–MUSIC CREATORS

MCNA

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July 1, 2022

**COPYRIGHT ROYALTY BOARD (CRB)**
**In re DOCKET NO. 21-CRB-0001-PR-(2023-2027)**
**Making and Distributing Phonorecords (Phonorecords IV)**
**Notice of Proposed Rulemaking[1] re: 37 C.F.R. Part 385 Subpart B**

**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, and endorsed by the Music Creator Groups Noted on the Appended Listing**

## I. Introduction and Statements of Interest

The following Comments are respectfully submitted by the signatory organizations Songwriters Guild of America, Inc. ("SGA"),[2] Society of Composers & Lyricists ("SCL"),[3] and Music Creators North America ("MCNA"),[4] and by the individuals Rick Carnes[5] and Ashley Irwin[6] (the parties sometimes collectively referred to herein as the "Independent Music Creators"). MCNA also represents the interests of the international music creator groups additionally listed at the end of this letter through its affiliation (as its North American continental representative) with the International Council of Music Creators (CIAM).[7] Together, these groups represent and advocate on behalf of hundreds of thousands of independent songwriters, composers and lyricists in the United States (US) and throughout the world.

Today, we respectfully ask the CRB to modify or decline to approve in its present form --as a necessity for providing economic and legal justice for music creators-- the proposed settlement concerning subpart B mechanical royalties submitted by the vertically integrated multinational recording and publishing companies individually known throughout the music industry as Universal, Warner and Sony music companies (the "Majors"), and by their related trade

[1] https://www.federalregister.gov/documents/2022/06/01/2022-11521/determination-of-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv
[2] https://www.songwritersguild.com/site/index.php
[3] https://thescl.com/
[4] https://www.musiccreatorsna.org
[5] https://www.songwritersguild.com/site/rick-carnes
[6] https://en.wikipedia.org/wiki/Ashley_Irwin
[7] https://ciamcreators.org Some CIAM member groups, including the Asia-Pacific Music Creators Alliance, have specifically requested to be listed as endorsers.

association National Music Publishers Association (NMPA) and its allied organization, the Nashville Songwriters Association International (NSAI).[8]

### A. The Commenting Organizations

**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 over 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 2500 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 International**,[9] which is the leading US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

## II. Summary of Recent Events Related to These Proceedings

[8] It remains our position, as we have stated in prior comments (as noted in the recent CRB decision of March 24, 2022), that "[t]he proposed settlement at issue was negotiated by and among the three major, multinational record conglomerates…the US music publisher trade group NMPA (whose largest members include the music publishing affiliates of those major record companies), and inexplicably, the [NSAI]." See, https://www.federalregister.gov/documents/2022/03/30/2022-06691/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv

[9] https://www.fairtrademusicinternational.org/

**A. Independent Music Creator Letter to the CRB of April 9, 2022—**Following the welcome decision rendered by the CRB on March 24, 2022 to reject the proposed, two-decade "frozen rate" settlement proposal put forth by the Major music conglomerates,[10] NMPA and NSAI, a letter to the CRB dated April 9, 2022 (appended hereto as "Attachment A") was sent by our Independent Music Creator groups.[11]

In that letter, our appreciation for the CRB's decision was expressed, especially the citing by the CRB of the various comments of independent songwriter, composer and music publisher organizations and individuals that highlighted (i) the barriers which vertical integration plays in preventing the offering by the Major labels and publishers of any settlements properly negotiated at arm's length, and (ii) the wisdom of applying a simple, consumer price index (CPI) correction to the base rate of 9.1 cents for downloads and physical product grounded in changes in the CPI since September, 2006 (when such rate went into effect) and annual CPI adjustments thereafter.

