

**Before the
COPYRIGHT ROYALTY BOARD
Washington, D.C.**

In the Matter of

**Copyright Royalty Board Regulations
Regarding Filing of Claims to Royalty Fees
Collected Under Compulsory License**

Docket No. 17-CRB-0012-RM

**COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND
PUBLISHERS, BROADCAST MUSIC, INC. AND SESAC, INC.**

The American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), and SESAC, Inc. (“SESAC”) (collectively, the “Performing Rights Organizations” or “PROs”) submit the following comments in response to the Notice of Proposed Rulemaking of the Copyright Royalty Board (“CRB”) dated March 10, 2017 regarding the CRB’s proposed regulations concerning the electronic filing of claims to royalty fees collected under compulsory licenses (82 Fed. Reg. 14167 (March 17, 2017)) (the “Notice”). The PROs are also joining in comments submitted by all Allocation Phase Cable and Satellite Claimants in this docket on the joint claim filing requirements, and incorporate those comments herein.

I. The PROs’ Claim Filing Requirements

As collective music licensing entities, the PROs¹ have long held a unique status among joint claimants with regard to the filing of cable and satellite royalty claims pursuant to 37 C.F.R. Sec. 360.1-360.5 (cable) and Sec. 360.10-306.15 (satellite) (all Sections hereinafter refer to Title 37 of the Code of Federal Regulations). The three PROs represent the public performance rights of tens

¹ “Performing Rights Society” is a defined term pursuant to Section 101 of the Copyright Act, and specifically includes each of ASCAP, BMI and SESAC.

of millions of musical works created and owned by over one million individual songwriters, composers and music publishers. The PROs each license such rights on behalf of their respective members and affiliates, collecting and distributing performance royalties to their members and affiliates, including cable, satellite and DART royalties paid under Title 17 of the U.S. Code and Title 37 of the Code of Federal Regulations. For cable and satellite claims, that representation is established through the membership and affiliation agreements signed by each PRO member or affiliate with its PRO. For DART claims, the PROs' authority to collect on behalf of their members and affiliates is established through a specific DART authorization granted by each songwriter and music publisher so electing, either through express language in the membership agreement or through a separate DART authorization agreement with the PRO.

Since the inception of the cable and satellite royalty claim processes, the regulations (of the CRB and its predecessor entities) in effect have permitted each PRO to file a single joint claim on behalf of all of its authorizing members and affiliates. Recognizing the burdens and inefficiencies inherent in requiring a PRO to list each copyright owner made a part of the joint claim, the regulations concerning the filing of cable and satellite claims have long specified that a performing rights society shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard membership or affiliate agreements, nor shall a performing rights society be required to list the name of each of its members or affiliates in the joint claim. *See* Sections 360.3(b)(2)(ii) and 360.12(b)(2)(ii). Accordingly, the PROs have never been required to file with their joint cable and satellite claims lists of authorizing copyright owners.

The regulations concerning DART claims, however, have not included this exemption, because the DART home taping royalty was considered a *sui generis* right that required separate

authorization to claim and collect on behalf of a copyright owner beyond the language contained in standard membership or affiliation agreements. *See* Section 360.22(e). Accordingly, the PROs have been required to submit lists of their respective DART members when filing claims for DART royalties.

With regard to all joint claims – cable, satellite and DART – the regulations require the identification in the joint claim of only one work of only one of the claimed copyright owners of the joint claim and the identification of the copyright owner of the work so identified. *See* Sections 360.3(b)(2)(iii); 360.12(b)(2)(iii); and 360.22(b)(6). For the PROs, their cable and satellite claims must identify at least one musical work contained in a program that was retransmitted by a cable operator or satellite carrier as a distant signal. For DART claims, they must identify one musical work or sound recording embodied in a digital musical recording or an analog musical recording that was sold to the public or transmitted to the public. There has never been a need in the current and past regulations to specify that the PROs are not required to identify in their claims a single work for each copyright owner represented in the joint claim, because no joint claimant must do so.

Accordingly, for nearly four decades, the filing of cable and satellite joint claims has long been a relatively simple, efficient process for the PROs. Each PRO traditionally files a single joint claim for each of cable and satellite royalties on behalf of its thousands of members and affiliates without providing a list of each member and affiliate comprising the claim and with simply identifying one applicable representative work for all copyright owners represented by the joint claim. With regard to DART claims, however, the joint claims filings for PROs have been more onerous to the extent that a complete list of DART authorized members is necessary. Notwithstanding this list requirement, like cable and satellite claims, only a single musical work

need be identified to be an eligible DART claimant. In short, even while the PROs have always been required to include with their DART claims a list of all authorizing claimants, which for each of ASCAP and BMI includes the names of hundreds of thousands of songwriters and publishers, and for SESAC includes the names of tens of thousands of affiliates, comprising numerous paper volumes that are attached to the claim, the rules still provided for identification of only one eligible work.

II. Specific Comments to the Notice

A. Cable, Satellite and DART Claims Examples

The PROs agree that the separate cable and satellite claim regulations are largely redundant and favor their consolidation. The PROs anticipate that this consolidation will be carried through the new online eCRB process, obviating the need to duplicate efforts in filing claims.

