

November 20, 2021

Hon. C.J. Suzanne Barnett  
Hon. J. David R. Strickler  
Hon. J. Steve Ruwe

US Copyright Royalty Board  
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Honorable Judges of the Copyright Royalty Board:

I am a Connecticut resident, attorney, and law professor, and the views expressed here are mine, and not necessarily those of any local or state bar association, or any employer. The bulk of this comment appeared in an open letter to this body, and to my senators, dated May 27, 2021. It requested time to comment for those that were not represented by the publishing lobby, the so-called “self-administered” songwriters that were so en vogue during the passing of the Music Modernization Act, and with it, the advent of the Mechanical Licensing Collective. As the preeminent music economist of the day, Will Page, put it in his annual “Global Value of Music Copyright” compendium, “anyone can record a song, but only someone can compose it.”<sup>1</sup> I don’t speak for them, I’ve not been empowered to do so, but because so many of us know “self-administered” means “not administered” I speak to their best interests, even if they don’t know anything about this process. These writers are considered “self-publishing”, but the reality is, they have no publishing. Ironically, it is these independent writers who rely disproportionately on physical sales, direct downloads, and Bandcamp Fridays. In essence, “I speak for the trees.”<sup>2</sup>

On May 18, 2021, a “Notice of Settlement in Principle” was filed by parties to the proceedings before the Copyright Royalty Board about its Determination of Royalty Rates and Terms for Making and Distributing Phonorecords.<sup>3</sup> That Notice was followed on May 25, 2021 by a Motion To Adopt Settlement Of Statutory Royalty Rates And Terms For Subpart B Configurations, filed by the NMPA, Sony, Universal and Warner and NSAI.<sup>4</sup> I write today in reference to that proposed settlement.

This settlement outlines the terms by which mechanical royalty<sup>5</sup> and download rates will remain locked at the current rate of 9.1¢. The same almost-dime for each copy of a work manufactured and

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<sup>1</sup> Available at <https://tarzaneconomics.com/undercurrents/copyright-2021>

<sup>2</sup> SEUSS. (1971). The Lorax. MLA (7th ed.) Seuss, . The Lorax. , 1971. Print.

<sup>3</sup> (Phonorecords IV) (Docket No. 21–CRB–0001–PR (2023–2027)).

<sup>4</sup> Available at <https://app.crb.gov/document/download/25288>

<sup>5</sup> The term “mechanical royalty” dates back to the 1909 Copyright Law when Congress deemed it necessary to pay a music publishing company for the right to mechanically reproduce a musical composition on a player-piano roll. As a result, music publishers began issuing “mechanical licenses”, and collecting mechanical royalties from piano-roll manufacturers. The times, and the tech, changed, but the name stuck.

distributed. The same almost-dime that it's generated since 2006. A paltry sum to be certain but a far cry from the 2¢ royalty rate mechanical royalties imposed for the better part of seventy years.<sup>6</sup> Starting in 1977, Congress mandated that the mechanical royalty be increased incrementally until 2006 when the rate of 9.1¢ was achieved. And there it has remained.

This proposed private settlement would extend that 2006 freeze until 2027.

In March 2017, a precursor to Phonorecords IV found the Copyright Royalty Board ruling that interactive streaming services must pay more in mechanical royalties over the course of the next five years.<sup>7</sup> Surely more than a simple inflation adjustment, but nonetheless a sign that the CRB thought costs and values needed to become more aligned for streaming—which is paid by the streaming platforms unlike the physical and download mechanical which is paid by the record companies. Now comes Phonorecords IV, and a proposed settlement from the major publishers and their affiliated major labels. Before this proposal can be accepted by the CRB, I asked for the simple opportunity of public comment. This COurt saw fit to grant that request, and I express my appreciation.

As you well know, in nearly all other administrative proceedings public comment is an integral and indispensable component of the process. To see that the CRB may allow for a public comment period by members of the public beyond the participants in the proceeding or parties to the settlement is a step in the right direction, and my hope is that this development will be broadcast far and wide so that the CRB, and in turn, Congress, may get a full picture of the status of mechanical royalty rates, especially from those that are historically underrepresented. “Public comments” should be comments *by the public* and made in public; not comments by the participants made publicly.

