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

In the Matter of: **Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*)**	**16–CRB–0003–PR (2018–2022)**

SERVICES' OPPOSITION TO THE NMPA AND NSAI'S "INTERIM RATES MOTION"

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I. INTRODUCTION

Amazon.com Services LLC ("Amazon"), Pandora Media, LLC ("Pandora"), and Spotify USA Inc. ("Spotify," and, collectively, the "Services") respectfully submit this opposition to the motion filed by the National Music Publishers' Association, Inc. (the "NMPA") and the Nashville Songwriters Association International (the "NSAI," and, collectively, the "Copyright Owners") on November 2, 2020 (the "Motion").

In *Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020), the D.C. Circuit reviewed this agency's Final Determination in *Phonorecords III*. The result of the court's review was to "vacate and remand the Board's adopted rate structure and percentages." *Id.* at 381. The Motion now asks the Judges to ignore that ruling by reimposing the same rate structure and rate levels on an interim basis, in direct contravention of the court's order vacating them. The Judges should decline the invitation.

First and most important, the proposed interim remedy would conflict with the D.C. Circuit's ruling. Once the court's mandate issued on October 26, 2020, the *Phonorecords III* Final Determination was vacated as a matter of law. That remedy was not the only one available for the court to order, even after having reversed on the merits. It could have preserved the *Phonorecords III* rate structure and rate levels by remanding without vacating — a remedy available for erroneous agency actions that are easily corrected on remand (in circumstances where temporarily vacating a likely salvageable rule would cause severe and unnecessary disruption to the industry). But that was not the path the court chose. Faced with the decision actually rendered, the Copyright Owners had ample opportunity to ask the court to reconsider or revise its ruling, but they never even asked for such relief. Specifically, they could have moved for rehearing asking the court to modify its judgment to remand without vacating. But they did not do that. Or they could have moved the court to stay the issuance of the mandate while the

Judges complete the remand proceedings. They did not do that either. Instead, they filed a Motion that would have the Judges implement a remedy that directly conflicts with the one the *D.C. Circuit* actually ordered, which was to invalidate the *Phonorecords III* rate structure and rate levels. The Motion should be denied for that reason alone.

Second, the Judges cannot adopt interim rates and terms in any event because the Copyright Act does not grant the power to do so. There is no sound basis to conclude, as the Motion urges, that "inherent authority" exists to engage in interim rate-setting as a general matter — much less the "inherent authority" to give force of law to the precise rate structure and percentages that a federal court has just vacated as unlawful. The effect of that vacatur was, unambiguously, to reinstate the preceding rates and terms — *i.e.*, those from the *Phonorecords II* determination — pending a new final determination of *Phonorecords III* rates and terms by the Judges, which will have retroactive effect back to the start of the *Phonorecords III* rate period once it is promulgated. Under the mandatory language of 17 U.S.C. § 803(d)(2)(B), that means that *Phonorecords II* rates and terms "shall remain in effect" until "successor rates and terms become effective." The only way for that to happen is for the Judges to respond appropriately to the D.C. Circuit's decision and issue a new *Phonorecords III* ruling. The statute neither contemplates nor permits a shortcut allowing successor rates and terms to be implemented on an interim basis pending the issuance of a final determination.

Third, the "uncertainty" and "disruption" invoked by the Motion as justifications for agency action are strawmen that will not materialize if the remand takes its course without intervention. There is no uncertainty about the operative rates today. When the D.C. Circuit vacates an administrative decision, the decision becomes a "nullity," and the operative regulatory regime reverts to the status quo ante. *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671-72

(D.C. Cir. 2006). By the time this Motion is decided, at least a month's worth of royalty payments (if not more) will have been made under *Phonorecords II*, following the remand. The only approach that would cause further disruption here would be to whipsaw the industry back to the *Phonorecords III* paradigm which has already been vacated and treated as such. And regardless, the Motion's factual assertions regarding the predicted effects of allowing the case to proceed on remand without setting interim rates and terms are unsupported by any record evidence and therefore cannot serve as the basis for agency action.

