MUSIC CREATORS

MCNA

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November 22, 2021

COPYRIGHT ROYALTY BOARD (CRB)
In re DOCKET NO. 21-CRB-0001-PR-(2023-2027)
Making and Distributing Phonorecords (Phonorecords IV)
Notice of Proposed Rulemaking re: 37 C.F.R. Part 385 Subpart B
(Second Re-Opened Comment Period)

Second Comments Submitted by the Songwriters Guild of America, Inc., the Society of Composers & Lyricists, Music Creators North America, and the individual music creators Rick Carnes and Ashley Irwin

These Comments Are Endorsed by the Following Music Creator Organizations:

Alliance for Women Film Composers (AWFC). https://theawfc.com
Alliance of Latin American Composers & Authors (AlcaMusica) https://www.alcamusica.org
Asia-Pacific Music Creators Alliance (APMA), https://musiccreatorsap.org/
European Composers and Songwriters Alliance (ECSA), https://composeralliance.org
The Ivors Academy (IVORS), https://ivorsacademy.com
Music Answers (M.A.), https://www.musicanswers.org
Pan-African Composers and Songwriters Alliance (PACSA), http://www.pacsa.org
Screen Composers Guild of Canada (SCGC), https://screencomposers.ca
Songwriters Association of Canada (SAC), http://www.songwriters.ca

I. Introduction and Statements of Interest

The following Comments are respectfully submitted by the signatory organizations Songwriters Guild of America, Inc. ("SGA"),[1] Society of Composers & Lyricists ("SCL"),[2] and Music

[1] https://www.songwritersguild.com/site/index.php
[2] https://thescl.com/

Creators North America ("MCNA"),[3] and by the individuals Rick Carnes[4] and Ashley Irwin[5] (the parties sometimes collectively referred to herein as the "Independent Music Creators"). These Comments have also been endorsed by the national and international music creator groups additionally listed above. Together, these commenters and endorsers advocate for and represent the interests of hundreds of thousands of independent songwriters, composers and lyricists in the United States (US) and throughout the world.

SGA is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated independently and solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or are in conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for 90 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world. SGA's organizational membership stands at approximately 4500 members. SGA is represented by signatory Rick Carnes, who is signing as an individual music creator and copyright owner, and as an organizational officer.

SCL is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre). It has a membership of over 2000 professional composers and lyricists, and is a founding co-member --along with SGA and other independent music creator groups-- of MCNA. SCL is represented by signatory Ashley Irwin, who is signing as an individual music creator and copyright owner, and as an organizational officer.

MCNA is an alliance of independent songwriter and composer organizations that advocates and educates on behalf of North America's music creator community. As the only internationally recognized voice of American and Canadian songwriters and composers, MCNA, through its affiliation with the International Council of Music Creators (CIAM), is part of a coalition that represents the professional interests and aspirations of more than half a million creators across Africa, Asia, Austral- Oceania, North and South America, and Europe. MCNA is represented by signatories Rick Carnes and Ashley Irwin, who are signing as organizational officers.

Of particular relevance to these comments, SGA, SCL and MCNA are also founding members of the international organization Fair Trade Music,[6] which is the leading US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

[3] https://www.musiccreatorsna.org
[4] https://www.songwritersguild.com/site/rick-carnes
[5] https://en.wikipedia.org/wiki/Ashley_Irwin
[6] https://www.fairtrademusicinternational.org/

II. Summary of Comments

The following is a summary of recent events related to these proceedings, and issues that the Independent Music Creators seek to raise in these Comments:

A. Letter to the CRB of October 20, 2021-- On October 20, 2021, the Independent Music Creators who comprise the signatory organizations to these Comments sent a letter to the CRB (a copy of which is appended hereto and incorporated herein as "Attachment A"). In that communication ("Letter of October 20, 2021"), we sought to provide new information supplemental to the data included our comments submitted to the CRB dated July 26, 2021 ("Comments of July 26, 2021")[7] concerning the spiking of inflation rates in the US throughout 2020-21, as well as the continued market resurgence of vinyl and other 37 CFR Part 385 Subpart B ("Subpart B") configurations. That new information will be further discussed herein.

B. Re-Opening of CRB Comment Period on October 22, 2021-- Shortly after the delivery of our Letter of October 20, 2021, we were gratified by publication in the Federal Register on October 22, 2021 of a Notice issued by the CRB re-opening the public comment period concerning Subpart B rate setting and related issues.[8] We thank the CRB for its recognition of the importance of upholding the statutory rights of interested parties to express *as part of the record of these proceedings* the views on the proposed voluntary rate setting agreements that may profoundly affect our livelihoods and our abilities to continue creating new works.

C. Summary of Issues to be Discussed in these Comments-- With that in mind, we welcome this opportunity to offer these further Comments on a number of important issues, highlighted by the following four principles:

1. **The Statutory Importance of Outside Party Comments to CRB Decision Making--** We strenuously object to the position of the major publishers and record labels that submissions by interested, non-participant commenters need not be considered by the CRB in evaluating the adoption of privately negotiated settlements. That claim, contrary to the spirit and letter of the US Copyright Act, was made apparent in the "COMMENTS IN FURTHER SUPPORT OF THE SETTLEMENT OF STATUTORY ROYALTY RATES AND TERMS FOR SUBPART B CONFIGURATIONS" jointly submitted to the CRB on August 10, 2021 by the National Music Publishers Association ("NMPA"), the Nashville Songwriters Association International ("NSAI"), and the major record labels Universal Music Group Recordings ("UMG"), Sony Music Entertainment ("SME"), and Warner Music Group Corp ("WMG") (together referred to herein as the "Major Music Conglomerates").

