

 **THE Authors Guild**



**ALLIANCE FOR WOMEN  
FILM COMPOSERS**



 **Romance Writers of America®**  
The Voice of Romance Writers



December 20, 2021

Lina Khan, Chair  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Jonathan Kanter, Assistant Attorney General  
Department of Justice, Antitrust Division  
Robert F. Kennedy Department of Justice Building  
950 Pennsylvania Avenue  
NW Washington, D.C., United States

Re: Making Competition Work: Promoting Competition in Labor Markets

Dear Chair Khan, Assistant Attorney General Kanter, and members of the Federal Trade Commission:

We, the organizations listed below, are an informal coalition of organizations who together represent tens of thousands of professionals working across the creative industries. Our members work on a freelance and independent contractor basis and include authors, journalists and other text writers, songwriters, composers, lyricists, playwrights, librettists, illustrators, graphic designers, graphic artists, photographers, and videographers, and other

creative professionals. We thank you for the opportunity to submit these comments on the important issues surrounding antitrust and labor.

## **Who We Are**

Our coalition is composed of the following organizations:

**The Authors Guild** is a national non-profit association of over 12,000 professional, published writers of all genres including historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. Among our members are historians, biographers, poets, novelists, and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works that never reach the bestseller lists. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award. The Authors Guild defends and promotes the rights of all authors to write without interference or threat, and to receive fair compensation for their work. For over a century, we have vigorously represented authors' concerns in Washington D.C. We educate and advise Congress and federal agencies on legislation that would help—or harm—authors. We develop and shepherd legislation.

**The Alliance for Women Film Composers (AWFC)** is a community of composers and colleagues who strive to support and celebrate the work of women composers through advocacy and education. This visibility is important to herald in equality amongst our industry and bring diverse voices to film, television, video games and multimedia projects. We are proud to host the first ever directory of women film composers allowing filmmakers and decision makers the opportunity to discover new talent. The AWFC was founded in 2014 by Laura Karpman, Miriam Cutler, Lolita Ritmanis and Chandler Poling out of a need and desire to raise visibility and create opportunity for female composers. Although women composers have always been writing and creating music, they have historically been overlooked and kept invisible. The AWFC set out to change the landscape of equity in music for visual media. By creating a directory, events, performances, gatherings, advocacy, and partnerships, the AWFC has begun to shift the tide of equity in Hollywood and beyond.

**The Dramatists Guild of America (DGA)** is the national, professional membership trade association of theatre writers including playwrights, composers, lyricists, and librettists. Since The Guild's founding in 1919, its mission has been to aid dramatists in protecting both the artistic and economic integrity of their work through education, advocacy, opportunity, and community. The Guild assists its 8000+ members in developing both their artistic and business skills through its many services and resources, and is an aggressive public advocate for dramatists' interests, speaking out on issues that affect the role of dramatic authors in the theatre and in society in general. The Guild is governed by a board of directors elected from its membership. Our current officers are Amanda Green (President), Branden Jacobs-Jenkins (Vice-President), Kristoffer Diaz (Secretary) and Christine Toy Johnson (Treasurer). Past presidents have included Richard Rodgers, Oscar Hammerstein II, Moss Hart, Alan Jay Lerner, Robert Sherwood, Robert Anderson, Frank Gilroy, Peter Stone, Stephen Sondheim, John Weidman, Stephen Schwartz, and Doug Wright.

**Graphic Artists Guild, Inc.** has advocated on behalf of illustrators, graphic designers, and other graphic artists for fifty years. The Guild educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The *Graphic Artists Guild*

*Handbook: Pricing & Ethical Guidelines* raises industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

**Music Creators of North America (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 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-Asia, North and South America, and Europe.

**The National Press Photographers Association (NPPA)** is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students, and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and advocated for the copyrights of journalists as well as defended the First Amendment freedoms of the press and speech in all its forms, especially as it relates to visual journalism.

**National Writers Union (NWU)** is an independent national labor union that advocates for freelance and contract writers and media workers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers and media workers in all genres, media, and formats. NWU membership includes, among others, journalists, fiction and nonfiction book authors, poets, novelists, playwrights, editors, academic writers, business and technical writers, website and e-mail newsletter content providers, bloggers, social media producers, podcasters, videographers, illustrators, photographers, graphic artists, and other digital media workers. The NWU is a member of the International Federation of Journalists, the world's largest organization of journalists, and of the International Authors Forum. As an organization of digital media workers, our concern is with the livelihoods of individual creators.

