Before the
U.S. COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords	Docket No. 2011-3 CRB Phonorecords II

BRIEF OF SETTLING PARTICIPANTS ADDRESSING MATERIAL QUESTIONS OF LAW ON REFERRAL TO THE REGISTER OF COPYRIGHTS

The undersigned parties (collectively, the "Settling Parties") are participants in the above-referenced proceeding and signatories to the Motion to Adopt Settlement filed with the Copyright Royalty Judges ("CRJs") in this proceeding on April 11, 2012 (the "Motion to Adopt").

Pursuant to 17 U.S.C. § 802(f)(1)(A)(ii), the Chief Copyright Royalty Judge referred to the Register of Copyrights the following material question of law:

> Does the detail requirements set forth in 37 C.F.R. as proposed § 385.12(e) (*existing*) and proposed § 385.22(d) (*new*) as well as the confidentiality requirement proposed for §§ 385.12(f) and 385.22(e) encroach upon the exclusive statutory domain of the Register under § 115 of the Act?

Order Referring Material Questions of Law and Setting Briefing Schedule, Docket No. 2011-3 CRB Phonorecords II (Mar. 27, 2013) (the "Referral Order").

This question addresses two pairs of provisions of the proposed regulations attached to the Motion to Adopt (the "Settlement"). Both of these pairs of provisions complement and do not encroach upon the exclusive statutory domain of the Register

under Section 115. They are integral parts of the Settlement that should be adopted concurrently with the Settlement. Accordingly, the Settling Parties urge the Register to find that the CRJs' adoption of the provisions identified in the Referral Order would *not* encroach upon the Register's authority under Section 115 of the Copyright Act. If the Register reaches a contrary conclusion, the Settling Parties hereby request that the Register adopt the same provisions as part of the Copyright Office's statement of account regulations without delay.

BACKGROUND

The Settlement and Its Provisions Questioned in the Referral Order

The statutory rate-setting system favors settlements and is designed to facilitate and encourage the participants in rate proceedings to reach negotiated resolutions. H.R. Rep. 108-408, at 24 (2004); S. Rep. 104-128, at 39 (1995). The Settling Parties were pleased to be able to resolve the above-captioned proceeding without litigation and to present a comprehensive compromise to the CRJs.

As the Settling Parties explained in the Motion to Adopt, the Settlement was the product of extensive negotiations. The Settlement carries forward, with only minor adjustments, existing rates and terms for physical phonorecords, permanent digital downloads, ringtones, limited downloads and interactive streams (rates set forth in 37 C.F.R. Part 385 Subparts A and B). The Settlement also provides rates and terms for certain new categories of services, including mixed service bundles, paid locker services, purchased content locker services, limited offerings and music bundles that either have been developed since the last proceeding or are likely to be launched over the term covered by this one (proposed Part 385 Subpart C). Prompt implementation of the

Settlement is important to the Settling Parties and to the overall digital music marketplace, particularly because of the rates and terms for new categories of services, which will provide certainty to businesses, bring new services to market and thereby help reduce online copyright infringement. The settlement was submitted to the CRJs in April of 2012, with the expectation and hope that the rates would be put into effect as of January 1 of this year.

The Settlement was the result of complex, multi-party negotiations, which lasted for over a year and ultimately achieved a delicate balancing of the various interests at stake. The two pairs of provisions questioned in the Referral Order are integral to the Settlement. Each pair includes equivalent provisions in Subparts B and C.

First, the Referral Order inquires concerning Sections 385.12(e) and 385.22(d) (the "Accounting Provisions"). Section 385.12(e) is an existing regulatory provision that went into effect in 2009 without any comment from the Register in her comprehensive review of the CRJs' decision adopting it. It provides as follows:

> *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information and belief of the licensee at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(5) and §201.19 of this title. Without limitation, a licensee's statements of account shall set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to §385.13 does or does not apply) and, for each offering reported, also indicate the type of licensed activity involved and the number of plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

37 C.F.R. § 385.12(e). Section 385.22(d), which is proposed for Subpart C, is nearly identical to Section 385.12(e), except for immaterial changes to conform it to its placement in proposed Subpart C.

