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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

IN RE COMPACT DISC MINIMUM
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ANTITRUST LITIGATION

MDL DOCKET No. 1361

(This Document Applies To *Trowbridge,*
et al. v. Sony Music Entertainment, Inc.,
et al., Docket No. 2:00-MD-1361-P-H)

ORDER ON CY PRES DISTRIBUTION OF EXCESS SETTLEMENT FUNDS

I must decide how to distribute excess funds (approximately \$271,000) remaining after payment of attorney fees.¹ In my June 10, 2005 Order, I directed that the lawyers invite the four potential recipients² of the funds to submit proposals explaining how they would use the monies. The four are: Jazz at Lincoln Center, Music for Youth Foundation, the National Guild of Community Schools of the Arts, and radio station WKCR-FM of Columbia University.

From all that appears, all four are worthy entities, deserving of financial support for the valuable programs they conduct. But after careful review of the four proposals against the criteria I previously identified for a *cy pres* distribution in a class action, I direct that awards (subject to the conditions set out in this order) be made, first, to WKCR-FM in the amount of \$107,000 (plus

¹ As described in my June 10, 2005, Order, the options available to me under the settlement agreement are *cy pres* distribution and reversion to the defendants. I initially rejected a settlement agreement that provided only for reversion of excess funds. Because of the settlement agreement, escheat is not an option; in any case, it would be unlikely to advance the interests of the class in this case.

² The parties proposed three of the recipients; an objector proposed the fourth. Although the settlement agreement does not limit me to their proposals, I have consciously decided not to take an initiating role by adding any. I also assume from their silence that the parties do not have any connection to the recipient proposed by the objector.

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an amount to be identified) and, second, the remainder, to the National Guild of Community Schools of the Arts.

ANALYSIS

In my June 10, 2005, Order, I identified the following factors for consideration:

the degree to which the *cy pres* proposal will benefit class members; the degree to which it will promote the purposes of the underlying cause of action that has been settled; the minimization of administrative costs; ensuring that funds disbursed to a private body are used for purposes benefiting the class; holding the recipient accountable; the amount of spillover to non-class-members; and avoidance of having the funds merely replace other monies.

I also observed that spillover to non-class-members is unavoidable here, and that antitrust deterrence is achieved by not allowing reversion of these funds to the defendants. Finally, in describing the interests of the plaintiff class, I observed:

music club members have demonstrated that they want to listen to music on their own terms. But I cannot determine the type of music; the offerings are wide-ranging. Likewise, the membership of the class is not restricted to any geographic area, but is nationwide. . . . [B]y definition, music club members are vitally interested in the availability of recorded music and in the performance of music and of musicians.

As is to be expected, none of the submitted proposals is a perfect fit for the purposes of the music club antitrust class action settlement; after all, these are independent entities responsibly pursuing their own charitable purposes. I must therefore try to determine which of the proposals come closest.

I conclude that the WKCR proposal best meets the considerations used in evaluating a *cy pres* distribution plan for this lawsuit. WKCR proposes to use the *cy pres* funds to buy equipment to furnish "Studio D." The purpose of

Studio D is to house the best in analog equipment to play back historic twentieth-century recordings—discs and tapes—in their original medium. Then they will be transferred to digital format and posted in sound files to WKCR's internet website where anyone can listen to them.³ WKCR's goal is to achieve high sound quality and audio clarity for these historic recordings. In its supplemental application, submitted in response to my June 10 Order, WKCR requested \$107,000 for the purchase of specific equipment (Rockport turntable; Studer A820 reel-to-reel tape deck; Mousetrap analog de-ticker; Urei 565T notch filter set⁴; Sontec, Pultec and Focusrite analog equalizers) to accomplish this goal.

So, applying the *cy pres* factors, I find the following:

1. The WKCR proposal will benefit class members because, via the internet, they can access these recordings and listen to them in a superior audio quality.
2. The proposal promotes the purposes of the underlying cause of action, i.e., a penalty for antitrust violations, in preventing these funds from reverting to the defendants, but so do all the proposals.
3. There are minimal administrative costs because all funds will go to purchase of equipment.

³ The New York Times recently reported that 98.9% of libraries provide free public Internet access. See Gretchen Ruethling, *Almost All Libraries in U.S. Offer Free Access to Internet*, N.Y. Times, June 24, 2005, at A14.

⁴ WKCR neglected to price the Urei 565T notch filter set in its proposal. I will consider a reasonable request for such funds if submitted by September 19, 2005.

4. The funds will be used for purposes benefiting the class because the class interest is in having easy access to recorded music.⁵

5. WKCR will be held accountable: it has committed to making quarterly reports on the expenditure of monies, but notes that due to the limited availability of the necessary equipment, the acquisition process may take some time. The proposal does not include a commitment on *use* of the equipment. As a condition of receiving the money, WKCR shall file a plan by September 19, 2005, with set milestones for the purchase *and use* of the equipment over a period of three years. As with the second proposal I fund, however, annual (not quarterly) reports will be sufficient.

