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

In the Matter of: DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III)	Docket No. 16–CRB–0003–PR (2018–2022)

COPYRIGHT OWNERS' MOTION FOR CLARIFICATION OR CORRECTION OF TYPOGRAPHICAL ERRORS AND CERTAIN REGULATORY TERMS

The National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI") (together, the "Copyright Owners") do not request rehearing, but submit this motion pursuant to the general motion procedures of 37 CFR §§ 350.3 and 350.4 to put before the Judges certain questions concerning the regulatory terms ("Regulatory Terms") attached to the Initial Determination (the "Determination").

The Copyright Owners submit for the Judges' consideration correcting what appear to be typographical and similar errors (including missing or incomplete definitions) in certain of the regulatory terms and modifying or clarifying certain of the Regulatory Terms to conform them to what appears to be the intent of the Determination.

As required by 37 CFR § 350.4, a Proposed Order accompanies this motion, proposing revisions to the Regulatory Terms to resolve the questions discussed herein.[1]

[1] The Proposed Order also conforms the Regulatory Terms' Table of Contents to the body of the Regulatory Terms.

Clarifying Or Correcting The Below Regulatory Terms Will Better Implement The Determination

A. *Definitions of Service and Offering Service*

The capitalized term *Service* is used often in the Regulatory Terms, however it is not defined therein. On the other hand, the term *Offering Service* is defined, but is not used in the Regulatory Terms.

The definition of *Offering Service* is derived from the definition of *Service Provider* in Section 385.11 of the current regulations. In the Regulatory Terms, however, the definition has been expanded to include the licensees (generally, record labels) of permanent downloads, physical phonorecords and ringtones (*i.e.*, licensees in the former Subpart A, which is now Subpart B of the Regulatory Terms, and thus hereafter referred to as the "New Subpart B"). But because *Offering Service* is not a term that is used in the New Subpart B, it is not necessary for the definition of Offering Service to be revised to include New Subpart B licensees. Rather, the term *Licensee*, which is separately defined in the Regulatory Terms (and which is used in the New Subpart B and the new Subpart A) suffices to provide the terms for the New Subpart B licensees. Further, defining New Subpart B licensees as *Offering Services* as well as *Licensees* is problematic, as it pulls the New Subpart B licensees into other provisions that are intended to apply to interactive streaming services rather than New Subpart B licensees.

As reflected in the accompanying Proposed Order, the Copyright Owners respectfully submit that the unintentional ambiguities from (i) using the undefined term *Service* and (ii) revising *Offering Service* to include the New Subpart B licensees can be easily corrected (and the regulations further simplified) by simply changing the defined term *Offering Service* to *Service*, and by deleting subparagraph (1) of that definition covering the New Subpart B licensees (who are already defined as *Licensees*). This would essentially conform the definition of *Offering Service*

in the Regulatory Terms to the existing definition of *Service Provider* in the former Subpart B covering Interactive Streaming and Limited Download licensees (at 37 CFR § 385.11).

B. *Definitions of Licensed Activity and Offering*

The Determination revises the definition of *Licensed Activity*, which in the current regulations are confined to interactive streams and limited downloads, to now include New Subpart B products (physical phonorecords, permanent digital downloads, and ringtones). The definition of *Offering* was similarly changed.

This definition, however, also pulls New Subpart B products into definitions and provisions that are not applicable to New Subpart B products. For example, the term *Licensed Activity* is used in the definition of *Promotional Offering*, but New Subpart B products have never been the subject of promotional uses entitled to a zero rate. *See, e.g.,* 37 CFR § 385.14(a)(vii)(4) ("The promotional royalty rate is exclusively for audio-only interactive streaming and limited downloads of musical works subject to licensing under 17 U.S.C. 115. The promotional royalty rate does not apply to any other use under 17 U.S.C. 115 . . . ."). Thus, the new regulations inadvertently alter the approved settlement and the newly published regulations effectuating that settlement.[2]

Similarly, the use of the term *Licensed Activity*, to the extent that it now inadvertently includes New Subpart B products in the definitions of *Bundled Subscription Services* (in Section 385.22) and in the rate calculation methodologies in Section 385.21, as well as the use of the term

[2] The rates and terms for New Subpart B products were of course bifurcated from the hearing, and settled on terms published in the Federal Register, providing that "the currently existing rates and terms in subpart A of 37 CFR part 385" were "to continue unaltered." Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); Subpart A Configurations of the Mechanical License, 82 Fed. Reg. 15297-01, 15297 (Mar. 28, 2017).