Second, the Referral Order inquires concerning Sections 385.12(f) and 385.22(e) (the "Confidentiality Provisions"). These are identical new provisions restricting a copyright owner's use and disclosure of a licensee's statements of account. They were carefully negotiated to protect the highly sensitive competitive information that must be reported under the new regulations. The Confidentiality Provisions state as follows:

> *Confidentiality.* A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall be maintained in confidence by any copyright owner, authorized representative or agent that receives it, and shall solely be used by the copyright owner, authorized representative or agent for purposes of reviewing the amounts paid by the licensee and verifying the accuracy of any such payments, and only those employees of the copyright owner, authorized representative or agent who need to have access to such information for such purposes will be given access to such information; provided that in no event shall access be granted to any individual who, on behalf of a record company, is directly involved in negotiating or approving royalty rates in transactions authorizing third party services to undertake licensed activity with respect to sound recordings. A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall not be used for any other purpose, and shall not be disclosed to or used by or for any record company affiliate or any third party, including any third-party record company.

As discussed more fully below, both the Accounting Provisions and the Confidentiality Provisions were developed to address concerns specific to the percentage royalty rate structure, and it bears emphasizing that these provisions were critical to the decision of some of the Settling Parties to agree to the Settlement.

Procedural History

The Motion to Adopt was filed with the CRJs on April 11, 2012. All remaining participants in the Proceeding either were parties to the Settlement or reviewed the Settlement prior to its submission to the CRJs and did not object to its being adopted as the basis for setting statutory rates and terms.

The CRJs promptly published the Settlement in the Federal Register pursuant to Section 801(b)(7)(A) of the Copyright Act. 77 Fed. Reg. 29,259 (May 17, 2012). When the Settlement was published in the Federal Register, the Judges received only two timely comments – one from some of the Settling Parties, which primarily pointed out various inadvertent errors and stylistic issues in the version of the Settlement that appeared in the Federal Register, and one from Gear Publishing Company ("Gear"), a non-participant in the proceeding. Months later, the Judges received a further untimely comment from Mr. Robert Clarida, who is also a non-participant.[1]

Nobody has suggested that the Accounting Provisions and Confidentiality Provisions are not valid terms that the CRJs would be empowered to adopt were it not for the grants of authority to the Register. However, when the CRJs published the Settlement, they specifically invited comment from the participants and the Register as to whether the Accounting Provisions are consistent with the Register's authority to promulgate statement of account regulations under 17 U.S.C. § 115(c)(5). 77 Fed. Reg.

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[1] The Referral Order refers to Mr. Clarida's comment as timely, but that simply does not seem to be true. The deadline for comments concerning the Settlement was June 18, 2012. 77 Fed. Reg. at 29,259. The Settling Parties can find no indication that this deadline was ever extended. It appears that Mr. Clarida's comments were filed on or about October 19, 2012.

at 29,260-61. In response, some of the Settling Parties indicated that because Section 385.12(e) was previously adopted by the CRJs without negative comment from the Register, it would be reasonable and appropriate to provide for continuation of its language. Neither Gear, Mr. Clarida nor the Register addressed the question posed by the CRJs.[2]

Shortly after the CRJs' comment period for the Settlement closed, the Office separately commenced a rulemaking proceeding (the "SOA Rulemaking") to update its statement of account regulations and particularly to take into account the rates and terms determined in the last Section 115 rate-setting proceeding, which concluded in 2008. Notice of Proposed Rulemaking, 77 Fed. Reg. 44,179 (July 27, 2012) (the "SOA NPRM"). In the SOA NPRM, the Office inquired about the specifics of the Confidentiality Provisions, and sought comments as to appropriate limits on such a requirement and the Office's authority to require copyright owners to keep information contained in Statements of Account confidential. *Id.* at 44,185. In comments filed October 25, 2012, some of the Settling Parties explained that because the Confidentiality Provisions merely address what a licensee may do (or not do) with a statement prepared and served in accordance with the Office's regulations, they do not impinge on the Office's authority. Joint Comments in Docket No. 2012-7, at 26 (Oct. 25, 2012).

