BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS

In re Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) 37 CFR Part 385 Proposed Regulations	Docket No. 21–CRB–0001–PR (2023–2027)

SECOND REOPENING PERIOD COMMENTS OF HELIENNE LINDVALL, DAVID LOWERY AND BLAKE MORGAN

Helienne Lindvall, David Lowery and Blake Morgan (collectively, the "Writers") thank the Judges for the opportunity and respectfully submit the following comments responding to the Copyright Royalty Judges' notice ("Second Notice") soliciting comments on additional materials ("Reply") received by the Judges[1] from the National Music Publishers Association, Nashville Songwriters Association International, Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp. (collectively, the "Majors")[2] regarding the so-called "Subpart B" statutory rates and terms[3] relating to the making and distribution of

[1] 86 FR 58626.

[2] NMPA, NSAI, Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Comments in Further Support of the Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV),* Copyright Royalty Board (Aug. 10, 2021).

[3] 37 C.F.R. §385.11(a).

physical or digital phonorecords of nondramatic musical works in the docket referenced above ("Proceeding").

The Writers previously submitted comments[4] ("Prior Comment") responding to the Judges' notice[5] ("First Notice") soliciting comments on the Major's proposed purported settlement (the "Proposed Settlement")[6] of the Subpart B rates. The Writers along with attorney Gwendolyn Seale[7] attempted to submit additional comments in response to the Majors' filing but were not able to timely file that response.[8] The Writers appreciate the Judges' decision to reopen the comment period in order to afford the public, and those that would be bound by the rates and terms set by the Proposed Settlement,[9] an opportunity to comment on those additional materials filed by the Majors and to further participate in the rulemaking.[10]

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[4] Comments of Helienne Lindvall, David Lowery and Blake Morgan, *Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)* (July 26, 2021) available at https://app.crb.gov/document/download/25533.

[5] 86 FR 33601.

[6] *Motion To Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations,* Docket No. 21-CRB-0001-PR (2023-2027).

[7] Ms. Seale does not otherwise join in this comment. We understand she is filing a separate comment regarding the additional materials.

[8] The Writers' reply was posted on The Trichordist website available at https://thetrichordist.com/2021/08/16/frozenmechanicals-crisis-unfiled-supplemental-comments-of-helienne-lindvall-davidclowery-theblakemorgan-and-sealeinthedeal/. Parts of that unfiled comment are included in this comment.

[9] See 17 USC 801(b)(7)(a)(i).

[10] As with the Writers prior submission in response to the First Notice, the Writers focus in this comment almost entirely on the Subpart B rates applicable to physical carriers under 37 C.F.R. §385.11(a).

I. SUMMARY

As a general comment on the record to date in Phonorecords IV, the Writers are mystified by the histrionics that have become associated with this Proceeding both on the record and in the press. A voluntary negotiation is just a deal, often made by people who are paid to always be closing. The Writers believe that Congress intended that voluntary negotiation produce a fair result on a reasonable timetable.

While not directly at issue in the reopened comment period, what is clearly the case is that the settlement of the Subpart B rates has unnecessarily become a major gating item for the streaming side of this Proceeding, geese and ganders being what they are. Despite the extensive voluntary negotiation period for the Subpart B rates by the Majors, the Judges—and, frankly, songwriters around the world--are presented instead with a cornucopia of chaos across the board; the cherry on top is the frozen mechanicals crisis. However, in this season of hope the Writers are confident that the Judges will lead us all out of this daunting situation.

The Writers are not interested in the personalities, the arm-waving or the finger-pointing. They are interested in *the results*, particularly because neither they nor anyone they authorized had input into the negotiation that produced either the Proposed Settlement or the impasse.

There is at least one easy way to fix this and recognize the intrinsic value of songs: Raise the statutory rate proposal for Subpart B configurations in at least some relation to the streaming rate increase. A song is no less valuable because of

the medium in which it is exploited.[11]

As the Writers will argue, just like the voluntary agreement on Subpart B that led to this impasse was reached by the Majors, those same parties can go back to the drawing board to reach an appropriate conclusion with a higher Subpart B rate.

Neither the public nor the songwriters are well served (and frankly neither are the Judges) by thrashing about and waiving arms. This may serve well the people who are paid by the hour but it hasn't served people who are paid by the song. At all. "Victory" without winning may pass for success in Washington, but it does not in the writer room or at a songwriter's kitchen table.

The Proposed Settlement is a crystallization of everything that is wrong with the licensing and payment practices that have arisen under the compulsory license regime where no is yes, more is less and the Kool-Aid whispers "Drink Me." While the Writers will focus in this comment on the frozen mechanicals issue that has become emblematic of the current crisis, it must be said that the decade-plus MOU agreements are a backward looking and inequitable insider arrangement that permits a mindset of sloppiness and a "kick the can down the road" mentality that debilitates the entire music publishing business.[12] It's no accident that the

[11] The Judges no doubt will be told many stories about how Subpart B configurations are not meaningful sales compared to streaming so rates deserve to be frozen. This is a novel copyright argument without a statutory basis. The theory is also not based on accurate facts as the Writers discuss extensively in the Prior Comment at paragraph 5 and will not repeat here.

[12] There is a growing backlash to decades of delaying definitive action on song metadata and songwriter payments such as Credits Due campaign of the Ivors Academy and Abba's Björn Ulvaeus. *See generally* Chris Cooke, *PPL Backs Björn Ulvaeus's Credits Due Campaign*, Complete Music

Mechanical Licensing Collective—run by largely the same cast of characters under a jaw-dropping Congressional governance mandate—has been sitting on $424,000,000 of other peoples' money for nine months during a pandemic with no visible compliance with another Congressional mandate of paying songwriters correctly in Title I of the Music Modernization Act.[13]

The MLC and the sequence of MOUs are both descended from the same ancestors a generation ago. Each have essentially the same business model and each are somehow inexplicably viewed as a "win" for the songwriters. The irony of splicing the genetic code of the *ancien régime* MOU to the future is not lost on anyone. If the failure to match money and songs in the MOU process is still a problem after fifteen years as well as the much-trumpeted Title I of the Music Modernization Act, it's not the horse's fault. It's the rider's.

It would be a real pity for the CRB to perpetuate this unfairness by adopting the Proposed Settlement. With respect, it is bad law, bad policy, and a failure to even try to bend the arc of the moral universe. Conversely, rejecting the Proposed Settlement would provide the kind of steely oversight tragically lacking in the current regime. Please let the future have a vote, just once.

Update (Oct. 4, 2021) available at https://completemusicupdate.com/article/ppl-backs-bjorn-ulvaeuss-credits-due-campaign/

[13] See, e.g., H. Rep. 115-651 (115th Cong. 2nd Sess. April 25, 2018) at 5; S. Rep. 115-339 (115th Cong. 2nd Sess. Sept. 17, 2018) at 5 ("The Committee welcomes the creation of a new musical works database that is mandated by the legislation….***Music metadata has more often been seen as a competitive advantage for the party that controls the database***, rather than as a resource for building an industry on." (emphasis added)).

