

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

In re

Determination of Royalty Rates and Terms for
Making and Distributing Phonorecords
(Phonorecords IV)

Docket No. 21-CRB-0001-PR
(2023–2027)¹

**MOTION TO ADOPT SETTLEMENT OF STATUTORY ROYALTY
RATES AND TERMS FOR SUBPART B CONFIGURATIONS**

The National Music Publishers’ Association, Inc. (“NMPA”) and Nashville Songwriters Association International (“NSAI,” and collectively with NMPA, the “Publisher/Songwriter Participants”), on the one hand, and Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp. (collectively, the “Record Company Participants”), on the other hand, hereby notify the Copyright Royalty Judges that they have agreed to a settlement in the above-captioned proceeding (the “Proceeding”) as to (1) royalty rates and terms under Section 115 of the Copyright Act (“Section 115”) for physical phonorecords, permanent downloads, ringtones and music bundles presently addressed in 37 C.F.R. Part 385 Subpart B (the “Subpart B Configurations”), together with certain definitions applicable to Subpart B Configurations presently addressed in 37 C.F.R. Part 385 Subpart A (such rates, terms and definitions, collectively, the “Subpart B Configuration Rates and Terms”), and (2) late payment fees under Section 115 solely as they concern Subpart B Configurations presently addressed in 37 C.F.R. § 385.3 of 37 C.F.R. Part 385 Subpart A, together with certain definitions applicable to such late

¹ By using this caption, the Record Company Participants (defined above) are not waiving any rights or expressing any agreement concerning the dates that any rates and terms adopted by the Judges in any rate proceeding are to be in effect.

payment fees presently addressed in 37 C.F.R. Part 385 Subpart A (such late payment fees and definitions, collectively, “Late Fees”), for the rate period covered by the Proceeding. Proposed regulations implementing the agreed-upon Subpart B Configuration Rates and Terms and Late Fees are attached hereto.

The Parties respectfully request that the Judges publish the royalty rates and terms, including late fee payment terms, described herein and set forth in the Attachment (the “Settlement”) in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2) and adopt the Settlement industry-wide as the statutory royalty rates and terms for all Subpart B Configurations and Late Fees for Subpart B Configurations.

The Record Company Participants do not expect to further participate in the Proceeding except as to prosecution of the Settlement, or if the Settlement is not adopted industry-wide with respect to Subpart B Configurations, any other matters respecting the adoption of royalty rates and terms for Subpart B Configurations, including Late Fees related to Subpart B Configurations.

I. The Parties

All of the Parties filed petitions to participate in this Proceeding.

The Record Company Participants own or operate three of the largest recorded music businesses in the U.S. Each year those businesses create, manufacture and/or distribute a large volume of sound recordings pursuant to mechanical licenses and make substantial royalty payments tied to Section 115 of the Copyright Act. Collectively, products they produce or distribute represent the vast majority of the U.S. sound recording market.

The National Music Publishers’ Association, Inc. (“NMPA”) is a trade association representing the U.S. music publishing and songwriting industry. Musical works owned or

controlled by NMPA members account for the vast majority of the market for musical work licensing in the U.S.

The Nashville Songwriters Association International (“NSAI”) is a trade organization serving songwriters of all genres of music, including songwriters who directly publish and license their own music.

Concurrent with the settlement, the Joint Record Company Participants and NMPA have separately entered into a memorandum of understanding addressing certain negotiated licensing processes and late fee waivers.

II. Nature of the Settlement

The Parties have agreed that the Subpart B Configuration Rates and Terms presently set forth in 37 C.F.R. Part 385 Subparts A and B should continue to be applicable to the Record Company Participants and all other licensees of “mechanical” rights in musical works for the Subpart B Configurations, for the rate period covered by the Proceeding, with only a few minor editorial changes to the applicable regulations as set forth in the Attachment. The rationale for the editorial changes is set forth in drafting notes in the Attachment.

The Parties have also agreed that the Late Fees presently set forth in 37 C.F.R. Part 385 should continue to be applicable to the Record Company Participants and all other licensees of “mechanical” rights in musical works for the Subpart B Configurations, for the rate period covered by the Proceeding.

III. Adoption of the Settlement by the Copyright Royalty Judges

Pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority “[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding.” Such an agreement may serve as the basis of proposed regulations if other interested parties who “would

be bound by the terms, rates or other determination” set by the agreement are afforded “an opportunity to comment on the agreement,” *id.* § 801(b)(7)(A)(i), and provided that, in the event a participant in the proceeding who would be bound by the settlement raises an objection, the Judges conclude that the rates and terms set forth in the settlement agreement “provide a reasonable basis for setting statutory terms or rates.” *Id.* § 801(b)(7)(A)(ii).