**B. Announcement of a New Settlement Proposal on May 5, 2022—**In April, 2022, the vertically integrated multinational recording and publishing companies returned to their negotiations to reconsider the rejected, two-decade royalty freeze proposal (already being trumpeted by digital music distributors as a pretext for arguing against future streaming rate adjustments), and re-emerged in early May, 2022 with a revised proposed settlement.[12] That proposal was enthusiastically announced by NMPA and NSAI as representing a "32% increase" in the subpart B mechanical royalty base rate with future CPI adjustments.[13] The revised proposal was subsequently submitted to the CRB for reconsideration.[14]

Among the crucial points not addressed in that announcement and CRB motion, however, were the facts (according to the U.S. Government's own, easily accessible CPI statistics and rate calculator) that: (i) by the end of 2021 the 9.1 cent royalty rate had already lost well over *40%* of its initial 2006 value; that (ii) the 2006 value of 9.1 cents was already 12 cents by early 2021, and by the time of introduction by the Majors of the revised May, 2022 settlement had further risen almost another 10% to 13.11 cents; that (iii) none of the above calculations take into account further discounting of royalty rates by the continuing imposition of controlled composition clauses by the Major labels and others; and that (iv) especially importantly, the Majors' new "flat base rate" 12 cent proposal would eliminate application of inflationary increases as measured by the CPI that occurred not only in the last three quarters of calendar year 2021, but also those changes in value through

[10] https://www.federalregister.gov/documents/2022/03/30/2022-06691/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv
[11] https://app.crb.gov/document/download/26436
[12] https://www.musicbusinessworldwide.com/files/2022/05/Joint-Motion-to-Adopt-New-Settlement-of-Statutory-Royalty-Rates-and-Terms-for-Subpart-B-Configurations-1.pdf
[13] https://www.nmpa.org/songwriter-artist-trade-groups-applaud-crb-mechanical-rate-increase/
[14] https://www.federalregister.gov/documents/2022/06/01/2022-11521/determination-of-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv

November of 2022 as well[15] --*a stretch of nearly two years currently expected to represent the worst inflationary period in the United States over the past four decades.*[16]

The question arises as to how such a proposed deal could truly have been struck "at arm's length" between "willing buyers and willing sellers." The motivations underlying the proposal can only be known by those who devised and agreed upon it. However, we note that to our knowledge, once again not a single independent music creator group was meaningfully consulted in the process of *negotiation* of the Majors' new proposal (an outreach that we believe would clearly have been permissible within the competition rules to which proceeding participants are subject). It was presented by the Major publishers and their representatives as a revised *fait accompli* to be approved by such groups (or not) prior to its submission to the CRB.

SCL, for example, was invited by NMPA to provide a quote for inclusion in its press announcement, publicly endorsing the new proposed settlement immediately prior to its publication. When NMPA was requested to provide a copy of the proposed agreement for consideration, SCL was informed that the new rate would be 12 cents subject to future adjustment pursuant to periodic changes in the CPI, and that other less relevant points were unavailable until publication. SCL declined as a matter of organizational policy to support a proposal it could not actually read in full or properly analyze. Other MCNA groups were not contacted at all.

In part as a result of this continuing lack of opportunity for independent music creators to meaningfully participate in the shaping of the revised proposal, the stark reality is that the un-modified implementation in 2023 of the Majors' new subpart B mechanical royalty rate proposal would actually provide approximately 16-20% ***less*** in actual value to songwriters and composers than the royalty rate implemented in 2006 and subsequently frozen for sixteen years.[17] It is also, nevertheless, a proposal currently being championed by the Major publishers, NMPA and NSAI with exactly the same narrative as the one that accompanied their initial and subsequently rejected freeze proposal: "this is the best we can do."

Unfortunately, without knowing or fully understanding the facts and circumstances behind the Majors' new proposal as described above, some creators and smaller music publisher groups have subsequently issued endorsements despite clearly having received incomplete information regarding the particulars of the current proposal and its obvious shortcomings. We hope that the CRB will again take the necessary steps to avoid allowing vertical integration and lack of transparency to overwhelm the fair and equitable exercise of governmental oversight intended by Congress-- regardless of the skill in

[15] Under the Major Conglomerates' new proposal, subsequent CPI adjustments would only commence with 2023 measurements (11/22 through 11/23), meaning that inflationary devaluation during nearly the entire years 2021 and 2022 would simply been ignored.

