

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Library of Congress  
Washington, DC

*In re*

**DETERMINATION OF ROYALTY RATES  
AND TERMS FOR PERFORMANCE OR  
DISPLAY OF NONDRAMATIC MUSICAL  
WORKS AND PICTORIAL, GRAPHIC, AND  
SCULPTURAL WORKS BY PUBLIC  
BROADCASTING ENTITIES (PB III)**

**Docket No. 16-CRB-0002-PBR  
(2018-2022)**

**COMMENTS OF GLOBAL MUSIC RIGHTS, LLC**

**Submitted by Scott Zebrak, Esq. and Leo Lichtman, Esq.  
Oppenheim + Zebrak, LLP**

On November 7, 2017, the Copyright Royalty Board published a proposed rule at 82 Fed. Reg. 51,589 setting forth proposed rates and terms for use of certain works in connection with noncommercial broadcasting for the period commencing January 1, 2018, and ending on December 31, 2022. Global Music Rights, LLC (“GMR”) appreciates the opportunity to provide the Copyright Royalty Judges with its comments in response. While GMR was not a participant in the rate proceedings, it nevertheless has several concerns and suggested changes, as set forth below.

**I. BACKGROUND**

**A. About Global Music Rights**

GMR is the first performing rights society (“PRO”) in the United States in nearly 75 years. Founded in 2013, GMR represents many of today’s greatest and most popular music creators in the public performance licensing of their catalogs. The Copyright Office recognized GMR as “a fourth contender in the performance rights arena, with an impressive client list roster,”<sup>1</sup> and the Copyright Royalty Board’s website provides a hyperlink to direct visitors to GMR’s site.<sup>2</sup> In less than four years, GMR has become the

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<sup>1</sup> *U.S. Copyright Office, Copyright and the Music Marketplace*, at 150 (2015), available at <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

<sup>2</sup> <https://www.crb.gov/links/> [last visited Nov. 22, 2017].

performing rights organization of choice for nearly 30,000 works, including the works of songwriters and composers as diverse as Ira Gershwin, John Lennon, Smokey Robinson, Bruce Springsteen, Pharrell Williams, Bruno Mars and Drake. Its repertoire includes such iconic songs as “Imagine,” “The Tracks of My Tears,” “Born In The USA,” and “Happy,” among others. Each of the songwriters and composers who are now represented by GMR were formerly represented by ASCAP or BMI.

## **B. Procedure**

In a Federal Register notice dated January 5, 2016, the Judges requested that interested parties submit petitions to participate in a proceeding to set rates and terms for the statutory license for the use of certain copyrighted works in connection with noncommercial television and radio broadcasting. The organizations that filed petitions to participate included: American Society of Authors, Composers and Publishers (“ASCAP”); Broadcast Music, Inc. (“BMI”); SESAC, Inc. (“SESAC”); Educational Media Foundation (“EMF”); Harry Fox Agency LLC (“Harry Fox”); National Association of College and University Business Officers (“NACUBO”); National Music Publishers’ Association, (“NMPA”); National Public Radio (“NPR”); Public Broadcasting Service (“PBS”); National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”); and David Powell. Various parties filed notices of settlement and proposed rates and terms for adoption. No participant filed a written direct statement or other evidence.

## **C. Underlying Principles**

Section 801(b)(7)(A) of the Copyright Act requires that the Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determinations set by any agreement in a rate proceeding an opportunity to comment on the agreement. It further provides that the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement if, upon receiving objections, the Copyright Royalty Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms and rates.

GMR recognizes the challenges that the Copyright Royalty Judges face in terms of the absence of an evidentiary record. At the same time, it is incumbent upon the Copyright Royalty Judges to ground their rate determinations on evidence in the record.<sup>3</sup> For purposes of setting rates and terms under 17 U.S.C. § 118, the Copyright Royalty

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<sup>3</sup> See *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1121-22 (D.C. Cir. 2015) (vacating portion of Copyright Royalty Judges’ determination where there was an absence of evidence in the record to support the determination); see also *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 571 F.3d 69, (D.C. Cir. 2009) (vacating rate determination where Copyright Royalty Judges relied on proposal of a single participant).

