MUSIC CREATORS

MCNA

NORTH AMERICA
5120 Virginia Way, Suite C22
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May 17, 2021

Via Electronic Delivery
Chief Copyright Royalty Judge Jesse M. Feder
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

To Your Honors:

As a US-led coalition representing hundreds of thousands of songwriters and composers from across the United States and around the world, we are writing today to express our deep concerns over the "Notice of Settlement in Principle" recently filed by parties to the proceedings before the Copyright Royalty Board concerning its Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) (Docket No. 21–CRB–0001–PR (2023–2027)).

For reasons explained below, several highly conflicted parties to this proceeding have apparently agreed to propose a rolling forward to the year 2027 of the current US statutory mechanical royalty rate for the use of musical compositions in the manufacture and sale of physical phonorecords (such as CDs and vinyl records). This proposal (and related industry agreements yet to be disclosed by the parties— see, https://app.crb.gov/document/download/23825) should neither be acted upon nor accepted by the CRB without the opportunity for public comment, especially by members of the broad community of music creators for whom it is financially unfeasible to participate in these proceedings as interested parties. It is our livelihoods that are at stake, and we respectfully ask to be heard even though we lack the economic means to appear formally as parties. If procedures are already in place to accommodate this request, we look forward receiving the CRB's instructions as to how to proceed.

The current U.S statutory mechanical rate for physical phonorecords is 9.1 cents per musical composition for each copy manufactured and distributed. That rate has been in effect since January 1, 2006. It represents the high-water mark for US mechanical royalty rates applicable to physical products, a rate first established in 1909 at 2 cents. That 2-cent royalty rate, in one of the most damaging and egregious acts in music industry history, remained unchanged for an astonishing period of sixty-nine years, until 1978. Nevertheless, the recording industry now

seeks to repeat that history by freezing the 9.1 cent rate for an era that will have exceeded twenty years by the end of the Phonorecords IV statutory rate setting period.

Inflation has already devalued the 9.1 cent rate by approximately one third. By 2027, 9.1 cents may be worth less than half of what it was in 2006. How can the US music publishing industry's trade association, and a single music creator organization (which represents at most only a tiny sliver of the music creator community) have agreed to such a proposal?

The answer to that question is an easy one to surmise. The three major record companies who negotiated the deal on one side of the table have the same corporate parents as the most powerful members of the music publishing community ostensibly sitting on the other side of the table. Songwriter, composer and independent music publisher interests in these "negotiations" were given little if any consideration, and the proposed settlement was clearly framed without any meaningful consultation with the wider independent music creator and music publishing communities, both domestically and internationally.

How on earth can these parties be relied upon to present a carefully reasoned, arms-length "Settlement in Principle" proposal to the CRB under such circumstances, fraught as they are with conflicts of interest, without at least an opportunity for public comment? Further, how can these parties be relied upon in the future to argue persuasively that mechanical royalty rates applicable to *on-demand digital distribution* need to be increased as a matter of economic fairness (which they most certainly should be), when they refuse to seriously conduct negotiations on rates applicable to the physical product the distribution of which is still controlled by record companies (who not so incidentally also receive the lion's share of music industry revenue generated by digital distribution of music)?

The ugly precedent of frozen mechanical royalty rates on physical product has, in fact, already served as the basis for freezing permanent digital download royalty rates since 2006. Is this the transparency and level playing field the community of songwriters and composers have been promised by Congress through legislation enacted pursuant to Article I, Section 8 of the Constitution?

The trade association for the US music publishing industry is supported by the dues of its music publisher members, the costs of which are often in large part passed along to the music creators affiliated with such publishers. It is thus mainly the songwriter and composer community that pays for the activities of that publisher trade association, a reality that has existed since that organization's inception. Still, the genuine voice of those songwriters and composers is neither being sought nor heard. Further in that regard, we wish to make it emphatically clear that regardless of how the music publishing industry and its affiliated trade associations may present themselves, they do not speak for the interests of music creators, and regularly adopt positions that are in conflict with the welfare of songwriters and composers. Their voice is *not* synonymous with ours.

Unfortunately, the music creator community lacks the independent financial resources --in the age of continuing undervaluation of rights, rampant digital piracy and pandemic-related losses-- to rectify these inequities by expending millions more dollars to achieve full participation in

CRB legal and rate-setting proceedings. Clearly, such an inequitable situation is antithetical to sound Governmental oversight in pursuit of honest and equitable policies and results.

In the interests of justice and fairness, we respectfully implore the CRB to adopt and publicize a period and opportunity for public comment on the record in these and other proceedings, especially in regard to so-called proposed "industry settlements" in which creators and other interested parties have had no opportunity to meaningfully participate prior to their presentation to the CRB for consideration, modification or rejection. In the present case, hundreds of millions of dollars of our future royalties remain at stake, even in a diminished market for traditional, mechanical uses of music. To preclude our ability to comment on proposals that ultimately impact our incomes, our careers, and our families, simply isn't fair.

Finally, we request that this letter be made a part of the public record of the Phonorecords IV proceedings. We extend our sincere thanks for your attention to this very difficult conundrum for music creators, and further note that your consideration is very much appreciated.