**Romance Writers of America (RWA)**, founded in 1980, is a nonprofit trade association, with a membership of more than 4,000 romance writers and related industry professionals, whose mission is to advance the professional interests of career-focused romance writers through networking and advocacy. RWA works to support the efforts of its members to earn a living, to make a full-time career out of writing romance—or a part-time one that supplements his/her main income.

**Society of Composers & Lyricists (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 2,000 professional composers and lyricists, and is a founding co-member—along with SGA and other independent music creator groups-- of MCNA.

**The Songwriters Guild of America (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 are in conflict with those

of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for 90 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.

### **Grossly Imbalanced Bargaining Power in our Industries Affects the Earnings and Working Conditions of Our Respective Members.**

Freelance creative professionals all share one thing in common: they are workers who provide their labor to bring artistic beauty, ideas, expertise, and insight to us all, and they do this with no employee protections, no benefits, no minimum wages, no ability to collect unemployment benefits, and negligible ability to negotiate their contracts. Most of these workers are grossly underpaid, although they create the very foundation and reason for the existence of the core copyright and creative industries—publishing, film, music, software, newspapers, and magazines—which together add more than \$1.5 trillion in annual value to the U.S. GDP, and about 7.41% of the U.S. economy, and directly employ more than six million workers.<sup>1</sup>

In today’s marketplace, these workers face myriad challenges, and the Federal Trade Commission and the Department of Justice’s inquiry into the intersection of antitrust and labor law casts much-needed light on these struggles.

Antitrust laws, as well as our members’ lack of collective bargaining rights, directly affect our members’ ability to earn a sustainable living through their creative work. In most creative fields today, industry consolidation and the domination of a handful of online distributors has vested excessive market power in the purchasers, publishers, and distributors of creative works, resulting in a grotesquely imbalanced marketplace that negatively impacts the advance of both commerce and culture to the detriment of creators and consumers alike.

The result is that these few and dominant corporate monopsonies are able to force unfair terms on individual creators and extract from the marketplace far more than their fair share, while the individuals who labor to bring creative work into the world are offered unfair terms, which they generally accept because they cannot hope to even minimally profit from their work otherwise. Meanwhile, smaller entities that try to compete with the monopsonies and attract talent with more favorable terms inevitably fail because they cannot sustainably compete with the dominant firms. And once the outsize player(s) in a particular creative industry adopt new terms that disfavor the creators, their midsize “competitors” are quickly forced by marketplace necessity to follow behind. This race to the bottom leaves creators with no choices but the swallow the newer, increasingly unfair terms, or to abandon their careers to pursue other ways to earn a sustainable living. Creators who attempt to attempt to escape the monopsonies in their sectors by distributing on their own work face an equal or greater imbalance of bargaining power in dealing with the handful of dominant digital distribution and monetization platforms.

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<sup>1</sup> *Copyright Industries in the U.S. Economy: The 2020 Report*, by Robert Stoner and Jéssica Dutra of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), (December 2020), at 4, <https://www.iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf>.

While the specifics differ from industry to industry, many creative professionals do not even earn the equivalent of minimum wage, while their publishers and distributors demand more and more exclusive rights for the same amount of compensation, to the point that most creators can no longer sell rights for different uses to separate entities (and thereby earn additional fees), as was contemplated by the 1976 Copyright Act. As a result, in the last decade or so, freelance creators' pay in most sectors of the creative economy has decreased dramatically, even as the revenues produced for others by the use of their works has skyrocketed. For instance, authors used to be able to sell audio books to audio book publishers as a way to earn additional money. Now, most major book publishers demand audiobook rights coupled with the book publishing rights, increasing the publishers' income streams while depriving creators of their own bargaining and earning opportunities.

