

Gwendolyn Seale, Esq.  
[gwen@miketolleson.com](mailto:gwen@miketolleson.com)  
512-480-8822

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

July 26, 2021

**SENT VIA ELECTRONIC DELIVERY**

**IN RE DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS, DOCKET NUMBER 21-CRB-0001-PR (2023-2027)  
(*Phonorecords IV*)**

Honorable Judges,

I am a music lawyer in Austin, Texas, and represent songwriters throughout the state of Texas. Over the last two months, I have spent a considerable amount of time educating songwriters about the proposed settlement (“Proposed Settlement”) presented by the three major labels, the National Music Publishers Association (NMPA) and Nashville Songwriters International (NSAI) (collectively “Settlement Parties”) to freeze the statutory mechanical rate in connection with physical products and digital downloads through 2027.

The feedback I received was straightforward and foreseeable: songwriters do not wish to see this rate frozen for yet another five years. As someone who works with songwriters far removed from the major music industry hubs, like Los Angeles, Nashville and New York, and from the place where the rules are made, Washington, D.C., you quickly recognize that a significant education gap exists, and many songwriters do not comprehend basic copyright and music publishing concepts. Naturally, if songwriters do not grasp music publishing basics, they do not know about this *Phonorecords IV* proceeding, or government rate-settings in general.

We must remember those songwriters as this rate-setting progresses – as they too are copyright owners who are entitled to due process and transparency. There would be no music publishing business without them.

Thank you for the opportunity to comment in this proceeding and please note that the views I am expressing here are not made on behalf of any client or the State Bar of Texas.

**I. Private Party Settlements Between Willing Buyers and Willing Sellers Representing Different Sides of the Same Corporate Coin Do Not Reflect an Effectively Competitive Market.**

With the passage of the Music Modernization Act in 2018, the Copyright Royalty Board (CRB) was instructed in future Section 115 rate-setting proceedings, like this *Phonorecords IV* proceeding, to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." Pub. L. No. 115-264, § 102(a)(3), 132 Stat. at 3680. In establishing such rates and terms, the Copyright Royalty Judges ("CRJs") are to base their decision on "economic, competitive and programming information presented by the parties." 17 U.S.C. § 115(c)(1)(F).

While *Phonorecords IV* is the first proceeding by which this "willing buyer/willing seller" standard will be applied in the Section 115 context, this standard and the aforementioned language have been the basis for Section 114 rate-settings which provide instructive precedent. Both the CRB and D.C. Circuit in prior Section 114 proceedings understood that proposed rates are to reflect an effectively competitive market. "Legislative history supports the conclusion that § 114 directs the Judges to set rates that reflect the workings of a hypothetical effectively competitive market." 81 FR 26316, 26334. And the CRB "can and should determine whether the proffered rates reflect a sufficiently competitive market, i.e., an 'effectively competitive' market." *SoundExchange, Inc. v. Copyright Royalty Bd.*, 438 U.S. App. D.C. 332, 346, 904 F.3d 41, 55 (2018). Thus, the CRB should examine whether the mechanical rate freeze proffered by the Settlement Parties reflects an effectively competitive market.

While there has been much discourse and disagreement regarding the true meaning of the "willing buyer/willing seller" standard in prior CRB rate proceedings, this *Phonorecords IV* proceeding has presented a novel conundrum that the CRJs must inspect: what happens when the willing buyer and willing seller are effectively the same parties at the corporate level?

On one side of the Proposed Settlement sits the three major record labels (Sony Music Entertainment, Warner Music Group and Universal Music Group), who are to pay these mechanical royalties to music publishers and songwriters. On the other side of the proposed settlement sits the NMPA and NSAI. The NMPA's board is comprised of representatives of the publishing company corporate affiliates of the three major labels on the other side of the negotiating table.<sup>1</sup> Further, these major publishing company board members appear to have greater voting power than other NMPA board members on account of their gross annual revenue.<sup>2</sup> It is also worth noting that the NSAI represents only fragment of the songwriter community, and that two of the three songwriters who penned the "SONGWRITERS REFUTE FALSE CLAIMS REGARDING COPYRIGHT ROYALTY BOARD" letter<sup>3</sup> (presumably

---

<sup>1</sup> <https://www.nmpa.org/boardmembers/>.

<sup>2</sup> "NMPA shall have two classes of voting members: executive members and general members. A member shall be an executive member if its Gross Revenue is equal to or in excess of One hundred million dollars in the prior calendar year. A member shall be a general member if its Gross Revenue is less than One hundred million dollars in the prior calendar year." "Each executive and general member shall be entitled to one vote for each one-hundred thousand dollars of gross revenue of such member (including its affiliates) with respect to any matter to be voted on by members; provided that (i) each member shall have at least one vote, and (ii) with respect to a particular calendar year, each executive member shall have no more votes than the number of votes held by the General Member with the greatest number of votes for such year." NMPA Inc. 2018 IRS 990, Schedule O, at 27.

