

UNITED STATES OF AMERICA
BEFORE THE COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D.C.

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:
COMPULSORY LICENSE FOR MAKING :
AND DISTRIBUTING PHONORECORDS : CRT No. 80-2
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ROYALTY ADJUSTMENT PROCEEDING :
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NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
PROPOSED ADJUSTMENT OF ROYALTY
AND ADMINISTRATIVE PROVISIONS

Preliminary Statement

National Music Publishers' Association, Inc. ("NMPA") respectfully submits the following proposed adjustment of royalty and administrative provisions.

When we submitted our tentative proposed regulations on June 11, 1980, we reserved the right to modify the proposal, in light of testimony of further witnesses. 37 C.F.R. § 301.51 (1979).

That further testimony has confirmed that NMPA's proposal presents a simple, straightforward approach to the administration of a percentage royalty rate. Not only does it have the obvious virtue of universal application -- embracing all categories of phonorecords and any type of copyright use under

the compulsory license -- but it also conforms to the dictates of the statutory criteria governing a determination in this proceeding, 17 U.S.C. § 801, by incorporating existing industry practices into the very modus operandi.

NMPA recognizes that every regulatory system is dependent upon the good faith and cooperation of the parties, and that no regulation is immune from the possibility of evasion or subterfuge. Accordingly, in an effort to lessen the prospects of non-compliance, and to counter the Recording Industry Association of America, Inc.'s ("RIAA") few, specific complaints of record, NMPA now modifies its proposal to incorporate the following procedures:

(a) Stanley M. Gortikov, president of the Recording Industry Association of America, pointed out that the regulations made no provision for phonorecords which contain some non-dramatic musical works along with other material. Mr. Gortikov gave as examples comedy albums released by Steve Martin and Richard Pryor, in which each of those comedians sung songs, only a few seconds long, as part of their comedy routines. Although such records are extraordinarily rare, these regulations contain a clause which deals with that situation. The new clause states that material other than musical works shall be treated in the aggregate as a single musical work, and

assigned the same number of units, based on its aggregate playing time, except that if the aggregate playing time is not greater than five minutes, it shall be assigned no units. It is necessary to treat the aggregate playing time of the material other than musical works, because, for example, a comedy routine may not have any natural breaks into different parts. The reason for the provision that the materials other than musical works shall be disregarded if the aggregate playing time is not greater than five minutes is that many albums -- especially those recorded live at concerts -- contain introductions, stage announcements, and the like, and such incidental material should not reduce the royalty payable on the songs.

(b) Fern Cranston, of Warner Bros., another RIAA witness, suggested that it was unnecessary to require existing licensees to serve an amended notice of intention setting forth the computation of the new royalty, and to require licensees to serve notices of change in suggested retail list price. These regulations eliminate these requirements, and instead provide simply that the necessary information shall be provided with the next royalty payment made by the licensee.

(c) Finally, to make the proposal clearer, it has

been separated into two parts: the adjustment of the royalty, and administrative provisions relating to that adjustment.

Text of Proposal

Pursuant to Sections 801(b)(1) and 804 of the Copyright Revision Act of 1976, the Copyright Royalty Tribunal hereby adjusts the royalty payable under Section 115 of the Act as follows:

A. Adjustment of Royalty

1. Royalty. With respect to each nondramatic musical work ("work") embodied in the phonorecord, the royalty payable shall be that work's share of six percent of the suggested retail list price of the phonorecord. Each work's share shall be determined as follows:

(a) Each work contained on the phonorecord, whether or not copyrighted and whether or not licensed through the use of the compulsory license, shall be assigned a number of units as follows:

(1) if the playing time of the work is not greater than one minute, one-third unit;

(2) if the playing time of the work is greater than one minute and not greater than five minutes, one unit;

(3) if the playing time of the work is greater than five minutes, one-fifth unit per minute of playing time or fraction thereof.

(b) If a phonorecord contains material other than

works ("other material"), such other material shall be treated in the aggregate as a single work, and shall be assigned the same number of units, based on its aggregate playing time, which it would be assigned if it were a work, except that such other material shall be assigned no units if its aggregate playing time is not greater than five minutes.

(c) The share of each work shall be the number of units assigned to that work, divided by the total number of units assigned to all works and other material on the phonorecord.

2. Change in Suggested Retail List Price. Royalties payable with respect to phonorecords distributed on or after the effective date of a change in the suggested retail list price of the phonorecord shall be computed based on the new suggested retail list price. For this purpose, the effective date of a change in the suggested retail list price is the date upon which the new suggested retail list price is effective as to the consumer.

3. Transitional Provisions. This adjustment of royalty shall apply to all phonorecords made and distributed on or after the effective date of these regulations, regardless of the date upon which the compulsory license was obtained.

