BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
COPYRIGHT ROYALTY BOARD
WASHINGTON, DC

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)

COMMENTS OF HELIENNE LINDVALL, DAVID LOWERY AND BLAKE MORGAN FOR JOINT MOTION TO ADOPT NEW SETTLEMENT OF STATUTORY ROYALTY RATES AND TERMS FOR SUBPART B CONFIGURATIONS

Songwriters Helienne Lindvall, David Lowery and Blake Morgan (collectively, the "Writers") thank the Copyright Royalty Judges for the opportunity and respectfully submit the following comments responding to the Judges' notice[1] ("Notice") soliciting public comments on a *Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations* ("New Rules")[2] received by the Judges from the National Music Publishers Association, Nashville

[1] 87 FR 33093, *Proposed Rule (Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations)*, Docket No. 21–CRB–0001–PR (2023–2027) (June 1, 2022). The Writers previously submitted comments in the Subpart B proceeding: 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 and Second Reopening Period Comments of Helienne Lindvall, David Lowery and Blake Morgan, *Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)* (Nov. 22, 2021) available at https://app.crb.gov/document/download/25936.

[2] *Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations*, Docket No. 21–CRB–0001–PR (2023–2027) (May 25, 2022) available at https://app.crb.gov/document/download/26619

Songwriters Association International, Sony Music Entertainment ("Sony"), UMG Recordings, Inc. ("Universal") and Warner Music Group Corp. ("Warner") (collectively, the "Majors") regarding the so-called "Subpart B" statutory rates and terms[3] relating to the making and distribution of physical or digital phonorecords of nondramatic musical works in the docket referenced above ("Proceeding").

The Writers are independent songwriters who own the copyrights to many of their songs. They previously submitted comments in the Proceeding on two occasions. They were amici in *Google v. Oracle* together with the Songwriters Guild of America at the Supreme Court of the United States. 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 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.[4]

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[3] 37 C.F.R. §385.11(a).

[4] The Writers omit the customary "Statement of Interests" having included the statement in prior filings. The most significant change from prior comments is that Helienne Lindvall has been elected President of the European Composer and Songwriter Alliance (announcement available at https://composeralliance.org/about/who-we-are/the-board/helienne-lindvall-sweden-uk/).

I. SUMMARY

The Writers wish to emphasize that the entire concept of "frozen mechanicals" did not arrive out of the blue. Rather it emanates from the "controlled compositions clause"[5] that will still exist as an inherent barrier regardless of whether the Judges raise the Subpart B rates by 30% or 300%. Freezing mechanical rates is a very old business concept in the United States[6] designed to maintain the harm of below-statutory song royalties in perpetuity ***no matter where the government sets the rate in the future***. Frozen mechanicals is the whole reason for a controlled compositions clause to exist in the first place. The 2006 freeze was a statutory freeze on top of a contractual freeze that compounded the already-frozen controlled compositions rates. They know this. Sadly, it is a uniquely American concept.

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[5] It is common for a "controlled compositions clause" in U.S. or U.S. based 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 of a recording embodying the song concerned. As has been discussed extensively in the Writers' previous comments in the record of the Proceeding, the more aggressive versions of these provisions were created in reaction to the gradual increase in the statutory rate implemented from 1978 until 2006 when the statutory rate was first frozen by the CRB. The Writers also note that freezing the mechanical rate 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. *See generally*, Donald S. Passman, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (2019) at 264.

[6] Older contracts may express the calculation differently but still cap the exposure based on configuration. For example, in a contract entered into at a time that the statutory rate was higher than 27.5¢, the controlled pool might be hard-wired at 27.5¢ for an album (10 x 2.75¢, i.e., the rate set in 1978) even though the contract did not specifically state the ¾ rate. One can arrive at a reduced rate mechanical royalty without directly using the ¾ rate, although it is common to use both the cap and the ¾ rate to arrive at a net-pennies reduction from statutory.

Writer Helienne Lindvall (who is a Swedish national living in London) also has personal experience with the absence of controlled compositions clauses in the world outside of the United States where the practice is universally rejected. It must be said that the record companies operating without controlled compositions in every other country of the world—many of the same labels that propose the New Rules—all seem to get on just fine and ex-U.S. songwriters have not caused the sky to fall. The idea that the U.S. government requires a compulsory license, sets the rate, freezes that rate, and then allows private companies to reduce the already-frozen rate even further through a variety of additional private rate freezes is anathema to ex-U.S. songwriters. This is the kind of thing that has given rise to WTO arbitrations.[7]

The Writers have repeatedly heard from the "self-identified Copyright Owners"[8] throughout this Proceeding that Subpart B royalties are not significant and make up a small portion of recent measurements of aggregate revenue for the Majors or even the aggregated revenue sources across the industry. Of course, a good way to make sure that Subpart B rates are not significant is to freeze the rates for 15 years which was the decision of the same "self-identified Copyright Owners" and was not a natural result of a functioning market and especially not the

[7] *See, e.g.,* WTO, *Report of the Panel, United States: Section 110(5) of U.S. Copyright Act*, WT/DS160/R currently available at http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf ("DS160"). The DS160 panel of arbitrators recommended "…that the United States that the WTO's Dispute Settlement Body request the United States to bring subparagraph (B) of Section 110(5) into conformity with its obligations under the TRIPS Agreement." DS160 at 75.

[8] Notice at 33094.

mythical willing buyer and seller. Not only has that freeze harmed songwriters at least as much if not more than controlled compositions rates, it has also understated the value of catalogs that sell like hotcakes these days—albeit smaller hotcakes, to be sure.

The struggle by songwriters against frozen mechanicals has gone on for decades. Indeed, at the core of the Withdrawal Order[9] is the Judges' recognition that a settlement that imposes static statutory royalties on those not at the table should not be acceptable; Writers would add that the Judges' goals are on all fours with Congressional action in 1995[10] ***because the controlled compositions clause is an inherent harm to the Constitutional copyright system***. If the Judges' best intentions in this Proceeding will be frustrated immediately by the imposition of a standard contract term designed for the sole purpose of blocking the beneficial effect of a statutory rate increase, it is well to plan ahead. Noah built the ark *before* the rain.

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[9] Copyright Royalty Board, *Proposed Rule; Withdrawal*, 87 FR 18342 (March 30, 2022) ("Withdrawal Order").

