April 9, 2022

Via Electronic Delivery

Chief Copyright Royalty Judge Suzanne M. Barnett
Copyright Royalty Judge David R. Strickler
Copyright Royalty Judge Steve Ruwe
US Copyright Royalty Board
101 Independence Ave SE / P.O. Box 70977
Washington, DC 20024-0977

Re: DOCKET NO. 21-CRB-0001-PR-(2023-2027) Making and Distributing Phonorecords (Phonorecords IV) Notice of Proposed Rulemaking re: 37 C.F.R. Part 385 Subpart B

To Your Honors:

On behalf of the hundreds of thousands of songwriters, composers and lyricists represented by the various organizations listed below,[1] we extend our thanks to the Copyright Royalty Judges for their dedication to the rule of law. The rejection on the basis of unreasonableness of the "Frozen Subpart B Mechanical Rate" settlement proposal in the CRB's recent ruling of March 24, 2022 accomplished at least two crucial results for music creators, as were specifically intended by Congress under the US Copyright Act.

First, the decision rejects a grossly unfair royalty arrangement proposed by the NMPA, the NSAI and the major music publishers along with their own, vertically integrated and/or affiliated major record companies. Second, it likely quashes a potential plan by digital music distributors like Spotify to urge the CRB to enact a similar freeze on its royalty obligations to songwriters and composers on the pretext of "what's good for them should be good for us." Both results could have been catastrophic to future music creator income. [2]

[1] This letter is intended to further update information presented to the Copyright Royalty Board (CRB) in Comments dated November 22, 2021, 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 (endorsed by the Alliance for Women Film Composers (AWFC), the Alliance of Latin American Composers & Authors (AlcaMusica), the Asia-Pacific Music Creators Alliance (APMA), the European Composers and Songwriters Alliance (ECSA), The Ivors Academy (IVORS), Music Answers (M.A.), the Pan-African Composers and Songwriters Alliance (PACSA), the Screen Composers Guild of Canada (SCGC), and the Songwriters Association of Canada (SAC)).

[2] Quoting directly from the CRB's decision:

We have every confidence that the ruling will withstand every level of groundless criticism and appeal, and that together, the various segments of the music community can soon move forward with an equitable, sane approach to addressing the issue of maintaining royalty value for music creators in these highly inflationary times. Those few multinational music corporations who insist on ignoring that their very businesses are built on the backs of the same creators they seem intent on denying fair compensation, have already revealed the shameless nature of their corporate strategy. It is reassuring to know that the CRB is very much aware of that fact and willing to act accordingly, as it did in recently rejecting the proposed insider frozen subpart B mechanical rate agreement.

Further in that regard, the independent music creator community, led by the signatories to this letter, want to be crystal clear in our willingness to work with our colleagues in the recording and music publishing sectors in helping to frame a new, voluntary CRB royalty settlement proposal that will be agreeable to the US and global songwriter and composer community as a whole. As interested but non-participating parties (for reasons of economics) in the CRB proceeding, we have taken careful and consistent note of the CRB's favorable inclination toward approving voluntary royalty-adjustment proposals that account for cost-of-living adjustments (such as the recent Webcasting V decision). As the CRB further noted in its Phonorecord IV decision of March 24, 2022:

> In the dynamic music industry, there is insufficient reason to conclude that a static musical works rate is reasonable. The determination rendered in 2008, with an effective date of 2006, cannot continue to bind the parties sixteen years later, absent sufficient record evidence that the *status quo* remains grounded in current facts and is a reasonable option. Since 2006, the retail marketplace for music has changed dramatically with regard to the Subpart B Configurations. From 2006 to 2008 (and, indeed, in years prior) the Subpart B Configurations dominated the recorded music marketplace.
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> By 2020, industry data collected by the Recording Industry Association of America showed that various forms of digital streaming accounted for 83% of recorded music market revenues. Notwithstanding the decrease in revenues attributable to Subpart B

"Pursuant to section 801(b)(7)(A)(ii), based on the totality of the present record— including the Judges' application of the law to that record, as well as GEO's [participant George Johnson's] objections, which, as noted *supra*, are consistent with the non-participant comments—the Judges find that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms.[19] Furthermore, the Judges find a paucity of evidence regarding the terms, conditions, and effects of the MOU [the moving parties' private memorandum of understanding]. 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 additional cause to conclude that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms."

> [19] Section 801(b)(7)(A) does not state which party—proponent or objector—might bear a burden of proof in connection with the Judges' evaluation of a proposed settlement and objections thereto. The Judges do not believe that a "burden of proof" issue exists in this settlement process, because evidence as described in the Judges' Rules, 37 CFR 351.10, is not required. ***However, were a burden of proof applicable in this proceeding, the Judges find that, if the burden were placed on the proposers of this settlement, they failed to meet that burden and, if the burden of proof were placed on GEO and/or the other commenters referenced above, they have met that burden.***

> Configurations, in 2020, vinyl record sales surpassed the volume of CD album sales, signaling a resurgence in vinyl as a music medium. Even if the sales figures were otherwise, however, sixteen years at a static rate is unreasonable under the current record, if for no other reason than the continuous erosion of the value of the dollar by persistent inflation that recently has increased significantly. In this regard, application of a consumer price index cost of living increase, beginning in 2006, would yield a statutory subpart B royalty rate for 2021 of approximately $0.12 per unit as compared with the $0.091 that prevails, which adjustment, as noted *supra*, represents a 31.9% increase.
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> The disparity between the static rate and the dynamic market is even more stark when considering the "controlled composition clause" that contractually lowers the statutory rate by 25%. Add to that the record labels' limit on album royalties to ten tracks, regardless of the number of songs actually included in each album. In other words, the statutory rate is not the effective rate record labels use in compensating songwriters and publishers.
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> The proposed settlement did not include any adjustment to subpart B rates, not even an indexed increase. Adjudication of rates may provide the parties an opportunity to present evidence of the advisability of such an indexed increase.

