

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

Rate-Making Proceeding for the
Mechanical Royalty Rate Under
Section 115

CRT Docket No. 80-2

RECORDING INDUSTRY ASSOCIATION OF AMERICA
PROPOSAL FOR ADJUSTMENT OF MECHANICAL ROYALTY RATE

Summary

The Recording Industry Association of America ("RIAA") respectfully submits the attached Proposal for the adjustment of mechanical royalty rates. This Memorandum describes the Proposal and summarizes the reasons for its adoption.

Preface

RIAA believes the evidence before the Tribunal clearly establishes that there is no justification, under the controlling statutory criteria, for any increase in the mechanical royalty rate under existing economic conditions.

We also believe we have demonstrated that increases in the sales volume of records and in other record-related sources of income can be expected to provide sufficient added income to copyright owners to counter problems of inflation in the future.

Nevertheless, if the Tribunal should determine that it wants to provide for a mechanism to respond to uncertainties in future years, we believe that the Tribunal should adopt the following procedures. The RIAA Proposal is designed to maintain the fair return that copyright owners now enjoy and respond to potential inflation in a way that minimizes disruption of prevailing industry practices and is simple, workable, and responsible.

Summary Description of the Proposal

The main features of the RIAA Proposal are as follows:

1. Retain Flat Rate Royalty. The basic principle that royalties should be calculated on a flat cents-per-tune rate (or a flat cents-per-minute playing time rate) would not be changed.

2. No Present Adjustment in Rate. The record demonstrates that the present rate affords a fair return to copyright owners and should not be adjusted under the relevant criteria. Therefore, the present rate (2 3/4¢ per tune and 1/2¢ per minute) would not be changed at this time.

3. Adjustments in 1982 and 1985. The rates would be subject to automatic adjustment on April 1, 1982 and April 1, 1985. Each adjustment in the flat rate would be proportional to the change in the average price of leading albums since the base year 1980. For example, if the average price of leading albums goes up 8% between 1980 and 1981, the per-tune rate would increase 8% on April 1, 1982 (from 2.75¢ to 2.95¢ after rounding), and the per-minute playing time rate would also increase 8% (from .5¢ to .55¢).^{*/}

4. Definition of Average Price. The average price of leading albums would be based on the retail list prices of all albums (except multiple record sets and

^{*/} To continue the example, assume the average price of leading albums increases 18% from 1980 to 1984. The present per-tune rate would increase a total of 18% on April 1, 1985. The new rate would become 3.25¢ after rounding and the per-minute playing time rate would become .6¢ after rounding.

albums that bear no suggested list prices) that appear during the year in the Billboard, Record World or Cash Box weekly Top 200. The average for any calendar year would be determined by adding up the list prices of all albums so listed and dividing by the number of entries.

5. Calculation of Average Price. RIAA would calculate each yearly average and furnish the calculation to the Tribunal and NMPA. There is a provision for a conference among RIAA and NMPA to review the calculation. There is also provision for resort if necessary to an audit of any disputed calculation by a mutually acceptable certified public accounting firm, whose decision would be final.

6. Rounding. No adjustment would be made in any year unless the effect of the calculation were to raise (or lower) the per-tune rate by at least .1¢, and any adjustment would be rounded to the nearest .05¢.

7. Applicability. Adjusted royalty rates would be applicable only to recordings released after the date of the adjustment.

8. Possible Shift to Wholesale Prices. Because of

the possibility that suggested list prices will disappear, the RIAA Proposal contains a provision for shifting, if necessary, to an average of LP wholesale prices. These computations would also be made for the albums appearing in the Billboard, Record World and Cash Box Top 200, again excluding multiple-record sets. Price determinations and averaging would be done by a certified public accounting firm.

Reasons for Adoption of the RIAA Proposal

The RIAA Proposal is designed to provide an automatic mechanism to permit periodic adjustments in mechanical royalty rates in response to future inflation within the industry. Unlike the publishers' and songwriters' percentage proposal, the RIAA Proposal would retain the prevailing industry practice of flat per-tune rates. Unlike the suggestion of indexing the rate to the CPI or some other general index unrelated to records, the RIAA Proposal would base any rate adjustment on changes in record prices.

The flat cents-per-tune rate has been the centerpiece of the mechanical royalty system since 1909. It is



embedded in tens of thousands of licenses, contracts, and computer instructions. It was deliberately retained by Congress in 1976. RIAA fully intends to press its contention that the Tribunal is not authorized to depart from flat cents-per-tune rates and, in particular, has no power to adopt any percentage system of relational rates that would make the rate for any given use of a tune dependent on the number and length of other tunes in the same album.

The simplicity of the flat cents-per-tune rate system has minimized the cost of royalty administration -- which is wasted money for both copyright owners and copyright users. The RIAA Proposal preserves this simplicity. One calculation on each adjustment date, using readily available data, yields new rates applicable to all songs on every future release. No amount of publisher legerdemain can conceal the fact that under their percentage system, even after the computers have been reprogrammed, a relational rate would have to be separately calculated for every tune on every configuration of every release. Every step of the royalty process -- from the data processing system for computing the royalties payable on each tune to

the composer's attempt to figure out whether the check he receives in the mail is for the right amount -- would be made more complicated.

