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

In the Matter of	)	
MECHANICAL AND DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING	)	**Docket No. 2006-3 CRB DPRA**

RECORDING INDUSTRY ASSOCIATION OF AMERICA'S MOTION TO VACATE, OR FOR REHEARING OF, THE FEBRUARY 6, 2009 AMENDMENT TO FINAL DETERMINATION OF RATES AND TERMS

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. § 353.1, the Recording Industry Association of America, Inc. ("RIAA") requests that this Court vacate, or in the alternative grant rehearing of, this Court's February 6, 2009 Order amending the Final Determination of Rates and Terms in the above-captioned proceeding. *See Amendment to Determination to Final Determination of Rates and Terms*, Feb. 6, 2009, published in the Federal Register at 74 Fed. Reg. 6832 (Feb. 11, 2009) (the "Amendment to Determination"). RIAA respectfully suggests that vacating or granting rehearing of the Amendment to Determination is required to correct clear error and prevent manifest injustice in this case. The Amendment to Determination was clearly erroneous because it eliminated material provisions from a settlement agreement that RIAA, the National Music Publishers' Association, Inc., the Songwriters Guild of America, the Nashville Songwriters Association International, and the Digital Media Association (collectively, the "Parties") all agreed was not severable. As we explain below, this was plain error.

ATTACHED NOTES

BACKGROUND

On November 24, 2008, the Court issued its final determination in this proceeding. *Final Determination of Rates and Terms in the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Docket No. 2006-3 CRB DPRA* (Nov. 24, 2008) ("Final Determination"). The Final Determination largely incorporated the terms of a Settlement Agreement, provided by the parties to the Court on September 22, 2008 and published in the Federal Register shortly thereafter, that comprehensively addressed the terms and rates for limited downloads and interactive streaming. *See* 73 Fed. Reg. 57,033 (Oct. 1, 2008) ("Settlement Agreement"). In submitting the Settlement Agreement to the Court, the Parties stated that "[t]he Settlement is . . . submitted on the understanding that its various provisions are not severable." *Joint Motion to Adopt Partial Settlement*, Sept. 22, 2008, at 2.

On January 16, 2009, the Register of Copyrights issued a decision "identifying and correcting erroneous resolutions of material questions of substantive law under title 17 that underlie or are contained" in the Final Determination. *Review of Copyright Royalty Judges Determination*, Docket No. 2009-1, at 1 (Jan. 16, 2009) ("Register's Decision"). In that decision, the Register found that the Copyright Royalty Judges were mistaken in concluding that in the absence of an objection by a party, they were foreclosed from reviewing the Settlement Agreement for its adherence to the law. The Register then found that several provisions of the Settlement Agreement "either conflict with statutory provisions in title 17 or could be read to alter or expand the statutory license." *Id.* at 15; *see also id.* at 15-23 (finding errors in the terms pertaining to classification of interactive streams as incidental DPDs, the retroactive application of the promotional royalty rate to certain limited downloads, the timing of initial payment, and reporting of uses requiring no royalty payment). The Register also found that the Copyright

Royalty Judges "enjoy continuing jurisdiction to amend their final determination . . . to codify the corrections identified and made herein." *Id.* at 23-24.

In light of the Register's Decision, the Parties wrote a joint letter to the Court indicating their view that they did "not believe further action by the Judges is required" but that, "[t]o the extent the Judges contemplate otherwise, the Participants respectively request the opportunity to provide their input." *Letter from the Parties to the Judges*, Feb. 4, 2009.

Instead, without seeking any further comment or input from any of the Parties, the Court, by a vote of 2-1, issued the Amendment to Determination on February 6, 2009.

ARGUMENT

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. § 353.1, this Court has the 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)).

RIAA respectfully suggests that vacating, or granting rehearing of, the Amendment to Determination is required to correct clear error and prevent manifest injustice in this case. Both the Register's Decision and the Amendment to Determination make clear that it was not necessary for the Copyright Royalty Judges to amend their Final Determination based on the Register's Decision. Thus, vacating the Amendment to Determination and restoring the Final Determination as originally adopted would violate no duty of the Copyright Royalty Judges and avoid the errors identified herein. However, if the Copyright Royalty Judges choose to amend their Final Determination, they must stay within the limits of their authority.

In the Amendment to Determination, all three Copyright Royalty Judges agreed that the authority of this Court to modify settlement agreements under 17 U.S.C. § 803(c)(4) is limited by the need to remain true to the underlying agreement of the parties and thereby act pursuant to 17 U.S.C. § 801(b)(7). *See* Amendment to Determination, 674 Fed. Reg. at 6833 (finding that Register determined that "agreements of the participants may be modified to excise provisions that conflict with law *and still be the agreement of the participants*") (emphasis added); *id.* (declining to "add provision to the participants' agreement . . . and still treat it as an agreement of the participants"); *id.* at 6834 (Sledge, C.J., dissenting) ("[t]he suggested change would adopt an agreement of the participants after provisions are deleted . . . notwithstanding the non-severability restrictions in the agreement"). Nonetheless, the Court, by a 2-1 majority, concluded that it was still permissible to delete outright four provisions of the Settlement Agreement, the effect of which is to implement in the amended Final Determination a materially altered version of the Parties' settlement.