On March 27, 2013, the Chief Copyright Royalty Judge issued the Referral Order questioning the CRJs' power to adopt the Accounting Provisions and Confidentiality

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[2] Mr. Clarida's comments did assert, without analysis, that the Confidentiality Provisions are inconsistent with the grant of authority to the Register because they "are self-evidently 'regarding statements of account.'"

Provisions. The Settling Parties file this brief because they believe the Chief Judge's concerns are misplaced.

ARGUMENT

I. The Accounting Provisions and Confidentiality Provisions Do Not Impermissibly Encroach upon the Register's Authority Under Section 115

The CRJs and the Register share responsibility for administration of Section 115. The CRJs are to "determine reasonable rates and terms of royalty payments," 17 U.S.C. § 115(c)(3)(C), and "establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section," 17 U.S.C. § 115(c)(3)(D). The Register is to prescribe requirements for the form, content and manner of service of notices of intention to obtain a compulsory license, 17 U.S.C. § 115(b)(1), and also the form, content, and manner of certification of statements of account, 17 U.S.C. § 115(c)(5).[3]

The Accounting Provisions speak to the content of statements of account, but in a way that is fully consistent with the Office's statement of account regulations. Cross referencing and making explicit the application of the statement of account regulations to a new rate structure does not encroach upon the Register's authority to adopt statement of account regulations. The Confidentiality Provisions have nothing to do with the form, content, and manner of certification of statements of account and so are terms that the CRJs can adopt without encroaching on the Register's authority. Accordingly, the

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[3] Section 115(c)(5) also specifically directs the Register to prescribe requirements for filing certified annual statements of account. Because such statements serve primarily to convey the certification, we understand that to be encompassed within "form, content, and manner of certification."

Register should find that the Accounting Provisions and Confidentiality Provisions do not impermissibly encroach upon the Register's authority under Section 115.

A. The Accounting Provisions Do Not Impermissibly Encroach upon the Register's Authority Under Section 115

The Accounting Provisions are fully consistent with the Register's regulations concerning statements of account. The first sentence of the Accounting Provisions echoes the language of the statement of account certification at 37 C.F.R. § 201.19(e)(6)(v) and specifically requires compliance with 37 C.F.R. § 201.19. The second sentence then confirms that statements of account are to set forth the licensee's royalty calculations in detail, which is exactly what is required by Section 201.19(e)(4)(iii) ("Each step in computing the monthly payment, including the arithmetical calculations involved in each step, shall be set out in detail in the Monthly Statement."). Finally, the Accounting Provisions identify a few specific data points fundamental to the calculation of royalty payments under Part 385 Subpart B and proposed Subpart C. A licensee making a royalty payment under Part 385 Subpart B or proposed Subpart C could not comply with Section 201.19(e)(4)(iii) without including in a statement of account the items identified in the Accounting Provisions. A term that mentions statements of account – but that is consistent with the statement of account regulations, and indeed requires compliance with those regulations – does not encroach upon the Register's authority in any way. That is presumably why the Register let Section 385.12(e) pass without objection in the Register's review of the CRJs' decision in

the last mechanical royalty rate-setting proceeding, and should be the end of the analysis of the Accounting Provisions.[4]

However, the CRJs have suggested that because the Accounting Provisions relate to statements of account, they might run afoul of certain language in the Register's last opinion concerning the division of authority between the Register and the CRJs. Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License, 73 Fed. Reg. 48,396 (Aug. 19, 2008) (the "Division of Authority Decision"). The Division of Authority Decision, however, was directed to proposed terms that would have been inconsistent with and would have supplanted the Register's rules regarding statements of account. It should not properly be read to preclude regulations proposed as part of a settlement that are wholly consistent with and merely amplify and clarify the application of the Register's regulations to specific fee calculations. Understanding the Register's Division of Authority Decision in its proper context, and taking into account the context of the Accounting Provisions, the Register should not find that the Accounting Provisions exceed the CRJs' authority.

