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

In the Matter of	)	
	)	Docket No. 2006-3 CRB DPRA
Mechanical and Digital Phonorecord	)	
Delivery Rate Adjustment Proceeding	)	
	)	

RIAA'S OPPOSITION TO NMPA, SGA, AND NSAI'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE RELATING TO U.K. AND JAPANESE RATES INCLUDING THE RECENT SETTLEMENT IN THE U.K. COPYRIGHT TRIBUNAL

INTRODUCTION

The Recording Industry Association of America ("RIAA") respectfully submits this opposition to the motion *in limine* of the National Music Publishers' Association, Inc. ("NMPA"), the Songwriters Guild of America ("SGA"), and the Nashville Songwriters' Association International ("NSAI") (collectively, "Copyright Owners") seeking to exclude evidence relating to royalty rates in the United Kingdom and Japan, including the recent settlement in the U.K. Copyright Tribunal.

The Copyright Owners' motion should be seen for what it is -- an attempt to prevent the Court from considering relevant evidence that the Copyright Owners fear. Contrary to their claims that (1) a percentage rate is not appropriate; (2) they cannot possibly survive with lower rates; and (3) a percentage rate would be difficult to administer, the testimony presented by RIAA concerning the rates governing mechanical royalties in the most developed music markets in the world demonstrates that (1) percentage rates are the norm; (2) the mechanical rate in the United States is now one of the highest in the world, in great part because the cents rate has been increasing while consumer prices have been decreasing; and (3) music publishers operate under a

percentage rate throughout the world and cannot plausibly claim that such a rate would be difficult to administer in the United States.

To support this transparent attempt to prevent the Court from hearing relevant and important testimony concerning comparable mechanical royalty rates in the U.K. and Japan, the Copyright Owners rely primarily on stray references from the depositions of DiMA witnesses (taken out of context), without providing a substantive analysis of why, in their view, looking at international rates is wholly irrelevant. Indeed, they could not do so. As the last litigated mechanical royalty rate proceeding illustrates, consideration of international rates in deciding how much mechanical rights are worth in the United States is certainly relevant evidence for the Court to hear. The Copyright Tribunal in 1981 held that international rates were a relevant benchmark under the statute, and the D.C. Circuit affirmed that aspect of the decision, explaining that "[w]e see nothing in the statute or its legislative history that requires the Tribunal to close its eyes to conditions in other countries while deciding what a fair return to a composer should be." *Recording Industry Ass'n of America v. CRT*, 662 F.2d 1, 10 n. 23 (D.C. Cir. 1981). That same conclusion holds true today.

Finally, the Copyright Owners are simply wrong to claim that the RIAA has failed to justify a particular focus on rates in the U.K. and Japan. The written direct testimony of Geoffrey Taylor provides that explanation in some detail. Written Direct Testimony ("WDT") of Geoffrey Michael Taylor, at 5-7, 14-15. In any event, the Copyright Owners fall far short of their burden of demonstrating that rates in the two other most developed music markets are irrelevant or that any there would be any prejudicial effect that would outweigh the probative value of RIAA's international comparisons. They will have a full and fair opportunity to cross-

examine witnesses on these points. But their motion -- a preemptive assault to prevent the Court from even hearing about these rates -- must be denied.

DISCUSSION

The Copyright Owners' motion fails to satisfy the standards for exclusion under Federal Rule of Evidence 403. Under that rule, a trial court has the discretion to exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Copyright Owners not only fail to assess accurately the substantial probative value of the testimony, they also fail to demonstrate why, in a proceeding with hundreds of pages of written direct testimony concerning a wide variety of issues (and no jury), this is the testimony that will break the back of the proceeding through prejudice, confusion, or undue delay.

