V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2022–0200 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.2.

■ 2. Add § 165.T13–0200 to read as follows:

§ 165.T13–0200 Safety Zone; Hydroplane and Raceboat Museum Test Area, Lake Washington, WA.

(a) *Location.* The safety zone will cover all navigable waters within a 4,000-yard oval radius drawn from 47°34′31″ N, 122°16′34″ W, thence to position 47°34′02″ N, 122°15′44″ W, 150 yards offshore of the Stan Sayres Memorial Hydroplane Pits downward to 150 yards off the Adams Street Boat Ramp which will be marked with buoys, located on Lake Washington. These coordinates are based on World Geodetic System (WGS 84).

(b) *Definitions.* As used in this section, a *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector Puget Sound (COTP) in the enforcement of the safety zone.

(c) Regulations. (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from 10 a.m. until 2 p.m. on May 24, 2022.

Dated: March 24, 2022.

P.M. Hilbert,

Captain, U.S. Coast Guard, Captain of the Port Sector Puget Sound.

[FR Doc. 2022–06657 Filed 3–29–22; 8:45 am]

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Copyright Royalty Board

37 CFR Part 385

[Docket No. 21–CRB–0001–PR (2023–2027)]

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Copyright Royalty Judges withdraw a proposed rule that would have set continued, unaltered rates and terms for subpart B configurations subject to the statutory license to use nondramatic musical works to make and distribute phonorecords of those works (the Mechanical License).

DATES: The Copyright Royalty Board is withdrawing the proposed rule published June 25, 2021 (86 FR 33601) as of March 24, 2022.

ADDRESSES: *Docket:* For access to the docket to read background documents or comments received, go to eCRB at *https://app.crb.gov* and perform a case search for docket 21–CRB–0001–PR (2023–2027).

FOR FURTHER INFORMATION CONTACT: Anita Brown, Program Specialist, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Copyright Royalty Judges (Judges) received a Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations (Motion) from National Music Publishers' Association, Inc. and Nashville Songwriters Association International (together, Licensors) and Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. (together, Labels). The Licensors and Labels (together, Moving Parties) sought approval of a partial settlement of the license rate proceeding before the Judges titled *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV),* Docket No. 21–CRB–0001–PR (2023–2027). The Moving Parties asserted that they had agreed to a settlement as to royalty rates and applicable regulatory terms relating to physical phonorecords, permanent downloads, ringtones, and music bundles presently addressed in 37 CFR part 385, subpart B (Subpart B Configurations). The Moving Parties' settlement agreement also addressed payment of late fees relating to Subpart B Configurations.

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt rates and terms negotiated by ''some or all of the participants in a proceeding at any time during the proceeding'' provided the settling parties submit the negotiated rates and terms to the Judges for approval. That provision directs the Judges to provide those who would be bound by the negotiated rates and terms an opportunity to comment on the agreement.

The Judges published the proposed settlement in the **Federal Register** and requested comments from the public. 86 FR 40793 (Jun. 25, 2021). Comments were due by July 25, 2021. The Judges received comments from 14 interested parties.[1] One participant, George Johnson (GEO) filed three motions opposing the proposed settlement.[2] Because of some technical issues with the CRB electronic filing system, the Judges reopened the comment period with a new deadline of August 10, 2021. *See* 86 FR 40793 (Jul. 29, 2021). During the second comment period, the Judges received comments from two interested parties [3] and GEO.[4] On August 10, 2021, the closing date for comments, the Moving Parties filed comments in further support of the proposed settlement.

In their comments, the Moving Parties reasserted their respective ''significant interest[s]'' in the proceeding.[5] *See* Comments in Further Support of the Settlement . . . for Subpart B Configurations (Aug. 10, 2021) (Further Comments) at 1. The Moving Parties referred to the Congressional encouragement of settlement of royalty rate issues. *Id.* at 3. In the Motion seeking adoption of the settled rates and terms, the Moving Parties averred that the settlement would continue subpart B rates at their current levels and that the late fee provisions in the current regulations would ''continue to be applicable'' to the Labels ''and all other licensees'' of the mechanical rights at issue in subpart B. Motion at 3. Immediately preceding this synopsis of the settlement terms, however, in a section headed ''Parties,'' the Moving Parties indicated ''[c]oncurrent with the settlement, the Joint Record Company Participants and NMPA have separately entered into a memorandum of understanding addressing certain negotiated licensing processes and late fee waivers.'' Motion at 3.

The Moving Parties' comment in support of adoption of the settlement contained additional material, *i.e.,* the memorandum of understanding (MOU) as an attachment, the Judges reopened for a second time the comment period on the proposed rule. *See* 86 FR 58626 (Oct. 22, 2021). This third comment period ended on November 22, 2021. *Id.* Commenters expressed concern regarding this mention of an undefined MOU between the Labels and NMPA. During the third comment period, the Judges received seven comments.[6] GEO also filed a ''Second Round of Comments . . .'' opposing the settlement.[7]

Statutory Standard and Precedent

Section 801(b)(7)(A) of the Copyright Act is clear that the Judges have the authority to adopt settlements between some or all of the participants to a proceeding at any time during a proceeding, so long as those that would be bound by the agreed rates and terms are given an opportunity to comment. *Id.* at (b)(7)(A)(i). The Judges give notice by publishing a settlement as a proposed rule in the **Federal Register**. They are obliged to give notice and offer all interested parties an opportunity to comment, but only *participants* have the opportunity to comment and *object* to a proposed settlement. *See id.* (emphasis added). Section 801(b)(7)(A)(ii) provides that the Judges ''may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,'' only ''if any participant [in the proceeding] objects to the agreement and the [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.'' 17 U.S.C. 801(b)(7)(A)(ii).