Enormous downstream pressure from internet monopsonies and monopolies has shrunk the number of buyers (and competition) for creative works. This lack of competition has of course increased the bargaining power of representatives and middle marketers, leading in turn to a gradual erosion of contractual protections, benefits, and income for creators. This trend, as shown below, extends across the various creative sectors. What's more, the same internet platforms that disrupted and reconfigured the markets with complete impunity are now also creating their own publishing and production entities, directly competing with established publishers, record companies, image licensors, self-published creators, and other businesses engaged in artistic and cultural endeavors. These conglomerates then favor use of their own works on their platforms while increasing the pressure on creators to acquiesce to diminished terms of remuneration, thus further artificially depressing earning power.

Much has been made of the recent legal protections provided to "gig" workers in today's economy, but creative freelance workers are the original underpaid gig workers—they work on a freelance basis for a defined set of publishers and distributors that provide standard contracts and low pay. Like traditional employees, these workers earn their livings by providing labor to the companies that hire them; they are not on an equal footing to negotiate the terms on which they provide services and licenses. Publishers and distributors generally, and increasingly, give individual creators contracts of adhesion to sign on an essentially take-it-or-leave-it basis, with little or no ability to negotiate better terms. Parity will not be achieved in these labor markets unless and until the individual creators in each field are clearly allowed to negotiate and act collectively with their de facto employers: publishers and distributors.

The labor and antitrust laws have been applied to creative workers as though they are businesses with the ability to negotiate freely and on an even footing with the buyers of their services and creative works – a marketplace fiction with economically lethal consequences. Since many creative professionals work under independent contractor agreements, and are classified as independent contractors rather than employees, they do not have the collective bargaining rights and other common employment benefits and face potential liability under the antitrust laws from acting together, in concert, to say "no" to certain terms, demand better pay, or boycott bad actors.

The members of our organizations desperately need the ability to collectively demand better treatment and terms for their work from those they work for. They need the ability to act together to say "no" to certain terms, demand minimums and better pay, and to boycott bad actors without risking suit for antitrust violations.

This is our coalition's top legislative priority in the near term. As such, we have drafted suggested legislative changes to the NLRA, a free-standing antitrust exemption bill, as well as amendments to the PRO Act, should it become a potential candidate for enactment at some point in the future. Each of these proposals would give creative professionals the leverage they need to negotiate more fairly in a market dominated by a few large companies and internet platforms for whom the playing field is outrageously and favorably tilted. We respectfully ask that you consider our proposals, and work with us to help craft legislation that will bring more parity to the freelance creative workforce. In short, we seek your help in closing what is now a grotesque value gap between the pittance in remuneration earned by the creators of artistic works, compared with the billions of dollars in revenues and equity value gleaned by those who dominantly market and distribute such works to the public.

We thank the agencies for undertaking this inquiry, and hope that the following comments on labor conditions in the creative economy will help drive changes to make it more efficient and equitable for workers.

### **Conditions Affecting the Various Sectors of the Creative Economy**

#### **a. Book Publishing**

Despite having started with extremely one-sided agreements favoring publishers, book authors have seen their contract terms worsen and their rights under publishing contracts deteriorate even further in the last two decades of the "Digital Age." Publishers in general are increasingly defraying the costs of doing business in the new tech-dominated ecosystem (where the mega internet monopolies starve publishers by extracting an excessive portion of overall industry margins for their own benefit) by paying authors smaller advances and diminished royalties—only 25% of net for audiobook and ebook sales (compared to what traditionally was approximately 50% of net profit) and a half or one-third royalty for deeply discounted products or special sales to non-traditional outlets; and an increasing number of publishers are paying royalties for print books on "net receipts" instead of the book's list price (amounting to approximately half a traditional royalty rate) or paying a reduced percentage for "bundled" sales or subscription sales, as well as other cuts to authors' incomes. A few high-profile, best-selling authors and their agents are able to push back to some extent against these worsening terms, but the vast majority of authors, with or without agents, have no leverage against their publishers to negotiate changes. The writer is simply told, "that is the way it is now."

The fact is that there is no longer meaningful, two-way bargaining between authors and publishers. Most authors' bargaining power in today's publishing economy is virtually non-existent. Walking away from an unfair contract is not an option either, because when one major publisher changes its contract terms against authors' interests, the others inevitably follow. While traditional publishers at least give lip service to negotiating by allowing certain terms to be tweaked around the edges of the employers' standard forms, tech-based publishing platforms, such as Amazon's Kindle and Audible platforms don't even make a pretense of negotiation; they give authors click-through agreements. Indeed, the distribution of self-published ebooks and audiobooks is overwhelmingly dominated by one company, Amazon.