The primary testimony put at issue in this motion is that of Geoffrey Taylor, who was the General Counsel and Executive Vice-President of the International Federation of the Phonographic Industry ("IFPI") at the time he submitted his written testimony, and is now the CEO of The British Phonographic Industry ("BPI"). Taylor WDT, at 1. The IFPI is "an association that represents the record industry worldwide." *Id.* Mr. Taylor offers the unique perspective of an executive of the global association representing record companies worldwide to assist in describing the international context in which the United States rate will be established. Specifically, Taylor (1) establishes the similarities between the recording industries in the United States, United Kingdom, and Japan; (2) explains the mechanical royalty structures in the U.K. and Japan; (3) identifies differences between the United States, U.K. and Japan; (4) reasons why the comparison to the U.K. and Japan is preferable to that of other countries; and (5) finally,

places the current United States mechanical rates within the global context. *See* Taylor WDT, at 4-20. Relatedly, the Copyright Owners also seek to exclude the written direct testimony of Richard Boulton. Boulton provides further context for understanding the comparison to the U.K. by analyzing the terms of the most recent U.K. joint online license deal ("the New JOL"). That agreement is between music publishers and record companies in the U.K. concerning royalties to be paid songwriters for, among other things, digital downloads of sound recordings embodying their songs. Finally, the Copyright Owners seek to exclude any testimony that even mentions international rates or comparisons to other markets from a wide variety of witnesses. *See* Mot. at Ex. A. All of this testimony is relevant, however, and should be permitted.

Of course, the real reason that the Copyright Owners seek to exclude this information has little to do with Rule 403 and everything to do with the threat that it poses to their rate proposal. The evidence that is the subject of the motion will show that "the United States has gone from having one of the lowest mechanical royalty rates in the world to having one of the highest," in large part due do a cents rate that has continued to increase as prices for recordings have fallen. Taylor WDT at 1, 16-19. It will further establish that "almost every country in the world has recognized the advantages of using a percentage rate" in setting mechanical royalty rates. *Id.* at 4. The Copyright Owners plainly do not want the Court to hear this information, but that is no basis for excluding it under Rule 403.

I. The Probative Value of International Comparison Evidence is Undeniable.

A. Binding Precedent Establishes That International Rates Are Relevant When Considering the Section 801(b) Factors.

The Copyright Owners do not deny that international rates are relevant and probative in this matter in determining reasonable mechanical rates for the United under the Section 801(b) factors. Nor could they. For example, what is paid for comparable rights elsewhere is relevant

in determining what rate would provide a fair return to the Copyright Owners and a fair income for those paying the royalties, as well as in determining what rate is needed to assure that the availability of creative works to the public is maximized. *See* 17 U.S.C. 801(b)(1)(A)&(B).

Moreover, the applicable precedent from the D.C. Circuit and the Copyright Royalty Tribunal ("CRT") recognizes the probative value of this evidence in precisely this context. In the 1981 mechanicals proceeding, the CRT used international rates as a benchmark: "the actual royalty payable to copyright owners whose songs are used in each of the BIEM member nations provides a benchmark against which to judge the [mechanical royalty] rate." *In the Matter of Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates* ("*1981 Decision*"), CRT Docket No. 80-2, 46 Fed. Reg. 10466-02, 10484 (Feb. 3, 1981). The Tribunal explained: "We find that the foreign experience is relevant -- because it provides one measure of whether copyright owners in the United States are being afforded a fair return." *Id.* at 10483.[1] The D.C. Circuit affirmed the CRT on precisely this point, recognizing that international rates are relevant to at least some of the policy factors that much guide this Court's decision on Section 801(b)(1). *Recording*

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[1] Ironically, although the publishers today want to exclude this relevant testimony before trial even starts, in the 1980-81 proceeding the publishers were adamant about the importance of testimony about the international/foreign comparison. *1981 Decision*, at 10468 ("The music publishers considered that mechanical royalties abroad are an important point of comparison."); Robert J. Nathan, *Economic Study Submitted On Behalf of National Music Publishers' Association, Inc., In the Matter of Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates* ("*Nathan Study*"), CRT Docket No. 80-2, at 40 (Apr. 7, 1980) (comparing mechanical royalty rates in the United States to the U.K., Japan, Australia, and Western Europe) (attached hereto as Ex. A); Proposed Findings of Fact and Conclusions of National Music Publishers' Association, Inc., *In the Matter of Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, CRT Docket No. 80-2, at ¶¶ 84-85 (noting the U.K.'s mechanical royalty rate in making the international comparison) (attached hereto as Ex. B). While the RIAA also takes a different position today then it did in 1981, the difference, of course, is that RIAA's altered position *is consistent* with the CRT's determination in 1981.

Industry Ass'n of America v. CRT, 662 F.2d 1, 10 n. 23 (D.C. Cir. 1981) ("We see nothing in the statute or its legislative history that requires the Tribunal to close its eyes to conditions in other countries while deciding what a fair return to a composer should be.").