[16] https://www.usnews.com/news/us/articles/2022-02-10/us-inflation-might-have-hit-a-new-40-year-high-in-january

[17] This determination is based upon the reasonable extrapolation (pursuant to current CPI trending) that the present value of 9.1 cents in 2006 dollars will by the end of 2022 be equal to 14 cents or more.

salesmanship being demonstrated by the multi-billion-dollar corporations orchestrating it.[18]

## III. Discussion of Fairness in Royalty Rates and Fair Dealing in Practice

A. **Fairness in Subpart B Mechanical Royalty Rates**-- By agreeing to the sleight of hand maneuvers contained within the new royalty rate proposal as described above, the Major publishers, NMPA and NSAI have essentially proposed a revised settlement that acquiesces to foregoing payment over the next five years of what will likely amount to tens of millions of dollars in composer and songwriter royalties that would otherwise have been due from record labels had truly arm's length negotiations taken place between willing buyers and willing sellers.

As the Major publishers, NMPA and NSAI are well aware, in reality there was and remains little chance that their insistence on a settlement plan that would simply have applied CPI calculations through 2022 to the 2006 base rate, would have resulted in more extensive and expensive proceedings at the demand of the labels. That is especially so in light of the CRB's own comments in its March 24, 2022 decision indicating that just such an approach could easily be viable, after being adapted in ways to recognize that inflation rates had recently "increased significantly."[19] To claim otherwise as the reason for extending to record labels yet another apparent "sweetheart" royalty deal excluding application of sharply rising inflationary adjustments for nearly all of 2021 and 2022 appears to border on the absurd.[20]

Under such obvious circumstances, the potentially insidious role of vertical integration must again be considered. If there was smoke before, as the CRB noted in its decision of March 24, 2022, here is further evidence clearly suggestive of the underlying conflagration:

> Conflicts are inherent if not inevitable in the composition of the negotiating parties. Vertical integration linking music publishers and record labels raises a

[18] Many of these points, and others included herein, have also been raised by Phonorecord IV participant George Johnson in his most recent comments. While we do not join Mr. Johnson in his suggestions that we return all the way back to 1909 for application of CPI adjustments (except for purposes of providing historical background), we most certainly subscribe to his insistence that inflationary statistics covering the entire period of 2006 through the end of 2022 be included in determining a new, going-forward subpart B royalty base rate.

[19] As the CRB stated in its decision of March 24, 2022 (citing to Consumer Price Index figures): "[S]ixteen years at a static rate is unreasonable under the current record, if for no other reason than the continuous erosion of the value of the dollar by persistent inflation *that recently has increased significantly*." (emphasis added) https://www.federalregister.gov/documents/2022/03/30/2022-06691/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv.

[20] That is especially so when one considers that by delaying the application of proposed inflationary adjustments overall from 2006 though 2020, the labels have been enabled to pay future royalties in dollars so diminished in value that the relative past savings may actually wipe out any increases in royalty rates.

> warning flag…. While corporate relationships alone do not suffice as probative evidence of wrongdoing, they do provide smoke; the Judges must therefore assure themselves that there is no fire. The potential for self-dealing present in the negotiation of this proposed settlement and the questionable effects of the MOU are sufficient to question the reasonableness of the settlement at issue as a basis for setting statutory rates and terms."[21]

In prior comments to the CRB on this matter, the Independent Music Creators have on numerous occasions presented suggested language for a rule that would resolve the subpart B download and physical mechanical royalty rate issue in an equitable manner, with the simple application of a CPI-based formula on a going-forward basis using 2006 through 2022 statistics. Today, we once again respectfully present such a proposal (with slightly updated revisions in dates) for further consideration by the CRB as the potential basis for modification of the current proposal into a final determination --or alternatively-- to serve as a recommendation for a second revised settlement proposal among the participants:

> 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 November 2022 (inclusive) 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 November to November of the preceding year. At no point, however, shall such royalty fees be adjusted by the Copyright Royalty Judges below the level of rates effective in September 2006.