In recent years, the Authors Guild and NWU have strenuously fought back against a number of unfair standard terms in the publishing industry, but publishers generally have refused to

budge. The Authors Guild has pushed for higher ebook and audiobook rates (authors earn only 25% of the publisher’s profits from audio and ebooks, as opposed to theoretically 50% of the profits for print); objected to “deep discount” clauses whereby publishers sell books to retailers at less than half the suggested retail price and reduce author royalties from those sales; and it has challenged publishers’ demands for audiobook rights in addition to print and ebook rights. NWU has offered similar advice to its members in their individual “negotiations” with book, audiobook, and ebook publishers. Yet, the publishers have not budged on these terms. As organizations representing freelance writers, we understand that we are prohibited by antitrust law from organizing boycotts or asking our members to collectively demand certain minimum rates or other financial terms.

Writing as a profession is in grave danger for all but the top sellers. A 2018 survey of authors by the Authors Guild—the largest survey of writing-related earnings by U.S. authors ever conducted—found that mean author writing incomes were just \$20,300, and less than half of that is from their books. More than half (54%) of full-time authors surveyed earned less than the federal poverty threshold of \$12,488 from their writing, and an alarming 23% of full-time professional authors reported earning zero income from books in the prior year. Literary authors suffered the greatest decline in incomes with a 46% drop in their book-related income in just four years, from 2013 to 2017. This means that many talented writers are no longer entering the profession and many who have written for their livelihood for decades are leaving the field and not writing anymore or as much. It is censorship by impoverishment.

The cause of this precipitous decline in writing-related earnings isn’t—as some claim—that people are reading less. As a culture, we are more literate than ever before and have more ways to access books. Moreover, strong revenues reported by major publishers show that publishing remains profitable for market participants, other than the writers who provide the reason for its existence. A majority of the unfair terms in publishing and distribution contracts, such as low ebook and audio rates and deep discount clauses, are arguably downstream effects of internet platforms making inroads in publishing and squeezing out traditional actors. While no one wants to see publishers suffer either, as they are essential for getting many books to market, giving creators collective bargaining would put sufficient pressure on the publishing industry as a whole to make the ecosystem work for everyone and not just the big corporations.

## **b. Journalism and Other Freelance Writing**

As is well-known, U.S. newspaper and magazine publishers have suffered severe losses of advertising revenue in the last two decades due to online ad revenue moving to news aggregators such as Facebook and Google – where most news is now read. Unfortunately, journalists have increasingly borne the brunt of the losses in the newsprint industry. Newspapers and magazines have laid off staff in droves and rely increasingly on freelancers; and at the same time most publications have decreased rates paid to freelancers.<sup>2</sup> Loss of journalism jobs and incomes means that there are fewer journalists reporting and collecting real news and writing original stories, and so the American public has less access to fact-based news reporting, especially on the local level.

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<sup>2</sup> According to the nonpartisan Pew Center for Research, press publisher advertising revenues have fallen from approximately \$50 billion in 2005 to an estimated \$8.8 billion in 2020. Pew Research Center, Newspaper Fact Sheet, <http://www.journalism.org/fact-sheet/newspapers/>

The pandemic has only accelerated these trends with as many as ninety local news outlets closing their doors or merging. This in turn led to further losses for freelance writers. According to surveys conducted by the Authors Guild to assess the pandemic's impact on author incomes, loss of freelance journalism work was the second-most common reason cited by authors for the slump in their incomes last year – over 70% of those surveyed had lost significant income due to the pandemic and on average lost almost half of their regular pre-pandemic income.<sup>3</sup>