Regardless of the comments of interested parties or participants, the Judges are not compelled to adopt a settlement to the extent it includes provisions that are inconsistent with the statutory license. *See* Review of Copyright Royalty Judges Determination, 74 FR 4537, 4540 (Jan. 26, 2009) (error for Judges to adopt settlement without threshold determination of legality); *see also* Review of Copyright Royalty Judges Determination, 73 FR 9143, 9146 (Feb. 19, 2008) (error not to set separate rates as required under § 112 and 114 when parties' unopposed settlement combined rates in contravention of those statutory sections).[8]

As the Register of Copyrights (Register) observed in the 2009 review of the Judges' decision, nothing in the statute precludes rejection of any portions of a settlement that would be contrary to provisions of the applicable license or otherwise contrary to the statute. *Id.* In the instance under review by the Register, the settlement agreement purported to alter the date(s) for payment of royalties granting licensees a longer period than section 115 provided. 74 FR at 4542. The Register also noted that nothing in the

[1] Songwriters and independent music publishers Anthony Garnier, Abby North, David Poe, and Michelle Shocked filed individual comments. Joint comments were filed by: Helienne Lindvall, David Lowery, and Blake Morgan (Lindvall Comments); Songwriters Guild of America, Inc., Society of Composers and Lyricists, Music Creators North America, Rick Carnes, and Ashley Irwin (together, SGA). Attorneys Gwendolyn Seale and Peter W. DiZozza, Esq. filed comments as music industry lawyers but not on behalf of any specific client/s.

[2] GEO filed an Objection to Fraudulent Motion . . . on May 27, 2021. On the same day, GEO filed an Objection to Settlement . . . .'' GEO filed these objections before the Judges published the proposed rule for comment. GEO's filings did not seek relief and were not proper motions. On July 20, 2021, the Judges therefore denied GEO's motions and suggested GEO express his apparent opposition to the settlement by way of a comment in response to the published proposed rule. *See* Order Denying Three Motions . . . (Jul. 20, 2021).

[3] Commenters were independent music publisher Monica Corton and singer, songwriter, and teacher Rosanne Cash.

[4] GEO styled his comment as ''George Johnson's Fourth Opposition Motion Objecting to . . . Settlement . . . Also Filed as Comments. (Aug. 10, 2021). Subsequently, GEO filed four notices informing the Judges of inflation rates and a motion seeking indexing of subpart B rates.

[5] The Moving Parties alleged that the Labels represent ''the vast majority of the U.S. sound recording market.'' They also asserted that NMPA ''protects and advances the interests of over 300 music publishers'' and that NSAI is a trade association with over 4,000 members ''dedicated to serving songwriters . . . .'' Further Comments at 2.

[6] Lynne Robin Green filed an individual comment. Gwendolyn Seale and Monica Corton augmented previous comments. Abby North augmented her earlier comments in a joint filing with Erin McAnally and Chelsea Crowell. Helienne Lindvall, David Lowery, and Blake Morgan augmented their previous joint comment (Second Lindvall Comments). The Songwriters Guild of America, Inc.; Society of Composers & Lyricists; and Music Creators North America; along with individuals Rick Carnes and Ashley Irwin filed a joint comment, which was endorsed by Alliance for Women Film Composers, Alliance of Latin American Composers & Authors, Asia-Pacific Music Creators Alliance, European Composers and Songwriters Alliance, The Ivors Academy, Music Answers, Pan-African Composers and Songwriters Alliance, Screen Composers Guild of Canada, and Songwriters Association of Canada (endorsers and second submission of commenters together, Second SGA Comments). Attorney Kevin M. Casini commented as an advocate, not for any particular client.

[7] The deadline for comments was November 22. The CRB's electronic filing system noted the date and time of GEO's filing as November 23, 2021 at 12:04 a.m. The Judges accept this technically late filing.

[8] The Register found that a ''paucity of evidence'' in the record to support a determination of separate rates for the separate licenses ''does not dispatch the . . . Judges' statutory obligations.'' Review of Copyright Royalty Judges Determination, 73 *FR* 9143, 9145 (Feb. 19, 2008). The Register noted that the Judges have subpoena power to compel witnesses to appear and give testimony. *Id.*

statute relating to adoption of settlements precludes the Judges from considering comments of non-participants ''which argue that proposed [settlement] provisions are contrary to statutory law.'' *Id.* at 4540.

The Judges received a relatively large number of negative comments from interested parties. The only participant who objected to the proposed settlement was GEO. His objections tracked many of the negative comments by other parties who are not participants but who could be bound by the regulation. The Judges have also reviewed the proposed settlement for consistency with the law and the statutory license.

