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July 26, 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

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://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

I. Introduction

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 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

[1] https://www.songwritersguild.com/site/index.php
[2] https://thescl.com/
[3] https://www.musiccreatorsna.org
[4] https://www.songwritersguild.com/site/rick-carnes
[5] https://en.wikipedia.org/wiki/Ashley_Irwin

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.

The Independent Music Creators speak today (i) in strong opposition to any rulemaking that would result in the adoption by the CRB of a proposed, continuing freeze on mechanical royalty rates for physical phonorecords, permanent downloads, ringtones, and music bundles, and (ii) against other, non-transparent elements that may be presented to the CRB 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").

II. Statements of Interest

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.

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

III. History of US Statutory Mechanical Royalty Rate-Setting

As the CRB is well aware, the establishment of a compulsory mechanical rights licensing system, and the setting of a statutory mechanical royalty rate for the manufacture and distribution of sound carriers reproducing musical compositions, has its roots in the US Copyright Act of 1909. Section 1 (e) of that law provided that once a musical composition had been distributed for the first time on a sound carrier in the US, any other party (i.e., a record company) was free to make and distribute its own recorded version of such composition so long as such party abided by the formalities set forth in the law, and paid a total of 2 cents for each unit of each composition distributed. Thus began one of the most notorious miscarriages of economic justice in the history of the international music industry.

By 1978, the tiny US record industry of the early twentieth century had grown into a multi-billion dollar, multi-national corporate entertainment empire that dominated the international music marketplace. A good deal of the credit for such growth, it is widely acknowledged, is attributable to the fact that the intervening years were marked by one of the greatest periods of creative songwriting and composing that the world had ever seen, centered principally in the United States. Those 20th century (and later 21st century) songs, composers and lyricists created the foundation on which the American record industry's domination of global music sales was constructed, and on which it still rests.[7]

Surreal as it may still seem, however, for that *entire seventy-year period* of phenomenal record industry growth between 1909 and 1978, the US mechanical royalty rate remained static at 2 cents per composition. According to US Consumer Price Index (CPI) statistics during those seven decades, the buying power of 2 cents in 1909 required the approximate equivalent of 14 to 15 cents in 1978.[8] A songwriter or composer would have needed to earn about 750% of the original 2 cent royalty rate to have maintained his or her cost-of-living standard. And yet no increase *whatsoever* had taken place.

Congress, despite enduring the intense lobbying of the recording industry not to take action, did finally raise the US statutory mechanical rate in 1978 under the "new" US Copyright Act of 1976. It did so, however, by raising the rate by just 37.5%, to 2.75 cents. Immediately thereafter, the entire record industry (claiming coincidence rather than collusion) immediately introduced and expanded the concept of the "controlled composition clause" into nearly every American recording contract.[9] The practical effect of that essentially non-negotiable provision was to contractually freeze and then de-value the new US statutory mechanical royalty rate to 75% of its new level -- *driving it back down to two cents.*

The outcry from the US and global music creator community over the ensuing years was substantial enough to result in gradual rises in the statutory mechanical royalty rate phased in every five years under the statutory rate-setting provisions of the 1976 Copyright Act (with some increases based upon negotiated cost of living increases tagged to various measurements under

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[7] See, e.g., http://www.americanmusicpreservation.com/songwriters.htm
[8] https://www.bls.gov/data/inflation_calculator.htm
[9] See, e.g., https://escholarship.org/content/qt332557hg/qt332557hg.pdf

the CPI). That process continued until its current 9.1 cent royalty rate zenith was reached in 2006.[10] And there it has stayed, applicable not only to musical compositions manufactured and distributed in physical phonorecord form, but to permanent downloads in the realm of digital phonorecord deliveries and to certain other uses also specified in 37 C.F.R. Part 385 Subpart B ("Subpart B").

Subsequently, the 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.

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 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).