B. The Comparison to U.K. and Japanese Rates Is Appropriate and Certainly Relevant Under Fed. R. Evid. 403.

Rather than contesting the probative value of international rates in general, the Copyright Owners focus on the particular countries -- the U.K. and Japan -- that are addressed in RIAA's written direct testimony. They argue (1) that the rates in those two countries cover different rights from those at issue in this proceeding, and (2) the selection of these two countries paints a false picture of international rates overall. *See* Mot. at 4-7. Neither argument is remotely persuasive as a basis to exclude the proffered evidence and, indeed, both issues are addressed directly by the testimony offered by RIAA.

As the Copyright Owners acknowledge, the testimony of Geoffrey Taylor recognizes that "the rates in the U.K. and Japan cover a different set of rights established under different regimes than those at issue here." Mot. at 4. But they fail to note that his testimony goes on to explain how the Judges can account for the differences in the regimes. First, Taylor states that "[t]o translate the rate to something that could be applied in the U.S., one must deduct the value of the performance royalty from the joint royalty rate." Taylor WDT, at 14. Taylor even offers a formula to apportion these royalties based on his experience and public information about how collecting societies apportion mechanical and performance royalties. *Id.*[2]

[2] Taylor also acknowledges a second difference between the U.S. on the one hand and the U.K. and Japan on the other -- namely, the higher level of international marketing undertaken by U.S. record companies. Taylor WDT at 14-15. But this difference cuts the other way -- justifying lower rates in the U.S. -- because music publishers and songwriters are the direct beneficiaries of global sales of U.S. recordings made possible by the massive marketing efforts contributed by the recording industry.

As for the Copyright Owners' argument that the U.K. and Japan are a skewed sample, it is overstated and, in any event, fully answered. To begin with, Taylor also addresses other countries as well. Taylor WDT, at 17-18. In fact, he points out that "the United States has gone from having the lowest mechanical royalty rates in the world for physical music formats [in 1981] to having the highest rates today." *Id.* at 17. And he provides examples such as Austria, France, Italy and the Netherlands. *Id.* at 17-18.[3]

Moreover, to the extent Taylor focuses on the U.K. and Japan, he fully explains that decision in his written testimony. He identifies a number of reasons why the comparison between these three nations in particular is sensible, including but not limited to that (1) "[t]hese three countries have the most developed music markets in the world"; (2) "[t]hese three countries are also world leaders in developing the online marketplace"; (3) "their record companies invest particularly heavily in the areas of A & R and marketing and promotion of records"; (4) "the recording industries in the U.S., U.K. and Japan have also experienced similar damaging changes in recent years"; (5) "there is a mechanism in place to set reasonable royalty rates when parties cannot agree on the rate"; and (6) they rely on domestic repertoire, which increases their risks and production costs. Taylor WDT, at 5-7, 16. In other words, Taylor's testimony -- and the other related testimony that the Copyright Owners seek to exclude in their motion -- provides the international context in which this proceeding occurs as well as several reasons why these two particular nations -- the U.K. and Japan -- offer good, comparable benchmarks.

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[3] Although the Copyright Owners seek to exclude the entirety of Taylor's written testimony, they have styled their motion as one to exclude only evidence relating to U.K. and Japanese rates, ignoring the fact that Taylor testifies about rates in countries in addition to the U.K. and Japan. There is no basis for excluding only testimony about the U.K. and Japanese rates, nor is there a basis for excluding testimony about other countries, which serves to reinforce Taylor's conclusions and is no less relevant than the rest of his testimony.

Taylor also explains why comparisons to other countries would be less suitable. He devotes an entire section of this testimony to the question of "why the mechanical royalty rates are higher in a number of countries, most notably continental European countries, than the rates are in the U.K. and Japan, and the rates should be in the U.S." explaining that those other nations (1) do not have independent bodies that determine royalty rates; (2) have reduced investment by their record companies; (3) have reduced risk because most international repertoire comes to them from the U.S. and U.K.; and (4) with respect to continental Europe, the rates are artificially high at face value because a number of discounts apply to that rate. Taylor WDT, at 15-17. In other words, Taylor has already done the analysis and therefore his testimony provides reasons why the Judges will *not* have to engage in an "around-the-world review of rates." Whether and how the Copyright Owners choose to challenge the veracity or analysis of Taylor's claims is their choice, but they cannot simply throw up their hands and claim that it is too much work for them. *See* Mot. at 6-7.

