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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)	Docket No. 16–CRB–0003–PR (2018–2022)

REPLY IN SUPPORT OF MOTION OF COPYRIGHT OWNERS TO ADOPT INTERIM RATES AND TERMS PENDING THE REMAND DETERMINATION

PRELIMINARY STATEMENT

Three of the five participating services, Spotify, Amazon and Pandora ("Opposing Services") oppose the Motion by ignoring controlling precedent, mischaracterizing the Decision,[1] and rewriting the Copyright Act (the "Act"), advancing two assertions unsupported by law or facts. First, ignoring controlling law recognizing that the Judges, like other agencies with similar functions, have authority to set interim rates on remand, they claim the Judges cannot set interim rates. Second, despite the absence of any specific direction from the Circuit to reimpose the Phonorecords II rates, they claim the rates should default to those obsolete rates set eight years ago and superseded three years ago.

As discussed in the Motion and below, the Act lays out how successor rates are established, and supports that the rates in the Final Determination (the "Current Rates") are appropriate rates pending remand determination. The Act also discusses vacatur and remand, and neither the Act nor the Decision provides for revival of the superseded Phonorecords II rates (which the Circuit could have required but did not, and which the Act could have provided for but does not). While Copyright Owners ("COs") reject the notion that Phonorecords II rates somehow revive in the absence of such direction, COs request an order setting the Interim Rates to avoid uncertainty pending remand, an uncertainty underscored by the three Opposing Services which intend to pay COs at the obsolete Phonorecords II rates during such period.

[1] Capitalized terms not defined herein have the same meaning as in the Motion.

The arguments of the Opposing Services represent their desired outcome, not the law. They ask the Judges to abstain from addressing interim rates, pretending their request would not result in the unilateral imposition of their desired interim rates. Their request ignores the human consequences of their desired drastic reduction in rates, and eschews the Board's affirmed findings that a rate increase was necessary to ensure continued viability of the songwriting profession. 84 Fed. Reg. at 1,958; *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 387-88 (D.C. Cir. 2020).[2] For these reasons, an order from the Judges setting reasonable rates during the interim period, which the Judges plainly have authority to enter under both the Act and the precedent, is required.

ARGUMENT

I. The Act supports the Interim Rates

Opposing Services argue that "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." (Opp. at 8.) This is incorrect.

First, the Judges have interim ratesetting authority absent a "definitive contrary legislative command," and there is no such contrary command. (Motion at 4-8.) Neither the Act nor the regulations "prescribe any particular procedures" on remand, and the rules are "purposely flexible to permit the Judges, and the parties, to address the particulars of each remand . . . in an effort to promote administrative efficiency and reduce costs." *Intercollegiate Broad. Sys., Inc., v. Copyright Royalty Bd.*, 796 F.3d 111, 125-26 (D.C. Cir. 2015).

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[2] The Opposing Services' suggestion that maintaining Current Rates will add transaction costs is unpersuasive. Even if they chose to pay at the superseded rates for a month, that is a trifling adjustment to correct next to requiring songwriters to live with a decrease to unreasonable rates in the midst of the pandemic, and music publishers to adjust collectively hundreds of thousands of payments to songwriters across the entire remand period.

Opposing Services seek to distract from the specific law recognizing interim ratesetting authority by arguing a general principle that an agency has no "inherent powers," only powers that are "statutorily implicit." (Opp. at 8, *citing HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016).) But *HTH Corp.* explains that these terms are often used interchangeably (*id.* at 679), and whatever the label, the Board has interim ratesetting authority. (Motion at 4-9.)

Second, Opposing Services offer a pure conclusion that the Phonorecords II rates apply by default during the interim period, but their assertion that "[t]he Judges are not authorized to order licensees to pay rates other than the *Phonorecords II* rates during the remand" is not supported. Insofar as the Act speaks to default rates, it provides that the Current Rates should remain in place. (Motion at 7-9.) Section 803(d)(2)(B) provides that after rates are published in the Federal Register, "except as otherwise provided in this title, or by the [Judges], or as agreed by the participants" those rates and terms shall remain in effect until successor rates and terms become effective. No successor rates have come into effect since publication of the Current Rates.

Opposing Services claim that because of the partial vacatur, the superseded rates can be automatically restored. But the *lex specialis* in Section 803(d)(2)(B) concerning rate succession says nothing about vacatur (and there is not even conflicting *legi generali*, as the partial affirmance/partial vacatur/remand does not create a clear status in conflict with the Act's provision, which should control in any event). Notably, the subsequent section, 803(d)(3), provides that the Circuit may vacate and enter its own determination in certain situations, which did not occur here.[3]

[3] Nor did the Circuit order reinstatement of the superseded rates, as in *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 920 (D.C. Cir. 1984), a case the Opposition cites which instead supports the maintenance of the Current Rates here.