<sup>3</sup> *SONGWRITERS REFUTE FALSE CLAIMS REGARDING COPYRIGHT ROYALTY BOARD*, available at <https://www.nashvillesongwriters.com/songwriters-refute-false-claims-regarding-copyright-royalty-board>.

published in response to negative press on account of this proposed freeze) sit on NMPA boards, one on the board of NMPA Inc., and the other on the board of the NMPA SONGS Foundation.<sup>4</sup>

How these organizations wish to conduct their business is wholly up to them, as is how they choose to represent their members. Nonetheless, when I see a phrase in a motion reflecting the intentions of a group of parties riddled with conflicts of interest, “the settlement represents the consensus of buyers and sellers representing the vast majority of the market for ‘mechanical’ rights for [the 37 CFR 385] Subpart B Configurations”<sup>5</sup> – I believe it is important to acknowledge that there are countless millions of copyright owners that these parties do *not* represent. While the Proposed Settlement may represent the “consensus” of the wealthy major music publishing companies and their record label counterparts, in no manner does this settlement speak for the consensus of songwriters and independent publishers, who lack the overwhelming resources needed to participate in this proceeding and whose views were not solicited.

In sum, none of these factors lead me to believe that this Proposed Settlement reflects an “effectively competitive market.”

## **II. The Dire Need for Transparency.**

In addition to the proposed settlement, the Settlement Parties (less the NSAI) also referenced a separate Memorandum of Understanding (“MOU”):

“Concurrent with the settlement, the Joint Record Company Participants and NMPA have separately entered into a memorandum of understanding addressing certain negotiated licensing processes and late fee waivers.”<sup>6</sup>

If this “Memorandum of Understanding” is irrelevant to the proposed settlement, why would it be referenced in the motion to adopt the settlement? Setting aside the broadly drafted “certain negotiated licensing processes,” the phrase “late fee waivers” is exceptionally concerning. I interpret this language to mean that money is changing hands as consideration for this proposed rate freeze – but ultimately, I cannot know this with certainty since neither the Proposed Settlement nor the MOU have been published.

As songwriters worldwide may be bound to the decisions rendered in this *Phonorecords IV*, it is of the utmost importance for the CRB to work to afford songwriters with complete transparency. In a letter dated July 13, 2021,<sup>7</sup> Representative Lloyd Doggett (TX-35) asked,

“May the CRB disclose (or compel the settlement participants to disclose) the unredacted actual settlement agreements referenced in the Motion, including the MOU?”

---

<sup>4</sup> <https://www.nmpa.org/boardmembers/> ; <https://www.songsfoundation.org/our-board-1> .

<sup>5</sup> Motion at 4, available at <https://app.crb.gov/document/download/25288>.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> July 13, 2021 Letter from Representative Lloyd Doggett, available at <https://thetrichordist.com/2021/07/18/letter-from-congressman-lloyd-doggett-about-frozen-mechanicals-to-librarian-of-congress-and-register-of-copyrights/>.

I would also like to know the answer to this question. Further, in the event the CRB does not reject this Proposed Settlement, it should publish both the actual, unredacted proposed settlement, along with the MOU, not merely the regulations giving effect to the settlement. If songwriters and independent music publishers worldwide are to be bound to these terms, they deserve to have the opportunity to review and to be able to provide meaningful comment on these actual documents at a minimum.

### **III. Songwriters and Independent Music Publishers Should Not Face a Rate Freeze In The Midst of a Vinyl Resurgence, During a Worldwide Pandemic.**

With the constant consumption of music via the streaming services, many do not realize the degree of revenue generated from the sale of physical products (vinyl, CDs) and digital downloads in the United States. Notwithstanding the devastating pandemic which forced the majority of musicians to pivot, and resulted in at the very least the temporary shutdown of a significant amount of businesses, revenue from the physical music sales amounted to \$1.13 billion dollars in 2020.<sup>8</sup> Additionally, vinyl record sales increased by more than 28% from 2019 to 2020.<sup>9</sup> Further, physical and downloads accounted for 15% of worldwide revenue for U.S. recorded music in 2020.<sup>10</sup> Just within the last couple of months, Taylor Swift broke the modern-era weekly vinyl album sales record.<sup>11</sup> Record Store Day Drop #1 sparked 1.3 million vinyl album sales during the week ending June 17, 2021, with 942,000 records sold at independent record stores -- resulting in the largest weekly vinyl sales at the indie sector in MRC Data history.<sup>12</sup> Those Record Store Day figures represent over \$1.1 million dollars in mechanical royalties generated within a weekly period (assuming 10 tracks per album at the current statutory rate of 9.1 cents) – which I believe is economically significant for songwriters.

