

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

Mechanical and Digital Phonorecord Delivery Rate
Adjustment Proceeding

Docket No. 2006-3 CRB DPRA

**WRITTEN DIRECT STATEMENT OF
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
THE SONGWRITERS GUILD OF AMERICA AND
THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL**

National Music Publishers' Association, Inc. ("NMPA"), the Songwriters Guild of America ("SGA") and the Nashville Songwriters Association International ("NSAI") (collectively, the "Copyright Owners") respectfully submit this Written Direct Statement pursuant to the order entered by the Chief Copyright Royalty Judge on October 25, 2006 in support of their proposal for rates and terms for mechanical royalties under Section 115 of the Copyright Act to be effective from January 1, 2008 through December 31, 2012.

Introduction

This proceeding will determine the mechanical royalty rate paid to songwriters and music publishers for the use of their musical works pursuant to the compulsory license provision of the Copyright Act. Songwriters — the composers and lyricists — are the authors of the work and those in whom the musical work copyright initially vests. Music publishers, to whom a songwriter frequently assigns his or her copyright in exchange for a share of the income from the work's exploitation, help

songwriters create and exploit their works by, among other activities, assisting them in their creative process, promoting the works to record companies and performing artists, and licensing and administering the works.

Notwithstanding the pivotal role they play in the music industry, songwriters face financial struggles throughout their careers. Music publishers have experienced declines in their shares of revenue from mechanical royalties, and face increasing costs in connection with their crucial services provided to songwriters.

The current statutory mechanical royalties — comprising a significant portion of songwriter and music publisher income — do not fairly compensate songwriters and music publishers. The mechanical royalty rate for the distribution of music in both physical and digital format currently is 9.1 cents — a mere 7.1 cents above the rate set nearly a century ago at the time of the compulsory license's enactment. Copyright Owners agreed to the current rate — lower than that to which they believed they were entitled at the time — in the late 1990s, when the market for the sale of music in physical CD album format was thriving and the market for the digital distribution of music was in its infancy.

Those markets stand in stark contrast to the physical and digital distribution markets of today. Among other differences, physical sales have dropped dramatically. At the same time, the legitimate market for digital distribution has flourished, increasing the value of music to consumers, reducing the costs of record companies and digital music providers of making music available to the public, and enabling consumers to purchase primarily singles rather than albums. These striking changes have caused declines in the mechanical royalties paid to the Copyright Owners

— challenging the vitality of these professions — and compel increased mechanical royalty rates.

As set forth in detail below, the Copyright Owners’ proposal requests increased physical and digital rates to account for these market differences. The Copyright Owners’ proposal advances the statutory goals set forth in Section 801(b) of the Copyright Act. Increased rates will ensure adequate compensation to the Copyright Owners, allowing them to continue creating songs and to continue to make their works available to the public, while providing them a fair return on their critical creative efforts. Increased rates will also more accurately reflect the relative roles of the parties in the product made available to the public in today’s markets. These rates will not be disruptive to the recorded music industry, which is enjoying increasing profits. Nor should the fair division of royalties between creators of musical works and the owners of sound recordings disrupt the digital distribution of music by digital music providers.

In sum, increased mechanical royalty rates are vital to the Copyright Owners and their continued creation of musical works. The musical work is the heart of the music industry. Without the musical work, there would be no song for recording artists to perform and no song for record companies and digital music providers to sell. And without the Copyright Owners, there would be no musical works.

Background

The Copyright Owners

NMPA is the principal trade association of music publishers in the United States. Founded in 1917, it has approximately 600 members, which own or control the majority of musical compositions available for licensing in this country. NMPA

represents the rights of music publishers and, through them, songwriters, in litigation, legislation, industry-wide negotiations and rate-setting proceedings. It is the most active proponent for the interests of music publishers in the United States. NMPA's licensing affiliate, The Harry Fox Agency, Inc. ("HFA"), was established in 1927 and serves as a licensing and collecting agent on behalf of its over 27,000 publisher-principals in licensing their copyrighted musical compositions for reproduction and distribution.