Like book authors, freelance writers, and journalists, including visual journalists, have been forced to give up more rights for less pay. Major U.S. newspapers used to request only the right to publish freelance articles in print in their newspapers; but with the advent of electronic media, news publishers and magazines started requiring electronic rights as well, and some now require the journalists to assign them the entire copyright in the work. Visual journalists are forced to grant sublicenses to vast extended client networks—publications who used to contact photographers directly for additional uses now pay flat fees or subscriptions that leave all of the profit to the publishing company. Today, the largest news services insist on all rights in all media in perpetuity—but do not pay extra for those rights. Journalists working for many publications no longer can earn separate revenue from audio (podcast), audiovisual, or merchandising, nor can they resell their pieces for other uses. NWU and the Authors Guild successfully challenged the taking of rights to digital distribution, without additional compensation, of works which had been licensed by the *New York Times* and other periodicals only for print publication. As a result of these lawsuits, however, the *Times* and other newspapers and periodicals began demanding that freelance writers sign away all rights in all media as a condition of any contracts for new freelance work. Several years ago, when the Authors Guild asked the *Times* to reconsider its new policy of taking an outright assignment of all rights, explaining the enormous harm to writers, it was told in no uncertain terms that the *Times* could not consider reviewing the policy because taking all rights was now integral to the company's business model. We understand the struggles that news publishers face today, but journalists should not be the primary victims.

The imbalance of bargaining power between the dominant “news aggregators” and the “press publishers” (as these terms are used in the recent Notice of Inquiry by the Copyright Office's “Publishers' Protections Study,” FR Doc. 2021-22077, Copyright Office Docket Number 2021-05, 86 Federal Register 56721-56726, October 12, 2021) is mirrored in the imbalance of bargaining power between press publishers and individual journalists and creators. This imbalance is hugely exacerbated by the fact that the limited exception to U.S. antitrust law for collective bargaining by labor unions on behalf of *employees* does not clearly extend to freelancers, independent contractors, or self-published writers, who make up a growing share of the journalists, as salaried newsroom staff is cut back in favor of outsourcing to freelancers. And in digital journalism and other forms of web content, independent journalists and other self-publishers face the same imbalance of bargaining power with respect to the dominant digital distribution and monetization platforms as do authors of self-

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<sup>3</sup> Newsroom staff dropped by 40% from 2008 to 2019. Overall, newsroom employment dwindled from 114,000 employed journalists in 2008 to only 85,000 last year, a drop of more than 26%. As a consequence of the shrinking advertising market, scores of newspapers and magazines have been forced to shutter—one in five since 2008 and an estimated 2,100 since 2004—or otherwise consolidated under large national media holdings, creating vast news deserts and depriving communities of much-needed transparency at the local level. <https://www.usnewsdeserts.com/#1536249049294-115f3533-f5e9>



published ebooks and audiobooks. Journalists should get the same antitrust exemption with respect to publishers that the publishers seek for negotiations with the internet platforms.

The future of journalism depends on the future of journalists' ability to earn a living from their creative work. Journalists write and produce the news—in text, visual, and multimedia formats—and need to receive a fair share of remuneration if they are to keep working as journalists. Several recent initiatives, such as the Journalism Competition and Protection Act (JCPA), H.R. 1735/S. 673, and the U.S. Copyright Office's current study on protections for press publishers, seek means of increasing revenues to news publishers. A lesson we have learned from other jurisdictions where ancillary protections for publishers have been enacted, including Australia and the member states of the European Union, is that additional revenues for publishers will not automatically “trickle down” to journalists. A meaningful, legally protected right to bargain collectively is the only means of ensuring that journalists and other freelancers will benefit from any new rights or assistance provided to publishers.

### **c. Songwriters and Composers**

The issues of extreme market consolidation, aggregated market dominance, allegedly “coincidental” but parallel behavior by competitors, and vertical integration of competing industries have all combined to place music creators on an impossibly un-level economic playing field in the 2020s. As a result, the bargaining power of individual creators against the few multi-national giants that dominate the music publishing industry is today virtually nil, with the rare exception of “superstar” songwriter/recording artists who are on occasion able to exercise leverage on certain issues in their dual capacities as both the creators and popular performers of music.

The world's three “major” music publishing conglomerates (Universal, Sony and Warner music groups) now control at minimum 72% of world's musical works on a revenue basis.<sup>4</sup> Between them, Universal (32%) and Sony (21%) account for over half the global music market, including recorded music and musical compositions.<sup>5</sup> Frequently, the music publishing arms of these three majors act in ways that parallel one another in the imposition of nearly identically egregious terms in their agreements with music creators, such as in regard to acquiescing to the payment of royalties at 75% of statutory rates by their affiliated recording companies (a decades-long result of consolidation and vertical integration known as the “controlled compositions” dilemma).<sup>6</sup> Under such circumstances, nearly all independent music publishers follow along, in part out of fear of offending the majors.