B. **Fair Dealing in Practice**—There are numerous other issues to be considered in the continuing subpart B Phonorecord IV proceedings and in general, including (i) the still murky issues of MOUs and private, insider agreements negotiated among the vertically integrated labels and publishers potentially being utilized to circumvent the authority, rate determinations and rulings of the CRB; (ii) the issue of limited download royalty rates and the unclear nature of pending proposals in that regard; and, (iii) the full scope of authority of the CRB to modify proposed settlement agreements among the participants to a proceeding prior to adopting them.[22]

If rules permit, we look forward to submitting comments on those issues, as well. As we have frequently expressed, however, we regard the current laws and regulations

[21] https://www.federalregister.gov/documents/2022/03/30/2022-06691/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv

[22] We also make note of our interest in at least pursuing discussion of the CRB's statutory authority as it pertains to the "buy button" issue that has been energetically raised and pursued by participant George Johnson over a period of many years.

governing the CRB to be severely lacking insofar as they concern the promotion of affordable, full participation by creator groups and individuals in proceedings that will significantly impact songwriter and composer livelihoods. In that regard, we noted in our letter to the CRB of April 9, 2022 that:

> Our intention [is] to follow through on a legislative initiative that would amend Chapter 8 of the US Copyright Act in order to expand the ability of interested music creator groups to more actively participate in proceedings before the CRB- despite the enormous gap in resources between multi-national recording and publishing conglomerates on the one hand, and creator groups on the other. The current system simply does not adequately account for the disparities in the participatory abilities of the two segments, a situation so obviously unfair that we believe it is essential for Congress to act promptly to address it.

As the next important step in that process, we have recently sent a letter dated June 24, 2022 to Members of Congress (together with other organizational colleagues) concerning numerous issues related to the protection of creators' rights in relation to the CRB, the MLC and other governmental and quasi-governmental entities, which is appended hereto as "Attachment B." We will also be consulting with the US Copyright Office on these matters in the immediate future, and eagerly look forward to helping usher into existence a new era characterized by far greater direct participation in CRB proceedings by members of the independent creative community.

## IV. Conclusion

We thank the CRB for its demonstrated desire to exercise sound oversight through the consideration a wide variety of viewpoints, including those of the interested, engaged and independent creators themselves. The rejection by the CRB of the frozen rate settlement and the submission of a revised proposal were clearly steps in the right direction. With implementation of the crucial changes discussed herein, our support of the revised proposal would undoubtedly be forthcoming. Absent such changes, however, the current proposal remains seriously and unnecessarily flawed and biased against the rights of creators to fair compensation amounting to the loss of tens of millions of dollars in creators revenues, making its unmodified adoption far less protective of the interests of the US and global songwriter and composer communities than it easily can and absolutely should be.

Respectfully submitted,

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

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

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

**List of Other Affiliated 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
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

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April 9, 2022

**Via Electronic Delivery**

Chief Copyright Royalty Judge Suzanne M. Barnett
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

**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**

To Your Honors:

On behalf of the hundreds of thousands of songwriters, composers and lyricists represented by the various organizations listed below,[23] we extend our thanks to the Copyright Royalty Judges for their dedication to the rule of law. The rejection on the basis of unreasonableness of the “Frozen Subpart B Mechanical Rate” settlement proposal in the CRB’s recent ruling of March 24, 2022 accomplished at least two crucial results for music creators, as were specifically intended by Congress under the US Copyright Act.

First, the decision rejects a grossly unfair royalty arrangement proposed by the NMPA, the NSAI and the major music publishers along with their own, vertically integrated and/or affiliated major record companies. Second, it likely quashes a potential plan by digital music distributors like Spotify to urge the CRB to enact a similar freeze on its royalty obligations to songwriters and

[23] This letter is intended to further update information presented to the Copyright Royalty Board (CRB) in Comments dated November 22, 2021, 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)).

composers on the pretext of "what's good for them should be good for us." Both results could have been catastrophic to future music creator income. [24]

We have every confidence that the ruling will withstand every level of groundless criticism and appeal, and that together, the various segments of the music community can soon move forward with an equitable, sane approach to addressing the issue of maintaining royalty value for music creators in these highly inflationary times. Those few multinational music corporations who insist on ignoring that their very businesses are built on the backs of the same creators they seem intent on denying fair compensation, have already revealed the shameless nature of their corporate strategy. It is reassuring to know that the CRB is very much aware of that fact and willing to act accordingly, as it did in recently rejecting the proposed insider frozen subpart B mechanical rate agreement.

