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MUSIC CREATORS

MCNA

NORTH AMERICA
5120 Virginia Way, Suite C22
Brentwood, TN 37027
615 742 9945

December 7, 2022

COPYRIGHT ROYALTY BOARD (CRB)
In re DOCKET NO. 21-CRB-0001-PR-(2023-2027)
Determination of Rates and Terms for Making and Distributing Phonorecords
(Phonorecords IV)
Notice of Proposed Rulemaking[1]

Comments Submitted by the Songwriters Guild of America, Inc., the Society of Composers & Lyricists, Music Creators North America, and the individual music creators Rick Carnes and Ashley Irwin, and endorsed by the Music Creator Groups Noted on the Appended Listing

I. Introduction, Summary and Statements of Interest

A. Introduction: The following Comments are respectfully submitted by the signatory organizations Songwriters Guild of America, Inc. ("SGA"),[2] Society of Composers & Lyricists ("SCL"),[3] and Music Creators North America ("MCNA"),[4] and by the individuals Rick Carnes[5] and Ashley Irwin[6] (the parties sometimes collectively referred to herein as the "Independent Music Creators"). MCNA also stands for the interests of the international music creator groups additionally listed at the end of this letter, many through its affiliation (as its North American continental representative) with the International Council of Music Creators (CIAM).[7] Together, these groups represent and advocate on behalf of hundreds of thousands of independent songwriters, composers and lyricists in the United States (US) and throughout the world.

[1] https://www.govinfo.gov/content/pkg/FR-2022-11-07/pdf/2022-24300.pdf
[2] https://www.songwritersguild.com/site/index.php
[3] https://thescl.com/
[4] https://www.musiccreatorsna.org
[5] https://www.songwritersguild.com/site/rick-carnes
[6] https://en.wikipedia.org/wiki/Ashley_Irwin
[7] https://ciamcreators.org

B. Summary of Comments: Today, the Independent Music Creator community joins in support for the comments of Phonorecords IV Proceeding party George Johnson,[8] and respectfully asks the CRB to modify or reject in its present form --as a necessity for providing economic justice for music creators-- the proposed regulations that set royalty rates and terms applicable during the period from January 1, 2023 through December 31, 2027 for streaming on demand and related uses of music.

Such proposed regulations are based upon the partial settlement concerning subparts C and D, submitted to the CRB in the form of a motion dated August 31, 2022 by the National Music Publishers' Association (''NMPA'') and Nashville Songwriters Association International (''NSAI," and collectively with NMPA, the ''Copyright Owners'') on the one hand, and Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC, and Spotify USA Inc. ("Music Delivery Services") on the other.[9]

It is the position of the Independent Music Creator community that the partial settlement proposal submitted to the CRB on August 31 appears to represent little more than a "give-back" arrangement, negotiated between parties with potentially significant conflicts of interest, that could easily negate most if not all the streaming royalty rate gains established but not yet implemented pursuant to the Phonorecord III proceedings. The "privately negotiated" settlement proposal --which provides for a microscopic, phased-in rise in streaming rates of 1.66 percent *in the aggregate* over a five-year period-- in fact represents "growth" so far below the current, near double-digit rate of inflation that by 2027, its adoption might effectively result in a streaming royalty rate in adjusted dollars that falls below the rates in effect prior to the 2018-2022 Phonorecord III adjustment.

If the parties to the proposed settlement believe that is not the case, owing to the hoped-for effects of other ancillary aspects of the settlement, they should be made to explain in detail how and why those speculative, "trickle-down" mechanisms (which do not include cost of living "COLA" adjustments) stand a likely or even reasonable chance of preventing the slow motion, inflationary evisceration of the mechanical streaming rate over the next five years.

The Phonorecord III decision was an attempt to at least bring streaming royalty rates up to a level that might draw us closer to fair market value, and aid in the sustainability of the creative music sector.[10] Effectively gutting the rates over the next five years under

[8] Our support for the comments and submissions of Phonorecords IV participant George Johnson extends beyond his suggestions regarding cost-of-living increases and related rate-setting matters, and includes his references to the limited download/buy button issue and his points related to the limited nature of copyright protection in both time and scope pursuant to Article I Section 8 of the US Constitution, which make copyright matters more urgent to timely resolve.

[9] https://www.govinfo.gov/content/pkg/FR-2022-11-07/pdf/2022-24300.pdf at 66977.

[10] Discussed, infra. p. 10.

the proposed Phonorecords IV subparts C and D settlement (a very real probability under the 1.66 percent plan without COLA protections), will eliminate any potential benefits achieved under Phonorecords III. That victory was gained only after the expenditure of millions of dollars in music creator funds during the process of negotiation and subsequent litigation of that prior proceeding.

Independent songwriters and composers, whose interests have been woefully under-represented (and potentially even misrepresented) in private negotiations related to the Phonorecords IV proceeding, cannot financially withstand such a result. It is not mere hyperbole to assert that approval by the CRB of the seemingly grossly unreasonable, proposed August 31 streaming settlement, would represent a yet another step backward toward the elimination altogether of music creation as a viable profession in the United States.

As Phonorecords IV party George Johnson repeatedly warned during the negotiation process, such approval and adoption of the proposed subparts C and D settlement without additional, COLA safeguards would exacerbate unrelenting, long-term harm not only to the US music creator community, but to the entire economic sector represented by the US music and technology industries that rely on our works as the main drivers of their success.

In short, adoption of the settlement without addressing the aforementioned issues would continue an avoidable financial and cultural collapse that none of us either wants or can afford.

C. Statements of Interest

SGA is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated independently and solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for over 91 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world. SGA's organizational membership stands at approximately 4500 members. SGA is represented by signatory Rick Carnes, who is signing as an individual music creator and copyright owner, and as an organizational officer.

