Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)	Docket No. 21-CRB-0001-PR (2023–2027)[1]

JOINT RECORD COMPANY PARTICIPANTS' EMERGENCY MOTION FOR CLARIFICATION AND REQUEST FOR EXTENSION

On March 30, 2022, the Copyright Royalty Judges published in the *Federal Register* a notice withdrawing from consideration under Section 801(b)(7)(A) of the Copyright Act a settlement among certain participants of the royalty rates and terms in 37 C.F.R. Subpart B (such settlement, the "Settlement," and such rates and terms, the "Subpart B Rates and Terms"). *See* 87 Fed. Reg. 18342 (March 30, 2022) (the "Withdrawal Notice"). The parties to the Settlement were Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. (the "Joint Record Company Participants"), along with the National Music Publishers' Association, Inc. ("NMPA") and Nashville Songwriters Association International ("NSAI").

The Joint Record Company Participants file this emergency motion for three reasons.

First, they respectfully request that the Judges make explicit that they have declined to adopt the settlement *only* as to "participants that are not parties to the agreement," as required by 17 U.S.C. § 801(b)(7)(A)(ii). This conclusion should be self-evident. The Judges relied on Section 801(b)(7)(A)(ii) of the Copyright Act in declining to adopt the Settlement. And Section

[1] By using this caption, the Joint Record Company Participants (defined above) are not waiving any rights or expressing any agreement concerning the dates that any rates and terms adopted by the Judges in any rate proceeding are to be in effect.

801(b)(7)(A)(ii) states clearly that the Judges' rejection of a settlement applies only as to "participants that are not parties to the agreement." 17 U.S.C. § 801(b)(7)(A)(ii); *see also* 37 C.F.R. § 351.2(b)(2). That is, Section 801(b)(7)(A)(ii) authorizes the Judges to decline to adopt the Settlement only as to Mr. Johnson, the sole licensor participant that is not a party to the Settlement. Unfortunately, certain industry observers have misreported the issue, creating the potential for confusion about what remains to be litigated. That reporting suggests a perception that the participants will now litigate Subpart B Rates and Terms as to all copyright owners. Such a result would be contrary to the express and unambiguous terms of the Copyright Act. The Joint Record Company Participants urge the Judges to make this explicit before the filing of the cases the Withdrawal Notice anticipates. A case litigating the fair market value of mechanical licenses to Mr. Johnson's works would be very different from a case more broadly addressing Subpart B Rates and Terms.

Second, the Withdrawal Notice does not address the procedures to be employed in litigating the Subpart B Rates and Terms. All participants would benefit from additional procedural clarity before moving forward with this litigation, given that this is uncharted territory. While the Judges have previously struck bits of settlements found to be contrary to law, they have never before rejected the applicability of a settlement in its entirety to participants who are not parties to that settlement. *See, e.g.*, 87 Fed. Reg. at 18343-44. The Joint Record Company Participants therefore ask the Judges to clarify that in filing a rebuttal case, they need only address the valuation of Mr. Johnson's works by responding to the assertions in Mr. Johnson's written direct case.

Third, the Joint Record Company Participants move for an extension of the deadline to file a written rebuttal statement concerning Subpart B Rates and Terms responding to the written direct

statement of George Johnson and the criticisms of the Settlement by Mr. Johnson. In the absence of any contrary procedures, the scheduling order in this proceeding seems to contemplate that participants who are parties to the Settlement should file written rebuttal statements on April 22, 2022 – only 23 days after publication of the Withdrawal Notice. The Joint Record Company Participants respectfully submit that this would be an unreasonably short time to prepare a rebuttal case. That is especially so given the participants' need for additional clarity as to scope and procedures, as set forth above. Pursuant to the Judge's authority under Section 801(c), the Judges should specify a deadline for filing written rebuttal statements concerning Subpart B Rates and Terms that is at least 60 days after their issuance of an order clarifying the applicable scope and procedures.