[7] https://app.crb.gov/document/download/25535?fbclid=IwAR2rAqy7qiW8kk2KYX4XEEPYKHnleB4WTTvWmY0J_rOr9u6Zebjadp8SiMA

[8] https://app.crb.gov/document/download/25880

2. **The Unfairness and Inadvisability of Adopting the Frozen Subpart B Mechanical Royalty Rate Proposal--** We strongly oppose any rulemaking that would result in the adoption by the CRB of a proposed, continued freeze on mechanical royalty rates for physical phonorecords, permanent downloads, ringtones, and music bundles as proposed to the CRB by the Major Music Conglomerates. Rather, we urge establishment of a new, Subpart B base royalty rate reflective of changes to the US Consumer Price Index since 2006, with a built-in, cost-of-living mechanism to adjust such rate(s) on an annual basis throughout the Phonorecords IV rate period. Such a system will recognize both the severe financial dangers posed to songwriters and composers by the inflationary times in which we now live, and the demonstrably resurging importance to independent music creators and music publishers of royalty income realized from the distribution of physical product, downloads and other Subpart B configurations.

3. **Avoiding the Rate-Setting Precedent That an Overwhelming Percentage of US and Global Songwriters and Composers Do Not Want and Cannot Afford—** We vehemently protest the potential establishment of a precedent that would be set by yet another five-year extension of Subpart B frozen mechanical rates as requested by the vertically integrated Major Music Conglomerates, a proposal that is now being broadly used as a pretext by digital music distributors to propose the freezing or lowering of the already paltry streaming royalty rates they are obligated to pay.

4. **The Importance of Future, Non-Participant Music Creator Comments in Phonorecord IV and Other Proceedings—**We enthusiastically support continued calls for comments by the CRB from interested parties in appropriate circumstances during all future stages of the Phonorecord IV and other proceedings. This will help to ensure that more music creator voices are heard by the CRB, other than the extremely narrow constituency of opinions provided by only those whose participation the Major Music Conglomerates are willing to finance.

III. Discussion

A. The Statutory Importance of Interested, Non-Participant Comments to CRB Decision Making

While Congress may have expressed enthusiasm for joint rate setting proposals being developed through arms-length, independent negotiations among the parties to a CRB rate-setting proceeding (which clearly may not have been what transpired in the present case among vertically integrated parties),[9] Congress was also crystal clear in

[9] As stated in our Comments of July 26, 2021, it is by no means clear that the "negotiations" which took place among the vertically integrated participants in developing the frozen mechanical royalty rate proposal were at arm's length. "The circumstances under which the settlement negotiations were conducted that produced the proposed royalty rate freeze set forth in the May 25 Motion to Adopt can be fairly characterized --under the above standards-- as being exactly the opposite of what both Congress and the Executive Branch have in mind in defining "reasonability" under the "willing seller-willing buyer" formula. Rather than arm's length negotiations between parties on opposites sides of the table, the referenced discussions that produced

another of its related statutory directives. Namely, that the CRB also has a duty to ensure that interested, non-participating parties who would be bound by the terms of the negotiated agreement are given the full opportunity to comment upon the proposal *as part of the record of the proceeding* prior to the proposal's adoption or rejection by the CRB.

Section 801(b)(7)(a)(i) of the US Copyright Act stipulates that:

> [T]he Copyright Royalty Judges shall [1] provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall [2] provide to participants in the proceeding under § 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates. (Bracketed numbers added for clarity)

More importantly for the purposes of these Comments, Section 801(b)(7)(a)(ii) explicitly sets forth the authority of the CRB to accept or reject the proposed agreements of parties to a proceeding based upon the combination of comments and objections filed *both* by participants in the proceeding *and* outside, interested party commenters:

> [T]he Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any ***participant*** described in clause (i) objects to the agreement and the Copyright Royalty Judges conclude, ***based on the record before them*** if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates. (emphasis added)

In the present case, the Major Music Conglomerates (once again counterintuitively joined by NSAI) have chosen to simply ignore the statutory requirements, set forth above, and focus solely on issuing a blanket rejection of the comments of *pro se* participant George Johnson (who formally objected to the proposed agreement). In fact, in their submission to the CRB of August 10, 2021,[10] the Major Music Conglomerates did not even bother to *mention* the detailed comments of those many individuals and groups who, on behalf of their constituents comprising a large percentage of the US' and the world's music creators, filed detailed comments with the CRB objecting to the proposed frozen mechanical rate deal as unreasonable.

Rather, the Conglomerates opted instead to stand solely on the following, naked assertion:

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the settlement agreement instead seem to have taken place solely among vertically integrated parties and their trade association agents, apparently with little or no input from independent music creators and copyright owners[9] upon whom "those rates and terms [will be] binding." See, Comments of July 26, 2021 at 8-9.