[10] Congress recognized the harm of the controlled compositions clause in amendments to Section 115 in 1995 (then 17 U.S.C. § 115(c)(3)(E)) following the passing of the Digital Performance Right in Sound Recordings Act, Pub. L. 104-39, 109 Stat. 336. The purpose of the rather convoluted amendment appears to have been to require payment of full statutory rate on "digital phonorecord deliveries" in private contracts entered after June 22, 1995. Even so, the provision is honored in the breach as a practical matter and has not prevented the application of all the other limiting provisions of the typical clause. *See, e.g.,* Marybeth Peters, *Summary of Statement Before the U.S. Senate Committee on the Judiciary, Subcommittee on Intellectual Property* (July 12, 2005) at 5 available at https://www.judiciary.senate.gov/imo/media/doc/peters_testimony_07_12_05.pdf ("In general, the [Digital Performance Right in Sound Recording Act] provides that privately negotiated contracts entered into after June 22, 1995, between a recording company and a recording artist who is the author of the musical work cannot include a rate for the making and distribution of the musical work below that established for the compulsory license.").

The Writers greatly appreciate the effort by all concerned to resolve the frozen mechanicals crisis that has consumed so much of the Judges' time in this Proceeding. We particularly want to commend Sony, Universal and Warner for quickly recognizing the wrong turn[11] that the first Subpart B settlement had taken—again—and responding appropriately in a spirit of compromise despite the fact that the "self-identified Copyright Owners" had given up the ghost in the first settlement.[12] Thanks to the Judges' gentle demand for fairness as the voice of the voiceless,[13] the songwriting community are in the breathtaking position of watching the long arc of the moral universe bending toward justice right before their eyes.[14]

The Writers mean "voiceless" literally; this is not hyperbole. According to a casual poll survey conducted by Artist Rights Watch[15] and distributed to several hundred songwriters and several songwriter activist enthusiasts, fully 68%

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[11] *See 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).

[12] That spirit has, in the Writers' view, been starkly absent among the participants in the streaming side of the Proceeding including the biggest corporations in commercial history and their many well-heeled counsels.

[13] As the Judges concluded in the Withdrawal Motion at 18347, "Even though the physical and 'permanent' download products are different in character from streaming uses, the Judges cannot and do not treat them with any less care and attention." Neither has it ever been the rule in any copyright law of any country in the world at any time in history that a government-mandated rate ought to decline based on the popularity of a configuration.

[14] John Craig, *Wesleyan Baccalaureate Is Delivered by Dr. King*, HARTFORD COURANT (June 8, 1964, at 4) (""The arc of the moral universe is long,' Dr. King said in closing, 'but it bends toward justice.'").

[15] ARTIST RIGHTS WATCH, *Physical and Download Mechanical Rates Survey* (May 8, 2022) (N=361) available at https://artistrightswatch.com/2022/05/08/survey-results-physical-and-download-mechanical-rates-survey/

responded that ***they had never been asked their opinion on mechanical rates***. This result seems inconsistent with any group purporting to "represent" songwriters.[16] How could it be true that a lobbyist represents a songwriter in a negotiation for their income yet 68% of a relevant survey population say they've never even been asked what they think? The Writers put themselves in that category, too.

Moreover, of the remaining 32%, only 14.24% of respondents had been asked for their opinion by a music publisher (or songwriter) organization (which could include the "self-identified Copyright Owners") and yet another 21.05% had discussed the issue with a songwriting peer, i.e., another songwriter and apparently not the lobbyists. It is hard to understand how this distribution supports the claim that the "self-identified Copyright Owners" actually "represent" the overwhelming majority of songwriters with any plausible definition of "representation."

While the casual poll survey may not be dispositive of the issue, the result certainly should make one want to inquire further and ask for poll results or other authority from the "self-identified Copyright Owners," if such evidence exists.

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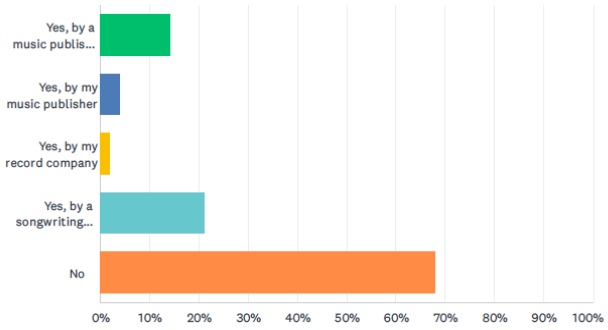
[16] The Writers respectfully suggest that there is a very large difference between lobbyists on the one hand who use the term "represent" loosely to mean that they articulate a position that may or may not be consistently in the overlap of a multiplicity of views on a Venn diagram of policy, and the bona fide authorized agents on the other hand who have been appointed to negotiate on behalf of anyone other than their own boards of directors who themselves may play inside a moral hazard. The woman on the street may stand at a physical or virtual speaker's corner and express views to the delight or dismay of the crowd; yet cheers or groans from members of that crowd does not mean any in her audience have appointed her to negotiate their employment rates and terms or control their livelihood. Neither have the Writers, and it appears neither have a large number of songwriters no matter how many solicited "attaboys" find their way into the record after the fact.

Physical and Download Mechanical Rates Survey

Q7 Have you ever been asked for your opinion on mechanical rates? (Pick all that apply)

Answered: 323 Skipped: 38



ANSWER CHOICES	RESPONSES	
Yes, by a music publisher or songwriter organization	14.24%	46
Yes, by my music publisher	4.02%	13
Yes, by my record company	1.86%	6
Yes, by a songwriting peer	21.05%	68
No	68.11%	220
Total Respondents: 323		

To conclude the Writers' frozen mechanicals conversation in the Subpart B Proceeding, the Writers respectfully call the Judges' attention to three issues resonating in the New Rules: A clarification to shore up choices embedded in the annual rate adjustment formula,[17] a suggestion to respond to (and hopefully ameliorate) the Judges' well-founded and previously expressed concerns[18] about the inevitable impact of the disfavored but industry-standard "controlled compositions clause," and confirmation that there are none of the undisclosed side-deals that

[17] Cathy O'Neil, WEAPONS OF MATH DESTRUCTION (2016) at 21 ("Our own values and desires influence our choices, from the data we choose to collect to the questions we ask. *Models are opinions embedded in mathematics*.") (emphasis added).

[18] Withdrawal Order at 18347.

were of concern to the Judges in rejecting the first voluntary settlement reached by the Majors.

The Writers do not wish to appear to be quibbling with the New Rates or to be critical of the Judges' great accomplishment in guiding the Majors[19] to a fairer settlement. Instead, the Writers offer a few minor repairs to the New Rules in the hope that the Judges will find these solutions useful in crafting the final rule.

As Jefferson wrote, "The great principles of right and wrong are legible to every reader: to pursue them requires not the aid of many counselors."[20] What the Judges have accomplished is rare and we deeply appreciate the Judges' willingness to do the right thing. Hope may spring eternal, but refreshing the spring occasionally is a recommended prescription.