SCL is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre). It has a membership of over 2800 professional composers and lyricists, and is a founding co-member --along with SGA and other independent music creator groups-- of MCNA. SCL is represented by signatory Ashley Irwin, who is signing as an individual music creator and copyright owner, and as an organizational officer.

MCNA is an alliance of independent songwriter and composer organizations that advocates and educates on behalf of North America's music creator community. As the only internationally recognized voice of American and Canadian songwriters and composers, MCNA, through its affiliation with the International Council of Music Creators (CIAM), is part of a coalition that represents the professional interests and aspirations of more than half a million creators across Africa, Asia, Austral-Oceania, North and South America, and Europe. MCNA is represented by signatories Rick Carnes and Ashley Irwin, who are signing as organizational officers.

Of particular relevance to these comments, SGA, SCL and MCNA are also founding members of the international organization **Fair Trade Music International (FTMI)**,[11] which is the leading US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

All signatories qualify under Section 801(b)(7)(A) of the Copyright Act as non- participants who are and represent those who would be bound by the terms, rates, or other determination set by the proposed settlement agreement.

II. Summary of Recent Events Related to These Proceedings, and Analysis of the Proposed Settlement Agreement Under Consideration

In order to make clear the bases for positions taken in these Comments by the Independent Music Creator community, it is necessary to first review the record of the Phonorecords IV proceedings regarding the motions filed requesting CRB adoption of privately negotiated agreements between NMPA and NSAI on the one hand (purporting to represent the interests of music copyright owners and creators), and music copyright users on the other. The record of non-transparency, conflicts of interest and biased reasoning that have marked such private negotiations among the parties to these proceedings so far, we maintain, is relevant to exposing a system that seemingly cannot be trusted to --and in fact has not-- produced fair and reasonable results worthy of CRB approval regarding streaming and related matters.

A. The Motion to Approve and Adopt Frozen Mechanical Royalty Rates for Subpart B Full Downloads and Physical Phonorecords of May 18, 2021, Based Upon a Privately Negotiated Settlement

On March 2, 2021, NMPA and NSAI, principally on behalf of the three major, global music publishing groups that control approximately three-quarters of the world's music copyrights, announced that they had completed a privately negotiated "Settlement in Principle" *mainly with the affiliated record labels of NMPA's own primary constituents* regarding subpart B configurations. Those negotiated royalty rates amounted to a proposed freeze on US mechanical royalty rates for music downloads and physical product such as vinyl records at 2006 levels, until January 1, 2028.[12]

[11] https://www.fairtrademusicinternational.org/ FTMI supports these Comments.
[12] See, https://app.crb.gov/document/download/23825.

At the time of this 2021 subpart B proposal, inflation had already reduced the current value of the 9.1 cent frozen rate by close to forty percent since 2006, with reliable projections that by 2028 the rate would be significantly below half of its original market value established two decades prior. Understandably, there nearly unanimous howls of protest from independent music creator and music publisher groups, led by our own organizations.

As we pointed out in letters to the CRB dated May 17 and May 24, 2021, and in subsequent comments filed on July 26, 2021,[13] the proposed frozen rates had been determined in "negotiations" mainly among conflicted, vertically integrated parties, and had resulted in a suggested continuation of royalty rates so drastically reduced by inflation that no US Governmental oversight body could possibly deem them "reasonable." For detailed support of these conclusions, we refer the CRB to our prior submissions, especially our comments dated July 26, 2021.[14]

Nevertheless, the Phonorecord IV subpart B "frozen rate" proposal was submitted for approval to the CRB by the "negotiating parties" on May 18, 2021.

B. The Public Statements of NSAI and NMPA Concerning the Subpart B Negotiations, and their Intentions Regarding Mechanical Royalty Rates for Streaming on Demand and Related Uses

Tellingly for purposes of our Comments today, NSAI (apparently with the support of NMPA), publicly responded to the blistering criticism it and NMPA were enduring both before and after the filing of the May 18, 2021 frozen rate motion.[15] NSAI claimed that NMPA (through whose largesse NSAI was enabled to participate in the Phonorecords IV proceeding) could not afford to go to war with its constituents' own, affiliated labels and still maintain the fiscal ability to sustain yet another, long and expensive fight anticipated over the upcoming Phonorecords IV subparts C and D mechanical royalty rate proceedings concerning the far larger music streaming market.

In effect, after misrepresenting the value of physical product that --according to Recording Industry of America (RIAA) statistics-- were actually ten to fifteen times higher than NSAI's estimates and rapidly growing--[16] NSAI specifically asserted it was supporting NMPA's decision to sacrifice inflationary rises in what they each viewed as the minimally important subpart B physical and download royalty rates *in order to preserve their ability to fight for higher mechanical royalty rates for streaming*:

> Had we chosen to fight [the labels] again, they would have argued for a rate DECREASE! They could also have contested our much more meaningful streaming rates resulting in us having to fight two powerful groups, streaming companies, and the

[13] https://app.crb.gov/document/download/25535
[14] https://app.crb.gov/document/download/25535
[15] See, e.g., https://musicrow.com/2021/06/nsai-songwriters-respond-to-criticism-of-decision-not-to-challenge-physical-royalty-rates/
[16] https://app.crb.gov/document/download/25535 at 10-11.