The vertical integration phenomenon, in fact, produces broad potential conflict of interest problems for music publishers in relation to their bargaining positions on behalf of music creators not only with the publishers' affiliated record companies, but also with the digital distributors of music who maintain close relationships with those record companies. Those conflicts have in many instances resulted in royalty rates and payments to creators far below fair market value. The current battle over “frozen” and reduced royalty rates currently being waged before the Copyright Royalty Board in the “Phonorecords IV” proceedings is a good

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<sup>4</sup> See <https://creativeindustriesnews.com/2021/12/impf-report-shows-the-global-music-publishing-business-was-worth-e6bn-in-2020-with-indie-music-publishers-accounting-for-e1-68bn/>

<sup>5</sup> See <https://www.statista.com/statistics/947107/recorded-music-market-worldwide-label/>

<sup>6</sup> See <https://www.ascap.com/help/music-business-101/controlled-composition-clauses>

example of this conundrum.<sup>7</sup> So is the continued dominance of record companies in the division of digital income streams at the expense of songwriters and composers,<sup>8</sup> as is the aggressive steering of performing rights organizations by the major music publishers in ways often in conflict with the interests of creators.

Since the 1976 ruling in which the National Labor Relations Board deregistered the Composers & Lyricists Guild of America (CLGA), removing any right to collective bargaining, U.S. audiovisual composers' musical creations have been deemed works made for hire. This action means that as a condition of engagement, composers are forced to grant producers (the film and television studios) ownership of the copyrights in the works. While foregoing ownership in exchange for benefits such as collective bargaining (salary, working conditions, etc.), retirement and healthcare plans, may be typical of employee status, audiovisual composers are instead classified as independent contractors and therefore access none of these benefits. They lose ownership of their works, as well as the right to any of the standard benefits accorded every other crew and cast member working in the audiovisual industry.

In many ways, the position of composers and songwriters today can be analogized to the bargaining position of individual, assembly line factory workers against the big three U.S. auto makers in days gone by. Grossly unfair market conditions prevailed until those individual workers were extended the ability to engage in collective bargaining in at least a limited manner to secure basic, best practice protections and rights. American music creators believe they are entitled to at least consideration of such a solution by the U.S. Government, in an age when it is estimated that the number of songwriters and composers earning a living wage through their craft has been *literally* decimated in the 21<sup>st</sup> century. The issue of “closing the value gap” has recently gained serious support in UK and the European Union,<sup>9</sup> and is deserving of attention in our own country as well as the world's major creator and exporter of musical works.

While most musicians and songwriters don't dedicate themselves to making music solely for money, the simple truth is they can't make music without it. The sustainability of creativity depends on the recognition of the intrinsic *financial* value that musical works bring to so many businesses. This can only be achieved through fair compensation to songwriters and performers, and this can only be obtained by giving composers and songwriters the clear right to collectively bargain.

#### **d. Graphic Artists: Designers and Illustrators**

Graphic artists, such as book designers and illustrators, and editorial illustrators and cartoonists, are experiencing many of the same stressors as writers and journalists. Overall, graphic artists have seen their wages stagnate, if not decline, over the past two decades, as reported in the 2003 and 2021 editions of the trade publication, *The Graphic Artists Guild*

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<sup>7</sup> See, <https://thetrichordist.com/2021/10/27/a-potential-solution-in-phono-iv-to-the-streaming-services-lowest-in-history-rate-proposals-withdrawing-the-settlement-to-freeze/>.

<sup>8</sup> See <https://www.musicbusinessworldwide.com/should-spotify-pay-songwriters-and-publishers-the-same-amount-as-they-do-artists-and-record-labels/>

<sup>9</sup> See <https://committees.parliament.uk/work/646/economics-of-music-streaming/news/156593/mps-call-for-a-complete-reset-of-music-streaming-to-fairly-reward-performers-and-creators/>; and [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_1807](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1807).

