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SENT VIA ELECTRONIC DELIVERY

IN RE DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)

Honorable Judges,

I am a music lawyer in Austin, Texas, and represent songwriters throughout the state of Texas. I appreciate the judges reopening the comment period with respect to the proposed settlement (“Proposed Settlement”) submitted by the three major labels, the National Music Publishers Association (“NMPA”) and the Nashville Songwriters Association International (“NSAI”) which, if adopted by the Judges, would freeze the statutory mechanical royalty rate at 9.1 cents for physical products and permanent digital downloads through 2027. For reference, my prior comment regarding the Proposed Settlement can be found in the footnote below,¹ and the purpose of this supplemental comment is to highlight the relevance of the Memorandum of Understanding 4 (“MOU4”) between the three major labels and the RIAA on the one hand and the NMPA and a select group of music publishers on the other hand (collectively “MOU Parties”) in the Judges’ consideration of the Proposed Settlement. As the Judges will see below, MOU4 appears to be additional consideration for the Proposed Settlement -- consideration which is only able to be enjoyed by NMPA members. Binding the world’s songwriters to this Proposed Settlement when the overwhelming majority of songwriters cannot even reap the benefits of the additional consideration demonstrates there is no reasonable basis to adopt the rates and terms of the Proposed Settlement industrywide, and further, doing so would be patently unjust.

Please note that the views I am expressing here are not made on behalf of any client or the State Bar of Texas.

I. THE PLAIN LANGUAGE OF MOU4 MORE THAN SUGGESTS IT IS ADDITIONAL CONSIDERATION FOR THE PROPOSED SETTLEMENT

When the three major labels, the NMPA and NSAI submitted their motion to adopt the Proposed Settlement to the CRB, included was the following language that raised concerns during the first round of comments:

¹Prior Comment, available at <https://app.crb.gov/document/download/25534>.

Concurrent with the settlement, the Joint Record Company Participants and NMPA have separately entered into a memorandum of understanding addressing certain negotiated licensing processes and late fee waivers.²

In my prior comment, I posed the question, “[if] this Memorandum of Understanding is irrelevant to the proposed settlement, why would it be referenced in the motion to adopt the settlement?” At the time of drafting the prior comment, I will honestly say I was not too familiar with the previous MOUs and associated NMPA Late Fee Programs (“Late Fee Programs”). Subsequently, I began perusing through the sparse number of media articles concerning the MOU stemming from *Phonorecords I* (“MOU1”), along with information listed on the Late Fee Program website, and the text of each MOU to date (MOU1, MOU2 and MOU3). Examining the text of the MOUs was eye-opening; it became readily apparent that each, and their associated Late Fee Programs, would never have come into existence if the MOU Parties had not submitted settlement proposals to the Judges in connection with mechanical rates for physical product and permanent downloads (i.e., the mechanical royalties paid by record companies). In other words, there is no Proposed Settlement without MOU4 and there is no MOU4 without the Proposed Settlement – the two are inextricably intertwined. The longstanding history of this practice is first exhibited in the language from Section 1.0 of MOU2:

This MOU 2 shall not go into effect unless a proposed settlement of the 2013-2017 Proceeding is submitted to the Copyright Royalty Judges for approval, which the Parties anticipate happening promptly after this MOU 2 has been entered into by all Parties³.

The key word to examine here is “unless.” MOU2 would not go into effect **unless** a proposed settlement was submitted to the CRB in *Phonorecords II* (2013-2017). If the MOU Parties had not presented the proposed settlement in *Phonorecords II* to the CRB, MOU2 would have never gone into effect and thus, no Late Fee Program for that time period. A close review of the plain language of MOU2 is critical as it more than suggests MOU2 served as additional consideration for the proposed settlement in *Phonorecords II*, which extended the 9.1 cent mechanical rate freeze for physical products and permanent downloads that commenced in 2006.

Fast-forward to the language in Section 2 of MOU3, where the same condition is visible:

This MOU 3 is a separate, conditional agreement that shall not go into effect until NMPA and SME submit a motion to adopt a proposed settlement of the 2018-2022 Proceeding as to rates and terms presently addressed in 37 C.F.R. Part 385 Subpart A to the Copyright Royalty Judges, which the Parties anticipate happening promptly after this MOU 3 has been signed by all of the Parties. It is understood that SME, UMG, WMG, RIAA and NMPA will sign this MOU 3 at the outset, and that NMPA will use its best efforts to obtain the signatures of all the music publishers represented on its Board of Directors as additional Parties to this MOU 3 by October 28, 2016. The term of this MOU 3 shall commence on the date when a motion to adopt such a settlement is

² Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations, Docket No. 21–CRB– 0001–PR (2023–2027) (May 25, 2021) (Proposed Settlement).