Synopsis of Related Non-Participant and Moving Parties' Comments

The comments of interested parties in this proceeding were uniformly negative regarding the proposed settlement. Their comments were largely overlapping and are summarized, along with the Moving Parties' comments as follows.

Importance of Subpart B Configurations

The Moving Parties downplayed the importance of Subpart B Configurations in the universe of music consumption. *See* Further Comments at 3–4. The Moving Parties emphasized that 83% of the recorded music market [9] comes from streaming. *See id.* In the same paragraph, however, they conceded that Subpart B Configurations account for 15% of the market.[10] *Id.* The Moving Parties acknowledged that the Subpart B Configurations represent a ''not immaterial source of revenue'' for songwriters and publishers. *Id.*

More than one commenter cited publications of the Recording Industry Association of America (RIAA) that give perspective to the apparent diminution of Subpart B Configurations, both to the rightsholders and to music consumers. *See, e.g.,* Comments of Gwendolyn Seale (Jul. 26, 2021) (Seale Comments) at 4; Comments of Michelle Shocked (Jul. 26, 2021) (Shocked Comments) at 1; Comments of SGA (Jul. 26, 2021) (SGA Comments) at 10 [11] (all citing ''Year-End 2020 RIAA Revenue Statistics,'' *https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf* (last visited 02/14/2022) (RIAA Report)); Comments of Monica Corton (Nov. 22, 2021) (Second Corton Comments) at 2 (vinyl ''seems to be surging . . .''). The RIAA Report reflected near static sales of physical product (including digital downloads) but noted that ''[f]or the first time since 1986, revenues from vinyl records were larger than from CDs. . . . [V]inyl grew by 28.7% by value year-over-year . . . .'' RIAA Report at 2.

Commenter Corton detailed the rightsholders' mechanical license earnings from vinyl and CD albums as compared to downloading or streaming individual tracks. *See* Second Corton Comments at 2. She alleged that retailers are selling new vinyl releases for $25 to $50 (rounded). Assuming the wholesale price to be 50% of the retail price, she calculated that retailers are paying $12.50 to $25 to the record companies. *Id.* Corton contended that even in the surging market, under standard publisher-record company contracts, the record label pays the publisher $0.91 for a ten-track album ($.091 per track, limit ten, regardless of the actual number of tracks on the album). *Id.* Corton asserted that most labels enforce a ''controlled composition clause'' [12] in their contracts with publishers, limiting their earnings on an album to 75% of the statutory mechanical license rate and a standard ten song cap, or $0.6825 per album, which the publisher generally splits 50–50 with the songwriter. *Id.* The royalty that reaches the songwriter is $0.3412 for all the protected works on the marketed album. *Id.* Even after compensating performers, record labels appear to be receiving over $10 per permanent album to the songwriters' $0.34. *Id.*

Commenter Roseanne Cash asserted that mechanical royalties are ''one of the most reliable ways a songwriter can still make a minimum-to-decent wage . . . .'' Comments of Roseanne Cash at 1 (Aug. 2, 2021). She asserted that the need for fair subpart B rates is ''more dire because of the lack of fairness in compensation from streaming services. Streaming services are not in the music business. They are in the tech business, and they have built multi-billion dollar profit machines on the back of songwriters and musicians whom they use as loss-leader content.'' *Id.* at 2.

Rate ''Freeze''

Almost every commenter emphasized that the subpart B mechanical rates have remained unchanged for well over a decade, since 2006. *See, e.g.,* Comments of Kevin M. Casini (Nov. 21, 2021) (Casini Comments) at 3 (''what has not been frozen since 2006: the cost of living.''). According to SGA, from enactment of the governing statute in 1909 until 1978, mechanical royalties were set at $ 0.02 per unit. *See* Comments of SGA (Jul. 26, 2021) (SGA Comments) at 3. In 1978, Congress raised the rate to $ 0.0275 per unit, which was offset by a ''controlled composition clause'' in sound recording contracts by which creators were obliged to lower that new 1978 mechanical royalty rate by 25%. *Id.* The statutory rate gradually increased until 2006, when the CRB maintained the existing rate at $ 0.091 per unit in mechanical rate proceedings commenced in 2006, 2011, and 2016. *Id.* The controlled composition clause remains a feature of sound recording contracts. Second Corton Comments at 2.

Commenters advocated application of an inflation adjustment beginning, at a minimum, in 2006. *See, e.g.* SGA Comments at 4; Corton Comments at 4; Casini Comments at 4. According to the proponents of a cost of living adjustment (COLA) applied to the 2006 rates, that adjustment would yield a 2021 royalty rate of $ 0.12 (an upward 31.9% inflation adjustment over the sixteen-year period). *See, e.g.,* SGA Comments at 4. SGA conceded that the COLA extrapolation cannot be considered dispositive on the issue of new rate-setting, but they contended that it does ''starkly demonstrate the outrageous unfairness that has been imposed on the music creator community over a period of more than an entire century.'' *Id.*

Conflicts of Interest

More than one commenter questioned whether the underlying negotiations could be, in fact, arm's length transactions because of the vertical integration of music publishing and recording. The proposed settlement at issue was negotiated by and among the ''three major, multinational record conglomerates UMG, SME and WMG, the US music publisher trade group NMPA (whose largest members include the music publishing affiliates of those major record companies), and

[9] The Moving Parties did not define ''recorded music market.'' The study to which they referred analyzed recorded music revenues.