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.[11] 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.[12] 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.[13]

Nevertheless, on March 2, 2021, the three major, multinational record conglomerates UMG, SME and WMG, the US music publisher trade group NMPA (whose largest members include the music publishing affiliates of those major record companies), and inexplicably, the Nashville Songwriters Association International (collectively, the "Settling Parties"), filed a Notice of Settlement in Principle (the "March 2 Notice")[14] with the CRB, stating as follows:

[10] https://copyright.gov/licensing/m200a.pdf
[11] https://www.bls.gov/data/inflation_calculator.htm
[12] Ibid..
[13] 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."
[14] https://app.crb.gov/document/download/25288

> Once they reach a definitive agreement concerning the Settlement, the Participants expect to propose to the CRJs [Copyright Royalty Judges] that the royalty rates and terms presently set forth in 37 C.F.R. Part 385 Subpart B, and the related definitions and late fees for Subpart B Configurations presently addressed in Subpart A, should be continued for the rate period at issue in the Proceeding [through 2027].

One participant in the Phonorecord IV proceedings, pro se music creator and music publisher George Johnson, filed his objections to the adoption with the CRB on April 19, 2021. He noted specifically the unfairness of the proposed roll forward of the frozen Subpart B royalty rate proposals,[15] among his other objections that also included a substantial lack of transparency by the Settling Parties.

The remainder of the music creator community, none of whose members seem in any way to have been consulted concerning the anticipated settlement noted in the March 2 Notice by the Settling Parties, were similarly taken aback by the Settling Parties' actions. Not only were they blindsided by the pending decision to recommend a continued freeze of the royalty rates and other terms contained in Subpart B, they were also agitated by the lack of more detailed disclosure by the Settling Parties concerning the following statement contained in the March 2 Notice:

> NMPA, UMG, WMG and SME have also reached an agreement in principle concerning a separate memorandum of understanding addressing certain related issues.

With a pending deadline of May 18, 2021 set by the CRB for the filing by the Settling Parties of a final proposed settlement, the signatories to these Independent Music Creator Comments --in reliance on, among other provisions, §801 (b) (7) of the US Copyright Act-- sent a letter to the CRB dated May 17, 2021[16] stating as follows:

> In the interests of justice and fairness, we respectfully implore the CRB to adopt and publicize a period and opportunity for public comment on the record in these and other proceedings, especially in regard to so-called proposed "industry settlements" in which creators and other interested parties have had no opportunity to meaningfully participate prior to their presentation to the CRB for consideration, modification or rejection. In the present case, hundreds of millions of dollars of our future royalties remain at stake, even in a diminished market for traditional, mechanical uses of music. To preclude our ability to comment on proposals that ultimately impact our incomes, our careers, and our families, simply isn't fair.

Thereafter, the Settling Parties informed the CRB on May 18, 2021 that they had reached an agreement that mirrored the terms set forth in their prior March 2 Notice, but did not file a *motion* asking the CRB to adopt their settlement. This procedural anomaly raised alarms among the members of the independent music creator community, who once again had not been

[15] https://app.crb.gov/document/download/23883
[16] https://www.musiccreatorsna.org/mcna-letter-regarding-fairness-and-transparency-on-frozen-mechanicals/

consulted in any way by the Settling Parties regarding their settlement discussions, or concerning the subsequent filings announcing agreement on the royalty rate freeze.

In a second letter to the CRB dated May 24, 2021,[17] the Independent Music Creator signatories to these Comments once again conveyed their concerns:

> We believe that this procedural omission (whether permissible or not) may well be calculated to delay and/or compromise the ability of the independent music creator and music publishing communities to file comments in a timely manner, and could result in irreparable harm to our ability to present our views and pose our questions, for example, if one or more of the settling parties subsequently withdraws from the proceeding. Simply put, we believe the settling parties are seeking to stifle timely discussion and dissent through delay, a strategy which should be rejected as antithetical to due process.