I. The Judges Should Clarify that They Have Declined to Adopt the Settlement Pursuant to Section 801(b)(7)(A)(ii) Only as to Mr. Johnson

Some of the reporting concerning the Withdrawal Notice suggests a perception that the participants will now be required to litigate Subpart B Rates and Terms as to *all* copyright owners.[2] This appears to be contrary to the Withdrawal Notice and it is foreclosed by the governing provision of the Copyright Act. *See* 87 Fed. Reg. at 18343 (quoting 17 U.S.C. § 801(b)(7)(A)(ii)). Given that the Withdrawal Notice contains ambiguity on the margins, and in light of the importance of the participants' fully understanding the scope of what remains to be litigated before

[2] *See, e.g.*, Ed Christman, *The 9.1 Cent Mechanical Royalty Rate Ditched in New CRB Ruling*, Billboard (Mar. 29, 2022), https://www.billboard.com/pro/mechanical-royalty-rate-ditched-new-crb-ruling/; Dylan Smith, *Copyright Royalty Board Rejects Mechanical-Rate Freeze: 'Vertical Integration Linking Music Publishers and Record Labels Raises A Warning Flag,'* Digital Music News (Mar. 30, 2022), https://www.digitalmusicnews.com/2022/03/30/copyright-royalty-board-mechanical-rate-freeze/.

filing written rebuttal statements, the Joint Record Company Participants respectfully urge the Judges to clarify the issue.

Encouraging settlements was a key goal of Congress when it adopted the current rate-setting procedures. H. Rep. No. 108-408, at 30 (Jan. 30, 2004) ("the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates"). Toward that end, the theme of settlement pervades the rate-setting provisions of the Copyright Act. Every proceeding begins with a voluntary negotiation proceeding. 17 U.S.C. § 803(b)(3). Later, the Judges are to order a settlement conference. 17 U.S.C. § 803(b)(6)(C)(x). And the limited, enumerated functions of the Judges include specific instructions for how settlements are to be handled. 17 U.S.C. § 801(b)(7)(A). Those instructions are clear and detailed, and set forth the process the Judges must follow in evaluating a settlement.

Specifically, and as set forth in the Withdrawal Notice, when a settlement is reached, the Judges are to provide those that would be bound by a determination based on the settlement "an opportunity to comment on the agreement," and they are to provide participants in the proceeding that would be bound by such a determination "an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates." 17 U.S.C. § 801(b)(7)(A)(i); *see also* 87 Fed. Reg. at 18343. In other words, although non-participants may offer comments regarding agreements, they have no right to object to agreements. The Judges then "may decline to adopt the agreement as a basis for statutory terms and rates" only if a "participant" objects to the settlement and the Judges conclude "that the agreement does not provide a reasonable basis for setting statutory terms or rates." 17 U.S.C. § 801(b)(7)(A)(ii); *see also* 87 Fed. Reg. at 18343. This is what the Judges did in the Withdrawal Notice.

However, Section 801(b)(7)(A)(ii) authorizes the Judges to decline to adopt a settlement as the basis for statutory terms and rates *only* for a specific and limited group of persons and entities: "participants that are not parties to the agreement." 17 U.S.C. § 801(b)(7)(A)(ii). That is, the Judges may decline to adopt a settlement as to the objecting participants in a proceeding who will go on to litigate, but they cannot decline to adopt a settlement as the basis for setting statutory terms and rates for anyone else.

It makes perfect sense that the Judges cannot decline to adopt a settlement as the basis for statutory terms and rates for participants that *are* parties to the agreement. Those parties have voluntarily agreed to particular rates and terms, as willing buyers and willing sellers. There is no reason to think the Judges need to save settling parties from themselves by negating an agreement that they have voluntarily reached, and certainly no basis in Section 801(b)(7)(A) to think that the Judges have the power to upset contractual expectations by giving a party to a settlement a better deal than the one it voluntarily accepted. To the contrary, the Judges are required to determine 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." 17 U.S.C. § 115(c)(1)(F). Here, such an agreement has in fact been reached, leaving no need to guess at what the parties to the Settlement would agree to, and no work for the Judges to do when setting rates binding on those parties.