³ Memorandum of Understanding 2 at 1.

submitted to the Copyright Royalty Judges (the “Effective Date”), and continue until the End Date...⁴

Despite the removal of the word, “unless,” exhibited in MOU2, and the replacement with the word, “until,” the analysis remains the same. MOU3 appears to have been additional consideration for the proposed settlement in *Phonorecords III*, which furthermore extended the 9.1 cent mechanical rate freeze for physical products and permanent downloads.⁵

Finally, the same condition is found in MOU4’s language:

*This MOU4 is a separate, conditional agreement that **shall not go into effect until** 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, RIAA, NMPA, Sony Music Publishing, Universal Music Publishing Group, and Warner Chappell Music, Inc. (the “Initial Signatories”)...*

The plain text of MOU4 and likewise, the plain text of MOU2 and MOU3 demonstrates MOU4 serves as additional consideration for the Proposed Settlement. If this is the case, the Proposed Settlement does not provide a reasonable basis for establishing Subpart B rates and terms because MOU4 is consideration which can only be enjoyed by select participants in *Phonorecords IV*, while songwriters worldwide are bound to rates and terms they do not approve and for which they receive no benefit of the MOU4 bargain. Further, in a stunning display of pretzel logic, if a self-published songwriter even wants to reap the benefits of MOU4, such songwriter would have to join the NMPA as a publisher to participate in Late Fee Program – which would entail *paying* to join an organization that has agreed multiple times to freeze the mechanical royalty rate for physical and download formats.⁶

Songwriters, including those who have submitted comments in this proceeding, have made it abundantly clear that they do not support extending a mechanical royalty rate freeze. So, the question becomes whether the Judges believe it is just and reasonable to subject songwriters to a rate freeze that they oppose, understanding that they will either never benefit from the additional consideration for the freeze or will have to pay dues to a party proposing the freeze

⁴ Memorandum of Understanding 3 at 2-3.

⁵ This analysis is further exhibited by the content in this article, which provides a recap of the 99th NMPA annual meeting: <https://www.musicweek.com/publishing/read/us-publishers-push-for-music-industry-unity-at-nmpa-agm/065029>.

⁶ FAQ 8, available at <http://www.nmpalatefeesettlement.com/mou3/faq.php>; FAQ 3, available at <https://www.nmpa.org/boardmembers/faqs/>.

they oppose to benefit from the additional consideration. Therefore, I ask the Judges to please determine whether MOU4 is additional consideration for the Proposed Settlement.

II. IF ALL SONGWRITERS ARE TO BE BOUND TO THE PROPOSED SETTLEMENT, ADDITIONAL TRANSPARANCY IS WARRANTED

The MOU Parties stated in their “Comments in Further Support of the Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations” (“Reply Comment”) that they did not present MOU4 to the Judges as they regarded it to be routine and irrelevant to the Judges’ determination of the Proposed Settlement.⁷ The MOU Parties further stated the payments under the previous MOU processes have resulted in hundreds of millions being properly paid to publishers and songwriters and enabled more successful identifications of musical works.⁸ Additionally, the MOU Parties contended the history of the MOUs is no secret, pointing to a couple of articles from 2009-2010 and the NMPA Late Fee Settlement website.⁹

While the MOU Parties can generally state MOU4 and prior MOUs are no secret, the MOU process to date has hardly been transparent. While some media outlets published information about MOU1 in 2009-2010, over the last decade there has been virtually no reporting on the MOU program, encompassing MOU2 and MOU3. With respect to MOU1, outlets reported approximately \$275 million was paid out from the labels and distributed to publishers via marketshare methodology.¹⁰ Amounts paid out pursuant to MOU2 and MOU3 have not been publicly disclosed – and should be if MOU2 and MOU3 were additional consideration which continued the mechanical rate freeze to the present day.

The MOU Parties further state, “[c]ontrary to the conspiracy theories of others, there is no secret payoff to major publishers or to any other MOU participant.”¹¹ It is not conspiratorial to simply point out that the public is unaware of the amounts payable to publishers under these MOUs; it is further obvious the major publishers benefit from a settlement system which distributes funds to publishers in accordance with major label and HFA data via marketshare methodology. Additionally, according to the NMPA’s 2018 and 2019 IRS 990 filings, “Royalty Late Fee Program” was listed as an income line-item, reflecting \$2,908,988.00 and \$768,368.00, respectively, as revenue for the organization. If in fact this line item pertains to commissions taken by the NMPA on prior Late Fee Programs established by the MOUs, there is absolutely a payoff to a MOU participant, albeit, not secret.

Note that I have no issue with the notion of these MOUs and the Late Fee Programs, or which sums are paid out to whom, provided that the MOUs and associated Late Fee Programs

⁷ Comments in Further Support of the Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations, Docket No. 21–CRB– 0001–PR (2023–2027) (August 10, 2021).

