

UNITED STATES COPYRIGHT ROYALTY JUDGES

_____)	
In The Matter Of:)	
)	Docket No. 2005-1 CRB DTRA
Digital Performance Right in Sound)	
Recordings and Ephemeral Recordings)	
_____)	

MOTION FOR REHEARING OF NATIONAL PUBLIC RADIO, ITS MEMBER STATIONS, AND ALL CORPORATION FOR PUBLIC BROADCASTING-QUALIFIED PUBLIC RADIO STATIONS (collectively “NPR”)

Preliminary Statement

NPR files this motion for rehearing of the Copyright Royalty Judges’ Determination of Rates and Terms herein issued on March 2, 2007 (the “Decision”). The Decision, unless modified, will have crippling effects on the ability of public radio to fulfill its mandate to serve the public interest, as it will multiply NPR’s license costs several-fold and thus make cost-prohibitive any systematic effort on NPR’s part to continue its prior commitments (i) to enhance online music discovery and education opportunities for its listeners and (ii) to provide more exposure for emerging and non-mainstream artists via streaming.

The manifest errors committed by the Judges in reaching their determination as to NPR are beyond the scope of a rehearing motion as contemplated by 37 C.F.R. 353. NPR intends, in due course, to appeal the Judges’ Decision to the D.C. Circuit Court of Appeals. NPR thus reserves all its rights to challenge the Decision on appeal – on the grounds that it was arbitrary and capricious, an abuse of discretion and/or unsupported by sufficient evidence – insofar as it, inter alia: (i) establishes an arbitrary and insupportable annual minimum fee of \$500 per NPR station or channel (which *alone* computes to a fee that would be approximately [[REDACTED]] the

effective rate paid under the pre-existing voluntary license between NPR and the recording industry), and (ii) on top of that, makes the erroneous and extremely prejudicial determination that many NPR stations should be treated no differently than commercial webcasting services when they pass an arbitrary “point of convergence” with commercial webcasters – at which point they must pay royalties equal to the commercial webcasting rate on an escalating per-performance basis. Decision at 52-53, 58-60.

The instant motion is limited to specific issues that the Judges likely did not consider fully (or at all) and which, NPR believes, require a rehearing to avoid plainly inequitable outcomes that would befall NPR imminently unless addressed at this time. The crux of NPR’s instant rehearing motion is that, putting aside the core merits issues which NPR will appeal, the rate structure formulated by the Judges for NPR simply is unworkable in application in two fundamental respects described below (relating to its establishment of a monthly aggregate tuning hour (“ATH”) threshold which, if surpassed by any NPR station, would trigger additional royalty payments on a per-performance basis). A rehearing is necessary so the Judges may: (i) reconsider the ATH threshold and per-performance aspects of the fee structure it adopted for NPR and, upon reconsideration, withdraw or modify these aspects of their fee determination as to NPR; or (ii) at a minimum, stay the application of the ATH threshold and per-performance aspects of the Decision until NPR exhausts its appellate remedies.

Argument

THE COPYRIGHT ROYALTY JUDGES SHOULD GRANT A REHEARING TO RECONSIDER THE ATH THRESHOLD AND PER-PLAY RATE STRUCTURE SET FOR PUBLIC RADIO

A. NPR Stations Cannot Comply with the Rate Determination As Formulated

The Judges' rate determination with respect to NPR requires NPR and its stations to track two data-points on a station-by-station basis: (1) each station's monthly aggregate tuning hours; and (2) in the event the station's monthly ATH exceeds a threshold of 159,140 ATH, individual performances of sound recordings above and beyond that threshold. See Decision at 57-58, 61 (determining that NPR stations must pay \$500 per station/channel annually *plus* a per-performance fee equal to the commercial webcasting per-play rates for those performances of sound recordings requiring a license *after* the station surpasses a specific ATH figure in any month). Both these data-points are essential to NPR's ability to operate under the Decision (as it pertains to NPR); and both are infeasible for NPR to track and report—thus warranting a rehearing in order to consider how, if at all, to implement the Judges' determinations in respect of NPR (both in the short and long term).