The Writers object to the Proposed Settlement for the following reasons and respectfully suggest constructive alternatives. The gravamen of our objection is that (1) the Subpart B rates have already been frozen since 2006 and extending the freeze another five years is unjust; (2) no evidence has been publicly produced in the Proceeding that justifies or even explains extending the proposed freeze aside from the connection to the memorandum of understanding in the MOU4 late fee waiver ("MOU"), a document that the Majors only recently disclosed in their Reply; (3) very large numbers of songwriters and copyright owners of various domiciles around the world and national origins are unlikely to even know this Proceeding is happening and there still is no evidence that the unrepresented have appointed any of the participants to act on their behalf or were asked to consent to the purported settlement before the fact even if they were members of these organizations aside from the respective board of directors; (4) physical sales are still a vital part of songwriter revenue (which the Writers documented in the Prior Comment[14]); and (5) there are many just alternatives available to the Judges without applying an unjust settlement to the world's songwriters who are strangers to the Proposed Settlement and in particular the MOU component (as the MOU will likely require membership in the NMPA to benefit consistent with prior MOUs).

[14] See Prior Comment at 16.

II. STATEMENT OF INTERESTS.

By way of background, following are short summaries of the Writers' biographies demonstrating their respective significant interests in the subject matter of this Proceeding.

HELIENNE LINDVALL: Ms. Lindvall is an award-winning professional songwriter, musician and columnist based in London, England. She is Chair of the Songwriter Committee & Board Director, Ivors Academy of Music Creators (formerly British Academy of Songwriters, Composers & Authors BASCA) and chairs the esteemed Ivor Novello Awards. She also is the writer behind *The Guardian*'s music industry columns *Behind the Music* and *Plugged In* and has contributed to a variety of publications and broadcasts discussing songwriters' rights, copyright, and other music industry issues.

DAVID LOWERY: Mr. Lowery is the founder of the musical groups Cracker and Camper Van Beethoven and a lecturer at the University of Georgia Terry College of Business and is based in Athens, Georgia. He has testified before Congress on the topic of fair use policy[15] and is a frequent commentator on copyright policy and artist rights in a variety of outlets, including his blog at TheTrichordist.com. He has been a class representative in two successful class actions by songwriters

[15] *See The Scope of Fair Use: Hearing before the Subcomm. on the Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan. 28, 2014) (statement of David Lowery).

against music streaming services and is currently an objector[16] to the cy pres-only class action settlement in the Google "Wi-Spy" litigation in which he has been supported by 13 state attorneys general amici.[17]

BLAKE MORGAN: Mr. Morgan is a New York-based artist, songwriter, label owner, music publisher, and the leader of the #IRespectMusic campaign[18] which focuses on supporting fair payment for creators across all mediums and platforms including supporting the American Music Fairness Act sponsored by Representatives Deutch and Issa.[19] Mr. Morgan also lectures on artists' rights at music, business, and law schools across the United States.

Helienne Lindvall, David Lowery and Blake Morgan are independent songwriters who own the copyrights to many of their songs. They previously were amici in *Google v. Oracle*[20] together with the Songwriters Guild of America. In some instances, they have written songs whose copyrights they have transferred in limited parts and in some cases for limited periods of time to major music

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[16] Objection of David Lowery, *In Re Google LLC Street View Electronic Communications Litigation* (U.S.D.C. N. Dist. Calif. San Fran. Division, Case No. 3:10-md-02184-CRB) (2021).

[17] Brief of Thirteen Attorneys General as Amici Curiae in Support of Objector-Appellant and Reversal, *In Re Google LLC Street View Electronic Communications Litigation (9th Cir. Case No.* 20-15616) (2021).

[18] *See #*IRespectMusic campaign, *available at* https://www.irespectmusic.org.

[19] See *Reps. Issa, Deutch Introduce Bill to Ensure Artists Receive Fair Pay for FM/AM Radio Airplay* (June 21, 2021) available at https://issa.house.gov/media/press-releases/reps-issa-deutch-introduce-bill-ensure-artists-receive-fair-pay-fmam-radio.

[20] Google LLC v. Oracle America, Inc., 593 U.S. ___ (2021), *Brief of Amici Curiae Helienne Lindvall, David Lowery, Blake Morgan and the Songwriters Guild of America in support of Respondent* (2021) available at https://www.supremecourt.gov/DocketPDF/18/18-956/133298/20200218155210566_18-956%20bsac%20Helienne%20Lindvall%20et%20al--PDFA.pdf.

publishers. In other cases, their songs are not owned by major music publishers but are administered by one or more of them, in many cases also for limited periods of time. In some instances, these transfers were in perpetuity subject to certain statutory or contractual termination rights. They also have retained the copyrights to many of their songs and are self-administered songwriters with respect to those nondramatic musical works.

The Writers thank the Copyright Royalty Judges for inviting the public to participate in crafting the proposed regulations in the Proceeding.[21]

III. OBJECTIONS, DISCUSSION AND SOLUTIONS

The Writers hope that their comments and suggestions are helpful to the Judges in trying to solve the frozen mechanicals crisis. The Writers also appreciate that the Judges seek to do justice and find a fair result given both their appointed role of administering the awesome power of the government to compel songwriters to accept all rates and terms of the statutory license and their mandate to engage with the public in crafting these regulations.

[21] 86 FR 33601.

A. Evidence of the MOU Quid Pro Quo Supports Bifurcating Subpart B Rates and Terms

1. The MOU is Inextricably Bound to the Frozen Rate Extension

The Majors seem to take the position that there is no connection between the MOU and their proposal to extend the frozen mechanical rates and terms for Subpart B configurations.[22]

The Majors almost say that to the Judges; they tell the Judges in a rather conditional statement that:

> The MOU entered into contemporaneously with the Settlement is *irrelevant* to the Judges' consideration *of the Settlement*, and does not call into question the reasonableness of the Settlement.[23]

The Writers will take this somewhat ambiguous statement to mean that the Majors want the Judges to believe that there is no connection between the MOU and the frozen rate extension which are *both* part of the Settlement.[24]

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[22] It is common for a "controlled compositions clause" in term recording artist agreements and some producer agreements to include a "rate fixing date" that freezes the applicable statutory royalty to the date of initial release. As has been discussed extensively in the comments to the First Notice, these provisions were created in reaction to the gradual increase in the statutory rate implemented from 1978-2006 when the rise in the statutory rate was frozen by the CRB. The Writers also note that freezing the mechanical rate for permanent downloads effectively extends the "rate fixing date" provision of "controlled compositions clauses" to every songwriter in the world without the consideration payable under a term recording artist agreement or producer agreement. The CRB thus negates a hard-won industry standard of paying the full statutory rate for permanent downloads through the government's awesome power to mandate price controls under the compulsory license. *See generally*, Donald S. Passman, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (2019) at 264.

[23] Reply at 6 (emphasis added).

[24] Note that the truth value of the Majors' argument is that A (MOU) and B (frozen rates) necessarily equal C (the settlement), but the existence of A has no bearing on the C even though C

Respectfully, if the MOU is "irrelevant" to the settlement, why did the Majors ever bring it up in the first place? Recall that the Writers previously asked the Judges to question whether the MOU was *additional* consideration for extending the frozen mechanical rates.[25] While others may have questioned the motives, the Writers did not and do not concern themselves with whether the MOU could be characterized as a "sweetheart deal" or another pejorative. The *quid pro quo* speaks for itself.

Rather, the Writers' question was whether the MOU was a *quid pro quo* of additional consideration for the frozen rates that was enjoyed by a limited group of participants in the MOU[26] but was not enjoyed by strangers to the deal[27] yet who were still subject to the frozen rate. Indeed, it appears that this bootstrapping is exactly the case and that the MOU may have been a major factor in the proposal to extend the frozen rates—all while publishers are paid with their own money at the ever-eroding frozen rate.[28] While the Writers appreciate that the Majors have now

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equals the sum of A and B.