C. The Copyright Owners' Reliance on the Deposition of DiMA Expert Guerin-Calvert Provides No Basis for Excluding Evidence of U.K. and Japanese Rates.

In the face of this thorough and probative testimony presented by RIAA, the Copyright Owners turn to three words from the deposition of DiMA's expert witness and use that soundbite to try to prop up the conclusion that the entire comparison is "apples to oranges." Mot. at 1. This gambit fails because it ignores the adjustments that Taylor made in his testimony to account for the differences identified by Ms. Guerin-Calvert, and because it improperly takes Ms. Guerin-Calvert's quote out of context.

First, Ms. Guerin-Calvert's comment referred to the fact that different rights are reflected in the rates in different countries. But as discussed above, Taylor recognized these differences in

his testimony and adjusted for them. As this Court has recognized in its prior decisions, it is perfectly appropriate to take an existing benchmark and make appropriate adjustments to govern the rights at issue in this proceeding. *In the Matter of Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services* ("*SDARS*"), Docket No. 2006-1 CRB DSTRA (Dec. 3, 2007), at 16; *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings* ("*Webcasting*"), Docket No. 2005-1 CRB DTRA, 72 Fed. Reg. 24084, 24091-92 (May 1, 2007). That is what the Court did in the webcasting and SDARS proceedings and what Taylor did here.

Second, the Copyright Owners take the "apples and oranges" quote out of context by conveniently failing to mention that in her deposition Ms. Guerin-Calvert stated unequivocally that rates outside of the United States "in terms of rates, rate methodology, are informative about the statutory objectives and hence are relevant." Deposition Tr. of Margaret Guerin-Calvert, dated Oct. 3, 2007 ("Guerin-Calvert Tr."), at 167 (Mot. at Ex. C). She noted, for example, that one of the aspects in which other countries' experience is "informative and useful" is to demonstrate that the vast majority of countries have rates determined on a percentage-of-revenue basis. *Id.* Indeed, in her written direct testimony, Ms. Guerin-Calvert analyzed the recent U.K. settlement. *See* Guerin-Calvert WDT, at ¶¶ 25-26 & n.76. The Copyright Owners cannot reasonably rely on Ms. Guerin-Calvert as a basis for trying to exclude testimony about international rates when she plainly has endorsed their relevance here.

D. The Copyright Owners' Own Witnesses Confirm the Relevance of the U.K. and Japanese Rates.

Even if there were any lingering doubt about the probative nature of the comparison, the testimony of the Copyright Owners' own witnesses eliminates it. For example, Claire Enders, one of the experts proffered by the Copyright Owners, testified that she had thought about the

comparison between the U.K. and the United States and among other similarities, she noted: (1) the same majors are present in most markets worldwide; (2) the U.K. is a good early adopter market; (3) European nations including the U.K. are plagued with piracy; (4) most of the sound recordings sold in the U.K., Japan and the U.S. are ones that originated there; and (5) both the U.K. and U.S. are large exporters of music. Deposition Tr. of Claire Enders, dated Oct. 5, 2007 ("Enders Tr."), at 186-88 (attached hereto as Ex. C). Moreover, Enders verified a statement from one of her reports that: "Strong digital sales are far from the solution to the industry's ills. In fact, they are eroding the base CD business, principally in the United States, but also in U.K. and Japan, markets with relatively stable CD volumes in the past." *Id.* at 214.

Other Copyright Owner witnesses testify about how a percentage rate would be difficult to administer and claim that this is a reason that the Court should retain a mechanical rate for CDs that is based on a cents rate. *See, e.g.,* Written Direct Testimony of Roger Faxon at ¶ 75; Written Direct Testimony of Ralph Peer at ¶ 50. But the example of foreign countries demonstrates that Copyright Owners administer royalties under a percentage rate in almost every other country in the world -- at a minimum, this shows that that it is quite feasible to do so in the United States.

In sum, the probative value of this testimony is unmistakable: the combination of the testimony of Taylor, Boulton, and all of the other witnesses selected by the Copyright Owners provide a plain view of the United States' place in the global music marketplace, a benchmark of nations with comparable mechanical regimes and industry issues (with a recognition of their differences from the U.S.), and a thorough explanation of why that benchmark is preferable to other international comparisons.