The Determination also holds that it "accept[s] the agreed definition in the extant regulations and the agreed zero rate for promotional streams." Determination at 93 (emphasis added). This appears to confirm that the Determination intended no change to the New Subpart B and the regulations recently published in the Federal Register. *See also* Definitions of Promotional Offering and Free Trial Offering at section I, *infra*.

Offering, to the extent it inadvertently includes New Subpart B products in the definition of *Relevant Page* (which is used in the *Service Revenue* definition and relates to interactive streaming services), include the same ambiguity.

These ambiguities can be resolved by revisions to the definitions of *Licensed Activity* and *Offering* as shown in the accompanying Proposed Order.

C. *Definition of Play*

Play is defined in the Regulatory Terms as "an interactive stream or limited download of 30 seconds or more, except a track that lasts in its entirety under 30 seconds and the End User streams the entire 30 second duration of the track." (emphasis added)

There appear to be two typographical errors here. First, the above underlined "30 second" language appears inadvertent, since a track of less than 30 seconds cannot be streamed for 30 seconds, and thus simply "the entire duration of the track" would clarify what seems to have been intended.

Second, in place of the above underlined word "except," it appears what was intended was the word "and." The word "except" may imply that streams of the full duration of sub-30 second tracks are not plays, when it seems clear that they are intended to be counted as plays. The proposed correction conforms to definitions advanced by the Services in this proceeding. *See* Google Proposal at 4; Spotify Proposal at 7; Pandora Proposal at 5.[3]

[3] Amazon Digital Services LLC's Proposed Rates and Terms is referred to herein as "Amazon Proposal." Apple Inc. Proposed Rates and Terms is referred to herein as "Apple Proposal." Google Inc.'s Amended Proposed Rates and Terms is referred to herein as "Google Proposal." Proposed Rates and Terms of Pandora Media, Inc. (As Amended) is referred to herein as "Pandora Proposal." Second Amended Proposed Rates and Terms Of Spotify USA Inc. is referred to herein as "Spotify Proposal."

D. ***Definition of Total Cost of Content and Applicable Consideration***

The definition of *Total Cost of Content* in the Regulatory Terms is based on Section 385.13(b) of the existing regulations, and contains the phrase "which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP." Regulatory Terms § 385.2, at 8 (emphasis added). The above underlined term *applicable consideration* is an important term of art that is defined in the existing § 385.11, but was likely inadvertently omitted from the new Regulatory Terms. It was explained at the hearing that the definition of *applicable consideration* was added in *Phonorecords II* to ensure "TCCi" or "TCC integrity" and avoid the undermining of the TCC rate prong. (*E.g.*, Tr. 161) The Proposed Order would include the existing definition of *applicable consideration* to avoid any doubt that *applicable consideration* continues to have the same meaning as defined in the current terms. This definition is consistent with the proposals of every Service that proposed a TCC prong. Google Proposal at 2-3, 12-13; Spotify Proposal at 6, 15-16; Pandora Proposal at 3, 11-13; Amazon Proposal at 2.

E. ***Definition of Student Plan***

The Determination purports to "adopt the Services' proposal, in the form articulated by Spotify," for student accounts. Determination at 93. However, the definition in the Regulatory Terms of "*Student Plan or Student Account*" does not include the language proposed by Spotify (and the other Services) or indeed any definition of what constitutes a "student."

It appears clear that the Determination intended to provide a discounted mechanical floor for subscription plans offered to college students, as articulated by the Services, who provided generally similar definitions of their requested "student account," namely "an individual subscription that meets at least the following criteria: the individual is enrolled in at least one

course at a college geographically located in the United States." Spotify Proposal at 11. *See also* Amazon Proposal at 5 (same) and Pandora Proposal at 8 (same).

The definition in the Regulatory Terms is that: "*Student Plan or Student Account* means a discounted subscription available on a limited basis by a Service." This definition does not appear to be what the Determination intended. The language might wrongly imply that family plans are also student plans, and that anyone can get a student plan, whether or not a student. The Copyright Owners submit that using the language proposed by Spotify and the other Services more faithfully implements what was intended in the Determination, as reflected in the Proposed Order.

