

BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS

In re

Determination of Rates and Terms for Making and
Distributing Phonorecords (Phonorecords IV)
37 CFR Part 385 Proposed Regulations

Docket No. 21-CRB-0001-PR
(2023-2027)

**SUPPLEMENTAL COMMENTS OF HELEENNE LINDVALL, DAVID LOWERY, BLAKE MORGAN AND
GWENDOLYN SEALE OBJECTING TO PROPOSED SETTLEMENT OF SUBPART B RATES**

This comment is in reply to the comment¹ filed by the Copyright Owners and the Joint Record Company Participants (the “Majors”) time-stamped after the close of business on August 10, 2021 and made available on the CRB docket the morning of August 11, 2021, i.e., after the deadline established by the Judges in the Proposed Rule published at 86 FR 33601 that would codify the Proposed Settlement.²

We ask the Judges’ leniency in permitting our late-filed supplemental comment to be made a part of the record in hopes that our responsive discussion will be helpful to the Copyright Royalty Board in resolving the frozen mechanicals crisis.

This comment is filed on behalf of Helienne Lindvall, David Lowery and Blake Morgan who timely filed their comment on July 26, 2021³ in accordance with the proposed rule. This

¹ *Comments in Further Support of the Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations*, Docket No. 21-CRB- 0001-PR (2023-2027) (August 10, 2021)(Reply).

² *Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations*, Docket No. 21-CRB- 0001-PR (2023-2027) (May 25, 2021) (Proposed Settlement).

³ *Comment of Helienne Lindvall, David Lowery and Blake Morgan*, Docket No. 21-CRB- 0001-PR (2023-2027) (July 26, 2021) available at <https://app.crb.gov/document/download/25533>

comment is also filed by Gwendolyn Seale who timely filed her own comment⁴ in accordance with the proposed rule. Their respective biographical information may be found in their previously filed comments.

We will briefly discuss what we think are the essential points the Judges should consider that the Majors have raised in their comment.

I. Discussion

A. Authority: As multiple commenters have stated, it is unclear whether the NMPA and NSAI have been authorized by their respective memberships of over 300 music publishers and over 4,000 songwriters to propose and/or accept a settlement freezing the statutory rate for Subpart B configurations through 2027. Thus, we ask the Judges to seek out evidence demonstrating that self-published songwriters and independent publishers have authorized the NSAI and NMPA to accept this Proposed Settlement. We do not question the integrity of the Majors, but we do have questions about the negotiation process that have yet to be answered.

References to a broad “consensus” must be questioned because there is both a lack of evidence of consensus and also evidence in the record that at least 12 international songwriter groups object to the Proposed Settlement. Independent songwriters, including Ms. Lindvall, Mr. Lowery and Mr. Morgan, also object. It seems simple enough for the Judges to require some evidence of consent to the Proposed Settlement given the awesome power of the government that the Judges are essentially asked by Congress to delegate to the Majors

⁴ *Comment of Gwendolyn Seale*, Docket No. 21-CRB- 0001-PR (2023-2027) (July 26, 2021) available at <https://app.crb.gov/document/download/25534>

through a voluntary negotiation. This seems to us to be good cause for further verification of authority to make the deal in the first place.

B. The Judges Predicted the Current Opposition in their Phonorecords III Determination:

The Majors rely on a citation that both demonstrates the foresight of the CRB and on balance tends to support our position that the NMPA and the NSAI likely lack the requisite authority to negotiate on behalf of all the world's songwriters. The Majors invite the Judges to participate in a thought experiment⁵ that actually serves quite well to highlight the issues we have raised in the respective comments regarding both the authority of the NMPA and NSAI and the implied below-statutory rates bootstrapped indirectly by means of the freeze:

As the Judges have noted, "NMPA and NSAI represent individual songwriters and publishers," and would not "engage[] in anti-competitive price-fixing at below-market rates," since they must "act[] in the interest of their constituents" *lest their constituents seek representation elsewhere.*" [Phonorecords III] at 15298.⁶

Respectfully, the problem is way beyond seeking representation elsewhere—the problem is that there was likely no "representation" in the first place if you take "representation" in the legal sense (such as that of a common agent) which we gather is how the Judges intended the use of the word. Likewise, there is a difference between an agent's principal and a "constituent", i.e., a difference between one who expressly authorizes an agent to represent them in certain circumstances and one who is allowed to vote on who that representative is to be. Neither is the case for many songwriters who have commented in the record for the

⁵ Reply at 5.

⁶ Id. (emphasis added).

current proceeding. We will leave their record to speak for themselves as to why they have sought “representation elsewhere” but it appears that it is for the same reason that they are not participants in the proceeding—they can’t afford the justice and this is why they ask the Judges to give special weight to their comments in the CRB’s deliberations.