We turn to a few repairs consistent with what we perceive as the Judges' goals that we think will inevitably require ruling around the application of controlled compositions clauses.

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[19] Indeed, were it not for the Judges, none of this would have happened. BMG Rights Management, *BMG Statement On Proposed Settlement On U.S. Mechanical Royalty Rates*, available at https://www.bmg.com/us/news/bmg-statement-us-mechanical-royalty-rates.html ("The entire songwriter community owes a huge debt of thanks to those who fought for this increase in the face of the opposition of major record companies and indifference of music publishers. Thanks to them, songwriters will get an effective 32% rate increase on the current 9.1 cents a track mechanical rate for physical products and downloads in the US. Without their belief and commitment, the RIAA (representing record companies) and the NMPA (representing music publishers) would not have been forced back to the negotiating table.")

[20] Thomas Jefferson, *A Summary View of the Rights of British America*, from *Draft of Instructions to the Virginia Delegates in the Continental Congress*, July 1774, in Julian P. Boyd, ed., THE PAPERS OF THOMAS JEFFERSON, VOL. 1 (1950) at 121–23.

II. MINOR REPAIRS TO NEW RULES

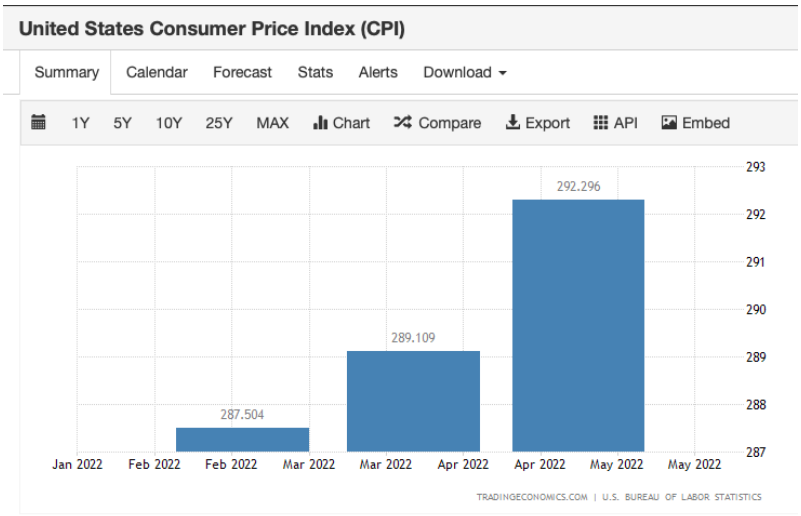
A. CLARIFYING THE ANNUAL RATE ADJUSTMENT

The Judges have taken notice of the ample proof that the U.S. economy is unfortunately currently being ravaged by inflation, a somber trend that is likely to extend throughout the Phonorecords IV rate period. That trend has certainly accelerated even from the time of the negotiation of the New Rules until today. We greatly appreciate the proposed annual rate adjustment in the New Rules but wish to call the Judges' attention to a couple nuances that we respectfully suggest require clarification particularly since we also know that whatever increase the Judges provide will simply be knocked down again in significant part by the industry-standard controlled compositions clause and practices.

The Writers' concern is anchored in the sudden rise in the economic inflation indicators over the last few months, i.e., the time since the negotiated 12¢ rate was closed—indeed, Writers aren't the only ones; the Chair of the Federal Reserve tells us "I think we now understand better how little we understand about inflation."[21] Many of these indicators seem likely to be trending up for the Phonorecords IV rate period. Consider the key items of the CPI-U for the unadjusted 12 months ended in

[21] Joe Silverstein, *Fed Chair Powell draws criticism for admitting "how little we understand about inflation,"* FOX NEWS (June 30, 2022) available at https://www.foxnews.com/media/fed-chairman-powell-admitting-understand-inflation. The Writers focus on the sudden rise in the CPI-U since the static 12¢ rate was negotiated but many other indicators in the economy also experienced sharp moves during the same period confirming Writers' concerns. There are too many to name in this comment but include the -1.6% decline in GDP for Q12022, the weakest gains of the year in consumer spending, continued decline in both personal savings and disposable personal income and increasing interest rates.

May 2022: "Food at home" is up 11.9%, gasoline up 48.7% and electricity up 12%.[22] It must also be said that economic circumstances have changed alarmingly since the 12¢ rates were negotiated in April as we can see in steep rise[23] of the US Consumer Price Index over the last three months:



Writers are not the only ones expecting higher inflation. The Congressional Budget Office economic outlook is also anticipating more of the same: "CBO currently projects higher inflation in 2022 and 2023 than it did last July; prices are increasing more rapidly across many sectors of the economy than CBO anticipated."[24] These indicators suggest that the Judges may wish to revisit any static components of the New Rules due to changed circumstances that strongly

[22] BUREAU OF LABOR STATISTICS, *Consumer Price Index Summary (CPI-U)* (June 10, 2022) available at https://www.bls.gov/news.release/cpi.nr0.htm

[23] TRADING ECONOMICS, *United States Consumer Price Index (CPI)* available at https://tradingeconomics.com/united-states/consumer-price-index-cpi

[24] CONGRESSIONAL BUDGET OFFICE, *The Budget and Economic Outlook: 2022 to 2032 At a Glance* (May 2022) available at https://www.cbo.gov/publication/58147#_idTextAnchor038

indicate future trends during the Phonorecords IV rate period, including the impact of controlled compositions clauses—the original frozen mechanicals.

The New Rules state a hard-wired penny rate for 2023 with the rate floating cumulatively in the "out years" based on CPI-U. To restate the New Rules, the proposed annual rate adjustment formula after 2023 is:

$$(1 + (Cy - \text{Base Rate}) / \text{Base Rate}) \times 12¢$$

The first clarification is that instead of using a hard-wired penny rate of 12¢ for 2023, we suggest that in light of sharp increases in consumer prices the Judges consider calculating the 2023 rate (in paragraph (a)(1) of the New Rules) based on the 2006 CPI-U through the November 2022 CPI-U (defined as the "Base Rate" in the New Rules) applied to the frozen 9.1¢ rate, or:

$$[1 + (\text{CPI-U } 11/2022 - \text{CPI-U } 1/2006) \div \text{CPI-U } 1/2006] \times 9.1¢ = R1$$

The result of *that* calculation may be defined as "R1" but, respectfully, should be *no less than* the new settlement proposal of 12¢.[25] Thus in December 2023 the formula[26] to determine the 2024 rate would be the same as proposed except that the "12¢" variable would be replaced with the new value of R1, but no less than 12¢ as a floor we will discuss presently.[27]

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[25] Again, at the risk of stating the obvious, the Web V rates from which the Majors tell us they derived the subject formula provided for increases or decreases. A decrease in the Subpart B rates undermines the Judges stated desire to eliminate the static rate; therefore, a floor rate is an appropriate and reasonable way to address what would be a further injustice. Respectfully, songwriters have had enough decreases to last several generations.

