

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (*Web V*)

Docket No. 19-CRB-0005-WR
(2021-2025)

SOUNDEXCHANGE’S STATEMENT CONCERNING THE EFFECTIVE DATE OF THE RATES TO BE DETERMINED IN THIS PROCEEDING

SoundExchange, Inc., American Federation of Musicians of the United States and Canada, Screen Actors Guild-American Federation of Television and Radio Artists, American Association of Independent Music, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and Jagjaguwar Inc. (“SoundExchange”) submit this statement pursuant to Paragraph 3 of the Copyright Royalty Judges’ June 25, 2020 Order Setting Virtual Hearing and Addressing Other Hearing-Related Matters (the “Order”).

SoundExchange understands that the Judges have requested, and the Register of Copyrights has granted, pursuant to Section 710(a) of the Copyright Act, an extension until April 15, 2021, of the deadline in Section 803(c)(1) for the Judges to issue their determination in this proceeding. SoundExchange agrees with the Judges that pursuant to Section 803(d)(2)(A) (among others), the rates and terms to be determined in this proceeding are to be effective as of January 1, 2021, “even if the determination of the Copyright Royalty Judges is rendered on a later date.” 17 U.S.C. § 803(d)(2)(A). SoundExchange provides this statement to confirm its understanding of why that is, explain why there is no legal impediment to making the rates and

terms to be determined in this proceeding retroactive to January 1, 2021, and urge the Judges to issue their determination as early as practicable notwithstanding the extension granted by the Register.

1. Under Section 803(d)(2)(A), the rates and terms to be determined in this proceeding are to be effective as of January 1, 2021.

As the Judges understand, statutory royalty rates and terms under the statutory licenses in Sections 114 and 112(e) of the Copyright Act are generally set for closed-end five-year periods. 17 U.S.C. §§ 112(e)(3), 114(f)(1)(A), 804(b)(3)(A). Thus, the current webcasting rates will expire on December 31, 2020, 37 C.F.R. § 380.1(a), and the Judges commenced this proceeding to determine royalty rates “for the period beginning January 1, 2021.” 84 Fed. Reg. 359 (Jan. 24, 2019). This is because this proceeding was commenced ten years after January 2009, and the rates to be determined in this proceeding are to become effective ten years after January 1, 2011.¹ See 17 U.S.C. § 804(b)(3)(A).

To the same effect, Section 803(d)(2)(A) specifies that because “the royalty rates and terms that were previously in effect are to expire on a specified date [December 31, 2020], 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 [January 1, 2021].” 17 U.S.C.

¹ This arrangement stands in contrast to the compulsory license in Section 115 of the Copyright Act, for which statutory royalty rates are generally set for open-ended periods that are approximately five years long, but pursuant to which old rates remain in effect until successor rates are determined. 17 U.S.C. § 115(c)(1)(E). Sections 112(e)(3) and 114(f)(1)(A), like Section 115(c)(1)(E), permit the parties to a proceeding to agree to different royalty rate periods. SoundExchange understands that the Judges relied on an apparent agreement to a non-standard start date in determining the effective date of the rates set in the *Phonorecords III* proceeding. 84 Fed. Reg. 1918 (Feb. 5, 2019). To be clear, SoundExchange has not agreed to any effective date for the rates to be determined in this proceeding other than the standard date of January 1, 2021.

§ 803(d)(2)(A). Normally, the determination deadline in Section 803(c)(1) ensures that new Section 112/114 statutory royalty rates and terms will be known at least a couple weeks before they are to be effective. However, whether a delay in the issuance of a determination is due to an extension granted by the Register pursuant to Section 710(a) or otherwise, Section 803(d)(2)(A) specifies that the January 1, 2021 effective date is to apply “even if the determination of the Copyright Royalty Judges is rendered on a later date.” 17 U.S.C. § 803(d)(2)(A).

These provisions could not be clearer, and all of them point to the same result: the rates and terms to be determined in this proceeding are to be effective as of January 1, 2021. That is to be the case even though the Register has used her authority under Section 710(a) to extend the deadline in Section 803(c)(1) for the Judges to issue their determination in this proceeding.

2. There is no legal impediment to making the rates to be determined in this proceeding retroactive to January 1, 2021.

The Order invites participants to identify reasons why the Judges might be unable to “impose retroactive royalty or other terms” if their determination is not issued until early 2021. SoundExchange believes that no such reasons exist.