[10] The Moving Parties minimized the subpart B revenue by splitting it between physical sales (9%) and digital downloads (6%), glossing over the total for mechanical licenses, which was, in fact, 15%.

[11] SGA also reported that physical phonorecords and permanent downloads accounted for over 25% of total recorded music revenues worldwide in 2020. SGA Comments at 10, *citing* International Federation of the Phonographic Industry report of global recorded music revenues for 2020, *https://www.ifpi.org/our-industry/industry-data/* (last visited Mar. 16, 2022) (reporting 25.3% combined revenue).

[12] According to SGA, record labels introduced the ''controlled composition clause'' in 1978 in response to the increase of the statutory rate from $.02 per unit in effect between 1909 and 1978, to $0.275 per unit. *See* SGA Comments at 3. The controlled composition clause continues. In other words, the statutory royalty rate of $.091 per unit translates to $.06825 per unit actually paid by the subpart B licensor. *Id.*

inexplicably, the [NSAI] . . . the 'Settling Parties'. . . .'' SGA Comments at 4.

When the Settling Parties gave notice of their impending settlement, they included reference to a separate memorandum of understanding between NMPA and the record labels. Notice of Settlement in Principle (Mar. 2, 2021) 1 (''NMPA, UMG, WMG and SME have also reached an agreement in principle concerning a separate memorandum of understanding addressing certain related issues.'') *See, e.g.,* Second Seale Comments at 6 (representative negotiators of subpart B settlement and MOU ''represent 'willing buyers' and 'willing sellers' who are effectively the same parties at the corporate level.''); Comments of Anthony Garnier (Jul. 19, 2021) (''Vertical integration . . . between the major labels and major publishers poses a serious conflict of interest and engenders self-dealing among negotiators'').

Moving Parties stated, categorically, that no publisher would negotiate a below-market mechanical royalty rate and extend that rate to competitors of its ''sister record company.'' *See* Further Comments at 5. The Moving Parties referred the Judges to their determination in *Phonorecords III* wherein the Judges discounted claims of self-dealing, noting that the negotiating parties—the same parties as are presenting the present settlement for approval—''would not 'engage[ ] in anti-competitive price-fixing at below-market rates . . . .' '' *Id.* (citing Final Determination, *Determination of Royalty Rates and Terms for . . . Phonorecords,* Docket No. 16–CRB–0003–PR (*Phonorecords III*)).

Lack of Transparency Regarding MOU

In the Motion seeking adoption of the settled rates and terms, the Moving Parties averred that the settlement would continue subpart B rates at their current levels and that the late fee provisions in the current regulations would ''continue to be applicable'' to the Labels ''and all other licensees'' of the mechanical rights at issue in subpart B. Motion at 3. Immediately preceding their synopsis of the settlement terms, however, in a section headed ''Parties,'' the Moving Parties indicated ''[c]oncurrent with the settlement, the Joint Record Company Participants and NMPA have separately entered into a memorandum of understanding addressing certain negotiated licensing processes and late fee waivers.'' Motion at 3.

Commenters assailed a lack of transparency in the settlement with regard to the memorandum of understanding (MOU). They contended that there must be a hidden *quid pro quo* unrevealed in the proposed settlement or the Motion. In their Further Comments, the Moving Parties explained the offhand revelation of the MOU: They viewed it as ''routine, and irrelevant to the Judges' decision-making concerning the Settlement.'' *Id.* at 6. The Moving Parties further addressed this purported oversight in the Motion by indicating that all but ''a low single digit percentage'' of the music publishers have opted into the MOUs of the past. They also opined that ''thousands of independent publishers'' will voluntarily opt in to the latest iteration of the MOU. Further Comments at 7.

The Moving Parties contended that the MOU is a private contract and not something to be codified as it does not address statutory rates. *See id.* at 8. As the commenters noted, however, the MOU is tied directly to the rate determination. The current MOU is conditional and was not effective until the parties to the MOU (the Moving Parties, *except* NSAI) submitted a motion to adopt the proposed settlement in *Phonorecords IV* as rates and terms for the subpart B configurations. *Id.,* at Exhibit C, 2.

Further, the MOU contains a late fee waiver provision, contrary to published regulations, which add a late fee of up to 1.5% per month until the rightsholder receives royalties that are due monthly. *See* 37 CFR 385.3. In their comments, Lindvall, Lowery, Morgan, and Castle questioned who might receive the benefit of the waived late fees. *See* Comments of Lindvall, Lowery, Morgan, Castle (Nov. 22, 2021) (Second Lindvall Comments). The commenters in this proceeding, representing songwriters and independent or self-publishers, object strenuously to terms that they considered ''hidden'' and that would affect the amount of remuneration they receive in exchange for licensing their protected works.