Further in that regard, the independent music creator community, led by the signatories to this letter, want to be crystal clear in our willingness to work with our colleagues in the recording and music publishing sectors in helping to frame a new, voluntary CRB royalty settlement proposal that will be agreeable to the US and global songwriter and composer community as a whole. As interested but non-participating parties (for reasons of economics) in the CRB proceeding, we have taken careful and consistent note of the CRB's favorable inclination toward approving voluntary royalty-adjustment proposals that account for cost-of-living adjustments (such as the recent Webcasting V decision). As the CRB further noted in its Phonorecord IV decision of March 24, 2022:

> In the dynamic music industry, there is insufficient reason to conclude that a static musical works rate is reasonable. The determination rendered in 2008, with an effective date of 2006, cannot continue to bind the parties sixteen years later, absent sufficient record evidence that the *status quo* remains grounded in current facts and is a reasonable option. Since 2006, the retail marketplace for music has changed dramatically with regard to the Subpart B Configurations. From 2006 to 2008 (and, indeed, in years prior) the Subpart B Configurations dominated the recorded music marketplace.

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[24] Quoting directly from the CRB's decision:

"Pursuant to section 801(b)(7)(A)(ii), based on the totality of the present record— including the Judges' application of the law to that record, as well as GEO's [participant George Johnson's] objections, which, as noted *supra*, are consistent with the non-participant comments—the Judges find that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms.[19] Furthermore, the Judges find a paucity of evidence regarding the terms, conditions, and effects of the MOU [the moving parties' private memorandum of understanding]. Based on the record, the Judges also find they are unable to determine the value of consideration offered and accepted by each side in the MOU. These unknown factors, as highlighted in the record comments, provide the Judges with additional cause to conclude that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms."

> [19] Section 801(b)(7)(A) does not state which party—proponent or objector—might bear a burden of proof in connection with the Judges' evaluation of a proposed settlement and objections thereto. The Judges do not believe that a "burden of proof" issue exists in this settlement process, because evidence as described in the Judges' Rules, 37 CFR 351.10, is not required. ***However, were a burden of proof applicable in this proceeding, the Judges find that, if the burden were placed on the proposers of this settlement, they failed to meet that burden and, if the burden of proof were placed on GEO and/or the other commenters referenced above, they have met that burden.***

> By 2020, industry data collected by the Recording Industry Association of America showed that various forms of digital streaming accounted for 83% of recorded music market revenues. Notwithstanding the decrease in revenues attributable to Subpart B Configurations, in 2020, vinyl record sales surpassed the volume of CD album sales, signaling a resurgence in vinyl as a music medium. Even if the sales figures were otherwise, however, sixteen years at a static rate is unreasonable under the current record, if for no other reason than the continuous erosion of the value of the dollar by persistent inflation that recently has increased significantly. In this regard, application of a consumer price index cost of living increase, beginning in 2006, would yield a statutory subpart B royalty rate for 2021 of approximately $0.12 per unit as compared with the $0.091 that prevails, which adjustment, as noted *supra*, represents a 31.9% increase.
>
> The disparity between the static rate and the dynamic market is even more stark when considering the "controlled composition clause" that contractually lowers the statutory rate by 25%. Add to that the record labels' limit on album royalties to ten tracks, regardless of the number of songs actually included in each album. In other words, the statutory rate is not the effective rate record labels use in compensating songwriters and publishers.
>
> The proposed settlement did not include any adjustment to subpart B rates, not even an indexed increase. Adjudication of rates may provide the parties an opportunity to present evidence of the advisability of such an indexed increase.

In anticipation of this equitable and well-reasoned conclusion by the CRB, our groups submitted in Comments to the CRB dated November 22, 2021 in which we proposed draft language for an alternative voluntary settlement agreement. We stand by that proposal, which reads as follows:

> 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 further noted in our Comments the underlying rationale, background and benefits of the above language, which we consider to be a fair and even-handed approach:

> 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. (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).

Later in those same Comments, we took specific note of the recent Webcasting V precedent:

> Moreover, in June of [2021], 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.
>
> One might wonder how the record industry can successfully advocate for CPI adjustments for its own royalties in Webcasting V, 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 community.

