UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of	}	
	}	**Docket No. 2005-1 CRB DTRA**
Digital Performance Right in Sound	}	
Recordings and Ephemeral Recordings	}	
	}	

ORDER DENYING MOTIONS FOR REHEARING

On March 2, 2007, the Copyright Royalty Judges issued a Determination of Rates and Terms in this matter ("Initial Determination"). Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. Part 353, the parties in the proceeding filed various motions for rehearing, reconsideration or clarification.[1] On March 20, 2007, the Judges requested that the parties respond to the motions that had been filed to determine the positions of each party on each of the issues raised in these motions and file written arguments to support those positions. Order on Motions for Rehearing. The parties filed various responses per our request.[2] Having reviewed all motions, responses to those motions, and written arguments, the Judges now deny all such motions. Nevertheless, as discussed below, the Judges have determined that certain areas of the Initial Determination warrant clarification.

The standard for reviewing motions for rehearing is set forth in 17 U.S.C. § 803(c)(2)(A), which states that the Judges may, in exceptional cases, upon a motion of a participant in a proceeding, order a rehearing after the determination in the proceeding is issued, on such matters as the Judges deem to be appropriate. Such exceptional cases require the movant to show that an aspect of the determination is erroneous, without evidentiary support, or contrary to legal requirements. *See* 37 C.F.R. §§ 353.1 and 353.2. The parties made no such showing. Moreover, as we stated in our May 3, 2006 Order Denying SoundExchange's Motion to Reconsider the Board's Order Requiring, in Part, the Production of Certain Income Tax Returns, "[m]otions for reconsideration must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the Board." Such motions should be granted only where (1) there has been an intervening change in controlling law; (2) new evidence is

[1] Motions were filed by Digital Media Association ("DiMA"), Intercollegiate Broadcasting System, Inc. ("IBS") (filed jointly with WHRB), National Public Radio ("NPR"), Radio Broadcasters, Royalty Logic, Inc., Small Commercial Webcasters, SoundExchange, Inc., and WHRB (filed jointly with IBS). In its motion, NPR requests that the Judges grant a rehearing, or, in the alternative, that we "stay the application of the aggregate tuning hour threshold and per-performance aspects of the Decision until NPR exhausts its appellate remedies." NPR Motion at 2. In addition, Collegiate Broadcasters, Inc. ("CBI") filed a notice of joinder notifying the Judges that it was joining the Radio Broadcasters' Motion for Rehearing, the Joint Motion of IBS and WHRB for Partial Reconsideration and the Motion for Rehearing of Digital Media Association.

[2] We received responses from CBI, DiMA, IBS (joint response with WHRB), NPR, Radio Broadcasters, Small Commercial Webcasters, SoundExchange, and WHRB (joint with IBS).

available; or (3) there is a need to correct a clear error or prevent manifest injustice. *Regency Communications Inc. v. Cleartel Communications, Inc.*, 212 F. Supp.2d 1, 3 (D. D.C. 2002). It is also appropriate to consider these standards in reviewing motions for rehearing.

The parties that request a rehearing in this proceeding do so based on categories (2) and (3). We find, however, that none of the moving parties have made a sufficient showing of new evidence or a clear error or manifest injustice that would warrant a rehearing. To the contrary, with the exceptions discussed below, most of the parties' arguments in support of a rehearing or reconsideration merely restate arguments that were made or evidence that was presented during the proceeding. While some parties purport to offer new evidence that was not presented during the proceeding, we are unconvinced that this evidence was in fact newly discovered after the proceeding. Indeed, it appears that all evidence discussed in the motions had either been discovered during the proceeding or could have been discovered during the proceeding, with reasonable diligence. Therefore, we cannot grant the parties' motion for rehearing based on new evidence. *See Frederick S. Wyle v. Texaco*, 764 F.2d 604, 609 (9th Cir. 1985) (affirming the district court's denial of a motion for reconsideration based on the district court's determination that the movant failed to meet its obligations to show "not only that [purportedly new evidence] was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing."). Motions for rehearing do not support a change of tactics for a party to present a new theory or evidence after the trial is concluded. *See Good Luck Nursing Home Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) ("a party that…has not presented known facts helpful to its cause when it had the chance cannot ordinarily avail itself on [Federal Rule of Civil Procedure 60(b) permitting relief from judgment based on a previously undisclosed fact] after an adverse judgment has been handed down").

In the absence of an adequate showing for new evidence, the parties' arguments in their respective motions amount to nothing more than a rehash of the arguments that the Judges considered in the Initial Determination. As such, the motions do not present the type of exceptional case that would warrant a rehearing or reconsideration. *See Messina v. Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006) (motion to vacate a judgment that did nothing more than rely on the same arguments made prior to entry of the judgment was properly denied). Therefore, we deny the parties' motions for rehearing or reconsideration.

Moreover, certain parties request that the Judges withdraw and/or modify the Aggregate Tuning Hours ("ATH") threshold and per-play rate structure, applicable to the limited number of public radio stations that may exceed the ATH threshold, because of their purported inability to track both ATH and the number of compensable sound recording performances that occur in excess of the ATH threshold. Motion for Rehearing of National Public Radio, Its Member Stations, and All Corporation for Public Broadcasting-Qualified Public Radio Stations. We deem these claims to have been waived because the parties failed to assert such claims during the proceeding in their

proposed findings of fact and conclusions of law. *See* Initial Determination at 85 and 37 C.F.R. § 351.14(b) ("A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party").