> labels…. History and experience told us not to create a powerful opponent when there is a strong possibility of losing with little to gain. *So, we decided to focus on the digital streaming services and streaming rates during the next trial*.[17] [emphasis added]

NMPA later announced its own position on the matter as being directly in line with NSAI's, especially concerning the need for maintaining financial resources to draw upon in the coming fight over streaming royalty rates:

> Do we do we want to litigate that [subpart B] rate in [a] trial [against record labels] when we are going to litigate against the world's biggest companies? ....We did a lot of analysis. We are not minimizing the importance of physical, but let's say we get a 10% increase, we would spend more on lawyers to get that rate. *So the decision was made to focus on streaming rates where the real fight is* and not get into a fight on 9.1 cents….[18] [emphasis added]

C. The Rejection by the CRB of the Subpart B Frozen Mechanical Royalty Rate Motion

On March 30, 2022, the CRB soundly rejected the May 18, 2021 subpart B frozen mechanical royalty rate motion submitted by NMPA, NSAI and the major labels.[19] In a powerful ruling, Chief Copyright Royalty Judge Suzanne M. Barnette cited the submissions of our Independent Music Creator organizations, and those of Phonorecords IV proceeding participant George Johnson and other independent publishing groups, in agreeing that the privately negotiated settlement underlying the frozen mechanical rate motion had produced an opaque, suspect and blatantly unreasonable result in large part owing to conflicts of interest:

> Conflicts are inherent if not inevitable in the composition of the negotiating parties. Vertical integration linking music publishers and record labels raises a warning flag…. While corporate relationships alone do not suffice as probative evidence of wrongdoing, they do provide smoke; the Judges must therefore assure themselves that there is no fire. *The potential for self-dealing present in the negotiation of this proposed settlement and the questionable effects of the MOU are sufficient to question the reasonableness of the settlement at issue as a basis for setting statutory rates and terms….*
>
> [T]he Judges find that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms. Furthermore, the Judges find a paucity of evidence regarding the terms, conditions, and effects of the [concurrently executed Memorandum of Understanding (MOU)]. Based on the record, the Judges also find they are unable to determine the value of consideration offered and accepted by each side in the MOU. These unknown factors, as highlighted in the record comments, provide the Judges with

[17] https://musicrow.com/2021/06/nsai-songwriters-respond-to-criticism-of-decision-not-to-challenge-physical-royalty-rates/
[18] https://creativeindustriesnews.com/2022/03/david-israelite-nmpa-dsps-are-proposing-the-lowest-rates-in-history/
[19] https://www.govinfo.gov/content/pkg/FR-2022-03-30/pdf/2022-06691.pdf

> additional cause to conclude that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms.[20] [emphasis added]

Officially chastised, the moving parties returned to their one-sided bargaining table to resume negotiations on the subpart B royalty rates. It took mere weeks for a new proposal to be hammered out between the major publishers and their label affiliates, purporting to apply Cost of Living Adjustments (COLA) based upon Consumer Price Index (CPI) inflation measurements to a new base rate of 12 cents. Unfortunately, just as our organizations had anticipated and feared, the parties once again could not resist including loopholes enormously damaging to music creator interests in its motion to the CRB for adoption of the new rates, as published by the CRB on June 1, 2022.[21]

As the Independent Music Creator community subsequently pointed out in our comments to the CRB dated July 1, 2022 urging amendment of the subpart B proposal to eliminate those loopholes:[22]

> Th[e] [new] proposal was enthusiastically announced by NMPA and NSAI as representing a 32% increase in the subpart B mechanical royalty base rate with future CPI adjustments. The revised proposal was subsequently submitted to the CRB for reconsideration.
>
> Among the crucial points not addressed in that announcement and CRB motion, however, were the facts (according to the U.S. Government's own, easily accessible CPI statistics and rate calculator) that: (i) by the end of 2021 the 9.1 cent royalty rate had already lost well over *40%* of its initial 2006 value; that (ii) the 2006 value of 9.1 cents was already 12 cents by early 2021, and by the time of introduction by the Majors of the revised May, 2022 settlement had further risen almost another 10% to 13.11 cents; that (iii) none of the above calculations take into account further discounting of royalty rates by the continuing imposition of controlled composition clauses by the Major labels and others; and that (iv) especially importantly, the Majors' new "flat base rate" 12 cent proposal would eliminate application of inflationary increases as measured by the CPI that occurred not only in the last three quarters of calendar year 2021, but also those changes in value through November of 2022 as well --*a stretch of nearly two years currently expected to represent the worst inflationary period in the United States over the past four decades.*
>
> The question arises as to how such a proposed deal could truly have been struck "at arm's length" between "willing buyers and willing sellers." The motivations underlying the proposal can only be known by those who devised and agreed upon it. However, we note that to our knowledge, once again not a single independent music creator group was meaningfully consulted in the process of negotiation of the Majors' new proposal (an outreach that we believe would clearly have been permissible within the competition

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[20] https://www.govinfo.gov/content/pkg/FR-2022-03-30/pdf/2022-06691.pdf at 18348-9.
See also, https://www.digitalmusicnews.com/2022/04/19/crb-nmpa-gaslight-mechanical-license/; https://www.digitalmusicnews.com/2022/03/30/copyright-royalty-board-mechanical-rate-freeze/

[21] https://www.govinfo.gov/content/pkg/FR-2022-06-01/pdf/2022-11521.pdf

[22] https://app.crb.gov/document/download/26942

> rules to which proceeding participants are subject). It was presented by the Major publishers and their representatives as a revised fait accompli to be approved by such groups (or not) prior to its submission to the CRB….

