

VIA ELECTRONIC TRANSMISSION

November 23, 2022

The Honorable Patrick Leahy
Chairman, Subcommittee on Intellectual
Property
Senate Judiciary Committee
United States Senate
437 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Thom Tillis
Ranking Member, Subcommittee on Intellectual
Property
Senate Judiciary Committee
United States Senate
113 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Tillis:

The Copyright Royalty Board (CRB) has the privilege of responding to your letter of July 25, 2022, addressed to Register Perlmutter of the U.S. Copyright Office (USCO). As indicated in correspondence between your offices and the Congressional Relations Office of the Library of Congress, the CRB addresses herein questions that were raised in your letter and are applicable to the CRB, which commences proceedings outside the auspices of the USCO.¹ It is the understanding of the CRB that the USCO is concurrently providing a response to the additional questions or their applicable subparts.

Your letter references comments and inquiries from groups representing the independent songwriter and composer community, who urge that steps be instituted to promote and facilitate participation by bona fide representatives of American music creators in proceedings before the CRB and USCO. The four questions, as enumerated in your letter, are repeated below, with a response following immediately after each question.

- 1. In the view of the USCO and the CRB, what is the current opportunity for and scope of permissible commentary by non-participants in CRB proceedings (other than in regard to comments on proposed settlement agreements in rate setting proceedings)? Can non-participants submit and have comments considered by the CRB in its deliberations and decisions related to those proceedings?**

¹ Although the CRB proceedings are generally undertaken without the involvement of the USCO, the Register may address novel and other questions of law, and moreover has the authority to review resolutions of material questions of substantive law in a final determination issued by the Copyright Royalty Judges. See 17 U.S.C. § 802(f)(1)(A)(B) & (D).

The CRB administers statutory licenses that authorize parties to use certain types of copyrighted works by paying a set royalty rate and complying with applicable license terms, without having to request an individual license from each rights-holder. The CRB sets rates and terms for such statutory licenses after conducting administrative proceedings in which evidence is offered, and expert and lay witnesses are examined and cross-examined by attorneys who represent interested parties, generally copyright owners and users of copyrighted works. The CRB also conducts administrative proceedings through which it allocates, among competing claimants, copyright royalties collected by the licensing section of the USCO for the retransmission by cable systems and satellite carriers of certain programming from distant broadcast signals.

By statute, participation in CRB proceedings is generally limited to those individuals or groups that have filed a petition to participate in which the petitioner describes the petitioner's interest in the subject matter of the proceeding. Comments from non-participants have not been requested or considered in CRB rate proceedings inasmuch as the statute does not expressly allow for comments from non-participants (except comments on proposed settlements, discussed below).² Thus, the Copyright Royalty Judges have not had occasion to consider whether to allow comments from non-participants in connection with a rate setting determination.³ Yet, if non-participants who want to provide comments in such a context were to attempt to do so, the Copyright Royalty Judges would consider whether the comments are appropriate and if so whether the comments can be considered in deliberations and decisions. The Copyright Royalty Judges may also entertain requests for rulemaking that would allow such comments from non-participants, and allow for consideration of such comments in deliberations and decisions.

Another area of CRB activity, outside of rate setting and royalty distribution, is rulemaking pursuant to the Administrative Procedure Act (5 U.S.C. § 551 et seq.)(APA). In some contexts, rulemaking can be termed a proceeding or a process related to CRB proceedings. During rulemaking, as required by the APA, the CRB provides an opportunity for public comment. *See, e.g.*, Proposed Rules, Copyright Royalty Board Regulations Regarding the Conduct of Proceedings, 86 Fed. Reg. 11673 (Feb. 26, 2021).

2. In the view of the USCO and the CRB, what is the current opportunity for and scope of permissible commentary by non-participants in CRB proceedings, specifically pertaining to proposed settlement agreements in rate setting proceedings? Can

² Apart from "comments" from non-participants, the Copyright Act allows CRB to take affirmative steps to subpoena information from non-participants regarding issues of fact material in a rate setting. 17 U.S.C. § 803(b)(6)(C)(ix).

