

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.

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In the Matter of )

Mechanical and Digital Phonorecord )

Delivery Rate Adjustment Proceeding )

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Docket No. 2006-3 CRB DPRA

Copyright Royalty Board

**RIAA'S BRIEF ON THE JURISDICTION  
OF THE UNITED STATES COPYRIGHT ROYALTY JUDGES TO SET CERTAIN  
TERMS AND MOTION TO STRIKE TERMS OUTSIDE THAT JURISDICTION**

The Recording Industry Association of America (“RIAA”) respectfully submits this brief in response to the questions raised by the Court concerning its jurisdiction to set “terms of royalty payments.”<sup>1</sup> As discussed in more detail below, the plain language of the Copyright Act compels the conclusion that, although the Court has authority to establish certain terms, many of the terms proposed by the National Music Publishers’ Association, Inc., the Songwriters Guild of America and the Nashville Songwriters Association International (the “Copyright Owners”), and one of the terms proposed by RIAA itself, exceed Congress’s delegation of power to this Court under 17 U.S.C. § 115(c)(3)(C) because they conflict with applicable regulations promulgated by the Copyright Office and are outside the specific areas of notice and recordkeeping in which the Copyright Act authorizes the Copyright Royalty Judges to set terms inconsistent with the Copyright Office regulations.

At the outset of this proceeding, all of the parties proposed terms in an environment of uncertainty about the scope of the Court’s authority to determine terms of royalty payments.

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<sup>1</sup> As the parties have previously informed the Court, the parties have agreed to file simultaneous briefing on this issue today.

During the opening statements, the Court focused the parties on this uncertainty and suggested that the Court lacks authority to enter many of the terms requested by the parties. Upon further examination of the matter at the Court's request, RIAA has become convinced that the better view is that many, though not all, of the terms the Copyright Royalty Judges have been asked to adopt in this proceeding are inconsistent with the role of the Register of Copyrights in the administration of Section 115 and otherwise outside the scope of Congress's delegation of authority to the Copyright Royalty Judges to determine terms of royalty payments.<sup>2</sup>

As discussed in more detail below, Congress intentionally split the administration of Section 115 between the Copyright Royalty Judges and the Register of Copyrights. This division of authority is not entirely new. Prior to the creation of the office of Copyright Royalty Judges, the Copyright Act gave the Copyright Royalty Tribunal and thereafter copyright arbitration royalty panels ("CARPs") authority to set rates under Section 115 (and later some limited authority to set terms of royalty payments) but gave the Copyright Office broad authority to establish detailed terms that govern operation of the compulsory license. In 2004, after passage of the Copyright Royalty and Distribution Reform Act ("CRDRA"), the provisions authorizing regulation by the Register remained intact. *See* 17 U.S.C. §§ 115(b)(1), (c)(4), (c)(5). The Copyright Royalty Judges, in turn, were required to "act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress." *Id.* § 803(a)(1). But they were given enhanced authority to set the terms, particularly with regard to rules governing notice to copyright owners of uses of works and recordkeeping by users about such uses. *Id.* § 115(c)(3)(D). The resulting tension is resolved in Section 803(c)(3), which

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<sup>2</sup> One of the terms proposed by RIAA suffers from the same kinds of infirmities as those proposed by the Copyright Owners, so if the Court adopts the statutory interpretation urged here, RIAA would of course withdraw that proposed term.

provides that a determination by the Copyright Royalty Judges may specify “notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations.” In the areas of notice and recordkeeping, a final determination of rates and terms may supplant applicable regulations of the Register. As to other matters, however, the regulations are binding on the Copyright Royalty Judges.

### **BACKGROUND**

From the passage of the 1976 Copyright Act until 1995, the Copyright Royalty Tribunal (created by legislation enacted in 1976) and the CARPs (created by legislation enacted in 1993) were authorized only to set mechanical *rates* under Section 115. That limitation was made clear in former Section 801(b)(1) (granting authority to “make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116”).