The Judges’ invitation may be motivated by the general presumption against retroactive rulemaking. To be sure, it is a general principle of administrative law that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *accord Motion Picture Ass’n of America, Inc. v. Oman*, 969 F.2d 1154, 1156 (1992) (applying this principle in the context of a copyright statutory license). Accordingly, “[n]either the CRJs nor the participants have the power to engage in retroactive rate setting other than that which is expressly authorized by the statute.” *Review of Copyright Royalty Judges Determination*, 74 Fed. Reg. 4537, 4542

(Jan. 26, 2009).

However, as the language quoted above says, Congress has the power to authorize retroactive rulemaking by the Judges. That is exactly what Congress did in Section 803(d)(2)(A), when it specified that “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.*” 17 U.S.C. § 803(d)(2)(A) (emphasis added). Because Congress expressly authorized retroactive rulemaking in cases in which the Judges render their decision after the expiration of predecessor rates, the general presumption against retroactive rulemaking does not apply.

3. The Judges should issue their determination as early as practicable.

During the June 22, 2020, status conference, Chief Judge Feder indicated that while the Judges do not necessarily intend to use all of the time afforded by the Register’s extension of the deadline in Section 803(c)(1) until April 15, 2021, the Judges preferred to seek just one extension that would be sufficient to complete a determination without a need for further extensions. Consistent with that, SoundExchange urges the Judges to issue their determination as early as practicable. In particular, SoundExchange respectfully requests that the Judges aim to issue their determination, or at least a statement of the determined rates, by mid-February 2021.

Section 803(d)(2)(A) sets forth what is to happen if the Judges issue their determination after December 31, 2020:

A licensee shall be obligated to continue making payments under the rates and terms previously in effect until such time as rates and terms for the successor period are established. Whenever royalties pursuant to this section are paid to a person other than the Copyright Office [such as SoundExchange], 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 determination of the Copyright Royalty Judges establishing rates and terms for a successor period or the exhaustion of all rehearings or appeals of such determination, if any, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates. Any underpayment of royalties by a copyright user shall be paid to the entity designated by the Copyright Royalty Judges within the same period.

17 U.S.C. § 803(d)(2)(A).

Under this arrangement, any delay in issuing a determination will be disruptive, because it will prolong uncertainty in business planning and upset the normal schedule for implementing changes in the rates (as every participant has proposed). However, the disruptive effect grows over time, as delay increasingly affects cash flows and requires retroactive adjustments. The disruptive effect would become particularly acute after mid-February, because March 17, 2021 is the deadline for licensees to pay their royalties for January usage, *see* 37 C.F.R. § 380.2(b), and SoundExchange will need time after new rates are announced to update its collection and distribution platforms to implement the new rates. In the ordinary course, SoundExchange would process a large part of the royalties received in March for distribution to artists and rights owners by late April. However, uncertainty as to the Judges' determination would cast a shadow over that process and potentially delay payments to artists and copyright owners. Even a decision in mid-March would mean that accounting for January royalties as between licensees and SoundExchange would not be settled until mid-May, and a final accounting of January royalties would not begin to hit artist and copyright owner royalty statements until late June. A mid-April decision would be even more disruptive. SoundExchange urges the Judges to do what they reasonably can to issue the determination as soon as practicable. If it is not feasible for them to issue by mid-February a determination sufficiently explaining the rationale for their decision, SoundExchange respectfully requests that they consider releasing by mid-February at

least a statement of the determined rates so as to allow implementation efforts to begin at a time that will minimize disruption for everyone involved.

July 7, 2020

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, July 07, 2020, I provided a true and correct copy of the SOUNDEXCHANGE'S STATEMENT CONCERNING THE EFFECTIVE DATE OF THE RATES TO BE DETERMINED IN THIS PROCEEDING to the following:

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via ESERVICE at ablin@fhhlaw.com

National Association of Broadcasters, represented by Alicia R. Jovais, served via ESERVICE at alicia.jovais@lw.com

Educational Media Foundation, represented by David Oxenford, served via ESERVICE at doxenford@wbklaw.com

Pandora Media, LLC, represented by Jeremy P Auster, served via ESERVICE at jeremy.auster@weil.com

iHeartMedia, Inc., represented by Julia L Haines, served via ESERVICE at jhaines@kellogghansen.com

Sirius XM Radio Inc., represented by Jeremy P Auster, served via ESERVICE at jeremy.auster@weil.com

Google Inc., represented by Lida J Ramsey, served via ESERVICE at lramsey@kslaw.com

Signed: /s/ Steven R. Englund