The SGA is the nation's oldest and largest organization run exclusively by and for songwriters. Founded in 1931, the SGA is an unincorporated voluntary association of approximately 5,000 songwriters and songwriter estates throughout the United States. The SGA promotes the interests of songwriters by assisting them with skill development, royalty audits and collection, catalog administration and legislative advocacy. One of its primary objectives is to ensure that those who devote their careers to songwriting earn royalties adequate to support themselves and their families. Consistent with that objective, the SGA joined NMPA as representatives of the interests of songwriters and other copyright owners in prior mechanical rate proceedings.

The NSAI is a trade organization dedicated to providing a support system for songwriters of all genres. Established in 1967, the NSAI protects the legal and economic interests of its approximately 5,000 songwriter members and acts to safeguard the future of the songwriting profession. The NSAI offers a wide array of services to its members, including hosting workshops to teach them the art of songwriting, organizing festivals to showcase their talents, and lobbying on their behalf before Congress.

The Existing Mechanical Royalty Rates

The compulsory mechanical license was initially enacted as Section 1(e) of the 1909 Copyright Act. The first statutory rate for reproducing and distributing musical works was set at 2 cents per song. This rate did not change until the implementation of the Copyright Act of 1976, when Congress raised the rate to 2.75 cents and amended the law to add a rate adjustment mechanism. *See* 17 U.S.C. § 115. The last time mechanical royalties were set by a contested proceeding was in 1980. In that proceeding, the Copyright Royalty Tribunal established a compulsory rate for physical phonorecords equal to the larger of 4 cents or .75 cents per minute of playing time or fraction thereof, with scheduled increases in 1983, 1984 and 1986 to the larger of 4.25 cents or .8 cents per minute, 4.5 cents or .85 cents per minute, and 5 cents or .95 cents per minute, respectively. *See* 37 C.F.R. § 255.3; *see also* 46 F.R. 62267-02.

In 1987, pursuant to a joint proposal by NMPA, the SGA and the Recording Industry Association of America, Inc. (“RIAA”), the Copyright Royalty Tribunal established a schedule of rate increases indexed for inflation based on the CPI every two years over the next 10 years, except that rates could not be decreased below 1986-1987 levels or increased in any single adjustment by more than 25 percent. *See* 37 C.F.R. § 255.3; *see also* 52 F.R. 23546; 52 F.R. 22637. The rates were increased to the larger of 5.25 cents or 1 cent per minute in 1988, 5.7 cents or 1.1 cents per minute in 1990, 6.25 cents or 1.2 cents per minute in 1992, 6.6 cents or 1.25 cents per minute in 1994, and 6.95 cents or 1.3 cents per minute in 1996. *See id.*

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (“DPRA”), which confirmed that digital phonorecord deliveries

(“DPDs”) are subject to the mechanical license. *See* Pub. L. 104-39, 109 Stat. 336. The Copyright Act defines a DPD as “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that recording.” 17 U.S.C. §115(d).

The current mechanical royalty rates for physical phonorecords arise out of a 1997 agreement (“1997 Agreement”) between NMPA and the SGA, on behalf of the Copyright Owners, and the RIAA. Rather than litigate a contested proceeding — a heavy expense for entities such as the Copyright Owners who lack the financial resources of the record companies — and because sales of music in physical format such as CDs had been steadily climbing, the Copyright Owners agreed to a rate for physical phonorecords lower than that to which they believed they were entitled at that time. Pursuant to the 1997 Agreement, the mechanical royalty rate for physical phonorecords as of January 1, 2006 is the larger of 9.1 cents per track or 1.75 cents per minute of playing time or fraction thereof.¹

As part of the 1997 Agreement, the parties agreed, on a non-precedential basis, to propose rates for so-called “permanent downloads”² but did not address the rates

¹ Had the penny rate of 2.1 cents set in 1909 been increased at the same rate as prices generally (as measured by the CPI), the rate, as of January 1, 2006, would have been 40.7 cents.