Authority over terms was given to the Register. Since 1976, Section 115 has provided that:

Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

17 U.S.C. § 115(c)(5).<sup>3</sup> *See also id.* § 115(b)(1) (also enacted in 1976 and still in force) (notice of intention to obtain compulsory license “shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation”).

As a result of an extensive rulemaking proceeding concluded in 1980, *see* 45 Fed. Reg. 79,046 (Nov. 28, 1980), and various further proceedings, the Copyright Office has established intricate regulations concerning notices of intention and requirements for payments under Section 115. These regulations, set forth at 37 C.F.R. §§ 201.18 and 201.19, comprehensively address nearly every imaginable procedural aspect of the mechanical compulsory license system.

Matters changed to some extent in 1995 when Congress added to Section 115 provisions specifically related to mechanical royalties payable for “digital phonorecord deliveries” (“DPDs”). *See* 17 U.S.C. § 115(c)(3) (1996). Those provisions authorized a CARP to set “reasonable terms and rates of royalty payments” for DPDs. *Id.* § 115(c)(3)(C), (D) (1996). But such terms and rates, like all CARP determinations, were subject to modification by the Librarian on recommendation of the Register. *Id.* § 802(f) (1996). And the same legislation authorized the Librarian to “establish requirements by which copyright owners may receive reasonable notice of the use of their works . . . , and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.” *Id.* § 115(c)(3)(D) (1996). The Register and Librarian also retained sole authority to set the terms of royalty payments for physical products. The legislative history explained that the goal was to provide CARPs with limited authority to fill in any unforeseen gaps in the regulations that might arise as a result of the extension of the mechanical royalty system to DPDs:

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<sup>3</sup> This language was originally contained in Section 115(c)(3). The section has been renumbered twice as amendments have been made to other parts of Section 115, but the statutory language has remained the same.

By “terms,” the Committee means such details as how payments are to be made, when, and other accounting matters. While these details are for the most part already prescribed in section 115, and related details are to be established by the Librarian under section 115(c)(3)(D), the bill allows for additional such terms to be set by the parties or by CARP’s in the event that the foregoing provisions or regulations are not readily applicable to the new digital transmission environment.

S. Rep. No. 104-128, at 40 (1995).

Then, in the 2004 CRDRA, the new Copyright Royalty Judges were given broader authority in Section 801(b)(1) to set the “terms and rates of royalty payments” under, *inter alia*, Section 115. Section 115, in turn, was amended to provide that the Copyright Royalty Judges had authority to set “reasonable rates and terms of royalty payments.” 17 U.S.C.

§§ 115(c)(3)(C), (D) (as amended by the replacement of the first sentences in each subsection).

*See also id.* § 115(c)(3)(D) (the final sentence as amended in 2004) (replacing the Librarian with the Copyright Royalty Judges as the persons directed to establish rules for notice of use and for recordkeeping). However, the statutory provisions authorizing the Register to regulate the terms of the mechanical license system in general remained in place as well.

## ARGUMENT

### **I. In Setting Terms Under Section 115, the Copyright Royalty Judges Must Follow Applicable Regulations Promulgated by the Register, Except with Regard to Notice and Recordkeeping Requirements.**

The division of authority over terms that Congress intended to establish in 2004 is ultimately clear. Congress did not take away any of the Register’s authority to regulate in this area, including the Register’s specific authority to specify the form and content of notices of intention to obtain a license, 17 U.S.C. § 115(b)(1), authority to set the “requirements” for monthly payments, *id.* § 115(c)(5), and authority to promulgate “regulations covering both the monthly and the annual statements of account,” *id.* And it directed the Copyright Royalty Judges

to follow the regulations issued by the Copyright Office (through the Librarian of Congress) in most instances. *Id.* § 803(a)(1).