In the last mechanical royalty rate proceeding, the participants proposed various terms, including several that directly contradicted the statement of account regulations. *See, e.g.*, 73 Fed. Reg. at 48,397. The CRJs referred to the Register a question concerning their authority to adopt such terms, which led to the Division of Authority Decision. In that decision, the Register found that the CRJs' power is limited by the

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[4] Even if there were an issue with Section 385.12(e), the time to have addressed it was in the last proceeding, not this one. Neither the Settlement nor the CRJ's notice of proposed rulemaking concerning the Settlement proposes any change to Section 385.12(e).

specific grant of rulemaking authority to the Register to issue regulations regarding statements of account. 73 Fed. Reg. at 48,398.

That grant of authority is to set requirements for the form, content and manner of certification of statements of account. 17 U.S.C. § 115(c)(5); 73 Fed. Reg. at 48,398. A great deal of the focus of the Division of Authority Decision was on the question of when "the CRJs may issue regulations that *supplant* currently applicable regulations." *Id.* (emphasis added). Thus, the Register's analysis repeatedly refers to the power of the CRJs to "supplant" the Register's regulations. *Id.* In the end the Register concluded that the CRJs cannot supplant what the Register requires concerning the form, content or manner of certification of statements of account.

The Register returned to these questions in the review of the current Section 115 rates and terms. As originally adopted by the CRJs, the current terms included a statement that certain zero-rate promotional uses need not be included in statements of account. Relying on the Division of Authority Decision, the Register found that "[t]he CRJs cannot alter requirements issued by the Register regarding statements of account." Review of Copyright Royalty Judges Determination, 74 Fed. Reg. 4537, 4543 (Jan. 26, 2009). Notably, the Register did not take exception to Sections 385.12(e), the existing Accounting Provision, even though it was squarely before the Register.

The Accounting Provisions identified in the Referral Order present a very different situation from the terms before the Register when the Register rendered the Division of Authority Decision and from the reporting of promotional uses at issue in the review of the CRJs' decision. The Accounting Provisions are consistent – and require compliance – with the statement of account regulations. They certainly do not supplant

those regulations. They simply clarify the application of those regulations to specific rate calculations required by Part 385 and identify the elements of that rate calculation that must be included in the statements of account to comply with the fundamental principles of the Register's regulations.

There is thus a substantial question – never squarely before the Register – of what ought to happen to effectuate accounting when the CRJs properly adopt a new rate structure different than that contemplated by the statement of account regulations. The Division of Authority Decision speaks to the possibility "that the CRJs may determine that licensees should be required to provide some information related to notice of use that is not addressed in either the notice of intention to obtain the section 115 license or the statements of account." 73 Fed. Reg. at 48,398. In such a case the Register indicated that the CRJs had two options: "require that a licensee include that type of information in a notice of use (but not in the statement of account)" or make "a recommendation . . . to the Register to amend the regulations governing statements of account to include additional information." *Id.*

However, when the Register wrote the language above, it does not appear that the Register had in mind the possibility of a wholly new rate structure, which would necessarily require reporting a different set of data elements than addressed in the then-current statement of account regulations. If the Register had, it seems unlikely that the Register would have endorsed either of the foregoing options. With respect to the former, if the CRJs were to require that licensees report rate calculations under the new rate structure in something called a notice of use, the statement of account regulations calling for reporting in accordance with the wrong rate structure would effectively

become irrelevant. Setting up competing reporting regimes for the new rate structure certainly is not a sensible way to proceed.

In theory, having the Copyright Office update its statement of account regulations seems like a better alternative. However, these regulations must necessarily lag behind rate decisions, and experience suggests that they lag by quite a bit. The current mechanical royalty rates have been in effect for over four years, but complex issues are presented, so while the Office has commenced a proceeding to update the regulations, that proceeding has not yet concluded. In a system where mechanical royalty accountings are to be provided monthly, waiting for updates to the statement of account regulations is not a good solution to the problem of implementing reporting of new rate calculations. 17 U.S.C. § 115(c)(5).