² These rates, as well as the rates for the reproduction and distribution of physical phonorecords, were embodied in a joint petition submitted by NMPA, the SGA and the RIAA to the Copyright Office on November 5, 1997. After further proceedings regarding rates and terms for DPDs, the parties reaffirmed their agreement on October 13, 1998.

for other digital uses, such as “limited downloads” and “interactive streams.”³ At the time, the market for the digital distribution of music was in its infancy and the Copyright Owners had no empirical or economic evidence that would have enabled them to value accurately the future of digital distribution of music. Given this uncertainty, and in order to avoid the substantial costs associated with a litigated rate-setting proceeding, the Copyright Owners agreed to accept physical rates for permanent downloads. Thus, the mechanical royalty rate for permanent downloads as of January 1, 2006 is the larger of 9.1 cents per track or 1.75 cents per minute of playing time or fraction thereof.

The parties did not come to an agreement on the rates for other digital uses, which remain unresolved. Beginning in 2001, the parties addressed the licensing of these additional methods of digital distribution of music and entered into a series of agreements allowing users immediately to use musical works and pay Copyright Owners for those uses later once an appropriate mechanical rate had been set.⁴ In exchange for the payment of relatively modest advances to the Copyright Owners, record companies and digital music providers were allowed to set up businesses quickly so that they could

³ In today’s world, digital distribution of music is typically categorized as falling into three different modes of delivery. A “permanent download” is a digital delivery of a sound recording of a musical work that is not limited in availability for listening by the end user either to a period of time or number of times the sound recording can be played. A “limited download” is a digital delivery of a sound recording of a musical work that is available for listening by the end user for a limited period of time or a limited number of times. An “interactive stream” is a digital delivery of a sound recording of a musical work, using streaming technology, in response to an end user’s request.

⁴ *See, e.g.*, Agreement between Recording Industry Association of America, Inc. and National Music Publishers’ Association, Inc. and The Harry Fox Agency, Inc. (2001); Agreement Concerning the Licensing of Certain Internet Music Subscription Services between Listen.com, Inc. and The Harry Fox Agency, Inc. (2001); Agreement Concerning the Licensing of Certain Internet Music Subscription Services between FullAudio Corporation and The Harry Fox Agency, Inc. (2002).

capitalize on the new technology, without prejudicing the Copyright Owners' rights to seek appropriate digital rates once the digital distribution market became more fully evolved.

The Changes in the Markets for the Physical and Digital Distribution of Music

The current mechanical royalty rates were agreed to by the parties against the backdrop of a thriving market for the sale of music in physical format and an infant market for the digital distribution of music. Today, those markets have dramatically changed, undermining the premises upon which the current rates are based.

With respect to the sale of music in physical format, the Copyright Owners agreed to a relatively low penny rate in 1997 on the assumption that physical sales, as they had been, would continue to rise. Thus, the Copyright Owners believed that a low rate, when multiplied by a large number of full album CD sales, would yield them a fair aggregate return. In reality, physical sales have declined precipitously. This decline in physical sales resulted from a number of factors. First, the emergence of technology enabling the digital distribution of music and the initial dearth of legitimate online music services led to an unprecedented level of piracy. Because the Copyright Owners depend on mechanical royalties for every copy made of their works, the massive piracy occurring online has deprived the Copyright Owners of immeasurable royalties — losses that the Copyright Owners (subject to the compulsory license) cannot recover simply by raising prices. Second, as the legitimate market for the digital distribution of music has evolved, the market for physical sales has been diminished, resulting in fewer sales of physical product.

Moreover, the mechanical royalty rate is a ceiling above which the Copyright Owners cannot negotiate. It serves as a one-sided constraint in favor of the user. For example, the record companies frequently insist on rates below the statutory rate through so-called “controlled composition clauses” in record company agreements with songwriters who also perform their works, which clauses typically reduce the mechanical royalty rate (often to 75% or less of the statutory rate) and cap the total mechanical royalties paid to the songwriter at a certain number of songs per album.