Our comments continued:

> In part because of this continuing lack of opportunity for independent music creators to meaningfully participate in the shaping of the revised proposal, the stark reality is that the un-modified implementation in 2023 of the Majors' new subpart B mechanical royalty rate proposal *would actually provide approximately 16-20% less in actual value to songwriters and composers than the royalty rate implemented in 2006 and subsequently frozen for sixteen years.* It is also, nevertheless, a proposal currently being championed by the Major publishers, NMPA and NSAI with exactly the same narrative as the one that accompanied their initial and subsequently rejected freeze proposal: "this is the best we can do…." [against our own, affiliated labels]
>
> By agreeing to the sleight of hand maneuvers contained within the new royalty rate proposal as described above, the Major publishers, NMPA and NSAI have essentially proposed a revised settlement that acquiesces to foregoing payment over the next five years of what will likely amount to tens of millions of dollars in composer and songwriter royalties that would otherwise have been due from record labels had truly arm's length negotiations taken place between willing buyers and willing sellers.
>
> As the Major publishers, NMPA and NSAI are well aware, in reality there was and remains little chance that their insistence on a settlement plan that would simply have applied CPI calculations through 2022 to the 2006 base rate, would have resulted in more extensive and expensive proceedings at the demand of the [affiliated] labels. That is especially so considering the CRB's own comments in its March 24, 2022 decision indicating that just such an approach could easily be viable, after being adapted in ways to recognize that inflation rates had recently "increased significantly." To claim otherwise as the reason for extending to record labels yet another apparent "sweetheart" royalty deal excluding application of sharply rising inflationary adjustments for nearly all of 2021 and 2022 appears to border on the absurd.
>
> Under such obvious circumstances, the potentially insidious role of vertical integration must again be considered. If there was smoke before, as the CRB noted in its decision of March 24, 2022, here is further evidence clearly suggestive of the underlying conflagration.[23]

Currently, the issue of subpart B mechanical royalty rates remains undetermined by the CRB. We respectfully continue to urge that the very serious nature of the points raised above will be given full consideration by the CRB in determining new applicable subpart B rates, due to the tens of millions of dollars in songwriter and composer royalties that are at stake. We, however, have included the above details only as a prelude to our discussion of the eerily similar, convoluted process that has resulted in the recent submission to the CRB by NMPA, NSAI and

[23] https://app.crb.gov/document/download/26942 at 5-6.

the global Music Delivery Service conglomerates regarding the setting of new digital music streaming rates under subparts C and D worth *hundreds of millions of dollars* more to creators.

D. The New Motion to Approve and Adopt Mechanical Royalty Rates for Subparts C and D Streaming on Demand and Related Uses Based Upon a Privately Negotiated Settlement

During roughly the same period between 2021-2 in which NMPA and NSAI had been insisting that they could not afford to pursue higher subpart B mechanical royalty rates from the record labels for downloads and physical product because of the need to maintain a war chest to pursue higher streaming royalty rates, NMPA and NSAI began outlining their goals for such new subparts C and D rates.

On March 1, 2022, NMPA announced a preliminary royalty plan that would "increase streaming services' publisher payments to the highest of 20 percent of revenue, $0.0015 per play, 40 percent of the compensation forwarded to record labels/master-recording owners (the latter amount is referred to as TCC, or 'total content cost'), or $1.50 per subscriber, calculated on a monthly basis."[24]

This announcement was in answer to the proposed Phonorecord IV royalty plans of the Music Delivery Service conglomerates for 2023-2027, which NMPA characterized as "the lowest in history." Spotify, for example, proposed for 2023-2027 a 10.5 percent payment of streaming-service revenue for "standalone non-portable subscription offering – streaming only" – the pre-2018 rate.[25]

For their part, the Music Delivery Service conglomerates also jointly took and continue to assert the position that on average, record labels already get 55 percent of streaming revenues, and music publishers, songwriters and composers might now receive 15 percent under Phonorecords III. The remaining 30 percent, they maintain, is an inadequate margin, and suggest that the major music publishers *look to their affiliated record labels for a piece of their 55 percent of revenues*.[26]

On July 1, 2022, meanwhile, the CRB announced its decision on the nearly four-year Phonorecord III proceeding, litigation and remand, agreeing to raise mechanical royalty rates for on-demand streaming from 11.2% of streaming revenue in 2018 to 15.1% of streaming revenue by 2022.[27] It has been and remains the view of Independent Music Creators that this 44 percent increase over the five-year period between 2018-2022, which has yet to be implemented, was intended to bring streaming royalty rates up to a level that would draw us closer, but not yet get us to, a level of fair market value that would aid in the sustainability of the creative music sector. The major music publishing community claims to be of the same view, judging by NMPA's statement following announcement of the Phonorecords III determination:

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[24] https://creativeindustriesnews.com/2022/03/david-israelite-nmpa-dsps-are-proposing-the-lowest-rates-in-history/
[25] https://app.crb.gov/document/download/25876
[26] https://musically.com/2021/10/15/nmpa-streaming-services-crb-rates/
[27] See, https://www.nmpa.org/phonorecords-iii-remand-upholds-15-1-rate-increase-reduces-some-protections/ However, the decision also overturned Total Content Cost and bundle definitions, reverting them to CRB II levels.

> Songwriters and music publishers finally can receive the rightful royalty rates from streaming services that they should have been paid years ago. This process was protracted and expensive, and though we are relieved with the outcome, we have spent years fighting a broken system. As an industry, we move forward united as *we press for even fairer rates and terms in the next CRB trial [over streaming rates]*.[28] [emphasis added]

The battle lines having been drawn, NMPA and NSAI (with their substantial war chest intact) entered into what was anticipated would be a long and contentious process of negotiation with the Digital Music Delivery services. The Independent Music Creator community hoped but did not expect to be consulted on its views, and so were not surprised by being excluded from offering input (along with most other independent groups and industry segments who were likewise ignored). What did come as an enormous surprise, however, was an announcement by the negotiating parties on August 31, 2022, that a settlement agreement had been reached that would raise streaming rates over the next five years by just 1.66 percent *in the aggregate,* from 15.1 percent of streaming revenues in 2023 to 15.35 percent of revenues by 2027, far less than the 20 percent of revenues that NMPA and NSAI had previously maintained was a minimum target rate for fairness and reasonability exactly six months earlier.