RIAA respectfully submits that this was clear error for three reasons.

First, the majority failed to acknowledge the import of the Parties' agreement that the Settlement Agreement is non-severable. "It is well established that whether a contract is entire or divisible is controlled by the intent of the contracting parties." 15 *Williston on Contracts* § 45:5, at 277 (4th ed. 2000). Accordingly, the Parties' clear statement of non-severability in the Joint Motion to Adopt Partial Settlement is controlling. *Cf. Dodge v. Trustees of Nat'l Gallery of Art*, 326 F. Supp. 2d 1, 9 (D.D.C. 2004) ("An agreement to settle a legal dispute is essentially a contract" and "[i]n such cases, the court uses traditional principles of contract interpretation").

In considering a settlement agreement that is not severable, courts have rightly recognized that they cannot pick and choose among its components. *See Buchbinder v. Weisser*

Companies, Inc., 679 F. Supp. 820, 822 (C.D. Ill. 1987) ("Because the alleged settlement agreement . . . is not severable, [it] must be enforced either in its entirety or not at all."). This is because non-severable settlement agreements, like the one at issue in this case, are typically the result of extensive negotiations and considerable tradeoffs among the parties, which would go for naught if a court could simply adopt those provisions it prefers and delete those it does not. *See In re Delta Air Lines, Inc.*, 374 B.R. 516, 523 (S.D.N.Y. 2007) ("to nullify [a certain provision] while leaving the remainder of the consummated Settlement intact would ignore the tradeoff that allowed the parties to settle in the first instance and would treat a non-severable provision of the Settlement Agreement as dispensable"); *see also In re Texaco Inc.*, 92 B.R. 38, 47 (S.D.N.Y. 1988) (severing part of an integrated settlement would undermine the settlement). As Chief Judge Sledge rightly pointed out, the rewriting of settlement agreements in this manner "discourages settlements" and "hinder[s] judicial efficiency." Amendment to Determination, 74 Fed. Reg. at 6834 (Sledge, C.J. dissenting).

Second, the majority modified the Parties' non-severable Settlement Agreement without a further hearing and without even the chance for further comment by the Parties. Had the Parties been given a chance to comment on the proposed action, they might with time have been able to come to terms on a revised settlement agreement, one that complied with the Register's Decision yet did not unfairly upset the delicate balance reflected in the original Settlement Agreement. Alternatively, the Parties might have concluded that further hearings would be warranted in order to resolve disputed issues coming to the fore as a result of the Register's Decision. Because the Parties were not given a chance to provide their input on this matter, the decisionmaking process of this Court was ultimately impoverished, and its outcome prejudicial.

Finally, the majority purported to rely on the Register's Decision for authority that "agreements of the participants may be modified to excise provisions that conflict with law and still be the agreement of the participants." *Id.* at 6833. But the Register's Decision says no such thing. The Register concluded that 17 U.S.C. § 801(b)(7)(A) "does not foreclose the CRJs from ascertaining whether specific provisions [of a settlement agreement] are contrary to law." Register's Decision at 11. Nowhere in her Decision did the Register indicate that this Court could simply excise offending provisions out of the Settlement Agreement, irrespective of the parties' clear intent that the agreement was non-severable, and then adopt the remains of the agreement as a settlement.

The Register's Decision did invite the Court to consider revision of certain of the offending provisions, rather than simply deleting them. *See* Register's Decision at 17 ("Under the CRJs' continuing jurisdiction, the regulation [concerning interactive streams] may be redrafted"); *id.* at 19 ("the regulations may be redrafted"); *id.* at 22 (suggesting possible revisions to regulations concerning timing of payment); *id.* at 23 ("regulations [concerning statements of account] may be redrafted"). However, the Register appeared to anticipate the continuing involvement of the Parties in the revision process. *See id.* at 22 ("The Register takes no position . . . on whether the effective date should be adjusted, noting that such a decision is within the discretion of the CRJs *and the participants themselves*") (emphasis added); *id.* at 20 (Register declines to come to conclusion regarding application of the promotion royalty rate to promotional interactive streams "given the lack of evidence or in-depth argument on these questions"). Absent the input of the Parties, the Register's Decision does not support the action taken in the Amendment to Determination.

CONCLUSION

For the foregoing reasons, the Court should vacate its Amendment to Determination, or grant rehearing of its Amendment to Determination and give the Parties the opportunity to provide their input as to the further action appropriate in light of the Register's Decision.

February 23, 2009

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd of February 2009, I caused a true and correct copy of the foregoing **RIAA's Motion to Vacate, or for Rehearing of, the February 6, 2009 Amendment to Final Determination of Rates and Terms** to be served upon the following by overnight mail and electronic mail:

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