On the next day, the Settling Parties acted to file their "Motion to Adopt Settlement of Statutory Royalty Rates and Terms For Subpart B Configurations" ("the May 25 Motion to Adopt").[18] That motion contained the following statement by the Settling Parties:

> In all material respects, the Parties propose that the current regulatory provisions applicable to Subpart B Configurations, and Late Fees solely as they concern Subpart B Configurations, remain in effect. They propose a few minor editorial changes to the applicable regulatory language, which are shown below with additions in bold and underlined text and deletions in bold with a strikethrough. To the extent that the provisions set forth below are also applicable to configurations other than Subpart B Configurations, such matters are outside the scope of the Settlement.

The May 25 Motion to Adopt contained no further elaboration concerning the statement originally made in the Settling Parties' March 2 Notice that "NMPA, UMG, WMG and SME have also reached an agreement in principle concerning a separate memorandum of understanding addressing certain related issues."

One month later, on June 25, 2021, the CRB published in the Federal Register its Notice of Proposed Rulemaking[19] addressing the May 25 Motion to Adopt filed by the Settling Parties, stating in pertinent part as follows:

> The Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants not party to the agreement if any participant objects and the Judges conclude that the agreement does not *provide a reasonable basis for setting statutory terms or rates*. See §801(b)(7)(A).[20] (Emphasis and Footnote added). If the Judges adopt rates and

[17] https://thetrichordist.com/2021/05/25/coalition-of-songwriter-groups-ask-crb-wheres-the-motion-on-insider-deal-for-frozen-mechanicals/
[18] https://app.crb.gov/document/download/25288

[19] https://www.govinfo.gov/content/pkg/FR-2021-06-25/pdf/2021-12950.pdf

[20] 801 (b) Functions.—Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

terms reached pursuant to a negotiated settlement, those rates and terms are binding on all copyright owners of musical works and those using the musical works in the activities described in the proposed regulations….

> The Judges solicit comments on whether they should adopt the proposed regulations as statutory rates and terms relating to the making and distribution of physical or digital phonorecords of nondramatic musical works. Comments and objections regarding the rates and terms and the minor revisions must be submitted no later than July 26, 2021.

By submitting these Comments today, the Independent Music Creator community seeks to respectfully explain the myriad reasons why adoption by the CRB of the Settling Parties' May 25 Motion to Adopt (including the proposed royalty freeze) would not only be inconsistent with the provisions of the US Copyright Act, but will cause great harm to the US and global songwriter and composer communities. We likewise urge circumspection by the CRB concerning the possibility of any *potential* "insider" or "self-dealing" settlement arrangement among related companies and trade associations that may have been carried out at the expense of those music creators whom Congress intended (pursuant to Article I §8 of the US Constitution) to be the beneficiaries --not the victims-- of the statutory mechanical royalty rate-setting process.

IV. Discussion of Objections By Independent Music Creators

A. The Willing Buyer-Willing Seller Standard and the Conflicts of Interest Inherent in the Present Settlement Negotiation Process

In evaluating whether the terms of the settlement proposal set forth in the May 25 Motion to Adopt "provide a reasonable basis for setting statutory terms or rates," the US Copyright Act establishes a blueprint in §115(c)(1)(F) for determining the reasonability and adequacy of any such proposed, industry-wide agreement:

> The Copyright Royalty Judges shall 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*** (emphasis added).

The US Treasury Department provides further insight into the "willing buyer-willing seller" construct in the Code of Federal Regulations:[21]

…(7)(A). To adopt as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding, except that—

(i) the Copyright Royalty Judges shall 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 provide to participants in the proceeding under section 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; and

(ii) the 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.

[21] 26 CFR § 25.2512-1

> Valuation of Property; in general: The value of the property is ***the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts*** **(emphasis added).**

Thus, while under certain circumstances the US Copyright Act provides that private agreements and licenses may be entered into between copyright owners and prospective users that apply various other indicia and metrics to gauge the advisability of one particular royalty rate over another, that latitude does *not* exist in regard to proposals for the adoption of industry-wide settlements by the CRB "binding on all copyright owners of musical works" per §801(b)(7)(A).

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 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[22] upon whom "those rates and terms [will be] binding."