E. Evaluating the Reasonability of the Proposed Streaming Royalty Rate Settlement and its Failure to Include COLA Safeguards

While NMPA and NSAI touted the settlement deal as a masterstroke of negotiation that avoided the use of their war chest to litigate for higher streaming rates, and other of their supporters chimed in with congratulations without having seen any other details of the agreement (which NMPA apparently assured them were good for the industry),[29] we in the Independent Music Creator Community was dumbfounded. Even in light of the significant rate increases approved under Phonorecord III, we were and remain left to wonder how NMPA and NSAI could possibly have agreed to a deal that limited increases in streaming rates over the next five years under Phonorecord IV to about *one third of one percent per year* on average, when US inflation is now running close to double digits, if not higher, and expected to so continue.

Specifically, with inflation limited to even 7.5 percent per annum over the next five years, the value of US dollars would be reduced by approximately 50 percent by the end of 2027, while streaming revenue percentages will have risen just 1.66 percent in total. This phenomenon might reset the revenue values of streaming back to Phonorecord II levels, *representing a total give-back of gains achieved over the past decade.* We wonder under what measure or metric this type of obvious give-back can be deemed reasonable?

Moreover, we are likewise left speechless over what became of the bold statements of NMPA and NSAI that the initial agreement to a frozen subpart B physical and download rate proposal had been necessitated by a desire to concentrate solely on a sustained fight to finally bring

[28] See, NMPA comments at https://www.globenewswire.com/news-release/2022/07/06/2475474/0/en/Reservoir-Commends-U-S-Copyright-Royalty-Board-Phonorecords-III-Ruling.html
[29] https://variety.com/2022/digital/news/music-publishers-streaming-services-royalty-rates-spotify-1235356212/

streaming rates up to true market value standards. What happened to the promised efforts to close the vast "value gap" between revenues and value realized by the Music Delivery Service conglomerates as opposed to the comparatively miniscule sums earned by those who create and own the music being distributed?

Since announcing the proposed settlement on August 31, 2022, NMPA spokespersons have asserted that the more subtle benefits of the deal lie in the minimums established, and in certain other "larger of" calculations, the market value of which provisions are difficult to quantify in real dollar terms. Here is the explanation provided to Billboard Magazine --after consultation with NMPA to seek clarification-- on those complex, ancillary terms:

> Under the new settlement agreement — which the NMPA touts will set the 'highest royalty rate in the history of streaming anywhere' — the headline rate will escalate from 15.1% of revenue in 2023 to 15.2% in 2024 and then a half a percentage point increase in each of the remaining three years, peaking at 15.35% in 2027, the final year of the term. Meanwhile, for the stand-alone portable subscription offerings — like Spotify — the total content cost (TCC) component of the rate formula will be set at 26.2% of what's paid to labels for the entire term, or $1.10 per subscriber, whichever is lower. Previously, those numbers were 21% of revenue and 80 cents per subscriber. This means that the resultant TCC pool is measured against the total service revenue. Whichever is larger is designated the 'all-in' pool, including both performance and mechanical royalties. After this is established, performance royalties are subtracted out, leaving just the mechanical royalties behind. Finally, the resultant mechanicals are judged against a pool, calculated by multiplying a streaming service's total subscribers by 60 cents per person. Whichever of these two totals is bigger becomes the final mechanical royalty pool paid out to publishers and songwriters. Previously, the multiplier for the last 10 years had been set at 50 cents per subscriber.[30]

Our groups were not the only ones who noted anomalies and information gaps in the torturously labyrinthine explanations offered. Those "complexities" include a total lack of plain language explanations regarding the real, projected value of what each of the so-called "ancillary benefits" might be, and how well "total cost content" protections have worked in the past in closing the still-grossly imbalanced ratio of record label shares of streaming revenues versus those realized by music creators and publishers.

The music industry publication known as *The Trichordist* voiced similar concerns over the convoluted nature of the proposed settlement in an editorial published in the Autumn of 2022:

> You may have noticed that a cost of living [COLA] adjustment for statutory royalties was front and center in the recent (and still ongoing) physical mechanicals rate setting. Unfortunately, the idea of a COLA seems to have disappeared in the streaming mechanicals proceeding. Note that it's different music users on the physical mechanicals than on streaming. The physical mechanicals are paid by record companies and streaming mechanicals are paid by some of the biggest corporations in history, namely Amazon, Apple and Google and other wealthy public companies like Spotify and

[30] See, https://www.billboard.com/pro/songwriter-streaming-royalty-rates-explained-publishers-crb-deal/: ""

> Pandora/SiriusXM. All these companies have market capitalizations greater than the gross national product of some countries.
>
> You may have also noticed that after years of frozen subscription rates, Apple is the first of the streaming subscription services to raise rates by $1 on several of its services including Apple Music. [Sources] are asking if Spotify will follow[31]….Who knows, but what's interesting about this is the effect it will have on streaming mechanical rates, or more pointedly the effect that the Big Tech cartel would like you to think it will have.
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> *The calculation for streaming mechanicals is absurdly complicated*. You do have to wonder which of the genii came up with that one. About the only thing that is certain is that the negotiation of that rate every five years (and judicial appeals occasionally) guarantees employment for lots of lawyers and lobbyists on both sides, although definitely skewed toward Big Tech's share of the 46 lawyers on the docket.[32] [emphasis added]

In sum, from our perspective, the explanations of the settling parties and their spokespeople that the anticipated increasing revenues earned by the raising of subscription fees by the global Music Delivery Service conglomerates --and other tweaks in the streaming royalty rate determination formula like total cost content-- will offset inflationary losses, are at best speculative and at worst specious. As music industry legal commentator Christian Castle has pointed out, such wishful thinking regarding the avoidance of value loss seems more reflective of some kind of twisted application of the discredited theories of "trickle-down" economics, rather than sound, common sense financial planning based on COLA principles:

> [A]nyone setting a wage control like the statutory mechanical royalty rate simply *cannot order that rate for five years* and fail to take into account the potential for a coming inflation spike even if the smart people sign a suicide pact. Yet this is exactly what just happened with the settlement of the streaming mechanical rates for Phonorecords IV at the Copyright Royalty Board….
>
> It is essential that the Judges are allowed to do their job outside the hurley burley of the commercial relationship with the biggest corporations in history whose lawyers are hell-bent on conducting a scorched earth litigation campaign to crush songwriters. This is especially true of Google, Amazon and Spotify who have demonstrated truly vile behavior during the entire proceeding, a bully-fest beyond category.
>
> George Johnson hit upon a potential solution in his recent comment. If one applies the COLA to the royalty pool after the mind-numbing "greater than/lesser of formula" created by those seeking full employment for lobbyists, lawyers and accountants, that's actually a pretty elegant solution. I would quibble a little bit with the idea and apply the

[31] https://www.musicbusinessworldwide.com/apple-music-just-raised-its-subscription-price-to-10-99-in-the-us-will-spotify-be-next1/
[32] https://thetrichordist.com/category/frozen-mechanicals/

> COLA as an uplift to the actual royalty statement so that the royalty recipients could see how that uplift was arrived at (which in theory would make them less likely to audit the MLC [the Mechanical Licensing Collective established under the Music Modernization Act]). That "show your work" approach would allow the payee to see how the MLC got there and make it easier to audit upstream for obvious mistakes. It will also make it easier for the Judges to add the COLA because the building blocks of the calculation won't change from the voluntary settlement (TCC, revenue share, etc.).
>
> If songwriters are forced to stay in the confines of the statutory license trap, at least a COLA keeps the cheese from melting before their eyes. Plus they're not required to guess today what the cost of food at home, shelter and gasoline will be five or six years from now…. Songwriters [and composers] may not be able to do anything tangible to stop cataclysmic economic events, but they can demand at least a bare minimum of downside protection through a COLA.[33]

We, too, emphatically agree with George Johnson's approach that a royalty floor based upon the application of COLA principles is essential to guard against the potential economic catastrophe that could befall the music creator community if the proposed streaming rate is adopted without such an inflation-proof amendment.[34] To summarize:

> One thing that is clear…is that any argument that a COLA is not necessary with streaming mechanicals because the rate is theoretically based on increases or decreases in revenue is a particularly insulting form of trickle-down gaslighting. It must be said that the record company group of music users that pays the physical mechanical rate voluntarily agreed [to] a COLA on their rates that is currently pending approval by the Judges. There really is no excuse for the streaming services to rely on the discredited trickle-down theory to pawn off their Rube Goldberg royalty structure on songwriters.[35]

F. The Question of Undue Record Label Influence on the Subpart C Settlement Negotiation Process

We are additionally compelled to underline a further matter crucial to a full understanding of the scope of conflicts and complications surrounding the streaming royalty rate negotiations between NMPA and the Music Delivery Service conglomerates. It concerns yet another aspect of the vertical integration issues that plague the rate-setting process for musical compositions, and points up the necessity for the CRB to recognize the uniquely troubling aspects of "settlements"

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[33] https://thetrichordist.com/category/frozen-mechanicals/

[34] At least one commenter has also proposed that a rate floor of one cent per stream be established, presumably to which a CPI-based COLA could be applied in the future. While fixed rate floors may have certain advantages in terms of ease of calculation, we cannot express an opinion without further information as to how such a base rate would be initially set. See, https://app.crb.gov/document/download/27333

[35] Statement of Christian Castle. https://www.hypebot.com/hypebot/2022/10/leftover-streaming-mechanicals-will-be-up-for-discussion-chris-castle.html

forged against a backdrop of obvious, potential self-dealing that marks the music publishing corner of the music world.

The issue to which we refer is the question of whether "undue label influence" was and continues to be exercised by major music publisher-affiliated record companies regarding the subparts C and D settlement negotiations, in contravention of songwriter, composer and music publisher rights and interests. Once again, as was the case regarding the proposed and rejected subpart B frozen rate adoption, the facts and circumstances surrounding this third proposed Phonorecords IV settlement agreement seem to cry out for a more active oversight role for the CRB judges in the interests of economic fairness *and* music creator survival.

The "undue label influence" issue is actually tangential to the argument raised by the Music Delivery Service conglomerates concerning the drastic imbalance between streaming royalty revenues realized by the record labels (estimated to be at least 55 percent and up to nearly 60 percent of inadequately defined Music Delivery Service proceeds[36]), as opposed to the paltry music creator and publishing receipt of just 15.1 percent of such revenues (once the Phonorecords III remand decision is finally implemented). The suggestion of the Music Delivery Services that the Independent Music Creator community look to the record labels rather than to their companies for streaming royalty increases has created a conundrum for the three major music parent organizations, who through intra-company vertical integration control in the aggregate a massive percentage of both musical compositions and music recordings around the globe.

While we give absolutely no credence to the claims of the multi-billion-dollar Music Delivery Service conglomerates that they cannot maintain value for their corporations if made to reduce margins by paying fair remuneration to music creators and publishers, we also recognize that the label/music publisher vertical integration issue --combined with the royalty split imbalances noted above—establish a clear conflict of interest scenario that should be carefully considered by the CRB judges in the settlement evaluation process. Thus, while it may be factual that record labels did *not* overtly interfere with the efforts of NMPA and NSAI to gain significant streaming rate royalty increases in the highly contentious Phonorecord III proceedings, we believe it is likely that those same labels grew more wary following the CRB's Phonorecords III decision on July 1, 2022 to actually raise those rates.

