BEFORE THE
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

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

COMMENTS OF GEAR PUBLISHING COMPANY

By Federal Register notice dated May 17, 2012, 77 Fed. Reg. 29259, the Copyright Royalty Board ("Board") solicited comment on the proposed regulations that set rates and terms under section 115 statutory license for use of musical works in physical phonorecord deliveries, permanent digital downloads, ringtones, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services. Gear Publishing Company hereby submits its comments of objection of certain portions of the motion.

INTRODUCTION

Gear Publishing Company is a privately held company established in 1965. Gear has been recording artist Bob Seger's exclusive publisher since 1966. Mr. Seger is an accomplished international recording artist and composer who has achieved remarkable success and longevity in his career. He is a 2012 inductee in the Songwriter's Hall of Fame, 2004 Inductee in the Rock And Roll Hall of Fame, has sold over 50 million records, and his Greatest Hits album was recognized by SoundScan as the #1 Catalog Album of the Decade (2000 – 2010). Gear also served as a publishing consultant for recording artist Robert Ritchie (p/k/a/ Kid Rock) while Mr. Ritchie was managed by Punch Enterprises from 2000 to 2007.

COMMENTS

There are several issues with the proposed settlement we respectfully request the Board consider as it contemplates implementing the proposed settlement as compulsory rates and terms affecting all copyright owners in the United States, including:

1. MANDATORY STREAMING EQUALS MANDATORY REDUCTIONS IN SONGWRITER INCOMES AND POSES A HUGE RISK TO MUSICAL WORK COPYRIGHT OWNER ASSETS. It should not be a requirement of copyright owners to make their assets available for other companies to use in their attempt to develop new methods of music delivery and consumer markets at the expense of the copyright owner's current long established revenue sources. We are supposed to protect these interests. Streaming and limited download services have been in existence for only a few years and the royalties are extremely low and insufficient to compensate for the losses artists, writers and publishers have sustained due to the resulting erosion in phonorecord sales. By design, subscription streaming services replace the need for consumers to purchase records. In our view, it is inappropriate to offer interactive streaming and limited download rights via compulsory license until there is sufficient evidence to demonstrate that these uses will provide long term sustainable revenue streams that are sufficient for musical work copyright owners to earn compensation for the use of their works commensurate with pre-streaming standards of income. If copyright owners and authors wish to license their works for nominal rates in risky new markets then they should have the right to do so, but it should not be mandatory for all copyright owners to place their copyrights in this position of risk. Copyright owners should not be forced to be venture capitalists with their assets or that of their clients.

2. THERE SHOULD BE NO INSTANCE WHERE THE COMPULSORY LICENSE RATE IS ZERO. United States copyright law already provides gratis uses for preview of segments of musical works in order to induce a phonorecord sale. In our view, this is a courtesy that should not be a requirement. The proposed settlement greatly expands the number of compulsory uses which can be offered on a free or discounted basis.

For example, in the proposed settlement licensees who operate subscription services are able to provide thirty days of use to their customers every twenty four months as a free trial period without payment to copyright owners. If applied evenly over the twenty four month period, this amounts to an automatic 4.16% reduction "off the top" of musical work copyright owner incomes ($1/24^{th}$). However, the earnings curve for copyrights is heavily skewed to their initial chart success. Ironically, the copyrights that carry the most influence with consumers who take advantage of a free thirty day trial period would sacrifice the most pursuant to this provision. This provision would result in significantly reduced income of musical works when they are at the peak of their financial earnings potential. There is no reason for musical work copyright owners to extend to subscription service providers or other

digital service providers free trial periods for customers to sample the service itself. This sells the service, not the musical work which should result in sponsorship fees, not gratis licenses.