[10] https://app.crb.gov/document/download/25577

> Mr. Johnson provides no basis for the Judges to reject the Settlement. Mr. Johnson makes unfounded accusations of fraud and inaccurate statements concerning the corporate structure of record companies, but provides no economic reason to believe that the rates in the Settlement are outside the "zone of reasonableness." This is nothing more than a rehash of arguments he made and the Judges rejected when a similar settlement was presented in *Phonorecords III*….
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> Objections to a settlement that is substantially the same as the one adopted in *Phonorecords III*, absent a showing of changed market conditions that would support a change in the rates and terms for Subpart B configurations at this time, do not permit the Judges to "conclude that the agreement reached voluntarily between the Settling Parties does not provide a reasonable basis for setting statutory terms and rates." (citation omitted). Thus, as in *Phonorecords III*, "***the Judges must adopt the proposed regulations that codify the partial settlement***."[11] (emphasis added).

This evasive and misleading statement is counter-productive to upholding the Congressional mandate that all interested parties be heard --even those unable to afford the hundreds of thousands of dollars required to participate effectively in the formal rate-setting proceedings.

To repeat the obvious, when they filed the above comments, the Major Music Conglomerates were fully aware that Mr. Johnson was by far not the only person or entity to have filed detailed objections with the CRB to the frozen mechanical proposal, including the extensive comments of the Independent Music Creator groups who are the signatories hereto that had been submitted some *two weeks* prior to the filing of the Major Music Conglomerates' comments on August 10, 2021 and reported on and published in the press.[12]

Specifically, some two dozen other organizations and individuals filed or endorsed comments[13] detailing with great specificity the unreasonable nature of the frozen royalty rate proposal made by the Major Music Conglomerates, owing to drastically changed market conditions that include the damage of long-term and now accelerating inflation, the growing length in time of the current freeze, and the demonstrably re-emerging physical phonorecord, download/Non-Fungible Token (NFT) markets amounting to tens of millions of dollars in annual royalty revenue for music creators. Those issues were spelled out extensively in our own Comments of July 26, 2021, and later updated in our Letter of October 20, 2021.

There is little mystery why the Major Music Conglomerates would choose not to acknowledge the existence of these many music creator dissenters, or to comment on

[11] https://app.crb.gov/document/download/25577 at 4-5.
[12] See, e.g., https://thetrichordist.com/2021/07/27/frozen-mechanicals-crisis-davidpoemusics-comment-to-the-copyright-royalty-board/ and https://thetrichordist.com/category/frozen-mechanicals/.
[13] See, https://app.crb.gov/case/detail/21-CRB-0001-PR%20%282023-2027%29 for comments filed between dates July 19 and August 2, 2021.

what those dissenters had to say. As the CRB itself noted presciently in its Phonorecords III determination, "NMPA and NSAI represent individual songwriters and publishers." For them to "engage in anti-competitive price-fixing at below-market rates," would be against the interests of their potential constituents, who would likely "seek representation elsewhere" if they were so concerned.[14]

In the current instance, the Major Music Conglomerates seem to be actively seeking to obfuscate the fact that this result, for whatever reason, is exactly what has transpired. The multiple sets of comments received by the CRB from US and global music creator advocacy groups bluntly criticizing the frozen royalty rate proposal signify the raising of voices of those representing a vast portion of the world's music creators against the proposal's obvious inadvisability and irrationality. The isolated support for the proposal by NSAI, an organization that represents only a tiny sliver of US songwriters and composers principally from a single genre and local geographic area (and whose presumptively underwritten presence in the proceeding raises significant questions about whether it can truly represent any collection of songwriters and composers - let alone the actual, diverse universe whose rights and livelihoods are presently at stake), has been drowned out by hundreds of thousands of other music creators arguing substantively through their organizational representatives against the thoroughly unreasonable nature of extending frozen rates for another five-year period.

Thus is the specious nature of the Major Music Conglomerates' central claim --that the CRB has neither the authority nor sufficient reason to reject the proposed mechanical rate freeze as unreasonable-- demonstrated. Fulfilling all statutory requirements, a participant in the proceedings (George Johnson) has objected to the privately negotiated deal concocted by the vertically integrated Conglomerates. Further, numerous interested commentators who "would be bound by the terms, rates, or other determination set by the agreement" have joined with Johnson in providing to the CRB amply detailed comments demonstrating significant, multiple changes in circumstances that make the proposed agreement unreasonable and irrationally flawed in 2021.

Under such circumstances, the CRB would be well within the scope of its statutory authority to either "decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement," or to reject it altogether. We prefer the latter, but respectfully suggest that it should most certainly do one or the other.

Moreover, the assertion by the Major Music Conglomerates that the CRB lacks sufficient reason or authority to review the Memorandum of Understanding ("MOU")[15] negotiated and agreed upon concurrently with the Frozen Rate Proposal

[14] Phonorecords III at 15298.

[15] According to the Major Music Conglomerates: "Specifically, this memorandum of understanding ("MOU") provides for (1) participating record companies and music publishers to work collaboratively on licensing processes to improve clearance of new

for its effect on that rate proposal, is equally without merit. In their submission of August 10, 2021, the Conglomerates go so far as to claim that they "did not present the MOU to the Judges because they viewed it as routine, and irrelevant to the Judges' decision-making concerning the Settlement." To put it mildly, the Songwriter and Composer community views this statement with uneasiness as it pertains to the general issues of fairness and transparency in the Phonorecord IV proceeding, and hopes the CRB shares our concerns.

It suffices to say that two agreements --negotiated side by side with one another at the same time by the same parties regarding details of the same general matter—inarguably stand a substantial chance of being inter-related through both their content and potential *quid pro quos*. We therefore believe it obvious that in evaluating the fairness and reasonableness of one, the terms and scope of the other should be considered as a matter of course for reasons of both best practices and common sense.