With respect to the digital distribution of music, what was in the late 1990s a nascent market has now flourished into a vibrant and rapidly growing market characterized by significant differences from the market for the distribution of music in physical format. First, the digital distribution of music permits consumers to purchase particular tracks from an album without purchasing others. In the physical market, consumers typically purchased music on albums, each of which contained numerous tracks of varying levels of popularity, even though consumers generally sought to obtain copies of only one or two “hit” songs. Thus, although the Copyright Owners did not receive what they believed to be a high enough amount on each track on an album in the physical world, they received royalties on all of the tracks. In the digital market, by contrast, consumers are able to “cherry-pick” their purchases, resulting in the fact that the digital market is a predominantly singles-based market. Copyright Owners, therefore, get paid only for the purchased “hits.”

Second, music delivered digitally provides greater value to consumers than music delivered in physical format. For example, the digital distribution of music provides consumers with greater and more convenient access to works, portability of

their music collections, and the ability to sample works prior to purchase. At the same time that music distributed digitally provides increased value to consumers, its distribution in digital format is far less costly to record companies and digital music providers than its distribution in physical format.

The result of these market changes has been a decline in the payment of mechanical royalties to songwriters and music publishers. As the Copyright Owners' songwriting witnesses will explain, songwriting as a career presents often insurmountable financial struggles. In a profession that offers no reliable income stream, any reduction of compensation in the already-modest payments received will have adverse consequences for creative output. And, as the music publishers will explain, they face declining mechanical royalties and increasing costs of providing their essential support to songwriters.

The Copyright Owners' Proposal

For these reasons and those set forth in greater detail below and in the accompanying expert reports and witness statements, the existing mechanical rates should be increased and several new terms to the compulsory license should be adopted. Thus, the Copyright Owners propose the following rates and terms:⁵

⁵ The terms proposed here supplement — and do not override — existing terms except where there is a conflict. Moreover, the Copyright Owners' proposal has been crafted pre-discovery and necessarily is preliminary. The Copyright Owners expect to discover financial information from the record companies demonstrating, among other things, their costs involved in the sale of music in digital and physical format, their margins, financial forecasts and their agreements with digital music distributors. Thus, the Copyright Owners reserve their right, and expect, to amend or supplement their proposal following discovery.

Rates

- *Physical Phonorecords*: A penny rate equal to the greater of 12.5 cents per song or 2.40 cents per minute of playing time or fraction thereof, subject to periodic adjustments for inflation, as measured by the Consumer Price Index (“CPI”).
- *Permanent Downloads*: A penny rate equal to the greater of 15 cents per track or 2.90 cents per minute of playing time or fraction thereof, subject to periodic adjustments for inflation as measured by the CPI.
- *Limited Downloads*: A rate equal to the greatest of: (i) 15 percent of revenue;⁶ (ii) one-third of the total content costs paid for mechanical rights to musical compositions and rights to sound recordings; or (iii) the greater of \$0.0033 per use or \$0.00064 per minute of playing time or fraction thereof, subject to periodic adjustments for inflation as measured by the CPI.
- *Interactive Streaming*: A rate equal to the greatest of: (i) 12 ½ percent of revenue; (ii) 27½ percent of the total content costs paid for mechanical rights to musical compositions and rights to sound recordings; or (iii) the greater of \$0.00275 per use or \$0.00053 per minute of playing time or fraction thereof, subject to periodic adjustments for inflation as measured by the CPI.
- *Ringtones*⁷: A rate equal to the greatest of: (i) 15 percent of revenue; (ii) one-third of the total content costs paid for mechanical rights to musical

⁶ Given the rapidly evolving models of digital music distribution, the computation of revenue is of critical import. For services that are music-only, the revenue base against which the royalty would apply would be all revenue, including but not limited to subscription fees paid for access to or use of music, the fair market value of non-cash or in-kind consideration paid or payable by third parties, monies and other consideration from audio or visual advertising, promotions, sponsorships, time or space made available to subscribers of a subscription service, and monies and other consideration from the sale of any product or service directly related to a music service. For online services for which music is only one part of what is offered to consumers, or for which no separate fee for music is charged, the intention, as discussed, is to capture all revenue that is fairly attributable to music, however that revenue is generated. A more precise definition will not be possible until after discovery.

