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December 30, 2022

To: Leadership and Members of the US House and Senate Judiciary Committees

Re: A Request by the U.S. Independent Music Creator Community for Congressional Consideration of Reforms to the Copyright Royalty Board (CRB) Music Royalty Rate-Setting Process

Dear Judiciary Committee Members:

Our coalition, representing tens of thousands of independent songwriters and composers in the United States and across the world,[1] is writing to express our deep concerns over the recent decision by the US Copyright Royalty Board ("CRB") to approve a privately negotiated and highly conflicted rate settlement in its "Phonorecords IV" proceeding pertaining to royalties for *musical compositions* generated by their distribution in the U.S. via electronic downloads, and on physical products such as vinyl records and CDs.[2] As a result of such decision, we believe tens of millions of dollars in annual songwriter and composer royalties have been unfairly forfeited.

In our letter today, we seek to explain both the troubling history of this representative rate settlement covering the period 2023-27 (the "Subpart Royalty B Settlement"), and the inevitably devastating financial impact it will have on independent songwriters and composers. We also seek your help in bringing a greater degree of inclusivity, transparency and fairness to the CRB rate-setting process in the future. In pursuit of that goal, we hope to meet with your office early in the coming Congressional Session to discuss these and other matters of enormous financial and artistic importance, not only to the independent U.S. songwriter and composer community, but to American culture as a whole.

I. Background of CRB Decisions

By way of background, this past March the CRB rejected an initial, Subpart B Royalty Settlement proposal that had been negotiated principally between the major record labels *and*

[1] For information about our organizations, see, https://www.songwritersguild.com/site/index.php; https://thescl.com/: https://www.musiccreatorsna.org; https://www.fairtrademusicinternational.org; https://theawfc.com/

[2] Streaming rates were not included in the decision, and are the subject of a seperate, proposed settlement agreement still pending before the CRB. See, https://www.federalregister.gov/documents/2022/12/16/2022-27237/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv

their own, affiliated major music publishing companies. That rejection by the CRB was based in large part on the grounds that such obvious conflicts of interest between the negotiating parties had produced a grotesquely unfair "frozen mechanical royalty rate" proposal that a Governmental agency could not properly approve.

In their March 30, 2022 ruling, the Copyright Royalty Judges clearly stated:

> 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 [private Memorandum of Understanding among the parties ("MOU")] are sufficient to question the reasonableness of the settlement at issue as a basis for setting statutory rates and terms….
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> [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 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 additional cause to conclude that the proposed settlement does not provide a reasonable basis for setting statutory rates and terms.[3]

Presumably chastened, those same, vertically integrated negotiating parties returned to their one-sided bargaining table to devise a revised settlement proposal to replace the rejected, frozen royalty rate deal. That deal would have had record labels continue to pay music creators and publishers at 2006 rates *through the year 2027*, providing just 9.1 cents per copy for musical compositions distributed in the U.S. via download or physical copy. Such royalties, once split among co-writers and publishers, would have amounted on average to a rate of less than two cents per copy for each individual songwriter and composer, an amount equal to the "mechanical" royalty rate for songs used on sound carriers such as piano rolls *established by Congress in 1909*.

As Members of Congress have frequently been made aware over the past two or more decades by our independent music creator advocacy groups, the financial health of the U.S. songwriter and composer community has been devastated in the digital age, even as the three, multi-billion-dollar, multi-national music conglomerates have thrived through unchecked consolidation. We simply cannot afford to be continually victimized by the perpetuation of these insider deals among them and expect to survive. It is estimated that since 1999, the number of persons able to earn a living from music creation in America has declined by over 75%.[4]

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[3] 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/

[4] See, for example, https://www.youtube.com/watch?v=UdpJ7OQnbmQ

Under such circumstances, the independent music creator community has long advocated for cost-of-living ("COLA") protections on U.S. Government-set royalty rates, adjustments which we believe are indispensable to the sustainability of American music creation as a viable, commercial artform and a valuable US economic asset. The CRB has, in fact. followed that blueprint regarding some recent, rate-setting determinations.[5]

Thus, while the conflicted negotiating parties continued to discuss potential revisions to the Subpart B Settlement proposal, our independent music creator community took the further opportunity to remind the public that songwriter/composer royalties for the use of music on physical phonorecords had previously been frozen at 2 cents *for 69 years* between 1909 and 1978, and then again for physical phonorecords and downloads at 9.1 cents *for 16 years* between 2006-2022.[6] In focusing on those gross historical injustices, we sought to make clear that another period of frozen royalty rates engineered through self-dealing was neither fair nor acceptable, and advocated in favor of Subpart B COLA adjustments covering the period 2006 through 2022.

By the end of May, 2022, the negotiating parties apparently recognized at last that inclusion of a COLA provision in their revised Subpart B Royalty Settlement was essential for eventual CRB approval, as the CRB had all but demanded in its March 30 opinion. That epiphany by the negotiators was likely spurred by their realization that the CRB –as demonstrated by its decision to reject the Subpart B Royalty Settlement as initially proposed-- had finally caught on to the practice of the major labels trying to pass off insider deals with their affiliated music publishing divisions as arm's length agreements.