[25] Prior Comment at 11.

[26] Prior Comment at 23. The payment under the MOU is, in many cases, simply paying copyright owners with their own money (and sometimes other peoples' money) to encourage those copyright owners to grant a release of claims to the participating record companies.

[27] It must be said that prior MOUs also require membership in the National Music Publishers Association in order for participants to be paid. See, e.g., Frequently Asked Questions ("MOU FAQ") "Group V is open to NMPA-member music publishers and foreign societies with musical compositions initially distributed by one or more participating record companies in the United States from 2018 through 2022." In response to the FAQ of whether a publisher can participate in the MOU3 distribution without joining the NMPA, the NMPA stated "To participate in Group V distributions, you must join NMPA before you opt into MOU 3."

[28] There is nothing on its face that is inherently wrong with the MOU process itself as it may be an efficient way to address the "pending and unmatched" problem arising from overuse of

disclosed the MOU as part of their Reply, nothing in the Majors' comment ameliorates the Writers' fundamental concern.

This objection is not a conspiracy theory; there is nothing theoretical about it. A significant reason why the Writers' concern still exists is the MOU's *quid pro quo* language directly related to extending the frozen Subpart B rates:

> ***This MOU4 is a separate, conditional agreement [the quid] that shall not go into effect until [the quo] NMPA, SME, WMG's affiliate Warner Music Group Corp., and UMG submit a motion to adopt a proposed settlement of the Phonorecords IV Proceeding as to statutory royalty rates and terms for physical phonorecords, permanent downloads, ringtones and music bundles presently addressed in 37 C.F.R. Part 385 Subpart B (the "Subpart B Configurations"), together with (1) certain definitions applicable to Subpart B Configurations presently addressed in 37 C.F.R. § 385.2 and (2) late payment fees under Section 115 for Subpart B Configurations presently addressed in 37 C.F.R. § 385.3, together with certain definitions applicable to such late payment fees presently addressed in 37 C.F.R. § 385.2, for the rate period covered by the Phonorecords IV Proceeding***, which the Parties anticipate happening promptly *after* this MOU4 has been signed by SME, UMG, WMG,

"copyright control" designations or bad metadata, at least until the arrival of the Mechanical Licensing Collective with its Congressional mandate to build the musical works database to solve this problem. The problem is with using an MOU, including MOU4, as consideration for frozen rates that apply to songwriters who do not benefit from an MOU.

RIAA, NMPA, Sony Music Publishing, Universal Music Publishing Group, and Warner Chappell Music, Inc. (the "Initial Signatories").[29]

Based on the quoted language, the MOU is not effective until the motion to adopt the Proposed Settlement is submitted to the CRB—by its own terms. A fair reading of the MOU suggests, and may even require, that the consideration for the MOU is conditioned on extending the frozen rates in the Proposed Settlement. The Writers understand why the deal was made; they just do not think it is equal justice under law for the Judges to compel unwilling sellers to accept the terms.

There is another less obvious nuance to the MOU. If the NMPA continues the practices it unilaterally established for prior MOUs, only certain publishers and presumably any foreign collecting society may claim the undisclosed amount of the late fee waiver funds.[30]

However, the Writers say "certain publishers" because any claiming publisher must *join the NMPA* and, presumably, pay dues and whatever other compensation is payable to NMPA in connection with the MOU (euphemistically referred to as a "donation" in the MOU).[31] Again, not a conspiracy theory, the

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[29] Reply at 19, MOU-4 at 2 (emphasis added).

[30] The FAQs for the prior MOUs clearly state that the MOU has no mechanism for paying songwriters or ascertaining whether songwriters are even entitled to a share of the monies concerned "The Program Administrator has not been authorized to address and will not respond to questions relating to how songwriters are paid. We suggest songwriters contact their publishers directly for guidance." MOU3 FAQ at question 21 available at http://www.nmpalatefeesettlement.com/mou3/faq.php

[31] MOU at 10, par. 4.8. A "donation" is defined in Merriam Webster as "the making of a gift" or a "free contribution." Compare to the MOU3 FAQ requirement that the money can only be claimed by a dues-paying member of the NMPA.

"donation" reference is in the four corners of the Proposed Settlement and the requirement to join the NMPA is in the public FAQ of prior MOUs.

As the Writers have raised previously,[32] not only is the authority of the NMPA and NSAI to represent songwriters or non-members in this Proceeding in question due to a lack of process, but it also now appears that at least the NMPA may have a stake in the outcome if not get a piece of the action.

The Writers respectfully ask the Judges to consider requiring the Majors to disclose the *amount* of the MOU settlement payment and to provide full disclosure to the public of how and to whom the money from the MOU actually flows until it finally comes to rest. Otherwise, it seems that the Proposed Settlement may have the knock-on effect of driving revenue to the NMPA and perhaps others in the shadows if not the dark.

2. The Regulations Should Reference the MOU.

At the heart of the Writers' objection to the Proposed Settlement is the connection between the frozen rate and the as yet unknown settlement payment under the MOU. And it is worth noting that all of the money starts with the songwriter. The songwriter may agree to give up a portion of their money to music publishers or collecting societies, they may appreciate the investment and support of these organizations, they may even come to regard the organizations fondly, they may be happy to cut them in, but in the cold light of dawn the money belongs to the songwriters. Everyone else is just visiting.

[32] Prior Comment at 4.

The Writers wish to reiterate again that they do not believe there is anything untoward about the MOU itself. Copyright owners, like the Writers, are entitled to both a late fee under the Copyright Act and the right to terminate a compulsory license for non-payment under certain circumstances. Even the compulsory license recognizes the copyright owner's right not to be ripped off.

Copyright owners are also entitled to waive those rights at their discretion, which of course ought to be a knowing, intelligent, and voluntary waiver of their material and valuable natural rights codified by the Constitution and implemented by Congress and international treaties. Even though that standard waiver criteria have not been met here as to the Writers and probably many others who have not had the opportunity to be heard,[33] that is not the most pressing problem with the Proposed Settlement.

That problem is the MOU. The proposed regulations are silent on the existence of the MOU and the MOU itself is silent on the amount of the late fee settlement. The Judges could revise the proposed regulations to include an appropriate reference to the MOU which is now a public document in the docket of Phonorecords IV.

Such a revision is not trivial. Why? Failing that revision, someone not "in the know" who reads the proposed regulations if given effect—such as a songwriter residing outside of the U.S. or any songwriter who has not followed this Proceeding

[33] The opportunity to be heard is a cornerstone of our jurisprudence dating back to the Anglo-Saxon "wager of law" or "compurgation" from the 5th Century (*see generally* James B. Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 24-26 (1898)), and of course Article 39 of Magna Carta.

but whose works are exploited under the compulsory license--would not necessarily know of the MOU absent further inquiry or know that the MOU was a *quid pro quo* for the extension of the frozen Subpart B rates.

Even if the MOU is disclosed in a revised version of the proposed regulations, it seems unlikely that the Judges can properly require a late fee waiver, release of claims and membership in the NMPA as conditions of the compulsory license, but at least there would be disclosure. Given that the MOU is inextricably bound to the proposed extension of the frozen rates, lack of disclosure of the amount of the MOU may be reformed in another forum.