⁷ A ringtone is a snippet of a sound recording or digital file of a musical work of up to 30 seconds in length that is downloaded to a mobile phone or similar device to personalize its ring. The Copyright Owners believe that ringtones are not within the parameters of the compulsory license, and have appealed the Register’s recent decision to the contrary. As explained in the accompanying witness statements, the

compositions and rights to sound recordings; or (iii) 15 cents per ringtone, subject to periodic adjustments for inflation as measured by the CPI.

Terms

- *Payment:* Without affecting any right to terminate a license for failure to report or pay royalties as provided in §115(c)(6), late fees shall be assessed at 1.5% per month (or the highest lawful rate, whichever is lower) from the date payment should have been made (the twentieth day of the calendar month following the month of distribution) to the date payment is actually received by the Copyright Owner. For pass-through licensing, there shall be an automatic 3% assessment on all royalty payments by the licensee to address the fact that the Copyright Owners would receive payment sooner if the retailer were paying the Copyright Owners directly (such assessment to be augmented by additional late fees at 1.5% per month if payment by the licensee is otherwise late). A Copyright Owner shall be entitled to recover from the licensee reasonable attorneys' fees expended to collect past due royalties and late fees.
- *Applicability of Rates:* The statutory rate to be applied is the rate in effect as of the date of distribution.
- *Reserves:* In the case of physical product, there is a general failure to comply with, and abuse of, the existing reserve rules (see 37 C.F.R. § 201.19) — to be further confirmed in the discovery process — with the effect of substantially decreasing and delaying payments to publishers and songwriters. Subject to our findings in discovery, the Copyright Owners may propose the elimination of reserves for physical product or, at a minimum, new rules designed to correct the abuses.
- *Specific Licensing and Reporting:* Licenses are to be taken by specific configuration (e.g., CD, cassette, permanent download, limited download, interactive stream, etc.). In addition to any other applicable requirements, reporting must be broken down by specific configuration (*i.e.*, must detail how many units distributed of a particular configuration, and the applicable rate and royalties due for that configuration) and, in the case of pass-through licensing, must be further broken down to indicate the retail outlet through which the distribution was made to the end user.

Copyright Owners have entered into numerous voluntary license agreements granting copyright users the right to create ringtones at varying rates above the current statutory fee.

The Copyright Owners' Proposal Is Reasonable

The Copyright Act sets forth several criteria to be applied in the determination of whether mechanical royalty rates and terms are reasonable. Thus, rates and terms should: (1) maximize the availability of creative works to the public; (2) afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions; (3) reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and (4) minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. *See* 17 U.S.C. §801(b)(1). The Copyright Owners' proposal is reasonable under all of these criteria.

First, an increase in the mechanical rate consistent with the Copyright Owners' proposal is required to maximize the availability of creative works to the public by providing needed incentives to Copyright Owners to create new works. Mechanical royalties are an essential component of the incomes of both songwriters and music publishers, and over the past ten years, their mechanical royalties have steadily declined. As the songwriter witnesses will make clear, songwriting is a financially trying profession, with many songwriters forced to work odd jobs to make ends meet — thereby minimizing the time they have to devote to their craft — and others forced to abandon their songwriting aspirations altogether for other careers. Declining royalties also jeopardize the ability of music publishers to provide their critical support to songwriters. Increased rates will allow music publishers to support their songwriters and increase their

rosters, and increased rates will allow more and more songwriters to do what they do best: create musical works for the enjoyment of the public.