B. The Unfairness and Inadvisability of Frozen Subpart B Mechanical Royalty Rates

In our Comments of July 26, 2021, the Independent Music Creators explained in detail the historic unfairness of frozen mechanical royalty rates during the periods 1909 to 1978 (7 decades), and 2006 to the present (1.5 decades and counting):

> [T]he Copyright Royalty Board opted in the rate-setting proceedings Phonorecords I (2006), Phonorecords II (2011) and Phonorecords III (2016) to adopt "roll forward" recommendations regarding the 9.1 cent royalty rate relative to Subpart B, principally without the formal objection of music creators. In those years, members of the songwriter and composer community were forced to focus on pleading for substantial increases in the pitifully low digital streaming rates that were driving most music creators either into poverty or out of the music industry altogether. That same drastic problem, unfortunately, remains for music creators. Streaming royalty rates continue to be the subject of ongoing federal litigation brought by copyright users in the digital music distribution industry to negate rate increases mandated in Phonorecords III. The case is currently on remand back to the CRB.
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> Thus, economic circumstances for songwriters and composers --after fifteen years of a 9.1 cent rate applicable to Subpart B uses-- are more dire than ever. That is especially true in light of the hardships brought on by the recent pandemic. The vast majority of songwriters and composers simply cannot abide a continuation of

releases, (2) a procedure for bulk distribution of mechanical royalties accrued by participating record companies that are not otherwise payable, and (3) late fee waivers when participating record companies follow specified clearance procedures for new releases." See, https://app.crb.gov/document/download/25577 at 6.

> this financially strangling status quo any longer. To do so would be to rubber stamp the extension of a *second* era of frozen mechanical royalty rates applicable to the sale of physical phonorecords and permanent downloads, for a period that would now stretch to over *twenty years* and counting (2006-2027).
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> To put the effect of such result into numerical perspective, even a simple cost of living application to the subject statutory mechanical royalty rate since 2006 would have already yielded a 2021 royalty rate of 12 cents under CPI measurements.[16] The 9.1 cent rate, in other words, *has already been devalued by one third* in real dollars since its implementation. That leaves aside the historical legacy of the 2-cent rate from 1909, which would in 2021 dollars equal over 55 cents pursuant to those same CPI formulas.[17] While no one is suggesting this latter extrapolation be considered dispositive on the issue of new rate-setting, it does starkly demonstrate the outrageous unfairness that has been imposed on the music creator community over a period of more than an entire century.[18]

Since our submission of those Comments of July 26, 2021to the CRB this past summer, the news concerning inflation in the US has grown significantly more dire, representing an even more drastic change in circumstances from the recent past. The US Bureau of Labor Statistics announced in October 2021 that:

> The "all items" index rose 6.2 percent for the 12 months ending October, the largest 12 month increase since the period ending November 1990. The index for "all items less food and energy" rose 4.6 percent over the last 12 months, the largest 12-month increase since the period ending August 1991. The energy index rose 30.0 percent over the last 12 months, and the food index increased 5.3 percent.[19]

In that same month, the US Social Security Administration made a similar announcement regarding the application of Consumer Price Index (CPI)-based cost-of-living adjustments (COLA) to Social Security benefits:

> The latest COLA is 5.9 percent for Social Security benefits and SSI payments. Social Security benefits will increase by 5.9 percent beginning with the December 2021 benefits, which are payable in January 2022. Federal SSI payment levels will also increase by 5.9 percent effective for payments made for January 2022.[20]

As the Independent Music Creators stated in our October 20, 2021 letter to the CRB concerning these alarming economic trends:

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[16] https://www.bls.gov/data/inflation_calculator.htm
[17] Ibid.
[18] As songwriter and recording artist Michelle Shocked has so aptly commented on this issue, "many may forgive the past, but we do not forget it." Ms. Shocked has endorsed these Comments of November 22, 2021.
[19] https://www.bls.gov/news.release/cpi.nr0.htm
[20] See, https://www.ssa.gov/cola/

> By applying October 2021 Consumer Price Index and SSI COLA statistics (a projected additional 5.9% inflationary increase in 2021) to numbers previously submitted in our [prior Comments of July 26, 2021 at page 4], the 9.1 cent mechanical rate in 2006 should today have the equivalent value in 2021-2022 of 12.92 cents. ***Put another way, according to new US Government statistics, Subpart B mechanical royalty rates have suffered an approximate 42% drop in value over the past fifteen years simply by standing still.*** [emphasis added].

We take this opportunity to respectfully pose the question to the CRB: *How can songwriters and composers financially survive under such circumstances without the institution of an inflationary adjustment system?* The answer is, we can't, any more than Social Security beneficiaries would be able to withstand such a precipitous drop in value of their benefits for any sustained period.[21]

The music creator community and the music publishing industry have faced this situation before. In 1987, with the mechanical royalty rate set at 5 cents / .95 cents per minute and the country facing fears of runaway inflation, NMPA (under prior leadership) joined with the Songwriters Guild of America to advocate successfully before the US Copyright Royalty Tribunal for establishment of new rates based upon CPI-based COLA adjustments. All other participants acquiesced. As a result, over the ten-year period between 1988 and 1997, mechanical rates kept pace with inflation by *rising* nearly 40%, instead of dropping 40% in value.[22] That rate of increase sustained tens of thousands of songwriters, composers and publishers in business through very rough economic times.