*Handbook: Pricing and Ethical Guidelines*.<sup>10</sup> This decline has accelerated in the past three years: 45% of illustrators reported that their income levels have dropped compared to the previous year, and only 42% state that they are able to support themselves by working full-time as illustrators.<sup>11</sup> Fees commanded in the publishing industry have stagnated or declined precipitously depending on the market. For example, book cover illustrators receive on average as little as 25% of what they did in 2003.<sup>12</sup>

In addition to receiving lower fees for their work, graphic artists are being asked to sign contracts with onerous language, including non-compete clauses, all-rights transfers, terms that skim wages from creative contractors as a condition of submitting an invoice,<sup>13</sup> or licensing terms that transfers rights “in perpetuity.” Of particular concern is work made for hire<sup>14</sup> language that not only transfers the entire copyright from the author to the publisher, but also deems the publisher, not the graphic artist, to be the creator of the work and so the artist loses even the ability that all creators otherwise have to reclaim their rights by terminating grants after 35 to 40 years. Although for a project must meet certain standards for the work product to be considered work made for hire,<sup>15</sup> Graphic Artists Guild members report that such language is becoming commonplace in contracts even when the project does not meet the required standards.

A large concern for graphic artists is that as such practices become normalized by large clients such as major publishers, small clients such as self-publishing authors and small independent presses pick up this language and introduce it into their own contracts. The graphic artist is squeezed at all points in their client roster.

### **Collective Bargaining for Creative Professionals: Proposed Legislation**

We have prepared three draft pieces of legislation (set forth below) that would clearly allow professional creators to collectively bargain, and we ask for your support in ensuring that Congress enacts one of them. While we appreciate that you are seeking ways to improve enforcement to assist workers and to remedy the problem of worker misclassification, freelance laborers who are correctly classified and wish to remain freelancers desperately need a legislative correction to allow them to collectively bargain. Our proposals are, in order of priority: (1) an amendment to the National Labor Relations Act that would add “professional creative workers” to section 7 of the NLRA (the provision that allows “employees” to bargain collectively and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection); (2) a stand-alone antitrust exemption for professional creative workers; and (3) amendments to section 101 of the 2021

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<sup>10</sup> The 11th edition of *The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*, page 115 (2003) cites *The Creative Group* salary listings for illustrators as ranging from \$30,750-\$57,250. In the 16th edition, page 196 (2021) the same source gives a salary range of \$45,500-\$64,250. Had illustrator salaries kept pace with inflation, the 2021 salary range would be \$44,269-\$82,419. *The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*, 11th edition (2003), page 115. Inflation adjustment was calculated via the Department of Labor CPI Calculator, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm)

<sup>11</sup> *State of Illustration*, 6th Edition, <https://www.stateofillustration.com>

<sup>12</sup> From a comparison of book jacket/cover fees in the 11<sup>th</sup> Edition (page 207) and 12<sup>th</sup> edition (page 172) of *The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*.

<sup>13</sup> *Call to Action: Ask McGraw-Hill to Rescind their Freelancers Fee* <https://graphicartistsguild.org/ask-mcgraw-hill-to-rescind-their-freelancers-fee/>

<sup>14</sup> *Work for hire in the design world*, <https://bookmachine.org/2021/11/29/work-for-hire-in-the-design-world-an-interview-with-rebecca-blake-of-the-graphic-artists-guild/>

<sup>15</sup> *Works Made for Hire*, Copyright Office Circular 9, <https://www.copyright.gov/circs/circ09.pdf>

Protecting the Right to Organize (PRO) Act (H.R. 842) to cover professional creative workers.

## **1. DRAFT AMENDMENT TO THE NATIONAL LABOR RELATIONS ACT TO ALLOW FREELANCE CREATORS TO COLLECTIVELY BARGAIN.**

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the Freelance Author and Artist Labor Act (“FAALA”) of 2022.