Also, under the proposed terms record companies would be permitted, in their sole discretion, to authorize sixty cumulative days of free uses of musical work copyrights for an unlimited number of interactive streams and limited downloads on third party services and websites and ninety cumulative days of free interactive streaming on artist or record company websites directly owned or operated by the recording artist or record company. This scheme would be virtually impossible to monitor and enforce. Even if tracking mechanisms are employed to calculate the number of clicks or streams on all the websites that are licensed to carry such royalty free uses, the days under which there is no activity would be invisible to tracking devices. Additionally, a musical work copyright owner would literally have to audit dozens, if not hundreds of parties across many industries to verify the information provided by the compulsory licensees was correct. Obtaining basic royalty back up information from record companies can take years. The idea that record companies are suddenly going to be able to compile information from their own marketing, sales, social media, publicity, business affairs, and accounting departments and reconcile that information with third party information from a vast number of websites, digital service providers and third party vendors to keep track of free spins of thousands of copyrights on a track by track basis and process these reports and accountings on a monthly basis is completely unrealistic. This is a pie in the sky, looks good on paper, never going to happen set of rules that in practice will translate to nothing less than automatic free goods for record companies that cannot possibly be verified.

The government should never force owners to a) make their copyrights available for third party commercial purposes at government regulated promotional or discounted rates, or b) make their copyrights available for third parties to run promotions in order to sell third party products and services on a government regulated basis to entice sales, either for free or at any compulsory rate. It is the copyright owners' duty and right to decide whether to promote or not promote sound recordings of their works. Sales discounts and free trials are a form of advertising and promotion. However, sales discounts and free trials are not the only way for compulsory licensees to promote sales or third party service providers to promote their products and services. Other ways to promote sales and services are to spend money on advertising and promotions, make promotional videos, create consumer contests, publicity tours, concert tours, etc. The proposed requirement mandating musical work copyright owners to offer their assets for free to compulsory licensees so such licensees can use the musical works

to promote their sound recorded versions of such copyrights and third party products and services is akin to requiring the musical work copyright owner to bear the cost of record company advertising expenses and sponsor third party products and services without consent or proper remuneration.

3. THERE IS NO PLACE FOR SO-CALLED "PROMOTIONAL CONSIDERATION" IN COMPULSORY LICENSE PROVISIONS. The settlement is vague as to the application and distribution of benefits of so-called promotional consideration. The very fact that promotional consideration is mentioned suggests that some value has been placed upon such consideration to warrant a reduction in compulsory license rates. It is not clear who is promoting who. Promotional consideration can take many forms depending on the applicable media, service, or distribution outlet. It can take the form of email blasts, text campaigns, mailings, inclusion in so-called promotional liners or announcements, etc. Promotional value is inherently subjective and often wildly exaggerated by those purporting its worth in lieu of monetary compensation. Not all copyright owners want, need, or place any value on promotional consideration. Inappropriate application of promotional value can undermine the perceived value of musical works in the marketplace. Promotional consideration is the lowest common denominator of licensing consideration. It is often offered in lieu of standard license fees or to compliment what is otherwise a nominal 'below market' fee. The musical work owners and the author(s) should not be required to accept promotional consideration in lieu of or as partial payment for compulsory use of its copyrights. Promotional consideration must be applied and managed on a case by case basis by the copyright owners.

Additionally, the settlement suggests that so-called in-kind promotional consideration earned by copyright owners will be applied at the discretion of the third party industry representatives and sound recording owners on an ad hoc basis – that is, there is no system or plan to apply these so-called benefits specifically to the owners of the musical copyrights that have earned them based on sales, clicks, streams, or any other measure of consumer interest or licensee use. <u>Compulsory license rights and benefits are very specific to individual copyright owners and cannot be claimed by other copyright owners and used for their own benefit.</u>

4. PASS THROUGH LICENSING TRANSFERS AUTHOR ADMINISTRATION RIGHTS EXCLUSIVE TO THE COPYRIGHT OWNER TO THIRD PARTIES AND UNFAIRLY FAVORS ONE CLASS OF COPYRIGHT OWNERS OVER ANOTHER CLASS OF COPYRIGHT OWNERS. Pass through licensing essentially transfers the

administration and control belonging to the musical work owner to the sound recording owner, regardless of which copyright has a more established historical market value.