Moreover, in June of this year, perhaps sensing that inflationary times were about to return, the CRB acted decisively on the recommendation of the record industry in the Webcasting V proceeding. The Board established new webcasting rates regarding sound recording uses under §114 for the years 2021-25 that will include the following royalty rate adjustment formula:

> The Copyright Royalty Judges shall adjust the royalty fees each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year.[23]

One might wonder how the record industry can successfully advocate for CPI adjustments for its own royalties in Webcasting V,[24] and yet refuse to accept such adjustments for the mechanical royalties it pays to music creators and music publishers in Phonorecords IV. One might also be justified in questioning how NMPA and NSAI can possibly accept this position and still be considered as "advocates" for the music creator

[21] See, https://www.hypebot.com/hypebot/2021/06/will-the-copyright-royalty-board-share-the-madness-of-pretending-that-songwriters-dont-feel-the-effects-of-economic-inflation.html
[22] https://copyright.gov/licensing/m200a.pdf
[23] See, e.g., https://musictechpolicy.com/2021/06/13/the-copyright-royalty-board-gets-it-right-new-increased-inflation-adjusted-royalty-rates-for-webcasting/
[24] https://copyright.gov/licensing/m200a.pdf

community.[25] The conflicts of interest that have driven those latter two organizations to act in this manner are important, but immaterial to rectifying the situation as it now exists. Under such circumstances, we simply and respectfully request that the CRB undertake consideration of the following, alternative proposal (or language akin to it):

> The Copyright Royalty Judges shall adjust the royalty fees payable under 37 C.F.R. Part 385 Subpart B for the year 2023 by adjusting the current fees to reflect the aggregate, compounded change occurring in the cost of living from September 2006 to September 2022 as determined by the Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published annually by the Secretary of Labor. The Copyright Royalty Judges shall thereafter adjust such royalty fees each subsequent year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor for September to September of the preceding year. At no point, however, shall such royalty fees be adjusted by the Copyright Royalty Judges below the level of rates set in 2006.

We believe this solution to be both sound and equitable, principally only restoring *without retroactive effect* the financial position of music creators and music publishers to the royalty rate values they achieved in 2006, the time of the last rate adjustment of royalty fees payable under Subpart B.[26] (It is important to note that precedent and support for such a prospective adjustment methodology can also be found in §805 of the Copyright Act).[27]

We also hasten to point out that even with upward adjustment by the CRB of Subpart B royalty rates pursuant to our Comments, such rates may still unfortunately remain subject to the debilitating effects of controlled composition clauses (submitted to by music publishers and creators in their agreements with record companies often on a coercive, "take it or leave it" basis).[28] It is worth noting that even today, those clauses are still shamefully serving, in some cases, to freeze royalty fees on physical sound carriers at rates as low as 2 cents-- the identical royalty rate paid by "recording" companies in 1909, one hundred and eleven years ago. This is yet another reason to question the recording

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[25] See, https://www.hypebot.com/hypebot/2021/06/will-the-copyright-royalty-board-share-the-madness-of-pretending-that-songwriters-dont-feel-the-effects-of-economic-inflation.html

[27] 805. General rule for voluntarily negotiated agreements

Any rates or terms under this title that—

(1) are agreed to by participants to a proceeding under section 803(3),

(2) are adopted by the Copyright Royalty Judges as part of a determination under this chapter, and

(3) are in effect for a period shorter than would otherwise apply under a determination pursuant to this chapter, shall remain in effect for such period of time as would otherwise apply under such determination, *except that the Copyright Royalty Judges shall adjust the rates pursuant to the voluntary negotiations to reflect national monetary inflation during the additional period the rates remain in effect* [emphasis added].

[28] See, https://www.royaltyexchange.com/blog/mechanical-royalties

industry's opposition to inflationary adjustments to Subpart B royalty rates for those limited number of music creators and music publishers not subject to controlled composition clauses.

Moreover, we feel similarly obliged to repeat our strong objection to mischaracterizations by the Major Music Conglomerates (joined by NSAI) that Subpart B uses of music have declined to the point of insignificance. As we stated in our Comments of July 26, 2021 (and updated in our Letter of October 20, 2021), such claims are patently untrustworthy. Subpart B income continues to constitute a significant and now growing source of revenue for independent music creators and music publishers:

> According to the RIAA's *Year-End 2020 Revenue Report*,[29] the record industry's total US revenues in both 2019 and 2020 from the combined categories of physical phonorecords and permanent downloads surpassed $1 billion in each of those years, correlating on a percentage basis to 14.3% of total revenues in 2020 and 17% of total revenues in 2019….The data published by the International Federation of the Phonographic Industry (IFPI) for 2020 regarding global recorded music revenues is even more starkly indicative of the continuing statistical and economic importance of physical phonorecords and permanent downloads. According to IFPI, those two categories combined for *over 25%* of total worldwide earnings.[30]
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> On the basis of these numbers, it would seem a near impossibility for mechanical royalties attributable to physical phonorecords and permanent downloads (projected by NSAI to be less than 1% of US mechanical revenues by 2027) to represent anywhere near such a tiny comparable percentage to total recording revenue in the same categories. That is *especially* so when one takes into account the fact that recording revenues from vinyl recordings are actually *growing* at a substantial rate (a 30% increase in 2020), not diminishing. In fact, recent reports for the first half of 2021 indicate that this vinyl growth trend is actually accelerating. ***Vinyl sales in quarters one and two of 2021 reportedly rose a whopping 108% over the same period in 2020,[31] and demand for vinyl records is outpacing manufacturing capabilities on both a national and global basis***.[32] (emphasis added)
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> [W]hile no one can plausibly argue that "traditional" mechanical uses of music have not shifted significantly toward streaming on demand in the digital age, that is not to say that Subpart B uses in the US are disappearing or anything close to it. Subpart B mechanical royalty income remains a substantial and continuing revenue source for many music creators and independent music publishers, almost

