

## NMPA LATE FEE PROGRAM

### Overview

The Copyright Royalty Board (“CRB”) is empowered under U.S. Copyright Law to set compulsory mechanical royalty rates to be paid by music users, including the four major record companies (“Record Companies”), to music publishers and foreign societies for the right to distribute and/or transmit physical and digital phonorecords, ringtones, interactive streams, and limited digital downloads. In the most recent CRB, the National Music Publishers’ Association (“NMPA”) requested, and the CRB ruled, for the first time, that music publishers and foreign societies are entitled to collect a late fee of 18% annually for late payments of royalties from Record Companies and other music distribution services.

In response to the ruling, the NMPA, The Harry Fox Agency, Inc., and the Recording Industry Association of America (“RIAA”) entered into a Memorandum of Understanding on November 10, 2009 (the “MOU”). The MOU creates a comprehensive program (“NMPA Late Fee Program” or “Late Fee Program”) whereby the Record Companies and music publishers will work together to improve mechanical licensing practices and encourage prompt dispute resolution. In exchange for waivers of certain late fees through 2012, the Record Companies must comply with the provisions of the MOU, including paying participating music publishers and foreign societies their respective market share of accrued P&U Royalties. Registration for the distribution of the first installment of P&U royalties accrued for products released on or before December 31, 2006 (“Group I”) has ended. Registration for distribution of the second installment of P&U royalties accrued for products released from January 1, 2007 through December 31, 2008 (“Group II”) will commence in mid-October 2010. The distribution – involving potentially up to about \$36 million – will be based on accrued royalties that have not been cleared through the cooperative efforts of Record Companies and music publishers.

Group I of the Late Fee Program was administered by Kenneth Feinberg of Feinberg Rozen, LLP. For Group II, the NMPA has engaged The Harry Fox Agency, Inc. (“HFA” or the “Program Administrator”) to determine and distribute payments to music publishers and foreign societies through the Late Fee Program. In addition, the NMPA engaged HFA to handle continuing quarterly payments for Group I Product after the initial Group I Fund is distributed.

Group II of the Late Fee Program is open to music publishers and foreign societies with musical compositions initially distributed by one or more Record Companies in the United States during the years 2007 and 2008. **Publishers and foreign societies that have already opted into the Late Fee Program have already agreed to participate in the Group II phase.** Publishers who did not participate in Group I may participate in Group II by registering and opting into the Group II program. A Participating Music Publisher (but not a foreign society) must be or become a member of the NMPA on or before the date of the submission of the Opt-In Enrollment Form. Independent Record Companies will have the opportunity to participate in the Late Fee Program in the near future as Participating Record Companies on substantially the same terms as in the MOU.

**Publishers and foreign societies who have already opted into the Late Fee Program will be sent a Group II Late Fee Program Confirmation Form to confirm certain information necessary to process their Group II distributions. Failure to return the Confirmation Form to the Program Administrator promptly, either electronically or by mail, will delay a participating publisher’s Group II distribution.** The Program Administrator will send a Group II Program Confirmation Form to each music publisher and foreign society who participated in Group I at their address on record. Group II Program Confirmation Forms must be received on or before November 29, 2010 to ensure timely distribution. A publisher or foreign society needing guidance on how to fill out the Confirmation Form should consult the website.

**For publishers and foreign societies who did not participate in Group I of the Late Fee Program, there are three steps in participating in the Group II phase of the Late Fee Program:**

**First Step:** A music publisher or foreign society must submit a registration form to the Program Administrator either electronically or by mail. Copies of the Group II Late Fee Program Registration Form can be downloaded from the website at [www.NMPAlatefeesettlement.com](http://www.NMPAlatefeesettlement.com) or the publisher may file electronically. The Program Administrator will also send a Group II Program Registration Form to each music publisher and foreign society identified on Record Company or HFA payee lists who did not participate in Group I of the Late Fee Program, for which HFA or the Record Companies have accurate mailing information in their royalty systems. Group II Program Registration Forms must be received on or before November 29, 2010. A publisher needing guidance on how to fill out the Registration Form should consult the website.

**IMPORTANT POINT** - Registering does not commit a publisher who did not opt into the Group I of the Late Fee Program to participate in Group II of the Late Fee Program. Registration will simply provide the Program Administrator with key information to allow the Program Administrator to determine each publisher's estimated share of the Group II distribution. A registered publisher will not become a party to the Late Fee Program until the registered publisher "opts in" to the Late Fee Program, as described below in the "Third Step."

**Second Step:** After the initial registration period is over, the Program Administrator will calculate the estimated "market-share" distribution for each newly registered publisher and foreign society, and will send each newly registered publisher and foreign society: (1) an estimate of the amount the publisher can expect to receive from the initial distribution of the P&U Royalties that will be distributed by the Program Administrator; and (2) an opt-in form ("Opt-In Enrollment Form"). The Group II Opt-In Enrollment period will last for approximately 45 days from the date of the initial mailing of the Opt-In Enrollment Forms. The deadline date will be indicated in the Opt-In Enrollment Form and will also be posted on the website.

**Third Step:** If a registered publisher who did not opt into the Group I of the Late Fee Program decides to participate in the Late Fee Program, the registered publisher must submit the Group II Opt-In Enrollment Form and it must be received by the Program Administration before the deadline set by the Program Administrator. The deadline will be clearly identified on the Opt-in Enrollment Form, and will also be available through the Late Fee Program website. It is anticipated the Opt-In Enrollment Form deadline will be during the first quarter of 2011. When a publisher opts in by sending the Opt-In Enrollment Form to the Program Administrator, the publisher then becomes a Participating Publisher ("Participating Publishers") under the MOU, and will be eligible to receive its share of the distributed royalties.