More to the point, the corporate parties participating in such settlement discussions could by definition plausibly have been compromised by the conflicts of interest inherent in the fact that the corporate overseers of each major label participating in the "negotiation" likewise control the affiliated music publishers of each such label. UMG is not only one of the three largest record labels in the world, it also is one of the world's three largest music publisher owners of copyrights in musical compositions, with both UMG entities reporting to the same corporate ownership (Vivendi, Inc. of France).[23] The same holds true for both WMG (in regard to the multinational corporation Access Industries headquartered in New York)[24] and SME (in regard to the Sony Corporation of Japan).[25]

Together, these three international conglomerates control close to 70% of the market for sound recordings *and* musical compositions in the world.[26] All three represent both sides in any Subpart B mechanical royalty rate discussions, rendering the concept of "willing buyer-willing seller" almost farcical in relation to fashioning a fair proposal to the CRB. Simply put, in this case, the buyers *are* the sellers (and the prospective licensors *are* the prospective licensees).

NMPA's role in these negotiations was, and is, as the trade association for music publishers operating in the US, including the above-mentioned major music publishing firms that serve as their most powerful and influential board members by far-- and who answer to the same owners

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[22] See, e.g., Statement of Anthony Garnier, https://thetrichordist.com/category/frozen-mechanicals/.
[23] https://www.digitalmusicnews.com/2021/06/18/biggest-record-labels-of-2021/
[24] Ibid.
[25] Ibid
[26] Ibid

as those against whom they and NMPA are allegedly negotiating. It is unclear what level of input independent music publishers were enabled to exercise in the negotiations, including those with representatives on the board of the trade association.

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.[27] 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.

Based upon these facts and circumstances alone, the settlement agreement produced by the Settling Parties can in no way be considered to have been fashioned upon "willing buyer-willing seller" principles. As such, respectfully, it should *not* be relied upon as the basis for a conclusion by the CRB that the proposed settlement "[provides] a reasonable basis for setting statutory terms or rates," per §801(b)(7)(A) of the Copyright Act and otherwise.

A. Lack of Transparency in the Negotiating and Settlement Process

As previously noted, the Independent Music Creator Community remains additionally concerned over the general lack of transparency that has marked the entire process described above. We are especially disquieted by the unexplained contents of a "separate Memorandum of Understanding addressing certain related issues" referenced in the March 2 Notice as having been negotiated among the three major labels and publishers and NMPA, with the conspicuous absence of NSAI.

Has such an MOU been presented to the CRB for approval or adoption? Has it been seen by NSAI? Is NSAI endorsing it? These are important, additional details and questions that require comprehensive answers to complete a full evaluation of any settlement alleged to be reasonable and based upon "willing buyer-willing seller" principles.

Further on the issue of transparency, we also are compelled to raise the issue of NSAI's public statements purportedly made to explain its support for a five-year continuation of the Subpart B royalty rate freeze. These statements give insight into the level of factual distortion that may have been foisted upon NSAI during negotiations, and that may have hampered it in evaluating the advisability of the settlement, as discussed below.

[27] See, https://thetrichordist.com/2021/06/07/the-ivors-academy-joins-the-no-frozen-mechanicals-campaign/

B. Misleading Mechanical Royalty Statistics

In an open letter to its "Fellow Songwriters and Composers" published by NSAI on or about June 2, 2021,[28] the organization presented the following analysis of its position in favor of continuing the Subpart B royalty freeze:

> 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 [sic]. 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!

The statistics presented by NSAI in its statement are patently misleading and/or incorrect, contradicted by data published by the principle trade association of US recording companies, the Recording Industry Association of America (RIAA) (a participating party in the Phonorecords IV proceeding). 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:

RIAA US RECORDING REVENUES (rounded)	2020	2019
VINYL	$620M (5.1%)	$480M (4.3%)
CDs	$483M (4.0%)	$631M (5.7%)
DOWNLOADED ALBUMS	$320M (2.6%)	$369M (3.3%)
DOWNLOADED SINGLES	$312M (2.6%)	$408M (3.7%)
TOTAL PERCENTAGES	*14.3%*	*17.0%*

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]

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

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[28] https://musicrow.com/2021/06/nsai-songwriters-respond-to-criticism-of-decision-not-to-challenge-physical-royalty-rates/
[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

demand for vinyl records is outpacing manufacturing capabilities on both a national and global basis.[32]

Thus, while 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 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.