Restating their particularized argument, the Moving Parties maintained that the current MOU was the fourth such arrangement between Labels and NMPA to address ''mechanical licensing process issues unique to record companies.'' *Id.* at 6. Further, the Moving Parties asserted that, in any event, the existence of MOUs has been public knowledge. *See* Further Comments at 6–7 (citing E. Christman, ''NMPA, Major Labels Sign on Terms of Agreement,'' *Billboard* (Oct. 7. 2009) and Exhibit B Supplemental Statement in *Phonorecords II* (April 11, 2012).[13]

Several commenters professed no knowledge of the current MOU or the history of MOUs. *See* SGA Comments at 9; Seale Comments at 3. Further, as they pointed out, songwriters are not parties to the MOU. The benefits of the agreement are alleged to accrue to the benefit of only certain music publishers. *See* Seale Comments at 3. This benefit, some asserted, is consideration for the publishers agreeing to continue the freeze of subpart B rates. *See* Second Seale Comments at 3; Second Lindvall Comments at 10–11. Songwriters cannot be said to have agreed to a royalty late fee waiver if they are not parties to the ''private contract'' that potentially deprives them of those late fees. *See, e.g.,* Lindvall Comments at 11 (settlement expressly refers to undisclosed terms; those ''outside the insider group'' cannot agree without knowledge of extent of consideration exchanged).

Lack of Representation by Negotiators

The Moving Parties asserted that the NMPA ''protects and advances the interests of over 300 music publishers . . . and their songwriting partners . . . .'' Further Comments at 2. They further asserted that NSAI is a trade organization ''of over 4,000 members dedicated to serving songwriters of all genres of music.'' *Id.* Commenters pointed out several issues with the negotiating representatives, NMPA and NSAI.

Several commenters, comprising independent songwriters, independent publishers, and music industry lawyers, challenged the validity of the representatives. *See, e.g.,* Corton Comments at 2 (many NSAI members unaware that organization is agreeing to these rates; no mention on NSAI website); Second Lindvall Comments at 19 (judges suggest unhappy songwriters might ''seek representation elsewhere . . . .''; ''the problem is that there was likely no 'representation' in the first place . . . .''); Seale Comments at 3 (NMPA, NSAI do not represent ''countless millions'' of owners); Comments of Anthony Garnier (Jul. 19, 2021) (NMPA, NSAI have not consulted with any other songwriter organizations); Comments of Abby North (Jul. 26, 2021) (North Comments) at 3 (NMPA, NSAI do not have broad authority they claim); Comments of

[13] The cited *Billboard* article describes a mechanism for allocating unclaimed royalty funds among publishers based upon market share. However, neither the *Billboard* article nor Supplemental Statement in *Phonorecords II* reveal details of the agreement.

Abby North (Nov. 22, 2021) at 1 (Second North Comments) (rightsholders that are not NMPA members cannot opt in to receive money under MOU); SGA Comments at 5 (music creator community ''blindsided'' by settlement). SGA asserts that its own membership numbers 4,500 and its co-commenter SCL has over 2,000 members, but it was not included in the negotiations of rates or the MOU. *See* SGA Comments at 5.

Claiming no voice in the negotiations that resulted in the proposed settlement, the commenters asserted that the resulting rates are contrary to statutory requirements inasmuch as they represent rates negotiated by a willing buyer and imposed on an ''unwilling seller.'' *See* Comments of David Poe (Jul. 12, 2021); Corton Comments at 2 (NSAI members unaware of organization's negotiating positions; nothing on NSAI website about MOU; without knowledge, songwriter member cannot be a willing seller).

Negotiating Strategy

The Moving Parties supported the negotiated settlement by reporting that, in the period 2006 to 2008, they spent ''tens of millions of dollars litigating'' the mechanical royalty rates only to have the Judges adopt the rates in place at that time as reflective of the marketplace. Further Comments at 3. They then projected that the possibility of an adjudicated change in the current subpart B rates was outweighed by the cost of litigating the rates and the uncertainty of the outcome of litigation. *Id.* at 4. Building on the small market share of Subpart B Configurations, the Moving Parties contended that agreement to static subpart B rates was an important concession in the context of the mechanical license proceeding. *Id.*

Commenters took umbrage at the conclusion by NMPA, the publisher trade group, that ''the game is not worth the candle.'' *See* Seale Comments at 6–7. Monica Corton, a veteran in the music publishing business, noted that the negotiators' conclusion to freeze Subpart B Configuration rates as a ''component'' of an overall negotiating strategy to increase digital streaming rates is, after 15 years, ''no longer justifiable.'' Second Corton Comments at 1.

Mr. Johnson's Objections to the Settlement

The only participant in the captioned proceeding to offer comments on the notice of the proposed settlement was George Johnson (GEO). The substance of his comments in opposition to adoption of the settlement tracked with the negative comments of other interested parties detailed above. GEO's filings include: GEO Fourth Opposition Motion (Aug. 10, 2021); Response and Further Opposition to Comments/Motion and Fraudulent Settlement for Subpart B Configurations (Aug. 21, 2021) (Further Opposition); Second Round of Comments (Nov. 23, 2021); Corrected Second Round of Comments (Dec. 1, 2021) (Corrected Second Comments).[14]

Importance of Subpart B Configurations

GEO pointed to the RIAA report cited by other commenters to emphasize that Subpart B Configurations are a growing part of the music business, comprising 15% of the market. *See* Further Opposition at 5. He claimed the importance of subpart B royalties is clear because affected parties ''are all perfectly willing to *spend millions of dollars to fight GEO's proposal to increase the 9.1 cents* for lost inflation . . . .'' *Id.* Other commenters indicated similar concerns.

