

Before the  
**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
Washington, D.C.

*In re*

Determination of Royalty Rates and Terms for  
Making and Distributing Phonorecords  
(Phonorecords IV)

Docket No. 21-CRB-0001-PR (2023-2027)

**COMMENTS OF AMERICAN ASSOCIATION OF INDEPENDENT  
MUSIC ON PROPOSED RULE FOR SUBPART B RATES AND TERMS**

The American Association of Independent Music (A2IM), a Section 501(c)(6) trade association representing over 600 independently owned record labels, appreciates the opportunity to file comments addressing the settlement reached by NMPA, NSAI, and the three major record companies. *See* Proposed Rule, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) 87 Fed. Reg. 33093 (June 1, 2022) (“New Proposed Rule”).

**INTRODUCTION**

The New Proposed Rule relates to “traditional mechanical” royalties owed by record labels to publishers for CDs, vinyl, and downloads. A2IM supports increasing those royalties and believes songwriters and publishers (as well as record companies) have been disserved by the old rates and rate structure for years. That is true even though independent record labels will bear a disproportionate amount of the increased rate. The Copyright Royalty Judges should nonetheless reject the new settlement, and withdraw the New Proposed Rule, for the same reason that it rejected the initial settlement, *see* 87 Fed. Reg. 18342 (March 30, 2022) (“Withdrawal Order”): the new settlement “freezes” the original “penny rate” structure, and then imposes an annual consumer price index (“CPI”) adjustment to the new penny rate in subsequent years,

without considering whether either is appropriate in light of the current market realities. In addition, the new settlement even more than the first reflects the “[v]ertical integration linking music publishers and record labels” that caused the Judges concern in the first place. *Id.* at 18348.

Importantly, it is not necessary for the parties to litigate the matter through trial, nor is it necessary to develop a traditional judicial record to reach an acceptable resolution. Instead, the Judges should invite the parties to convene a more open and transparent settlement process in which all stakeholders are given an opportunity to participate and provide their perspective. That process could also present an opportunity to raise and consider potential revisions to both the Music Modernization Act and the Copyright Royalty Board process generally, to address issues that came to the foreground in this proceeding.

## **DISCUSSION**

### **I. A2IM Supports Increasing Songwriter Pay, But the Current Rate Structure Is the Wrong Solution**

Songwriters deserve to be paid more for traditional formats — CDs, vinyl, and downloads – as well as streaming, and A2IM understands their frustration with the so-called “frozen mechanicals” settlement. Unfortunately, the new settlement — by maintaining the existing “penny rate” structure and relying on the consumer price index to adjust the rates upward (or downward) for the duration of the term – is both a mistake and a missed opportunity to come up with a new, better solution.

Now is the time to reject the penny rate model for mechanical royalties altogether. The penny rate structure has been frozen since 1909 — the era of the piano roll — and the rates have been arbitrarily increased periodically, through processes largely disconnected from the marketplace. There is no particularly good reason to assume that the same rate structure that has

been in place through a number of different format shifts, including the recent digital and streaming revolutions, should reflexively be adopted yet again.

Nor does imposing a blunt CPI adjustment help matters; in fact, that simply sets the penny rate on a path to being that much more detached from the market, since CPI has not historically been correlated to the actual market price of the affected formats. In fact, the average retail price of a CD has dropped by 38% when adjusted for inflation (and 17% in absolute dollars) since 2006. See <https://www.riaa.com/u-s-sales-database/>. Download pricing has remained unchanged since 2006, which is equivalent to a 28% reduction in price due to inflation. *Id.* While vinyl now trades at a higher price than before, rising by 12% (adjusted for inflation), *see id.*, vinyl manufacturing costs have increased by far more than that over the same period. Vinyl margins are very low and a label often receives about the same gross profit in dollars that it generates from the sale of a CD. Given the current rate of inflation, maintaining the current fixed fee rate structure with annual CPI increases could make these formats unsustainable, potentially eliminating CDs and downloads as formats altogether and reducing the viability of releases on vinyl. This is especially true for downloads, given that labels do not control pricing for this format and, therefore, do not have the option of passing increased costs on to the consumer.