Existing pass through provisions should be reversed, not reinforced or expanded. The rights of the owner of the copyright in a musical work should not be controlled by the copyright owner of a sound recording embodying that musical work in any instance other than by arms length negotiated agreement reached between the parties. Only the musical work copyright owner is in a position to serve the best interest of the musical work and the interest of the author, if different. Third party licensees do not have the knowledge to address the needs of the copyright itself or the author. The settlement agreement expands the scope of rights subject to pass through licensing for sound recording owners.

Sound recording owners should not have the power to commit musical work copyright owners' assets to any use without the copyright owners' prior written consent. Musical work copyrights are not inferior to or less valuable than sound recording copyrights. Clearly, there are hundreds of thousands of instances where the entities in a better position to serve the interest of the two copyrights are the musical work copyright owners as opposed to the sound recording copyright owners. For example, when lesser known artists, karaoke companies, soundalike and so-called tribute companies record well known classic musical works the copyright owner of the classic musical work has the dominant market value. In our view, in any application of pass through licensing the owner of the musical work should control the combined musical work and sound recording rights, not the other way around. In any process whereby one of the two owners is permitted under compulsory license to license on behalf of the other the gross profit split to the entity whose rights are third party controlled should be no less than 50% of total gross revenues from the use of the copyrights and each owner should be paid directly from the source.

Additionally, the author of a musical work should have the right to place the ownership, administration and/or control of his/her copyrights with a representative of his/her choosing. A publisher who is contractually engaged to serve the interests of the author of the musical work has the responsibility to make licensing decisions solely on behalf of the author. The pass through compulsory license provisions pass these exclusive rights to manage the exploitation and licensing of the musical work copyright to third parties who have no binding interest or responsibility to serve the interests of the author or copyright owner or the long term value of the musical work copyright itself. Under these

provisions, authors' copyrights can be represented by an unlimited number of administrators who have insufficient knowledge and no responsibility to look out for their interests or the interests of their works.

5. COMPULSORY LICENSEES SHOULD NOT BE PERMITTED TO PROSTITUTE MUSICAL WORK COPYRIGHTS FOR THIRD PARTY COMMERCIAL PURPOSES. There should be no instance where a copyright owner of a musical work or sound recording is forced to license that musical work or sound recording to help sell third party products and services whether as so-called "premiums", "bundles", "added value", or any other form of promotion, advertisement, or inducement to purchase without his or her express written permission. This settlement contemplates bundling copyrights with third party products and services and provides for reduced compensation to the copyright holders. Even the formula for the discounted multi-service bundle is proposed in such a way that the musical work and sound recording copyright owners bear a disproportionate share of the burden of the discount passed along to the customer (i.e. the value of the non music products contained in the multi-service bundles are calculated at their full market independent price and the music copyright share of such bundles is valued at whatever is left.) Combining author's works with third party products is without question beyond the scope of compulsory licensing. Many artists and songwriters object to combining their copyrights with third party products. While commercially successful artists have negotiating leverage to prevent the record company they are signed to from exploiting their recordings in this manner, under the settlement provisions a compulsory license would allow third parties (including the manufacturers of the third party products) to produce new recordings of musical works and use them as a premium even if the songwriter or copyright owner expressly objects to such use.

Additionally, premiums and bundles walk a thin line between product sales promotions and express or implied endorsements which can only be determined on a case-by-case basis. These types of arrangements often include rights that are not subject to royalties, but subject to negotiation for anywhere from thousands to millions of dollars depending on the scope of use, the stature of the artist and/or the works involved, and whether name, image and likeness and/or rights of publicity are affected either directly or indirectly. If these uses are classified by the Board as compulsory phonorecord uses then, due to the way most artist contracts are written, the artist's image and likeness could conceivably be used in conjunction with such multi-service bundle uses without the songwriters' or artists' permission and without additional compensation. Once a third party industry has the ability to bundle their products with the sound recording of the well known musical work, the sound recording and/or musical work can become associated with the product without the manufacturer or licensee having to

pay any compensation to the artist or songwriter for these ancillary rights. By including premium or bundled uses in the scope of a compulsory license extremely negative financial consequences for many artists and songwriters can occur as well as the potential for irreparable damage to the artist and/or songwriter's image and goodwill with fans.