Judges may consider the rates for comparable circumstances under voluntary license agreements negotiated.

## II. SPECIFIC COMMENTS

With the above-referenced principles in mind, and to effectuate the purposes of copyright law and the statutory license, GMR respectfully provides the comments set forth below.

### A. **37 C.F.R. § 381.4: There Is No Basis for the Decrease in Rates for Non-Settling Parties**

The current rates as set forth in 37 C.F.R. § 381.4(a) provide for eight tiers of royalty rates, which range from \$232.18 (for the performance of nondramatic musical compositions in a feature presentation of PBS) to \$0.59 (for the performance of nondramatic musical compositions as background or theme music in a program of a station of NPR), and certain tiers are doubled where a work is performed as theme music in an entire series. These rates apply to all copyright owners. At the same time, the current rates are deliberately tiered based on (a) the type of performance, and (b) whether the performance is undertaken by PBS or one of its stations or NPR or one of its stations, and provide for additional royalty payments where a work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR. The proposed rate would do away with these tiers and terms entirely, providing that, except for compositions that are the subject of voluntary license agreements, the royalty rate for any performance of the nondramatic musical works of any copyright owner under section 381.4 would be \$1.

The record does not support such a change. While GMR recognizes that NPR and PBS have entered into voluntary settlements with some parties, such settlements do not provide a basis for drastically reducing the statutory rate for those parties that have not settled. GMR's works include a number of the most popular and valuable works of today, as well as some of the most iconic works from years past. Yet the change, which appears to come solely from the recommendation of NPR and PBS,<sup>4</sup> would substantially prejudice GMR and other copyright owners that have not entered into voluntary license agreements by significantly devaluing their copyrighted works, likely far below the rates established in confidential settlements submitted to the Copyright Royalty Judges. Though 17 U.S.C. § 118 is intended to allow copyright owners to voluntarily negotiate with public broadcasting entities "at any time," the proposed rate would all but eviscerate the incentive for PBS, NPR, and related public broadcasting entities to negotiate for voluntary rates.

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<sup>4</sup> Submission of National Public Radio and Public Broadcasting Service, No. 16-CRB-0002-PBR (2018-2022) (Oct. 25, 2017), at 2.

Even apart from how the \$1 rate compares to the rates set forth in confidential settlements with the other PROs, the record provides no basis for why such a significant decrease in the current rates, effectively for all copyright owners that have not entered voluntary agreements, is warranted. While \$1 would represent a slight increase when compared solely to the current lowest tier, it represents a significant drop as compared to the seven other tiers. This simply does not square with the current music environment, where quality songs such as those within GMR's repertoire are increasing in value, not decreasing.<sup>5</sup> It further conflicts with the basic notions of cost of living adjustments.

Accordingly, GMR requests that with respect to those copyright owners who have not reached voluntary agreements, the Copyright Royalty Judges carry forward the current rates and terms, but with a one-time cost of living adjustment based upon the greater of the change, if any, in the Consumer Price Index (all consumers, all items) or 2%.

**B. 37 C.F.R. §§ 381.5 and 381.6: There Is No Basis for the Rates and Terms for Non-Participants**

Section 381.5 of Title 37 of the Code of Federal Regulations provides rates and terms for noncommercial educational radio stations that are licensed to colleges or universities, and which are not affiliated with NPR. Section 381.6 provides rates and terms for radio stations that are not licensed to colleges or universities, and which are not affiliated with NPR. Under both sections, there are specific tiered rates set forth for each of ASCAP, BMI, and SESAC.<sup>6</sup> All other copyright owners are only entitled to \$1.<sup>7</sup> The proposed rates provide for increases in the tiered rates for ASCAP, BMI, and SESAC, but would leave the \$1 rate for all other copyright owners unchanged. GMR believes that, for the same reasons that there is no basis for the proposed \$1 rate under section 381.4, there is no basis for the proposed \$1 rates under sections 381.5 and 381.6.