Just as our organizations had feared, however, even in claiming a new appreciation for music-creator-advocated COLA principles, the vertically integrated parties once again could not resist including loopholes enormously damaging to songwriter and composer interests in their motion for adoption of the revised Subpart B Royalty Settlement. The new proposal was published by the CRB on June 1, 2022.[7]

II. Independent Music Creator Objections to the Revised Settlement

In our subsequent, July 1, 2022 comments to the CRB on the revised settlement proposal, the independent music creator community pointed out the blatantly unfair and misleading provisions still present, despite "COLA-based" revisions. Those points included that:

(i) although the revised proposal was touted by the major labels and publishers as representing a *32%* increase in the Subpart B mechanical royalty base rate with future COLA adjustments, by the end of 2021 the 9.1 cent royalty rate had in actuality already lost well over *40%* of its initial 2006 value;

[5] See, for example, https://www.digitalmusicnews.com/2022/12/08/copyright-royalty-board-webcaster-cost-of-living-adjustment/
[6] See, Our Comments to the CRB of July 26, 2021, https://thescl.com/wp-content/uploads/2021/07/FINAL-Comments-to-CRB-re-SUBPART-B-07.26.21-2.pdf at 3.
[7] https://www.govinfo.gov/content/pkg/FR-2022-06-01/pdf/2022-11521.pdf

(ii) in early 2021, the 2006 value of 9.1 cents was already *at least* 12 cents (the increase proposed in the revised settlement), but by the time of introduction by the major labels and publishers of their proposed revisions in May 2022, the relative 2006 value of 9.1 cents had further risen almost another 10% to *13.11* cents.

To further elucidate what has transpired, the negotiators knowingly proposed a new, 12 cent flat base rate that would eliminate application of inflationary increases as measured by the U.S. Consumer Price Index ("CPI") that occurred in the last three quarters of calendar year 2021 through to the end of 2022 --a stretch of nearly two years that has represented the worst inflationary period in the U.S. over the past four decades. *The value of 9.1 cents in 2006 is now equal at the end of 2022 to over 13.67 cents.* Use of this biased construct in setting the base rate for 2023 at 12 cents will result in the loss of tens and potentially hundreds of millions of dollars in songwriter and composer royalties over the five-year period covered by the revised Subpart B Royalty Settlement (2023-2027), to the principle benefit of the major record labels;

(iii) none of the above calculations take into account further discounting of Subpart B royalty rates by the continuing imposition of contractual "controlled composition" clauses by the major labels, their publishers, and others; and,

(iv) the revised proposal was arrived at with no participation or input from independent parties representing the creative community, who are unable to financially afford the millions of dollars necessary for full representation in CRB proceedings, and whose consultative input is blocked by the three major music conglomerates that dominate the global, recorded music and music publishing industries.[8]

III. Approval By the CRB, With Reservations

Nevertheless, on December 15, 2022 the CRB published its approval of the revised, conflicted Subpart B Royalty Settlement, referring to it as "Proposed Settlement 2." It did so, however, in seeming contradiction to its own best judgement and preference, a circumstance to which the Judges openly alluded. According to the decision:

> The Judges recognize that several comments proposed alternative rates that they prefer, as well as alternative methods for addressing inflation adjustments. The Judges also recognize that some comments take issue with existing procedures for participation in rate proceedings before the Judges. However, Proposed Settlement 2 is what is before the Judges for consideration, not alternative rates or proposals for alternative procedures.…
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> In the current consideration of Proposed Settlement 2, the issue of conflicts of interest remains. As stated in the Withdrawal of Proposed Settlement 1, conflicts are inherent if not inevitable in the existing composition of the negotiating parties. [But] [n]o party

[8] See, full comments at https://app.crb.gov/document/download/26942

> opposing the present settlement has presented persuasive evidence of misconduct, including any arising from the issue of conflicts of interest. The corporate relationships involving the record labels on the one hand and the publishers on the other alone do not suffice as probative evidence of wrongdoing. As addressed above, the details and effects of the MOU are not undisclosed. The Judges therefore do not find that conflicts present sufficient reason to doubt the reasonableness of the settlement at issue as a basis for setting statutory rates and terms….
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> The entirety of the record before the Judges…is [thus] insufficient for the Judges to determine that the agreed rates and terms are unreasonable….*In making this finding, the Judges are not indicating that the particular method of adjusting for inflation in the settlement is superior to methods offered by parties that voiced their opposition to Proposed Settlement 2, or that Proposed Settlement 2 represents an approach to inflation that the Judges would have chosen after a fully contested proceeding*. [emphasis added][9]

In our view, the reasoning underlying the CRB's approval of the revised settlement boils down to the following, confounding situation: While the CRB might prefer other, more equitable rates and methods for Subpart B royalty rate adjustments as proposed by independent music creator advocates, and further takes note of the difficulties that such creator groups have in financially affording full participation in the CRB process, the Judges still believe they are compelled by law to conclude that unless persuasive evidence of undisclosed settlement terms or other willful misconduct is presented concerning the negotiations to which those opposition groups had no access, the CRB lacks sufficient grounds to reject the revised settlement as "unreasonable" regardless of the points made in opposition.