I have a great deal of respect and admiration for the work put into the landmark copyright legislation that came about at the end of 2018, and for those that made it happen. So too for the members of the CRB, and in this space, I thank those Judges for taking the time to read a letter from an adjunct law professor with no economic stake in the outcome, but rather an interest in, and duty of, candor to the Court.

In an age of unprecedented political polarization, the consensus built in the passage of the Music Modernization Act showed that politics aside, when it's time to make new laws that fix old problems, Congress can still get the job done. I know well the sweat-equity poured into its creation by the very same people that propose this settlement. I have found myself on the same side fighting the same fight as them many times. They have proven capable of navigating your halls and taking on those that would seek to devalue (or worse) the work of the songwriter, and musician. In this instance, I would like to see them fight the fight yet again. recognize the reasoning and intention

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<sup>6</sup> A summary of historical mechanical royalty rates is available from the U.S. Copyright Office at <https://www.copyright.gov/licensing/m200a.pdf>

<sup>7</sup> Docket No. 16-CBR-0003-PR (2018-2022) (Phonorecords III).

behind the proposed settlement. Commenting by the public is a way for that to happen.<sup>8</sup> I commend this Court for re-opening the comment period to allow for as much dialogue, and information, as possible.

A year ago, I made the unilateral decision to pivot our consulting company, Ecco Artist Services, to purposefully work with, and advocate for, the traditionally and historically underserved and underrepresented in the music industry. Freezing the growth of rates for physical and digital sales that are already digging out of the residual effects of 70 years at 2¢ strikes at the heart of that community's ability to generate revenues from their music.

Sadly, rate freezes for mechanical royalties are nothing new. I'll tell you what has not been frozen since 2006: the cost of living. According to the U.S. Bureau of Labor Statistics, prices for rent of primary residence were 53.49% higher in 2021 versus 2006 (a \$534.91 difference in value). Between 2006 and 2021 rent experienced an average inflation rate of 2.90% per year. This rate of change indicates significant inflation. In other words, rent costing \$1,000 in the year 2006 would cost \$1,534.91 in 2021 for an equivalent purchase. Compared to the overall inflation rate of 1.82% during this same period, inflation for rent was higher.<sup>9</sup> Milk? How about 19.48%.<sup>10</sup> Childcare? Here in Connecticut? According to the U.S. Bureau of Labor Statistics, prices for childcare and nursery school were 52.57% higher in 2021 versus 2006 (a \$5,256.98 difference in value).

Now, it's no secret the trade association for the US music publishing industry is funded by its music publisher members, and of course, as a professional trade organization, the association is bound to represent those members. Publishers have long enjoyed a better reputation amongst industry insiders than "the labels," and for good reason, but the fact remains that writers signed to publishing deals are in contractual relationships with their publishers, and their interests are not always aligned. Such is the state of play in a consumer-driven marketplace, and especially now that publishers and labels are consolidating their businesses under the same tents. They, it seems, are the forest. An indie songwriter is but a tree.

Unfortunately, the independent songwriter lacks the resources to participate fully in the process, and although a signed songwriter may believe her interests and those of her publisher are one and the same, they may not always be. It would seem the economic analysis the publishers undertook in deciding the mechanical royalty was not worth the heavy cost and burden of fighting is the same calculus the writers need not do: they couldn't afford the fight no matter the decision.

But I ask: if the mechanical royalty covered by the proposed settlement is a dying source of revenue, why would the fight be so onerous? By the RIAA's 2020 year-end statistics, physical sales and

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<sup>8</sup> The CRB arguably has the statutory obligation to publish the Motion in the Federal Register for public comment, but may have the discretion to construe those commenting to the participants in the proceeding and the parties to the settlement. 17 U.S.C. § 801(b)(7).