One final point bears emphasis at the outset: The Services *agree* with the Copyright Owners that nothing about the court's decision requires any "true ups" or "true downs" *now*. To the extent the Motion is predicated on a concern for avoiding the need for any party immediately to pay back royalties received under the now-vacated regime, that concern is a non-issue: neither the Copyright Owners nor the Services believe that any such accounting is warranted or required at this time, rather than being called for solely at the end of the rate-setting process.

II. BACKGROUND

In *Johnson*, the D.C. Circuit unanimously identified three errors in the Judges' *Phonorecords III* Final Determination that led it to vacate that decision. First, the court found that the Services "had no fair notice" that the Judges would "take the dramatic step of uncapping the total content cost prong for every category of service offering." *Johnson*, 969 F.3d at 381. This failure to provide fair notice "is no mere formality." *Id.* As the court explained, "[b]y eliminating any cap on the total content cost prongs, the Final Determination yokes the mechanical license royalties to the sound recording rightsholders' unchecked market power" and — "[w]orse still" — was coupled with "significant hike[s] [to] both the revenue rate and the total content cost rates the streaming services would have to pay." *Id.* at 382-83. The court found

that, if the "Board wishes to pursue [this] novel rate structure [on remand], it will need to reopen the evidentiary record." *Id.* at 383.

Second, the court found that the Judges had not sufficiently explained why they rejected the *Phonorecords II* rates as a benchmark. *See id.* at 387. The court found that the Final Determination's sole ground for rejecting that benchmark — the lack of "evidence of the parties' subjective intent in negotiating" that settlement — failed under prevailing administrative law principles. *Id.* at 387. Echoing the conclusion of Judge Strickler in dissent, the court held that the Judges are required to consider anew using the *Phonorecords II* rates as a benchmark. *Id*.

As a result of these two fundamental errors, the D.C. Circuit found it premature to address challenges to the Final Determination's application of the statutory factors in § 801(b)(1)(B)-(D). *See id.* at 389. As the court explained, the Judges' analysis of those § 801(b)(1) factors on remand will be necessarily "intertwined with the nature of the rate structure ultimately imposed by the Board" after properly considering the *Phonorecords II* benchmark. *Id.* Indeed, for any rate structure the Judges adopt, the analysis and balancing of the § 801(b)(1) factors must be re-done. *See id.*

Third, the court held that the Order on Rehearing and Final Determination "failed to explain" the legal basis for the decision, on rehearing, to change the definition of Service Revenue for bundles found in the Initial Determination. *Id.* at 389. The court found that § 803 "identifies three ways in which the Board can revise its Initial Determinations," and that the revision to the Service Revenue definition "fit none of those categories." *Id.* at 390. The court also rejected the claim that the Judges have "inherent authority *sua sponte* to" revise an Initial Determination, finding that the assertion of such authority would render the Copyright Act's other provisions a "nullity." *Id.* at 392.

In light of these errors, the court "vacate[d] and remand[ed] the Board's adopted rate structure and percentages" in the *Phonorecords III* Final Determination. *Id* at 381.

In response to the court's decision, George Johnson filed a motion for rehearing, which both the panel and the *en banc* court denied on October 16, 2020. Neither the Copyright Owners nor the Judges sought rehearing or clarification, and no party moved to stay the issuance of the mandate, which issued on October 26, 2020. Had such a motion been filed, the D.C. Circuit would have considered the same factors — the extent of the identified deficiencies in the Final Determination and the disruptive consequences of a vacatur during remand — that the Copyright Owners now argue support reinstating the vacated *Phonorecords III* Final Determination on an interim basis. *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (addressing *Allied-Signal* factors, *see infra* n. 1); *id.* at 11 (Randolph, J., concurring) (comparing to motion to stay mandate); *see also* D.C. Cir. R. 41(a)(2); *Friends of the Earth, Inc. v. EPA,* 446 F.3d 140, 148 (D.C. Cir. 2006).