3. Reformation of the MOU

The Writers recognize that the Judges may lack the jurisdiction to actually reform the MOU. However, it does seem reasonable that the Judges could require that the amount of the late fee waiver settlement be disclosed because the MOU is inextricably bound to the frozen rate extension by its own terms. Absent such a disclosure, how could a copyright owner not "in the know" ever determine the fairness of the *quid pro quo*?

The amount of the late fee waiver settlement could be a lot of cash. In the 2009 Billboard article cited by the Majors, the MOU that was the subject of that reporting was valued at "up to $264 million." [34] However "routine" the Majors may think that the MOU process is, a $264 million payment in a "pennies business" is

[34] Ed Christman, *NMPA, Major Labels Sign Terms of Agreement*, Billboard (Oct. 7, 2009) available at https://www.billboard.com/articles/business/1264471/nmpa-major-%20labels-sign-on-terms-of-agreement.

not routine. This is particularly true during the pandemic because the MOU pays somebody—ostensibly songwriters—with the songwriters' own money which they could have used long ago. As the Majors tell the Judges, the MOU as submitted is evidently not a secret but strangers to the deal are even further removed from its negotiation than they are from this Proceeding.[35] They do not have the opportunity to subject these assertions to the crucible of cross-examination, even if they could afford to do so.

A copyright owner who lacks the means to participate in the Proceeding or who lives outside the United States could, after consulting the proposed regulations, reasonably think that the final rate was arrived at through considered reflection and analysis and not an unvetted settlement among related parties in meetings to which the stranger was not invited. Accordingly, these strangers to the deal that the CRB is asked to adopt rely entirely on the Judges to consider their interests without regard to the stranger's position in life or national origin.

Will past be prologue? Copyright owners may well ask given the past practices of the several MOUs being a law unto itself that require participants to join the NMPA, pay NMPA dues and possibly other "donations", offer no representation of the copyright owners who dispute the MOU market share allocation, do not seek authority before the fact to negotiate the terms of the MOU in the first place (other than a board of directors), and offer no protection after the

[35] It is worth noting that NSAI is not a party to the MOU.

fact for songwriters to guarantee they receive a dime.[36] Again, if the Judges adopt the Proposed Settlement, songwriters are only guaranteed the burden of the frozen rate extension and none of the benefit of the late fee waiver settlement.[37]

Thus, the CRB is being asked to impose a regime where certain copyright owners bear all of the burden of the frozen rate and potentially none of the benefits of the MOU *quid pro quo*. While the Writers understand that the same frozen rate/MOU structure has been approved by the CRB in prior proceedings, there is no time like the present to bend the arc of history.

4. Lack of Evidence of Authority or Consent of Songwriters Supports Requiring an Opt-In by the Songwriters Affected by Majors' Settlement

An opt-in arrangement may help to cure the due process problems with the Proposed Settlement. The Majors in their Reply rely on a citation that both

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[36] The FAQ for prior MOU settlements clearly states that songwriters are on their own in evaluating the terms of the settlement, even though they are required to join the trade association that negotiated the deal. For example, MOU3 clearly states "The NMPA, HFA, and their attorneys will not act as legal counsel to any publisher, and should not be relied on for legal advice." MOU3 FAQ 12 available at http://www.nmpalatefeesettlement.com/mou3/faq.php.

[37] The Judges may be told by the NMPA and NSAI that "our side" paid over $20 million for prior CRB proceedings. *See* L.B. Cantrell, *NSAI Songwriters Respond to Criticism of Decision not to Challenge Physical Mechanical Rates*, Music Row (June 2, 2021)("[In CRB I] after **our side** spent more than $20 million, the judges kept the rate exactly where it was, at 9.1 cents.") available at https://musicrow.com/2021/06/nsai-songwriters-respond-to-criticism-of-decision-not-to-challenge-physical-royalty-rates/ (emphasis added). The Judges may be in a better position than any songwriter to drill down on that statement and determine its truth value. While it may be true that the proceedings cost over $20 million in legal fees, an astonishing number, the source of those funds may have been a percentage of sums actually paid to NMPA in MOU1 as an off-the-top deduction from the settlement as a "donation" to cover the significant legal expenses NMPA incurred. If that is true, the bill was paid by the songwriters in large part by deducting the fees "off the top." *See generally*, David Israelite, *Songwriters vs. Giant Tech Streaming Services: What You Need to Know*, Billboard (Oct. 25, 2021) available at https://www.billboard.com/pro/songwriters-vs-streaming-need-to-know-nmpa-nsai/ ("Ultimately, around 80% of the streaming money that goes to songwriters and music publishers from these services, goes to the songwriters, so this truly is a battle on their behalf.").

demonstrates the foresight of the CRB and on balance tends to support the Writers' position that the NMPA and the NSAI likely lack the requisite authority to negotiate on behalf of all the world's songwriters. The Majors invite the Judges to participate in a thought experiment[38] that serves quite well to highlight the issues the Writers have raised regarding the authority of the NMPA and the NSAI to impose rates bootstrapped by means of the freeze:

> As the Judges have noted, "NMPA and NSAI represent individual songwriters and publishers," and would not "engage[] in anti-competitive price-fixing at below-market rates," since they must "act[] in the interest of their constituents" *lest their constituents "seek representation elsewhere."* [Phonorecords III] at 15298.[39]

Respectfully, the problem is way beyond seeking representation elsewhere—the problem is that there was likely no "representation" in the first place if you take "representation" in the legal sense (such as that of a common agent) which the Writers gather is how the Judges intended the use of the word. Likewise, there is a difference between an agent's principal and a "constituent", i.e., a difference between one who expressly authorizes an agent to represent them in certain circumstances and one who is allowed to vote on who that representative is to be and what actions the representative is permitted to take.

[38] Reply at 5.

[39] Id. (emphasis added).

Neither arrangement is the case for many songwriters who have commented in the record for the Proceeding. The Writers will leave the record to speak for itself as to why these commenters have sought "representation elsewhere" but it appears that it is for the same reason that they are not participants in the proceeding—they can't afford the justice and therefore they ask the Judges to give special weight to their comments in the CRB's deliberations as a matter of fundamental fairness.

But the Major's thought experiment and speculation continues to an interesting coda regarding below statutory licensing (generally not permitted as a matter of contract in likely tens of thousands of co-publishing and administration agreements):

> And certainly it would not be in the interest of any major publisher to agree to extend a below-market mechanical royalty rate ***to the competitors of its sister record company***.[40]

While the thought experiment and speculation sound innocuous, consider what is being said here. First, the Majors identify their interest as that of "major publishers"; not all publishers, not all songwriters, but "major publishers." Then the Majors go on to say that it would not be in the interest of the major publishers to give a "below market" rate ***to their sister record company's competitors***.

[40] Id.

Of course, there is no market rate in the U.S.[41] and essentially never has been[42]; the Judges have the unenviable task of divining a market rate to be made statutory and compelled by force of law. Respectfully, in our Republic such a task cannot be accomplished in a back room with a starry ceiling if the work is to last; it may be accomplished only with great attention to due process and equal justice under law.

The Writers would therefore modify the Major's thought experiment to include "below statutory" along with "below market". Now the Writers are left with the assertion—they said it, the Writers merely repeat the words--that major publishers use the statutory rate to protect their record company affiliates from competition rather than fulfilling their role as true blue brokers ***for their songwriters*** by refusing to grant below-statutory rates (either directly in their deals or indirectly through the rot of inflation or artifice of controlled compositions clauses). And they are using their market power to impose a rate on the world that they seem to say protects the major publishers' affiliates. While this assertion is a bit like Captain Renault discovering gambling at Rick Blaine's American Bar, it is an uncharacteristically bald description of reality and may prove too much.