[29] https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf
[30] https://www.ifpi.org/our-industry/industry-data/
[31] https://www.cnbc.com/2021/07/13/music-fans-pushed-sales-of-vinyl-albums-higher-in-first-half-of-2021.html
[32] https://static.billboard.com/files/2021/06/june-08-2021-billboard-bulletin-1623187818.pdf

certainly amounting to tens of millions of dollars per year out of the $823.5 million in mechanical royalties NMPA reports are generated annually in the US.[33]

And make no mistake about it. Those tens of millions in annual Subpart B revenues are keeping thousands of songwriters and composers financially afloat in an age that continues to be dominated by unlicensed uses of music on the Internet, and far-below market value royalty rates being paid for music streaming. The freezing of the Subpart B royalty rate starting in 2006 has inarguably caused significant financial harm to creators in an era when they could least afford it.

We note that not one effective word regarding the above facts and assertions was offered in rebuttal by the Major Music Conglomerates or their related songwriter group (whether in their submission of August 10, 2021 or otherwise), even in the face of recent media reports that the demand for vinyl recordings is so great as to be outstripping the abilities of manufacturing facilities to keep pace.[34] Those circumstances alone call into question the unreasonable and irresponsible nature of the frozen mechanical rate proposal.

In light of the foregoing factors, the Independent Music Creator community again respectfully implores the CRB to consider our suggested, compromise solution that would simply adjust, restore and maintain the equivalent values of Subpart B royalty fees to 2006 levels.

C. Avoiding the Frozen Rate-Setting Precedent That an Overwhelming Percentage of US and Global Songwriters and Composers Do Not Want and Cannot Afford

Placing aside for the moment the direct economic damage that adoption of the Major Music Conglomerates' frozen mechanical rates proposal would inflict on independent music creators and publishers, there is a collateral issue raised by that proposal of even greater concern.

As dolefully predicted in our Comments of July 26, 2021, digital music distributors participating in the Phonorecords IV proceeding have seized upon the frozen rate proposal offered up by the Major Music Conglomerates as a pretext to call for frozen or lowered royalty rates applicable to streaming on demand.[35] Music creators view this situation as potentially catastrophic.

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[33] https://www.royaltyexchange.com/blog/u-s-music-publishing-grows-nearly-10-to-over-4b-in-2020
[34] https://www.npr.org/2021/10/22/1048288997/manufacturers-are-having-a-hard-time-keeping-up-with-vinyl-record-sales

[35] See our Comments of July 26, 2021 at 14: "Thus has the current Phonorecords IV Subpart B settlement negotiation process continued to move forward without independent music creator input, tainted by the appearance of conflicts of interest created through vertical integration. Unsurprisingly, the resulting 'settlements' now unfairly threaten to harm the ability of music creators to argue successfully for substantial and desperately needed increases in streaming royalty rates. In that regard, shortly after the March 2 Notice was filed by the Settling Parties concerning their anticipated agreement to again freeze Subpart B royalty rates in Phonorecords IV, a witness for the music streaming company Pandora in the Phonorecords III Remand proceeding filed testimony citing the March 2 Notice as proof that frozen or diminished streaming royalty rates are similarly needed as a matter of

According to industry analyst and attorney Gwendolyn Seale in her editorial of October 27, 2021 in *The Trichordist*:

> Last week, participants in *Phonorecords IV* filed the public versions of their written direct statements with the Copyright Royalty Board (CRB) – and since, countless articles have surfaced from the major music media outlets with headlines reading, "Streaming Services Propose Lowest Rates in History for Songwriters"(see here: https://www.musicbusinessworldwide.com/spotify-and-other-streaming-services-propose-lowest-royalty-rates-in-history-for-songwriters/) and tuneful soundbites equating this proceeding to a "war."
>
> It is absolutely accurate that the streaming services are pushing for abysmal rates and terms in *Phono IV*. Some services like Amazon, Pandora and Spotify actually advocate to a return of the rates and terms from prior rate setting "wars" in *Phono I (2006)* and *II (2011).* Others, like Apple, suggest applying the rates and terms that are determined by the CRB in *Phono III*…. Nevertheless, there is something that has been conveniently omitted from each of these media articles: "the why." Why are the services proposing the "lowest rates in history?" What justification do the services provide for their positions? Unfortunately, the answer is not as simple as the streaming services playing the role of "the villains" in the "war" for songwriters' livelihoods.
>
> When you download the hundreds of pages of the services' written direct testimony from the CRB, and wade through the arguments in the mire of heavily redacted passages, there is a surprising common theme used to bolster every last one of their positions: the proposed settlement by the NMPA, NSAI and the three major labels to freeze rates for physical product like vinyl and permanent downloads (the Subpart B configurations) (see here: https://app.crb.gov/document/download/25288).
>
> Simply put, **every service** used the NMPA and NSAI proposed settlement for physical as a benchmark to support their abysmal rates on streaming[36] (original emphasis).