We hope our music industry colleagues will seriously consider joining us in making this equitable settlement proposal a reality. As stated, we are ready, willing and able to commence discussions as soon as they are. Moreover, the post-decision comments of NMPA[25] and other music publishing industry representatives reflecting their support for what they term the "grassroots" music creator community give us encouragement that they, too, are ready to cooperatively move forward. In fact, according to SONY music publishing head Jon Platt, "The CRB judges listened to the voices of songwriter advocates who made a strong case for higher physical and download rates and agreed that they should be increased. While it is still too early to predict the outcome, we are pleased that the CRB is receptive to higher rates, and we stand by these songwriter advocates and applaud their grassroots efforts and achievements."[26]

In closing, we also wish to inform the CRB of our intention to follow through on a legislative initiative that would amend Chapter 8 of the US Copyright Act in order to expand the ability of interested music creator groups to more actively participate in proceedings before the CRB--despite the enormous gap in resources between multi-national recording and publishing conglomerates on the one hand, and creator groups on the other. The current system simply does not adequately account for the disparities in the participatory abilities of the two segments, a situation so obviously unfair that we believe it is essential for Congress to act promptly to

[25] https://www.billboard.com/pro/mechanical-royalty-rate-ditched-new-crb-ruling/#recipient_hashed=3a259dd7948fa5cf81748fd59fbfdb0cdc19448cf6f4bf505f19cde98578e9d3&utm_medium=email&utm_source=exacttarget&utm_campaign=billboard_BreakingNews&utm_content=341171_03-29-2022&utm_term=2803480

[26] https://www.billboard.com/pro/mechanical-royalties-crb-rate-settlement-major-labels-publishers/

address it. That is not in any way to denigrate the enormously important efforts of songwriter George Johnson, whose participation in CRB proceedings on a pro se basis without the benefit of legal counsel is much appreciated-- but acknowledged by Mr. Johnson himself as often a matter of him being spectacularly outgunned.

Judging from the reaction of those who disagree with the CRB's decision on the frozen rates proposal, and the arguments framed by some record labels which literally amount to "if you're too poor to fully participate in proceedings, your opinion is as worthless as your economic status and welfare," we expect to find at least some sympathetic ears on Capitol Hill. We hope that the US Copyright Office will support us in championing such reforms, as well.

Thank you again for your consideration.

Respectfully submitted,

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

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

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

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# “ATTACHMENT B”

June 24, 2022

The Honorable Patrick Leahy, United States Senate
The Honorable Jerrold Nadler, United States House of Representatives
The Honorable Thom Tillis, United States Senate
The Honorable Jim Jordan, United States House of Representatives

— via email —

Re: Important Legislative Concerns of the Independent Music Creator and Musical Artist Communities of the United States

Dear Chairmen Leahy and Nadler and Ranking Members Tillis and Jordan:

We write to you as an alliance of American independent music creator and musical artist groups and our international partner organizations. Together, we represent the professional interests and aspirations of more than half a million creators across America and throughout the world.

The recent announcement of a new, proposed settlement regarding the mechanical rate on physical recordings and downloads is positive news. Perhaps the most important aspect of this development is that truly independent songwriters were able to thwart a badly conceived agreement to freeze mechanical royalty rates for physical product. We believe that this successful grassroots effort demonstrates the need for a new paradigm for governmental actions that affect the broad and varied interests of music creators. [fn1]

The initial agreement that independent songwriters helped to derail, an agreement that was arrived at without their input, would have left mechanical royalty rates at the same level where they have sat for 16 years. This would have been very good for record companies, who pay these royalties, and the major publishers, who are owned and controlled by the same corporations that own the major record companies. But it would have been terrible for songwriters.

George Johnson, a courageous independent songwriter, initiated this effort. Subsequently joined by many members of our community [fn2] , most notably the Songwriters Guild of America (SGA) and Music Creators of North America (MCNA) [fn3], this forceful advocacy has resulted in a fairer --although by no means perfect-- proposal, one that includes a long-overdue increase in royalties, with periodic adjustments for inflation. While there is much more to be done to ensure a living wage for songwriters, one that is commensurate with their contributions, this is a step in the right direction.