B. Administrative Provisions

1. Notice of Intention to Obtain Compulsory License.

Any person who wishes to obtain a compulsory license under Section 115 shall include in the notice of intention required by Section 115(b)(1) a statement setting forth the suggested retail list price of the phonorecord, the titles, copyright owners, and playing times of each of the works and other material embodied in the phonorecord, the share of the phonorecord attributed to the work for which the compulsory license is sought, and the royalty payable.

2. Change in Suggested Retail List Price. Any licensee who, at any time following the service of the notice of intention, changes the suggested retail list price of the phonorecord, shall provide with its next royalty payment, under Section 115(c)(3), a statement setting forth the new suggested retail list price, the share of the phonorecord attributed to the work for which the compulsory license was obtained, the new royalty payable, and the effective date of the new suggested retail list price.

3. Transitional Provisions. Any licensee who served or serves a notice of intention prior to the effective date of these regulations without including the statement required by these regulations shall provide such statement with its next royalty payment, under Section 115(c)(3).

Examples

Example 1. A phonorecord has a suggested retail list price of \$8.00 and contains 12 works. Each of the works is greater than one minute and not greater than five minutes playing time. Each of the works is copyrighted, and each is licensed through the use of the compulsory license.

Each of the 12 works is assigned one unit. The total number of units on the phonorecord is 12. Therefore, each work's share is 1/12. Six percent of the \$8.00 suggested retail list price is 48 cents. Therefore, the royalty payable with respect to each work is 1/12 of 48 cents, or 4 cents.

Example 2. Assuming the same facts as Example 1, except that only 8 of the 12 works are copyrighted. The remaining 4 are in the public domain.

Each of the 12 works is assigned one unit, because whether or not a song is copyrighted or is in the public domain does not affect the calculations of units. The total number of units on the phonorecord is 12. Therefore, the share of each work would be 1/12. Six percent of the \$8.00 suggested retail list price is 48 cents. Therefore, the royalty payable for each copyrighted work would be 1/12 of 48 cents, or 4 cents.

Of course, no royalty would be payable for the 4 works in the public domain. Therefore, assuming that each of

the 8 copyrighted works were licensed through the use of the compulsory license, the royalties paid on that phonorecord would be 4 cents for each of the 8 works, or a total of 32 cents.

Example 3. Assuming the same facts as Example 1, except that only 6 of the 12 musical works are licensed through the compulsory license. The other 6 works are licensed through private negotiations which do not involve invoking the compulsory license, and under which the copyright user agrees to pay, and the copyright owners agree to accept, a royalty of 3 cents per work.

Each of the 12 works is assigned one unit, because whether or not a work is licensed through the use of the compulsory license does not affect the calculation of units. The total number of units on the phonorecord is 12. Therefore, the share of each work licensed through the compulsory license would be $1/12$. Six percent of the \$8.00 suggested retail list price is 48 cents. Therefore, the royalty payable for each work licensed through the compulsory license would be $1/12$ of 48 cents, or 4 cents.

Thus, the level of the privately negotiated licenses does not affect the royalty payable for each work licensed through the use of the compulsory license. It does, of course, reduce the total royalties payable on the phonorecord.

In this example, the total royalties payable on the 6 songs licensed through the use of the compulsory license would be 24 cents. The total royalties payable on the 6 songs licensed through private negotiations, if each song was licensed at 3 cents, would be 18 cents. Thus, the total royalties payable on the phonorecord would be 42 cents.

Example 4. A phonorecord has a suggested retail list price of \$8.00, and contains 9 musical works. Seven of the musical works are greater than one minute, but not greater than five minutes playing time, one work is 5-1/2 minutes playing time, and one work is 8-1/2 minutes playing time. Each of the works is copyrighted, and each is licensed through the use of the compulsory license.

Each of the works of not more than five minutes playing time is assigned one unit. The 5-1/2 minute work is assigned 1.2 units (that is, one-fifth unit for each minute of playing time or fraction thereof). The 8-1/2 minute work is assigned 1.8 units (that is, one-fifth unit for each minute of playing time or fraction thereof). Thus, there are a total of 10 units (that is, 7 plus 1.2 plus 1.8) on the phonorecord.

Six percent of the \$8.00 suggested retail list price is 48 cents.

Each of the seven works not greater than five minutes playing time is entitled to a share of 1/10 of 48 cents, or 4.8 cents.

The 5-1/2 minute work is entitled to a share of $\frac{1.2}{10}$ of 48 cents, or 5.76 cents.

The 8-1/2 minute work is entitled to a share of $\frac{1.8}{10}$ of 48 cents, or 8.64 cents.

