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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES OCT 17 2008
Washington, D.C.

Copyright Royalty Board

In the Matter of)
)
MECHANICAL AND DIGITAL)
PHONORECORD DELIVERY RATE)
ADJUSTMENT PROCEEDING)
)
)
)
_____)

Docket No. 2006-3 CRB DPRA

**THE RECORDING INDUSTRY ASSOCIATION OF AMERICA'S
MOTION FOR REHEARING AND THE PARTIES' JOINT REQUEST TO HOLD THIS
MOTION IN ABEYANCE**

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. § 353.1, the Recording Industry Association of America ("RIAA") requests rehearing of the Court's October 2, 2008, Determination of Rates and Terms (the "Determination") governing the rates and terms of royalty payments for the making and distribution of phonorecords, including digital phonorecord deliveries ("DPDs"), under the statutory mechanical license set forth in Section 115 of the Copyright Act. The focus of this motion is the late payment fee of 1.5% per month established by the Court.¹ Only RIAA makes this motion. But as discussed below, all parties -- RIAA, DiMA, and the Copyright Owners -- believe that they may be able to resolve issues related to the timing of the late fee through negotiation, which may obviate this motion. Therefore, the parties jointly request that the Court hold this motion for 20 days to allow negotiation by the parties.

In the event that those negotiations do not bear fruit, RIAA respectfully submits that the late fee portion of the Court's Determination lacks evidentiary support in the record, 37 C.F.R. §

¹ RIAA raises this narrow issue in this motion for rehearing, but reserves its right to appeal other aspects of the Court's final determination.

353.2, and requests that the Court order a rehearing on that issue. The Copyright Owners oppose rehearing and DiMA takes no position.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. § 353.1, this Court has authority to order a rehearing to reconsider any element of its Determination. This Court will reconsider an element of a determination where “(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or prevent manifest injustice.” *Order Denying Motions for Rehearing*, Docket No. 2005-1 CRB DTRA (Apr. 4, 2007) (citing *Regency Comms. Inc. v. Cleartel Comms., Inc.*, 212 F. Supp. 2d (D.D.C. 2002)).

II. RIAA ASKS THE COURT TO ORDER REHEARING ON ITS DECISION TO ESTABLISH A LATE FEE

RIAA respectfully requests that the Court reconsider its decision in the Determination to establish a late fee. We submit that the Court’s decision is based on a misreading of the controlling legal standard and lacks evidentiary support in the record. Although it is now established that the Court has the authority to set a late fee under section 115, *see* Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights Under the Section 115 Statutory License, 73 Fed. Reg. 48396, 48399 (August 12, 2008), that does not mean that the Court may do so based on a record that supplies no evidence supporting such an assessment.

As this Court recognized in its Determination, RIAA pointed to a substantial number of marketplace agreements as evidence that adopting a late fee term would be inconsistent with the terms agreed to in the marketplace. Determination at 64; RIAA PFF ¶¶ 1784-92; RIAA PCL at ¶¶ 219-20. The Determination rejected reliance on this evidence, noting that the Court had

adopted a late fee in its prior decisions, and criticizing RIAA for “not argu[ing]” that a late fee would violate any of the Section 801(b) factors. Determination at 64. But this misapprehended RIAA’s argument and misread the controlling legal standard. As RIAA made clear in its proposed findings, any analysis under the Section 801(b) factors must begin with an assessment of marketplace benchmarks. RIAA PCL ¶ 33; RIAA PFF ¶¶ 1784-1792. Indeed, the very basis for the adoption of a late fee in those other proceedings was the existence of marketplace agreements containing a late fee. As the Court put it in its *Webcasting* decision, “the Copyright Royalty Judges find that the record company/music service agreements provided by SoundExchange are the best evidence as to the appropriate late fee.” *Digital Performance Right in Sound Recordings and Ephemeral Recordings (“Webcasting”)*, 72 Fed. Reg. 24084, 24107 (May 1, 2007). Here, the agreements in the record support the opposite conclusion -- that a late fee is inappropriate and unreasonable. If marketplace agreements were “the best evidence” of the appropriate of a late fee in the *Webcasting* proceeding, then such agreements should have caused the Court to decline to adopt a late fee in this proceeding.