Respectfully submitted,

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

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

List of Supporting Organizations
Songwriters Guild of America (SGA), https://www.songwritersguild.com/site/index.php
Society of Composers & Lyricists (SCL), https://thescl.com
Alliance for Women Film Composers (AWFC). https://theawfc.com
Songwriters Association of Canada (SAC), http://www.songwriters.ca
Screen Composers Guild of Canada (SCGC), https://screencomposers.ca
Music Creators North America (MCNA), https://www.musiccreatorsna.org
Music Answers (M.A.), https://www.musicanswers.org
Alliance of Latin American Composers & Authors (ALCAMusica), https://www.alcamusica.org
Asia-Pacific Music Creators Alliance (APMA), https://apmaciam.wixsite.com/home/news
European Composers and Songwriters Alliance (ECSA), https://composeralliance.org
Pan-African Composers and Songwriters Alliance (PACSA), http://www.pacsa.org

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

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May 24, 2021

Via Electronic Delivery
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Copyright Royalty Judge David R. Strickler
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US Copyright Royalty Board
101 Independence Ave SE / P.O. Box 70977
Washington, DC 20024-0977

To Your Honors:

Music Creators North American (MCNA) and its numerous organizational supporters noted below wish to express our sincere thanks for the immediate reply to our letter dated May 17, 2021, which we received from the Copyright Royalty Board on May 18, 2021. As stated in our prior letter, we have had deep concerns regarding the proposed physical mechanical royalty rate settlement negotiated between the major record labels and their affiliated major music publishers (and the respective trade groups of each), and your assurances that all interested parties -- including non-participating songwriters and composers-- will have a chance to be heard on this matter prior to its disposition is very much appreciated.

Indeed, as previously noted, independent music creators and music publishers have not to our knowledge ever been contacted, let alone consulted, about a deal that will be binding on us and will ultimately have profound impact on our livelihoods. Our community of songwriters and composers proudly speaks for itself on such matters, and we very much look forward to presenting our views concerning a "settlement" that in no way could have been negotiated at arm's length through fair dealing—the process and result that ought to be the goal of all CRB proceedings.

In addition to expressing our appreciation for the opportunity to comment, however, we also write to respectfully seek clarification concerning certain details. Specifically, in its May 18 response, the CRB stated that:

> After the parties to the partial settlement file a motion to adopt [the] settlement, the Judges will publish the settlement in the Federal Register for comments by the participants in the proceeding and others who would be bound by the terms of the settlement. We haven't received that motion yet, but it is due today.

As the CRB is now aware, the parties did in fact file notice with the CRB later that day (May 18, 2021) indicating that the terms of the settlement they had now reached was identical to the terms set forth in their prior "Notice of Settlement in Principle" filed on March 2, 2021 (https://app.crb.gov/document/download/23825).

The parties did not, however, file a *motion* asking the CRB to adopt the settlement as expected.

We believe that this procedural omission (whether permissible or not) may well be calculated to delay and/or compromise the ability of the independent music creator and music publishing communities to file comments in a timely manner, and could result in irreparable harm to our ability to present our views and pose our questions, for example, if one or more of the settling parties subsequently withdraws from the proceeding. Simply put, we believe the settling parties are seeking to stifle timely discussion and dissent through delay, a strategy which should be rejected as antithetical to due process.

Section 801 (b) (7) of the US Copyright Act provides that the CRB shall have the authority:

> **(A)** To adopt as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding *at any time during the proceeding*, except that—
> **(i)**
> *the Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates*; and
> **(ii)**
> *the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i) objects to the agreement and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates*. (emphasis added)

Pursuant to such authority, we urge the CRB to determine that the filings submitted by the settling parties on May 18, 2021 affirmatively triggered the fairness and transparency provisions of section 801 (b) (7) (a) (i), and that in the interests of equity and of sound economic and legal policy clearly intended by Congress, those "who would be bound by the terms of the settlement" now be permitted to timely file comments approving of, objecting to, or seeking more precise detail concerning the terms. Crucially, the plain language of the statute contemplates that every music creator in the world, living and dead, will be "bound" by the settlement of "participants" if adopted by the Board because the law will then impose the terms of that settlement on all songwriters and composers. Section 801 (b) (7) is designed specifically to timely promote openness, inclusivity and clarity in that process.

We thank you for your continued attention to this issue, which is 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 and Lyricists
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Alliance for Women Film Composers (AWFC). https://theawfc.com
Songwriters Association of Canada (SAC), http://www.songwriters.ca
Screen Composers Guild of Canada (SCGC), https://screencomposers.ca
Music Answers (M.A.), https://www.musicanswers.org
Music Creators North America (MCNA), https://www.musiccreatorsna.org

cc: Ms. Carla Hayden, US Librarian of Congress
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Mr. Alfons Karabuda, President, International Music Council
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Asia-Pacific Music Creators Alliance (APMA), https://apmaciam.wixsite.com/home/news
European Composers and Songwriters Alliance (ECSA), https://composeralliance.org
Pan-African Composers and Songwriters Alliance (PACSA), http://www.pacsa.org