II. There Is No Prejudice to Admitting This Testimony.

Federal Rule of Evidence 403 is not just a test of the probative quality of evidence; rather, to exclude evidence, the Copyright Owners must demonstrate that the prejudice, confusion, or undue delay of the evidence substantially outweighs its probative value.

As noted above, however, there is nothing in the challenged testimony that comes close to meeting Rule 403's standard of prejudice, as Taylor himself explains why there is no need to look to further countries because the U.K. and Japan are the best international comparisons. If the Copyright Owners want to challenge Taylor's testimony on the grounds set forth in their motion, they have that opportunity on cross-examination. But the suggestion that they somehow cannot do work to respond to Taylor's well-developed testimony or challenge him on the alleged inadequacies of his claims is wholly unavailing.

In addition, any risk of actual prejudice or misleading the decisionmaker is not present here because the Judges in this case are more than capable of assessing the credibility of witness testimony. Unlike the instant case, Rule 403 is concerned with the effect of prejudicial testimony on juries, not judges. *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) ("[W]e hold that in the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial. . . . Rule 403 was designed to keep evidence not germane to any issue outside the purview of the jury's consideration. For a bench trial, we are confident that the district court can hear relevant evidence, weigh its probative value and reject any improper inferences.").[4]

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[4] The two cases cited by the Copyright Owners are entirely inapposite. *See* Mot. at 5. In *Brooks v. Chrysler Corp.*, 786 F.2d 1191 (D.C. Cir. 1986), the issue turned on misleading a *jury* and the part of the opinion concerning trial delay involved a requirement of rebutting 330 separate complaints. 786 F.2d at 1198-99. Neither condition is present here. *Ferag AG v. Grapha-Holding AG*, No. CIV. A. 91-2215-LFO, 1996 WL 293542, at *1 (D.D.C. May 29, 1996), involved the offering of foreign decisions, but "*merely to rebut* plaintiffs' evidence and for no

Finally, the issues raised in this motion do not go to the admissibility of the evidence but, at best, go to the weight given by the Judges to the testimony. "Moreover, it is well-settled that 'Rule 403 should be applied infrequently and cautiously by trial judges' and that unfair prejudice results from '[e]vidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action.'" *Robertson v. McCloskey*, 680 F. Supp. 412, 413 (D.D.C. 1998) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 403[02] at 403-27; ¶ 403[3] at 403-33-36 (1986)). Like in *Robertson*, unfair prejudice is rare, and distinct from what the Copyright Owners argue here. The allegation of potential contradictory evidence is not an issue of admissibility but rather one of the weight accorded to each witness. *See id.* In this case, the Copyright Owners' argument depends on disagreements with the substance of the testimony -- i.e. they do not agree that the U.K. or Japan comparisons are good benchmarks. Such questions are, at best, proper fodder for cross examination, not a Rule 403 motion.

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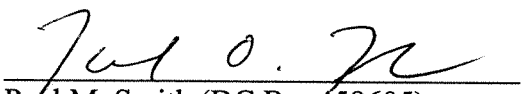
other purpose." A large part of the decision turned on how exclusion of the evidence would not at all impair the defendant's main case composed of 8 experts and hundreds of pages of exhibits.

CONCLUSION

For the foregoing reasons, RIAA respectfully requests that this Court deny the Copyright Owners' motion.

Respectfully Submitted,



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January 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January 2008, I caused a true and correct copy of the foregoing **Opposition to NMPA, SGA, and NSAI's Motion *In Limine* to Exclude Evidence Relating to U.K. and Japanese Rates** to be served upon the following by electronic mail and First Class Mail:

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Exhibit A

UNITED STATES OF AMERICA

BEFORE THE COPYRIGHT ROYALTY TRIBUNAL

WASHINGTON, D.C.

COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS ROYALTY ADJUSTMENT PROCEEDING	Pursuant to 17 U.S.C. § 804(a)(1)

Economic Study
submitted on behalf of

NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

April 7, 1980

RRNA

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6. The 2-3/4 Cent Royalty Is Lower Than Comparable Rates Afforded Songwriters and Music Publishers in England, Australia, Japan, and Western Europe

An American songwriter is compensated at higher royalty rates in England, Australia, Japan and throughout Western Europe than he is in his home country, the United States.