Rate ''Freeze''

GEO has long advocated inclusion of an inflation index in royalty rates set by the Judges, including the subpart B rates at issue here. In support of his advocacy, GEO has filed 27 pleadings, including motions seeking imposition of an inflation index on section 115 rates[15] and periodic notices of U.S. inflation rates. His plea is bolstered by the many commenters who, almost unanimously, included this suggestion.

Conflicts of Interest

GEO has long assailed the apparent conflict of interests when recording companies engage in negotiations with their related music publishing houses to set royalty rates for the labels to pay to publishers. In this proceeding, GEO further argued that major negotiating parties, three record labels and three publishers, are ''just two hands of the same three foreign corporations *negotiating with themselves* in an American rate proceeding, supposedly designed to help American songwriters and music publishers.'' Corrected Second Comments at 2 (emphasis in original).

Based upon his assumption of self-dealing in this instance, GEO alleged fraud, undue influence, anti-trust violations, and international intrigue. *Id.* at 8–9, 12–13.

Lack of Transparency Regarding MOU

In his analysis of the validity of the MOU, GEO invoked the same conflicts of interest arguments. He referred to the ''No. 2 *Same Parties* rule under willing buyer, willing seller . . . .'' Corrected Second Comments at 1 (emphasis in original). GEO did not identify the source of this ''rule'' and although the Judges are familiar with the concept, they are unaware of any set of rules relating to the determination of a willing buyer/willing seller market value.

GEO asserted, further, that the MOU ''seems to be a clear *quid pro quo*'' to freeze subpart B rates in exchange for the late fee provisions ''and other substantial financial consideration *only benefiting members of NMPA* . . .'' *Id.; see id.* at 8.

GEO also claimed that this MOU, although it is a fourth iteration of side agreements among the parties, was formerly a secret and that it only came to light after commenters raised questions about the reference to it in the Motion.[16] *Id.* at 3. GEO further ascribed malevolent intent to the Moving Parties' timing—filing additional information relating to the MOU on the last day of the comment period. *Id.*

Lack of Representation by Negotiators

GEO claimed to speak for all songwriters and independent or self-publishers. He contended he abandoned his membership in NSAI because he felt NSAI did not represent his interests. *Id.* at 10. Without representation by NSAI, GEO concluded that he had no choice but to participate in this proceeding formally and advocate for his own interests and those of others similarly

[14] GEO Fourth Opposition Motion was filed on the final day of the second comment period (Fourth Opposition). GEO Response and Further Opposition was filed August 21, 2021, after the close of the second comment period (Further Opposition). Nonetheless, the Judges reopened the matter for further comment and the Judges therefore accept the August 21, 2021, filing as a timely comment during the third comment period, which closed November 22, 2021. Though not a comment in response to the **Federal Register** notices, GEO filed a Written Direct Statement on October 13, 2021 (within the third comment period), which included arguments opposing the proposed subpart B settlement at issue. GEO filed a Second Round of Comments on November 23, 2021. These comments were filed a day after the close of the third comment period; GEO filed Corrected Second Round of Comments on December 1, 2021 (Corrected Second Comments). The Judges have occasionally afforded GEO limited leeway in these proceedings, as Mr. Johnson is appearing *pro se* in this proceeding. In this instance, the Judges accept the Second Round of Comments, as amended on December 1, 2021.

[15] Rates are not set by motion, but by agreement or following a full adjudication. While GEO's motions did not result in adoption of an inflation index, GEO's position on this issue is, and has been, clear.

[16] A one-sentence paragraph in the Motion stated simply: ''Concurrent with the settlement, the Joint Record Company Participants and NMPA have separately entered into a memorandum of understanding addressing certain negotiated licensing processes and late fee waivers.'' Motion at 3. This revelation was at the end of the section entitled ''Parties,'' not in the following section entitled ''Nature of the Settlement.''

situated. *Id.* Citing all of the other reasons he objected to the settlement (self-dealing, freezing the rate, using subpart B as a bargaining chip in streaming negotiations, undisclosed MOU waiving rights to late fees), GEO contended that NSAI and NMPA cannot possibly be representing the interests of the section 115 rightsholders.

GEO's comments repeated the refrain of other commenters. He and they disagree with the settlement proposed by trade organizations that claim to represent their interests. They contended that they are not willing sellers in this equation. *Id.* at 11.

Negotiating Strategy

Several commenters cited the negotiating parties' admission that they considered the subpart B rates as insignificant in the context of section 115 licenses. GEO echoed their concerns that the copyright owners' negotiators used subpart B as a loss leader in their attempts to negotiate higher streaming royalty rates. GEO argued further that the streaming services use the frozen subpart B rates, to which NSAI and NMPA agree, as a justification for maintaining or lowering section 115 streaming rates. *Id* at 14. He also opined that keeping subpart B rates frozen, for yet another rate period, will provide a convincing benchmark for the streaming services not only in this proceeding, but in the next, *Phonorecords V. Id.* at 15.

