

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

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

Docket No. 21-CRB-0001-PR (2023–2027)¹

**JOINT MOTION TO ADOPT NEW SETTLEMENT OF
STATUTORY ROYALTY RATES AND TERMS
FOR SUBPART B CONFIGURATIONS**

The National Music Publishers’ Association, Inc. (“NMPA”) and Nashville Songwriters Association International (“NSAI”) (collectively, “Copyright Owners”), on the one hand, and Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp. (collectively, the “Record Company Participants,” and together with Copyright Owners, the “Parties”), on the other hand, hereby notify the Copyright Royalty Judges that they have agreed to a new settlement in the above-captioned proceeding (the “Proceeding”) as to royalty rates and terms under Section 115 of the Copyright Act (“Section 115”) for physical phonorecords, permanent downloads, ringtones and music bundles presently addressed in 37 C.F.R. Part 385 Subpart B, including certain definitions and the applicable late fee provision (the “Subpart B Configurations,” and such rates and terms, the “Subpart B Configuration Rates and Terms”). The agreed-upon Subpart B Configuration Rates and Terms include an immediate 32% increase to 12¢ per track for physical phonorecords and permanent downloads for 2023 and inflation-based adjustments for subsequent

¹ By using this caption, the Record Company Participants (defined above) are not waiving any rights or expressing any agreement concerning the dates that any rates and terms adopted by the Judges in any rate proceeding are to be in effect.

years of the rate period. Proposed regulations implementing the agreed-upon Subpart B Configuration Rates and Terms are included in the Attachment hereto.

The Parties respectfully request that the Judges expeditiously publish the royalty rates and terms described herein and set forth in the Attachment (the “Settlement”) in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2) and adopt the Settlement industry-wide as the statutory royalty rates and terms for Subpart B Configurations. The Parties further request that the Judges stay and *not* move forward with litigation of statutory royalty rates and terms for Subpart B Configurations while the Settlement is under consideration.

The Record Company Participants do not expect to further participate in the Proceeding except as to prosecution of the Settlement, or if the Settlement is not adopted industry-wide with respect to Subpart B Configurations, any other matters respecting the adoption of royalty rates and terms for Subpart B Configurations.

I. The Parties

All of the Parties filed petitions to participate in this Proceeding.

The Record Company Participants own or operate three of the largest recorded music businesses in the U.S. Each year those businesses create, manufacture and/or distribute a large volume of sound recordings pursuant to mechanical licenses and make substantial royalty payments tied to Section 115 of the Copyright Act. Collectively, products they produce or distribute represent the vast majority of the U.S. sound recording market.

The National Music Publishers’ Association, Inc. (“NMPA”) is a trade association representing the U.S. music publishing and songwriting industry. Its board of directors includes songwriter representatives, and a majority of members of its board are representatives of independent music publishers (*i.e.*, publishers not affiliated with the major record companies).

Musical works owned or controlled by NMPA members account for the vast majority of the market for musical work licensing in the U.S.

The Nashville Songwriters Association International (“NSAI”) is a trade organization serving songwriters of all genres of music, including songwriters who directly publish and license their own music. Its board of directors consists solely of songwriters and a songwriter business manager. Its board of directors does not include any representatives of music publishers or record companies.

II. Nature of the Settlement

As the Judges are aware, the proposed increase in the statutory mechanical royalty rate to 12¢ per track for physical phonorecords and permanent downloads for 2023, with annual inflation-based adjustments for subsequent years of the term, is not the first settlement of Subpart B Configuration Rates and Terms in this Proceeding. On May 25, 2021, the Parties filed a Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations with the Judges. That Motion reflected an agreement among the Parties that the Subpart B Configuration Rates and Terms presently set forth in 37 C.F.R. Part 385 Subparts A and B should continue to be applicable to the Record Company Participants and all other licensees of “mechanical” rights in musical works for the Subpart B Configurations, for the rate period covered by the Proceeding, with only a few minor changes. The Motion requested that the Judges adopt the agreed-upon rates and terms industry-wide as the statutory royalty rates and terms and late fees for all Subpart B Configurations.