But the Major’s thought experiment and speculation continues in an interesting coda regarding below statutory licensing (generally not permitted as a matter of contract in likely tens of thousands of co-publishing and administration agreements):

And certainly it would not be in the interest of any major publisher to agree to extend a below-market mechanical royalty rate *to the competitors of its sister record company.*⁷

While the thought experiment and speculation sound innocuous, consider what is being said here. First, the Majors identify their interest as that of “major publishers”; not all publishers, not all songwriters, but “major publishers.” Then the Majors go on to say that it would not be in the interest of the major publishers to give a “below market” rate *to their sister record company’s competitors.*

Of course, there is no market rate in the U.S. and essentially never has been; the Judges have the unenviable task of divining a market rate to be made statutory. We would therefore modify the thought experiment to include “below statutory”. Now we are left with the assertion that major publishers use the statutory rate to protect their record company affiliates from competition—not that they fulfill their role as true blue fiduciaries *for their songwriters* by refusing to grant below-statutory rates (either directly or indirectly), but rather being hard on the competitors of their affiliates. And they are using their market power to impose a rate

⁷ Id.

on the world that they seem to say protects their affiliates. Extending the frozen mechanical rate certainly doesn't protect their songwriters—the Judges have ample evidence that many songwriters object to the extension. But in the Majors' own words we now know *cui bono*, and the benefit goes back to Phonorecords III and likely earlier.

But let us extend the thought experiment a little bit further. Who is an unrelated "competitor" of the three major labels and all their distributed labels, DIY operations like The Orchard, joint ventures and so on and on and on? That must be a pretty small group of true independents who have cobbled together a distribution network for the Subpart B configurations to deal with the logistics of manufacturing, warehousing, shipments, returns, and the like—branch distribution is what makes a major label a major. Perhaps the Majors could provide some examples of these "competitors"? Clearly though, the citation demonstrates that the Judges sensed many years ago the very situation now unfolding on the record in the frozen mechanicals crisis.

C. Comparisons to Largely Unopposed Prior Rulemakings Compare Apples to Oranges: We understand that the Majors claim to have proposed a similar settlement in Phonorecords III resulting in a freeze of the statutory rate for Subpart B configurations, and that the Judges then-adopted that settlement. We also understand that there was little if any *formal objection* to that freeze in Phonorecords III at least by comparison to the number of objecting commenters in Phonorecords IV. The Judges are now presented with a significant number of objectors who entirely reject the application of the Proposed Settlement to the world in a kind of bootstrapping move. Respectfully, comparing the field in Phonorecords III to Phonorecords IV is comparing apples to oranges and creating a pomegranate.

We also acknowledge the millions of dollars that the NMPA asserts that it spent litigating these rates some fifteen years ago, but this assertion perhaps proves too much. The cost of participating in any of these proceedings is exactly the reason why objecting songwriters understandably rely entirely on the Judges to seek fairness and justice. They cannot afford to participate in these proceedings themselves and trust the Judges to balance all the facts not just the arguments of rich people and corporations.

Not only do the Majors gloss over the songwriters' objections, but their reasoning is actually fallacious. Because both proceedings are called "Phonorecords" does not make them similar in regard to the frozen mechanicals crisis. The facts on the ground are wildly different between III and IV. Moreover, we hear a subtext in the Major's argument that if a configuration experiences declining sales, that is a reason for the government to *reduce* the royalty rate. Aside from a lack of statutory authority, this is also fallacious reasoning because the Majors have produced no evidence that the per-unit price for Subpart B configurations has declined, and if anything, we are informed that the dealer price has increased in the case of vinyl.⁸

We respectfully ask that the Judges consider these flaws in the Majors' positions and give them their due weight.

⁸ See, e.g., Samantha Handler, *Copyright Panel Rethinking Song Royalties Streamers Pay*, Bloomberg Law (Aug. 12, 2021) ("Royalties from downloads and CDs haven't increased since 2006, but still make up a significant portion of income for independent songwriters.") available at <https://news.bloomberglaw.com/ip-law/copyright-panel-rethinking-song-royalties-streamers-pay>

D. The Elusive MOU: The Majors tell the Judges that:

The MOU entered into contemporaneously with the Settlement is *irrelevant* to the Judges' consideration of the Settlement, and does not call into question the reasonableness of the Settlement.⁹

Respectfully, if the MOU is “irrelevant” to the settlement, why did they bring it up at all?