At the outset, GMR notes that it did not exist when these rates were set in prior proceedings. As GMR has grown, it is even more vital to ensure that the proposed rates adequately account for the interests of all copyright owners, and not simply those of ASCAP, BMI, and SESAC. However, as currently set and as carried over in the

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<sup>5</sup> See *ASCAP Delivers Record-High 2016 Financial Results: Collects \$1.059 Billion in Revenue and Distributes More Than \$918 Million to Songwriter, Composer and Music Publisher Members*, <https://www.ascap.com/press/2017/04-04-2016-financial> [last visited Nov. 21, 2017]; *Billboard, BMI's Revenues, Royalty Distributions Both Top \$1 Billion, Through Digital Services Revenue Growth Slows*, <https://www.billboard.com/articles/business/7957586/bmi-revenues-royalty-distributions-top-1-billion> [last visited Nov. 21, 2017].

<sup>6</sup> See 37 C.F.R. §§ 381.5(c)(1)-(3) and 381.6(d)(1)-(3).

<sup>7</sup> See 37 C.F.R. §§ 381.5(c)(4) and 381.6(d)(4).

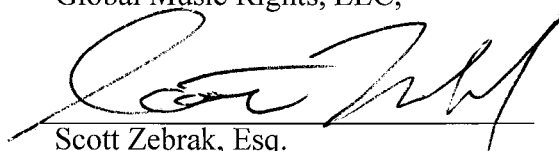
proposed rates, the \$1 rate would be incongruous with the increased rates proposed for ASCAP, BMI, and SESAC. Instead, GMR believes the Copyright Royalty Judges should take the rates representing the lowest agreed-upon rates under sections 381.5 and 381.6 (i.e., those proposed for SESAC) and adopt them as the rates for all other copyright owners. Doing so would ensure a more level playing field, where copyright owners such as GMR, who have not necessarily established relationships or bargaining positions with paying entities, are not hampered from doing so in the future.

Further, Sections 381.5 and 381.6 as drafted exclude copyright owners other than ASCAP, BMI, and SESAC from collecting royalty payments and requesting music-use reports.<sup>8</sup> The proposed rule would leave these subsections unchanged. In light of GMR's increasing role in the marketplace, GMR suggests that Sections 381.5(d)-(e) and 381.6(e)-(f) ought to be revised so that the payments and music-use reports are inclusive, and not restricted to ASCAP, BMI, and SESAC. This would ensure that all copyright owners have the right to receive the royalties due to them.

### **III. CONCLUSION**

The current rules and the new proposed rates, practically speaking, do not account for the existence of copyright owners other than ASCAP, BMI, and SESAC. Though GMR is relatively new in the music marketplace, it has quickly established itself as an important participant, committed to providing another option for songwriters. GMR thanks the Copyright Royalty Judges for the opportunity to comment, and to provide recommendations that GMR believes will lead to more reasonable rates and terms. For convenience and clarification, Appendix A is attached hereto, which outlines GMR's proposed changes set forth in its comments.

Respectfully submitted on behalf of  
Global Music Rights, LLC,



Scott Zebrak, Esq.  
Leo M. Lichtman, Esq.  
Oppenheim + Zebrak, LLP  
5225 Wisconsin Avenue NW,  
Suite 250  
Washington, DC 20015  
Tel: 202-480-2999  
scott@oandzlaw.com  
leo@oandzlaw.com  
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<sup>8</sup> See 37 C.F.R. §§ 381.5(d)-(e) (providing for payment of royalty rate and furnishing of music-use report to ASCAP, BMI, and SESAC) and 37 C.F.R. §§ 381.6(e)-(f) (same).

