

Dissenting Opinion of Copyright Royalty Judge Roberts

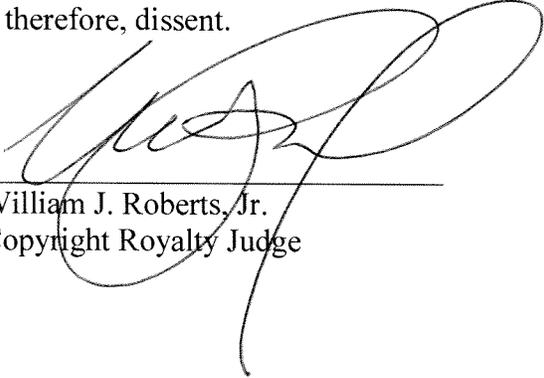
For the second time in this proceeding, the majority alters its evaluation of the evidence and explanation of its reasoning in determining royalty rates,¹ this time under the rubric of 17 U.S.C. § 803(c)(4). The majority's amendments do not comply with the terms and conditions of that section; and no other provision in the statute grants authority, at this stage of the proceeding, for making them.

Section 803(c)(4) of the Copyright Act, 17 U.S.C., entitled "Continuing Jurisdiction," states that "The Copyright Royalty Judges may issue an amendment to a written determination to correct any technical or clerical errors in the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination." This provision and § 803(c)(2), regarding motions for rehearing, are the only grants of authority for altering or amending written determinations. The language of § 803(c)(4) is very precise. Amendments can be made to a determination only if (1) they are "technical" or "clerical"; and (2) they are in response to unforeseen circumstances that would frustrate the proper implementation of such determination. The majority's issuance of amendments here fails on both accounts. First, the amendments are in no way "technical" or "clerical." The majority reconsiders both its evidentiary and legal analysis of the § 801(b) factors as applied to the preexisting subscription services ("PSS") in light of the Register of Copyrights' finding of legal error in the majority's analysis. *Review of Copyright Royalty Judges Determination, Notice*, 78 FR 22913 (Apr. 17, 2013). Recasting evidentiary and legal analysis is by no means "technical" or "clerical,"

¹ The first alteration in the reasoning supporting the majority's determination of royalty rates occurred in its denial of the motions for rehearing filed by SoundExchange, Inc. and Sirius XM. See *Order Denying Motions for Rehearing*, Docket No. 2011-1 CRB PSS/Satellite II (Jan. 30, 2013).

and I can find nothing in either the plain language of § 804(c)(4) or its legislative history that supports such a classification.

Furthermore, even if the majority is accurate in its conclusion that the amendments to the written determination are “technical,” the amendments do not satisfy the second criterion of § 803(c)(4), which is that they can be made only if the “proper implementation of such determination” would be frustrated without them.² The majority’s amendments are not at all necessary to the implementation of PSS rates, for they do not change them (which § 804(c)(4) expressly forbids) nor do they alter, correct, or clarify any of the terms or conditions of payment or reporting. What the amendments do seek to accomplish is to bolster the legal rationale behind the choice of the rates, presumably to raise the chances of success of the determination on appeal. This is not a permitted or intended purpose for making amendments under § 803(c)(4), and the majority is without authority to make them. I, therefore, dissent.



William J. Roberts, Jr.
Copyright Royalty Judge

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² The majority provides no discussion or analysis of this criterion.