

Before the
COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of

**Copyright Royalty Board Regulations
Regarding Filing of Claims to Royalty Fees
Collected Under Compulsory License**

Docket No. 17-CRB-0012-RM

**PETITION OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND
PUBLISHERS; BROADCAST MUSIC, INC.; SESAC, INC.; THE ALLIANCE OF
ARTISTS AND RECORDING COMPANIES; AND THE HARRY FOX AGENCY LLC
TO AMEND FINAL RULE**

The American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), SESAC, Inc. (“SESAC”), the Alliance of Artists and Recording Companies (“AARC”)¹ and the Harry Fox Agency LLC (collectively, “Petitioners”)² submit the following petition to amend the final rule issued in this proceeding by the Copyright Royalty Board (“CRB”) on May 26, 2017 at 82 Fed. Reg. 27,016 (June 13, 2017) (the “Final Rule”). Section 360.22 of the Final Rule imposes certain new requirements on the Petitioners when filing joint claims to royalty payments made in respect of digital audio recording devices and media (“DART”) pursuant to 17 U.S.C. §1006. Specifically, 37 C.F.R. §360.22(e) now requires the Petitioners, when submitting joint claims, to list the full legal name, address and email of each member, participant and affiliate made part of the joint claim. This new requirement was not included in the Notice of Proposed Rulemaking to

¹ AARC did not initially file comments in this rulemaking proceeding because the issues discussed in the Notice of Proposed Rulemaking did not affect it. However, the new requirement for joint claims, regarding the submission of full legal name, address and email of each member and affiliate made part of the joint claim, significantly and detrimentally affect AARC. Therefore, AARC joins in this petition.

² The joint claims filed annually by Petitioners collectively represent almost all individual claimants to digital audio recording (“DART”) royalties.

amend parts 350 and 360 of Title 37 of the Code of Federal Regulations (“CFR”) issued by the CRB on March 10, 2017 (82 Fed. Reg. 14,167 (March 17, 2017) (the “Rulemaking Notice”) and the Petitioners have not been provided with an opportunity to comment on this new change. As explained below, the new information required by the Final Rule contains proprietary, confidential information that Petitioners are not able to disclose to the CRB; doing so may likely violate the privacy rights of our members, participants and affiliates. Moreover, as the Petitioners submit and administer to claims on behalf of its members, participants and affiliates, and litigate any applicable proceedings on their behalf, there is no purpose for the inclusion of such information. Accordingly, the Petitioners respectfully request the CRB to amend the Final Rule to remove this new requirement.

I. Background

On March 10, 2017, the CRB issued the Rulemaking Notice, in part to effectuate new rules concerning the electronic filing of claims to royalty fees collected under compulsory licenses. The Rulemaking Notice included certain amendments to the regulations concerning the filing of certain joint claims. With regards to the filing of joint DART claims, the Rulemaking Notice proposed Section 360.22(e) (the “Proposed Rule”) as follows:

If the claim is a joint claim, [the claimant] must include a concise statement of the authorization for the filing of the joint claim in addition to the declaration required under paragraph (b)(7) of this section *and the name of each claimant to the joint claim* (emphasis added).

This Proposed Rule retained the longstanding requirement that, because the DART home taping royalty was considered a *sui generis* right that required separate authorization to claim and collect on behalf of a copyright owner beyond the language contained in standard membership or affiliation agreements, each Petitioner must submit with its joint claim a list of the names of the individual songwriters, publishers, featured artists and copyright owners, as applicable, that

authorized the Petitioner to file on their behalf and to be included within the joint claim. Addresses and other personal information of each claimant to the joint claim (*i.e.*, the members, participants and affiliates of the Petitioners) were not required as part of the Petitioner-filed joint claim.

However, Section 360.22(e), as promulgated by the Final Rule (the “Issued Rule”), imposes additional requirements not included in the Rulemaking Notice or the Proposed Rule, as follows:

List of claimants. If the claim is a joint claim, it must include the name of each claimant participating in the joint claim. Filers submitting joint claims online through eCRB on behalf of ten or fewer claimants, must list claimant information directly on the filed joint claim. *Filers submitting joint claims on behalf of more than ten claimants must include an Excel spreadsheet listing the full legal name, address, and email address of each claimant included in the joint claim.* For joint claims filed by mail or hand delivery, the filer may submit the list containing the name of each claimant included in the joint claim in a single Excel spreadsheet on CD, DVD, or other electronic storage medium (emphasis added).

Pursuant to the new Issued Rule, the Petitioners must now, with respect to each songwriter, publisher, featured artist and copyright owner claimant included in the joint claim, submit the member, artist or affiliate’s (1) *legal* name; (2) address and (3) email address. This new regulation requires the Petitioners to disclose confidential personal information of its individual members, participants and affiliates, which the Petitioners are unable to provide pursuant to their internal operating rules and procedures and contractual relationships with their members, participants and affiliates. If the CRB retains the Issued Rule, the Petitioners would be unable to file joint claims on behalf of their members and affiliates, and each of the hundreds of thousands of songwriters, publishers, featured artists and copyright owners would be required to file individual claims, obviating the efficiencies inherent in the rules surrounding the filing of joint claims. Accordingly, the CRB must amend the Issued Rule to remove these new requirements.

II. Authority and Process to Promulgate and Amend Regulations

In promulgating changes and additions to its regulations, the CRB follows the procedures imposed on all administrative agencies. The CRB first publishes in the Federal Register a notice of proposed rulemaking, providing interested parties the right and ability to file comments as necessary regarding the proposed rules. Once the comments are received and reviewed, the CRB takes regulatory action it deems appropriate pursuant to the authority given to it under Title 17 of the U.S. Code. In the event, a new or amended regulation is passed, the CRB retains the authority to make technical amendments whether due to clerical errors in the promulgated rule, or because the rule substantively raises problems or issues not apparent at the time of promulgation. Indeed, the CRB has in the past made technical amendments to promulgated rules under these circumstances. *See, e.g., Final Rule; Amendment, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License; Technical Amendment*, 81 Fed. Reg. 89,867 (Dec. 13, 2016).