³ In connection with royalty distribution proceedings, the Copyright Royalty Judges have permitted claimants to comment on partial distribution motions, even though they may be non-participants.

non-participants submit and have comments considered by the CRB in its deliberations and decisions related to those proceedings?

The Copyright Act provides that the Copyright Royalty Judges may adopt as a basis for statutory terms and rates an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding, except that “the Copyright Royalty Judges shall provide *to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment* on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement *and object to its adoption* as a basis for statutory terms and rates.” 17 U.S.C. § 801(b)(7)(a)(i) (emphasis added). Consequently, the statute specifically provides that non-participants who would be bound by the determinations based on a proposed settlement agreement must be provided an opportunity to comment on the proposed settlement agreement. Nevertheless, the statute distinguishes in this regard between participants and non-participants. Non-participants who would be bound by determinations based on a proposed settlement agreement must be provided an opportunity to *comment* on the proposed settlement agreement, but they do not have the right of participants to *object* to its adoption by the Copyright Royalty Judges.

Regardless of the comments of interested parties or objection of participants, the Judges are not compelled to adopt a settlement to the extent it includes provisions that are inconsistent with the statutory license. *See* Review of Copyright Royalty Judges Determination, 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009) (error for Judges to adopt settlement without threshold determination of legality); *see also* Review of Copyright Royalty Judges Determination, 73 Fed. Reg. 9143, 9146 (Feb. 19, 2008) (error not to set separate rates as required under §§ 112 and 114 when parties’ unopposed settlement combined rates in contravention of those statutory sections). Thus, it is possible for a non-participant’s comment to identify an alleged legal error, which may serve as a basis for the CRB to reject a settlement.

Accordingly, the Copyright Royalty Judges, by notice in the *Federal Register*, have informed non-participants in rate setting proceedings of their statutory right to comment on proposed settlements that may be adopted. Furthermore, the Copyright Royalty Judges have relied upon such comments in their deliberations, as discussed in the following paragraph, to address issues in a settlement proposed for industrywide application.

Earlier this year, the Copyright Royalty Judges received a motion stating that several participants in a rate setting proceeding had reached a partial settlement regarding the rates and terms for the period commencing in January 2023 under Section 115 of the Copyright Act, namely, the applicable rates for use of musical works in physical phonorecords, permanent downloads, ringtones, and music bundles (Subpart B

Configurations). That motion sought approval of the participants' partial settlement. The Copyright Royalty Judges, in the *Federal Register*, published for comment a proposed rule, and received an objection from a participant, as well as comments in opposition to the settlement from twelve non-participant interested parties, including joint comments from organizations, trade associations, and self-assembled groups of parties. After considering the objection from a participant and all comments in opposition to the settlement, the Copyright Royalty Judges determined, based on the entirety of the record, that the proposed settlement did not provide a reasonable basis for setting statutory rates and terms, and therefore withdrew the proposed rule that would have adopted that settlement as statutory royalty rates. Subsequently, the Copyright Royalty Judges received a joint motion to adopt a new settlement, which included a rate increase. Thereafter, the Copyright Royalty Judges, among other things, solicited comments on the new settlement. Proposed Rules, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), Docket No. 21-CRB-0001-PR (2023-2027), 87 Fed. Reg. 33093 (June 1, 2022). The comment period closed on July 1, 2022. The Judges have received and reviewed those comments, and have completed the process of transmitting their final disposition of the proposed settlement and regulations to the Librarian.

3. What do the USCO and CRB each consider to be the scope of the USCO's authority under the U.S. Copyright Act to promulgate rules that might economically and administratively promote more thorough and effective participation by representatives of American music creators in proceedings before the CRB?

Although the CRB has expertise regarding copyright law, its sphere of authority does not include the identification of the full scope of the USCO's authority under the Copyright Act, including the USCO's ability to promulgate rules that might promote participation in CRB proceedings. It is, however, the understanding of the CRB that the USCO is providing a response to this question.