Additionally, certain parties request relief from the recordkeeping and reporting requirements established in the Initial Determination (*see, e.g.*, Joint Motion of IBS and WHRB (FM) for Partial Reconsideration, and CBI's Memorandum in Support of Motion for Rehearing). These requests are not germane to this proceeding and will be addressed in a future proceeding. *See* Initial Determination at 98.

Other parties request that the Judges stay implementation of certain of the rates and terms established in the Initial Determination until all administrative appeals and judicial review are complete. *See* Motions of DiMA, NPR, and SCW. Section 804(b)(3) of the Copyright Act states in relevant part that "[p]roceedings under this chapter shall be commenced…to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of eligible nonsubscription transmission services and new subscription services, to be effective for the period beginning on January 1, 2006, and ending on December 31, 2010." 17 U.S.C. § 804(b)(3). Moreover, Section 803(c)(2)(E)(ii) of the Copyright Act states that "[t]he pendency of a motion for a rehearing under this paragraph shall not relieve persons obligated to make royalty payments who would be affected by the determination on that motion from providing the statements of account and any reports of use, to the extent required, and paying the royalties required under the relevant determination or regulations." 17 U.S.C. § 803(c)(2)(E)(ii). Finally, Section 803(c)(2)(E)(iii) of the Copyright Act states that "[n]otwithstanding clause (ii), whenever royalties described in clause (ii) are paid to a person other than the Copyright Office, the entity designated by the [Judges] to which such royalties are paid by the copyright user…shall, within 60 days after the motion for rehearing is resolved or, if the motion is granted, within 60 days after the rehearing is concluded, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates by the [Judges]. Any underpayment of royalties resulting from a rehearing shall be paid within the same period." 17 U.S.C. § 803(c)(2)(E)(iii). As these sections of the Copyright Act indicate, Congress, not the Judges, determined the effective dates for the royalty rates and terms the Judges established under Copyright Act Sections 114 and 112. Moreover, Congress determined that these rates would go into effect, notwithstanding any pending motions for rehearing. Finally, Congress set forth the remedy that would apply should those rates later be determined to result in an overpayment or underpayment of royalties. The provisions of these sections are clear and we will follow the statute. As a result, the motions for a stay are **DENIED**.

POINTS OF CLARIFICATION

However, in the course of making their supporting and opposing arguments regarding the various motions denied hereinabove, the parties raise two issues that merit clarification.

First, DiMA and Broadcasters ask for clarification as to whether the per performance usage fee structure adopted by the Judges in their Initial Determination contemplates the continued availability to the Services of an option to estimate usage through the application of ATH measures as permitted under the prior fee regime. *See* 37 C.F.R. § 262.3 (a)(1)(ii). The short answer is that the Initial Determination does not contemplate such an option as a permanent part of the fee structure, and the law and the trial record do not support a rehearing on the issue of establishing such a permanent option. Nevertheless, the Judges recognize that a smooth transition from the prior fee regime to the new fee structure adopted by the Judges in their Initial Determination may be aided by permitting the limited use of an ATH calculation option. Such a transition option enhances the ability of some Services to effectuate speedy payments and, in so doing, improves the ability of copyright owners to more quickly obtain monies due. In short, such a transition measure is reasonably calculated to facilitate a smooth, speedy transition to the new fee structure adopted by the Judges in their Initial Determination. Therefore, the Judges hereby clarify that the usage fee structure established in the Judges' Final Determination offers the continued use of an ATH option for *timely* payment of fees due for the years 2006 and 2007. For ease of transition, the Judges begin with the prior fee regime and increase the ATH usage equivalent fees from that structure by the same percentage by which per performance rates under our Final Determination increase over the prior fee regime's per performance rates (i.e., by 4.98% in 2006 and by 44.35% in 2007).[3] The following ATH usage rate calculation *options* will be available for the transition period of 2006 and 2007:

	Other Programming	Broadcast Simulcast Programming	Non-Music Programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH

where "Non-Music Programming" is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; "Broadcast Simulcast

[3] This approach retains the sound recordings per hour assumptions underlying the previous fee regime for the transition period. However, the Services and the copyright owners agreed that those assumptions would govern the prior regime. Furthermore, while these assumptions may exhibit some change over the course of a full licensing period, it is reasonable to continue to utilize those assumptions for the limited period of time that demarcates the transition period (i.e., 2006-2007) in the interest of assuring copyright owners of the expeditious payment of fees they are due from all the Services.

Programming" is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and "Other Programming" is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

Second, SoundExchange asks for clarification as to whether the phrase "Internet transmissions" where that phrase appears in the implementing regulations for the Judges' Initial Determination (e.g., at § 380.3 of the Judges' implementing regulations) is more accurately represented by the phrase "digital audio transmissions." SoundExchange requests a technical correction to reflect adoption of the latter terminology. NPR and DiMA do not object to this clarification. NPR's Memorandum in Response to the Copyright Royalty Judges' March 20, 2007 Order On Motions for Rehearing and Submission of DiMA in Response to the Copyright Royalty Judges' March 20, 2007 Order on Motions for Rehearing. Section 114(j)(5) of the Copyright Act defines the term "digital audio transmission" without reference to the Internet. 17 U.S.C. § 114(j)(5). Therefore, the Judges hereby clarify their Initial Determination and related regulations by replacing the phrase "Internet transmissions" where that phrase appears in the implementing regulations for the Judges' Initial Determination by the phrase "digital audio transmissions" in the implementing regulations for the Judges' Final Determination.

SO ORDERED.

James Scott Sledge
Chief Copyright Royalty Judge

DATED: April 16, 2007