F. ***Family Plan Proration Provision***

The Regulatory Terms provide for modifications to the subscriber-based monthly royalty floors for student and family plans. These modifications are to be prorated for partial calendar months pursuant to 385.22(b). The proration provision with respect to family plans states:

> A Family plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family plan end user who subscribed for only part of a calendar month.

This language appears to create an ambiguity since family plans allow for more than one end user to make plays, and thus a family plan has *multiple* end users for *one* subscription. A particular family plan subscription could thus be in effect for an entire calendar month, and yet have an (additional) end user participating for only a portion of the month. Since the language calls for proration for each "end user who subscribed," it could be questioned what is meant.

Since the only clear way to prorate family plans is based upon *subscription* status, not end user status, which is what the Copyright Owners believe was intended by the Determination, the Proposed Order clarifies the language of §385.22(b) to state that Family plans are "prorated in the

case of a Family plan subscription in effect for only part of a calendar month," which removes any perceived ambiguity.[4]

G. *Omission of the Two Subpart C Subscriber-Based All-In Royalty Floors*

The Determination states that "[t]he existing subscriber-based royalty floors shall remain in effect during the new rate period." Determination at 1. Section 385.22 of the Regulatory Terms then includes the subscriber-based royalty floors for the former Subpart B offerings. Two of the five former Subpart C offerings also have subscriber-based royalty floors: paid locker services (17 cents all-in) and limited offerings (18 cents all-in). However, these royalty floors were omitted from the Regulatory Terms, although the Determination does not hold that they should be omitted. It thus appears an oversight, and the Proposed Order includes provisions in §385.22 for rolling forward the existing all-in subscriber-based royalty floors from the former Subpart C, alongside the four former Subpart B floors, consistent with the holding in the Determination.

H. *Definitions of Locker Service and Purchased Content Locker Service*

The Determination distinguishes between the two types of locker services: paid locker services and purchased content locker services, and simplifies the definitions of *Locker Service*, *Paid Locker Service* and *Purchased Content Locker Service*. Determination at 77, 92. However, two apparently unintentional ambiguities now exist in the Regulatory Terms that merit clarification.

[4] We note also that there is an unrelated typographical error in the Family Plan section of the Determination. The Determination states that "Family accounts are to be counted as **one subscriber**." Determination at 95. But other statements in that section, as well as Section 385.22(b) of the Regulatory Terms, make plain that the Judges intended to state that "Family accounts are to be counted as **1.5** subscribers," as the Services requested.

1. Definition of Locker Service

The Regulatory Terms contain language that could be viewed as inadvertently conflating paid locker services with regular portable streaming service offerings. Since the two offerings have different subscriber-based royalty floors, the distinction is material.

What distinguishes a paid locker service from a standard subscription service is that the paid locker service streams only works that the service has reasonably determined have been purchased by or are otherwise in possession of the end user. If a user can stream all works, even those that he or she did not already possess, that is a standard subscription service, not a paid locker service, and is properly subject to the higher subscriber-based royalty floor.

The new definition of *Locker Service* omits language that makes this distinction which the Copyright Owners believe was not intended by the Judges. The relevant language is underlined in this comparison of the new and old definitions:

New definition	*Locker Service* means an Offering providing digital access to sound recordings of musical works in the form of Interactive Streams, Permanent Digital Downloads, Restricted Downloads or Ringtones But does not mean any part of a Service's products otherwise meeting this definition, but as to which the Service has not obtained a section 115 license.
Prior definition	*Locker Service* means a service providing access to sound recordings of musical works in the form of interactive streams, permanent digital downloads, restricted downloads or ringtones, where the service has reasonably determined that phonorecords of the applicable sound recordings have been purchased by the end user or are otherwise in the possession of the end user prior to the end user's first request to access such sound recordings by means of the service. The term locker service does not extend to any part of a service otherwise meeting this definition as to which a license is not obtained for the applicable reproductions and distributions of musical works. (Emphasis added)

Similar language to the underlined appears in the new *Purchased Content Locker Service* definition, but not in the new *Paid Locker Service* or the new general *Locker Service* definition.