Moreover, the publisher percentage royalty system would precipitate a host of disputes needing resolution long after the Tribunal ceases its statutory involvement in this proceeding. The RIAA Proposal, by contrast, allows interim royalty adjustments that are automatic, requiring no intermediate role for the Tribunal. Further, our proposal remains faithful to the Tribunal's statutory criteria.

The other virtue of the RIAA Proposal is that it ties interim adjustments for inflation to changes in record prices. All three parties have proposed record prices as the fairest basis for any adjustment to the mechanical rate. The mechanical royalty rate is not a wage rate but a rate per unit of record industry output. Because royalties also increase with volume, tying the per-unit rate to a general index like the CPI would enable copyright owners to profit unfairly from inflation.

The RIAA Proposal provides a mechanism for adjusting the mechanical royalty rate during the period between

now and 1987. It is not by any means intended to supplant the Tribunal's periodic rate adjustment proceedings as required by the Act. What is appropriate in 1980 may or may not be appropriate in 1987. It will be the Tribunal's task, in 1987, to determine -- on the basis of the statutory criteria -- what rates are reasonable under the economic conditions that prevail at that time.

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REGULATIONS

The Recording Industry Association of America ("RIAA") proposes that the Copyright Royalty Tribunal, pursuant to Sections 801(b)(1) and 804 of the Copyright Act, adopt the following regulations providing for interim adjustments to the royalty payable under Section 115 of the Act.

1. Dates of Adjustment

The per-tune rate of 2.75 cents and the per-minute playing time rate of .5 cents shall be subject to adjustment on April 1, 1982 and April 1, 1985 (hereinafter called "Adjustment Dates").

2. Method of Adjustment

(a) As of each Adjustment Date, new rates may be established. They shall be calculated by multiplying the 1980 rates (2.75 cents and .5 cents) by a fraction, the numerator of which is the Average Suggested List Price of Leading Albums (as defined below) in the calendar year immediately preceding the Adjustment Date (i.e., 1981 or 1984, as the case may be) and the denominator of which is

the Average Suggested List Price of Leading Albums in 1980.

(b) For purposes of the foregoing:

(i) "Leading Album" shall mean a long-playing album listed as one of the 200 top albums in any week during the year on the Billboard "Top LPs & Tape" chart, the Record World "Albums" chart, or the Cash Box "Top Albums" chart. "Leading Album" shall not include a multiple-disk set or an album for which there is no Suggested List Price.

(ii) "Suggested List Price" of an album shall mean the retail price recommended by the manufacturer of the album in disk form at the time of such listing.

(iii) "Average Suggested List Price of Leading Albums" for a year shall mean the average of the Suggested List Prices of all Leading Albums during that year, determined as follows:

(A) A table shall be prepared of the Suggested List Prices of all Leading Albums during the year. For any week in which an album is listed in Billboard, Record World or Cash Box as one of the 200

top albums, the Suggested List Price of the album shall be entered in the table once; for any week in which an album is so listed in two or three publications, the Suggested List Price of the album shall be entered two or three times, respectively.

(B) The Suggested List Prices so entered shall be totaled, and the sum divided by the number of entries in the list.

3. Adjustment Procedures

(a) The Average Suggested List Price of Leading Albums for 1980, 1981 and 1984 shall be calculated by RIAA, which shall submit its calculation for each year, together with the data on which it is based, to the Tribunal on or before January 20 of the following year, with a copy to the National Music Publishers' Association ("NMPA"). The calculations for 1981 and 1984 shall be accompanied by RIAA's calculation, in accordance with section 2, of the adjustments, if any, to be made on the next Adjustment Date.

(b) During 1981 and 1984, RIAA shall also furnish to NMPA, on or before the twentieth day after the

end of each calendar quarter, a table containing the album name, name of manufacturer, identifying number, Suggested List Price, and number of weekly entries with respect to each Leading Album for the quarter.

(c) If RIAA fails to submit the calculations required by paragraph (a) for any year to the Tribunal and NMPA on or before January 20 of the following year, NMPA may submit such calculations to the Tribunal and RIAA on or before February 15, and NMPA's calculations shall be deemed to be final.

(d) Within 20 days after receipt by NMPA of any calculation by RIAA pursuant to paragraph (a), NMPA may deliver to RIAA its written statement of disagreement with the calculation. If NMPA does not deliver such a statement within the 20-day period, the RIAA calculation shall be deemed to be final. If NMPA does deliver such a statement, a conference between representatives of RIAA and NMPA shall be held at a mutually agreeable time (but no later than five days after delivery of the statement to RIAA) at which RIAA and NMPA shall attempt to resolve the disagreement.