Moreover, an increase in the physical and download rates under the current structure, especially when coupled with annual CPI adjustments, is likely to further damage already challenged genres of cultural importance. Luminate (formerly Nielsen) data shows that, while vinyl, CDs and downloads collectively accounted for less than 20% of current (i.e., new projects released within the last 18 months) album or album equivalent sales in 2021 across the overall market, they made up 87% of current blues releases, 75% of jazz, and 50% of rock. There is

little doubt, therefore, that significant further cost increases will lead to less investment in these important genres and in any other genre that relies on the sale of an album.

Unlike a penny rate, a percentage of revenue would tie songwriter pay directly to the actual price paid in the market, and the royalty would adjust naturally with all the variables that have an impact on the price of the product, including inflation. A percentage of revenue is also simpler to understand and far less costly to administer. And it reflects the fact that songwriters, artists, record labels, and publishers are all in it together – maximizing the returns on the products they release into the market. It is no surprise that a percentage of revenue is the standard model throughout the world, and it is time to adopt the same structure in the United States.<sup>1</sup>

## **II. The Copyright Royalty Board Should Reject the New Settlement for the Same Reasons That It Rejected the First Settlement**

Like many observers (and presumably the participants), A2IM was surprised when the Copyright Royalty Judges rejected the first settlement. In doing so, however, the Judges articulated principles that, applied here, indicate that the new settlement should also be rejected.

First, the Judges concluded that it was inappropriate to adopt the original settlement without a deeper analysis of the market as it exists today. Withdrawal Order at 18347-48. Specifically, the court concluded that “[t]he determination rendered in 2008 . . . cannot continue to bind the parties sixteen years later, absent sufficient record evidence that the *status quo* remains grounded in current facts and is a reasonable option.” Withdrawal Order at 18347.

---

<sup>1</sup> A2IM does not necessarily oppose the magnitude of the increase in the royalties, but thinks that increase should be partially offset by the reduced administrative costs of a percentage of revenue structure rather than a simple adjustment to the penny rate. In addition, A2IM believes it is appropriate to investigate alternatives to the one-size-fits-all model in the current rate structure. As one example, it may be appropriate to have different rates for catalog and new releases, reflecting the different levels of record company investments in new releases compared to established repertoire.

Similarly, the judges criticized the parties for “projecting what actions the Judges might take on a new evidentiary record,” finding that “[t]he 2022 recorded music marketplace is not the 2006 marketplace.” Withdrawal Order at 18348. As they explained, “[t]he Judges’ determination of current rates and terms should be reflective of the current marketplace.” *Id.*

The new settlement suffers the exact same defect. Rather than take time to consider the actual circumstances of the current market, the settlement parties followed the Judges’ lead. Specifically, in their order, the Judges suggested that “[a]djudication of rates *may* provide the parties an opportunity *to present evidence of the advisability of such an indexed increase.*” Withdrawal Order at 18347-48 (emphasis added). Rather than proceed toward some form of adjudication or other method of information gathering and record building, however, the parties simply proposed a new settlement that tracked the Judges’ hypothetical alternative scenario. This was done in the absence of specific evidence that the current penny rate structure is still appropriate, much less that it should be adjusted by CPI in subsequent years. After all, that structure has been in place for more than a century without being revisited. If the former settlement was not appropriate, in light of changes in the marketplace, it is not clear how the new settlement passes muster.

Second, the CRJs rejected the settlement based in part on a belief that they “must . . . assure themselves that there is no fire” with respect to conflicts of interest among vertically integrated record companies and publishers. Withdrawal Order at 18348. It is not clear how the current settlement should satisfy their concern since, if anything, it reflects the impact of that vertical integration even more than the original settlement. To be clear, A2IM does not endorse the innuendo that the original settlement was tainted by a conflict of interest among the record companies and publishers at the table. Instead, the original settlement appears to have reflected a

reasonable assessment of the costs and benefits of litigation. But the new settlement *does* appear to reflect the desire of the major record companies and publishers to put this matter behind them without regard to the impact on the stakeholders that will bear the brunt of the increase and new structure, so that these major companies can focus on streaming and other matters of greater concern. And it is beyond dispute that the independent record label community has a much stronger interest in the mechanical rates than the major record companies. While RIAA data shows that physical formats and downloads made up less than 15% of total revenue in 2021, a survey of A2IM membership has shown that they represented 40% or more of 2021 revenue for independent labels. Moreover, unlike the major record labels, the majority of independent labels do not have any significant publishing interests at all.