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[41] Some of the services in the Phonorecords IV streaming rate proceeding seek to describe the Subpart B rates as evidence of a "WBWS" rate. The Writers wish to disabuse them of that idea. Some sellers were not willing and some—likely many if not most--were not even asked. See, e.g., discussion of "Subpart B Settlement" in Written Direct Testimony of Google LLC at 5 available at https://app.crb.gov/document/download/25881.

[42] See Prior Comment, discussion of historical rates at 26.

Extending the frozen mechanical rate certainly doesn't protect songwriters—the Judges have ample evidence that many songwriters object to the extension. But in the Majors' own words we now know *cui bono*, and the benefit goes back to Phonorecords III and likely earlier.

Moreover, language in the MOU highlights the limits of the authority of the NMPA and NSAI to bind strangers to them. Consider the following post-closing condition imposed on the NMPA by the plain terms of the MOU:

> It is understood that only the Initial Signatories will sign this MOU at the outset, and that ***NMPA shall use its best efforts to obtain the signatures to this MOU4 by all of the remaining Parties within two (2) weeks thereafter***.[43]

If the NMPA had the authority to bind these many publisher "Parties" to the MOU, why would there be a need to impose such a post-closing condition on the NMPA?

The MOU itself, then, contemplates a kind of "opt-in" within its four corners. Would it not be reasonable for the Judges to *require* an opt-in to demonstrate and confirm an agreement by individual copyright owners to the *quid pro quo* rather than compelling a vague acquiescence? As the Majors tell the CRB, this practice is well-established so the opt-in mechanics should not be burdensome.[44]

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[43] Reply at 20, MOU-4 at 3.

[44] It is worth noting that the MOU4 (or any prior MOU) requires no matching and appears to simply divide money based on market share which by definition benefits the largest publishers. Given that matching is clearly a focus of Congress in establishing the extensive matching requirements and obligations on the Mechanical Licensing Collective in the Music Modernization Act which was negotiated and promoted by the NMPA and NSAI, it is hard for Writers to understand why the MOU practice should go forward in its historical form. Matching should be required. If the Judges are not able to address this issue, it might be taken up in another forum.

B. The Cruelest Tax: Erosion of Frozen Rates by 15 Years of Inflation and Future Inflationary Forces in the U.S. Economy Supports Indexing All Subpart B Rates

Figure 1 United States Inflation Rate

Often called the "cruelest tax", the rot of rising inflation since 2006 has already significantly decayed the frozen statutory rates for Subpart B configurations. The Writers wish to reiterate[45] the importance of indexing the Subpart B rates to the CPI-U as the Judges recently did in Webcasting V.[46]

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[45] See Prior Comment at 25.

[46] See, e.g., Gwynn Guilford, *U.S. Inflation Hit 31-year High in October as Consumer Prices Jump 6.2%,* Wall Street Journal (Nov. 10, 2021) available at https://www.wsj.com/articles/us-inflation-consumer-price-index-october-2021-11636491959?mod=djemalertNEWS; Lisa Fickenscher, *Proctor & Gamble Warns of Price Increases as Inflation Continues to Bite*, NY Post (Oct. 19, 2021) available at https://nypost.com/2021/10/19/procter-gamble-warns-of-price-increase-on-consumer-products/; but see Melissa Repko, *Walmart CEO Doug McMillon says inflation is opportunity to beat*

Respectfully, the Judges could quite easily take notice of extensive information readily available regarding current levels of inflation in the U.S. economy and the expectation that inflationary pressures will continue well into the 2023 to 2027 period. The Writers find it inexplicable that the Majors have not already proposed indexing as part of the Proposed Settlement—aside from the fact they got away with it before during a time of relatively low inflation and the absence of stagflationary[47] supply side shocks.[48]

As the noted economist and former Treasury Secretary Lawrence Summers recently wrote:

> [The Federal Reserve] and Biden administration officials are entirely correct in pointing out that some of that inflation, such as last month's run-up in used-car prices, is transitory. But not everything we are seeing is likely to be temporary. A variety of factors suggests that inflation may yet accelerate — including further price pressures as demand growth outstrips supply growth; rising materials costs and diminished inventories; higher home prices that

competitors on price, CNBC (Nov. 16, 2021) available at https://www.cnbc.com/2021/11/16/walmart-ceo-doug-mcmillon-inflation-is-opportunity-to-win-customers.html.

[47] *See, e.g.,* Vivien Lou Chen, *"Stagflation is Here" following months of rising prices, Bank of America Analysts Say*, MarketWatch (Oct. 1, 2021) available at https://www.marketwatch.com/story/stagflation-is-here-following-months-of-rising-prices-bofa-analysts-say-11633110365 ("[F]ears about higher prices are coming to the fore, with BofA Global Research analysts declaring in a Friday note that 'stagflation is here'".)

[48] *See* 82 Fed. Reg. 15297, 15298 (Mar. 28, 2017) ("the Judges view the settling parties' consensual decision to establish a fixed nominal rate, *i.e.*, unadjusted for inflation, as also representative of their mutual self-interest").

have so far not been reflected at all in official price indexes; and the impact of inflation expectations on purchasing behavior.[49]

Secretary Summers is not alone in predicting inflation or stagflation in our future; the Internal Revenue Service recently announced[50] inflation adjustments for more than 60 tax provisions. Trading Economics also tells us:

> The annual inflation rate in the US surged to 6.2% in October of 2021, the highest since November of 1990 and above forecasts of 5.8%. Upward pressure was broad-based, with energy costs recording the biggest gain (30% vs 24.8% in September), namely gasoline (49.6%). Inflation also increased for shelter (3.5% vs 3.2%); food (5.3% vs 4.6%, the highest since January of 2009), namely food at home (5.4% vs 4.5%); new vehicles (9.8% vs 8.7%); used cars and trucks (26.4% percent vs 24.4%); transportation services (4.5% vs 4.4%); apparel (4.3% vs 3.4%); and medical care services (1.7% vs 0.9%). The monthly rate increased to 0.9% from 0.4% in September, also higher than forecasts of 0.6%, boosted by higher cost of energy, shelter, food, used cars and trucks, and new vehicles.[51]

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[49] Lawrence H. Summers, *Inflation is Real* (May 24, 2021) available at http://larrysummers.com/2021/05/24/the-inflation-risk-is-real/.

[50] Internal Revenue Service, *IRS Provides Tax Inflation Adjustments for Tax Year 2022* (Nov. 10, 2021) available at https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2022.

[51] Trading Economics, *United States Inflation Rate* available at https://tradingeconomics.com/united-states/inflation-cpi.