III. ARGUMENT

A. The Judges Are Required To Implement the D.C. Circuit's Mandate and Cannot Flout It By Re-Adopting the Just-Vacated *Phonorecords III* Rates and Terms (Even on an Interim Basis)

The Judges cannot re-adopt the *Phonorecords III* rates and terms — even on an interim basis — because doing so would violate the D.C. Circuit's judgment and mandate. That judgment and mandate vacated the *Phonorecords III* Final Determination. *See Johnson*, 969 F.3d at 381. Under settled law, "vacating" an agency order "render[s]" it "void" and a "legal nullity." *Action on Smoking*, *& Health v. Civ. Aero. Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983); *Virgin Islands*, 444 F.3d at 671-72.

As the Copyright Owners acknowledge (at 8), under § 803(d)(2), the *Phonorecords II* rates and terms were to "remain in effect until . . . successor rates and terms become effective."

17 U.S.C. § 803(d)(2)(B). Although the Copyright Owners suggest (at 8) that the *Phonorecords III* rates and terms should remain in effect notwithstanding the vacatur, that argument is the same one the D.C. Circuit rejected in *Action on Smoking* and *Virgin Islands*. Vacatur "restore[s] the *status quo ante*." *Virgin Islands*, 444 F.3d at 672; *accord Air Transp. Ass'n of Can. v. FAA*, 254 F.3d 271, 277 (D.C. Cir. 2001). It "ha[s] the effect of reinstating the rules previously in force." *Action on Smoking*, 713 F.2d at 797. As a result, it is the previously existing rules — here, the *Phonorecords II* rates and terms — that will "remain in effect until the [Judges] promulgate[] new . . . regulations" by publishing the Final Determination on remand in the Federal Register. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 n.25 (3d Cir. 2011).

Therefore, under the most generous reading, the relief that the Copyright Owners seek here is the equivalent of obtaining a stay of the D.C. Circuit's mandate (or an order granting rehearing and modifying *Johnson* to remand without vacating).[1] But the Copyright Owners did not seek such relief from the court, and it is the court that has the sole power to grant it. In fact, what the Copyright Owners actually propose is to replace the rates and terms that are now in effect (*Phonorecords II*) with the rates and terms the D.C. Circuit just vacated. That goes beyond seeking either a stay of a mandate or rehearing, either of which — if granted — would have prevented the *Phonorecords II* rates and terms from coming back into effect. That is, the Copyright Owners are not seeking to preserve the *status quo*, but asking the Judges to displace the *status quo* with a regime the court has rejected.

[1] Under the *Allied-Signal* doctrine, "[a]n inadequately supported rule . . . need not necessarily be vacated." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 998 F.2d 146, 150 (D.C. Cir. 1993). Where "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand" and "the consequences of vacating may be quite disruptive[,]" the D.C. Circuit may remand for the agency "to develop a reasoned treatment" of the issue at stake — while leaving the rule in question in place and un-vacated. *Id.* at 151. For example, the D.C. Circuit recently remanded certain EPA air quality designations without vacating where the court believed "there [was] at least a realistic possibility that EPA will be able to substantiate the relevant designations on remand." *Clean Wisconsin v. EPA*, 964 F.3d 1145, 1177 (D.C. Cir. 2020).

It is well settled that a federal agency may not "implement[] [a] stay [of the mandate] on [its] own" — even on an interim basis — by "reimplement[ing] precisely the same rule that th[e] court vacated." *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 923 (D.C. Cir. 1984) (per curiam). An agency is "without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case." *City of Cleveland, Ohio v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977). When an agency disregards the mandate by re-adopting on an interim basis the same rules the court vacated, the D.C. Circuit will act "forthwith to enforce the mandate and require the [agency] to comply with its terms." *Donovan*, 733 F.2d at 923; *see also Radio-Television News Directors Association v. FCC*, 229 F.3d 269, 270-72 (D.C. Cir. 2000) (issuing mandamus where FCC adopted an interim measure that put back in place the vacated rules).

None of the cases the Copyright Owners cite (at 5-6) discussing agencies' adoption of interim rates arose following a vacated initial decision; instead, all involved an agency seeking to set interim rates *before* completing its initial determination. And the cases the Copyright Owners cite that involved a remand all address the procedures the agency may use to reach its final determination on remand, not the adoption of interim rules (or rates) while that remand proceeding is ongoing. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Board*, 796 F.3d 111, 125-26 (D.C. Cir. 2015) (finding that the constitutionally appointed Judges were permitted to issue the Final Determination on remand based on a review of existing record); *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 136 (D.D.C. 2018) (discussing the agency's authority over the taking of new evidence to determine "how its prior decision should be modified"); *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 77-78 (D.D.C. 2011) (same).