[26] 2024 rate: $[1 + (\text{CPI-U } 11/2023 - \text{CPI-U } 11/2022) \div \text{CPI-U } 11/2022] \times R1 = R2 \not< \$0.12$

[27] The New Rules rely in part on the Judges' Webcasting V rate proceeding to justify indexing (at 5). "The formula for the annual rate adjustment for subsequent years of the rate period is based on the

Because the proposed formula as stated is "cumulative" over time,[28] each year of the rate period would require including the "R" variable *from the prior year* ("Ry")[29] to arrive at the royalty rate *for the current year* ("Rx").[30] Therefore, the minor repair to the formula would be stated as:

$$(1 + (Cy - \text{Base Rate}) / \text{Base Rate}) \times Ry$$

Finally, because the object of the exercise (or what Dr. O'Neil might call the "opinion embedded in the mathematics"[31]) is to increase the statutory rate and protect the songwriter's buying power after the increase, we respectfully suggest that the Judges should consider placing a lower bound on the possible result of these calculations given the volatility of the global economy (although "volatility" implies movement both down *and* up). Logically, we think that lower bound should be Ry, i.e., the rate determined in the prior year of the rate period but could also reasonably be no less than the settlement proposal of 12¢.

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formula for annual rate adjustments that the Judges adopted in the Web V proceeding. See 86 Fed Reg. 59,452, 59,593 (Oct. 27, 2021)." At the risk of stating the obvious, the rate period for Web V is 2021-2025; it is appropriate to start that rate period with a new rate and for the indexing started the next year to be at *that new rate*. While the Judges need not woodenly follow their ruling in an unrelated proceeding, it is worth noting that the Proceeding differs from Web V in the important way that the Web V rates had not been arbitrarily frozen for the prior 16 years. Thus, while the Web V indexing formula is informative it is not dispositive and, respectfully, ought to be distinguished in these respects.

[28] New Rules at 10 ("The calculation of the rate for each year shall be ***cumulative***...").

[29] 2025 rate would be: [1 + (CPI-U 11/2024 - CPI-U 11/2022) ÷ CPI-U 11/2022] x R2 = R3 ≮ $0.12

[30] R1 would be determined for 2023, R2 for 2024, R3 for 2025, R4 for 2026 and R5 for 2027.

[31] *See supra* note 17.

The revised formula (where "Ry" is the prior year's rate and Rx is the result of a current year calculation) with the floor logical operator would be stated as:

$$[(1 + (Cy - \text{Base Rate}) / \text{Base Rate}) \times Ry] = Rx \prec \$0.12$$

Given the assumptions of a CPI-U of 198.3 in January 2006[32] and a CPI-U of 292.296 in May 2022,[33] we estimate that current R1 would be in the 13.4¢ range with rounding down to the nearest tenth. Under current economic conditions, one could reasonably anticipate that R1 for 2023 would rise slightly by November 2022 (the determination date in the New Rules).

While this derived penny rate would likely be greater than the proposed settlement rate in the New Rules, the Writers' recommended methodology is consistent with both the philosophy and aspirations stated by the Judges in the Withdrawal Order,[34] the position long argued by George Johnson as a participant in the Proceeding, public comments filed by many, many songwriters and organizations (including the Writers), and the slightly modified CPI adjustment of the New Rules from which our suggestion is derived. Consistency is welcome and Writers agree with the Judges that an inflation adjustment is objectively reasonable

[32] https://cpiinflationcalculator.com/2006-cpi-inflation-united-states/

[33] https://cpiinflationcalculator.com/2022-cpi-and-inflation-rate-for-the-united-states/

[34] As the Judges stated in the Withdrawal Order at 18347, "[S]ixteen years at a static rate is unreasonable under the current record, if for no other reason than the continuous erosion of the value of the dollar by persistent inflation that recently has increased significantly. In this regard, application of a consumer price index cost of living increase, beginning in 2006, would yield a statutory subpart B royalty rate for 2021 of approximately $0.12 per unit as compared with the $0.091 that prevails, which adjustment, as noted *supra,* represents a 31.9% increase."

and not arbitrary which is itself essentially confirmed in the New Rules.[35] The Writers respectfully suggest that applying that adjustment consistently from 2006 through the beginning of the Phonorecords IV rate period is also objectively reasonable. The math speaks for itself.

B. THE "POISONOUS" EFFECT OF "CONTROLLED COMPOSITIONS" TERMS

The Judges may well ask themselves how it could be that the substantial increase of the New Rules is incomplete and why the Writers are suggesting the minor repair of a slightly increased annual adjustment starting in 2023.[36] Aside from the economic reality, one reason is the "controlled compositions clause" most commonly found in term recording artist agreements beginning in the 1970s that is unique to the United States and to a lesser extent to Canada. As the Judges correctly observed in the Withdrawal Order:

> "The disparity between the static rate and the dynamic market is even more stark when considering the "controlled composition clause" that contractually lowers the statutory rate by 25%. Add to that the record labels' limit on album royalties to ten tracks, regardless of the number of songs actually included in each album. In other words, the statutory rate is not the

[35] One may have to determine whether the policy point (and appropriate role for the CRB) is to adjust for inflation or to arrive at an arbitrary (albeit negotiated) rate of 12¢.

[36] Of course, the underlying reason for low songwriter royalty rates is the static 2¢ rate set by Congress in the 1909-1978 period. Songwriters around the world have paid the price ever since. The Judges are well aware of this cause for misery, so we will not address it again in this comment.

effective rate record labels use in compensating songwriters and publishers."[37]

Unfortunately, the New Rules are silent regarding the Judges' well-placed and clearly stated concern about the effect of controlled compositions clauses on the statutory rate when ***rejecting*** *a proposed settlement that itself failed to address this vital issue*. The Writers would like to respond to the Judges' concerns.

One of the Writers' concerns is if "non-controlled" songs on compact discs and vinyl (and occasionally album-bundle dpds[38]) are paid without protection from contract reductions given effect through the controlled compositions clause, the Judges' intended benefit of the higher rate could not only be muted, *but it could also actually be punitive*. (This is unlikely to be offset by a higher wholesale price on permanent downloads that are essentially set by Apple, Amazon, Google and other digital music stores with trillion-dollar market capitalizations that have shown no interest in price increases as an artificial technique to drive platform growth and stock price, like Spotify does on streaming).