Reading Section 115 as a whole, it is clear that the Register is empowered to determine minimum requirements for the form, content and manner of certification of statements of account. It is also clear that it is the CRJs who set rates, and that the system is to run on a tight timetable. In the case where the CRJs adopt a new rate structure, it does not encroach upon the Register's authority, and it would be most consistent with the overall operation of Section 115, to allow the Judges to specify additional data elements necessary to rate calculations under the new structure that must be included in statements of account. That is what the Accounting Provisions do, and the Register should find them permissible.

B. The Confidentiality Provisions Do Not Impermissibly Encroach upon the Register's Authority Under Section 115

The Register has properly recognized that what matters is the Register's "express statutory grant of authority." 73 Fed. Reg. at 48,398. With respect to statements of

account, the Register's express statutory grant of authority is to prescribe the "form, content, and manner of certification." 17 U.S.C. § 115(c)(5). While the Confidentiality Provisions might in some sense be considered to relate to statements of account, they do not have anything to do with the form, content or manner of certification of statements of account. Specifically, they do not add to, subtract from or otherwise alter the content of the statement, modify the form of the statement, or affect certification, in any way.[5] They merely specify what a licensee may do (or not do) with information in a statement after that statement has been prepared and served in accordance with the Office's regulations. That does not encroach on the Office's power with respect to statements of account as provided in Section 115(c)(5).

As discussed above, the statutory rate-setting system favors settlements and is designed to facilitate and encourage the participants in rate proceedings to reach negotiated resolutions. The Settlement was the product of extensive negotiations between multiple parties with often opposing interests, with the Settling Parties working diligently to resolve the proceeding via a comprehensive compromise that all parties agreed was in the best interests of all participants, the industry generally, and the public.

The Confidentiality Provisions were carefully negotiated as a part of this overall compromise, as each of the parties recognized that the new rate structure involves calculations that implicate highly sensitive competitive information. This information will be reported to multi-faceted companies that include entities that might benefit from knowing usage and royalty information that is easily deduced, if not explicitly set forth,

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[5] The Confidentiality Provisions also do not affect the manner or process "under which" annual statements of account "shall be filed."

in the calculations that licensees are required to undertake and report under the new regulations. The Confidentiality Provisions specifically require copyright owners to maintain the confidence of the particular information relating to the calculations in a licensee's statement of account from persons who are involved in negotiating or approving royalty rates of the types reported.

The Confidentiality Provisions do not add to or subtract from, modify or change the timing or manner of service of statements of account, in any way. The confidentially requirement is a provision regarding what a copyright owner may do, and not do, with a statement that has been prepared and served in accordance with the Office's regulations. Such entirely additional and non-intrusive provisions do not in any way impinge on the Office's unique power to prescribe the form, content and manner of certification of statements of account.

With respect to the specific questions concerning the potential effects of the Confidentiality Provisions on disclosure in litigation which were raised by the Office in its separate Rulemaking on Statements of Account, as was submitted in comments responsive in that proceeding, the Settling Parties believe that the Confidentiality Provisions would not interfere with the ordinary operation of legal process, such as disclosure pursuant to a subpoena or court order. Confidential information that is protected by the Confidentiality Provisions is routinely shielded from disclosure in litigation by means of a protective order, which makes the information available to litigants as may be demonstrated as necessary to the resolution of the litigation, but otherwise protects the information. The Confidentiality Provisions will not interfere with litigation to which a statement of account is likely to be relevant.

The Confidentiality Provisions are also appropriately limited in scope. The percentage rate calculations that are part of the terms submitted to the CRJs require information about matters such as services' overall revenues, royalty payments to record companies, performance rights organizations and overall usage, all of which is competitively sensitive. The purpose of the Confidentiality Provisions is to prevent that information from being used against the service by a record company affiliated with the publisher receiving the information, or by any other third party. That specific purpose was considered by the parties to the settlement to be important to operation of the percentage rate structure. The provision was carefully negotiated and drafted, and in the course of those negotiations the provision was carefully reviewed by numerous music publishers that would be bound by it, trade associations representing music publishers and songwriters, and their respective counsel.