The Proposed Order continues language similar to the underlined in the new definition of *Locker Service* as well, as it seems plain that this was intended by the Determination.

2. Definition of Purchased Content Locker Service

There is a slightly different concern with the definition of *Purchased Content Locker Service*, although similarly easy to resolve. Purchased content locker services involve streaming only works that were purchased from the Service or another qualified seller as a New Subpart B product. As the existing regulations and the Services' proposals confirm, actual purchase from the Service or another qualified seller is a necessary part of the definition, and it does not permit streaming of any recording that the user is "otherwise in possession of."

It appears that the "otherwise in possession of" language in the Regulatory Terms definition of *Purchased Content Locker Service* was inadvertently migrated from the general *Locker Service* definition (but not continued there). This language is appropriate for the general *Locker Service* definition, and indeed the Proposed Order would continue the language there, but purchased content locker services have a more precise limitation. The Proposed Order – which simply deletes the phrase "or otherwise in possession of" from the new definition of *Purchased Content Locker Service* – continues the accepted marketplace limitation, and is consistent with the Services' proposed definitions of *Purchased Content Locker Service*. Apple Proposal at 6-7; Amazon Proposal at 2, 7-8; Google Proposal at 23-24; Pandora Proposal at 23.

I. *Definitions of Promotional Offering and Free Trial Offering*

As noted above (*see* footnote 2, supra), the Determination "accept[s] the agreed definition in the extant regulations and the agreed zero rate for promotional streams." Determination at 93.

The new definition of *Promotional Offering* however introduces material changes to the agreed definition in the extant regulations, and thus appears inadvertent. The definitional change

would also sweep in New Subpart B products and have the unintentional consequence of changing the New Subpart B settlement and recently published regulations effectuating that settlement. The definition also introduces an ambiguity by including promotion by a label or Service for which the label or Service receives no consideration other than "in-kind promotional consideration," which is undefined and unclear.

Although the general simplification in the Regulatory Terms is a welcome improvement, the Copyright Owners submit that the maintenance of the existing promotional offerings provision at 37 CFR § 385.14 is appropriate for the holding in the Determination to maintain the existing terms and associated zero rate. The modification of the definition of promotional activities, while maintaining the zero rate, could lead to a mistaken assumption that there was an unintentional expansion of the scope of activities subject to a zero rate, and would conflict with the accepted settlement of the parties on New Subpart B.

Retaining the terms of the existing § 385.14 as the new § 385.31 will also allow for the removal of the *Free Trial Offering* definition in the Regulatory Terms. The definition of *Free Trial Offering* is drawn from a former Subpart C provision that "establishes a royalty rate of zero in the case of free trial periods for mixed service bundles, paid locker services and limited offerings under a license pursuant to 17 U.S.C. 115." 37 CFR § 385.24. But all interactive streaming offerings are covered under § 385.14, which also covers free trial offerings. *See* 37 CFR § 384.14(a), § 384.14 (a)(v), § 384.14 (b).

Thus, the intention of the Determination to carry forward the zero royalty rate for promotional and free trial streams "as they are defined in the regulations" would not be achieved by creating the separate and new definitions. The existing § 385.14 language, albeit long-winded, sets forth the complete set of (and important limitations on) the promotional activities for which a

zero rate might apply (and includes 30-day free trial periods for all types of interactive streaming and limited download offerings), carrying forward the promotional terms that exist, which is the Determination's stated intent.

The Copyright Owners thus propose to replace the new definitions of *Promotional Offering* and *Free Trial Offering* with a definition of *Promotional Offering* tied to a *Promotional Royalty Rate* that carries forward the terms of the existing Section 385.14 regulation into the new Section 385.31.[5] That regulation already covers both types of offerings. Conforming changes are made to Subpart D as shown in the Proposed Order.

J. *Definition of Service Revenue From Bundle Offerings*

The Copyright Owners submit that the definition of *Service Revenue* in the Regulatory Terms as it relates to bundles (which was not explicitly discussed in the Determination) was not intended and warrants revision to be consistent with the Determination as well as the Judges' holdings in *Web IV* and the *SDARS* proceedings.

In *SDARS I*, the Judges addressed a problem in the definition of bundle revenue by correcting, without any rehearing, the definition that had been put forward in their Initial Determination. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080 at 4081 (Jan. 24, 2008). The Copyright Owners submit that a similar procedure would be appropriate here.