Even more simply put, the independent US and International music creator communities thoroughly reject the position of the Major Music Conglomerates (including NSAI) that a

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both sound policy and fairness.(Ft Nt See pages 65-67 at https://app.crb.gov/document/download/23858; https://thetrichordist.com/2021/06/25/guest-post-by-sealeinthedeal-a-foreseeable- result-of-the-phonorecords-iv-private-settlement-opening-pandoras-box/), This predictable backfiring of the Settling Parties' 'roll forward' strategy is likely to be the catalyst for many more, baseless claims by other members of the digital distribution community desperately seeking to avoid paying market value streaming royalty rates under the Phonorecord III Remand and the Phonorecord IV proceeding."

[36] https://thetrichordist.com/2021/10/27/a-potential-solution-in-phono-iv-to-the-streaming-services-lowest-in-history-rate-proposals-withdrawing-the-settlement-to-freeze/. To access quotes from several of the submissions referenced, please click through on the link provided in the editorial.

freeze on Subpart B mechanical royalty fees bears any resemblance to a reasonable, rational agreement negotiated at arm's length.[37] We respectfully urge the CRB not only to reject the proposal, but to assign to it zero weight in balancing the equities in regard to the determination of Phonorecord IV streaming rates.

As noted, NSAI does not represent anything more than a tiny splinter of the American and international music creator communities.[38] The creative community as a whole should not be punished for NSAI's and NMPA's positions on frozen Subpart B royalty rates, which in this instance are wholly anathema to the rights and interests of the rest of us. Our community has been economically ravaged by the imposition of below-market music streaming rates for virtually the entire digital era. To allow the Major Music Conglomerates to place yet another obstacle in our path toward fair remuneration under the willing-buyer/willing seller standard would, in an economic sense, be both a travesty and a tragedy. And that is something none of us can afford.

D. The Importance of Future, Non-Participant Music Creator Comments in Phonorecord IV and Other Proceedings

Finally, we take this opportunity to respectfully remind the CRB of the suggestion set forth in our Comments of July 26, 2021 concerning the advantages of increasing diversity of representation in future CRB proceedings:

> We urge that the CRB recommend the undertaking of a study by the US Copyright Office to improve the ability of independent music creators and music publishers to more fully participate in CRB proceedings at reasonable cost. The current inability of all but the major music publishers and their affiliated music publisher and music creator groups to effectively participate in CRB proceedings due to the costs of such participation must be effectively addressed. Until then, it is incumbent upon the CRB to help level the playing field by taking into account the interests and predicaments of the independent music creator community, whose Constitutional, creative and economic interests the US Copyright Act is primarily intended to protect pursuant to Article I, §8 of the US Constitution.[39]

Further in that regard, consideration of amendments to §803 of the US Copyright Act to provide a greater opportunity for interested but non-participant parties to comment on the

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[37] See, https://www.digitalmusicnews.com/2021/11/11/songwriter-royalty-rates/?mc_cid=21a9a70f49&mc_eid=6413d85342

[38] As we stated in our comments of July 26, 2021 at 9:

"In regard to NSAI, its demonstrably uniform alignment with NMPA on a broad array of music industry issues over recent years has in our view appeared so unwavering as to approach potential inseparability. As a result, we believe we are correct to be concerned that the organization cannot be said in this instance to represent music creator rights and interests in an independent, unbiased manner. In an informal survey conducted by the well-respected music industry publication *Trichordist*, to our knowledge not a single music creator entity (either organizational or individual) responded that it intended to join NSAI and its narrow membership in support of the "royalty freeze" proposal. Organizations and individuals representing hundreds of thousands of songwriters, composers and lyricists, on the other hand, have publicly voiced objection to the proposed royalty rate freeze."

[39] See our comments of July 26 2021 at 16.

record at the behest of the CRB regarding issues of particular economic and cultural importance (beyond those addressed by § 801(b)(7)(a)) would be a most welcome subject of inquiry.

IV. Conclusion

We thank the Copyright Royalty Judges and the CRB for this opportunity to participate on the record in the Phonorecord IV proceedings through the submission of these Comments.

Respectfully submitted,

Rick Carnes
President, Songwriters Guild of America
Officer, Music Creators North America

Ashley Irwin
President, Society of Composers and Lyricists
Co-Chair, Music Creators North America

Songwriters Guild of America (SGA): https://www.songwritersguild.com/site/index.php
Society of Composers & Lyricists (SCL): https://thescl.com
Music Creators North America (MCNA): https://www.musiccreatorsna.org

cc: Charles J. Sanders, Esq.
Ms. Carla Hayden, US Librarian of Congress
Ms. Shira Perlmutter, US Register of Copyrights
Mr. Eddie Schwartz, President, MCNA/International Council of Music Creators (CIAM)
The Members of the US Senate and House Judiciary Committees
The Members of the US Senate and House Appropriations Committees

List of Other Supporting Organizations
Alliance for Women Film Composers (AWFC). https://theawfc.com
Alliance of Latin American Composers & Authors (AlcaMusica) https://www.alcamusica.org
Asia-Pacific Music Creators Alliance (APMA), https://apmaciam.wixsite.com/home/news
European Composers and Songwriters Alliance (ECSA), https://composeralliance.org
The Ivors Academy (IVORS), https://ivorsacademy.com
Music Answers (M.A.), https://www.musicanswers.org
Pan-African Composers and Songwriters Alliance (PACSA), http://www.pacsa.org
Screen Composers Guild of Canada (SCGC), https://screencomposers.ca
Songwriters Association of Canada (SAC), http://www.songwriters.ca