On June 25, 2021, the Judges published the proposed settlement in the *Federal Register* and requested comments from the public. 86 Fed. Reg. 40,793 (June 25, 2021). Following receipt of comments from both participants and non-participants to the Proceeding, including non-participant songwriter groups and representatives who submitted comments in opposition, the

Judges published a notice that they were withdrawing the proposed settlement from consideration pursuant to Section 801(b)(7). 87 Fed. Reg. 18,342 (Mar. 30, 2022) (the “Withdrawal Notice”). Among the reasons the Judges gave for rejecting the proposed settlement was the finding that “sixteen years at a static rate is unreasonable under the current record.” *Id.* at 18,347. The Judges noted that “application of a consumer price index cost of living increase, beginning in 2006”—the last year the Subpart B royalty rate was increased—“would yield a statutory subpart B royalty rate for 2021 of approximately \$0.12 per unit as compared with the \$0.091 that prevails.” *Id.* The Judges additionally expressed concern regarding a memorandum of understanding (“MOU”) the Parties had separately entered into addressing “certain negotiated licensing processes and late fee waivers.”² *Id.* at 18,343 (quoting Motion to Adopt Settlement at 3). The Judges stated that they lacked sufficient “knowledge of the implications of the MOU” to evaluate its relevance to the Proceeding or to the proposed settlement. *Id.* at 18,348.

Following the Judges’ rejection of the proposed settlement, the Parties entered into renewed negotiations regarding the Subpart B Configuration Rates and Terms for the rate period covered by the Proceeding. As part of these negotiations, the Parties engaged the majority of the songwriter groups and representatives who had submitted comments in opposition to the proposed settlement to discuss their views regarding a potential new settlement with a new, higher royalty rate for physical phonorecords and permanent downloads.

² The Parties note that they previously provided the Judges and the public access to comprehensive information about prior versions of the MOU program, including copies of predecessor MOUs. *See* Comments in Further Support of the Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations, at 7 (Aug. 10, 2021). Because the Judges’ April 28, 2022 referral to the Register of Copyrights suggests that the Judges remain interested in the three predecessor MOUs but also states incorrectly (at footnote 10) that the Parties “did not provide (and still have not provided) to the Judges and the public” those predecessor MOUs, the Parties reiterate that the MOUs are publicly available online at <http://nmpalatefeesettlement.com/>.

As a result of these renewed negotiations, the Parties have agreed that the Subpart B Configuration Rates and Terms presently set forth in 37 C.F.R. Part 385 Subparts A and B should be amended as set forth in the Attachment and should be applicable to the Record Company Participants and all other licensees of “mechanical” rights in musical works for the Subpart B Configurations, for the rate period covered by the Proceeding. The amended rates and terms revise the per-work rate for physical phonorecords and permanent downloads upward from 9.1¢ per track to 12¢ per track for 2023 and provide for annual rate adjustments for the rest of the term based on changes to the consumer price index. The 12¢ rate is the one the Judges derived by comparing the Consumer Price Index for all Urban Consumers (“CPI-U”) in 2021 to the CPI-U in 2006. The formula for the annual rate adjustment for subsequent years of the rate period is based on the formula for annual rate adjustments that the Judges adopted in the *Web V* proceeding. See 86 Fed Reg. 59,452, 59,593 (Oct. 27, 2021). The Parties have further agreed that except for these changes to the physical phonorecord and permanent download rates, the Subpart B Configuration Rates and Terms presently set forth in 37 C.F.R. Part 385 Subparts A and B, including the late fee term, should continue to be applicable for the rate period covered by the Proceeding, with only a few minor editorial changes to the applicable regulations as set forth in the Attachment. The rationale for the editorial changes is set forth in drafting notes in the Attachment.

III. Adoption of the Settlement by the Copyright Royalty Judges

Encouraging settlements was a key goal of Congress when it adopted the current ratesetting procedures. H. Rep. No. 108-408, at 30 (Jan. 30, 2004) (“the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates”). Accordingly, pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority “[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the

proceeding.” Such an agreement may serve as the basis of proposed regulations if other interested parties who “would be bound by the terms, rates or other determination” set by the agreement are afforded “an opportunity to comment on the agreement,” *id.* § 801(b)(7)(A)(i), and provided that, in the event a participant in the proceeding who would be bound by the settlement raises an objection, the Judges conclude that the rates and terms set forth in the settlement agreement “provide a reasonable basis for setting statutory terms or rates.” *Id.* § 801(b)(7)(A)(ii).