Figure 2 U.S. 10 Year Treasury Note

Even Treasury Secretary Yellin expects inflation to remain high through 2022,[52] and many other economists expect the same.[53] Many economists expect high inflation well into 2022 and beyond, i.e., well into the term of Phonorecords IV.[54]

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[52] Linus Chua, *Yellen Expects High Inflation Through Mid-2022 Before Easing*, Bloomberg (Oct. 24, 2021) available at https://www.bloomberg.com/news/articles/2021-10-24/yellen-expects-high-inflation-through-mid-2022-before-easing

[53] Olivia Rockeman and Kyungjin Yoo, *Economists Boost US Inflation Forecasts Through End of 2022* (Nov. 12, 2021) available at https://www.bloomberg.com/news/articles/2021-11-12/economists-boost-u-s-inflation-forecasts-through-end-of-2022; Jordan Yadoo, U.S. Consumer Sentiment Drops to 10 Year Low on Inflation Fears (Nov. 12, 2021) available at https://www.bnnbloomberg.ca/u-s-consumer-sentiment-drops-to-10-year-low-on-inflation-fears-1.1680947; Margaret Brennan and Gita Gopinath, *IMF's Chief Economist Says Inflation Pressure to Persist Into Next Year*, CBS News (Oct. 24, 2021) available at https://news.yahoo.com/imfs-chief-economist-says-inflation-161002962.html; Paul Wiseman, *Explainer: Why US Inflation is So High and When It May Ease*, ABC News (Nov. 11, 2021) available at https://abcnews.go.com/Lifestyle/wireStory/explainer-us-inflation-high-ease-81108287.

[54] Survey of Professional Forecasters, *Fourth Quarter 2021 Survey of Professional Forecasters* (Nov. 15, 2021) available at https://www.philadelphiafed.org/surveys-and-data/real-time-data-research/spf-q4-2021 ("Over the next 10 years, 2021 to 2030, the forecasters predict headline CPI inflation will average 2.55 percent at an annual rate. The corresponding estimate for 10-year annual-average PCE inflation is 2.30 percent. These 10-year projections are higher than those of the previous survey."); David Payne, *Kiplinger's Economic Forecasts: Inflation Hits 30 Year High*,

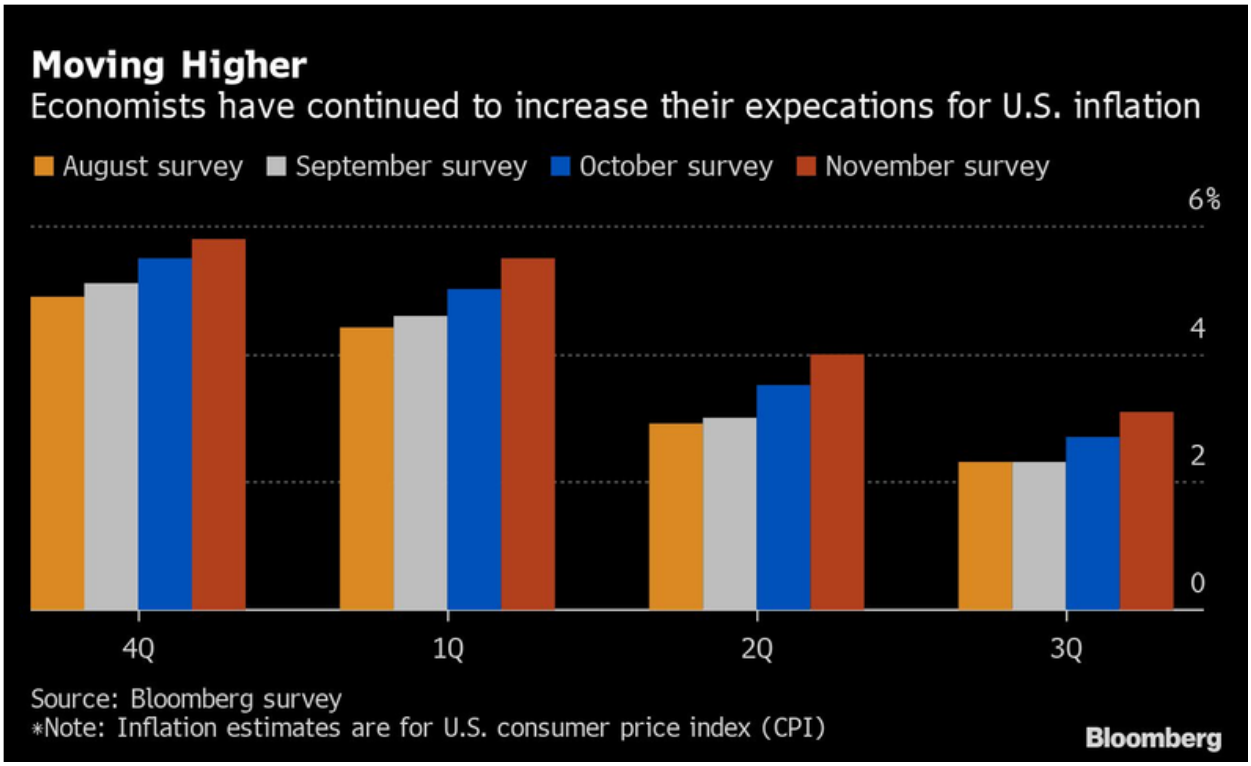

Figure 3 Bloomberg Survey of Economists

Given these obvious inflationary pressures, the Writers' need not explain again[55] why they are concerned that the proposed settlement completely ignores the stark reality of both supply side shocks and demand side pull that leave songwriters—once again—gasping for air due to an inescapable Subpart B price

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Kiplinger (Nov. 11, 2021) available at https://www.kiplinger.com/economic-forecasts/inflation ("Higher inflation is likely to get the Federal Reserve to start raising short-term interest rates in late 2022, instead of waiting until 2023, as originally planned….While we think that Powell will be reappointed, a chair preferred by the more progressive wing of the Democratic Party would likely mean that rate increases would be delayed longer, perhaps allowing higher inflation to take stronger root."); Greg Robb, *Powell Says Factors Pushing Inflation Higher Could Last Until Next Summer*, MarketWatch (Sept. 30, 2021) available at https://www.marketwatch.com/story/powell-says-factors-pushing-inflation-higher-could-last-until-next-summer-11633019533?mod=article_inline ("Exactly when [inflation will decline] is not possible to say," the Fed chairman added. "But I would say we should be seeing some relief in coming months and over the course of the first half of next year," Powell said.").

[55] Prior Comment at 25-26.

control and a compulsory license. That price control has been in place for 15 years already, harm second only to the negative real royalty rates required by the government during the 1909-1977 period.[56]

Respectfully, the Judges can determine through simple calculations using readily available government data the extent to which songwriters are underwater already due to a flood of inflation and will be further underwater if the Judges extend the frozen mechanical rate for yet another five years. Why this has not been raised by the NMPA and NSAI is anyone's guess; the inflationary trend has been observable at least since around the time that the Proposed Settlement was first submitted to the CRB and grows more obvious with each passing day.