Even more confusing is the fact that despite declaring that the conflicts of interest of the negotiating parties (the major labels and their affiliated publishers) remained obvious in the creation of the revised settlement, the CRB still gave credence to the absurd claim that the vertically integrated parties agreed to what appear to self-dealing terms in order "to avoid costly and uncertain litigation" --*apparently against themselves*.[10]

To quote the head of the trade association representing the major music publishers, who made the following public comments in July of this year concerning the CRB's approval of the streaming royalty settlement covering the prior years 2017-2022: "*This process was protracted and expensive, and though we are relieved with the outcome, we have spent years fighting a broken system"* [11] [emphasis added]

The CRB royalty rate determination process is indeed broken, especially as concerns rate-setting in the vertically integrated, conglomerate-dominated music industry. In fact, it is no

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[9] https://www.federalregister.gov/documents/2022/12/16/2022-27237/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv

[10] https://www.federalregister.gov/documents/2022/12/16/2022-27237/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iv

[11] 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

exaggeration to state that the Copyright Royalty Judges themselves --by their forthright explanations of the reasoning underlying their adoption of the revised Subpart B Settlement-- admit the urgent need for Congressional consideration of reforms. The words of the Judges, as set forth above, are again illuminating:

> The Judges recognize that several comments proposed alternative rates that they prefer, as well as alternative methods for addressing inflation adjustments. The Judges also recognize that some comments take issue with existing procedures for participation in rate proceedings before the Judges. *However, Proposed Settlement 2 is what is before the Judges for consideration, not alternative rates or proposals for alternative procedures.…*

Any legislative framework that forces administrative decisions in which the judges are moved to acknowledge a level of unfairness and inefficiency that effectively excludes those who will be most affected by their rulings --and to posit that their ruling is probably not the conclusion they would have reached had they the authority to decide otherwise-- is in dire need of review and reform.

That is especially the case in regard to intellectual property matters. Article I Section 8 of the U.S. Constitution gives authority to Congress to extend protection to *authors and inventors* for their benefit and for the public good, not for the benefit of corporate middle-groups. Statutory provisions having the practical effect of limiting the ability of the CRB to make sound decisions on behalf of music creators and the American public –rather than bowing to the self-dealing of the three major record labels, their publishing entities and their trade organizations-- has turned the Constitutional intent of Article I Section 8 on its head.

IV. Potential Reforms

With all of that in mind, we would welcome the opportunity to discuss with your office potential alternative approaches to addressing the problems outlined in this letter, including how to make full and effective participation by independent advocates for the music creator community before the CRB (and other Governmental and quasi-Governmental entities) more feasible. Our suggestions include the possibility of amending Section 801(b)(7)(A) of the Copyright Act to clarify that non-parties to CRB proceedings who will be "bound by the terms, rates, or other determination set by any proposed agreement in a proceeding," shall have the right not only to file comments on such agreements, *but also to have their comments and proposals meaningfully considered by the judges --and, if appropriate-- acted upon by the CRB in evaluating the reasonability of any agreements and in the rendering of final rate-setting decisions (whether or not any formal participant in the proceeding so agrees).*

V. A New and Even More Egregious CRB Decision on December 29, 2022

In closing, last evening we received word that the CRB has approved a last-minute, even more deeply flawed Phonorecords IV settlement agreement regarding royalty rates for the delivery of music via electronic streaming. *This decision will dwarf the negative effects described above regarding physical and download mechanical royalty rates, as it is likely to cause the forfeiture of many hundreds of millions of dollars in songwriter and composer streaming* royalties. We

will have much more to say about that decision (which lacks even minimal COLA protections for creators) in the coming weeks, but the issues that we hope to discuss with Members of Congress are both clear and urgent.

The legislative framework imposed upon the CRB is not working as intended, and in drastic need of reform. Advocating for Congressional hearings on that dilemma has now become even more of an existential imperative for our community of independent American songwriters and composers. We hope that by providing the detailed account set forth above, augmented by even more information in the days and weeks ahead regarding the subsequent streaming settlement, we are able to focus the attention of Members of Congress on the serious damage being caused to American creators and American culture by the current flaws in the CRB system that --from our perspective-- must be addressed on an immediate basis.

VI. Closing

Thank you for your consideration. We look forward to further discussions in the immediate future regarding these and other complex and important legislative issues to the U.S. music creator community.

Respectfully submitted,

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Officer, Music Creators North America	Co-Chair, Music Creators North America

cc: Charles J. Sanders, Outside Counsel, SGA
Members of the SGA, SCL and MCNA Boards of Directors
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