<sup>9</sup> <https://www.officialdata.org/Rent-of-primary-residence/price-inflation/2006-to-2021?amount=1000>

<sup>10</sup> <https://www.in2013dollars.com/Milk/price-inflation/2006-to-2021?amount=4>

downloads accounted for 15% of the music marketplace.<sup>11</sup> That's a \$12.2 billion marketplace, and that 15% amounts to \$1.8 billion. Now, I know attorney's fees can be exorbitant in regulatory matters, but I would think we could find a firm willing to take the case for less than that. As for sales, in 2020, 27.5 million vinyl LPs were sold in the United States, up 46-percent compared to 2019 and more than 30-fold compared to 2006 when the vinyl comeback began,<sup>12</sup> while some 31.6 million CD albums were sold.<sup>13</sup>

Median wages in the US, adjusted for inflation, have declined 9% for the American worker. Meanwhile, since the 9.1¢ rate freeze, the cost of living has gone up 31%, according to the American Institute of Economic Research<sup>14</sup>. The 2006 inflation rate was 3.23%. The current year-over-year inflation rate (2020 to 2021) is now 4.16%<sup>15</sup>, which is all really to say, simply, an accurate cost-of-living increase would have a mechanical rate of at least 12¢ per sale. Twelve cents! You would think that would be an easy sell, but the streaming rates are fractions of that rate. The reality is a song would need to be streamed 250 times to generate enough money to buy it from iTunes. As my dear friend Abby North put it, the royalty amount for the digital stream of a song is a micro penny.<sup>16</sup>

An adjustment for inflation should require no briefing, let alone argument. If songwriters were employees, this would simply be line-item budgeted as a "cost-of-living adjustment." If songwriters were unionized it would be a rounding error, but I digress.

Even if it is true that the mechanical revenue is a lost and dying stream, by the RIAA's own figures, there stand to be billions of dollars at stake. An opportunity to be heard, without having to sign with a publisher and then hope that publisher takes up the fight you want, maybe that's all the independent writers of the industry—and, indeed, the world--need to be able to win.

An inflation-adjusted cost-of-living update to the mechanical statutory royalty rate should be of no issue. Those independent, self-published writers affected by the decision of the CRB have been given the opportunity to voice their concerns through public comments. I hope that the CRB considers the disparities in bargaining power among those on the "writers' side" of this issue before

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<sup>11</sup> RIAA year-end revenue statistics.

<https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf>

<sup>12</sup> MRC 202 Year End Report.

[https://static.billboard.com/files/2021/01/MRC\\_Billboard\\_YEAR\\_END\\_2020\\_US-Final201.8.21-1610124809.pdf](https://static.billboard.com/files/2021/01/MRC_Billboard_YEAR_END_2020_US-Final201.8.21-1610124809.pdf)

<sup>13</sup> Id.

<sup>14</sup> American Institute for Economic Research. <https://www.aier.org/cost-of-living-calculator/>

<sup>15</sup> U.S. Bureau of Labor Statistics Consumer Price Index

<https://www.officialdata.org/articles/consumer-price-index-since-1913/>

<sup>16</sup> Abby North, *North Music Group Letter to Congress on Frozen Mechanicals and the Copyright Royalty Board*, The Trichordist (May 24, 2021) available at

<https://thetrichordist.com/2021/05/24/northmusicgroup-letter-to-congress-on-frozen-mechanicals-and-the-copyright-royalty-board/>

it makes its final decision. Please note, I pass on judgment on those that serve their constituencies, I just know there is no substitute for direct action, direct aid, or direct advocacy.

I want to close this time by thanking the Board, and Copyright Office, all for their continued attention to the universe of copyright, licensing royalties, and the economy that exists therein, and specifically the recently retired CJ of Copyright Royalty Board Jesse Feder, for allowing this opportunity, and so many other. It is my sincere hope (and effort) that the tone and tenor of these negotiations, deliberations, and litigation proceedings can be focused on the issue at hand, with collaborative results the goal, but when that cannot be, I trust the Copyright Royalty Board will see both forest and trees.

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cc: Ms. Carla Hayden, US Librarian of Congress  
Ms. Shira Perlmutter, US Register of Copyrights