Appendix A

**§ 381.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(c).**

\* \* \*

- (a) Determination of royalty rate.
- (1) For performance of such work in a feature presentation of PBS:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.
  - (2) For performance of such a work as background or theme music in a PBS program:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.
  - (3) For performance of such a work in a feature presentation of a station of PBS:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.
  - (4) For performance of such a work as background or theme music in a program of a station of PBS:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.
  - (5) For the performance of such a work in a feature presentation of NPR:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.
  - (6) For the performance of such a work as background or theme music in an NPR program:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.
  - (7) For the performance of such a work in a feature presentation of a station of NPR:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.
  - (8) For the performance of such a work as background or theme music in a program of a station of NPR:  
(2018-2022) The 2013-2017 rate, subject to a one-time cost of living adjustment in accordance with paragraph 11 of this section.

- (9) For purposes of this schedule the rate for the performance of theme music in an entire series shall be double the single program theme rate.
- (10) In the event the work is first performed in a program of a station of PBS or NPR, and such program is subsequently distributed by PBS or NPR, an additional royalty payment shall be made equal to the difference between the rate specified in this section for a program of a station of PBS or NPR, respectively, and the rate specified in this section for a PBS or NPR program, respectively.
- (11) Such cost of living adjustment to be made in accordance with the greater of
  - (A) The change, if any, in the Consumer Price Index (all consumers, all items) published by the U.S. Department of Labor, Bureau of Labor Statistics during the twelve (12) month period from the most recent Index, published before December 1 of the year immediately prior to the applicable year, or
  - (B) Two percent (2%).

**§ 381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.**

\* \* \*

(c) *Royalty Rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

\* \* \*

- (4) For the performance of any other such compositions, the royalty rates set forth in paragraph (c)(3) of this section shall apply.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to each known copyright owner not later than January 31 of each year. Each annual payment shall be accompanied by a signed declaration stating the number of full-time students enrolled in the educational entity operating the station and/or the effective radiated power (ERP) as specified in its current FCC license. An exact copy of such declaration shall be furnished to each known copyright owner.

(e) *Records of use.* A public broadcasting entity subject to this section shall, upon request of a copyright owner of a published work who believes a musical composition of such owner has been performed under the terms of this section, furnish a music-use

report during one week of each calendar. A copyright owner who believes a musical composition of such owner has been performed under the terms of this section shall not in any one calendar year request more than 10 stations to furnish such reports.

**§ 381.6 Performance of musical compositions by other public broadcasting entities.**

\* \* \*

(d) *Royalty Rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

\* \* \*

(4) For the performance of any other such compositions, the royalty rates set forth in paragraph (d)(3) of this section shall apply.

(e) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to each known copyright owner not later than January 31 of each year. Each annual payment shall be accompanied by a signed declaration stating the Population Count of the public broadcasting entity and the source for such Population Count. An exact copy of such declaration shall be furnished to each known copyright owner. Upon prior written notice thereof from a copyright owner who believes a music composition of such owner has been performed under the terms of this section, a public broadcasting entity shall make its books and records relating to its Population Count available for inspection. In the event that a public broadcasting entity wishes to be deemed a Talk Format Station, then such entity shall provide a signed declaration stating that Feature Music is performed in less than 20% of its annual programming and that it complies with the caps set forth in paragraph (b)(4) of this section. An exact copy of such declaration shall be furnished to each known copyright owner. Upon prior written notice from a copyright owner who believes a music composition of such owner has been performed under the terms of this section, a public broadcasting entity shall make its program schedule or other documentation supporting its eligibility as a Talk Format Station available for inspection.

(f) *Records of use.* A public broadcasting entity subject to this section shall, upon request of a copyright owner of a published work who believes a musical composition of such owner has been performed under the terms of this section, furnish a music-use report during one week of each calendar. A copyright owner who believes a music composition of such owner has been performed under the terms of this section shall not in any one calendar year request more than 10 stations to furnish such reports.