6. There will be spillover to non-class-members but, as with all the proposals, such spillover is unavoidable, there being no way to limit the benefit only to music club members.

7. Since currently there is no other source of funding for the equipment, the funds will not merely replace other monies.

In sum, WKCR's goal promotes the purposes of the underlying class action, because it increases the availability and quality of recorded music at low cost and does so for a potentially nationwide audience (over the Internet), just as the plaintiff class was nationwide.

The other three proposed recipients all focus on education for young people. The National Guild of Community Schools of the Arts provides support to institutions that provide educational programming in the arts. Music for

⁵ WKCR's proposal speaks of "critical recordings of Jazz, American musics, and the world's culture." In an earlier version of the proposal it recognized jazz music as its foremost interest. I confirm the second, broader, proposal as governing.

Youth distributes money to non-profit school groups and after-school organizations providing music education to children. Jazz at Lincoln Center's educational programs,⁶ which are geared largely toward school-age children, promote understanding and appreciation of jazz music. Two of them, Music for Youth and Jazz at Lincoln Center, devote their activities primarily to the New York City area. Given the scope of the music club membership, the plaintiff class in this lawsuit, I conclude that a program with a more national scope is preferable.

The National Guild of Community Schools of the Arts (the "Guild") has requested funds for the development of a website to provide resources to community schools of the arts. The website will provide useful resources to community arts schools across the country: the Guild's three-hundred-plus member schools are located in forty-five states. The provision of these resources to community schools will increase the resources available to spend on music education, which develop informed audiences and the recording artists of the future. After funding the WKCR proposal, I expect to make an award that will fund the total amount requested for hardware and software purchase and maintenance, \$34,000; projected costs for programming, including the services of a webmaster, \$42,000; and projected costs for Research/Writing/Editing/Design, \$80,000.

Applying the *cy pres* criteria, I find as follows:

1. Class members will indirectly benefit from the development of future

⁶ The proposal submitted by Jazz at Lincoln Center was limited to its educational programming.

musical artists, can participate in programming available to adults in their particular geographic area, and can benefit from performances at community arts schools.⁷

2. Avoiding reversion of these monies to the defendants furthers antitrust deterrence, as with all the proposals.

3. The award I make does not include the project's administrative costs. If the Guild is not willing to accept this limitation, it should so notify the court by August 19, 2005, and the grant will not occur.

4. The Guild has undertaken to use the funds for the purposes described.

5. The Guild has committed to filing progress reports annually, as well as a final report at the end of the three-year project period.⁸

6. Spillover is unavoidable, as with all the proposals. People other than music club members will be able to take advantage of these programs.

7. There is no other identified financial source for these programs, and therefore the *cy pres* funds are not merely replacing other available monies. However, I cannot determine from the proposal whether access to the website will be limited to member schools or include nonmember schools. I also cannot tell whether the Guild proposes to charge users for access. These issues should be clarified by September 19, 2005.

⁷ I note that the Guild's mission includes supporting schools that provide education in arts other than music. Nevertheless, 79% of member schools offer music education. Nat'l Guild of Cmty. Sch. of the Arts, *Facts and Figures*, at http://www.nationalguild.org/csas_facts.htm (last visited Aug. 9, 2005).

⁸ The Guild stated that "[i]f an award of less than the full amount is received, the project will develop more slowly and at a smaller scale." Since the award will encompass almost everything but administrative costs, it is my hope that the Guild will still meet its proposed timetable, so that court monitoring of funds can come to a timely end.

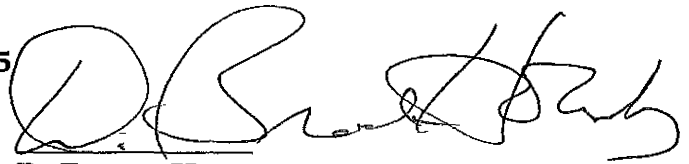
The two remaining proposals came from Jazz at Lincoln Center and the Music for Youth Foundation. As I have said, these appear to be excellent organizations with worthy programs. The fact that I conclude that the scope of their programs and purposes are more distant from the purposes of this music club antitrust settlement than those proposals I have funded in no way impugns the value of their activities.

CONCLUSION

The lawyers are directed to file with the Court by August 22, 2005, a detailed accounting of the funds available for *cy pres* distribution. WKCR is directed to file any request for additional monies necessary to complete the studio's capacity and a three-year plan for the purchase and use of the equipment. The Guild shall answer my questions about nonmember access and charges and confirm its timetable in light of the likely award I will make to it. WKCR's and the Guild's filings are due by September 19, 2005. If the additional filings are satisfactory, I expect to direct distribution of the remaining proceeds by September 30, 2005. It is my hope that all reporting will conclude in three years.

SO ORDERED.

DATED THIS 9TH DAY OF AUGUST, 2005



D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

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