6. PASS THROUGH COMPULSORY LICENSES HAVE LED TO LARGE NUMBERS OF INFRINGEMENTS; COMPULSORY LICENSE PRIVILEGES FOR SOUND RECORDINGS SHOULD BE OFFSET BY SAFEGUARDS FOR MUSICAL WORK COPYRIGHT OWNERS. In our experience, the compulsory license landscape is a bit like the speed limit. Unfortunately, many do not follow the rules and many more follow them loosely at best. In respect of our catalog, the number of bootlegs, unlicensed uses and breached compulsory licenses (collectively "Infringements") of our copyrights since 2003 has increased exponentially. Where there were occasional Infringements before 2003, there are now hundreds occurring. Not only are there countless more Infringements to contend with, infringers now have universal equal access to digital distribution virtually around the World. While physical retailers continue to care about the legitimacy of the sources of the products they offer on their store shelves, the same does not appear to hold true of digital service providers who are often unaware of what they offer as they have open systems. We share the frustration of many music publishers, large and small, that the market has become the "wild west" in terms of attempting to protect copyrights and properly license musical works. The pass through compulsory license provisions have opened the flood gates for infringements and created a "catch me if you can" licensing marketplace.

Pass through licensing provisions of the settlement provide music licensees with easier access to a larger scope of rights to musical works, requiring no need to negotiate with the musical work copyright owners for such licenses. At the same time, technology companies that are making huge profits from the use of the musical works have made policing infringements a daunting task. For example, easy to use dashboards and software interfaces have been created by technology companies to serve parties who are (or purport to be) the owners of sound recordings with the right to reproduce musical works embedded in those sound recordings (via pass through compulsory licensing provisions which have already been enacted). However, these dashboards/interfaces are not available to publisher's to help remove recordings that are not properly licensed or for which the rules of the compulsory license are not being followed (e.g. failure to account on a monthly basis, failure to provide annual statements, imposing improper reserves, withholding payments based on arbitrary minimum payment thresholds, etc.).

More specifically, when infringements of our writer's musical works appeared on one of the largest DSPs (i.e. a sound recording company uploaded unauthorized bootlegs of a performance of our artist's musical works without a direct license from us or a compulsory license), the DSP, who incidentally is a member of the negotiation panel that created this settlement proposal, was only willing to provide us contact information of the party who uploaded the infringing content, but refused to remove the infringing selections from its service. This is despite the fact that the DSP was technically the party reproducing and distributing the infringing content. This left us the task of pursuing the bootlegger (who was located in England) who claimed he had secured the right to the sound recordings from an entity in Austria (none of which was true, but that does not matter to bootleggers). The bootlegger who uploaded the infringing content refused to take it down. Finally we had to enlist the support of our record company to request that the DSP cooperate with removing the infringing content. Only when the record company (who had no interest in the musical work or sound recording copyrights) requested cooperation did the DSP comply. Ultimately, the relationship with the record company was more important to the DSP than removing obvious unauthorized bootleg content from its service.

Parties that upload recordings onto DSPs are not required to upload any proof of license, no pdfs or jpegs of documents to provide evidence that they have properly licensed the embedded musical works or complied with existing compulsory license provisions, no requirement to acknowledge or confirm royalty statements have been properly accounted to on a compulsory (monthly) or direct license (quarterly) basis. Compliance is based solely on an "honor system". This, in a business where audits commonly reveal huge discrepancies in payments to music copyright owners and artists for unreported sales, inaccurate accountings, and unauthorized uses. There are no rights afforded to compulsory licensors to audit the companies reproducing and distributing their copyrights via pass through licenses. <u>If the Board takes steps to streamline the licensing process for record companies, sound recording owners, third party industries, digital service providers and other licensees of copyrights, then the Board should also require the compulsory licensees to afford the same access to owners of musical work copyrights so these copyright owners can just as easily enforce their rights and take down infringing content</u>.