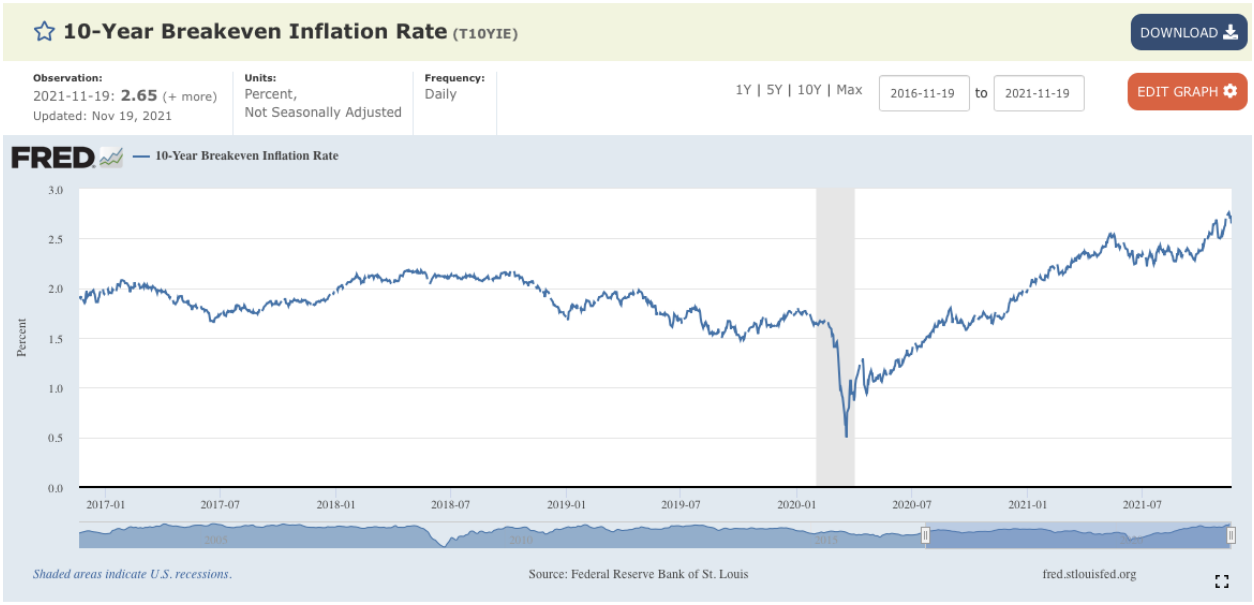

Figure 4 St. Louis Federal Reserve Bank 10-year Breakeven Inflation Rate

[56] See, e.g., Christian L. Castle, *Two Is the Loneliest Number: Why Are Songwriters Punished for 1909?* MusicTechPolicy (Oct. 18, 2021) available at https://musictechpolicy.com/2021/10/18/two-is-the-loneliest-number-why-are-songwriters-punished-for-1909/ ("[E]ven after 29 years of glacial statutory increases from 2¢ to 9.1¢ (not 44 years because the rates were frozen in 2006) songwriters are still receiving a negative real royalty rate.")

The Writers understand the "real" issue: labels want to pay songwriters less and songwriters want labels to pay more. Got it—it's a "buy low/sell high" situation, the 10 second MBA. But the Majors can use their market power and lawfare muscle to get the CRB to bootstrap their insider deal onto the backs of every songwriter in the world and songwriters lack leverage. Lack of indexing helps the users with a rate calculated in 2006 dollars but paid in current dollars—an inflation arbitrage.

The lack of indexing in the Proposed Settlement also means that the powers that be want songwriters to bear 100% of the inflation risk yet again, this time in a period of what many, many, many experts say in readily available public commentary will be one of high inflation. Instead of many years of chronic pain inflicted over the last 15 years, without indexing the next five years will be a few years of existential agony for songwriters, particularly featured artist-songwriters who tour. The Writers are, frankly, fed up with the government mandating that songwriters should be the only ones hurting.

At this point in time, indexing for inflation is a crucial issue that cannot be ignored or shined on. While the Judges are not expected to solve all economic problems for songwriters, songwriters can reasonably expect the government not to contribute to them further by compelling the unwilling seller to accept all the inflation risk from the all-too-willing buyer.[57]

[57] It is not the CRB's fault that the government-imposed wage and price controls on songwriters from 1909 to 1977; the CRB did not even exist yet. But in 2021, songwriters have nowhere else to turn save the Judges as they are priced out of the Proceedings and the Participants

Figure 5 Recent Gasoline Price

C. The CRB Should Take into Account the Rights of Songwriters and Publishers Not Represented by the Majors

Writing in Phonorecords III, the Judges put their finger on the exact problem with the current Phonorecords IV proceeding: "[T]he proposed rates and terms were negotiated on behalf of the vast majority of parties *that historically have participated* in Section 115 proceedings before the Judges….[T]hose parties [that historically have participated] clearly concluded that the rates and terms were acceptable to both sides."[58]

The Writers suggest that the Judges have evidence in the record today that the parties that "historically have participated" are not representative of the world's songwriters as the number of comments received by the Judges in this consultation should confirm—all of which oppose the Proposed Settlement. The parties that

have expressed no interest in listening while engaging in what seems like character assassination of a pro se participant.

[58] *See* 82 Fed. Reg. at 15298-99.

"historically have participated" have been in charge during the multi-year process that has led to the chaos before the CRB today.

The Writers respectfully ask the Judges to take notice that there are many songwriters who own their copyrights (similarly situated to the Writers) and who are not represented in this Proceeding. The number of public comments by non-participants—all opposed to the Proposed Settlement—as well as the unprecedented inquiry by a Member of Congress[59] on behalf of *actual* constituents hopefully will persuade the Judges that there is another side to the story presented by the Majors.

The Writers respectfully remind the Judges that the purpose of public comments in their proceedings is to allow the public to *participate* in the rulemaking process for just this reason.[60] The only way that the Writers and many, many songwriters similarly situated are able to enjoy participation in the Proceeding—as is their right—is through public comments. Given the unprecedented number of comments on a Phonorecords proceeding from nonparticipants (uniformly opposed), the Writers implore the Judges to give as much weight to the public comments on this Proposed Settlement as to the positions

[59] Letter from Hon. Lloyd Doggett to Librarian of Congress Dr. Carla Hayden and Register of Copyrights Shira Perlmutter (July 13, 2021), available at https://thetrichordist.files.wordpress.com/2021/07/letter-library-of- congress-register-of-copyrights-7.13.21.pdf

[60] *See, e.g,* Dept. of Justice, *Basic Purposes of the Administrative Procedures Act*, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 9 (1947) available at https://web.archive.org/web/20060915202809/http://www.law.fsu.edu/library/admin/1947i.html

of the participants in the Proceeding in order to fulfill the fundamental purpose of public comments in the first place.[61]

D. The CRB May Extend the Voluntary Negotiation Period for Subpart B Rates to Require the Majors to Reach a Higher Rate with Guidance from the Judges

The Writers do not envy the position of the Judges in presiding over a proceeding that has become, respectfully, entirely chaotic from the Writers' point of view. Due to the inability of the participants to reach an agreement—which is their highly-compensated job—decisions are being made out of sequence: Songwriters are being asked to extend the Subpart B freeze, the streaming rates for Phonorecords IV apparently must be decided before the resolution of the Phonorecords III remand, and so on. The loose ends seem endless, and one way or another, songwriters bear the cost of all this due to the government's statutory license which denies them the right to withhold their labor which many would gladly do.[62] César Chavez is rolling in his grave.

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[61] Roni A. Elias, *The Legislative History of the Administrative Procedures Act*, 28 FORDHAM ENV. L. REV. 207 (2016) at 219 (available at https://commons.law.famu.edu/cgi/viewcontent.cgi?article=1012&context=studentworks) ("Although the APA sets the minimum degree of public participation the agency must permit, ***Congress emphasized that this procedure was only a minimum requirement*** and that "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, ***should naturally be accorded more elaborate public procedures***." (emphasis added).)

[62] See, e.g., Trichordist Editors, *Say No to the Stockholm Syndrome: Is an Artist Strike Coming for Streaming?*, The Trichordist (Oct. 4, 2021) available at https://thetrichordist.com/2021/10/04/say-no-to-the-stockholm-syndrome-is-an-artist-strike-coming-for-streaming/ (quoting reader John Munnelly, "Musicians need to be able to aggregate their creative authority and organize to withdraw their labor—their content, music, presence, magic all of that from Spotify in the same way labor activists had a strike.")

