

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION AND ALLOCATION OF
INITIAL ADMINISTRATIVE ASSESSMENT TO
FUND MECHANICAL LICENSING
COLLECTIVE**

Docket No. 19-CRB-0009-AA

**ORDER DIRECTING PARTIES TO ADDRESS COMPLIANCE WITH TITLE 17 OF
PROPOSED REGULATIONS IMPLEMENTING SETTLEMENT**

On November 14, 2019, the Mechanical Licensing Collective (MLC) and the Digital Licensee Coordinator (DLC) (collectively Participants) filed with the Copyright Royalty Judges (Judges) a Joint Notice of Settlement and Motion to Suspend Case Schedule ([Motion](#)). The Participants are the only remaining participants in this proceeding.

The Motion states that the Participants “have reached a full settlement of all terms” in this proceeding, and describes the amount and terms of the Administrative Assessment. In light of the settlement and the impending deadline for the DLC’s responsive submission, the Judges issued an [Order](#) granting the Participants’ motion to suspend the case schedule and directing the Participants to jointly submit proposed regulatory language implementing the Settlement by November 26, 2019. Order at 2.

Section 115(d)(7)(D)(v) of the Copyright Act states

In lieu of reaching their own determination based on evaluation of relevant data, the Copyright Royalty Judges shall approve and adopt a negotiated agreement to establish the amount and terms of the administrative assessment that has been agreed to by the mechanical licensing collective and the digital licensee coordinator . . . , except that the Copyright Royalty Judges shall have the discretion to reject any such agreement for good cause shown.

17 U.S.C. § 115(d)(7)(D)(v).

Moreover, courts have consistently held that agencies cannot adopt regulations that are contrary to law, as the Register of Copyrights found in prior proceedings. *See* Review of Copyright Royalty Judges Determination, 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009), citing *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 965 (9th Cir. 2003) (“The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.”); *see also* Scope of the Copyright Royalty Judges Authority to Adopt Confidentiality Requirements upon Copyright Owners within a Voluntarily Negotiated License Agreement, 78 Fed. Reg. 47421, 47422 (Aug. 5, 2013). As

explained *infra*, at least two elements of the proposed settlement may be inconsistent with applicable statutory provisions.

As described in the Motion, the Settlement includes a formula under which all Licensees are to pay an annual minimum fee. The amount of that minimum fee will be determined by a Licensee's usage of Total Sound Recordings. The discussion of the Settlement in the Motion does not address specifically the minimum fee obligations of a "Significant Nonblanket Licensee" a term defined in section 115(e)(31) of the Copyright Act that references the entity's usage of sound recordings. This statutory definition may conflict with the threshold use of Total Sound Recordings separating alternative minimum fees in the Settlement. *See* Motion at 2-3. Additionally, the timing of payment by a "Significant Nonblanket Licensee" is on a *monthly* basis per section 115(d)(6), whereas the Settlement appears to direct payments to be made on a quarterly basis. *See* Motion at 4-5.

The Judges therefore **ORDER** the Participants to address in their submission due on November 26, 2019: (1) how the proposed regulatory terms in the settlement, including (but not limited to) those identified *supra*, are consistent with the applicable statutory provisions of Title 17; and (2) to amend all inconsistent proposed terms to make them consistent with the applicable statutory provisions.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: November 20, 2019