[5] Retaining the existing Section 385.14 will also solve the problem of a lack of a definition of "in-kind promotional consideration" in the new Promotional Offering definition. Both the existing 385.14 and 384.24 require that "the primary purpose" of the record company in making or authorizing the free trial period or other promotional offering be to promote either "the sale or other paid use of sound recordings by the relevant artist," or "the paid use of one or more established retail music services through which the sound recording is available, and not to promote any other good or service." 37 CFR § 385.14(a)(i); § 385.24(a)(1). The Copyright Owners believe that the language in the existing 384.14 covers both types of specifically-defined promotional consideration, although, for clarity, the phrase "or any subscription Offering" could be added to 385.14(a)(i).

The new Regulatory Terms include a definition of Service Revenue in the case of Bundles that is carried forward from the current regulations, as follows:

> *Service revenue.* ... (5) In instances in which a Service provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service for the Offering for the purpose of paragraph (1) of this definition of Service Revenue shall be the revenue recognized from End Users for the Bundle less the standalone published price for End Users for each of the other component(s) of the Bundle; provided that, if there is no standalone published price for a component of the Bundle, then the Service shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

The adoption of this definition was not discussed in the Determination and appears inadvertent and is inconsistent with reasoning of the Judges on fairness as explained in both *Web IV* and *SDARS III*.

Under this definition, for a bundle that includes an interactive streaming service plus one other item, the attributed price for streaming would be the total price minus the "standalone published" price of the other item. The Judges explicitly discussed the unfairness of this precise approach in *Web IV*, noting that: "If a vendor offered an ice cream cone… for $1.00, but offered two ice cream cones for $1.06, it would be absurd to conclude that the true market price of an ice cream cone is the incremental six cents." *Web IV*, 81 Fed. Reg. 26316 at 26382 (May 2, 2016). *See also* Initial Determination, *SDARS III* at pages 112-115 (December 14, 2017) (rejecting proposed deductions by service from bundle revenues because of the "acknowledged 'economic indeterminacy' problem inherent in bundling").

It was also undisputed at the hearing that, using this definition of service revenue, services have "allocated" zero revenues from bundles for royalty purposes, despite generating massive bundle revenues while sending billions of streams to millions of users. (*See, e.g.*, Copyright

Owners Proposed Conclusions of Law at COL-364, 365) This is again precisely the type of accounting that was considered "absurd" in *Web IV*.

In *SDARS III*, the Judges disallowed *any* exclusion from bundle revenue, counting total bundle revenue towards the royalty revenue base. If the Judges instead intend here to allow deductions from total bundle revenue, the current definition would be made more consistent with the Judges' reasoning by simply stating that the revenue attributed to a particular offering in a bundle is the standalone price of the offering (or comparables). The Proposed Order thus contains this revision to the definition of *Service Revenue*.

CONCLUSION

The Copyright Owners respectfully submit that the accompanying Proposed Order should be adopted, as the revisions to the Regulatory Terms noted therein will appropriately implement the Determination.

Dated: February 12, 2018

Respectfully submitted,

PRYOR CASHMAN LLP

By: _____

Donald S. Zakarin
James A. Janowitz
Frank P. Scibilia
Lisa M. Buckley
Benjamin K. Semel
7 Times Square
New York, New York 10036
Tel.: 212-421-4100
dzakarin@pryorcashman.com
jjanowitz@pryorcashman.com
fscibilia@pryorcashman.com
lbuckley@pryorcashman.com
bsemel@pryorcashman.com

Counsel for Copyright Owners

Certificate of Service

I hereby certify that on Monday, February 12, 2018 I provided a true and correct copy of the Copyright Owners' Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms to the following:

Spotify USA Inc., represented by Anita Lam served via Electronic Service at alam@mayerbrown.com

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

Google Inc., represented by Ivana Dukanovic served via Electronic Service at idukanovic@kslaw.com

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

Pandora Media, Inc., represented by Bruce Rich served via Electronic Service at bruce.rich@weil.com

Amazon Digital Services, LLC, represented by Thomas P Lane served via Electronic Service at tlane@winston.com

Signed: /s/ Benjamin K Semel