In short, if the first settlement reflected the close connection of the recorded music and publishing arms of the major music companies, the second settlement is even stronger evidence of that link.

### **III. The CRJs Should Invite the Parties To Convene a New Broadly Inclusive Settlement Process**

The ideal settlement would be the product of a true pan-industry negotiation that reflects the perspectives and input of industry stakeholders of all sizes and interests and ultimately leads to an improved music ecosystem in which inefficiencies are eliminated, investment is rewarded, and creators are properly compensated. Now that the parties have been forced to revisit their settlement based on the outpouring of comments from nonparticipants, it is important to have a process that includes the direct input of a broader set of stakeholders than the settling parties and the nonparties they chose to contact.

The settling parties should be given a three-month window to explore a new model and convene a process to solicit input from all interested stakeholders. The goal should be to devise

a settlement that better reflects the current economic circumstances of the physical and download marketplace, while improving the value of traditional mechanical royalties to songwriters. The parties should consider retaining a mediator to guide the process and ultimate deliberations. The process does not need to be expensive – although like all good faith negotiations, it would require everyone’s mindshare. In short, A2IM urges the parties to convene a new settlement process, and the CRB to give the parties time to adopt a settlement that, at a minimum, reflects input from people and stakeholders across the spectrum.

This approach would have an additional benefit: participants in that process could use the discussions as an opportunity to explore a number of common-sense reforms to the Music Modernization Act and the CRB process, to address issues that have come to the foreground in this proceeding, including two that A2IM will highlight here.

First, it is (past) time for the industry to transition to a system in which *all* mechanical royalties are administered centrally. That would bring the US marketplace into alignment with the rest of the world and would also dramatically reduce the costs of administering mechanical royalties, to everyone’s benefit. The Music Modernization Act (“MMA”) went halfway there, creating a system in which streaming mechanicals are handled centrally (by the Mechanical Licensing Collective), and in which download mechanicals *can* be administered centrally (although as a practice are not); meanwhile, physical formats are still administered under the old haphazard and inefficient system that has been in place for decades. It is time to modify the MMA to permit the central administration of all mechanical royalties, thereby driving down costs for both record labels and publishers alike.

Second, it is clear that the CRB settlement process should be reformed. The CRB process works best when industry stakeholders representing as broad a segment of the industry as

possible participate and reach a prompt settlement. Like many stakeholders, A2IM did not join as a participant in this proceeding; that is because A2IM (accurately) expected the parties to seek to maintain the status quo for traditional mechanicals, and because CRB rate settings can be incredibly expensive. In hindsight, A2IM — as well as the stakeholders who successfully obtained a rejection of the first settlement — should have filed a petition to participate. In any event, while the parties to the case satisfied Congress’s desire of achieving prompt settlements of these cases, the parties’ settlement did not, in fact, reflect the broad industry consensus that Congress preferred. A2IM believes meaningful CRB reform should achieve two core goals: Make the actual proceeding more efficient for everyone involved and provide a simple mechanism *early* in the process for nonparties to provide input about the scope of potential settlements.

### **CONCLUSION**

For the foregoing reasons, A2IM respectfully requests that the Judges sustain George Johnson’s objection, withdraw the New Proposed Rule, and invite the parties to convene a new settlement process in which all stakeholders can meaningfully participate.

Respectfully submitted,



Dr. Richard James Burgess MBE  
President and CEO  
American Association of Independent Music  
(A2IM)  
richard@a2im.org  
132 Delancey Street  
New York, NY 10002

June 30, 2022