing in this proceeding *pro se*, the Judges accepted his November 8, amended filing.

⁷ Opposition at 2; Second Opposition at 6; *see* Second Objection at 3.

⁸ Opposition at 2-3; Second Opposition at 6.

(3) involves foreign companies, as UMP/UMG and WCP/WMG are headquartered in France and Russia;⁹

(4) permits licensees to look out for their own self-interests;¹⁰

(5) is a product of anticompetitive “price-fixing other people’s property at the below-market 9.1 cents....”¹¹

(6) “*does not provide a reasonable basis for setting statutory terms or rates;*”¹²
and

(7) disregards the effects of inflation on the songwriter and publisher rights at issue.¹³

Mr. Johnson makes legal, economic, and subjective arguments against adoption of the agreed license rates and terms from his perspective as an independent songwriter and publisher.

Mr. Johnson’s legal argument, *viz.*, that the proposed settlement violates copyright owners’ exclusive rights, fails.¹⁴ The copyrights of creators of nondramatic musical works are not unlimited. They are subject to express exceptions and limitations, including section 115 of the Act. Section 115, like its predecessor, section 1(e) of the 1909 Copyright Act, creates a compulsory, statutory license available to users of musical works for “mechanical” manufacture

⁹ Opposition at 3; Second Opposition at 7.

¹⁰ *Id.*

¹¹ *Id.*; Objection at 2; *see* Second Objection at 3-4.

¹² Opposition at 6.

¹³ Opposition at 7; Second Opposition at 6-7; Objection at 3-4; Second Objection at 2.

¹⁴ It is unclear whether, in his Objection, Mr. Johnson intended to challenge the constitutionality of the mechanical compulsory license. The Judges find that Mr. Johnson’s conclusory statement that “[t]his is ... unconstitutional and violates the Art I exclusive rights in copyright” does not articulate a constitutional challenge that the Judges can consider.

and distribution of those works. Over time, the scope of the “mechanical” license has grown to include digital uses. These uses are expressly allowed by the Act and, so long as the user complies with the terms of the statutory license, the user is not infringing on any copyright that a songwriter or publisher might claim.¹⁵

Similarly, Mr. Johnson’s economic arguments must fail. Negotiations by and between major recording companies and major publishers might be concluded without input from independent songwriters or publishers. The negotiating representatives, however, *represent* individual songwriters and publishers.¹⁶ Presumably the representatives are acting in the interest of their constituents. If they were not doing so, the constituents could seek representation elsewhere. But, Mr. Johnson has not even hinted at evidence to support his argument that the representative negotiators are engaged in anti-competitive price-fixing at below-market rates. The very definition of a market value is one that is reached by negotiations between a willing buyer and a willing seller, with neither party being under any compulsion to bargain. Although Mr. Johnson states it as a negative, the parties’ negotiations are only fair and reasonable if each party acts to protect its own self-interest. In that regard, the Judges view the settling parties’ consensual decision to establish a fixed nominal rate, *i.e.*, unadjusted for inflation, as also representative of their mutual self-interest.¹⁷

Judges’ Conclusion

¹⁵ In some of his argument, Mr. Johnson refers to the difficulties presented not only by the section 115 license, but also by the Performing Rights Organizations’ uses that are governed by separate Consent Decrees that were first entered in 1941 and have been amended periodically since. Consent Decree rates are determined in a New York federal district court, commonly known as the Rate Court. The Judges agree with Mr. Johnson that music licensing is fragmented, both by reason of the Consent Decree and the fragmentation of the statutory licensing schemes in the Act. These issues are beyond the scope of authority of the Judges; they can only be addressed by Congress.

¹⁶ Of note, Mr. Johnson himself is a member of NSAI. *See* George Johnson’s (GEO) Objection to NMPA, NSAI and SME’s Motion to Adopt Settlement Industry Wide at 10 (Nov. 8, 2016).

¹⁷ Mr. Johnson repeats allegations that the recording companies involved in this licensing negotiation are foreign-owned. He fails, however, to state why foreign corporate ownership might be relevant to the issues at hand.

Section 801(b)(7)(A) of the Act is clear that the Judges have the authority to adopt settlements between some or all of the participants to a proceeding at any time during a proceeding, so long as those that would be bound by those rates and terms are given an opportunity to comment. *Id.* at (b)(7)(A)(i). If a participant raises an objection to adoption of the settlement, the Judges must determine whether, despite the objection(s), the proposed settlement provides a reasonable basis for setting the rates and terms at issue. *Id.* If the Judges find that no participant has shown that the agreement “does not provide a reasonable basis for setting statutory terms or rates” then they may adopt the proposed terms and rates as statutory rates and terms for participants that are not parties to the agreement. *Id.* at (b)(7)(A)(ii).

The Judges provided an opportunity for comment and, following the Second Motion, were left with only Mr. Johnson’s objections. As discussed above, Mr. Johnson’s objections did not change and he provides no persuasive legal or economic arguments that would convince the Judges to reject a proposed settlement reached voluntarily between the Settling parties.

From the perspective of an independent songwriter, the proposed rates might seem inadequate. The fact remains, however, that the proposed rates and terms were negotiated on behalf of the vast majority of parties that historically have participated in Section 115 proceedings before the Judges. Those parties clearly concluded that the rates and terms were acceptable to both sides. The evidence¹⁸ and arguments Mr. Johnson presented are insufficient for the Judges to determine that the agreed rates and terms are unreasonable.

¹⁸ The Judges are not ruling that any of Mr. Johnson’s submissions would be admissible at an evidentiary hearing. Even taking those submissions as admissible evidence in support of its positions, however, the Judges find that they would be immaterial to the Judges’ rate-setting mandate.

The only objections to the agreement by a participant were those of Mr. Johnson. Based on those objections, the Judges cannot conclude that the agreement reached voluntarily between the Settling Parties does not provide a reasonable basis for setting statutory terms and rates for licensing nondramatic musical works to manufacture and distribute phonorecords, including permanent digital downloads and ringtones (Subpart A Configurations). Therefore, the Judges must adopt the proposed regulations that codify the partial settlement.

Further, because the only participant, other than Mr. Johnson, offering objection to the settlement joined in the Second Motion to apply the rates and terms industry-side, the Judges adopt the proposed rates and terms industry-wide for subpart A Configurations. In doing so, the Judges make clear that the adoption of the partial settlement should in no way suggest that they are more or less inclined to adopt the reasoning or proposals of any of the parties remaining in the proceeding in relation to subpart B or C configurations.

In reviewing the regulations, the Judges discovered an outdated cross-reference and are correcting it.

The regulations of 37 CFR part 385, subpart A, are adopted as detailed in this Final Rule.

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Final Regulation

For the reasons set forth herein, the Copyright Royalty Judges amend 37 CFR part 385 as follows:

**PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER
COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING OF PHYSICAL AND
DIGITAL PHONORECORDS**

1. The authority citation for part 385 continues to read:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

§ 385.4 [Amended]

2. Section 385.4 is amended by removing “§ 201.19(e)(7)(i)” and adding “§ 210.16(g)(1)” in its place.

Dated: February 22, 2017.

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

Approved by:

Carla D. Hayden,

Librarian of Congress.

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