One independent music publishing company owner with substantial, practical insight into this issue, recently offered the following observations:

> The royalty amount for digital streams is a micro-penny. Unless we are talking about top songwriters with hundreds of millions to billions of streams, there is an excellent chance he or she still may be driving an Uber to support a family. It literally takes hundreds of streams to equal the 9.1 cent mechanical publishers receive for a physical sale or download. That's why the physical and download mechanical rate is so important to independent creators, and especially to those just starting out.
>
> Vinyl sales are still strong among many retailers, including Amazon. CDs remain a significant media format, and many listeners still prefer to 'own' rather than temporarily cache the music they listen to. Major music publishers do not face the same struggles as independent publishers and songwriters. They are part of multi-national conglomerates that own both the major publishers and major record labels. Major publishers that agree to freeze the statutory rate are simply leaving more money in the pockets of the labels that are their sister companies. We, on the other hand, are trying to preserve the only sources of revenue that we have. We don't have another pocket. That's why we must fight to be heard.[34]

C. NFTs

On a very much related issue, the emergence of non-fungible tokens (NFTs) and related block chain technologies seem to have been glaringly omitted from the mechanical royalty analysis presented in NSAI's informal statement and explanations of the proposed Subpart B settlement. Although the longevity periods of such trends are notoriously difficult to predict, NFTs appear to

[32] https://static.billboard.com/files/2021/06/june-08-2021-billboard-bulletin-1623187818.pdf
[33] https://www.royaltyexchange.com/blog/u-s-music-publishing-grows-nearly-10-to-over-4b-in-2020
[34] Comments of Abby North of North Music Group. See also, "Hit Songwriters are Driving Ubers," https://www.bbc.com/news/entertainment-arts-55232418

be forming the basis of new, specialized and mainstream music products and associated downloads.

As a category of recording industry revenues, NFT estimates for 2020-21 are in the tens of millions of dollars (out of billions of dollars in NFT earnings in all categories during that period so far).[35] The question of whether this issue was raised in the Phonorecords IV Subpart B settlement negotiations is an important one, on both a conceptual and a financial basis. Given the wide range of NFT supported consumer products that may be introduced in the near future, it is not a phenomenon that can be prudently ignored in light of its significant potential effects on the future of US and global mechanical royalties.

NFTs, which by definition are regarded as electronic and non-fungible, have since their introduction in the music realm often been bundled with specialty physical product and downloads to increase their total value. We pose the rhetorical question of whether there shouldn't be a conversation taking place at the CRB level as to whether an NFT that is purchased for hundreds, thousands or even millions of dollars (as some recently have been), and which includes a bundled, sometimes unique physical sound carrier or download component, shouldn't produce more than a one-time, 9.1 cent revenue payment for music creators and copyright administrators? Are these really sales to the public for private use under §115 of the Copyright Act, and what royalty rate should apply to them? Might a fixed percentage of the sale price realized be a more equitable means of compensating music creators in such situations? Millions of dollars in songwriter, composer and independent music publisher revenue may be riding on the answers to those questions.

On a much broader scale, the same holds true for recorded physical products and downloads that are sold to the general public as part of mainstream NFT packages now and in the future. Some industry analysts are predicting a further, significant resurgence of vinyl sales and downloads predicated on an NFT boom that will drive purchases of products such as artist box sets and other music collections and compilations. As we stand on the threshold of what might be a new era reliant in important part on NFT music distribution, the extension of a new, five-year freeze on already frozen Subpart B mechanical rates would further exclude the creative community from participation in the real and potential rewards such new technologies are intended to generate.