In sum, the Judges cannot grant the relief the Copyright Owners now request without flouting the mandate rule.

B. The Copyright Act Also Precludes the Judges from Setting Interim Rates and Terms

Even setting aside the mandate rule, the Copyright Act does not grant the authority to set interim rates and terms that would displace the *Phonorecords II* rates and terms that now apply as a result of the *Johnson* vacatur and the issuance of the mandate.

As noted above, the Copyright Act provides that existing *Phonorecords* rates and terms will apply until successor rates and terms take effect: "Except as otherwise provided in this title, the rates and terms, to the extent applicable, *shall* remain in effect until such successor rates and terms become effective." 17 U.S.C. § 803(d)(2)(B) (emphasis added). Just as the *Phonorecords II* rates and terms remained in effect past January 1, 2018 (albeit subject to retroactive adjustment) because the *Phonorecords III* Final Determination did not become effective until April 2019, the *Phonorecords II* rates and terms that again became effective post-mandate "shall remain in effect" (again subject to retroactive adjustment) until the Judges adopt new "successor rates and terms" and those new rates become effective. Nothing in the Copyright Act allows "interim" rates and terms to displace existing rates and terms. Nor do "interim" rates and terms qualify as "successor" rates and terms under the express language of the Act.

The Judges cannot rely on inherent authority in the manner the Copyright owners urge because the Copyright Act requires that prior rates "shall" remain in effect until "successor" rates and terms are adopted and become effective. An agency does not have any "inherent" powers, only those that are "statutorily implicit." *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016). "Therefore, unlike a federal court," an agency can take action "only if some provision or provisions of [the governing statutes] explicitly or implicitly grant it power to do so." *Id.* Here,

the authorizing statute does not implicitly or explicitly give the Judges power to set interim rates on remand.

The statute identifies precisely one scenario for interim rates, and it only applies to agreements between the mechanical licensing collective and digital music providers when the Judges have not established rates and terms for a covered activity at all. *See* 17 U.S.C. § 115(d)(8)(C). That is indisputably not the current scenario.[2] Accordingly, under the statutory framework, "interim rates" are outside the Judges' powers; they are a potential response *by licensees and the mechanical licensing collective* to circumstances where the Judges have not previously exercised their authority. That is the end of the inquiry: "any inherent . . . authority does not apply in cases where Congress has spoken." *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.); *see Johnson*, 969 F.3d at 392 (explaining that any "flexibility" the Copyright Act provides "must be exercised within the lines drawn by the authorizing statute").

Certainly, the Copyright Act does not allow the Judges to do as the Copyright Owners request and set interim rates without following any of the statute's prescribed rate-setting processes. The Copyright Act details specific steps that must be taken before *any* rate-setting decision can take effect. Those procedures require the Judges to reach a decision that is "supported by the written record" and by "findings of fact" — and then reviewable for legal error

[2] In the vast majority of scenarios, there is no need for anyone — the Judges or the participants — to set interim rates, because interim rates are automatically set by operation of the statute. *See, e.g.*, 17 U.S.C. § 803(c)(2)(E), (d)(2)(A), (d)(2)(C)(i). Here, too, the statute dictates what happens when final successor rates do not yet exist: the prior rates shall remain in effect. *See* 17 U.S.C. § 803(d)(2)(B) ("In . . . cases where rates and terms do not expire on a specified date, successor rates and terms shall take effect on the first day of the second month that begins after the publication of the determination of the Copyright Royalty Judges in the Federal Register, except as otherwise provided in this title, or by the Copyright Royalty Judges, or as agreed by the participants in a proceeding that would be bound by the rates and terms. Except as otherwise provided in this title, the rates and terms, to the extent applicable, shall remain in effect until such successor rates and terms become effective.").

by the Register of Copyrights. *See* 17 U.S.C. §§ 803(c)(3), 802(f)(1)(D). Only after those conditions have been satisfied can the determination be published in the Federal Register and take legal effect. *See id.* § 803(c)(6). There can be no "inherent authority" that short-circuits (or contravenes) the statute, even on an interim basis.