GEO's General Objections

GEO asserted that the section 115 licenses were ''designed to help American songwriters and . . . publishers.'' *Id.* at 2. Similarly, GEO contended that the Judges' rate setting proceedings ''are designed to help songwriters . . . .'' *Id.* at 5. In his objection, he argued that the settlement is contrary to those asserted statutory purposes.

GEO argued that the Moving Parties failed to provide evidence that the proposed settlement is reasonable. *Id.* In that way, he advocated assigning a burden of proof to the Moving Parties.

GEO made several objections based on supposition, rumor, or surmise. For example, he asserted that there is ''an issue of NMPA possibly getting secret 'donations' from . . . major publishers which may amount *to tens of millions of dollars going to NMPA.*'' *Id.* at 2.

Judges' Analysis and Conclusions

The Judges note that each faction in this discussion has alleged that the other side has failed to present evidence that the proposal is or is not a reasonable foundation upon which to base mechanical license rates and terms for subpart B musical works configurations. Although chapter 8 of the Copyright Act encourages parties to enter into settlement negotiations, ultimately the decision as to whether a *contested* settlement[17] should be approved on motion is subject to the Judges' discretion, informed by the submissions of the moving parties and the commenters, and by the Judges' application of the law to the facts.

Only one *participant* in this proceeding, GEO, objected to the proposed settlement. As shown by the foregoing synopsis, however, GEO's objections did not come to the Judges in a vacuum. The statute requires publication of a settlement proposal and solicitation of comments from interested parties—parties who would be bound by the proposed rates and terms. Non-participants who commented on the proposal uniformly objected to adoption of the proposed rates and terms and for reasons that paralleled those stated by GEO. Interested parties' comments are filed in the record of the proceeding and the Judges must analyze those comments even though the Judges may not base rejection of a settlement solely on negative comments from non-participants alone.

It is thus clear that the Judges' review of this or any proposed rates and terms is not a routine matter. The Judges must analyze carefully the terms of the settlement in light of the participant's objections. They must also evaluate the settlement in view of the requirements of section 115. The proposed settlement must not be contrary to the statutory terms of the mechanical license.

Reasonableness

Weighing the objections of GEO and considering those objections in the context of the record before them, the Judges make the following conclusions.

Importance of Subpart B Configurations

Royalties from Subpart B Configurations are not inconsequential to the rightsholders. Subpart B Configurations are qualitatively different from the digital streaming configurations; consequently, the Judges can and do set separate rates for the Subpart B Configurations. Even though the physical and ''permanent'' download products are different in character from streaming uses, the Judges cannot and do not treat them with any less care and attention. Subpart B Configurations, in particular vinyl recordings, are a significant source of income for section 115 rightsholders. The royalties they generate should not be treated as *de minimis,* or as a ''throw away'' negotiating chip to encourage better terms for streaming configurations.

Rate ''Freeze''

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.

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 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.

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.

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

[17] It seems clear that the language of section 801(b)(7)(A) inherently presumes that *uncontested* settlements are *factually* reasonable, but, even then, the Judges must be satisfied that the settlement is consistent with the law.

evidence of the advisability of such an indexed increase.

Conflicts of Interest

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. No party opposing the present settlement has evinced actual or implied evidence of misconduct, other than the corporate structure of the record labels on the one hand and the publishers on the other. 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 MOU are sufficient to question the reasonableness of the settlement at issue as a basis for setting statutory rates and terms.

Lack of Transparency in MOU

The Moving Parties noted in passing that their agreement also included a memorandum of understanding that did not have any impact on the reasonableness of the settlement terms. Reasonableness, however, is undermined by associated bargained-for provisions as to which the Judges have an inadequate basis for evaluation.

The Moving Parties assertion that the MOU is ''irrelevant'' and inconsequential to the settlement terms is facially invalid. First, the MOU is a side agreement between recording companies and publishers, which does not include participation by or agreement of either songwriters or a significant number of owners of musical works subject to the section 115 license. Second, the MOU grants a late fee waiver to licensees that are party to the agreement. This waiver of fees seems to have an indirect impact on proposed royalty returns to rightsholders. Without more complete knowledge of the implications of the MOU, however, the Judges are unable to evaluate the proposed settlement as a whole.

The Moving Parties asserted that the MOU is a private contract between private parties. It appears rather to be an attempt to modify the application of the terms of statutory licenses they allegedly are negotiating in the context of a rate-setting proceeding under the Copyright Act. By its terms, the current MOU was conditional and was not effective until the parties to the MOU (the Moving Parties, *except* NSAI) submitted a motion to adopt the proposed settlement as rates and terms for the Subpart B Configurations in *Phonorecords IV*.

Further, in their pleadings, the Moving Parties asserted that they withheld information regarding the MOU because they considered it ''irrelevant'' to statutory rate setting. Determining relevance is a judgment call reserved to the Judges. The contracting parties cannot hide changed application of a statutory rate scheme behind a ''private contract'' when that contract has implications for non-contracting parties and the ''private contract'' details necessarily inform the reasonableness of the proposed settlement. The Judges, not a participant, can and will decide what is ''irrelevant'' to this rate setting proceeding.

Finally, the Moving Parties justified the MOU by noting that it is the fourth iteration of similar agreements. The fact that this MOU is the fourth of its kind does not prove that it is appropriate or an acceptable corollary to the statutory rates set by this tribunal. Repetition alone does not make a practice advisable or fair. Nor does it indicate that the practice or its details are universally known and approved.