As the new rate structures require underlying calculations that include sensitive competitive information, the confidentiality provisions are commercially reasonable, broadly acceptable within the affected industries, and integral to the negotiated settlement. Permitting the CRJs to adopt the Confidentiality Provisions would be consistent with Section 115's goal of fostering private negotiated settlements, and with the division of authority between the CRB and the Register, and would in no way interfere with the Register's recognized authority to prescribe the form, content and manner of certification of statements of account. Accordingly, the Register should allow the CRJs to adopt the Confidentiality Provisions.

II. If the Register Finds That the Accounting Provisions and Confidentiality Provisions Do Impermissibly Encroach upon the Register's Authority Under Section 115, the Office Should Adopt Those Provisions Itself

As explained above, the Settling Parties believe that the Register should conclude that the CRJs have authority to adopt the Accounting Provisions and Confidentiality Provisions as part of the Settlement. If, however, the Register does not agree, these provisions nonetheless are integral to the Settlement and important to the operation of the compulsory mechanical license with the rates provided in the Settlement. Accordingly, in such a case, the Copyright Office should incorporate the same provisions into its statement of account regulations, and the Register should announce the intention to do so as part of the Register's decision on this referral.

A. The Accounting Provisions and Confidentiality Provisions Are Important and Reasonable

Both the Accounting Provisions and Confidentiality Provisions play an important role in the overall context of the Settlement. If (contrary to our belief) they cannot be adopted by the CRJs as part of the Settlement, they should contemporaneously be adopted by the Office as part of the statement of account regulations. It is important that the Settlement enter into effect soon, to allow licensees to rely on the new Subpart C rates, bring new services to market and thereby help respond to online copyright infringement. However, if that is to happen, everyone would benefit from the clarity concerning reporting provided by the Accounting Provisions, and from the comfort and protection of competition afforded by the Confidentiality Provisions.

These specific provisions are reasonable – and relatively noncontroversial. The Accounting Provisions were published by the CRJs as part of the Settlement, and no commenter took exception to them. In addition, the Office itself has concluded that the

Accounting Provisions are appropriate on their merits, incorporating their substance into the proposed rule in the Office's SOA NPRM. 77 Fed. Reg. at 44,185 n.1 and 44,194 (incorporating a substantial part of the Accounting Provision in proposed Section 210.23(d)(3)). In the SOA Rulemaking too, no commenter took exception to the Accounting Provisions.

Turning to the Confidentiality Provisions, it is important that the Office understand why these provisions are included in the Settlement. In the Section 114 context, there is a long history of providing for confidential treatment of statements of account as a "term." *See* 37 C.F.R. §§ 260.4, 261.5, 262.5, 380.5, 382.4, 382.14, 384.5. That has not previously been the case under Section 115, because statements of account under Section 115 historically have not been particularly sensitive. In the past, every copyright owner has received statements that reflect sales of only that publisher's works. Thus, each individual statement reveals only a small slice of the licensee's business, and generally does not raise significant competitive concerns.

That changed with the new percentage royalty rates. As explained above, under the percentage rate structure, payments to an individual publisher depend upon broad-reaching facts about the service, such as its overall revenues and subscribers, overall payments of sound recording royalties and musical work performance royalties, and overall usage of the service. This is sensitive business information that might have competitive implications and could potentially be used against a service reporting it (e.g., by a record company affiliated with a publisher receiving that information). As a result, providing confidential treatment for this information was important to services involved in negotiation of the Settlement and provides protection of competition. It was ultimately

agreed that the provision would not interfere with the ordinary operation of music publishers' businesses, publishers' ordinary reporting to songwriters, or their ability to enforce their rights if necessary.

Opportunities for public comment on the Confidentiality Provisions have been provided in both this proceeding and the SOA Rulemaking, and only one industry participant – Gear – has voiced any concern about the Confidentiality Provisions.[6] Many songwriters and small music publishers situated similarly to Gear filed reply comments in the SOA Rulemaking, but none other than Gear objected to the Confidentiality Provisions.