The CRB notes that the Copyright Act provides that the Copyright Royalty Judges are designated to "issue regulations to carry out their functions under [title 17]," and "shall issue regulations to govern proceedings under [chapter 8 of title 17]." 17 U.S.C. § 803(b)(6)(A).

4. What do the USCO and CRB each consider to be the scope of the CRB's authority under the U.S. Copyright Act and USCO Regulations to promulgate new or modified rules that might economically and administratively promote more thorough and effective participation by representatives of American music creators in proceedings before the CRB?

With respect to formal participation in a proceeding, the CRB observes that, pursuant to 17 U.S.C. § 803(b)(1) and (2), parties, whether they be persons or organizations,

may participate individually, or as a group of individuals with similar interests, in any proceeding for the purpose of making relevant determinations under section 111, 112, 114, 115, 116, 118, 119, 1004, or 1007 of chapter 8 of the Copyright Act. Thus, individuals may choose to aggregate their interests and their resources.

The statute provides that all participants must have a significant interest in the proceeding. Some individuals or groups choose to pursue different levels of participation in the various facets of a proceeding, and will have different abilities to participate, including financial abilities. Nevertheless, under the statute, a person or entity seeking to participate in a proceeding must file a valid petition to participate (including a description of the petitioner's interest in the subject matter of the proceeding). To maintain their status as participants, persons or entities must subsequently file a written direct statement, and, if challenged by another participant or by the Copyright Royalty Judges, demonstrate that their interests in the proceeding are "significant."⁴ *Id.* There is no prescribed level of detail required of a written direct statement, although there are elements that must be included. See 17 U.S.C. § 803(b)(6)(C)(ii)(II). Thus, there is no prescribed level of financial commitment, and each participant, given its resources, can determine the investment it chooses to make in the proceeding to present its case, provided that they satisfy the statutory and regulatory requirements.

The CRB believes that it has the ability to promulgate new rules, or to modify and to interpret existing rules that might serve the purposes outlined in the question. For example, whereas the Copyright Act requires petitioners to identify a "significant" interest in the subject matter of the proceeding in order to defend against a challenge to their participation, the Copyright Royalty Judges have the authority to determine the criteria that satisfy the "significant interest" requirement, either on a case-by-case basis, or through appropriate rulemaking, subject to the statute and the duty to act on the basis of "prior determinations and interpretations," as set forth in section 803(a) of the Copyright Act.

Thus, representatives of American music creators can participate in a particular proceeding by setting forth a "significant interest." They might also attempt to facilitate their participation in rate setting proceedings by seeking to initiate a rulemaking that would establish a more functional definition for "significant interest" requirement, or that would enumerate factors that may tend to show a "significant interest" that could be considered by potential participants and the CRB.

⁴ The statute provides that in a rate setting proceeding, the petition must be accompanied by a payment of \$150. The statute further provides that in a distribution proceeding, the petition must be accompanied by a payment of \$150, or a statement that the petitioner (individually or as a group) will not seek a distribution of more than \$1000. 17 U.S.C. § 803(b)(2)(D).

More broadly, as indicated in the response to Question #1 above, the Copyright Royalty Judges have not had occasion to address whether they possess implied authority to allow for comments from non-participants in connection with rate setting proceedings and determinations. The existence or scope of any such authority may be addressed, for example, in a rulemaking, or in a motion from a non-participant seeking leave to comment, either of which may entail substantive briefing addressing how public comments may be procedurally appropriate and not disruptive of the role of participants set forth by Congress. The CRB notes that it has engaged in rulemaking in response to requests from those affected by its determinations. *See, e.g., Regulation Concerning Proxy Distributions for Unmatched Royalties Deposited During 2010-2018, Docket No. 20-CRB-0007-RM, 87 Fed. Reg. 39000 (June 30, 2022).*

In conclusion, the CRB is receptive to proposals that might increase the contributions that American music creators make to proceedings before the CRB. We thank you for your interest in these matters and would be happy to address any request you have for additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "David P. Shaw". The signature is fluid and cursive, with a long horizontal stroke at the end.

David P. Shaw

Chief Copyright Royalty Judge
Library of Congress
101 Independence Avenue SE
Washington, DC 20540