(e) If a conference held pursuant to paragraph (d) fails to produce agreement within five days, the disagreement shall on the fifth day be submitted to a certified public accounting firm acceptable to RIAA and NMPA. RIAA and NMPA shall jointly designate a certified public accounting firm for this purpose, and report their designation to the Tribunal no later than January 10, 1981. The accounting firm shall conduct such procedures and perform such work as it deems necessary to resolve the disagreement in accordance with the principles set forth in section 2 and shall report its determinations in writing to RIAA and NMPA on or before the 30th day after submission of the matter to it. The determinations of the accounting firm shall be conclusive for all purposes. The fees of the accounting firm shall be borne equally by RIAA and NMPA.

(f) As early as possible, and in any event before March 25, 1981, 1982, or 1985, RIAA shall report to the Tribunal, with a copy to NMPA, the final calculations for the preceding year, determined in accordance with paragraph (a) (RIAA calculations accepted by NMPA),

paragraph (c) (NMPA calculations), paragraph (d) (agreement at conference), or paragraph (e) (accounting firm determination), as the case may be.

(g) As soon as practicable after it receives notification, in accordance with paragraph (f), of calculations for 1981 or 1984, and in no event later than the Adjustment Date, the Tribunal shall publish in the Federal Register the royalty rate adjustment, if any, resulting from such calculations, or, if no adjustment is required, a notice to that effect.

(h) In the event of an error in a publication's report of a Suggested List Price, the actual Suggested List Price recommended by the manufacturer shall control.

4. Use of Wholesale Prices in Certain Cases

(a) If, in any twelve successive calendar weeks in 1981 or 1984, 100 or more of the 200 top albums listed in any one of Billboard, Record World or Cash Box are albums for which there is no Suggested List Price recommended by the manufacturer, rate adjustments on the next Adjustment Date (April 1, 1982 or 1985 as the case

may be) shall be based on changes in the Average Wholesale Price of Leading Albums as defined below.

(b) As of such next Adjustment Date, new rates shall be established by multiplying the 1980 rates (2.75 cents and .5 cents) by a fraction, the numerator of which is the Average Wholesale Price of Leading Albums in the calendar year immediately preceding the Adjustment Date (1981 or 1984, as the case may be) and the denominator of which is the Average Wholesale Price of Leading Albums in 1980.

(c) For purposes of the foregoing:

(i) "Wholesale Price" of an album shall mean the lowest price at which the album is normally available for sale by the record manufacturer to non-affiliated, regular customers in the ordinary course of business. Said price shall be based on the average per-unit price on 100 or more albums shipped for resale.

(ii) "Average Wholesale Price of Leading Albums" for any week shall mean the sum of the Wholesale Prices of all Leading Albums for that week, divided by the number of Leading Albums.

(iii) "Average Wholesale Price of Leading Albums" for any year shall mean the sum of the averages for the first full calendar week of each month of the year, divided by 12.

5. Procedures for Use of Wholesale Prices

(a) The Average Wholesale Price of Leading Albums for 1980 shall be calculated by the certified public accounting firm referred to in paragraph 3(e) above, which shall submit its calculation, together with the data on which it is based, to the Tribunal on or before March 30, 1981, with copies to RIAA and NMPA. The calculations of the accounting firm shall be conclusive for all purposes.

(b) If the circumstances set forth in section 4(a) occur in 1981 or 1984, then the certified public accounting firm shall calculate the Average Wholesale Price of Leading Albums for the year 1981 or 1984, as the case may be. The calculations of the accounting firm shall be conclusive for all purposes. Said calculations, together with the data on which they are based, shall be submitted to the Tribunal, with copies to RIAA and NMPA, on or before March 20, 1982 or March 20, 1985, as the case

may be. Those calculations shall be accompanied by calculations, in accordance with paragraph 4, of the resulting adjustments in royalty rates, if any.

(c) The certified public accounting firm shall be entitled to rely, absent reliable evidence to the contrary, on a manufacturer's printed price list, or, if no such list exists, on the manufacturer's written statement of the Wholesale Price of an album manufactured by it.

(d) As soon as practicable after it receives the accounting firm's calculation under paragraph (b), and in no event later than the Adjustment Date, the Tribunal shall publish in the Federal Register the royalty rate adjustments, if any, resulting from such calculation, or, if no adjustment is required, a notice to that effect.

6. Minimum Adjustments

No adjustment in either the per-tune or the playing time rate shall be made on any Adjustment Date unless the effect of the calculation under section 3 or section 5, as the case may be, is to raise or lower the existing per-tune rate by .1 cents or more. Any adjustment in excess of .1 cents shall be rounded to the nearest .05 cents.

7. Application of Royalty Rate Adjustments

Royalty rate adjustments shall be applicable only to albums released after the Adjustment Date on which such adjustments take effect.

8. Change in Source of "Leading Album"

RIAA and NMPA may at any time, by mutual agreement in writing, of which a copy shall be sent to the Tribunal, specify a definition of "Leading Album" different from that specified in section 2(b)(ii).