A fuller description of the key provisions of the MOU follows. The NMPA strongly encourages all interested music publishers and foreign societies to register as soon as possible and to carefully review (i) the MOU, which is available at [www.NMPAlatefeesettlement.com](http://www.NMPAlatefeesettlement.com); and (ii) the more detailed materials they will then receive concerning the NMPA Late Fee Program.

Each publisher should seek independent legal counsel regarding all matters relating to the Late Fee Program. The NMPA, the Program Administrator, HFA, or any vendor, agent or attorney representing the same, will not act as legal counsel to any publisher, and should not be relied on for legal advice. Each publisher seeking legal advice should obtain its own legal counsel.

#### **Summary of Key Provisions of the Late Fee MOU**

**Term:** The MOU terminates on December 31, 2012. However, certain provisions, including those relating to payments of P&U Royalties by Participating Record Companies for sale of Group I Product and Group II Product after that date, as described below, will remain in effect past the termination date.

**Territory:** The MOU covers product made and distributed in the United States, its territories and possessions.

**Initial Payments:** We estimate that in the first quarter of 2011, Participating Publishers will begin receiving distributions of funds from the Program Administrator for accrued P&U Royalties for Group II Product based on a market share distribution methodology. Distribution of accrued royalties for Group II Product is net of the costs and fees identified in the Registration materials, Opt-In materials and the MOU.

**Product Clearance:** The MOU requires each Participating Record Company and Participating Publisher to take certain actions to facilitate clearance of products, including implementing certain Default Rules and Best Practices (as described below). To the extent a Participating Record Company clears a product, royalties due will be payable under the applicable licenses and will not be treated as P&U Royalties under the MOU.

**Future Payments:** We anticipate that Participating Publishers will begin receiving market share distributions for then-accrued P&U Royalties for Group II Product that remains uncleared during the first quarter of 2011 on a date to be determined by the Program Administrator. In addition, Participating Record Companies will continue to accrue P&U Royalties for ongoing sales of Group I Product and Group II Product and contribute them to the Group I and Group II funds on a quarterly basis. The Program Administrator will continue to make market share distributions for these ongoing sales to Participating Publishers for the indefinite future.

**Audit Rights:** The Program Administrator will have the right to audit Participating Record Companies on behalf of Participating Publishers for ongoing sales of Group I Product and Group II Product, and will be able to examine the P&U accrual rates used by the Participating Record Companies with respect to ongoing sales of digital product.

**Default Rules:** Participating Record Companies and Participating Publishers will implement certain rules to govern future licensing and payment procedures. Among other procedures, the Default Rules require Participating Record Companies to seek claims information from writers and their representatives prior to release and pay royalties through in certain situations, including some split disputes, if they are not to be potentially subject to statutory late fees (where applicable).

**Best Practices:** Participating Record Companies and Participating Publishers will adopt certain additional measures to improve the clearance process. Best Practices include various efforts to improve communications between Participating Publishers and Participating Record Companies, including regular meetings to review lists of unlicensed product. A Best Practices Group, composed of representatives from Participating Record Companies and Participating Publishers, will oversee implementation of the Best Practices and Default Rules.

**Releases:** In consideration for making Group I and Group II payments, Participating Record Companies will receive a release from Participating Publishers for claims arising from the reproduction and distribution of Group I Product and Group II Product as to which P&U Royalties have accrued, including claims for nonpayment, late payment and infringement. The signed release will be submitted with a Participating Publisher's Opt-In Enrollment Form, but will not be effective with respect to any particular units of product until the Participating Publisher has received payment based on P&U Royalty accruals for those units under the MOU. The release will roll forward to cover additional units of product as the Participating Publisher receives additional payments based on sale of those units. Additionally, upon receiving payments under the MOU, Participating Publishers will release the parties to the MOU, Participating Record Companies, the Program Administrator and its vendors for claims relating to the implementation and administration of the MOU itself.

**Late Fee Waivers:** In consideration for receiving Group I and Group II payments and implementation of the Default Rules and Best Practices, Participating Publishers agree not to collect certain late fees that would otherwise apply to Group I, Group II and Group III Product pursuant to the Section 115 statutory license or another mechanical license such as a Section 115 variance mechanical license (e.g., an HFA license). While a

late fee waiver will apply to P&U Royalties attributable to ongoing distributions of Group I and Group II Product so long as a Participating Record Company continues to make its required payments of P&U Royalties, late fee waivers for product released on or after January 1, 2009 will terminate upon the expiration of the MOU on December 31, 2012.

**Market Share Methodology:** In order to permit the Program Administrator to determine distribution amounts for Participating Publishers, the Participating Record Companies and the HFA have provided the Program Administrator with records of payments made by the Participating Record Companies to music publishers and foreign societies during the Group I period (2000-2006) and the Group II period (2007-2008). In addition, Participating Record Companies have engaged outside auditors to attest to the accuracy of historical payment information and the amount of their accrued P&U Royalties for Group I Product and Group II Product. The payment data was used by the Program Administrator to calculate the relative market shares of publishers who received payments from the Participating Record Companies during the Group I period, and similar calculations will be made for the Group II period, which, in turn, will be used as the basis for distributing the Group II funds.

A Participating Publisher will have the right to make a claim to the Program Administrator to contest the determination of the market share calculated by the Program Administrator. The Program Administrator will have sole discretion to alter the market share calculation for a particular publisher or to maintain the first calculation. There will be no right of appeal after the Program Administrator adjudicates the Participating Publisher's claim.

We will update the official website – [www.NMPAlatefeesettlement.com](http://www.NMPAlatefeesettlement.com) – with additional information as warranted. You may also learn more by calling our toll-free number at 1-866-249-8110.