

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC

In the Matter of)	
)	
Adjustment or Determination of)	Docket No. 2011-3 CRB PHONORECORDS II
Compulsory License Rates for Making)	
and Distributing Phonorecords)	
)	

COMMENTS IN RESPONSE TO REQUEST FOR PETITIONS TO PARTICIPATE

Broadcast Music, Inc. (“BMI”) hereby files its comments on the request for Petitions to Participate in the above-captioned proceeding in accordance with the Notice of the Copyright Royalty Judges (the “Judges”) announcing the commencement of a proceeding to adjust or determine compulsory license rates for making or distributing phonorecords, including digital phonorecord deliveries (“DPDs”), issued on December 22, 2010. *See* 76 Fed. Reg. 590 (January 5, 2011).

BMI is a music performing rights organization (“PRO”) that licenses, on a non-exclusive basis, the public performing right in approximately 6.5 million non-dramatic musical works on behalf of its over 475,000 affiliated songwriters, composers and publishers, including thousands of foreign works through BMI’s reciprocal licensing agreements with foreign performing right organizations.

Pursuant to 17 U.S.C. § 603 (b)(2)(C), BMI may have a significant interest in the subject matter of this proceeding to the extent that rates approved by the Judges for the making and distribution of digital phonorecord deliveries may have an impact on the performing rights income of BMI affiliates for conditional downloads and on-demand streams. This impact can

occur, as illustrated by the fact that the last mechanical rate proceeding conducted by the Judges resulted in the adoption of a mechanical license rate formula which included a credit for performing rights fees paid to BMI and other PROs. *See* Final Rule, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510 (January 26, 2009).

Specifically, in their determination, the Judges adopted a rate methodology that involved the calculation of an “all-in” publishing royalty for interactive streaming, other incidental DPDs and limited downloads from which any performing right license fees paid for the public performance of musical works would be subtracted in order to determine the payable royalty for the mechanical compulsory license. *See* 37 CFR § 385.10 *et seq.* This calculation methodology can have an impact on public performing right license fees payable to BMI and therefore an impact on the royalties that are payable by BMI to its affiliates. The rate methodology has established a *de facto* ceiling on the performing right license fee. Since the Judges do not have jurisdiction to set performing right license fees for interactive streaming and limited downloads, the methodology has resulted in an unintended result. Indeed, in negotiations some users have taken the position that performing rights license fees should be paid at artificially low rates because any increase in performing rights fees would come at the expense of mechanical royalties payable to the publishers under the “all in” formula.¹ This formula does not simply result in the movement of fees from one pocket to the other, however. This is because the economic and administrative aspects of the mechanical and performing right universes are governed by different factors. There may, for example, be different share split agreements for the

¹ Users have taken the position in the ASCAP rate court that “pure downloads” do not constitute public performances under Section 106, but that position, which was adopted last year by the Second Circuit, remains subject to appeal. *United States v. ASCAP*, 637 F.3d 64 (2d Cir. 2010). The applicability of the court’s holding to conditional downloads in any event is unsettled at this time.

different rights. The fees may be subject to offset against advances of different kinds and magnitudes. The fact that the issue of royalties for the public performing right in musical works has become a key element in the calculation of mechanical royalties, irrespective of the level of such fees, would be sufficient to give BMI a "significant interest" in this proceeding.

BMI does not know what rates will be proposed by the parties to the mechanical rate proceeding. It is possible that new formulas that do not implicate performing rights in any way will be proposed. In this case, BMI's interests would not be affected. If, however, formulas are proposed that include credits or offsets of fees paid for performing rights, BMI reserves its right to submit a petition to participate at that time for purposes of comments on such proposals.

Respectfully submitted,

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