While the future may not be clear, the fact that these issues deserve full, public airings and careful consideration before the CRB certainly is. We should not and cannot permit silent acquiescence through privately negotiated, confidential agreements, to control the future of NFT-related mechanical royalties. Moreover, we cannot help but wonder whether the NFT issue has been relegated to the unknown contents of the Settling Parties' MOU (at least executed and possibly negotiated without the participation of NSAI), which we expect may be claimed by those same Settling Parties to be subject to non-disclosure requirements (including those set forth in the protective order in place for these proceedings).

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[35] See, e.g., https://variety.com/2021/music/news/nft-sales-imusic-business-wild-west-1234970419/; https://www.businessinsider.com/how-crypto-art-muscians-primary-income-nfts-record-labels-2021-3; https://www.forbes.com/sites/forbesbusinesscouncil/2021/06/09/are-nfts-the-new-crypto-a-guide-to-understanding-non-fungible-tokens/?sh=51fc14763d95

These are issues of serious concern and great financial importance to the independent music creator community. We urge that they be addressed transparently and publicly as part of the Phonorecords IV Subpart B proceedings. At the very minimum, it also seems that NFTs should be excluded from the "music bundles" contemplated by Subpart B.

D. Economic Bars to Effective Music Creator Participation

There is one additional, extremely important issue raised by NSAI's explanatory statement upon which we believe it is essential to comment. It concerns the financial ability of independent music creators to participate in CRB proceedings, and the severely compromised bargaining positions of music creators when it comes to the negotiation of so-called "industry settlements" under the current CRB rate setting system.

In defending its position in favor of the continuing Subpart B royalty rate freeze in Phonorecords IV, NSAI offered the following observation:

> The question songwriters and composers should be asking is why these false critics [apparently referring to all other music creator organizations] did not participate in the trial [sic] themselves. Any of these groups or individuals could have participated, but they did not even try.

That position presents an interesting juxtaposition to this prior assertion made by NSAI within the same published statement:

> What these critics are not telling you is that we did fight that battle in 2006, during CRB I, when we asked the Copyright Royalty Board to increase the physical rate, while critics were nowhere to be found.[36] [footnote added] Instead, after ***our side*** spent more than $20 million, the judges kept the rate exactly where it was, at 9.1 cents [emphasis added].

The point made by NSAI about the necessity of huge participatory expenditures goes a long way toward explaining why the only "songwriter group" participating in the Phonorecords IV settlement discussions is NSAI.[37] Other music creator organizations *do not have millions of dollars* --or anything close to it-- to allow their full participation in CRB proceedings. Neither, in reality, does NSAI. In fact, we wonder how NSAI continues to be able to participate in $20 million battles without accepting support from other groups on its "side" whose conflicted goals and actions may be antithetical to songwriter interests, both long and short term.

Much has changed since 2006. In practice, the prohibitive costs of participating in CRB rate setting proceedings now form a nearly impenetrable barrier to entry for any independent music creator

[36] It should be noted that SGA did participate in the 2006 CRB proceedings. Moreover, perhaps the fact that "critics" in the music creator community were "nowhere to be found" in 2006 is because all espoused the same position in favor of a royalty rate increase for Subpart B uses.
[37] As the Independent Music Creator signatories have previously pointed out in these Comments, one individual music creator *is* participating in the Phonorecords IV proceedings. As always, we admire the courage and energy of Mr. George Johnson, whose efforts are appreciated by his fellow creators. However, as Mr. Johnson has often readily admitted, his ability to match the overwhelming firepower arrayed against him at every turn in these and other proceedings before the CRB severely diminishes his capacity to serve as an effective advocate, and frequently results in his total marginalization by other participants.

group wishing to participate while maintaining its autonomy. To participate generally means to acquiesce to those music publishing mega-corporations with the funds to remain in control of the negotiation, settlement and/or litigation process, including the conflicted major music publisher affiliates of the major record labels (some of whom purportedly utilize revenues charged back to their songwriters and composers to pay for positions taken before the CRB that are incompatible with those same music creators' interests—such as the approval of frozen royalty rates).