The suspected reason for such presumed record industry uneasiness is easy to pinpoint. That is, even though their vertically integrated music publishing companies may benefit from the Phonorecord III rate hikes, it is axiomatic that the higher streaming royalty rates for music creators and publishers climb toward fair market value, the greater the likelihood that more *credibility* will accrue to the claim by the Music Delivery Services that they have maxed out their margins and that record labels are simply taking too much of the pie.

[36] See, https://www.digitalmusicnews.com/2022/06/17/major-labels-nmpa-streaming-data/ It remains unclear, after two decades of unanswered requests to Music Delivery Services for information on the value of the revenues they derive from data mining, whether that income stream is being in any way accounted for in calculating commissionable streaming "proceeds."

That, in turn, shines a brighter light on the issue of why the discrepancies in the splits of streaming royalties between labels and music creators/publishers remain so skewed, a market reality about which the labels seem to be pressuring their affiliated music publishing arms to ignore, against those publishers' own interests and those of the music creators they purport to represent.

That is especially so when one considers that the major corporate music giants on average derive a far greater split of revenues under recording agreements with artists (potentially upwards of 80 percent) than under music publishing agreements with writers (often downwards from 20 percent). Given the choice, the major corporate music parents emphatically prefer to have as much "same source" royalty revenue flowing through their labels as possible, not through their publishing arms.[37]

Some may still maintain that without more direct proof, the undue label influence issue is too speculative for consideration as part of the Phonorecords IV rate settlement considerations. On the contrary, two recent developments lend important support to the idea that a deeper look by the CRB is warranted into (as the CRB itself phrased it in its subpart B inquiries) whether the odor of smoke may be evidence of a fire raging beneath the surface.

The first such development is the increasing, open questioning by music creators and publishers on a global basis as to why --in a digital distribution world-- they should not be deriving a greater split of streaming revenues with record labels (rather than suffering with just one-fourth or less of the amounts that record labels receive), *and why the major music publishers have recently remained so silent on such an overwhelmingly important revenue issue.*

As was recently reported in the respected UK publication, The Guardian:

> [M]embers of the songwriting community are frustrated that their particular situation is being overlooked: how the transition in music consumption over the past decade has affected their bottom line and the disparity between how much they earn compared to record labels. Songwriters and publishers have always received a comparatively smaller slice of the pie from the [physical] sale of recorded music – in the CD and vinyl age, their share was around 6%, rising to 8% for downloads. For streaming – which today counts

[37] See, https://www.musicbusinessworldwide.com/merck-mercuriadis-none-of-us-should-be-able-to-sleep-in-good-conscience-at-night-until-the-true-value-of-the-songwriters-contributions-to-this-business-are-recognized/ "The recorded music side of the business today is getting 4/5ths of the revenue, operating on an 80% gross margin and a 40% net margin – and in most cases record companies own catalogue music masters in perpetuity. Very few famous artists own their masters. Conversely, the publishing side of the business is getting 1/5th of the revenue, 1/5th of the margin and, quite rightly – whether through good management and lawyering or via renegotiations or reversions – the rights to songs regularly end up back in the hands of the songwriters. In that context it's no wonder that the recorded music companies exercise their control over their publishing companies. It's in their economic interest to push as much of the money in our business towards recorded music – where the lion's share goes to the record company. And to be clear: it goes to the record company at the expense of the songwriter."

> for 80.6% of music consumption in the UK – that share has risen to around 12 to 15%, while record labels and artists typically take 55%.
>
> Historically, the royalties split was justified by record labels taking on the labour of manufacturing and distributing physical records, and paying for studio sessions and musicians. With the advent of streaming, the label's role has diminished, says songwriter and Ivors Academy chair Crispin Hunt. "Record labels are still taking a manufacturing and distributing cut when all they're doing is a marketing job."
>
> Ben Katovsky, chief operating officer of BMG – a record label and music publisher that represents acts including Kylie Minogue, Gary Numan and KSI – agrees, saying that the way songwriters are compensated "is based on an analogue world" and "not fair". Fiona Bevan, who has written for Minogue, argues that songwriters and publishers should get an equal share of music royalties to record labels and artists. "That would make a huge difference."[38]

Even considering the eerie, recent silence of the major music publishers on this revenue imbalance issue, the representative comments of creators and smaller publishers cited above might --standing on their own-- still be dismissed by some naive critics as the anecdotal complaints of a few malcontented songwriters and outlier music publishers (no matter their size or pedigree).[39] It would be easy to suggest those complaining they are simply stirring the pot of controversy as the way to boost their own revenues and industry profiles, not evidencing the likelihood of undue label influence on the determination of streaming royalty rates for creators and publishers in the US. But those assumptions would very likely be wrong.

The underpinnings of that conclusion are found in the second development referred to above, the blunt public insights into the "undue label influence" issue attributable to the $2.2 billion music publishing firm known as Hipgnosis.[40] That company is one of the world's largest music copyright owners, with a seat inside the NMPA boardroom (along with BMG).

According to Hipgnosis owner Merck Mercuriadis, Hipgnosis' opinions are apparently quite similar to those expressed on the issue by BMG and others quoted by The Guardian:

> Many people working in the 'major' publishing companies…would like to do more to improve the earnings of songwriters they identify, sign, and develop – and who deliver hits to recorded music divisions within the same companies. Yet I believe the ability for many of these people to do so is limited by the recorded music divisions that control

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[38] https://www.theguardian.com/music/2021/feb/12/songwriters-fight-to-be-heard-in-streaming-revenues-debate

[39] Though it is a highly respected music publishing firm, BMG does not regard itself as being among the three, global music publishing "majors" UMG, SONY and WMG.