The Copyright Owners argue that, because the Copyright Act does "not delineate the *procedures* the Judges must apply on remand following an appeal," the Judges have inherent authority to set any reasonable interim rates. *See* Motion at 6 (emphasis added). But rates and terms are not "procedures"; they are substance. Whatever flexibility the Judges have in crafting the procedures they will use on remand, it does not encompass power to set interim rates in contravention of other statutory directives and a judicial mandate. Moreover, the statute *does* delineate procedures on remand: remand proceedings must be "in accordance with subsection (a)," which in turn requires the Judges to "act in accordance with this title [17]" in its entirety. 17 U.S.C. § 803(d)(3), (d)(a)(1). The Judges are not authorized to order licensees to pay rates other than the *Phonorecords II* rates during the remand. "Congress has spoken." *Ivy*, 767 F.3d at 86.

C. Even if the Judges Could Set Interim Rates that Would Apply While They Conduct the Remand, There is No Reason To Replace the *Phonorecords II* Rates Currently in Effect

The Copyright Owners claim that interim rates are necessary to avoid confusion, disruption, and fragmentation in the industry — and "irreparable harm." *E.g.*, Motion at 3. But as shown above, there is no need for the Judges to clarify which rates and terms are currently in effect: the *Phonorecords II* rates and terms are in effect, as a necessary consequence of the *Johnson* vacatur and mandate. The Copyright Owners' failure to seek the proper relief (a stay of the mandate, or rehearing to press their case for a remand without vacatur) from the proper forum (the D.C. Circuit) undermines their claim that interim rates other than those set in

Phonorecords II are urgently needed to prevent irreparable harm. Instead, any interim rate order would only add complexity — increasing transaction costs for everyone — between now and final resolution of the remand.

The Copyright Owners argue (at 8-10) that reinstating *Phonorecords III* as interim rates is necessary. The argument is premised on the transaction costs associated with "landslides of adjustments" (at 8) purportedly arising out of the return to *Phonorecords II* rates while the remand is pending, but these costs can be wholly avoided. The Services agree with the Copyright Owners that no historical adjustments are required until a final determination on remand takes effect. The Copyright Act provides that, "within 60 days after the final resolution of the appeal," all royalties paid to an "entity designated by the [Judges]" will be adjusted "to comply with the final determination of royalty rates on appeal," and the Services agree that this provision has not yet been triggered and does not apply here. 17 U.S.C. § 803(d)(2)(C)(ii). A vacatur and remand is not a "final resolution" of the appeal of *Phonorecords III*. Nor has there been a "final determination of royalty rates on appeal," and the rates and terms that apply as a result of *Johnson — Phonorecords II —* are not the "final," post-appeal rates. The statutory true-up (or true-down) process for previous payments will occur once the remand process is complete. At that point, whether the final determination results in "true ups" or "true downs," everyone will be made whole under lawful rates.[3]

[3] This result — using the *Phonorecords III* rates and terms (pre-mandate) and the *Phonorecords II* rates and terms (post-mandate) — also applies for the unmatched royalty amounts under § 115(d)(10). One of the conditions in § 115(d)(10) for the statutory limitation on liability that section affords is the "transfer [of] all accrued royalties[,]" at the "applicable statutory rate[,]" to the mechanical licensing collective by February 15, 2021. 17 U.S.C.§ 115(d)(10)(B)(iv)(III)(aa). For these purposes, the "applicable statutory rate" is a mix of *Phonorecords III* (pre-mandate) and *Phonorecords II* (post-mandate). Those are the same rates that a copyright owner of a *matched* work will have been (or will be) paid, consistent with the royalty allocation regime that seeks to treat matched and unmatched works on the same basis.