We respectfully leave it to the Judges to determine the extent of their jurisdiction to actually reform controlled compositions practices in private contracts that freeze contract rates to the reference statutory rate in effect at delivery of recording commitment masters. Whatever those jurisdictional limitations, we respectfully think it is important for the Judges to be clear-eyed about what is going

[37] Withdrawal Order at 18347.

[38] *See infra* note 41.

on out there. And what is going on is that since the time of the 1976 Copyright Act what the government (now the Judges) gave with one hand, the contract took away with the other, or tries to.[39]

1. The Squeeze: "The Large Print Giveth and the Small Print Taketh Away"[40]

The New Rules will inevitably establish what can be termed the "controlled *comp squeeze"* and this is how it works. First, the controlled compositions clause is itself a self-executing direct mechanical license that both incorporates terms of the Copyright Act and simultaneously purports to limit those incorporated terms, most notoriously by means of the so-called "3/4 rate." In other words, the concept of "minimum statutory rate" is turned on its head to be a "maximum statutory rate" that is only reduced in the artist agreement.[41]

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[39] The Writers call the Judges attention to announcements by Sony, Universal and Warner to pass through streaming royalties on a nonrecoupment basis. These record companies have made great strides in bringing fairness to their artist agreements. Limiting the impact of controlled compositions clauses is the logical next step, particularly given that the rate fixing dates may result in pre-1978 releases attracting the 2¢ mechanical in effect at the time of release.

[40] Tom Waits, *Step Right Up* (1976).

[41] There are those in the songwriter community who view the compulsory license and statutory rate as potentially a taking in violation of the Takings Clause of the 5th Amendment to the U.S. Constitution. Whatever problems that songwriters have with the statutory rate system, it is well to realize that at least we have the statutory rate rather than zero. If songwriters have a problem with controlled compositions clauses, they need only look across the hall to the streaming mechanicals piece of the Proceedings—it is obvious that the largest corporations in commercial history would like nothing more than to zero out the statutory rate altogether, which at least one Participant in the streaming proceeding argued in *Gaudio et al v. Spotify USA, Inc.* (Case No. 3:17-cv-01052 U.S.D.C. Mid. D. Tenn. Aug. 30, 2017) available at https://s3.documentcloud.org/documents/3986021/Gaudio-SpotifyMotion.pdf assuming that songwriters are not replaced by royalty-free algorithms.

There are many different terms in the controlled compositions clause, but we will call the Judges' attention to four: The "cap,"[42] the ¾ rate, the rate fixing date,[43] and the effect of non-controlled writers on the calculation. While we understand the desire of record companies to have certainty on their costs for budgeting and planning purposes, any one of these elements in the controlled compositions clause could help provide that certainty. All these restraints *taken together* in combination[44] are certainly onerous.[45] It must be said that at least one large record company—but only one to our knowledge—has announced it is eliminating from its

[42] An example of the cap language commonly used: The total Mechanical Royalty for all Compositions (including Controlled Compositions) will be (i) with respect to each Album other than Multiple Record Albums, **not more than ten (10) times** the Controlled Rate; (ii) with respect to each single Record released hereunder, not more than two (2) times the Controlled Rate; (iii) with respect to any EP released hereunder, not more than five (5) times the Controlled Rate; and (iv) with respect to Multiple Record Albums (if any), the maximum aggregate Mechanical Royalty will not be more than the maximum Mechanical Royalty applicable to an Album not in the form of a Multiple Record Album multiplied by a fraction, the numerator of which is the Suggested Retail List Price of such Multiple Record Album and the denominator of which is the Suggested Retail List Price of "top-line" Albums. **Without limiting the generality of the preceding sentence, Albums released hereunder in the form of Permanent Downloads shall not contain more than twelve (12) different Compositions**.

[43] An example of the ¾ rate and rate fixing date language commonly used: "If the copyright law of the United States provides for a minimum compulsory rate: The rate equal to seventy-five percent (75%) of the minimum compulsory license rate applicable to the use of musical compositions on audio Records under the United States copyright law (hereinafter referred to as the "U.S. Minimum Statutory Rate") ***at the time of the commencement of the recording*** of the Master concerned but in no event later ***than the last date for timely Delivery*** of such Master (the applicable date is hereinafter referred to as the "Copyright Fixing Date"). (The U.S. Minimum Statutory Rate is $.091 per Composition as of January 1, 2006)."

[44] And speaking of combinations, curiously seem to be nearly identical across the entire U.S. recording industry except the recent defection of BMG as noted.

[45] It must be noted that some provisions of the controlled compositions clause relate to reductions in the statutory rate for recordings that are sold at less-than-topline pricing. This is an understandable protection given that the US, unlike other jurisdictions, does not base mechanical rates on a percentage of the wholesale price.

U.S. artist agreements what the company calls the "poisonous" controlled compositions clause.[46]

As the Judges write in the Withdrawal Notice, the "cap" is an industry-wide limitation on the number of songs attracting a mechanical royalty paid by the record company, without regard to the total number of songs the record company allows *or requires* the artist to record. Most commonly, the cap is 10 songs. This means that regardless of the number of songs actually released on a particular phonorecord, the maximum number that the label will pay for is frozen at 10. When you see a record with 11 songs released since 2006, you can anticipate that the artist-songwriter is being paid approximately 68% of the statutory rate for starters.

The "rate fixing date" is a contractually frozen mechanical rate—that's right, the very static rate that the Judges are guiding us away from in the Proceeding. It is calculated with reference to the statutory mechanical royalty rate in effect on a specified date during the term of the recording agreement, usually the date that the artist delivers a recording commitment album for the option period concerned.[47] The rate fixing date concept was perfected in the post-1978 period when statutory rates increased over time; naturally the rate would be frozen at the earliest point in

[46] Murray Stassen, *BMG Eliminates 'Poisonous" Controlled Compositions Clauses from its U.S. Recording Contracts*, MUSIC BUSINESS WORLDWIDE (Oct. 8, 2020) available at https://www.musicbusinessworldwide.com/bmg-exterminates-poisonous-controlled-composition-clauses-from-its-us-record-contracts/.

[47] *See supra* notes 42 and 43.

time[48] so that the songwriters on the album received the lowest mechanical royalty, i.e., did not receive the benefit intended by Congress, the Judges or the CRB's predecessor agencies. Thus, after 1978 the rates could increase sequentially over *albums* based on release date, but the rate for any one album was frozen in time; once the rate was fixed, the songs on that album (including singles or EPs) were frozen at that fixed rate forever when exploited by the label concerned (with further reductions for mid-price or budget-price records, the ¾ of ¾ clause).[49] Writers are informed anecdotally that rates for songs on recordings released prior to 1978 are often fixed at 2¢ to this day.