Increased rates will also provide the Copyright Owners with a fair return for their creative works. As the songwriter and music publisher witnesses will explain in detail, the efforts made by the Copyright Owners to create musical works are extensive. For the songwriters, songwriting is a passion requiring great dedication and often enormous sacrifice. The music publishers, too, make substantial efforts in furtherance of the creative process by providing crucial creative, financial, promotional and administrative support to songwriters. In view of these efforts — which are the most significant creative contributions in terms of the end product delivered to consumers — an increase in mechanical royalties is necessary to provide a fair return to the Copyright Owners. Indeed, in free-market transactions — perhaps the best indicator of a “fair return” — the Copyright Owners are compensated at rates far higher than the current mechanical rates. Finally, the Copyright Owners’ proposal recognizes that in order to provide a fair return to Copyright Owners for music distributed digitally, digital rates must be higher than physical rates to account for the increased value to consumers and the singles-based nature of the digital market.

Further, increased royalty rates will better reflect the relative roles of the parties in making the product available to the public. Regardless of the market for distribution of music, the critical role of songwriters and music publishers remains the same: they continue to provide the most fundamental component of music — the song. The effort to create that song has not changed — if anything, it has become more difficult — and the value of that song in the digital world has increased. For the record

companies, however, the costs of distributing music have decreased. And for both the record companies and digital music providers, the costs of distributing music in digital format are lower than in physical format. As such, the contribution of songwriters and music publishers relative to that of the record companies and digital music providers has increased. Mechanical rates must reflect the increased value of music in digital form and ensure a fair distribution of total music content royalties paid to the owners of sound recordings and musical compositions.

Finally, the Copyright Owners' proposal will cause no disruption to the music industry. It preserves the penny rate royalty system in place for nearly a century where it has worked well — namely, for physical phonorecords and permanent downloads. For limited downloads and interactive streams, the Copyright Owners propose a flexible, tiered approach for new and rapidly changing services for which standard penny rates would be inconsistent with the pricing regimes currently in place. And for ringtones, the Copyright Owners' proposal follows the basic structures set forth in current ringtone agreements, which are designed to protect the Copyright Owners against changes in revenue models. By all public accounts, the record companies are enjoying and are expected to continue to enjoy an upswing in profitability and thus will be able to pay the increases proposed by the Copyright Owners.

With respect to the Copyright Owners' proposed terms, record company practices have rendered them necessary to safeguard the rights and incomes of songwriters and music publishers. Among other issues, some record companies are frequently delinquent in their payment of mechanical royalties, forcing publishers to devote time, effort and considerable expense to obtaining payment. Although license

termination will remain a statutory option, short of that remedy, a late fee on late payments is appropriate to ensure that the Copyright Owners receive fair compensation and copyright users are incentivized to pay on time. The issue of late payments is particularly acute in situations where record companies issue so-called “pass-through” licenses to online music service providers in which the record companies license the sound recording and also purport to convey the required mechanical license, warranting an assessment to be added to all mechanical royalties paid pursuant to pass-through licenses. Notwithstanding these measures to ensure full and timely payment, there may be instances in which Copyright Owners will be forced to litigate to recover the royalties they are owed. In such cases, Copyright Owners should be entitled to recover reasonable attorneys’ fees expended to collect such royalties.

Moreover, clarification that the mechanical license fee is calculated and due upon distribution is necessary given current record company practices of calculating mechanical fees at the date of manufacture, adversely impacting the Copyright Owners in circumstances in which the statutory rate is higher on the date of distribution than on the date of manufacture. Subject to our findings in discovery, the terms of the mechanical license should also eliminate reserves for physical phonorecords or otherwise modify the rules to correct certain abuses that currently result in underpayment to Copyright Owners. Finally, the music publishers’ costs of tracking royalty payments and auditing record companies have increased due in large measure to the record companies’ frequent refusal to deliver reports of use in a usable fashion. Reports of use must be broken down by specific configuration to account for the quantity of phonorecords distributed and

royalties earned for each kind of digital use and, in the case of pass-through licenses, the particular retailers through which digital deliveries were provided.