Given the vinyl resurgence, mechanical royalties from physical product sales are a crucial revenue stream for all songwriters, and particularly for independent songwriters who have struggled financially on account of COVID-19 and do not have the resources to compete for the streaming numbers generated by top artists signed with major labels. The effects of COVID-19 are properly taken into account when approximating a free market agreement because of what U.S. Treasury Secretary Janet Yellen described as “long-term scarring”<sup>13</sup> which is projected to exceed the period of the *Phonorecords IV* rate setting. For context, the mechanical royalty “rate” pertaining to streams on Spotify Premium during April 2020 amounted to \$0.00059 per

---

<sup>8</sup> Year-End 2020 RIAA Revenue Statistics, available at <https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Keith Caulfield, *Taylor Swift's 'Evermore' Breaks Modern-Era Record for Biggest Vinyl Album Sales Week*, BILLBOARD (May 31, 2021), available at <https://www.billboard.com/articles/news/9580407/taylor-swift-evermore-record-breaking-vinyl-album-sales-week/>.

<sup>12</sup> Keith Caulfield, *Record Store Day 2021's First Drop Sparks 1.3 Million in U.S. Vinyl Album Sales*, BILLBOARD (June 22, 2021), available at <https://www.billboard.com/articles/business/chart-beat/9590304/record-store-day-2021-first-drop-sets-record>.

<sup>13</sup> David Lawder, Andrea Shalal, *'Act Big' Now To Save Economy, Worry About Debt Later, Yellen Says In Treasury Testimony*, Reuters (Jan. 19, 2021), available at <https://www.reuters.com/article/us-usa-biden-yellen-idUSKBN2901WX>.

stream (according to the Audiam U.S. Mechanical rate calculator<sup>14</sup>). The “rate” for the ad-supported tier of Spotify was even lower.

Not only is the music industry experiencing a vinyl resurgence, but also, even CD sales are seeing a boost. According to a July 14, 2021, report from Billboard:

“Vinyl sales, which have grown for the past decade, more than doubled between January and June, up 108.2% to 19.2 million from 9.2 million in the first six months of last year. Even CD sales, which have been steadily and precipitously declining, posted a modest 2.2% gain, to 18.9 million units.”<sup>15</sup>

#### **IV. What’s Changed Since 2014? The Willing Buyer/Willing Seller Standard was Supposed to Result in Fairer Rates.**

Every person reviewing the comments in this proceeding should go back and review the Copyright Office’s 2015 “Copyright and the Music Marketplace Study.”<sup>16</sup> Copyright owners and their representatives within the study shared a common judgement: the then-current 801(b)(1) four-factor test standard resulted in deflated rates -- however, this quagmire could be remedied by the adoption of the “willing buyer/willing seller standard.”<sup>17</sup> According to the NMPA and Harry Fox Agency’s joint comment in 2014:

“Continued application of the 801(b) standard will ensure that the statutory royalty rate is held artificially low, and that songwriters and music publishers will continue to be treated unfairly in the marketplace.”<sup>18</sup>

*Phonorecords IV* is the first proceeding in the Section 115 context by which this “willing buyer/willing seller” standard is to be applied. If the Proposed Settlement is accepted by the CRJs, songwriters and music publishers are no better off than they were under the former 801(b)(1) standard; the statutory rate will continue to be held artificially low through 2027, and songwriters and music publishers will continue to endure unfair treatment in the marketplace. Proposing a freeze for the Subpart B rates during the first Section 115 proceeding applying the “willing buyer/willing seller” standard produces a disastrous ripple-effect with respect to other current and future rate-settings. In the current *Phonorecords III* remand, Pandora not only has used the Proposed Settlement to make the case that the streaming mechanicals rate in the 2012 settlement was a “good benchmark,” but also used this argument to rationalize the 2012 rate being *too high*.<sup>19</sup>

---

<sup>14</sup> Audiam Spotify U.S. Mechanical Rate Calculator, available at <https://resources.audiam.com/rates/> .

<sup>15</sup> Ed Christman, *Audio Streams Up 15%, Vinyl Sales Double in First Half of 2021*, BILLBOARD (July 14, 2021), available at <https://www.billboard.com/articles/business/9600940/streams-vinyl-cd-sales-genres-midyear-2021-analysis/> .

<sup>16</sup> *See generally*, *Copyright and the Music Marketplace* (February 2015), available at <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

<sup>17</sup> *Id.* at 82-83.

<sup>18</sup> NMPA & HFA First Notice Comments at 15-16, available at [https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/NMPA\\_HFA\\_MLS\\_2014.pdf](https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/NMPA_HFA_MLS_2014.pdf).

<sup>19</sup> Testimony of Michael Katz at 65-66, available at <https://app.crb.gov/document/download/23858> .