In its comments to the CRJs, Gear objected to the Confidentiality Provisions on fairness grounds, but then explained that objection primarily in terms of dissatisfaction with the rates in the Settlement, and suggested that confidentiality is a matter that should be left to private agreement. Gear Comments, at 9. However, the possibility of private agreements does not negate the need for a workable compulsory license system.

In its comments in the SOA Rulemaking, Gear suggested that the Confidentiality Provisions are unnecessary because the sensitive information may be provided to many copyright owners, and copyright owners should not be restricted from discussing such information within their organizations. Both of these concerns are misdirected. As to the former, it is precisely the point of the Confidentiality Provisions to limit use and disclosure of sensitive information that must be disseminated widely. As to the latter,

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[6] Mr. Clarida's comments to the CRJs asserted that the CRJs could not adopt the Confidentiality Provisions. However, his comments in this regard would be fully addressed by the Office's adoption of those provisions.

Gear seems to misread the Confidentiality Provisions. They specifically permit employees of a copyright owner who need to have access to confidential information to have it; what is specifically restricted is providing that information to individuals who negotiate or approve royalty rates in transactions involving an affiliated record company.

Accordingly, the merits of the Accounting Provisions and Confidentiality Provisions – and the great weight of industry sentiment – strongly support adoption of those provisions in Copyright Office regulations if they cannot be adopted in CRJ regulations.

B. The Accounting Provisions and Confidentiality Provisions Can and Should Be Adopted by the Office without Delay

Because these provisions are an integral part of the Settlement, it is important that they enter into effect at the same time as the remainder of the Settlement. In particular, the office should not wait for resolution of the more complicated issues in the SOA Rulemaking to adopt these provisions. While the Office continues to consider those issues, the Office should add the Accounting Provisions and Confidentiality Provisions to its current statement of account regulations.[7]

These provisions have in effect already been published for comment twice – once by the CRJs and then again by the Office in the SOA NPRM. The administrative record concerning these provisions is well-developed and fresh. Accordingly, it is unnecessary to provide further opportunity for notice and comment. Moreover, further delaying implementation of the Settlement to provide yet another opportunity for comment would

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[7] The Accounting Provisions could be added to Section 201.19(e)(4)(iii), and the Confidentiality Provisions could be added as a new Section 201.19(h).

be contrary to the public interest, because of the importance to the digital music marketplace of allowing the Subpart C rates to enter into effect. In such circumstances, the Office is not required to provide yet another opportunity for comment before adopting these provisions as part of its statement of account regulations. *See* 5 U.S.C. § 553(b) ("Except when notice or hearing is required by statute, this subsection does not apply . . . when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are . . . unnecessary, or contrary to the public interest.").[8]

Accordingly, if the Register concludes that the CRJs do not have authority to adopt the Accounting Provisions and Confidentiality Provisions as part of the Settlement, the Copyright Office should take advantage of the flexibility provided by the Administrative Procedure Act to incorporate the same provisions into its statement of account regulations without delay.

CONCLUSION

For the reasons set forth above, the Settling Parties urge the Register to find that the CRJs' adoption of the provisions identified in the Referral Order would *not* encroach

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[8] In contexts in which an agency has not provided any notice or opportunity for comment, notice and comment sometimes has been said to be "unnecessary" only where the relevant rules are insignificant. *E.g.*, *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012). However, the present circumstance is very different. Here, the Office can rely on the administrative record that has already been developed. *See Mobil Oil Corp. v. E.P.A.*, 35 F.3d 579, 584 (D.C. Cir. 1994) (where agency had previously taken comments, "[i]f the original record is still fresh, a new round of notice and comment might be unnecessary"); *see also Renal Physicians Ass'n v. U.S. Dept. of Health and Human Services*, 489 F.3d 1267, 1270 (D.C. Cir. 2007) (affirming dismissal of case for lack of standing, but noting that agency had proceeded without notice and comment because "the public had been afforded two prior opportunities to comment and could also comment on the interim final rule").

upon the Register's authority under Section 115 of the Copyright Act. If the Register reaches a contrary conclusion, the Settling Parties hereby request that the Register adopt the same provisions as part of the Copyright Office's statement of account regulations.

April 5, 2013

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