⁸ Id.

⁹ Id.

¹⁰ *Publishing Briefs: NMPA Late Fee Site, Melvin Brown, Peermusic*, BILLBOARD (Jan. 8, 2010), available at <https://www.billboard.com/music/music-news/publishing-briefs-nmpa-late-fee-site-melvin-brown-peermusic-1213394/>

¹¹ See supra note 6.

are truly irrelevant deals that do not serve as additional consideration for settlements to freeze the statutory mechanical rate for physical and download configurations industrywide.

III. IF THE PROPOSED SETTLEMENT IS NOT WITHDRAWN, THE JUDGES SHOULD APPLY DIFFERENT RATES AND TERMS TO PUBLISHERS AND SELF-PUBLISHED SONGWRITERS WHO DO NOT OPT INTO MOU4 AND THE LATE FEE PROGRAM

Notwithstanding the repeated practice of the CRB adopting settlements freezing the mechanical rate for physical products and permanent downloads proposed by parties who wield the most power in the music business, the current situation is different and should be treated as such. Many songwriters oppose the Proposed Settlement but cannot afford to participate in this proceeding. Songwriters and other key songwriter advocacy organizations oppose this Proposed Settlement, proffering comments that the Proposed Settlement is unreasonable because songwriters do not wish this revenue stream to be frozen for yet another five years during a vinyl resurgence amid a worldwide pandemic that continues to ravage the world's economy. While there has been considerably more public outcry with respect to this proceeding than those prior, luckily, there are solutions available which will reverse this course and are entirely within the control of the MOU Parties and the Judges.

First, the MOU Parties can withdraw the Proposed Settlement and voluntarily agree to a rate increase for Subpart B configurations – and continue to proceed with their Late Fee Program. This act will not only bring the entire songwriter and music publisher communities together, but also it will serve to extinguish one of the streaming services' key benchmarks in their testimony (since *every* streaming service participant in *Phonorecords IV* is using this Proposed Settlement to justify their abysmal streaming rate proposals).

Alternatively, if the foregoing is not an option, the terms of the Proposed Settlement should apply only to the MOU Parties and the NMPA publishers that subsequently opt-into the Late Fee Program, while the Judges determine different rates to be applied to everyone else. To be clear, again, I have no issue with the concept of MOU4 or the Late Fee Program, rather it is inequitable for songwriters to be bound to the terms of a settlement which they do not support, particularly when they do not receive any benefit from the consideration attached to the settlement.

CONCLUSION:

Prior to this *Phonorecords IV* proceeding, it appears the only person who publicly opposed any settlement to freeze the statutory mechanical rate for physical and download configurations was George Johnson, a pro se self-published songwriter participant. While the Judges' determination of rates and terms for physical and download configurations in *Phonorecords III* is final, I believe it is worth briefly revisiting an excerpt from the Judges' determination which addressed Mr. Johnson's opposition to the *Phonorecords III* settlement:


But, Mr. Johnson has not even hinted at evidence to support his argument that the representative negotiators are engaged in anti-competitive price-fixing at below-market rates. The very definition of a market value is one that is reached by negotiations between

*a willing buyer and a willing seller, with neither party being under any compulsion to bargain.*¹²

While Mr. Johnson may not have articulated his opposition to the *Phonorecords III* proposed settlement in a lawyer-like manner, he clearly understood years ago that there was something awry with respect to these proposed settlements. It is evident that the “something awry” happens to be these MOUs, which I never would have realized had the Judges not reopened the comment period to specifically address MOU4. The representative negotiators in these settlements represent “willing buyers” and “willing sellers” who are effectively the same parties at the corporate level. The “willing sellers” (i.e., the major publishers/ NMPA) are under compulsion to bargain so they can enjoy the compensation associated with the Late Fee Program. When such a settlement is adopted and applied industrywide, we are posed with an end result of “unwilling sellers” (i.e., songwriters worldwide) tethered to below-market rates who will not enjoy the benefits of the additional consideration – MOU4 and the associated Late Fee Program.

The Judges have a duty to all songwriters – from the millions who are unaware the CRB exists, to the millions who do not have the financial resources to participate in CRB proceedings, to the millions who do not speak English (in this country and abroad) and cannot follow this proceeding if they wanted to– to determine whether this MOU4, a side agreement which benefits a select few, is in fact additional consideration for the Proposed Settlement which would freeze statutory mechanical royalty rate for physical products and permanent downloads through 2027. And if the Judges determine this is true and the MOU Parties are unable to withdraw the Proposed Settlement, the Judges should establish different rates and terms to be applied to all other songwriters and publishers.

Thank you for re-opening the public comment period and for your consideration.



Gwendolyn Seale

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¹² 37 CFR Part 385 [Docket No. 16–CRB–0003–PR] Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); Subpart A Configurations of the Mechanical License.