1. The Vast Majority of NPR Stations Are Unable to Track ATH In Order to Calculate the ATH Threshold.

In determining rates for public radio, the Judges appear to have relied on SoundExchange Trial Ex. 67, a rough survey conducted by NPR to investigate the webcasting activities of NPR and CPB-funded stations. Decision at 59. Specifically, the Judges noted that, according to the survey, the NPR respondent stations reported an average of 218 simultaneous connections—which the Judges equated to 159,140 ATH per month (218 x 24 hrs x 365/12). Id. (citing SX Trial Ex. at CRB-NPR000036). However, this survey itself reveals that “79% of stations that air audio on their web sites are unable to provide their station's weekly Aggregate

Tuning Hours (ATH).” SX Trial Ex. at CRB-NPR000031; see also id. at CRB-NPR000042 (same). In other words, the very document upon which the Judges relied in fashioning a monthly threshold of 159,140 ATH—after which NPR stations would be required to pay at the commercial webcaster per-performance rate—also indicated that the substantial majority of NPR stations are *unable even to calculate that threshold* because they are unable to compute their monthly ATH.

NPR recognizes that services generally have a responsibility to comply with governing regulations, including the implementation of reasonable reporting requirements, and also recognizes that the Judges may not be required to craft rates and regulations to accommodate every limitation faced by every service in a market. However, where it is acknowledged in the very documentation relied upon that almost 80% of the entities affected by a determination lack the systems necessary to comply with a formula that did not exist for public radio before the Judges’ Decision (and which was not even proposed by any party in the proceedings), rehearing is warranted to reconsider the chosen formula/methodology.

2. NPR Stations Also Are Unable to Track the Number of Copyrighted Sound Recording Performances In Order to Calculate Their Payments Due Beyond the ATH Threshold.

Even for NPR stations that may be able to determine their monthly ATH, it is readily apparent that NPR stations generally *cannot* calculate, as the Decision would require (in order for NPR stations to calculate what, if anything, they owe on top of the Judges’ \$500 per station annual fee), the number of copyrighted sound recordings for which payment would be owed if a station exceeded the monthly ATH threshold. This is primarily a function of the fact that the predominant majority of NPR stations transmit a broad mix of programming (dominated by news, public affairs and talk); and, as NPR would elaborate upon a rehearing, it is simply not

possible by any means presently known and available to NPR to extract from NPR's program streaming data how many sound recordings were or are streamed during any relevant time period (never mind to any known number of listeners).

The fact that the mix of programming streamed by NPR is as stated above was the subject of NPR witness Kenneth Stern's testimony (see Stern WDT at 6-8) and amply confirmed by the very survey document relied upon by the Judges. Among other things, the survey (SX Trial Exhibit 67) confirmed:

- “The most common type of audio content currently provided by the stations is live streaming.” Id. at 6. “If stations engage in live streaming, they typically mirror the live stream of their broadcast without interruption....More stations simulcast newscasts, news, public affairs and talk than any other format; this format is followed by classical music and then jazz.” Id. at 10.
- With respect to streaming from NPR station archived programming, “forty-eight percent of respondents provide their web-users with archived audio clips of news programming. Other music clips follow a distant second with 8%. Id. at 3. Further, “[a]lmost half (46%) of stations that provide archival material on their websites cannot cite, with confidence, the hours of material made available. Of those that can, newscasts appear to comprise the largest portion of the archive (85%). Id. at 11.
- Finally, as to web-only programming, “[n]ews is the most common format of the small group of stations that stream web-only programming.” Id. at 3.

The foregoing addresses the inability of NPR and its stations to identify the number of sound recording performances occurring in their webcasts attributable to the fact that music performances occur within the broader context of such a diverse slate of programming. Beyond that, there is the *additional* inability to isolate out from any hypothetically known universe of sound recordings those which, in fact, would require payment at the statutory rate. Music contained in NPR broadcasts is often directly licensed or subject to some statutory exemption, such as fair use. Again, this constitutes just an additional layer of complexity on top

of the overarching inability of NPR, as described above, to identify performances for which potential payments beyond \$500 per station would be owed under the Judges' public radio fee formulation.