This process, however, has exposed serious shortcomings in the Copyright Royalty Board (CRB) process and, more broadly, in other legislative, regulatory, and institutional processes that impact the music creator community.

• Participating in the CRB process remains economically unfeasible for the vast majority of songwriters and music creator organizations. Indeed, but for the stalwart efforts of one songwriter, George Johnson, who spent years familiarizing himself with rate standards and rate-setting procedures and countless hours representing himself in CRB proceedings, the original, deeply flawed deal would have likely remained in place. Independent songwriters need accessible, affordable representation in rate-setting proceedings. One solution might be legislation creating an independent songwriter advocate (or a panel of a small number of advocates), who would gather viewpoints from our community and argue for our equities in CRB proceedings. Moreover, as recently demonstrated, United States copyright law and its administration could be vastly improved without over-burdening the CRB if all interested parties affected by proposed settlements, rules, and/or decisions were granted the opportunity to submit comments (whether or not such commenters are parties to a proceeding).

• A broader array of voices needs to be heard in all legislative and regulatory contexts. While the original CRB settlement included a well-established songwriter organization, Nashville Songwriters Association International (NSAI), its views significantly differed from those of most other songwriter groups and independent songwriters. We believe that policymakers and regulators have a responsibility to provide opportunities for a broader sampling of views, including those of the many groups and individuals who might not frequently walk the halls of Congress or argue before regulatory bodies.

• In a similar vein, while the interests of publishers and songwriters may at times be aligned, publishers and their trade association, the National Music Publishers Association (NMPA), are not songwriters' representatives. In this case, publishers purported to be acting on behalf of songwriters, but the result they agreed to—as they, themselves, ultimately came to admit and the CRB concluded—substantially undervalued our work in the market.

• We believe legislation is required to, among other things, amend the Music Modernization Act to require a democratic, transparent process that results in equal and independent representation of songwriters and publishers on the governing board of the Music Licensing Collective (MLC). Such a requirement should be a condition precedent for the renewal of the Collective, which currently operates under a board of directors heavily weighted in favor of music publishing company interests. We note that, in an analogous situation, when SoundExchange was created, lawmakers clearly understood that record labels are not artist representatives. As a result, since its earliest stages, SoundExchange has efficiently operated with a 50/50 split between label and artist representatives.

• The initial, closed-door settlement that prompted so much outrage also demonstrates the urgent need for far greater transparency in a variety of processes. An important first step would be mandating that the required, minimum fifty percent songwriter share of royalties be directly paid at source from the MLC to the songwriter. In creating SoundExchange, Congress required such transparency, rather than simply trusting that record labels would provide it to recording artists. It is our belief that, where the MLC is concerned, such a split and such transparency should be required, as well. Again, this can be achieved through legislation and, certainly, as a condition precedent for the renewal of the existing Collective.

We are grateful for the opportunity to place before you our views and for your continued advocacy for music creators. We look forward to fully participating in your consideration of these proposals and any others affecting the hundreds of thousands of songwriters, composers, and performers we represent.

Respectfully,

Music Creators North America (MCNA)
MusicAnswers
Songwriters Guild of America (SGA)
Society of Composers & Lyricists (SCL)
Songwriters Association of Canada (SAC)
Screen Composers Guild of Canada (SGC)
Alliance for Women Film Composers (AWFC)
Artist Rights Alliance (ARA)
Alianza Latinoamericana de compositores y autores de música (ALCAM)
Asia-Pacific Music Creators Alliance (APMA)
Ivors Academy
The Pan-African Composers' and Songwriters' Alliance (PACSA)

cc:
Members of the Senate Committee on the Judiciary
Members of the House Committee on the Judiciary
Librarian of Congress
Register of Copyright
Director, Patent and Trademark Office

**Footnotes**

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1

https://www.billboard.com/pro/crb-major-labels-publishers-songwriter-mechanical-royalties-deal/

2

Statement of Rosanne Cash regarding the original CRB settlement @ https://app.crb.gov/document/download/25553

3

https://artistrightswatch.com/2022/04/12/music-creators-north-america-letter-to-copyright-royalty-board-on-unfrozen-mechanical-rates/