Parties have an undeniable right of contract. The Judges, however, are not required to adopt the terms of any contract, particularly when the contract at issue relates in part, albeit by reference, to additional unknown terms that indicate additional unrevealed consideration passing between the parties, which consideration might have an impact on effective royalty rates.

Lack of Representation by Negotiators

The licensors in this proceeding are represented by their respective trade associations. The commenters asserted that the trade associations, NSAI in particular, did not appear to be representing the best interests of the music creators. It is not within the purview of the Judges to select or direct what parties file petitions to participate in rate setting proceedings. Dissatisfaction with the actions of a participant can only be contested by another participant, presenting competent evidence to inform the Judges of a reasonable outcome; it is not a proper or adequate basis to decline to adopt the settlement.

Negotiating Strategy

The Moving Parties justified their negotiating strategy and the outcome by asserting that the Judges previously continued existing rates after the interested parties spent ''tens of millions'' of dollars litigating the same rates in the mid-2000s. As the Moving Parties noted, however, the Judges' decision at that time was reflective of the conditions of that market. The Moving Parties seemed to be projecting what actions the Judges might take on a new evidentiary record. The 2022 recorded music marketplace is not the 2006 marketplace. The Judges' determination of current rates and terms should be reflective of the current marketplace.

GEO's Other Objections

Contrary to GEO's assertions that the section 115 licenses were ''designed to help American songwriters,'' the statutory rates are intended to benefit both rightsholders *and* licensees by permitting fair and fairly compensated exploitation of copyrighted works in an administratively manageable way. Until a recent statutory change, the Judges were instructed to weigh various factors in setting mechanical royalty rates to assure reasonable results, fair to both sides and of benefit to the music-consuming public. The current statutory standard for determining rates, the standard applicable in this proceeding, is the willing buyer-willing seller standard, which is aimed at finding a free and competitive market rate for the licenses. *See* 17 U.S.C. 115 (c)(1)(F).

GEO alleged that, under the MOU, NMPA might receive ''secret 'donations' from these major publishers which may amount *to tens of millions of dollars going to NMPA.*'' Second Corrected Comments at 2. Although GEO's revelation of an ''issue'' of ''secret donations'' might initially seem lacking in factual bases, it is noteworthy that the MOU contains the following language.

> For the avoidance of doubt, as provided in Section 10.3 of MOU1, it shall not be a breach of this MOU4 if NMPA chooses to seek a donation from Participating Publishers as part of the enrollment process. If, after the Administrator's final accounting and resolution of any disputes, Participating Publisher claims for a given Phase of Group 6 are for less than the 11 payments made by a Participating Record Company for such Phase, then the Administrator shall return any unclaimed monies to the Participating Record Company, and Section 4.21 of MOU1 shall apply, unless RIAA and NMPA agree to simplified procedures for the refund process.

Further Comments, Exhibit C (Memorandum of Understanding) at 10–11.

The provisions of Sections 10.3 and 4.21 of MOU 1 are not in the record of this proceeding and remain unknown to the Judges. They may support GEO's concerns regarding the provision condoning NMPA's solicitation of a ''donation'' as part of an enrollment process. GEO did not provide an evidentiary basis for his claim that, under this provision of the MOU, NMPA might benefit to the extent of ''tens of millions of dollars.'' The extent of NMPA's power to solicit donations ''*as part of the enrollment process*'' and the potential value of those donations, however, raised concerns with commenters who questioned the *quid pro quo* of the MOU and concern the Judges.[18]

If adopted by the Judges, the proposed settlement is one that would bind not only the parties to the MOU, but also songwriter licensors. Songwriters, however, are not parties to the MOU and would apparently not share in any benefit that might flow to licensors under the MOU.

Consistency With the Law and the Statutory License

The Judges reviewed the proposed settlement with regard to whether any portions of the settlement would be contrary to provisions of the applicable license or otherwise contrary to the statute, pursuant to the Register's prior rulings. *See e.g.,* Review of Copyright Royalty Judges Determination, 74 FR 4537, 4540 (Jan 26, 2009). Upon such review, the Judges see no basis to conclude the settlement is contrary to law, except with regard to 801(b)(7)(A).

Conclusion

Rightsholders are free to choose their representation in these proceedings. Admittedly, individual songwriters and self-publishers have traditionally chosen not to expend the resources necessary to participate in these proceedings at the same level as trade organizations and major technology companies. Nonetheless, the outcomes of these proceedings can have a significant impact on the lives of the individual rightsholders. In this proceeding, the Judges received lengthy comments from SGA, which claims to represent thousands of songwriters. For SGA's comments to have independent influence, however, SGA would have needed to join the proceeding as a participant. Nonetheless, with regard to the present proposed settlement, the comments of non-participants cumulatively served to amplify those of the objecting participant.

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 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. 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.

Dated: March 24, 2022.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

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[18] Further, given the absence of any discovery in connection with the procedures for review of a proposed settlement, the absence of evidence at this stage of the proceeding cannot be a sufficient basis to ignore an issue that the Judges find to be a matter of concern.

[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.