Consider:

-- In England, the royalty rate since 1928 has been 6.25 percent of the retail price of the individual record.

-- In Australia, the royalty rate since 1912 has been five percent of the retail price of the individual record. Moreover, the Copyright Tribunal in Australia recommended in January 1980 that the Attorney-General increase the statutory rate to 6.75 percent of retail price.

-- In Japan, the royalty rate is 5.4 percent of the fixed retail selling price for long-playing records.

-- Throughout Western Europe, wherever a statutory ceiling is not prescribed, the negotiated mechanical royalty rate under the standard BIEM agreement is eight percent of suggested retail price or, in its absence, the price most generally charged determined by reference to the manufacturers' highest price increased by an agreed margin.*

There is no conceivable economic justification for

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* The retail price is subject to certain nominal and variable deductions.

retaining a rate which is inadequate and thereby discourages the creation of indigenous musical compositions.

B. Aggregate Mechanical Royalties Paid to Songwriters and Music Publishers Fell Far Behind Record Company Income

Aggregate mechanical royalties paid to songwriters and music publishers have not kept pace with record company sales. Indeed, despite the astounding growth in market demand for recorded music today, aggregate mechanical royalties, while increasing in absolute dollar terms, declined steadily as a proportion of record company sales through 1978.

1. Mechanical Royalties Represent a Decreasing Percentage of Record Sales

Table 11 and Chart E show that since 1973, aggregate mechanical royalties have decreased markedly as a proportion of record sales. As noted above, throughout the first two decades of the long-playing album, songwriters and music publishers received an effective mechanical royalty rate in the neighborhood of five percent of record sales at the suggested retail list price.

By 1977, however, aggregate mechanical royalties had declined to between 2.6 and 3.2 percent of the record industry's total sales at the suggested retail list price -- barely half the historical effective rate. And although the interim increase to 2-3/4 cents increased the aggregate percentage in 1978 to between 2.9 and 3.9 percent of record sales, it is still far below the historical level.

Exhibit B

UNITED STATES OF AMERICA

BEFORE THE COPYRIGHT ROYALTY TRIBUNAL

WASHINGTON, D.C.

COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS ROYALTY ADJUSTMENT PROCEEDING	CRT Docket No. 80-2

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

81. Projecting at a conservative rate of inflation of 7.5 percent per annum, the Nathan Study anticipates that by 1987 the interim rate will be reduced to the purchasing power of 1.2 cents. (Nathan Study, at Chart C)

82. Declining Market Position. The Nathan Study further shows that the market position of copyright owners has deteriorated relative to that of others in the economy, including music arrangers, nonsymphony musicians, and industrial workers. (Nathan Study, at Table 9)

83. Comparison with Performing Artists. The market position of copyright owners has also deteriorated relative to that of performing artists. Available data show that average artist royalties range between ten and as high as twenty percent of list price. (Nathan Study, at Table 10)

84. International Comparison. Mechanical royalties are paid at a higher rate abroad than in the United States. The Nathan Study finds no economic or policy justification for this disparity. Moreover, in all countries (other than Canada and the Soviet Union), the royalty payable is expressed as a percentage of price, to ensure that the statutory or negotiated rate maintains its purchasing power under inflationary pressure. (Nathan Study, at pp. 40-41)

85. In England, the mechanical royalty payable under the compulsory license system is 6.25 percent of the retail price of phonorecords.

86. In Australia, the mechanical royalty payable under the compulsory license system is five percent of the retail price of phonorecords. Moreover, the Copyright Tribunal of Australia has recommended that the rate be increased -- to 6.75 percent of the retail price of phonorecords including the sales tax, or 7.9 percent of the pre-tax recommended retail price. (Nathan Study, at p. 40)

87. Throughout Europe and most of the Third World, the negotiated royalty rate under the agreement between the International Federation of Producers of Phonograms and Videograms ("IFPI"), a record industry federation, and the Bureau Internationale des Societe Gerant Les Droits d'Enregistrement et de Reproduction Musique ("BIEM"), an international society of songwriters and music publishers (the "BIEM agreement"), is eight percent of the retail price of phonorecords, or, in the alternative, of the price most generally charged by reference to the manufacturer's highest price charged to distributors increased by an agreed margin. (Nathan Study, at p. 40) The actual royalty payable per L.P. is, for example, 67 cents in Belgium, 51 cents in Italy, 66 cents in the Netherlands, and 82 cents in Austria and Switzerland. (NMPA Table 20)

