

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords IV)**

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

**Order on Joint Motion to Adopt Subpart B
Settlement Agreement; Order of Bifurcation; and
Order Responsive to Withdrawal of Emergency Motion**

THIS MATTER is before the Copyright Royalty Judges (Judges) pursuant to a Joint Motion to Adopt New Settlement [re] ... Subpart B Configurations ([Motion](#)) filed May 5, 2022, by self-identified Copyright Owners and self-identified Record Company Participants (together, Moving Parties).¹ George Johnson d/b/a/ GEO filed a timely [response](#) in opposition to the motion.

The Motion notified the Judges of a partial settlement of issues presented in the captioned proceeding; expressly, establishment of “mechanical royalties” for musical works licenses employed for “subpart B” phonorecord configurations.² In the Motion, the Moving Parties described the results of settlement negotiations relating to subpart B licenses and asked the Judges to follow statutory procedures for approval and adoption of the terms of the settlement as statutory rates and terms applicable to all licensors and licensees of musical works for subpart B configurations.³

The Moving Parties also requested that the Judges stay the captioned proceeding to the extent it requires litigation of the subpart B regulations. Given their negotiated settlement, the

¹ The Copyright Owners comprise National Music Publishers’ Association, Inc. (“NMPA”) and Nashville Songwriters Association International (“NSAI”). The Record Company Participants comprise Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp.

² 17 U.S.C. § 115 establishes a compulsory license for use of copyrighted musical works. The section 115 license is generally referred to as the “mechanical license.” Subpart B refers to subpart B, part 385, subchapter E, chapter III, title 37 of the Code of Federal Regulations (CFR). CFR part 385 contains regulations regarding administration of the section 115 mechanical license in general. Subpart B describes regulations applicable to certain phonorecords configurations (subpart B configurations), *viz.*, physical phonorecords, permanent digital downloads, ringtones, and music bundles.

³ The Moving Parties allege in the Motion that the Memorandum of Understanding (MOU) by and between certain recording companies and music publishers is independent of the terms of the settlement and proposed regulations. In any event, the Moving Parties allege that the full content of that MOU and its predecessor agreements is and has been available to the Judges. *See* Motion at 4 n.2. The Judges note, however, that the availability of documents on the internet does not incorporate those documents into the record of any proceeding.

Record Company Participants stated that they “do not expect to further participate” in the proceeding unless the Judges do not adopt the settlement as applicable industry-wide.⁴

In a filing contemporaneous with the Motion, the Joint Record Company Participants⁵ filed a “Withdrawal of Emergency Motion for Clarification and Request for Extension” (Withdrawal). GEO filed a response in opposition to the Withdrawal.⁶ Based on the content of the underlying Joint Record Company Participants’ Emergency Motion for Clarification and Request for Extension (Clarification Motion), the Judges referred to the Register of Copyrights (Register) a novel material question of substantive law, pursuant to 17 U.S.C. § 802(f)(1)(b). *See* Referral of a Novel Material Question of Substantive Law, eCRB Unique Doc. No. 26557 (Apr. 28, 2022). The predicate Clarification Motion was not the sole reason for the Judges’ referral to the Register, but it concerned the same subject matter. In the Withdrawal, the Joint Record Company Participants assert that, in view of the negotiated settlement relating to subpart B configurations, “it is no longer necessary for the Judges to address the matters raised in the [Clarification] Motion.” Withdrawal at 1.

Subpart B Settlement

In accordance with § 801(b)(7)(A) of the Copyright Act, the Judges shall submit the settlement and proposed regulations for publication in the *Federal Register*. Parties in interest will have an opportunity to file comments responsive to the proposal. Participants in the proceeding that would be bound by the proposed settlement will have an opportunity to comment and object to adoption of the settlement.

Motion for Clarification and Referral

Section 802(f)(1)(B) of the Copyright Act requires the Judges to refer to the Register novel material questions of substantive law that relate to interpretation of copyright law provisions that are the subject of a proceeding before the Judges. *See* 17 U.S.C. § 802(f)(1)(A)(ii), (f)(1)(B)(i). The Judges referred to the Register a novel material question of substantive law arising in the captioned proceeding. The Judges do not instruct the Register regarding her statutory duties; the Judges shall, however, by copy of this Order, notify the Register of the status of the proceeding for her information and consideration.

Stay and Bifurcation

In light of the statutory requirements for notice and opportunity for comment on any proposed royalty rate settlement and given the limited time remaining on the calendar in this proceeding, the Judges find it necessary to bifurcate this proceeding, separating consideration of royalty rates and terms for subpart B configurations from the record already developed with regard to royalty rates and terms applicable to music streaming services. After the close of the

⁴ Expressly, the Record Company Participants announced that they “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.” Motion at 2.

⁵ The Joint Record Company Participants are identical to the Record Company Participants in the Motion.

⁶ The Joint Record Companies’ Withdrawal is not a form of motion; it requires no response.

settlement comment period, if the Judges determine they must adopt the proposed rates and terms, they will publish a final rule. If, after receipt and consideration of comments on the proposed rule, the Judges determine, for whatever reason, they must decline to adopt the proposed rates and terms, the Judges will revisit with counsel next steps and appropriate procedures necessary for separately considering royalty rates and terms for subpart B configurations.

NOW, THEREFORE, the Judges **ORDER** that the captioned proceeding be and hereby is bifurcated. By separate order, if and when required, the Judges shall designate a docket identifier and proceeding schedule for establishing royalty rates and terms applicable to licensing of subpart B configurations of musical works.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

Dated: May 24, 2022.