The new Settlement provides “a reasonable basis” for statutory royalty rates and terms for Subpart B Configurations. First, it provides an immediate 32% increase to 12¢ per track for physical phonorecords and permanent downloads and provides for annual inflation-based adjustments for subsequent years of the term. This substantial increase and provision for annual adjustments responds to the Judges’ concerns regarding “static” rates. Second, it represents the consensus of stakeholders representing the vast majority of the market for “mechanical” rights for Subpart B Configurations, including many of the songwriter groups and representatives who did not support the prior proposed settlement. A significant number of those groups and representatives have indicated to the Parties that they support the new Settlement and will provide letters to the Judges in support of its adoption. Third, the new Settlement was negotiated independently of the MOU—which was executed a year ago, prior to the Parties’ entering into renewed negotiations regarding Subpart B Configuration Rates and Terms—and so was not consideration for any of the terms set forth in this new Settlement. Fourth, the new Settlement, if adopted, would avoid costly and uncertain litigation between the Parties over the proper rates and terms for Subpart B configurations.

Accordingly, the Parties are pleased to have reached the Settlement, and respectfully request that the Judges (1) publish the Settlement for comment expeditiously; (2) promptly adopt

the Settlement in its entirety as the Subpart B Configuration Rates and Terms; and (3) stay and not move forward with litigation of statutory royalty rates and terms for Subpart B Configurations while the Settlement is under consideration.

Dated: May 5, 2022

Respectfully submitted,

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Attachment

Proposed Regulations

The parties propose the following changes to the applicable regulatory language, which are shown below with additions in **bold and underlined** text and deletions in ~~bold with a strikethrough~~. To the extent that the provisions set forth below are also applicable to configurations other than Subpart B Configurations, such matters are outside the scope of the Settlement.

Subpart A—Regulations of General Application

§385.2 [Applicable] Definitions.

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e).

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity, ~~as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and~~, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Interactive Eligible Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

[Drafting Note: The term Licensed Activity is not currently used in Subpart B, and the Parties do not propose to use that term in Subpart B. Accordingly, it seems unnecessary to define the term with reference to Subpart B.]

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical

phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Permanent Download has the same meaning as in 17 U.S.C. 115(e).

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Sound Recording Company means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of ~~the Copyright Owner of the sound recording~~ a person identified in paragraph (1) through (3).

[Drafting Note: The defined term Copyright Owner refers to the copyright owner of a musical work, so it is inappropriate to use that defined term with reference to a sound recording.]

§385.3 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment.

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

§385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing physical phonorecords, ~~including by means of Digital Phonorecord Deliveries~~ Permanent

Downloads, Ringtones and Music Bundles, in accordance with the provisions of 17 U.S.C. 115.

[Drafting Note: These changes are intended to reflect the specific subject matter of this subpart, as distinguished from Part 385 as a whole.]

§385.11 Royalty rates.

(a) *Physical phonorecords ~~deliveries~~ and Permanent Downloads.*

[Drafting Note: The change to the caption of this paragraph is intended to conform the caption to the text of the paragraph and use the typical configuration name as in the case of the other paragraphs in the section.]

(1) 2023 Rate. For **the year 2023, for** every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either ~~9.1~~ **12.0** cents or ~~1.75~~ **2.31** cents per minute of playing time or fraction thereof, whichever amount is larger.

[Drafting Note: This paragraph specifies the increased statutory royalty rate for 2023. Consistent with 37 C.F.R. § 380.10(a), it is intended to be amended annually as provided in new paragraph (a)(2) below.]

(2) Annual rate adjustment. **The Copyright Royalty Judges shall adjust the royalty rates in paragraph (a)(1) each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year. The calculation of the rate for each year shall be cumulative based on a calculation of the percentage increase in the CPI-U from the CPI-U published in November, 2022 (the Base Rate) and shall be made according to the following formulas: for the per-work rate, $(1 + (C_y - \text{Base Rate}) / \text{Base Rate}) \times 12\text{¢}$, rounded to the nearest tenth of a cent; for the per-minute rate, $(1 + (C_y - \text{Base Rate}) / \text{Base Rate}) \times 2.31\text{¢}$, rounded to the nearest hundredth of a cent; where C_y is the CPI-U published by the Secretary of Labor before December 1 of the preceding year. The Judges shall publish notice of the adjusted fees in the Federal Register at least 25 days before January 1. The adjusted fees shall be effective on January 1.**

(b) *Ringtones.* For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles.* For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Proof of Delivery

I hereby certify that on Thursday, May 05, 2022, I provided a true and correct copy of the Joint Motion to Adopt New Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations to the following:

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at joe.wetzel@lw.com

Google LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Joint Record Company Participants, represented by Susan Chertkof, served via E-Service at susan.chertkof@riaa.com

Amazon.com Services LLC, represented by Joshua D Branson, served via E-Service at jbranson@kellogghansen.com

Signed: /s/ Benjamin K Semel