Before the UNITED STATES COPYRIGHT ROYALTY JUDGES Library of Congress Washington, DC

In re

DETERMINATION OF ROYALTY RATES AND TERMS FOR PERFORMANCE OR DISPLAY OF NONDRAMATIC MUSICAL WORKS AND PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS BY PUBLIC BROADCASTING ENTITIES (PB IV)

Docket No. 21-CRB-0002-PBR (2023-2027)

It is unclear what compelling government interest is served by the exception at 37 C.F.R. § 381.5(c)(4) [an exception for compositions in the repertory of GMR played on "stations broadcasting in a religious format"] the general royalty schema outlined by the Determination of Rates and Terms for Public Broadcasting (PB IV).

As I am sure the Judges are aware, the Establishment Clause of the United States holds, "Congress shall make no law respecting an establishment of religion." Although the history of the interpretation of this clause is long the most recent test established by the Supreme Court is the *Lemon* test, as viewed through the analytical framework of the Endorsement Test, first proposed in *Lynch v. Donnelly* (1984).

The *Lemon* Test is a three-part test and asks,

1. What is the secular purpose of the doctrine?,
2. That the primary purpose of the assistance neither promote nor inhibit religion,
3. That there is no excessive entanglement between church and state.

In *Lynch*, the Court examined together first two prongs, and asked whether the government has a "purpose" to endorse or disapprove of religion, and then clarified the third prong and asked whether the "effect" of the challenged practice is to endorse or disapprove of religion.

I believe that the proposed rulemaking runs afoul of the Establishment Clause on all of the above accounts.

Firstly, I would like to ask the Judges, what is the purpose of providing a reduction in the compulsory royalty payment requirement for religious stations? The immediate effect, obviously, is that the religious stations are benefitted to the detriment of the artists whose music is played. (What is additionally striking, although I do not advocate for this change, is that there is no requirement that the music itself, who is subjected to a lower rate, be either religious or in line with the beliefs of the station. Thus, artists who are not religious are to be paid significantly less, in the hundreds of dollars per play, when played on a "religious" station.) Artists are already extremely vulnerable as a group, especially in the "streaming era," where they are finding further reduction of their negotiating power, and an increase in abuse from DSPs. Surely, rulemaking should seek to empower them, rather than the other way around.

I can think of no secular reason for the rulemaking. There are no reasons suggested in the "SUPPLEMENTAL JOINT PROPOSAL OF GLOBAL MUSIC RIGHTS, LLC AND THE NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE REGARDING RELIGIOUS BROADCASTERS AFFILIATED WITH EDUCATIONAL INSTITUTIONS" filed on December 7th, 2022, a document where one might expect to find reasons associated with the proposal.

Additionally, the scheme puts non-religious broadcasting entities at a market disadvantage, having to pay hundreds of dollars more in royalties simply because the nature of the their entity is not "religious."

The purpose seems simply to benefit the religious broadcasting entities while in term harming non-religious broadcasting entities as well as artists in this zero-sum royalty scheme.

Secondly, the purpose of the legislation seems to promote religion both specifically (Christianity) as well as generally. The proposed legislation is, of course, not neutral in its expression of an exception for religion generally, but specifically it promotes Christianity both in purpose and effect. The proposal defines "religious format" as "including, without limitation, Contemporary Christian music, praise and worship, Gospel, Southern Gospel, Spanish religious music, inspirational, religious, etc." While of course, the "without limitation" language opens the proposal to all religions, it is clear from the list of explicitly excepted types of music that the focus is on Christianity. All are Christian. Even those that are not, such as "praise and worship," target Christian music – "praise and worship" is a Christian phrase. This rulemaking clearly promotes religion generally, and Christianity specifically.

Thirdly, the effect of the rulemaking would clearly be to endorse religion generally and Christianity specifically. Religious stations connected to education institutions would pay significantly lower compulsory rates from GMR, and thus would have a strong market advantage over non-religious stations. This has the effect of the endorsement of the United States government of religion generally. Because of both the language of the proposal, as mentioned above, but also because of the fact that the gross majority of religious stations in the United States are Christian, this rulemaking as the effect of the endorsement of the United States government of the religion of Christianity.

Following Supreme Court precedent leads us to the inevitable conclusion that the proposed rulemaking would be violative of the Establishment Clause of the First Amendment for the above reasons. I urge the Judges to remove these Constitutionally violative exceptions from the proposed royalty scheme.

Yours,

Jacob Eisenmann