[40] https://www.musicbusinessworldwide.com/hipgnosis-songs-fund-now-owns-a-music-catalog-worth-more-than-2-2-billion/

> them. I note that none of the major music publishers gave evidence at the recent DCMS hearings on the 'economics of streaming' in the UK.
>
> Many people [also] point out to me that the amount songwriters get paid is determined by legislation, not the major music companies. I remind them that legislation is determined by advocacy and lobbying. And if you don't have the biggest voices in your industry lobbying on behalf of the songwriter in a way that is not conflicted, how can you expect the true value of the songwriters' contribution to be reflected in law?[41]

Speaking again at the University of Georgia in Athens, Ga. for the Artist Rights' Symposium on November 15, 2022, Mercuriadis was even more direct on the issue. "Major music publishers are not free to do what's in the best interests of their constituency," he stated bluntly, "because they're owned and controlled by their major recorded music company."[42]

Can the undue label influence/revenue imbalance issue be overtly proven? Do we even know for certain whether the substantial equity holdings of the major record labels in the Music Delivery Services that existed at one time still continue in one form or another, influencing corporate decision-making in these vertically integrated corporations?[43] These are relevant and important questions.

Nevertheless, the specific answers are not the main points we are trying to make by raising them in these Comments. Rather, the real, underlying questions are whether the proposed settlement agreement on streaming currently under consideration can reliably be shown to have been arrived at with adequate and unconflicted representation of music creator and publisher interests, and whether the results reached following such negotiations are reasonable, or conversely, represent a massive potential give-back of gains in streaming royalty rates regarding musical compositions achieved in Phonorecords III.

Under the facts and circumstances discussed in these Comments (and some left unaddressed, such as the difficulties the CRB has endured in forcing the settling parties into a semblance of

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[41] https://www.musicbusinessworldwide.com/merck-mercuriadis-none-of-us-should-be-able-to-sleep-in-good-conscience-at-night-until-the-true-value-of-the-songwriters-contributions-to-this-business-are-recognized/

[42] See, https://www.billboard.com/pro/artists-rights-symposium-songwriters-metadata-merck-mercuriadis/#recipient_hashed=69147c876d64538a97146072ef01e0685688348b33d4338593af6afad146766d&recipient_salt=4aeea324818b0b8463dab0104e62dfadbef15ff3f224cc988721191125ae6b47 and https://www.youtube.com/watch?v=4LFYCBeGzI4. According to Billboard Magazine, Mercuriadis has expressed tepid support for the proposed Phonorecord IV streaming settlement "for one main reason:" that it provides stability after the almost four-year delay in implementing the Phonorecord III increases, which are still not in effect.

[43] See, https://www.rollingstone.com/pro/news/who-really-owns-spotify-955388/ "[As of 2020] Sony Music Entertainment andUniversal Music Group — continue to jointly own between six percent and seven percent of Spotify (Sony around 2.35 percent and Universal around 3.5)." See also, https://medium.com/@itsnorequests/major-record-labels-have-little-incentive-to-address-streaming-manipulation-510bde3fc60d

transparency[44]), we respectfully urge the CRB to undertake the same, thorough inquiry that it pursued in consideration of the subpart B mechanical royalty rate freeze settlement proposal last year culminating in its March 30, 2022 decision.

That evaluation process might include consideration of: (1) whether the settling parties should be required to explain in plain language how their streaming royalty rate settlement terms will avoid catastrophic losses in value due to inflation over the next five years; (2) whether a COLA provision is warranted, just as it has been included in several other recently negotiated rate agreements approved by the CRB, and; (3) whether the proposed settlement agreement was negotiated with adequate and unconflicted representation of music creator and publisher interests, leading to results that provide a reliably reasonable basis for the setting of fair and equitable statutory streaming rates and terms.

Unless and until these issues can be satisfactorily addressed, the Independent Music Creator community requests that the CRB judges reject the adoption of the subparts C and D settlement as proposed --just as it did regarding the subpart B frozen rate settlement proposal-- and send the parties back to the bargaining table with the benefit of greater CRB guidance.

III. Conclusion

We thank the CRB for consideration of these Comments, and for its steadfast work regarding the Phonorecords IV proceeding and other issues of crucial importance to the future economic health and survival of the US and global music creator community.

Respectfully submitted,

Rick Carnes
President, Songwriters Guild of America
Officer, Music Creators North America

Ashley Irwin
President, Society of Composers & Lyricists
Co-Chair, Music Creators North America

cc: Charles J. Sanders, Esq.
Ms. Carla Hayden, US Librarian of Congress
Ms. Shira Perlmutter, US Register of Copyrights
Mr. Eddie Schwartz, President, MCNA and International Council of Music Creators (CIAM)
The Members of the US Senate and House Sub-Committees on Intellectual Property

[44] https://app.crb.gov/document/download/27284?fbclid=IwAR3bWPqvAMpCJ51xddstN2okF184zaAoddrHJaN3FxIg74gbTzX5c9wfh5I

List of Other Affiliated Organizations

Alliance for Women Film Composers (AWFC). https://theawfc.com
Screen Composers Guild of Canada (SCGC), https://screencomposers.ca
Songwriters Association of Canada (SAC), http://www.songwriters.ca
Asia-Pacific Music Creators Alliance (APMA), https://apmaciam.wixsite.com/home/news
Music Answers (M.A.), https://www.musicanswers.org
Fair Trade Music International (FTMI), https://www.fairtrademusicinternational.org/
Pan-African Composers and Songwriters Alliance (PACSA), http://www.pacsa.org
Alliance of Latin American Composers & Authors (AlcaMusica) https://www.alcamusica.org