Equally perplexing upon retrospect is commentary from the NSAI. After stating the organization’s support of eliminating Section 115 entirely (which as an aside, I agree with), the NSAI stated:

“We favor a willing buyer-willing seller free marketplace approach to determining mechanical royalty rates. We believe the underlying work is more valuable than the present 9.1 [sic] rate established by the Copyright Royalty Board.”<sup>20</sup>

It does not sit well when the organization representing songwriters is party to a settlement proposing extending the freeze at 9.1 cents, seven years after advocating for a “willing buyer/willing seller” rate-setting standard because songs were more valuable than the 9.1 cent rate.

## **V. Rates Should not be Frozen Just Because Certain Settlement Parties Deem a Format is Not Worth the Fight.**

It is evident that trade organizations representing the publishers and songwriters in this proceeding and prior proceedings have not wished to advocate for an increased mechanical rate for physical products, as they prefer to concentrate on categories that they believe to be economically significant, such as the interactive streaming categories.<sup>21</sup> This lack of advocacy was not intended to demonstrate that rate freeze at 9.1 cents reflected the appropriate value of mechanical royalties for physical products, but instead that physical medium revenue was not going to make much of an economic difference within the next five years.<sup>22</sup> It is understandable that the NMPA and NSAI have concentrated their efforts on the abysmal streaming services and I applaud the organizations for such efforts. The NSAI also reechoed these sentiments in early June, 2021:

“Based on industry revenue analysis, it is anticipated that physical mechanical royalties will amount to less than 1% of the total mechanical royalty revenue in the United States during 2023-2028, the rate period this CRB proceeding covers. History and experience told us not to create a powerful opponent when there is a strong possibility of losing with little to gain. So, we decided to focus on the digital streaming services and streaming rates during the next trial. While 1% of revenue is meaningful, waging war was not worth the risk, especially since the rate may have been lowered!”<sup>23</sup>

To date, I have not seen this industry revenue analysis claiming that physical mechanical royalties will amount to less than 1% of the total U.S. mechanical royalty revenue over the next five years. Even if this is the consensus of various industry experts, the figure is simply a prediction. And as the data in Section III shows, the physical format has become increasingly

---

<sup>20</sup> NSAI Reply Comments at 7, available at [https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/extension\\_comments/Nashville\\_Songwriters\\_Association\\_International\\_NSAI.pdf](https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/extension_comments/Nashville_Songwriters_Association_International_NSAI.pdf).

<sup>21</sup> See *Phonorecords III* Open Session, available at <https://app.crb.gov/document/download/13897> at 3583-88; <https://www.nashvillesongwriters.com/songwriters-refute-false-claims-regarding-copyright-royalty-board>.

<sup>22</sup> See <https://app.crb.gov/document/download/13897> at 3583-88.

<sup>23</sup> *SONGWRITERS REFUTE FALSE CLAIMS REGARDING COPYRIGHT ROYALTY BOARD*, available at <https://www.nashvillesongwriters.com/songwriters-refute-false-claims-regarding-copyright-royalty-board>.

popular and provides a meaningful revenue stream for songwriters and publishers -- despite prior economic predictions from industry leaders.

In sum, songwriters should not face a continued rate freeze for Subpart B configurations due to trade organizations deeming that these formats are not worth the fight.

## **VI. May the CRJs Determine this Proposed Settlement Applies only to the Settlement Participants?**

Given the volume of songwriters who are self-published (or self-administered, as the Mechanical Licensing Collective calls it), and the number of independent music publishers who are not NMPA members and have no ties to the major publishers, the question becomes, what recourse do they have when private parties with endless resources decide to convene with their major label counterparts and propose a mechanical rate freeze? May the CRB determine that this frozen rate only applies to the Settlement Parties, but hold that a higher rate will apply to everyone else?

### **Conclusion**

This is the first time I have commented on a CRB rate-proceeding -- I was in high school during *Phonorecords I* and was completing law school when *Phonorecords III* commenced. This *Phonorecords IV* proceeding has taught me a lot, and has also raised a lot of questions in my mind about the process of rate-proceedings in general. Ultimately, a settlement to freeze the mechanical rate for the physical format, forged by parties who are one and the same at the corporate level during a vinyl boom in midst of a worldwide pandemic neither reflects an effectively competitive market nor is in the interest of songwriters. Making this situation all the worse is the fact that some of these Settlement Parties advocated for the repeal of the prior rate-setting standard in favor of this “willing buyer/willing seller” standard because they contended the former resulted in deflated rates and the latter would bequeath songwriters with higher rates. If this is truly the end result of CRB rate-proceedings, a process must be established by which copyright owners without the financial resources will have the ability to not only participate in such proceedings, but also have their own independent advocacy arm which can represent their interests. Because as it stands, I do not see the interests of songwriters being adequately represented in *Phonorecords IV*.

Thank you,



Gwendolyn Seale