The Parties understand that Mr. George Johnson has expressed an intention to oppose adoption of this Settlement. George Johnson’s Notice of Motion Objecting to NMPA, NSAI, SME, UMG, and WMG’s Settlement and Pending “Motion” (Apr. 19, 2021). However, it appears that Mr. Johnson is not actually opposed to the rates contained in the Settlement, but rather is opposed to the fact that the Settlement does not require streaming services to include a “buy button.” *See id.* at 4 (“at this time GEO simply proposes to *all* Participants a *BUY* button with no increase in the 9.1 cent royalty rate” (emphasis in original)).²

Encouraging settlements was a key goal of Congress when it adopted the current ratesetting procedures. H. Rep. No. 108-408, at 30 (Jan. 30, 2004) (“the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates”). Thus, the Copyright Royalty Judges are required to publish the Settlement in the *Federal Register* for comment notwithstanding Mr. Johnson’s expressed opposition. *See* 17 U.S.C. 801(b)(7)(A)(i). And because the Settlement represents the consensus of buyers and sellers representing the vast majority of the market for “mechanical” rights for Subpart B Configurations, and even Mr. Johnson does not propose different rates, the Settlement provides “a reasonable basis” for statutory

² Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc., have notified the movants that they do not object to the adoption of the Subpart B Settlement but reserve the right to propose changes to the common definitions that are set forth in Subpart A to the extent they are used in any other Subparts to be adopted by the Copyright Royalty Judges.

royalty rates and terms. Accordingly, the Parties are pleased to have reached the Settlement, and respectfully request that the Judges publish the Settlement for comment, and promptly adopt the Settlement in its entirety as the Subpart B Configuration Rates and Terms and Late Fees.

Dated: May 25, 2021

Respectfully submitted,

/s/ Susan Chertkof

Susan Chertkof (D.C. Bar No. 434503)
Kenneth Doroshow (D.C. Bar No. 429044)
Jared Freedman (D.C. Bar No. 469679)
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
1000 F Street NW, Floor 2
Washington, D.C. 20004
Telephone: (202) 775-0101
schertkof@riaa.com
kdoroshow@riaa.com
jfreedman@riaa.com

Counsel for Record Company Participants

/s/ Benjamin K. Semel

Benjamin K. Semel (N.Y. Bar No. 2963445)
Frank P. Scibilia (N.Y. Bar No. 2762466)
Donald S. Zakarin (N.Y. Bar No. 1545383)
PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036
Telephone: (212) 421-4100
bsemel@pryorcashman.com
fscibilia@pryorcashman.com
dzakarin@pryorcashman.com

Counsel for Publisher/Songwriter Participants

Attachment
Proposed Regulations

In all material respects, the Parties propose that the current regulatory provisions applicable to Subpart B Configurations, and Late Fees solely as they concern Subpart B Configurations, remain in effect. They propose a few minor editorial changes to the applicable regulatory language, which are shown below with additions in **bold and underlined** text and deletions in **~~bold with a strikethrough~~**. To the extent that the provisions set forth below are also applicable to configurations other than Subpart B Configurations, such matters are outside the scope of the Settlement.

Subpart A—Regulations of General Application

§385.2 [Applicable] Definitions.

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e).

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity, ~~as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and,~~ as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Interactive Eligible Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

[Drafting Note: The term Licensed Activity is not currently used in Subpart B, and the Parties do not propose to use that term in Subpart B. Accordingly, it seems unnecessary to define the term with reference to Subpart B.]

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord.

In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Permanent Download has the same meaning as in 17 U.S.C. 115(e).

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Sound Recording Company means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of ~~the Copyright Owner of the sound recording~~ a person identified in paragraph (1) through (3).

[Drafting Note: The defined term Copyright Owner refers to the copyright owner of a musical work, so it is inappropriate to use that defined term with reference to a sound recording.]

§385.3 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment.

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

§385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing physical phonorecords, ~~including by means of Digital Phonorecord Deliveries~~ Permanent

Downloads, Ringtones and Music Bundles, in accordance with the provisions of 17 U.S.C. 115.

[Drafting Note: These changes are intended to reflect the specific subject matter of this subpart, as distinguished from Part 385 as a whole.]

§385.11 Royalty rates.

(a) *Physical phonorecords ~~deliveries~~ and Permanent Downloads.* For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

[Drafting Note: The change to the caption of this paragraph is intended to conform the caption to the text of the paragraph and use the typical configuration name as in the case of the other paragraphs in the section.]

(b) *Ringtones.* For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles.* For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Proof of Delivery

I hereby certify that on Tuesday, May 25, 2021, I provided a true and correct copy of the Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations to the following:

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Signed: /s/ Benjamin K Semel