Artist-songwriters are almost always paid at 3/4ths of the *minimum* statutory rate (with no long song[50]), although incremental increases (called "bumps") may be tied to sales level escalations that may eventually get successful artists bumped to a full rate prospectively after negotiated sales levels are achieved on that album. Of course, all the other provisions of the controlled compositions clause still apply and the next recording commitment album will restart at a ¾ rate.

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[48] The choices might be the date of recording, the date of delivery of the recording to the record company, the date of commercial release, or the date the phonorecords were made or distributed. Date of delivery is the most common choice to the surprise of no one.

[49] If the recording were licensed for a soundtrack or compilation released by a different record company, the rate should float.

[50] Due to sloppy accounting practices, the streaming royalty calculation turns long song into a penalty by allowing a DSP to count all long songs in the denominator as opposed to counting the long-song royalty as a per-song compensation (as Congress has mandated be done for decades). This reduces the royalty payable to all songwriters in the numerator. This isn't the only error in the Code of Federal Regulations; the last clause of 37 CFR 210.29(h)(2) is missing a conjunct so trails off into nothing and has yet to be "corrected" despite assurances from the Copyright Office.

(It is worth noting that an incentive for the artist-songwriter to sign as a songwriter to the label's affiliated publisher is to tie these events together so that the signed artist-songwriter will get a full mechanical among other incentives to permit the tying.)

Not all songwriters who contribute songs for the artist concerned will themselves be "controlled," however—and here is where the squeeze problem begins. If the writer of all or part of a song is not the artist and has not agreed to be subject to the artist's controlled compositions clause—even if the record company *requires* the artist to record songs by one or more non-controlled writers—then the record company will pay that "non-controlled" or "outside" songwriter at full statutory but will deduct the overage from the mechanical royalty otherwise paid to the artist-songwriter. The practice of requiring an artist-songwriter to record songs written by outside writers is more common in Nashville as is well-known.

Take this example for a record released prior to the Phonorecords IV rate period: A 10 x 3/4 rate cap on 9.1¢ mechanicals yields a "cap rate" of 68.25¢ for all the songs on the album at the current rate (10 x .75 x 9.1¢). An artist-songwriter who wrote all the songs (or their publisher) would receive the entire 68.25¢. But, if there were two outside songs whose writers get 9.1¢ under current rates and refuse to accept the artist's controlled compositions rate, deduct 18.2¢ from the cap rate, leaving 50.05¢ as the "controlled pool" or the total mechanical royalty payable to the artist-songwriter and any other songwriters agreeing to the terms of the artist's

controlled compositions clause. So, you can see that's no longer a 75% rate, it's more like a 55% rate. Remember, these reductions do not happen outside the U.S.

Now assume that the new rate is 12¢ but the pre-Phonorecords IV rate fixing date requires a rate of 9.1¢ (or less) because of the timing of the applicable release. Same calculation, but two outside songs now get 24¢, while the cap rate stays the same ***because of the pre-Phonorecords IV rate fixing date***. While that cap rate is fixed at 9.1¢ x 10 x .75, the controlled pool[51] now is expressed as 68.25¢ – 24¢ = 44.25¢, or about 48%. This creates an additional penalty for the artist-songwriter called the "squeeze." And if there are 11 songs instead of 10, the Malthusian calculation just decreases further—and we have not even talked about reductions in *units*.

But now consider the songs on recordings delivered in 1979 when the statutory rate was 2-3/4¢. The cap rate would be 20.625¢, the outside songwriters would still receive 24¢--but wait. That means that the controlled pool is -3.375¢. However can that be? How can mechanical royalties be negative? What happens in Bizarro World? Fortunately (or unfortunately) there's a simple solution because if the aggregate mechanical royalties actually paid exceed the controlled pool, most recording agreements allow the record company to require repayment of the excess as a "direct debt" from the artist to the label (unlikely to be enforced), deduct the negative rate from the artist royalty (more likely), or debit the artist's record royalty

[51] Cap Rate – Outside Writers = Controlled Pool.

account if the artist is unrecouped thus becoming further unrecouped (very likely--also called cross-collateralization).[52]

One can, of course, imagine a few different fixes for the squeeze, all of which are in the control of the record company or Congress and possibly the Judges. As noted, we leave it with the Judges to determine if you are able to take action to correct for these contractual harms.

2. Abandoning Rate Fixing Dates: Eliminating the Private Freeze

Respectfully, we think the Judges should be aware that there may be examples of rate fixing dates that are a private version of the very static rate the Judges rejected in the Withdrawal Notice. We believe that fundamental fairness requires that these rate fixing clauses, like usury laws, be rescinded in order for songwriters to get the benefit of the statutory rate established by Congress. We understand that the Judges may not have jurisdiction to reform these limitations, but it does seem that the Judges should be aware[53] of the right hand/left hand limitation on their rate setting authority imposed by this private freeze to do indirectly that which is prohibited to be done directly.

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[52] Typical language would be "You agree to indemnify and hold Record Company harmless from the payment of Mechanical Royalties in excess of the applicable amounts in the provisions of this Article. If Record Company pays any such excess, such payments will be a direct debt from you to Record Company, which, in addition to any other remedies available, Record Company may recover from royalties or any other payments hereunder."

[53] It may be within the CRB's jurisdiction to require an off-setting uplift on any rate-fixing date to prevent the effective statutory rate from declining. For example, if the rate fixing date resulted in the controlled composition calculation starting with a $0.0755 rate from 2001, consider applying an uplift of Current New Rate ÷ Old Rate or 12¢ ÷ 7.55¢ = 159%. The rest of the controlled composition terms would apply, but the uplift would gross up the old rate to the current rate and avoid the effect of paying capped rates with inflated dollars.

It must also be said that Sony, Universal and Warner have commendably voluntarily agreed to pay certain artists and songwriters without regard to recoupment under certain circumstances.[54] The quickest way to solve these problems with the controlled compositions clause would be for the major label groups to follow their previous fairness-making voluntary policy changes with steps to eliminate at least the rate fixing date and penalties for outside songs from controlled compositions clauses followed by government action to make these and other changes permanent across all configurations as Congress started to do in 1995.