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 both sound policy and fairness.[38]

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. That sad eventuality raises even more complex, potential conflict of interest issues concerning past or current cross ownership/investment arrangements between record companies and digital distributors too labyrinthian to detail in these Comments, but worthy of future consideration. For now, however, we should consider that the ability of a stronger, broader group of independent music creator organizations and representatives to affordably participate in future CRB rate setting proceedings might avoid many of these unfair and counter-productive results. It is an inquiry that we believe is worth pursuing through the US Copyright Office.

In the meanwhile, to independent music creator organizations such as ours and our colleagues, the choice to officially participate in the Phonorecords IV proceedings (especially regarding the Subpart B settlement negotiations) as second-class citizens on an economically tilted playing field remained no choice at all. We instead have chosen to rely on the comments process, and our belief in the authority and wisdom of the CRB to ensure that the principles set forth in §§115 and 801 of the US Copyright Act, among others, are diligently applied.

To us, the events of 2006 occurred too long ago to be used as a pretext not to fight now for higher, more equitable Subpart B mechanical royalty rates, which in the interim have been devalued by a third simply due to inflation, inflicting significant economic harm on creators. Rather, we submit as independent music creator representatives that the circumstances described throughout these Comments demonstrate beyond doubt --despite the endorsement by NSAI of the Subpart B royalty rate freeze in Phonorecords IV—that the proposed settlement does not come close to providing a

[38] 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/

reasonable basis for setting royalty rate standards arrived at through a willing buyer-willing seller process.

V. Recommendations

In light of the foregoing, and with likely hundreds of millions of dollars of music creator income at stake for the future rate periods under consideration in Phonorecords IV, the independent music creator signatories to these Comments respectfully submit the following recommendations in regard to this Rulemaking:

1. For the reasons stated throughout these Comments, we urge the CRB to decline to adopt the settlement agreement as a basis for statutory rates and terms. Adoption of the settlement and the rules as proposed would represent a miscarriage of justice, placing the imprimatur of the CRB on a negotiation and settlement process that was unfair, non-transparent, and may have been conducted under circumstances that were anything but reasonable pursuant to (and setting crucial precedent for) the required "willing buyer-willing seller" standard.

2. We further urge that the CRB publish for comment at the earliest possible time the full text of the settlement agreement as submitted by the Settling Parties, and the MOU referenced in the March 2 Notice. As Congressman Lloyd Doggett of Texas wrote to the Librarian of Congress and the Register of Copyrights on July 18, 2021, "it seems appropriate that every songwriter who will be affected by the outcome of this proceeding, from San Antonio and Austin, Memphis, to Detroit and beyond, should have the opportunity to read and comment meaningfully on the actual settlement agreement posed for adoption, and the related MOU referenced."[39]

3. We urge that at minimum, new royalty rates be made applicable to Subpart B uses pursuant to Phonorecords IV, adjusted to reflect changes in the CPI since 2006 as a starting point, and further adjusted according to changes in the CPI each year thereafter (with a permanent floor of 9.1 cents and corresponding per minute rates for physical phonorecords and permanent downloads). Precedent and support for such a prospective adjustment methodology can be found in §805 of the Copyright Act,[40] as well as in the CPI-based mechanical royalty rate adjustments applied during the period January 1, 1990 through December 31, 1997,[41] and recent §114 decisions, among other sources. Moreover, at a minimum, it seems that NFTs should also be excluded from the "music

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[39] https://thetrichordist.com/category/frozen-mechanicals/

[40] 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].

[41] https://copyright.gov/licensing/m200a.pdf

bundles” contemplated by Subpart B. If the Settling Parties wish to establish different rates through private agreements for themselves, that is their prerogative. Non-participants in such settlements and agreements, however, should not be tied to such settlements and agreements (especially ones not negotiated at arm’s length) by the CRB.

4. 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.

VI. Conclusion

We thank the Copyright Royalty Judges and the CRB for this opportunity to participate 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

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

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