The PROs are pleased that Section 360.4(b)(2)(i) of the proposed new consolidated cable and satellite regulations carries forward the longstanding exemption granted to PROs requiring the need to file a list of members or affiliates, stating that “a performing rights organization is not required to list the name of each of its members or affiliates in the joint claim.” The proposed Section 360.4(b)(2)(ii) likewise carries forward the exemption granted to PROs regarding authorizations: “A performing rights organization shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard membership [or] affiliation agreements” (we note that the proposed language omits the word “or” between membership and affiliation, which should be added).

However, the PROs are concerned that the proposed Section 360.4(b)(2)(iii) appears to change the longstanding rule requiring the identification by a joint claimant of a single work, *i.e.*,

the proposed regulations no longer state that joint claims are required to identify only a single work of a single copyright owner covered by the joint claim. As proposed, the regulation requires “identification of at least one secondary transmission of one work by *each identified copyright owner* that has been secondarily transmitted by a cable system or satellite carrier” (emphasis added). This new requirement changes decades of established practice for all joint claimants, whereby only a single work of one copyright owner made part of the joint claim need be identified on the claim. Requiring a joint claim to identify an eligible work of each copyright owner made a part of the claim would be unduly burdensome for most joint claimants, and in particular for the PROs.² Therefore, we believe subsection (iii) should be amended to require the identification of a single work of only “one” copyright owner made part of the claim, and not “each,” as proposed.

The PROs understand that the current proposed language of subsection (iii) should not be intended to apply to the PROs, because proposed subsections (i) and (ii) excuse the PROs from the requirement for listing each copyright owner made part of the joint claim. Nonetheless, the current language remains troublingly vague in this respect. Accordingly, the PROs request that subsection (iii) either be amended to provide for only one work, or, like subsections (i) and (ii), be amended to provide specific language directed to claims filed by PROs. In the latter case, we propose the following language to be added to the end of the proposed Subsection (iii): “For this purpose, a performing rights society shall not be required to identify a work by each of its members or affiliates in the joint claim; identifying a single work of a single member or affiliate

² The Copyright Royalty Judges have acknowledged that the PROs “collectively represent[] more than one million claimants.” Order Exempting Performing Rights Organizations from Requirement to Identify Individual Claimants, *In re Distribution of Cable Royalty Funds and In re Distribution of Satellite Royalty Funds*, Docket Nos. 14-CRB-0007 (2010-12) and 14-CRB-0008 SD (2010-12) (January 16, 2015).

of a performing right society that has been secondarily transmitted by a cable system or satellite carrier shall be sufficient to form the basis for the joint claim.” This language clarifies that, as before, a PRO will only need to identify a single applicable work, regardless of the number of members or affiliates comprising the joint claim, and that, consistent with past practice, such work will serve as a basis for each member’s or affiliate’s claim to cable or satellite royalties, obviating any need for the PROs to establish during any distribution proceeding the separate eligibility of each member or affiliate made a part of the joint claim.

As the Allocation Phase parties collectively point out in the joint filing submitted in this docket, a requirement to submit an example of a distant retransmission of every eligible songwriter and publisher would entail the merging of complex and expensive databases of information, including television program listings, information on the distant carriage of each TV station, and music use and identification information on millions of musical compositions – all of this to be done merely to file an eligible claim. The costs of filing claims would be quite significant, especially in proportion to the percentage of compulsory license royalties that are customarily received by PROs. A similar but even more disproportionate cost burden placed on PROs would be presented by a DART claim rule requiring identification of at least one eligible work by hundreds of thousands of members, especially in view of the size of DART royalty funds, which have grown so small that the CRB has recently issued an order suspending royalty distribution proceedings for 2016 going forward for lack of funds.

Finally, we note that the term “performing rights society” should replace “performing rights organization” throughout the proposed regulations, as “performing rights society” is a defined term in Section 101 of the Copyright Act that specifically references the PROs. Such changes would apply to Subsections (i) and (ii) of proposed Section 360.4(b).

B. DART Claims

As noted above, unlike the proposed regulations regarding the filing of cable and satellite claims, the proposed regulations concerning the filing of DART claims continue the requirement for the PROs to include lists of authorizing songwriters and publishers that comprise the joint claim. *See* Section 360.22(e). The PROs do not object to this continued requirement in the proposed regulations. Nevertheless, due to the burdens and expense associated with compiling such lists in paper format, and particularly in conjunction with the requirement to file one original and one copy of the claim and the related claimant lists, the PROs request a modification to the regulations to obviate the requirement to file such claimant lists in paper form and to permit the filing of such list on a CD or other electronic format. Moreover, to the extent such claims may be filed by eCRB, the PROs anticipate that such system would accommodate such lists in electronic format.

We propose the following language to be added to the end of proposed Section 360.22(e): “For claims filed online through eCRB, lists containing the name of each claimant to the joint claim may be provided in digital format through eCRB. For claims filed with the Copyright Royalty Board by mail or by hand delivery, such lists may be submitted in a single copy on CD, DVD, or in other electronic format.”

Finally, the PROs note that proposed Section 360.23 addresses claims to cable or satellite compulsory license royalty fees; it should be revised to address claims to DART royalties.

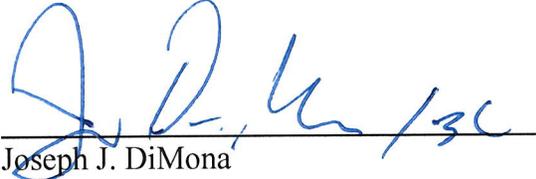
Respectfully submitted,

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