88. Percentage Rate. The Nathan Study concludes that the statutory royalty should be expressed as a percentage of the suggested retail list price of phonorecords, to ensure that the royalty payable maintains its purchasing power under inflationary pressure. (Nathan Study, at p. 45)

89. The Nathan Study strongly disapproves expressing the royalty as a flat cent rate, for such rate -- like the two cent royalty enacted in 1909 -- would quickly reduce to a mere fraction of its intended purchasing power. (Nathan Study, at Table 12)

90. The Nathan Study recognizes that indexing a flat cent rate to changes in the cost of living would maintain some of the purchasing power of the intended adjustment, but regards the use of an index as less equitable than a rate expressed as a percentage of price: Under a cost-of-living adjustment, increases in the rate payable always lag behind actual changes in inflation, thus perpetuating a built-in inequity.

91. In contrast, a royalty expressed as a percentage of price ensures that the compensation of songwriters and music publishers keeps pace not only with the price of records but also with the gross revenues generated by record sales. (Nathan Study, at pp. 48-49)

Exhibit C

In The Matter Of:

MECHANICAL AND DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING

CLAIRE WHITMORE ENDERS
October 5, 2007

RESTRICTED CONFIDENTIAL

MERRILL LEGAL SOLUTIONS
25 West 45th Street - Suite 900
New York, NY 10036
PH: 212-557-7400 / FAX: 212-692-9171

ENDERS, CLAIRE WHITMORE - Vol. 1

Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the Matter of:	)	
	)	
Mechanical and Digital	)	Docket No.
Phonorecord Delivery Rate	)	2006-3 CRB DPRA
Adjustment Proceeding	)	

RESTRICTED CONFIDENTIAL DEPOSITION OF

CLAIRE WHITMORE ENDERS

Washington, D.C.

Friday, October 5, 2007

8:59 a.m.

Job No.: 22-113140

Pages 1 - 309

Reported By: Joan V. Cain

CLAIRE WHITMORE ENDERS - CONFIDENTIAL

transactions.

Q Has Enders Analysis reviewed catalog transactions?

A I think one of my colleagues did.

Q And who was that?

A Ben Rumley, but I just remember him mentioning it.

Q So you believe that Enders Analysis would have data concerning the valuation of publishing catalogs subsequent to the date of this report?

A No, I didn't say that. We would not have all the data on catalogs sold in the world.

Q But you would have some data?

A We'd have something.

Q To what do you attribute the increase in valuations over time?

MS. BAYARD: Objection as to form.

THE WITNESS: The basic factor is the growth in the income streams related to music publishing over the last -- the decade in question.

BY MR. ENGLUND:

Q Is it accurate that you are projecting that those revenue streams will continue to increase through 2012?

A That's -- that was our view.

Q Would you thus expect valuations to continue increasing also?

A I can't say that.

Q Why not?

A Because I haven't perfectly correlated or indeed correlated, other than on a general basis, the fact that valuations go up with a certain rate of increase in revenue. I do not know whether a very small increase in revenue; i.e., 2.2 percent CAGR, would actually equate to a similar jump in value as higher growth or lower growth or whatever.

Q Do you have any information concerning the valuation of recorded music catalogs?

A What do you mean by recorded music catalogs?

Q Ownership of master recordings.

A I do not.

Q Have you ever had occasion to think about the similarities or differences between the U.S. and U.K. recorded music markets?

A I have pondered them for some time.

Q Could you tell me some of the similarities between those markets?

A People speak English. People in the U.K.

have a greater affinity to American culture than, say, Germans or French or Japanese, and, therefore, they have an interest in American music, which is substantial. The -- the same majors are present in most markets worldwide.

The U.K. has, at least recently, been a good earlier adopter market in Europe, unlike southern European markets. All European markets have been plagued with piracy. So, you know, British people have a greater interest in music, I mean in terms of per capita expenditure, than people in the U.S., but I would say those are the main similarities.

Q Is it accurate that both U.S. and U.K. recordings that are sold are primarily ones that have originated in country?

MS. BAYARD: Objection as to form.

THE WITNESS: Primarily originated in country? That's also the case for Japan and probably India. Yeah, no, that -- sorry. There was one other similarity I was thinking of -- sorry -- when you -- sorry. I can't -- I can't think of it now. Sorry.