As a final layer of complexity, NPR and its stations have no systematic way of tracking how many listeners actually receive a transmission of a particular music performance at any given time. For example, in the case of live streaming, the NPR station would first have to determine whether a sound recording performance subject to the statutory license was included in the program; *then* it would have to determine when that performance began and ended; *and then* it would have to determine how many people were logged on to the stream at that time. For its archived shows, NPR would have to, again, determine which parts of its millions of hours of archived shows contained music performances subject to the statutory license, and *then* have to track how many listeners accessed the particular parts of archived programming containing such performances.

In sum, even were all these tasks within the realm of possibility, which NPR does not believe presently is the case, NPR submits that, upon rehearing and reconsideration, the Judges should determine that these extremely burdensome and costly tasks are not ones that a licensee (particularly a non-profit public broadcaster whose mission is to serve the public interest) should be forced to take on as a prerequisite to availing itself of a statutory license.

B. In These Circumstances, the Judges Should Withdraw the ATH Threshold and Per-Performance Metrics Applicable to Public Radio Under the Decision

In light of the circumstances set forth in sections A.1 and A.2 above, it is obvious that NPR and its stations cannot reasonably or practically comply with the Judges' rate determination applicable to public radio (other than as it relates to the to-be-appealed \$500 per station/channel aspects of the Decision). This circumstance warrants a rehearing and, upon

reconsideration of these issues, a withdrawal and/or modification by the Judges of the unworkable ATH threshold and per-performance metrics for public radio set forth in the Decision.

Even if the Judges are not persuaded to rescind or modify these aspects of the Decision for the entirety of the statutory license term, NPR urges the Judges—at a minimum—to rescind them for the “Retroactive Period” (January 2006-March 2007) and the duration of the appeal process herein (which would at least give NPR an opportunity to explore whether systems necessary to report and pay on a strict per-performance basis, above a designated ATH level per station, can be developed and made available to NPR at some reasonable cost—should neither the Judges nor the Court of Appeals grant NPR its requested relief). Surely the hardship to NPR associated with having to seek solutions to the aforesaid compliance problems associated with the Decision for the Retroactive Period and the immediate short term future is enormous; meanwhile, there is no countervailing economic hardship for SoundExchange, since the \$500 per station/channel annual fee component of the Decision *by itself* would be expected to provide SoundExchange with a more than 500% increase in fees compared to those payable under the prior SoundExchange – NPR voluntary agreement.

C. At a Minimum, the Judges Should Stay the Application of Their Rate Determination for Public Radio Until All Appeals Are Exhausted

In light of the unknown manner and/or cost of implementation of the Judges’ announced rate structure for NPR, NPR respectfully requests that—at a minimum—the Judges stay the implementation of their rate determination with respect to public radio until NPR’s appeal remedies are exhausted.

Although, as noted, NPR intends to appeal the \$500-per-station aspects of the Judges’ ruling to the Court of Appeals, NPR plans to comply with its obligation to make the

calendar year 2007 minimum per-station fees required by the Decision as NPR prosecutes its appeal. Given, as noted, the more than five-fold annual fee increase that this will entail compared to NPR's prior annual payments to SoundExchange, there would obviously be no prejudice to SoundExchange were the Judges to stay implementation of the ATH threshold and per-performance fee aspects of their Decision applicable to NPR pending the appeal process.

Conclusion

For the foregoing reasons, NPR urges the Judges to grant rehearing and, upon such rehearing, to set aside or modify the ATH threshold and per-performance aspects of their fee determination applicable to NPR (or, at a minimum, to stay implementation of such provisions pending the duration of NPR's appeal to the D.C. Circuit Court of Appeals).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the MOTION FOR REHEARING OF NATIONAL PUBLIC RADIO, ITS MEMBER STATIONS, AND ALL CORPORATION FOR PUBLIC BROADCASTING-QUALIFIED PUBLIC RADIO STATIONS were served on March 17, 2007 by overnight mail on the following parties:

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