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Chief Copyright Royalty Judge Suzanne Barnett
Copyright Royalty Judge David R. Strickler
Copyright Royalty Judge Steve Ruwe
United States Copyright Royalty Board
101 Independence Ave SE / P.O. Box 70977
Washington, DC 20024-0977

Re: Docket No. 21-CRB-0001-PR-(2023-2027) Making and Distributing Phonorecords (Phonorecords IV) Notice of Proposed Rulemaking, 37 C.F.R. Part 385 Subpart B

Your Honors:

I write with reference to the Judges' notice[1] ("Notice") soliciting public comments on a *Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations* ("New Rules").[2] The views expressed in this letter are my own and should not be attributed to any client.

I will focus on a few issues raised by the American Association of Independent Music regarding the CRB settlement process in general, the penny rate structure of the mechanical royalty system in the United States, and their proposal that mechanical licensing for physical configurations be handed over to the Mechanical Licensing Collective.

[1] 87 FR 33093, *Proposed Rule (Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations)*, Docket No. 21–CRB–0001–PR (2023–2027) (June 1, 2022).

[2] *Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations*, Docket No. 21–CRB–0001–PR (2023–2027) (May 25, 2022) available at https://app.crb.gov/document/download/26619

As a general comment, all of these ideas must be examined under the authority delegated to the CRB by Congress, particularly in light of the Supreme Court's recent ruling in *West Virginia et al v. Environmental Protection Agency et al*.[3] At first blush, it appears to me that all of these ideas, whatever one thinks of the merits, will require Congress to act.

The Longer Table

I actually was pleased to join A2IM at their annual Indie Week conference recently in New York on a panel devoted to this very topic. I am well aware that they believe their members will be disproportionately affected by the increase in cost although I have not seen the data. After many years in the music business, I will take on faith for purposes of this letter that they are correct.

I completely concur that the negotiation process for CRB needs a relook if not an overhaul. I made the point on the A2IM panel that David Lowery and I intend to host a conference devoted largely to this subject in the fall at the University of Georgia at Athens. Dr. Lowery and I are both of a mind that this issue needs to be vetted by the Copyright Office in their roundtable format.

However, I do not concur that the Subpart B resolution should be derailed at the 11th hour because of these structural issues that lawmakers no doubt will need to resolve. The time for A2IM to have made their views known in Phonorecords IV has long passed. They had the opportunity to participate in the proceeding, which individual songwriters could not afford to do, and they did not. They had the opportunity to comment on the first and second comment periods for what became the rejected settlement and they did not. They had the opportunity to insert themselves in the second settlement and appear not to have done so until filing a comment on the last day at the 11th hour.

Derailing the settlement for this purpose at the 11th hour is inappropriate. Whether the Judges can even accomplish what is asked of them, I respectfully leave to Your Honors to decide, but I do think there's a question of authority here. I do support including all these topics being on the table for Phonorecords V as do many other commenters.

[3] *Certiorari to the United States Court Of Appeals for the District Of Columbia Circuit, 985 F. 3d 914, reversed and remanded, U.S. Sup. Ct. Case No 20-1530*

The Clean Slate

A2IM raises the idea of compensating songwriters on a percentage of wholesale basis which is how mechanicals are paid in many if not most other countries. I understand why labels favor this structure but I also understand why publishers and songwriters do not.

First, I am of the view that a percentage of wholesale royalty is incompatible with a compulsory license. Imposing a compulsory obligation to have a third party set the "just compensation" for rights the government takes from the songwriter has that unconstitutional ring to it.

And that really is the problem with a percentage of wholesale royalty—it allows the conflicted record company to call the tune which is the very definition of moral hazard. Having said all that, I am happy to have a conversation about a clean slate and reimagining of the entire structure as long as it really is a clean slate. Of course, that will mean throwing away the entire controlled composition structure.

It must be said that in countries with a percentage of dealer price mechanical royalty there is no controlled composition terms at all. So if we are to have the discussion, let's have all the discussion for all the record companies including catalog. If we want to be like Europe, let's be European.

We cannot overlook that changing that compensation system will throw royalty compliance examinations of every record company onto the table with great force. How can songwriters be asked to give up a system that has been in place since 1909 without knowing whether they have gotten a straight count heretofore?

It must also be said that if A2IM members feel justified in changing the entire U.S. mechanical rate system, there is nothing stopping them from creating such terms in their new signings under controlled compositions clauses. In fact, such arrangements might be a good laboratory to experiment with these alternative structures.

Mechanical Licensing Collective

The idea that the MLC will just take over the mechanical licensing process for configurations that Congress specifically held back from their portfolio supports

the idea that Congress would need to act in order to accomplish what A2IM wants to do.

I would respectfully point out to the Judges that the MLC has been sitting on top of at least $500,000,000 of other people's money on the streaming side for a year or more and still can't manage to get it matched and most importantly paid. There is also a growing anecdotal belief in the indie publisher community who actually deal with the MLC that there is no musical works database constructed as instructed by Congress—that database appears to be entirely resident at HFA, an MLC vendor. That seems odd and would be a good question for the Judges to ask of the MLC at the next administrative assessment.

Plus, the MLC will not be able to do this additional work on physical accounting for free. I simply cannot imagine that the DLC will welcome the opportunity to provide free accounting services for access to the compulsory license when their own members pay up front a share of the millions that have vanished into the MLC in return for what I cannot say.

We must ask that if the A2IM members cannot afford the modest increase in mechanical royalties for their own songwriters—many of whom are their own artists—how will they afford a share of the administrative assessment plus the transaction costs of switching over to an entirely new accounting system plus what will almost certainly be frequent audits by the MLC.

What is the Actual Cost of the New Rates?

While I am prepared to take disproportionate impact on faith, I am less prepared to take disproportionate financial impact without more data. There is an assumption that A2IM labels all will have a one-to-one increase in costs because of the new rates, whatever they end up being. I'm not so sure about that and would want to know a few things including the following.

Many indie labels operate on a revenue share basis with their artists (or licensors). In those revenue share deals, the artist or licensor is paid a percentage of revenue that includes all mechanical royalties. In that structure, the new rates have arguably zero impact on the licensee label.

Because of rate fixing dates in deals where the label does pay the mechanicals, the new rates would only apply to records delivered during the rate period, i.e., after January 1, 2023. Term recording artist agreements would typically include

a controlled compositions clause as the Judges have noted in the Withdrawal Notice. In such an arrangement, the label would be paying a modest increase and could easily tell the artist that unless the artist-songwriter agreed to take still lower rates based on the previously frozen rates, the label would be unable to release their records.

A2IM does make a good point about the bull-headedness of the DSPs on permanent download rates. Perhaps the Judges could refer this issue to the Register for subsequent referral to the Department of Justice Antitrust Division to investigate these pricing practices. Congress seems focused on these kinds of issues at the moment.

Conclusion

In short, while A2IM's comments are well-intentioned and I understand that they feel overlooked in the process, believe me they are not alone. There are a lot of people in the community who take their objections to heart and are willing to parlay about all these ideas in the future. Unfortunately, I don't think there is support for derailing the process at the 11th hour which should come as no surprise to anyone.

Very truly yours,

Christian L. Castle

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