ATTACHMENT A

MUSIC CREATORS

MCNA

NORTH AMERICA
5120 Virginia Way, Suite C22
Brentwood, TN 37027
615 742 9945

October 20, 2021

Chief Copyright Royalty Judge Jesse M. Feder
Copyright Royalty Judge David R. Strickler
Copyright Royalty Judge Steve Ruwe
US Copyright Royalty Board
101 Independence Ave SE / P.O. Box 70977
Washington, DC 20024-0977

In re DOCKET NO. 21-CRB-0001-PR-(2023-2027) Making and Distributing Phonorecords (Phonorecords IV) Notice of Proposed Rulemaking re: 37 C.F.R. Part 385 Subpart B.

Re: Updating information presented to the Copyright Royalty Board (CRB) in "Comments" dated July 26, 2021,[40] submitted by the Songwriters Guild of America, Inc., the Society of Composers & Lyricists, Music Creators North America, and the individual music creators Rick Carnes and Ashley Irwin (endorsed by the Alliance for Women Film Composers (AWFC), the Alliance of Latin American Composers & Authors (AlcaMusica), the Asia-Pacific Music Creators Alliance (APMA), the European Composers and Songwriters Alliance (ECSA), The Ivors Academy (IVORS), Music Answers (M.A.), the Pan-African Composers and Songwriters Alliance (PACSA), the Screen Composers Guild of Canada (SCGC), and the Songwriters Association of Canada (SAC)).

To Your Honors:

Further to our prior Comments, the groups referenced immediately above respectfully write to inform the CRB of additional, new facts that may be relevant to its ongoing deliberations concerning the "Motion to Adopt Settlement of Statutory Royalty Rates and Terms For Subpart

[40] See, https://app.crb.gov/document/download/25535?fbclid=IwAR2rAqy7qiW8kk2KYX4XEEPYKHnleB4WTTvWmY0J_rOr9u6Zebjadp8SiMA

B Configurations" filed by various Phonorecords IV participants on May 25, 2021 ("Settlement Motion").[41]

Specifically, we wish to update the factual data presented in those Comments with subsequent news and reported figures relevant to points made concerning the overwhelming importance of raising US mechanical royalty rates on physical phonorecords, permanent downloads and other configurations and delivery methods under 37 C.F.R. Part 385 Subpart B.

In that regard, we ask you to note the following, new information published by respected sources including the US Government:

1. **Latest Cost-Of-Living Adjustments (Oct 2021)**
   US Social Security Administration
   https://www.ssa.gov/oact/cola/latestCOLA.html;
   https://www.ssa.gov/news/press/factsheets/colafacts2022.pdf
   https://www.bls.gov/cpi/

By applying October 2021 Consumer Price Index and SSI COLA statistics (a projected additional 5.9% inflationary increase in 2021) to numbers previously submitted in our Comments at page 4, the 9.1 cent mechanical rate in 2006 should today have the equivalent value in 2021-2022 of 12.922 cents. Put another way, according to new US Government statistics, Subpart B mechanical royalty rates have suffered an approximate 42% drop in value over the past fifteen years simply by standing still.

2. **The Future of Music is (Still) Vinyl**
   Axios, Sept. 17, 2021
   https://www.axios.com/vinyl-sales-growth-music-industry-5b54cf4f-d46f-4e5a-9f9a-6bef05a2935d.html

Adding to information included in our Comments at page 10: **"The bottom line:** Even as tech changes the way we entertain ourselves — and makes certain forms of media obsolete — vinyl has the powerful asset of coolness to keep it alive."

Thank for your consideration of this new information. We look forward to receiving news of your disposition of the Settlement Motion following your reflection of the points set forth in our Comments, and invite your further questions at any time.

[41] See, https://app.crb.gov/document/download/25288

Respectfully submitted,

Rick Carnes
President, Songwriters Guild of America
Officer, Music Creators North America

Ashley Irwin
President, Society of Composers and Lyricists
Co-Chair, Music Creators North America

List of Supporting Organizations

Songwriters Guild of America (SGA), https://www.songwritersguild.com/site/index.php
Society of Composers & Lyricists (SCL), https://thescl.com
Alliance for Women Film Composers (AWFC). https://theawfc.com
Songwriters Association of Canada (SAC), http://www.songwriters.ca
Screen Composers Guild of Canada (SCGC), https://screencomposers.ca
Music Creators North America (MCNA), https://www.musiccreatorsna.org
Music Answers (M.A.), https://www.musicanswers.org
Alliance of Lain American Composers & Authors (ALCAMusica), https://www.alcamusica.org
Asia-Pacific Music Creators Alliance (APMA), https://apmaciam.wixsite.com/home/news
European Composers and Songwriters Alliance (ECSA), https://composeralliance.org
Pan-African Composers and Songwriters Alliance (PACSA), http://www.pacsa.org

cc: Ms. Carla Hayden, US Librarian of Congress
Ms. Shira Perlmutter, US Register of Copyrights
Mr. Alfons Karabuda, President, International Music Council
Mr. Eddie Schwartz, President, MCNA and International Council of Music Creators (CIAM)
The MCNA Board of Directors
The Members of the US Senate and House Sub-Committees on Intellectual Property
Charles J. Sanders, Esq.