Section 803(d)(3) then provides that the court of appeals may instead vacate and remand, which occurred in part here, *with no language that such a ruling negates the preceding specific language on rate succession*, which does not provide for successor rates by vacatur, let alone partial vacatur. Section 803(d)(2)(B), (d)(3).

The Act reflects Congressional intent to maintain the most-recently determined rates pending successor rates. Section 803(d)(2)(B). The remand does not call for the Current Rates to be rolled back to levels set eight years ago that were superseded and found unreasonably low (a finding affirmed by the Circuit). A procedural remand of current rates without direction to reimpose the Phonorecords II rates does not support blind default to older rates.[4]

Opposing Services admit the Current Rates not only took effect, but are applicable through the date of the mandate, both retrospectively and prospectively for payments to be made to the MLC in February 2021. (Opp. at 11 n.3.) This plain truth is inconsistent with the attempt to paint the Current Rates as nonexistent after the mandate. Rather, Opposing Services' own position confirms the obvious: that the Current Rates supplanted the Phonorecords II rates, remain the most current rates, and, as such, the Act supports their remaining as interim rates until successor rates are adopted in the manner dictated by the Act, which is *not* accomplished by the Decision's partial affirmance and partial vacatur.

[4] In this sense, royalty rates differ from many other agency rules. Unlike rules that apply perpetually and might be appropriate for roll back after vacatur, royalty rates are set for particular periods and are often obsolete and unreasonable by the end of their period, as here. This underscores why reviving superseded rates by vacatur would be improper and why the Act does not provide for such successor rates.

In any event, the Judges do not have to enter into a debate regarding the effect of the partial vacatur on applicable interim rates in the absence of action by the Judges, because the Judges have the authority to fix interim rates.

II. The Decision does not conflict with the Interim Rates

A. The partial vacatur does not preclude adoption of the Interim Rates

As a matter of law, the partial vacatur (or even a full vacatur) is no bar to the adoption of the current rates as the interim rates. Opposing Services claim 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." (Opp. at 5.) This is a rank conclusion for which no support is marshalled. The Board on remand is free to reach the exact same result it reached previously, *see e.g.*, *FEC v. Akins*, 524 U.S. 11, 25 (1998), and is no less entitled to set interim rates.

None of the Opposition authority holdings conflict with adoption of the Interim Rates. Most cited cases are wholly irrelevant,[5] and the others merely stand for the uncontroversial rule that an agency must adhere to applicable procedural requirements on remand.[6] The Opposing Services also fail to materially distinguish the Motion's controlling authorities recognizing interim

[5] *Radio-Television News Directors Ass'n v. FCC* did not involve an "interim measure that put back in place . . . vacated rules." (Opp. at 7.) It involved whether an agency violated an instruction to "act expeditiously on remand" to review rules by suspending the rules in lieu of review. 229 F.3d 269, 270-72 (D.C. Cir. 2000). Also inapposite are *Virgin Islands Tel. Corp. v. FCC,* 444 F.3d 666 (D.C. Cir. 2006), which dealt with the FCC's reconsideration of its own prior order, not a Circuit remand, and *City of Cleveland v. FPC*, 561 F.2d 344 (D.C. Cir. 1977), which concerned an agency misconceiving the scope of inquiry on remand.

[6] In *Action on Smoking, & Health v. Civ. Aero. Bd.*, the problem was the agency's "repeated technical noncompliance with the [APA notice and comment] requirements," *not* that the new rule was substantively the same as the vacated rule. The court explained its "'role is not to substitute its judgment for that of the [agency]' on the merits." 713 F.2d 795, 798-800, 802 (D.C. Cir. 1983). In *Donovan*, the Circuit not only vacated the Secretary's rule but specifically reinstated the prior rule (which did not occur here). No procedural rules would be violated by the Interim Rates. (*See* Motion at 6-9.)

ratesetting authority. (*See* Motion at 4-6.) The argument that the Motion's authorities involved ratesetting before initial determination instead of before remand determination (Opp. at 7) is illogical. The Motion's authorities are even more compelling in the remand context. The Board is in the same pre-determination posture with respect to the Remand Determination, with discretion to reach the same result, with even greater procedural latitude on remand, and armed with a robust, existing evidentiary record that the Decision affirmed had provided substantial evidence for the current rate levels.