Nor would there be any basis for the Judges to reject the Settlement as to non-participants. Non-participants take a calculated risk when they choose to sit out a proceeding. Specifically, they decide that to save the expense and burden of participating in a proceeding, they will live with the outcome of the proceeding whatever it is. In particular, just as a dissatisfied non-participant cannot

seek appellate review of the outcome of a rate proceeding, *Beethoven.com v. Librarian of Congress*, 394 F.3d 939, 945-46 (D.C. Cir. 2005), non-participants may not object to any settlement reached by those who *are* prepared to undertake the expense and burden of participation. *See* 87 Fed. Reg. at 18348 ("[d]issatisfaction with the actions of a participant can only be contested by another participant, presenting competent evidence to inform the Judges of a reasonable outcome"). Thus, while Congress has authorized the Judges to decline to adopt a settlement as to an objecting participant, it expressly did not authorize the Judges to decline a settlement as to non-participants who, by definition, have chosen to allow the participants to reach an agreement on their behalf. In so doing, Congress reasonably chose to promote participation in proceedings while also giving settlements broad effect.

Because Section 801(b)(7)(A)(ii) is clear that it confers upon the Judges the power to decline to adopt a settlement as the basis for statutory terms and rates only for "participants that are not parties to the agreement," the Joint Record Company Participants assume that the Withdrawal Notice was not intended to do more.[3] Importantly, the Withdrawal Notice in the main is perfectly consistent with that principle. In it, the Judges explain:

> Section 801(b)(7)(A)(ii) provides that 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,

[3] To the extent that the Judges believe that Section 801(b)(7)(A)(ii) might empower them to decline to adopt a settlement as the basis for statutory terms and rates for anyone other than Mr. Johnson, the Joint Record Company Participants respectfully submit that any such interpretation – which is contrary to the plain statutory language – would raise a novel question of law that would need to be referred to the Register of Copyrights pursuant to Section 802(f)(1)(B), and this motion should be considered a motion for such a referral.

> that the agreement does not provide a reasonable basis for setting statutory terms or rates."

87 Fed. Reg. at 18343 (emphasis added; bracketed language in original). As this quoted language indicates, Section 801(b)(7)(A)(ii) is clear that a rejection pursuant to that provision applies only to "participants that are not parties to the agreement." Similarly, the Withdrawal Notice focuses on Mr. Johnson's objections to the settlement. 87 Fed. Reg. at 18346-47.

However, the conclusion of the Withdrawal Notice leaves ambiguity on the margins, by declaring "that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms," and by not then specifying the effect of that finding. 87 Fed. Reg. at 18349. As a result, some commentators have interpreted the effect of the Withdrawal Notice as calling for litigation of Subpart B Rates and terms as to all musical works and copyright owners, not just Mr. Johnson. The Judges should clarify that, to the contrary, the going-forward scope of this litigation applies only to the Subpart B Rates and Terms for Mr. Johnson's works. That is, the Judges should clarify that, consistent with Section 801(b)(7)(A)(ii), they did not intend to reject the Settlement as to the willing buyers (the Joint Record Company Participants) and the willing sellers (the NMPA and NSAI) that entered into the Settlement, nor as to the non-participants who could have chosen to participate in order to present the Judges with alternative rates and terms and supporting evidence, but decided not to do so.

Because a rebuttal case addressing the fair market value of mechanical licenses to Mr. Johnson's works would likely be very different from a case more broadly addressing Subpart B Rates and Terms, it is important that the Judges clarify the scope of the Withdrawal Notice before the filing of written rebuttal statements.

II. The Judges Should Clarify the Procedures to Be Employed in Litigating the Subpart B Rates and Terms

Just as the Withdrawal Notice leaves ambiguity concerning the substantive scope of the Subpart B Rates and Terms to be determined by litigation, it does not specify any procedures to be followed in litigating the Subpart B Rates and Terms. In the absence of special procedures for litigating the Subpart B Rates and Terms, the scheduling order appears to contemplate that the participants are to address the Subpart B Rates and Terms in written rebuttal statements due April 22, 2022. *See* Order Extending Deadline for Written Rebuttal Statements (Mar. 14, 2022). Given the unusual posture of this proceeding as it concerns Subpart B Rates and Terms, and that impending deadline, the Judges should clarify for the participants what the Judges expect in this regard.