**SECTION 2.** Section 2 of the National Labor Relations Act (29 U.S.C. 152) is amended by adding at the end the following:

“15. The term “professional creative worker” means an individual who provides labor or work product as part of his or her profession on an individual basis (or through a “loan-out” or other entity created to solely to represent the individual creator for purposes of entering into such contracts) under contract and on a freelance basis for present or future compensation in any of the following professions:

- (a) writers, including authors, playwrights, screenwriters, journalists, copywriters, or digital media writers and creators;
- (b) visual artists, including without limitation fine artists, graphic designers, photographers, photojournalists, animators, illustrators, industrial product designers, interior designers, and fashion designers;
- (c) songwriters, composers, and librettists;
- (d) performing artists and the artisans within their fields, including without limitation musicians, recording artists, dancers, choreographers, actors, dramatists, puppeteers, and circus artists; and
- (e) videographers and filmmakers.”

**SECTION 3.** Section 7 of the National Labor Relations Act (29 U.S.C. 157) is amended by adding “and professional creators” in the first line after “Employees.”

## **2. APPLICATION OF ANTITRUST LAWS TO THE BARGAINING ACTIVITIES OF FREELANCE CREATORS**

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the Freelance Author and Artist Freedom Act (“FAAFA”) of 2022.

### **SECTION 2. APPLICATION OF ANTITRUST LAWS TO FREELANCE WRITERS, ARTISTS, AND SONGWRITERS**

The antitrust laws shall apply to Professional Freelance Creative Workers for purposes of negotiating the terms and conditions of contracts for the creation of copyrightable content to publishers or distributors of their works (collectively “publishers”) in the same manner as such laws apply to collective bargaining by employees to organize, mutually support one another, and engage in collective bargaining with publishers.

### **SECTION 3. DEFINITIONS.**

For purposes of this Act:

- (i) The term “antitrust laws” has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition.
- (ii) The term “professional creative worker” means an individual who provides labor or work product as part of his or her profession on an individual basis (or through a “loan-out” or other entity created to solely to represent the individual creator for purposes of entering into such contracts) under contract and on a freelance basis for present or future compensation in any of the following professions:
  - (a) writers, including without limitation authors, playwrights, screenwriters, journalists, copywriters, or digital media writers and creators;
  - (b) visual artists, including without limitation fine artists, graphic designers, photographers, photojournalists, animators, illustrators, industrial product designers, interior designers, and fashion designers;
  - (c) songwriters, composers, and librettists;
  - (d) performing artists and the artisans within their fields, including without limitation musicians, recording artists, dancers, choreographers, actors, dramatists, puppeteers, and circus artists; and
  - (e) videographers and filmmakers.”
- (iii) The term “publisher” means a person that produces or distributes any publication, periodical, magazine, newspaper, book, manual, advertising materials, website, music, sound recording, or other similar material, whether in printed, electronic, or other form.

### 3. AMENDMENTS TO SECTION 101(B) OF THE PRO ACT TO APPLY THE NLRA TO PROFESSIONAL CREATIVE WORKERS

**(Added language, as compared to H.R. 842, is underlined; no deletions.)**

(b) EMPLOYEE.—Section 2(3) of the National Labor Relations Act ([29 U.S.C. 152\(3\)](#)) is amended by adding at the end the following: “An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor solely for purposes of this Title 29, National Labor Relations Act, unless—

- (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- (B) the service is performed outside the usual course of the business of the employer; and
- (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Notwithstanding anything else in this section, a “professional creative worker” (as defined in section 2(15)) shall be considered an employee for purposes of, and solely for purposes of this Act, and this designation shall not affect copyright authorship or ownership under Title 17, the Copyright Act, nor employee designation under any state law.”

PROFESSIONAL CREATIVE WORKER. —Section 2 of the National Labor Relations Act (29 U.S.C. 152) is amended by adding at the end the following:

“15. The term “professional creative worker” means an individual who provides labor or work product as part of his or her profession on an individual basis (or through a “loan-out” or other entity created to solely to represent the individual creator for purposes of entering into such contracts) under contract and on a freelance basis for present or future compensation in any of the following professions:

- (a) writers, including authors, playwrights, screenwriters, journalists, copywriters, or digital media writers and creators;
- (b) visual artists, including without limitation fine artists, graphic designers, photographers, photojournalists, animators, illustrators, industrial product designers, interior designers, and fashion designers;
- (c) songwriters, composers, and librettists;
- (d) performing artists and the artisans within their fields, including without limitation musicians, recording artists, dancers, choreographers, actors, dramatists, puppeteers, and circus artists; and
- (e) videographers and filmmakers.”