Indeed, the Copyright Owners' own proposal, by requiring an additional transition to and from an interim rate, would unquestionably *add* transaction costs and uncertainty that would not occur if the industry stays where it already is today, under *Phonorecords II*. First, given the lack of any authority allowing the Judges to reinstate a vacated rule, the Copyright Owners' proposed order could compel the Services to return to the D.C. Circuit to enforce the *Johnson* judgment even before the remand proceeding commences. Second, by the time this motion is fully briefed — much less heard and decided — the deadline for payment of October 2020 royalties (at least) will have come and gone. Because that royalty period covers the first month after the D.C. Circuit issued its mandate in *Johnson*, those October 2020 royalties will be paid at *Phonorecords II* rates. Even if the Judges deny the Motion, there will already be as many as three sets of rates and terms in play when calculating final true-ups under § 803(d)(2)(C)(ii): *Phonorecords III* (pre-October 2020), *Phonorecords II* (October 2020 and later), and the rates adopted on remand. If the Judges grant the Motion, there is just more complexity and more whiplash — yet another set of rates, covering some period between, at the earliest, November or December 2020 and the conclusion of remand, that all parties will have to incorporate into the true-up process, causing additional transaction costs.

The Copyright Owners argue (at 14) that the *Phonorecords III* rates are reasonable because those rates "have been paid" by the streaming services for years. The same is true, of course, of *Phonorecords II* rates, which have several advantages that the *Phonorecords III* rates do not. For starters, the *Phonorecords II* rates reflected an industry-wide agreement that was not challenged or vacated on appeal. Indeed, one of the reasons for the vacatur was the court's conclusion that the Judges should more thoroughly consider using the *Phonorecords II* rates as a rate-setting benchmark and its recognition that doing so would require the Judges to re-do their

analysis of the § 801(b)(1) factors. *See Johnson*, 969 F.3d at 376, 389. The fact that the Services paid the now-vacated *Phonorecords III* rates while they were required to by law, pending appeal, is not probative of those rates' "reasonableness" in light of *Johnson*.[4]

The rest of the Motion's "reasonableness" arguments are, at bottom, efforts to limit *Johnson*'s holding that conflict with the opinion. The Copyright Owners assert (at 14) that "the substantial evidence underlying the Final Determination" justifies an order compelling payment of *Phonorecords III* rates. That turns *Johnson* on its head; the insufficiency of that same evidence is why the court vacated *Phonorecords III*. *See Johnson*, 969 F.3d at 381, 382-83, 387. Nor does Johnson promise a "narrow" remand, as Copyright Owners claim (at 11). The errors the D.C. Circuit identified are foundational issues, not sideshows, and the consistent theme of *Johnson* is that there was either nothing in the record or at least nothing in the Final Determination to support adoption of the *Phonorecords III* rates. *See Johnson*, 969 F.3d at 382-83, 387. Indeed, they are such important issues, and so likely to result in different ultimate rates and terms than those in the vacated *Phonorecords III* Final Determination, that the court declined to address numerous additional substantive issues the Services raised on appeal. *See id.* at 383, 389. The Copyright Owners cannot establish what positions will be taken, or accepted by the Judges, on these consequential matters on remand. And the Judges cannot assume that the *Phonorecords III* rates are reasonable — on an interim basis or otherwise. Resolving that inquiry is the purpose of the remand proceedings, and the Judges should address it through the proper process. *See* 37 C.F.R. § 351.15.

[4] *See* 17 U.S.C. § 803(d)(2)(C)(i) ("The pendency of an appeal under this subsection shall not relieve persons obligated to make royalty payments under section . . . 115 . . . who would be affected by the determination on appeal, from — (I) providing the applicable statements of account and reports of use; and (II) paying the royalties required under the relevant determination or regulations.").

Finally, the balance of the Motion rests on a bevy of factual assertions unsupported by any record evidence. For the Judges simply to rely on such unsupported claims would be inappropriate and inconsistent the requirement that rate-making decisions need a substantiated record, especially as the Motion does not even address the issue of how the requested rates would be allocated to the songwriters (as opposed to the publishers) for whom an interim rate order is claimed to be necessary.

IV. CONCLUSION

The Motion should be denied.

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Proof of Delivery

I hereby certify that on Wednesday, November 18, 2020, I provided a true and correct copy of the Services' Opposition to the NMPA and NSAI's "Interim Rates Motion" to the following:

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