BY MR. ENGLUND:

Q Is it accurate that both the U.S. and U.K. recording music companies licensed their masters for

distribution overseas in substantial amounts?

A Yes. Yes. Sorry. That was what I was thinking. Sorry. So U.K.'s also an exporter.

Q Relative to markets other than the U.S. and the U.K., are the U.S. and the U.K. situated in ways that you would characterize as being more closely aligned than, say, other continental European markets?

MS. BAYARD: I'm going to just object to the form.

THE WITNESS: I think that the cultural affinity, the cultural affinities between the U.S. and the U.K. are well-known. So those cultural affinities are much closer because of a shared language and actually shared economic policies in the last decade, but there are many, many differences.

BY MR. ENGLUND:

Q Do you have any information concerning the average retail price of a digital album?

A I think in the --

MS. BAYARD: Objection. I just want to object as to form. In the U.S.?

MR. ENGLUND: Yes, in the U.S.

THE WITNESS: I think I specified that in the U.S. it's the -- the retail price on iTunes is

9.99. That doesn't mean that all albums are 9.99, but that is what many albums appear to be priced at.

BY MR. ENGLUND:

Q Do you have any information concerning the average retail price of a physical album in the United States?

A We do in the company somewhere. We have a view.

Q Do you know now approximately what the average retail price for a physical album in the United States is?

A My estimate for physical product would be around the $10 mark.

Q Would you please turn to page 18 of your report, Exhibit 1. At the end of the first paragraph, you further price the CD album, (14.99). Is that a fair estimate of the price of a CD album?

A No. That's just -- many CD albums have an RRP of 14.99.

Q So your statement is not accurate to the extent it suggests that 14.99 is, in fact, the price at which CD albums are sold?

MS. BAYARD: Object to the form.

THE WITNESS: CD albums are sold at many

generated 481 different SKUs, which is an extraordinary range of products. Record companies are broadening their product portfolio very substantially.

Q Would you characterize the economic effects of unbundling on record companies as generally positive or generally negative?

MS. BAYARD: Objection as to form.

THE WITNESS: Some of them are negative and some of them are positive. The record companies are discovering a different range of activities and having to innovate and change their model. You know, it is possible for companies to survive change. It is obviously negative, especially for the shareholders, to experience decline in top line. It's a mixed bag.

BY MR. ENGLUND:

Q Would you take a look, please, at Exhibit 3?

A Could you just show it to me?

Q It's the March report.

A Sorry. I just don't have numbers on mine.

MS. BAYARD: You do. It's right here.

THE WITNESS: Oh, that. That's it. Sorry. They're not the same numbers as you. You've got them on the top.

BY MR. ENGLUND:

Q These are my private notes.

A Right.

Q Would you look at page 5, please. The second paragraph, "To summarize our view, on top of piracy and personal copying, cherry picking is permanently undermining the industry's historic album model. Strong digital sales are far from the solution to the industry's ills. In fact, they are eroding the base CD business, principally in the U.S., but now also in U.K. and Japan, markets with relatively stable CD sales volumes in the past."

Is that paragraph accurate?

A That's correct.

Q Turn now to page 16.

MS. BAYARD: Still on the exhibit, right?

MR. ENGLUND: Yes.

BY MR. ENGLUND:

Q Under the heading Volumes of Hits, it says that, "In our opinion, this decline," referring to a decline in the number of hits, "results from the combined impact of personal piracy, physical copying, and cherry picking of the singles online."

Is that statement accurate?

A Yes.

Q So is it your understanding that hits, as that term is used in this paragraph, are important to the financial performance of record companies?

A Yes. This refers to hit albums. I just want to point that out to you.

Q And why are hit albums important to the financial performance of record companies?

A They sustain the sales of those -- they sustain the sales of the company in a situation where the company issues albums that are not hits, so where they lose money on an album.

Q And cherry picking is contributing to a decline in the number of hits?

A Of hit albums.

Q Yes.

A Yes, as defined.

Q And do you view that as a serious problem for the recording industry?

MS. BAYARD: Objection as to form.

THE WITNESS: I have viewed it as a serious problem, yes. The industry model has had to change.

BY MR. ENGLUND:

Q Thank you. Page 17 right at the top you say, "Not only are there fewer hits in absolute terms,