C. NO UNDISCLOSED SIDE DEALS

The Writers' support for the New Rates is predicated on there being no undisclosed side deals as consideration for the New Rates. Writers acknowledge that the Majors stated in their Motion that "…the **new** Settlement was negotiated independently of the MOU—which was executed a year ago, prior to the Parties' entering into **renewed** negotiations regarding Subpart B Configuration Rates and Terms—and so was not consideration for any of the terms set forth in **this new**

[54] Chris Eggertsen, *Universal Music to Waive Unrecouped Advances for Legacy Artists*, BILLBOARD (March 31, 2022) available at https://www.billboard.com/pro/universal-music-group-waive-legacy-artists-songwriters-unrecouped-royalties/; Lindsey Havens, *Warner Music Group Launches Legacy Royalty Program to Pay Acts with Unrecouped Balances*, BILLBOARD (Feb. 1, 2022) available at https://www.billboard.com/pro/warner-music-group-legacy-royalty-program/#!; Andre Paine, *Sony Music Expands Artists and Songwriters Forward initiatives on streaming income for legacy talent*, MUSIC WEEK (May 26, 2022) available at https://www.musicweek.com/labels/read/sony-music-expands-artists-and-songwriters-forward-initiatives-on-streaming-income-for-legacy-talent/085888.

Settlement."[55]

Because the MOU4 and the "late fee waiver" program[56] has been disclosed to a degree both in and outside of the record for this Proceeding,[57] the MOU4 might not fall into the "undisclosed" category absent the disclosure of new facts that might require reconsidering this position. Also, since as both the Judges and we read the MOU4, it apparently comes into effect if the parties merely *submit* the frozen rate extension proposal to the Judges (already done and rejected) after the minimum number of publishers agree (already done and accepted), not that the Judges *approve* the frozen mechanicals settlement.[58] Since MOU4 is a complex document

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[55] New Rules at 6 (emphasis added). Which conversely begs the question if the MOU4 *was* consideration for the first settlement that started this whole process.

[56] There is a question regarding what happens to the late fee waiver payments under MOU4 and all prior MOUs. One might assume that the settlement payment would be treated like royalties earned and distributed to the songwriters whose songs were paid late, and that would be a logical and humane assumption. However, the late fee is just that—it is a late fee that is paid as a penalty to the copyright owner or administrator, usually the music publishers. One interpretation is that a late fee is not a royalty and therefore does not have to be shared with the songwriters as it is not necessarily identifiable to a song. Indeed, the New Rules state at 9, "Late fees shall accrue from the due date until the Copyright Owner receives payment." It would be a simple minor repair that reinforces the intent of the status quo to add a new sentence after the last sentence of 37 C.F.R. §385.3 that closes off what happens next: "After the Copyright Owner's receipt of payment, the Copyright Owner shall account to songwriters for the amount of the late fee by treating the late fee in the same manner as other payments for exploitations under the compulsory license, but in no case shall the payment or credit to an individual songwriter for such share of late fees be less than 50 percent of the payment received by the copyright owner attributable to the late fee for musical works (or shares of works) of that songwriter." Language of that nature might close any loophole.

[57] *See* Withdrawal Order at 18345 ("As the commenters noted, however, the MOU is tied directly to the rate determination. The current MOU is conditional and was not effective until the parties to the MOU (the Moving Parties, except NSAI) submitted a motion to adopt the proposed settlement in Phonorecords IV as rates and terms for the subpart B configurations.").

[58] 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) at 19, MOU-4 at 2.

negotiated by well-represented and sophisticated actors, is the fourth of its name, and no defenses to it have been asserted to our knowledge, there is no reason to think that the parties meant anything other than the plain language. The Writers have no way of knowing if there is an undisclosed side-deal supporting the New Rules and the Motion is inconclusive on this point.[59]

III. CONCLUSION

If we have all learned anything from the frozen mechanicals crisis in Phonorecords IV, it is that the Judges are quite correct in concluding that the music market is ill-suited to a static rate in place over long periods of time. Hopefully that means that the simple tools of no more rate freezes and indexing of statutory rates will be universally accepted for both Subpart B and Subpart C. In an economic environment marked by long-term volatility,[60] failing to protect songwriters from

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[59] Further assurances may be warranted. As the Judges held in the Withdrawal Order, "Further, in their pleadings, the Moving Parties asserted that they withheld information regarding the MOU because they considered it "irrelevant" to statutory rate setting. Determining relevance is a judgment call reserved to the Judges. The contracting parties cannot hide changed application of a statutory rate scheme behind a "private contract" when that contract has implications for noncontracting parties and the "private contract" details necessarily inform the reasonableness of the proposed settlement. The Judges, not a participant, can and will decide what is "irrelevant" to this rate setting proceeding."

[60] Red Jahncke, *Rising Interest Rates Will Crush the Federal Budget*, WALL STREET JOURNAL (June 29, 2022) available at https://www.wsj.com/articles/high-interest-rates-will-crush-the-federal-budget-inflation-debt-spending-costs-recession-economy-11656535631 ("The current debate about inflation and whether the Fed's monetary moves have been too late or too aggressive misses the point. The U.S. has been on an unsustainable fiscal and financial path for a long time. We are beginning to see the inevitable result."); Christian L. Castle, *Goldilocks, "Neutral Interest Rates," Inflation and the Unfrozen Mechanical Royalty*, MUSIC TECH SOLUTIONS (April 13, 2022) available at https://musictech.solutions/2022/04/11/goldilocks-neutral-interest-rates-inflation-and-the-unfrozen-mechanical-royalty/ ("How high will these [Fed funds] rates go? One way to look at a potential near-term target is for the Fed to reach a "neutral interest rate", that is one that is neither accommodative nor restrictive. Given that inflation is currently in the 8% range and likely to go higher still in the near term, that means raising the federal funds rate to over 8% [the Taylor Rule]. Such an increase highlights the debt trap that the US is in (along with most of the world), because if

the rot of inflation alone could finally deliver the *coup de grâce* to these standard bearers of free expression.[61]

We think it is also quite clear that there are many voices that should have been heard in the rate-setting process and hopefully will be heard in future proceedings.[62] These would include both major and independent record companies, major and independent music publishers, artist-songwriters, screen composers and individual songwriters. We think that another teaching from this crisis is that if a man on a white horse claims to speak for everyone, he probably doesn't.

If it were not for George Johnson doing yeoman's work at great personal cost as a participant, the Judges might not have heard responses from an entire community of those who would be bound by the Judges' rulings while the proceeding was underway and there was an opportunity to right the course.

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the government had to pay over 8% for government bonds it would bankrupt the country or require massive tax increases in a shrinking GDP. The failure to tax as we went along is, of course, how we got here. Government will always take easy money debt that nobody really notices rather than tax to pay as it goes, which everyone will notice and not like.").

[61] As Professor Nye notes in *Soft Power* "[l]ong before the Berlin Wall fell in 1989, it had been pierced by [music,] television and movies.... Lennon trumped Lenin.... One [Chinese] dissident told a foreign reporter [during the Tiananmen Square massacre] that when she was forced to listen to local Communist Party leaders rage about America, she would hum Bob Dylan tunes in her head as her own silent revolution." Joseph S. Nye, Jr. *Soft Power: The Means to Success in World Politics* (2009) at n. 57.