Figure 6 Illustration from The Trichordist

Having said that, the Writers have tried in the Prior Comment and try again here to offer some concrete solutions regarding the Subpart B rates and terms. First, the Writers are mindful of Congress' interest in emphasizing voluntary negotiations as the preferred resolution mechanism for compulsory rates which makes good sense as an aspiration.

Therefore, the Writers' first suggestion is that the Judges reject the Proposed Settlement and require the Majors to go back to a renewed voluntary negotiation period with guidance to return with a rate structure that raises the statutory rate for those who are not members of the NMPA and who do not wish to become members of the NMPA.

The Judges could also announce that whatever the ultimate rate for non-members of the NMPA, all rates will be indexed to inflation. This approach appears to the Writers to be within the permissible jurisdiction of the CRB and consistent with Congressional intent.

Anticipating an objection, a brief discussion of administering this structure may be helpful. While establishing an NMPA and non-NMPA rate may at first seem burdensome in the administration, it need not be. When setting up new songs in the record company accounting system (at least those that are not marked "Copyright Control", i.e., unlicensed, which is a contributing factor to the problem in the first place), the songwriter or her publisher need only designate whether they are NMPA members in the delivery of the song metadata. If they are NMPA members, that song would receive the lower rate due to the additional consideration of the MOU as designated in the Proposed Settlement. If they are not, they would get the higher rate to be set by the Judges.

Song metadata is often delivered by producers or artist managers to their record company or distributor in the first instance. NMPA membership would simply be one additional data field.

Songs delivered prior to the effective date of the rule would be even easier to administer for the Subpart B configurations, most of which are subject to controlled compositions clauses so their rates are already frozen at some point in the past and are often being administered by known publishers to the extent they are not "Copyright Control" at HFA. Existing frozen rates are already frozen (anecdotally some still at the 1909 2¢ rate), so would not necessarily change. Floating rates will have to be changed anyway, but only for non-NMPA publishers, so the transition would be even easier. The purported "consensus" for the frozen rate should make this approach even easier still.

There already are a multiplicity of song rates in record company accounting systems[63] due to negotiated terms in controlled compositions clauses,[64] different rate fixing dates, escalations to the full statutory rate by album, and so on. A bifurcated rate based on NMPA membership would just be an additional rate in a limited set of circumstances and is certainly no more burdensome than the obligations that the MOU imposes on "Participating Publishers".

E. The CRB May Require a Higher Rate Based on the Willing Buyer/Willing Seller Standard and Publicly Available Information

If a new voluntary negotiation period is not feasible, the Judges on their own motion in the interests of fairness could cabin the Proposed Settlement as a rate for NMPA member publishers (and the songwriters signed to those publishers) but also establish a higher rate for non-members of the NMPA. The Writers wish to emphasize again that they have no interest in interfering with the voluntary agreement reached by the Majors; they made their deal.

However, it should be clear to all concerned that the willing buyer and willing seller standard[65] ought to take into account evidence of large numbers of unwilling

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[63] *See, e.g.,* Counterpoint Suite, Vistex available at https://www.vistex.com/product-suites/counterpoint-suite/ ("The Counterpoint Suite provides specialized solutions to administer rights and royalty processes critical for the Music, Media and Licensing industries. To effectively manage large amounts of data (business assets), including content, digital media, and IP, a robust and flexible solution is required….The Counterpoint Suite is designed by industry experts with first-hand experience within these market sectors.")

[64] See, e.g., Christian Castle, *Controlled Compositions Clauses and Frozen Mechanicals,* MusicTechPolicy (Oct. 10, 2020) available at https://musictechpolicy.com/2020/10/10/controlled-compositions-clauses-and-frozen-mechanicals/ (extensive review of the history and essential terms of controlled compositions clauses in term recording artist agreements).

[65] As the Writers discussed in their Prior Comment, there are still questions of how this standard applies when the willing buyer and seller are the same legal person. Prior Comment at 13.

sellers who are effectively compelled[66] to accept either or both of the frozen rate or the MOU, particularly when the history suggests that the settlement by its own terms will require publishers (presumably including self-published songwriters) to join the NMPA and pay dues.[67] It may be entirely fair for the NMPA to take a fee for orchestrating the MOU—if that's what a copyright owner actually wants. Yet not only is the frozen rate being bootstrapped through the CRB, NMPA dues and potentially other payments are also being bootstrapped through the *quid pro quo* of the MOU. The logic is a bit twisted up, but we can see *cui bono*.

The higher Subpart B rate and who receives it can be objectively determined based on a number of factors, not the least of which are any increased rates for streaming mechanicals in both Phonorecords III and the current proceeding.[68] Increased streaming rates could be used as a greater of formula with whatever the Judges determine should be the Subpart B rate. If the aspirational higher streaming rate is intended to capture the inherent value of songs, then surely that inherent value does not become transactional based on who is paying the royalty

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[66] The Writers call the Judges' attention to the overt or more subtle pressure to bend to the will of the Majors and the potential for retaliation to anyone who speaks up against the wishes of the Majors.

[67] MOU at 10, par. 4.8 ("For the avoidance of doubt, as provided in Section 10.3 of MOU1, it shall not be a breach of this MOU4 if *NMPA chooses to seek a donation* from Participating Publishers as part of the enrollment process.") (emphasis added); *see also* MOU FAQ.

[68] This is particularly true because the services are attempting to use the Subpart B rates as WBWS evidence in their streaming proceeding. That tactic was entirely predictable. However, it is not the songwriters' fault that the NMPA and NSAI rode full tilt into an obvious box canyon ambush.

and for which configuration it is paid. The "who" that receive the higher rate are easily determined based on whether a copyright owner is a member of the NMPA.

Thus, there are several different solutions to at least the Subpart B part of the chaos.

III. SUMMARY OF OPTIONS

To summarize, the Writers suggest the following options:

--Status quo: Unsatisfactory, punitive and disregards inflation rot.

--Partial acceptance of the settlement and new voluntary negotiations for non-NMPA member rates;

--Partial acceptance of the settlement and Judges set higher non-NMPA member rates recognizing the value of songs in all configurations;

--Indexing of either non-NMPA member rates or all rates; and

--Rejection of the settlement and Judges set higher statutory rate applicable to all.

It must be said that what might go a long way to solving the issues presented in the many comments opposing the Proposed Settlement would be for the Copyright Royalty Board to include a permanent and independent songwriter representative or ombudsman to participate as a party in CRB proceedings related to Section 115.[69] While the Writers recognize that such an appointment may be

[69] Examples of such proceedings would include all rates set by the CRB in future Phonorecords proceedings as well as matters related to the Mechanical Licensing Collective such as the Administrative Assessment.

outside the scope of the Judges' jurisdiction or is a novel material question of law,[70] they would appreciate the Judges' consideration of requesting that the participants to Phonorecords IV brief the proposal and open the briefing to public comment.

[70] The topic of an independent songwriter representative is also addressed in the Prior Comment at 27.

IV. CONCLUSION

Thank you again for this opportunity to express the Writers' views on the proposed rule. The Writers respectfully hope that this comment has provided the Judges with some additional insight into how the proposed rule affects independent songwriters and publishers both in America and around the world, particularly since none of the Writers can afford to participate in the Proceeding. The Writers greatly appreciate the Judges' willingness to avoid process becoming punishment and to preserve both transparency and equal protection under law.

Respectfully submitted.

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