Congress, however, carved out one area relating to terms in which the Copyright Royalty Judges are able to make final determinations that may not be consistent with existing Copyright Office regulations. As noted above, it made a point in 2004 of amending Section 115(c)(3)(D) to shift from the Librarian to the Copyright Royalty Judges the power to “establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.” And it added a new Section 803(c)(3), which provides as follows:

*Contents of Determination.* A determination of the Copyright Royalty Judges shall be supported by the written record and shall set forth the findings of fact relied on by the Copyright Royalty Judges. *Among other terms adopted in a determination, the Copyright Royalty Judges may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under the regulations.*

17 U.S.C. § 803(c)(3) (emphasis added). Thus, Congress specifically provided that although the Register retained authority to regulate in the areas of (1) notice of use and (2) recordkeeping, *see id.* §§ 115(b)(1), (c)(5), those specific regulations of the Register could be supplanted in a final determination by the Copyright Royalty Judges of the terms of royalty payments under Section 115.

It follows, however, that all other regulations of the Register, such as regulations governing payment of royalties under Section 115, remain binding on the Copyright Royalty Judges. To begin with, Section 803(a)(1) generally requires compliance with any such applicable regulations. Moreover, under basic principles of statutory construction, Congress’s decision to carve out a special exception for regulations governing notice and recordkeeping

must mean that, outside those specific areas, the Copyright Royalty Judges may *not* order terms that “apply in lieu of those that would otherwise apply under the regulations.” 17 U.S.C. § 803(c)(3); *see, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”). In other words, the Copyright Royalty Judges’ authority over terms has two aspects: (1) authority to set the terms of notice of use and of recordkeeping that is not limited by the grant of authority to the Copyright Office, and (2) additional authority to set other terms that are not inconsistent with regulations promulgated by the Register.

**II. The Parties’ Proposed Terms Should Be Rejected to the Extent That They Conflict with Existing Regulations and Do Not Involve Notices of Use or Recordkeeping.**

Giving effect to the division of authority between the Copyright Royalty Judges and the Register of Copyrights mandated by Congress leads to the conclusion that many of the terms initially proposed by the parties to this proceeding are barred by governing regulations.

First, the Copyright Owners have proposed four categories of terms. *See* Written Direct Statement of National Music Publishers’ Association, Inc., the Songwriters Guild of America and the Nashville Songwriters Association International (“Copyright Owners’ WDS”), at 12. All but one is beyond the jurisdiction of the Copyright Royalty Judges to determine terms of royalty payments:

- Payment. Within the category of “payment,” the Copyright Owners propose sweeping regulations governing late payments, special assessments for instances of “pass-through” licensing, and payment of attorneys’ fees in collection actions. It is far from clear that even the Register could order all of these changes absent legislative authorization. But what is certainly clear is that they are outside the

authority of this Court because the terms for payment of royalties are set forth in detail in 37 C.F.R. § 201.19(e)(4). That subsection of the regulations sets forth a detailed five-step “formula” for calculating the “amount of the royalty payment” as well as specific situations in which adjustments are required. There can be no doubt that it would conflict with this regulation for the Copyright Royalty Judges to accept the Copyright Owners’ proposal. If Congress had intended to allow the Copyright Royalty Judges to set payment terms that conflict with the existing payment regulations, it would have said so in Section 803(c)(3). Moreover, creating a rule concerning attorneys’ fees in collection actions, having nothing to do with monthly payments, is manifestly not a “term[] of royalty payments” as described in the legislative history quoted above.

- Applicability of Rates. The Copyright Owners propose that the statutory rate to be applied is the one in effect as of the date of distribution (as opposed to the date of manufacture). Copyright Owners’ WDS at 12. As applied to physical products, this proposal may be legally permissible (although contrary to all previous changes in the mechanical royalty rate, *see* 37 C.F.R. § 255.3). With respect to digital phonorecord deliveries, this term draws a distinction without a difference because the Copyright Office’s regulations make clear that the date of manufacture and the date of distribution of a digital phonorecord delivery are the same. 37 C.F.R. § 201.19(a)(6)(i) (digital phonorecord delivery to be “treated as a phonorecord made and distributed on the date the phonorecord is digitally transmitted”). This term also would be inapplicable in the case of a percentage royalty, because in that case the



relevant rate would presumably be the one in effect on the date the relevant revenue is earned.