7. PROTECT COPYRIGHT OWNERS FROM REPEAT OFFENDERS. If a compulsory licensee fails to properly follow the rules of a compulsory license, including notices and accountings as required under the Act, then such parties should lose the privilege to obtain a compulsory license for ANY musical work

for a period of time, for example five (5) years, and should permanently lose the right to exercise pass through rights via compulsory licenses.

8. THE SO-CALLED "CONFIDENTIALITY CLAUSE" UNFAIRLY RESTRICTS COPYRIGHT OWNERS FROM USING INFORMATION REQUIRED TO COMPUTE ROYALTIES AS A BASIS FOR NEGOTIATING FUTURE RATES. There should be no burden of confidentiality placed on copyright owners with respect to statements provided by licensees to substantiate publicly obtained compulsory licenses. If a potential licensee wants to keep information private and confidential they are welcome to negotiate a direct license with the copyright owner of the works. This settlement proposal deprives individual musical work copyright owners of their right to negotiate licenses for the use of their copyrights, prevents them from receiving accountings related to the use of their copyrights direct from the users (with no right to audit directly the users of the copyrights), creates an elaborate labyrinth of free uses so that the musical work copyright holders are required to support and pay for promotion of third party content and services without their consent, and then seeks to silence the copyright owners from sharing or utilizing information obtained in the accountings, with special emphasis on preventing the information from being available to individuals who are negotiating royalty rates authorizing such third party services to undertake the licensed activity.

For example, on a statement we received June 11, 2012 via email for a quarterly accounting from WMG with respect to the iTunes' Match service, includes an accounting for the Bob Seger musical work "Turn The Page" of 65,576 units for which the total gross royalties were $16.13. (Can you imagine explaining this to your author?) There are no artists listed, but there are three different "Catalog No" entries. The email states we will receive accountings on a quarterly basis and will only receive payments if the total royalties due are at least $25.00 in the aggregate unless we contact them otherwise to make other arrangements. It goes on to say, "The terms of the monthly royalty payments for iTunes Match that appear in this email and the related royalty statements delivered to you in connection with iTunes Match are confidential information. As such, these terms and the royalty statements should not be discussed to any third parties other than Apple, WMG and Music Reports and should not be used except in connection with receipt of royalties related to the iTunes Match service." We do not share this info to single out WMG, Apple, or Music Reports. We share this info to pose the question, which part of this royalty statement is the confidentiality clause attempting to keep confidential: the lack of compliance with the compulsory license monthly accounting requirements or

the level of compensation? If the rates were negotiated between the owner of the musical work (Gear)

and the party using the work (Apple), then we could understand the inclusion of a confidentiality clause. We are led to believe these rates are being established as a result of good faith negotiations between certain government approved industry professionals, but other industry professionals who are the recipients of the devastating results are not permitted to share such results in order to re-negotiate or challenge the rates.

We believe the parties who drafted the proposed settlement should have the right to enter into private agreements with respect to their services and copyrights as contemplated in the settlement based on the terms they have painstakingly negotiated. We strongly object to certain of these terms being adopted as compulsory license provisions or the basis for setting statutory rates and terms under Section 115. 17 U.S.C.

Respectfully Submitted,

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Date: June 18, 2012

CERTIFICATE OF SERVICE

I, Michael Boila, hereby certify that a courtesy copy of the foregoing "Comments of Gear Publishing Company" was sent to the following via email, this 11th day of June, 2012:

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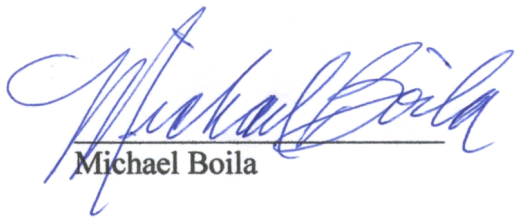

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