[62] *See,* Ed Christman, *Major Labels Appeal to Keep Mechanical Royalty Rate at 9.1¢*, BILLBOARD (April 14, 2022) available at https://www.billboard.com/pro/major-labels-appeal-keep-mechanical-royalty-rate/ ("[RIAA chief Mitch] Glazier, however, says that [while] he has no control [over] who participates in the CRB proceedings — it has its own process that makes those decisions — he does have a say [in] who participates in the negotiations for a new rate settlement ***and wants to include other independent songwriting groups, publishers and labels. He wants their point of view to inform negotiations***, he says."(emphasis added)).

Commenters can only call the Judges' attention to aspects of proposed rules essentially after the fact which is important but not that efficient. We think both the Judges, music users, songwriters and the public would be well-served by collaboration in real time during future proceedings.

Again, solving the root causes of this problem may be outside the scope of the Judges' jurisdiction but the Writers want the Judges to know that we stand ready to assist in finding collaborative solutions.[63] These discussions in the songwriter community are happening anyway and will likely continue to happen both in the United States and at least among affected songwriters abroad which could find their way back to the U.S. in a variety of ways and in a variety of fora.

The Writers are mindful of the admonition of Governor Ann Richards: If you are not at the table, you are on the menu. The Writers concur with Mr. Glazier's statement quoted above[64] and would add that it is apparent that what the community desperately needs is for more people to be seated at a longer table and we welcome the RIAA's aspiration in this regard.

However much we would like it, the decision of one day cannot cure the injustice of a century. Even though the New Rules bend the arc of the moral universe toward justice, there will be some bitterness that more was not done to

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[63] Writer Dr. David Lowery has already expressed a willingness to devote the next Artist Rights Symposium at the University of Georgia Terry College of Business (where he teaches) to the subject of improving the voluntary negotiation process, procedures and discovery practice at the CRB. *See David Lowery and Chris Castle, The Smartest People in the Room* (June 9, 2022) available at https://www.youtube.com/watch?v=_Y1TPMJiemk

[64] *See supra* note 62.

cast off the economic burdens imposed on songwriters by the statutory license and the controlled compositions clause. Some believe that the "self-identified Copyright Owners" have not presented the bona fides to speak for individual songwriters at all[65] or even any publisher beyond their own board of directors. There will also be some music users other than the major labels who believe the Judges have gone too far[66] and that the New Rules, like the rejected settlement, were made in the back room[67] and were driven by "[c]onflicts [of interest that] are inherent if not inevitable in the composition of the negotiating parties."[68] It's hardly credible for an industry

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[65] See, e.g., Ed Christman, *Mercuriadis Rising: Meet the Man Songwriters Love and Publishers Fear, Billboard* (Feb. 18, 2021) available at https://www.billboard.com/pro/merck-mercuriadis-hipgnosis-billboard-cover-story-interview-2021/ ("While labels and artists who own their own recordings can negotiate with on-demand streaming services in a free market, publishers and songwriters are constrained by a web of regulations. ***Mercuriadis suggests that this could be addressed by collective action, in the form of a songwriters guild***, but it might take years for such a group to gain as much influence in the United States as existing organizations like ASCAP or the National Music Publishers' Association (NMPA) — none of which has managed to change the regulatory structure that denies publishing rights holders the negotiating leverage that labels have."(emphasis added).

[66] A recent independent label conference discussed frozen mechanicals on a panel entitled *How the CRB's Rejection of Frozen Mechanicals Will Affect Your Label* in which counsel participated https://a2im.org/events/indieweek/2022-info/wednesday-6-15-22/ ("Frozen Mechanicals Panel"). A representative of the "self-identified Copyright Owners" objected to even using the term "frozen mechanicals" to describe frozen mechanicals at the Frozen Mechanicals Panel suggesting that there is a fundamental disconnect about a term the Judges used several times in the Withdrawal Order (at 18347) and is in such common descriptive usage it found its way into the conference title of the Frozen Mechanicals Panel.

[67] Indeed, the very topic was discussed at the Frozen Mechanicals Panel.

[68] Withdrawal Order at 18348. It must also be said that some in the independent label community would like to change the entire rate setting process and mechanical rates from a penny rate to a percentage of the dealer price as is the practice in other countries with the Mechanical Licensing Collective picking up the licensing burden for Subpart B configurations. However appealing percentage-based mechanicals might be for ease of use by the music users, it remains to be seen if the MLC can actually do that job as they really need to stick to their knitting such as it is—the MLC are still unable to distribute $500,000,000 or so of other people's money that they were paid by DSPs in consideration of the new safe harbor in the Music Modernization Act. As the Judges are no doubt well aware, the DLC is already seeking special dispensation because the DSPs anticipate being unable to account timely for retroactive payments in Phonorecords III remand. Presumably the DLC

shot full of conflicts due to the concentration of ownership and vertical integration (a still unanswered question raised by the Judges) to hitch their credibility to being bigger than anyone else.[69]

Both these constituencies are important because "…if democratic procedures are to continue…the losers must be willing to play again next time….[T]he continuation of democratic systems depends, in part, on the 'loser's consent.'"[70]

Perhaps it would make sense that there be a more formal information-gathering intervention by the CRB, the Copyright Office, the Librarian or, of course, by Congress itself or interested Members. Like the "loser's consent," the community must be willing to "play again next time," and we think that making sure everyone is heard is a good step in that direction. Particularly because the compulsory

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would expect any beneficiaries of physical accounting by the MLC (such as indie labels) to bear the cost of the Administrative Assessment as do they, and they would be entirely justified in that expectation. We would expect an even greater black box given the thoroughly modernized accounting SNAFUs already extant at the MLC. Accordingly, the better result is for the independents to be present at the table, possibly even before the Judges at the CRB with an ombudsman whose cost is borne by the participants as the Writers raised in prior comments in the record of this Proceeding.

[69] *See, e.g.*, New Rules at 2 ("Musical works owned or controlled by NMPA members account for the vast majority of the market for musical work licensing in the U.S."). This statement is like saying pay attention to us because "we're big because we're big because we're big because we're big."

[70] Loser's Consent at 4.

license—by definition—gives them no choice. Wholesale prices can be raised at will based on cost of inputs, supply and demand; statutory rates cannot. "Food at home" price increases must be anticipated five years in advance, an inexact science at best. To paraphrase Chair Powell, we understand better how little we understand about frozen rates.

With these caveats and concerns, the Writers wholeheartedly support the Judges' efforts in crafting new and equitable Subpart B rates and thank the Judges for this opportunity to comment.

Respectfully submitted.

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