

UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of

MECHANICAL AND DIGITAL
PHONORECORD DELIVERY RATE
ADJUSTMENT PROCEEDING

Docket No. 2006-3 CRB DPRA

ORDER DENYING MOTION FOR REHEARING

On October 2, 2008, the Copyright Royalty Judges (“Judges”) issued a Determination of Rates and Terms in this matter (“Initial Determination”). Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. Part 353, the Recording Industry Association of America (“RIAA”) filed a motion on October 17, 2008 for rehearing to reconsider the late payment fee of 1.5% per month established in the Initial Determination. At the same time all the parties – RIAA, the Digital Media Association (“DiMA”) and the Copyright Owners – jointly requested that the Judges “hold this motion for 20 days to allow negotiation by the parties” because they were of the view that they “may be able to resolve the issues related to the timing of the late fee through negotiation, which may obviate this motion.” As part of the joint request, Copyright Owners indicated they opposed the rehearing, while DiMA took no position on rehearing. The parties’ negotiations failed to resolve the issues related to the timing of the late fee within the requested 20 days following filing of the motion and the Judges now deny this motion.

The standard for reviewing motions for rehearing is set forth in 17 U.S.C. § 803(c)(2)(A), which states that the Judges may, in exceptional cases, upon a motion of a participant in a proceeding, order a rehearing after the determination in the proceeding is issued, on such matters as the Judges deem to be appropriate. Such exceptional cases require the movant to show that an aspect of the determination is erroneous, without evidentiary support, or contrary to legal requirements. See 37 C.F.R. §§ 353.1 and 353.2. The RIAA made no such showing. Moreover, as we stated in our May 3, 2006 *Order Denying SoundExchange’s Motion to Reconsider the Board’s Order Requiring, in Part, the Production of Certain Income Tax Returns in Webcaster II* (Docket No. 2005-1 CRB DTRA), “[m]otions for reconsideration must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the Board [Judges].” Such motions should be granted only where (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice. *Regency Communications Inc. v. Cleartel Communications, Inc.*, 212 F. Supp.2d 1, 3 (D. D.C. 2002). It is also appropriate to consider these standards in reviewing motions for rehearing. *Order Denying Motion for Rehearing*, Docket No. 2006-1 CRB DSTRA (January 8, 2008); *Order Denying Motions for Rehearing*, Docket No. 2005-1 CRB DTRA (April 16, 2007).

The RIAA does not claim an intervening change in controlling law or new evidence require a rehearing, but rather requests a rehearing based on its claim that no evidence in the record supports the assessment of a late fee. We find, however, that the RIAA has not made a sufficient showing of clear error or manifest injustice with respect to the 1.5% per month late fee determination. To the contrary, the RIAA's arguments in support of a rehearing are based on the same insufficiency of evidence that caused its similar arguments to be rejected by the Judges in their Initial Determination.

The RIAA claims that the Judges have misread the controlling legal standard, arguing *again* as it did in its proposed findings that an analysis under Section 801(b) factors must begin with an assessment of marketplace benchmarks. However, for the RIAA, the analysis not only begins but also ends here, because of its view of the applicability of the Judges' *Webcasting* decision (*Digital Performance Right in Sound Recordings and Ephemeral Recordings* ("Webcasting"), 72 Fed. Reg. 24084, 24107 (May 1, 2007), wherein the Judges found that certain record company/music service agreements were the best evidence as to the appropriate late fee. However, even viewing the RIAA's evidence in a light most favorable to the proponent, the RIAA's reliance on the *Webcasting* decision is misplaced because the willing buyer/willing seller standard that guided that proceeding is not applicable here. As we explained in our Initial Determination, we are instead "directed by the terms of this license to establish reasonable terms consistent with the Section 801(b) factors." Initial Determination at 64.

Moreover, the RIAA claims *again* the marketplace evidence it submitted as part of the record is indicative of the absence of such fees in the relevant marketplace. However, as we discussed in our Initial Determination, the RIAA's evidence was not undisputed. *See* Initial Determination at 64 n.45. ("NMPA and RIAA presented conflicting testimony as to the extent that late payments occur under licenses issued by the Harry Fox Agency and to the extent that those late payments were covered by advances paid by certain record companies.")

Finally, the RIAA argues that the adoption of a late fee was clear error because of its claim, raised here *again*, that the Copyright Owners are the primary cause of late payments. However, the RIAA's evidence pointed primarily to delays stemming from the failure of publishers and writers resolving copyright ownership interests (commonly referred to as "splits"), but did not provide persuasive evidence of a causal relationship between such delays and the actual imposition of late fees as a matter of industry practice. As a consequence, this "impossibility of compliance" argument was rejected by the Judges in their Initial Determination. While the RIAA's argument may highlight potential shortcomings in the payment requirements set forth in the statute and in the Register of Copyrights' regulations, it does not establish a nexus between the claimed delays and actual late fees incurred sufficient to support a finding that a 1.5% per month late fee is so burdensome and unfair as to lie outside the bounds of reasonableness as defined by Section 801(b).

For all these reasons, the RIAA does not demonstrate the need to correct a clear error or to prevent manifest injustice in the instant matter. Indeed, the RIAA's argument amounts to nothing more than a rehash of the same arguments that the Judges considered in the Initial Determination. As such, the motion does not present the type of exceptional case that would warrant a rehearing or reconsideration. *See Messina v. Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006) (motion to vacate a judgment that did nothing more than rely on the same arguments made prior to entry of the judgment was properly denied).

Wherefore, the RIAA's motion for rehearing is **DENIED**.

SO ORDERED.



James Scott Sledge
Chief Copyright Royalty Judge

DATED: November 12, 2008