Expert Reports And Witness Statements

The witnesses and experts who have submitted statements in support of the Copyright Owners' proposal will address the above-described points, and others. We summarize their testimony below:

NMPA President and Chief Executive Officer

David Israelite, President and Chief Executive Officer of NMPA, will describe the NMPA's role in the music publishing industry and the role of music publishers generally, and will introduce the Copyright Owners' proposal and the rationales in support of it.

Music Publishers

Five music publishers, representing over 150 years of industry experience, have submitted written statements on behalf of the Copyright Owners. They are:

- Irwin Z. Robinson, Chairman and Chief Executive Officer of Famous Music, Inc. the music publisher, an affiliate of Paramount Publishing (which is part of Viacom, Inc.), and Chairman of the Boards of Directors of NMPA and HFA.
- Ralph Peer II, Chairman and Chief Executive Officer of Peermusic, Inc., a leading independent music publisher with a catalog of over 300,000 songs.
- Roger Faxon, Co-Chief Executive Officer of EMI Music Publishing, currently the largest music publisher in the world.
- Nicholas Firth, Chairman and Chief Executive Officer of BMG Music Publishing, one of the largest music publishers in the world, with a catalog that cuts across all genres of music.
- Bob Doyle, Founder and President of Major Bob Music, a Nashville-based music publisher whose roster of songwriters includes Garth Brooks.

As the leaders of five music publishing companies, these individuals are uniquely qualified to explain the role that music publishers play, the essential contributions they make to the creation of music, and the importance of an increase in the mechanical royalty rate to them and to songwriters. Specifically, they detail the ways in which their companies discover talented songwriters, provide them with essential financial support at the earliest and most uncertain stages of their careers, nurture their creative talents by critiquing their compositions, promote their works to record companies and others, arrange collaborations with recording artists, producers and other songwriters, license their works and handle critical administrative affairs, including copyright registration and royalty collection. Finally, these publishers explain that an increase in the mechanical royalty rate is important to stem the decline in mechanical royalties experienced in recent years and to enable them to continue their crucial efforts on behalf of songwriters.

Songwriters

Seven professional songwriters, representing a variety of genres of music, have submitted written statements on behalf of the Copyright Owners. They are:

- Rick Carnes, a songwriter of country music for over 30 years who has written songs for major country recording artists such as Reba McEntire, Convoy Twitty and Pam Tillis, and is the current President of the SGA.
- Steve Bogard, a songwriter for more than 40 years and the current President of the NSAI.
- Jud Friedman, a successful songwriter for more than 20 years, whose hit single “Run to You” was recorded by Whitney Houston and sold over 30 million copies.
- Maia Sharp, a second-generation songwriter who has also recorded two albums of her own works.

- Phil Galdston, a composer, lyricist, music publisher and producer for almost 40 years, whose songs have been recorded by such popular recording artists as Vanessa Williams, Celine Dion and Beyoncé.
- Victoria Shaw, a Nashville-based songwriter whose songs have been recorded by such well-known recording artists as Garth Brooks.
- Stephen Paulus, an accomplished writer of opera and other classical music, and vice president of the American Composers Forum, the largest composer service organization in the world.

These songwriters detail the challenges associated with a career in songwriting. As they explain, songwriting is a career with no guarantees and one that offers no reliable income stream and relatively small rewards even from the most successful “hit” songs. Although some of these songwriters have enjoyed financial success from songwriting, they explain that such stories are unusual, that the plight of the average songwriter is difficult, and that success is typically modest and short-lived.

Several of these songwriters also describe the critical contributions that music publishers have made to their careers. In particular, they explain in detail how their publishers nurtured their talents and trained them to produce marketable compositions, provided them essential financial support through advances that allowed them to concentrate on songwriting, and secured recordings of their songs and facilitated relationships with other songwriters and artists. Each of the songwriters agrees that increases in the statutory rate would make a substantial difference to them and to their fellow songwriters in creating their works.

Economist

William M. Landes, Clinton R. Musser Professor of Law and Economics at the University of Chicago Law School, chairman of Leaf Group, LLC, an economics consulting firm, and author of numerous scholarly works in law and economics, antitrust,

and intellectual property, including The Economic Structure of Intellectual Property Law, which he co-authored with Judge Richard A. Posner, concludes that the Copyright Owners' proposal for statutory mechanical rates, for both physical phonorecords and digital distribution of music, is reasonable.