Recall that we previously asked the Judges to question whether the MOU was *additional* consideration for extending the frozen mechanical rates. While others may have, we did not concern ourselves with whether the MOU was a “sweetheart deal” as we knew nothing about it. Rather our issue was whether the MOU was a *quid pro quo* of additional consideration for the frozen rates that was enjoyed by a limited group of participants in the settlement but was not enjoyed by strangers to the deal who were still subject to the frozen rate. Indeed, it appears that this is exactly the case. While we appreciate that the Majors have now disclosed the MOU as part of their Reply, nothing in the Majors’ comment ameliorates this fundamental concern.

A significant reason why the concern still exists is language in the now-disclosed MOU that certainly has the ring of a *quid pro quo* directly related to extending the frozen Subpart B rates in Phonorecords IV:

This MOU4 is a separate, conditional agreement [the quid] that shall not go into effect until [the quo] NMPA, SME, WMG’s affiliate Warner Music Group Corp., and UMG submit a motion to adopt a proposed settlement of the Phonorecords IV Proceeding as to statutory royalty rates and terms for physical phonorecords, permanent downloads,

⁹ Reply at 6 (emphasis added).

ringtones and music bundles presently addressed in 37 C.F.R. Part 385 Subpart B (the “Subpart B Configurations”), together with (1) certain definitions applicable to Subpart B Configurations presently addressed in 37 C.F.R. § 385.2 and (2) late payment fees under Section 115 for Subpart B Configurations presently addressed in 37 C.F.R. § 385.3, together with certain definitions applicable to such late payment fees presently addressed in 37 C.F.R. § 385.2, for the rate period covered by the Phonorecords IV Proceeding, which the Parties anticipate happening promptly *after* this MOU4 has been signed by SME, UMG, WMG, RIAA, NMPA, Sony Music Publishing, Universal Music Publishing Group, and Warner Chappell Music, Inc. (the “Initial Signatories”).¹⁰

To the contrary, a fair reading of the MOU suggests, and may even require, that the consideration for the MOU is tied directly to extending the frozen rates in the Proposed Settlement.

Moreover, we can revisit the authority issue raised above given language in the MOU. Consider the following post-closing condition imposed on the NMPA by the plain terms of the MOU:

It is understood that only the Initial Signatories will sign this MOU4 at the outset, and that ***NMPA shall use its best efforts to obtain the signatures to this MOU4 by all of the remaining Parties within two (2) weeks thereafter.***¹¹

¹⁰ Reply at 19, MOU-4 at 2 (emphasis added).

¹¹ Id. at 20, MOU-4 at 3.

If the NMPA had the authority to bind these many publisher “Parties” to the MOU, why would there be a need to impose such a post-closing condition on the NMPA? There may be an explanation for this structure, but it is not obvious to us.

We also find it somewhat unusual that neither the Reply of the Majors nor the now-disclosed MOU reference a dollar figure that is changing hands. This could be a lot of cash. In the 2009 Billboard article cited by the Majors, the MOU that was the subject of that reporting was valued at “up to \$264 million.”¹² However “routine” the MOU process is, a \$264 million payment in a “pennies business” is not routine. We would appreciate a further disclosure of the amount at issue in the current MOU. As they say, it is evidently not a secret.

Respectfully, it does not appear that one can completely exclude the relevance of the MOU as consideration for extending the freeze on Subpart B royalties at least on the face of the documents provided. As strangers to the deal do not have the opportunity to subject these assertions to the crucible of cross-examination, we hope the Judges can welcome the reliance on them of those who cannot afford to participate in this proceeding.

¹² Ed Christman, *NMPA, Major Labels Sign Terms of Agreement*, Billboard (Oct. 7, 2009) available at <https://www.billboard.com/articles/business/1264471/nmpa-major-%20labels-sign-on-terms-of-agreement>.

II. Conclusion

In conclusion, we respectfully ask the Judges to consider the foregoing comments along with the many heartfelt and well-reasoned comments by others in Phonorecords IV. Unfortunately, as is too often the case in the music business, we think that the sum and substance of the Majors' argument is that "we are the wealthy and therefore we win."

We do not have to remind the Judges that this is the antithesis of our Constitutional system of government.

Respectfully submitted.



Christian L. Castle
(TX Bar No. 24077748; CA Bar No. 133988)
Christian L. Castle, Attorneys
9600 Great Hills Trail, Suite 150W
Austin, Texas 78759
Tel. (512) 420-2200
Fax (512) 519-2529
asst1@christiancastle.com

/s/ Gwendolyn Seale
Gwendolyn Seale
(TX Bar No. 24102478)
Mike Tolleson and Associates
2106 East M.L.K. Jr. Boulevard
Austin, Texas 78702
Tel. (512) 480-8822
gwen@miketolleson.com

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