In anticipation of this equitable and well-reasoned conclusion by the CRB, our groups submitted in Comments to the CRB dated November 22, 2021 in which we proposed draft language for an alternative voluntary settlement agreement. We stand by that proposal, which reads as follows:

> The Copyright Royalty Judges shall adjust the royalty fees payable under 37 C.F.R. Part 385 Subpart B for the year 2023 by adjusting the current fees to reflect the aggregate, compounded change occurring in the cost of living from September 2006 to September 2022 as determined by the Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published annually by the Secretary of Labor. The Copyright Royalty Judges shall thereafter adjust such royalty fees each subsequent year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor for September to September of the preceding year. At no point, however, shall such royalty fees be adjusted by the Copyright Royalty Judges below the level of rates set in 2006.

We further noted in our Comments the underlying rationale, background and benefits of the above language, which we consider to be a fair and even-handed approach:

> We believe this solution to be both sound and equitable, principally only restoring without retroactive effect the financial position of music creators and music publishers to the royalty rate values they achieved in 2006, the time of the last rate adjustment of royalty fees payable under Subpart B. (It is important to note that precedent and support for such a prospective adjustment methodology can also be found in §805 of the Copyright Act).

Later in those same Comments, we took specific note of the recent Webcasting V precedent:

> Moreover, in June of [2021], perhaps sensing that inflationary times were about to return, the CRB acted decisively on the recommendation of the record industry in the Webcasting V proceeding. The Board established new webcasting rates regarding sound recording uses under §114 for the years 2021-25 that will include the following royalty rate adjustment formula:
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> > The Copyright Royalty Judges shall adjust the royalty fees each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year.
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> One might wonder how the record industry can successfully advocate for CPI adjustments for its own royalties in Webcasting V, and yet refuse to accept such adjustments for the mechanical royalties it pays to music creators and music publishers in Phonorecords IV. One might also be justified in questioning how NMPA and NSAI can possibly accept this position and still be considered as "advocates" for the music creator

We hope our music industry colleagues will seriously consider joining us in making this equitable settlement proposal a reality. As stated, we are ready, willing and able to commence discussions as soon as they are. Moreover, the post-decision comments of NMPA[3] and other music publishing industry representatives reflecting their support for what they term the "grassroots" music creator community give us encouragement that they, too, are ready to cooperatively move forward. In fact, according to SONY music publishing head Jon Platt, "The CRB judges listened to the voices of songwriter advocates who made a strong case for higher physical and download rates and agreed that they should be increased. While it is still too early to predict the outcome, we are pleased that the CRB is receptive to higher rates, and we stand by these songwriter advocates and applaud their grassroots efforts and achievements."[4]

In closing, we also wish to inform the CRB of our intention to follow through on a legislative initiative that would amend Chapter 8 of the US Copyright Act in order to expand the ability of interested music creator groups to more actively participate in proceedings before the CRB--despite the enormous gap in resources between multi-national recording and publishing conglomerates on the one hand, and creator groups on the other. The current system simply does not adequately account for the disparities in the participatory abilities of the two segments, a situation so obviously unfair that we believe it is essential for Congress to act promptly to address it. That is not in any way to denigrate the enormously important efforts of songwriter George Johnson, whose participation in CRB proceedings on a pro se basis without the benefit of

[3] https://www.billboard.com/pro/mechanical-royalty-rate-ditched-new-crb-ruling/#recipient_hashed=3a259dd7948fa5cf81748fd59fbfdb0cdc19448cf6f4bf505f19cde98578e9d3&utm_medium=email&utm_source=exacttarget&utm_campaign=billboard_BreakingNews&utm_content=341171_03-29-2022&utm_term=2803480

[4] https://www.billboard.com/pro/mechanical-royalties-crb-rate-settlement-major-labels-publishers/

legal counsel is much appreciated-- but acknowledged by Mr. Johnson himself as often a matter of him being spectacularly outgunned.

Judging from the reaction of those who disagree with the CRB's decision on the frozen rates proposal, and the arguments framed by some record labels which literally amount to "if you're too poor to fully participate in proceedings, your opinion is as worthless as your economic status and welfare," we expect to find at least some sympathetic ears on Capitol Hill. We hope that the US Copyright Office will support us in championing such reforms, as well.

Thank you again for your consideration.

Respectfully submitted,

Rick Carnes	Ashley Irwin
President, Songwriters Guild of America	President, Society of Composers & Lyricists
Officer, Music Creators North America	Co-Chair, Music Creators North America

cc: Charles J. Sanders, Esq.
Mr. Eddie Schwartz, President, MCNA/International Council of Music Creators (CIAM)
Ms. Carla Hayden, US Librarian of Congress
The Members of the US Senate and House Judiciary Committees
The Members of the US Senate and House Appropriations Committees