First, he determines that the 12.5 cent rate for physical phonorecords is reasonable, because, among other reasons, the value of copyrighted songs has increased; that an increasing share of licenses issued by the HFA has been at, rather than below, the statutory rate, which suggests that the royalty rates under an increasing number of license agreements are being capped at an artificially low level; and that piracy has depressed the returns to songwriters and, thus, their incentives to create.

Second, Professor Landes determines that the Copyright Owners' proposal of 15 cents for permanent downloads is reasonable because, for reasons discussed above, music distributed digitally is more valuable to consumers than music in physical format and the digital market is "singles" based. In addition, Professor Landes concludes that virtually all licenses for permanent downloads have been at the statutory rate, which suggests that the rate is acting as a binding maximum and precluding bargaining at higher amounts.

Third, Professor Landes concludes that the Copyright Owners' proposal for subscription services offering limited downloads and interactive streaming is also reasonable. Specifically, he finds that the Copyright Owners' proposal is appropriate because it would result in the Copyright Owners receiving, in any event, no more than one-third of the total content costs paid by these services for rights to sound recordings and the mechanical rights to musical works, a proportion at or in fact below that received

by Copyright Owners in freely negotiated market transactions. Finally, Landes asserts that the Copyright Owners' proposal for ringtones is also reasonable because it is consistent with a conservative analysis of what the parties have agreed to under negotiated licensing agreements.

Digital Music Industry Expert

Claire Enders, Chief Executive Officer of Enders Analysis, an international provider of research, analysis, business strategy and advice on telecommunications, media and technology, provides an overview of the historical and current states of the U.S. digital music market to provide context for the Copyright Owners' proposal. Enders also opines that the Copyright Owners' proposal to set higher rates for the digital distribution of music than for physical phonorecords is reasonable for several reasons. In addition to the greater value to consumers from digital music and the implications of the digital market being a "singles market," she explains that record companies and digital music providers distribute digital music at lower costs and, thus, earn greater margins, than they do for physical phonorecords, while, by contrast, the contributions of the Copyright Owners to music that is digitally distributed have not declined.

Recorded Music Industry Expert

Helen Murphy, President of International Media Services Inc. ("IMS"), a New York-based strategic advisory and financial services firm, has extensive first-hand experience in the recorded music industry, including as chief financial officer of a major record company. Murphy addresses the historical, current and anticipated future financial state of the recorded music industry, and concludes that the recorded music

industry has historically undergone cyclical growth and profitability, and is now enjoying rising profits.

To that end, Murphy explains that technical innovation in the recorded music industry, such as the shift in delivery medium from albums and cassettes to compact discs in the mid-1980s, has often led to periods of decline in adapting to new technology followed by growth as the new formats for music stimulate new demand for, and fuel increased sales of, music. Concerning digital innovation specifically, Murphy notes that these emerging technologies led to significant piracy and, as lawful digital music services struggled to capture market share, record company sales and profitability waned. At the same time, record companies incurred billions of dollars in one-time restructuring costs designed to adapt their businesses to the digital age. By 2005, however, the emergence of successful, lawful digital music distribution services, coupled with the benefits of the previous restructurings, have led to a resurgence in record company profits, in part because record companies earn greater profits on digital sales than sales of physical phonorecords. According to Murphy, there is no reason to believe that these positive trends will not continue over the next five years as digital distribution of music captures a larger share of total market demand.

Conclusion

In sum, the Copyright Owners' direct case will demonstrate, and discovery will confirm, that increased mechanical royalty rates are warranted — indeed, critical — for the survival of the Copyright Owners and to ensure their continued creation of musical works.

Dated: November 30, 2006

Respectfully submitted,

NATIONAL MUSIC PUBLISHERS'
ASSOCIATION, INC.

THE SONGWRITERS GUILD OF
AMERICA

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