The settling participants filed the Settlement with the Judges on May 25, 2021, effectively announcing their rate request in this proceeding. The Joint Record Company Participants did not withdraw from the proceeding at that time, and so remain participants in the proceeding today. When they filed the Settlement, the Joint Record Company Participants stated that they did "not expect to further participate in the Proceeding except as to prosecution of the Settlement, or if the Settlement is not adopted industry-wide with respect to Subpart B Configurations, any other matters respecting the adoption of royalty rates and terms for Subpart B Configurations." Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations at 2 (May 25, 2021). Consistent with that expectation and the scheduling order adopted during the summer of 2021, the Joint Record Company Participants did not file written direct statements in this proceeding. That order specified that only "Non-Settling Parties" were to file written direct statements on October 13, 2021. Order Granting Joint Motion to Modify the Case Scheduling

Order (Aug. 3, 2021). Because the Joint Record Companies then had the Settlement pending before the Judges, they understood the scheduling order to direct them not to file a written direct statement.

Now that the Judges have declined to adopt the Settlement as the Subpart B Rates and Terms as to the sole licensor participant that is not a party to the Settlement, George Johnson, the scheduling order appears to require the Joint Record Company Participants to file a written rebuttal statement on April 22, 2022. *See* Order Extending Deadline for Written Rebuttal Statements (Mar. 14, 2022). However, the Withdrawal Notice suggests that this would be an unusual written rebuttal statement. NMPA, NSAI, Apple Inc., Google, LLC, Pandora Media, LLC and Spotify USA Inc. have all filed rate requests seeking Subpart B Rates and Terms that are the same as the ones in the Settlement in all substantive respects. Introductory Memorandum to the Written Direct Statement of Copyright Owners, App. A at A-9 (Oct. 13, 2021); Introductory Memorandum to the Written Direct Statement of Apple Inc., attachment at 10 (Oct. 13, 2021); Proposed Rates and Terms of Google LLC at 9 (Oct. 13, 2021); Proposed Rates and terms of Pandora Media, LLC at 10-11 (Oct. 13, 2021); Introductory Memorandum to the Written Direct Statement of Spotify USA Inc., Ex. B at 11 (Oct. 13, 2021). Thus, there are no Subpart B Rates and Terms issues to rebut as to those participants.

Only Mr. Johnson proposed substantively different Subpart B Rates and Terms from those provided by the Settlement: 56 cents per copy for physical phonorecords and permanent downloads. Introductory Memorandum to the Amended Written Direct Statement of George D. Johnson ("GEO") at 9, 25 (Mar. 11, 2022). The Joint Record Company Participants are certainly able to explain why Mr. Johnson's rate proposal is untethered from marketplace reality. The Joint

Record Company Participants request that the Judges clarify that a submission addressing other issues touched on in the Withdrawal Notice is not substantively required given Section 801(b)(7)(A)(ii). In other words, the written rebuttal statement to be filed by the Joint Record Company Participants need only address the valuation of Mr. Johnson's works by responding to the assertions in Mr. Johnson's written direct statement.

III. The Judges Should Set a Deadline for Filing Subpart B Written Rebuttal Statements at Least 60 Days after Clarification of the Scope and Procedures for the Subpart B Litigation

The Judges published the Withdrawal notice on March 30, 2022 – only 23 days before the current deadline for filing written rebuttal statements on April 22, 2022. The Joint Record Company Participants respectfully submit that this would be an unreasonably short time to prepare a rebuttal case responding to Mr. Johnson's assertions (let alone other, broader issues, should that be deemed necessary), given the need for clarity about matters of scope and procedure set forth in this motion. The Joint Record Company Participants request that the Judges use their authority under Section 801(c) to specify a deadline for filing written rebuttal statements concerning Subpart B Rates and Terms that is at least 60 days after their issuance of an order clarifying the applicable scope and procedures.

Dated: April 5, 2022

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, April 05, 2022, I provided a true and correct copy of the Joint Record Company Participants' Emergency Motion For Clarification and Request for Extension to the following:

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Signed: /s/ Susan Chertkof