- Reserves. The Copyright Owners indicate that they may propose the elimination or amendment of the existing regulations governing reserves. Copyright Owners' WDS at 12 (citing 37 C.F.R. § 201.19). Because the Copyright Office regulations at issue do not involve either notice of use or recordkeeping rules, the Copyright Royalty Judges lack the authority to supplant them in setting terms in a final determination.
- Specific Licensing and Reporting. The Copyright Owners propose that licenses be taken by specific configuration and that reporting be broken down by specific configuration. The first of these proposals is manifestly not a "term[] of royalty payments" within the meaning of Section 115(c)(3)(C). It is inconsistent with the statutory requirements for obtaining a license under Section 115(b), and in any event, it is only the Register who is authorized to prescribe requirements for the notices of intention by which licenses are obtained. *See* 17 U.S.C. § 115(b)(1). The latter proposal is already addressed in the Copyright Office's regulations concerning requirements for payments, *see* 37 C.F.R. § 201.19(e)(3)(ii)(D), which makes the proposal moot.

One of the four categories of terms RIAA has proposed in this proceeding suffers from the same infirmities.

- Clarification of Covered Reproductions. RIAA first asks that the Court clarify that the compulsory license (and thus a payment thereunder) extends to all reproductions necessary to engage in activities covered by the compulsory license. This request

does not conflict with any regulation or otherwise exceed the Copyright Royalty Judges' authority.

- Accounting for Digital Phonorecord Deliveries. RIAA next asks that the Court “modify 37 C.F.R. § 201.19(a)(6)” to provide that DPDs are treated as being made and distributed in the month after they are digitally transmitted under certain circumstances. Upon further reflection, it is now apparent that the Court may not modify the regulations under any circumstances. It has only a limited authority to supplant them in the areas of notice and recordkeeping. Here, because the regulation at issue involves payment issues, rather than notice or recordkeeping, the Court is barred from setting the proposed terms instead of following the regulations. If this Court concludes that its authority is limited as described above, RIAA would withdraw this proposed term.
- Signing Statements of Account. RIAA also asks that the Court “[m]odify 37 C.F.R. § 201.19(e)(6) and (f)(6)(i) so that monthly statements and annual statements of account can be signed by any duly authorized agent of the compulsory licensee.” Here again, modification of the regulation is not the correct phraseology. But the proposed term would appear to be within the areas in which Congress granted the Copyright Royalty Judges authority to supplant regulations. The authority to regulate copyright users’ “recordkeeping” should be read to include authority to regulate the form in which those records are periodically disclosed -- *i.e.*, statements of account. *Cf.* 17 U.S.C. § 115(c)(3)(D) (granting the Copyright Royalty Judges authority to set rules “under which records of . . . use shall be kept *and made available* by persons making digital phonorecord deliveries.”) (emphasis added).

- Audits. Finally, RIAA asks that the Court modify 37 C.F.R. § 201.19(f)(6) to confirm that certain audits serve as an acceptable verification procedure. As in the case of the immediately preceding proposal, modification of the Copyright Office regulation is not the correct phraseology, but the proposed term is within the areas in which Congress granted the Copyright Royalty Judges authority to supplant those regulations, because it concerns the verification and thus keeping of records.<sup>4</sup>

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<sup>4</sup> RIAA takes no position on whether DiMA's proposed terms are permitted or barred under the legal standards urged here.

## CONCLUSION

For the foregoing reasons, RIAA respectfully requests the Court to strike at least three of the terms proposed by the Copyright Owners.

Respectfully Submitted,



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February 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February 2008, I caused a true and correct copy of the foregoing RIAA's Brief on the Jurisdiction of the United States Copyright Royalty Judges to Set Certain Terms and Motion to Strike Terms Outside That Jurisdiction to be served upon the following by electronic mail and First Class Mail:

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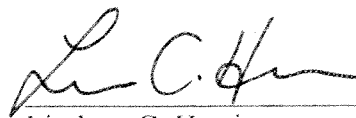
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