Moreover, the market agreements upon which the Court relied in its prior proceedings to adopt a late fee are inapposite in this one. For one thing, those agreements were not introduced into this record. For another, there was no evidence presented in this proceeding that the commercial marketplace for the mechanical license is similar to the commercial marketplaces at issue in the *Webcasting* or *SDARS* proceedings. Without such evidentiary support, there was no basis for the Court to assume that because a late fee was adopted in those proceedings, it is reasonable to adopt one here.

Indeed, there are strong reasons to believe that such an assumption is misplaced. In addition to the fact that the marketplace agreements submitted here lack a late fee, in prior

proceedings, the licensees did not oppose the imposition of a late fee; they merely differed over how large the fee should be. Here, RIAA vigorously opposed and put on evidence in opposition to such a fee. Significantly, much of RIAA's opposition stemmed from disagreement about the cause of late payments, something that was not at issue in prior proceedings. *SDARS*, 73 Fed. Reg. at 4099; *Webcasting*, 72 Fed. Reg. at 24107. Moreover, the record shows that record companies regularly pay advances to Harry Fox and individual publishers designed to cover delays in figuring out payments due. RIAA PFF ¶¶ 1808-1813. The Determination never addresses these differences or establishes any similarities to suggest why the appropriateness of late fees in earlier proceedings justifies one here.

Finally, the adoption of a late fee was clear error because the overwhelming weight of the evidence demonstrated that the Copyright Owners are the primary cause of the late payments. RIAA PFF ¶¶ 1793-1804. The Court did not find this evidence to be inaccurate or unpersuasive. Instead, the Determination merely states that this is a matter for Congress or the Copyright Office, not for the Court and such evidence has "no bearing" on the determination of the reasonableness of the late fee. Determination at 65. But this conclusion overlooks the very balance that the Court cited one paragraph earlier in its Determination, relying on its *SDARS* decision. Namely, "in determining an appropriate late fee" the Court must consider the "effective incentive to the licensee to make payments timely on the one hand and not making the fee so high that it is punitive on the other hand." Determination at 64 (quoting *SDARS* decision 73 Fed. Reg. at 4099). If, as the evidence in this proceeding shows, it is the Copyright Owners and not the licensee that primarily cause untimely payments, then no amount of late fee can incentivize licensees like the RIAA member companies to make timely payments. Indeed, under

such conditions, establishing a late fee against the licensee would always be punitive and out of balance.

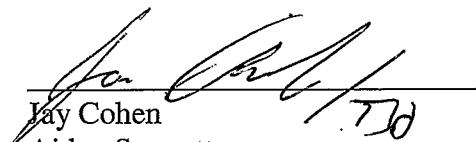
III. AT THE REQUEST OF ALL PARTIES, THE COURT SHOULD HOLD THE RIAA REHEARING MOTION PENDING NEGOTIATION BY THE PARTIES.

RIAA, DIMA, and the Copyright Owners believe that they may be able to reach a resolution on some or all issues related to the timing of a late fee. RIAA has indicated that a resolution of those timing issues may obviate the need to seek rehearing on the late fee. Thus, the parties are jointly requesting that the Court hold this motion for rehearing for a period of 20 days without taking action to permit the parties sufficient time to attempt to reach a negotiated resolution on such timing issues.² The statute imposes no timetable on the Court's consideration of a motion for rehearing, and thus there are no statutory deadlines that will be affected by holding this motion. If a negotiated resolution of some or all issues can be reached, the parties will submit the resolution to the Court for incorporation into a final determination.

CONCLUSION

For the foregoing reasons, the Court should, at the joint request of the parties, hold this motion for 20 days to allow efforts to reach a negotiated resolution of timing issues related to the late fee. In the event that the Court addresses the motion, RIAA asks that the Court order a rehearing on the issue of the late fee. The Copyright Owners oppose that motion and DiMA takes no position on it.

² The Copyright Owners join in this request to allow the parties time to reach a settlement that can be incorporated into the final determination, but dispute the arguments made by RIAA that rehearing is warranted.



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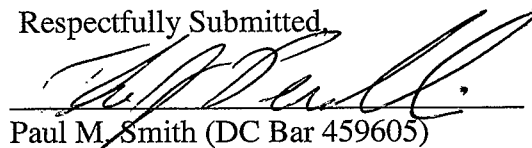


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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2008, I caused a true and correct copy of the to be served upon the following by e-mail and overnight mail, and a true and correct copy of the foregoing **RIAA's Motion for Rehearing and the Parties' Joint Request to Hold this Motion in Abeyance** to be served upon the following by electronic mail:

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