In the Rulemaking Notice, the CRB proposed various changes and amendments to current rules regarding the filing of statutory royalty claims, including the filing of joint claims by the Petitioners. Because of their unique status among joint claimants with regard to the filing of claims for statutory royalties, the Petitioners (minus AARC and HFA) submitted comprehensive comments regarding issues surrounding the filing of joint claims on behalf of hundreds of thousands of songwriter and publisher members and affiliates. The Rulemaking Notice did not, however, raise or address the requirement for inclusion within DART claims the full legal name, address and email address of each individual member, participant and affiliate made part of the joint claim. As a result, the Petitioners did not address this issue in its comments. Had the Rulemaking Notice included a proposed rule that included this requirement, the Petitioners would surely have filed comments regarding that issue that sets out the points raised in this petition. Accordingly, because the

Petitioners did not have the opportunity to address this issue during the notice-and-comment period prior to the passage of the Final Rule, good cause exists for the CRB to consider these comments at this time.

III. Section 360.22(e) Should be Amended

A. The Required Information Serves No Purpose.

The Issued Rule requires the Petitioners to submit personal contact information regarding its members, participants and affiliates. The inclusion of contact information in a statutory royalty claim serves one important goal: it allows the CRB and the other parties to contact the claimant as part of administering, negotiating and adjudicating the claim. However, considering that in the case of a Petitioner-filed joint claim, each of these individual claimants are fully represented by the Petitioners, including in an applicable DART proceeding – both during the voluntary negotiation phase, as well as during the course of any litigation proceedings – there exists no purpose for the Petitioners to include this information. The applicable Petitioner, not the represented claimants, has full authority and responsibility over the joint claim, and any notices or activity would run to the Petitioner, not the individual claimants.

The CRB, and potentially other parties, may wish to determine which individual claimants a respective Petitioner represents in a DART proceeding; however, the current requirement to list the names of the individual claimants has, for 25 years, served this purpose adequately. In the event there are two songwriters or featured artists with the same exact name listed in one or more Petitioner-filed joint claims, an inquiry can be made directly to the Petitioner to resolve any such confusion (which has not happened in 25 years). Moreover, all music publisher and record label (copyright owner) names are unique and the corporate or business information can be easily located on free online

databases, among other public resources. Accordingly, the Issued Rule serves no purpose and should be amended accordingly.³

B. The Issued Rule Defeats the Efficiencies of Joint Claims.

In its current form, the Petitioners are not able to meet the Issued Rule's requirements. Each of the Petitioners considers the personal information of its writer members, featured artist participants, and affiliates, the disclosure of which is required by the Issued Rule, to be confidential and proprietary information and may not disclose such information to third parties. And, for good cause – many of the writer members, featured artist participants, and affiliates the Petitioners represent are famous, private individuals who do not want their personal information made public. Accordingly, Petitioner rules, such as Rule 1.5.1 found in ASCAP's Compendium of Rules, Regulations and Policies⁴ are in place to maintain that confidentiality.

If the CRB does not amend the Issued Rule, the Petitioners would not be able to file joint claims. Each of the hundreds of thousands of songwriters, music publishers, featured artists and record labels would be required to file an individual claim, creating the possibility that DART proceedings would consist of tens of thousands of different individual claimants, the administration of which would overwhelm the CRB and more than exhaust the funds, particularly when the total amount of the funds has severely decreased. This utterly defeats and makes moot the existence of the joint claim process in DART proceedings, which was put in place to obviate the need for songwriters, publishers, featured artists and copyright owners who are members or affiliates of the Petitioners to file individual claims.

³ Moreover, the Issued Rule does not appear to require this level of detail for joint claims with ten or fewer individual claimants. No justification exists for disparate treatment based on the size of the joint claim.

⁴ Available at <https://www.ascap.com/-/media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf>

C. The Issued Rule Will Violate Privacy Laws.

The CRB is required to make all filed claims accessible and available to the public. Accordingly, inclusion of personal contact information of individual songwriters, publishers, featured artists and copyright owners without their explicit consent will run afoul of the Privacy Act of 1974, 5 U.S.C. §552a, which establishes a code of fair information practices governing the collection, maintenance and dissemination of records of information about individuals maintained by federal agencies. *See Tobey v. NLRB*, 40 F.3d 469 (D.C. Cir. 1994).

* * *

For the above, reasons we respectfully request the CRB to grant this petition and amend the Issued Rule to remove the newly added requirements. We propose the following language to replace the current Section 360.22(e):

List of claimants. If the claim is a joint claim, it must include the name of each claimant participating in the joint claim. Filers submitting joint claims online through eCRB on behalf of ten or fewer claimants, must list the name of each claimant included in the joint claim directly on the filed joint claim. Filers submitting joint claims on behalf of more than ten claimants must include an Excel spreadsheet listing the name of each claimant included in the joint claim. For joint claims filed by mail or hand delivery, the filer may submit the list containing the name of each claimant included in the joint claim in a single Excel spreadsheet on CD, DVD, or other electronic storage medium.

Respectfully submitted,

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Date: August 22, 2017

Certificate of Service

I hereby certify that on Tuesday, August 22, 2017 I provided a true and correct copy of the Petition to Amend Final Rule to the following:

American Society of Composers Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Signed: /s/ Jennifer T. Criss