Indeed, the Opposition's failure to cite *any* holdings that conflict with adoption of the Interim Rates, combined with its failure to identify any error in the Motion's case law, amplifies that the Interim Rates are appropriate and prudent.

Other Opposition arguments concerning vacatur are distraction. Opposing Services suggest the Motion should have been directed to the D.C. Circuit as a motion for remand without vacatur,[7] rehearing or to stay the mandate. (Opp. at 5-6.) However this issue is most appropriate for the Board, as part of its statutory function to set reasonable rates.[8]

B. The Opposition profoundly mischaracterizes the Decision

The Opposition grossly misrepresents the Decision. (Opp. at 13.) The D.C. Circuit rejected every argument that the Board's determinations were unsupported by substantial evidence. *See, e.g. Johnson*, 969 F.3d at 377-78 (effective rate period); *id.* at 384-86 (Shapley analysis), 387-

[7] There is a divergence of judicial opinion regarding remand without vacatur, with some in the D.C. Circuit deeming it unlawful under the APA. *See Comcast Corp. v. FCC,* 579 F.3d 1, 10-12 (D.C. Cir. 2009) (Randolph, J., concurring).

[8] Rather, Opposing Services should have sought an order of rate reinstatement from the Circuit, as in *Donovan*, if they wished to revive rates from Phonorecords II.

88 (factor A analysis).[9] Responding to the services' attack on the analysis underlying the Board's rate calculation, the court held that "substantial evidence supports [the Board's] judgment," that the Board's "weighing of evidence . . . [was] well within the Board's discretion," and that the Board's chosen rates "were grounded in the record." *Id*. at 385; *see also id*. at 388 (in holding Board's factor A analysis met substantial evidence standard, writing, "[t]he Board met that test here"). The Decision was not a merits reversal but a procedural remand.

The Opposition also fabricates a direction that the Judges reconsider whether to adopt the Phonorecords II benchmark and then redo the 801(b)(1) factor analysis. (Opp. at 4, 12-13.) In fact, the Decision does not even imply that "the Judges are required to consider anew using the *Phonorecords II* rates as a benchmark." (Opp. at 4.) The instruction is simply to provide "a reasoned analysis" for "the basis on which the Board rejected the Phonorecords II rates as a benchmark in its analysis," because the Decision found the written description "muddled." *Johnson*, 969 F.3d at 387. The Board is not directed to reconsider *whether* to adopt the Phonorecords II benchmark, which cannot be reconciled with the analysis and calculations underlying the adopted rates (which the Circuit affirmed), but only to explain further the benchmark's rejection. Remands for fuller explanation are commonplace, and routinely satisfied simply by the fuller explanation requested. *See e.g.*, *Stewart v. McPherson*, 955 F.3d 1102, 1103-04 (D.C. Cir. 2020).

No amount of rhetoric by Opposing Services changes that this is a partial, narrow remand that largely asks the Board to provide additional explanation. With respect to the TCC prong, the

[9] For the TCC prong, the remand was not for lack of substantial evidence, but simply because the services did not have adequate notice (despite having proposed it themselves). *Id*. at 381.

remand directs only that services be given opportunity to offer evidence of disruption from rates that have now been in effect for three years without any disruption.[10] The Circuit did not find error in a single substantive finding of the Board on the reasonableness of the rates and terms, and affirmed findings that rates should be higher. Far from indicating a different result, the scope of the partial remand further supports that it is appropriate for the Judges to set the reasonable Interim Rates pending the remand determination.

Copyright Owners respectfully request that the Judges grant the Motion.

Dated: November 25, 2020

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[10] COs see no reason to believe the Services can marshal evidence contradicting the market reality of the past three years, but if the Judges resolved to hear such evidence before maintaining the TCC prong as part of interim rates, COs submit that the Judges should not set interim rates at less than the Current Rates without the TCC prong for subscription offerings only (an uncapped TCC prong for ad-supported offerings was proposed by all Opposing Services). While the uncapped TCC prong is necessary backstop protection against revenue deferral, as the Final Determination acknowledged, interim reductions in the other rate prongs would multiply the harm to copyright owners by substantially increasing disruption in the short-term remand period.

Proof of Delivery

I hereby certify that on Wednesday, November 25, 2020, I provided a true and correct copy of the Reply of Copyright Owners in Support of Motion to Adopt Interim Rates & Terms Pending Remand to the following:

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