The total of royalties paid on the phonorecord is

$$4.8¢ \times 7 \text{ works} = 33.6¢$$

$$5.76¢ \times 1 \text{ work} = 5.76¢$$

$$8.64¢ \times 1 \text{ work} = \underline{8.64¢}$$

48 cents, which is six percent of the \$8.00 suggested retail list price.

Example 5. A "single" phonorecord has a suggested retail list price of \$1.25, and contains two musical works, each greater than one minute and not greater than five minutes playing time, each copyrighted, and each licensed through the use of the compulsory license.

Each work is assigned one unit. The total number of units is two. Therefore, each work's share is 1/2.

Six percent of the \$1.25 suggested retail list price is 7.5 cents. Thus, the royalty payable with respect to each work is one-half of 7.5 cents, or 3.75 cents.

Example 6. A phonorecord, consisting of two discs, has a suggested retail list price of \$12.00, and contains 20 works,

each greater than one minute and not greater than five minutes playing time, each copyrighted, and each licensed through the use of the compulsory license. Because the two discs are made and distributed as a single phonorecord, the computation of the number of units is done jointly.

Each work is assigned one unit. There are a total of 20 units. Six percent of the \$12.00 suggested retail list price is 72 cents. Each work is entitled to a share of $1/20$ of 72 cents, or 3.6 cents.

Example 7. Assuming the same facts as Example 1, the licensee changes the suggested retail list price from \$8.00 to \$9.00. Six percent of the new \$9.00 suggested retail list price is 54 cents. Therefore, the new royalty payable with respect to each work is $1/12$ of 54 cents, or 4.5 cents.

The licensee announces that the change will be effective as to the consumer on June 1, 1981. The new royalty of 4.5 cents is payable on all phonorecords distributed on or after June 1, 1981.

Example 8. A phonorecord was licensed through the use of the compulsory license on June 1, 1979. The phonorecord has a suggested retail list price of \$8.00, and contains 12 works. Each of the works is greater than one minute and not greater than five minutes playing time, each copyrighted, and each is licensed through the use of the compulsory license.

The licensee made and distributed 100,000 phonorecords before the effective date of these regulations. The royalty payable for each work embodied in those phonorecords is 2.75 cents.

The licensee made an additional 50,000 phonorecords before the effective date of these regulations, which were not distributed until on or after that date. The royalty payable for each work embodied in those records is 2.75 cents.

The licensee made and distributed an additional 25,000 phonorecords on or after the effective date of these regulations. The licensee's next royalty payment includes a statement that the suggested retail list price is \$8.00, that the work's share is 1/12, and that the royalty payable is 4 cents (that is, 1/12 of 48 cents). The 4-cent royalty is payable for each of those phonorecords, which were made and distributed on or after the effective date of these regulations.

Example 9. Assuming the same facts as Example 1, except that the phonorecord also contains stage announcements made at a live concert, which have an aggregate playing time of four minutes.

Because the aggregate playing time of the stage announcements is not greater than five minutes, they are assigned no units. The royalty payable with respect to each work is not affected.

Example 10. A phonorecord has a suggested retail list price of \$8.00, and contains three comedy routines and one nondramatic musical work. The three comedy routines have playing times of 8-1/2 minutes, 10 minutes, and 16 minutes. The one nondramatic musical work has a playing time of less than one minute.

The nondramatic musical work is assigned one-third unit. The three comedy routines, which have an aggregate playing time of 34-1/2 minutes, are assigned a total of 7 units.

Therefore, there are a total of 7-1/3 units on the phonorecord, and the share of the one nondramatic musical work is 1/3 divided by 7-1/3. Six percent of the \$8.00 suggested retail price is 48 cents. Therefore, the royalty payable for that work would be $(1/3)/(7-1/3)$ of 48 cents, or 2.2 cents.

Dated: October 6, 1980

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

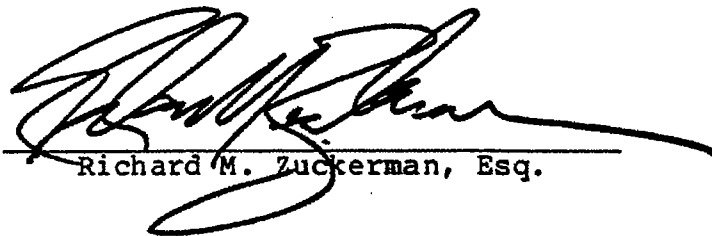
By 

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Attorneys for National Music Publishers'
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CERTIFICATE OF SERVICE

I certify that on October 7, 1980, I caused copies of the attached Proposed Adjustment of Royalty and Administrative Provisions to be served by hand upon ARNOLD & PORTER, attorneys for RIAA, and LINDEN & DEUTSCH, attorneys for AGAC.



Richard M. Zuckerman, Esq.