

Before the
United States Copyright Royalty Judges
The 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)**

SERVICES' PROPOSAL FOR REMAND PROCEEDINGS

Pursuant to 37 C.F.R. § 351.15, Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the “Services”) hereby submit their proposal for the conduct and schedule of the *Phonorecords III* remand proceeding.

Introduction

To address the D.C. Circuit’s remand in *Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020), the Services respectfully submit that the Judges should issue an order calling for further briefing solely on the existing record. The Services propose that they and the Copyright Owners each submit supplemental briefs of collectively no more than 100 pages per side, followed by responsive briefs not to exceed 75 pages per side. The Judges should not reopen the record. Nothing in *Johnson* requires doing so; and reopening the record—which already spans thousands of pages of hearing transcripts and over 1,100 exhibits—would create a significant delay of a new Final Determination and, in any event, would likely be futile.

In *Johnson*, the D.C. Circuit unanimously “vacate[d] and remand[ed] the Board’s adopted rate structure and percentages for further proceedings consistent with [its] opinion.” *Id.* at 381.¹ In

¹ The D.C. Circuit rejected the Copyright Owners’ challenge to the treatment of student and family plans for purposes of counting subscribers, which was Copyright Owners’ sole ground for appeal. *Id.* at 392 (“The Copyright Owners sole argument is that ‘the record lacks evidence to support [the] factual premise’ that ‘students and families have a low willingness to pay’ for digital music. That is wrong.”). As a result, the Judges need not revisit that determination.

doing so, the court identified three errors: (i) the failure “to provide adequate notice of the final rate structure”; (ii) the failure “to reasonably explain [the] rejection of the Phonorecords II settlement as a benchmark”; and (iii) the failure “to identify under what authority [the Board] substantively redefined [Service Revenue as it relates to bundled offerings] after publishing its Initial Determination.” *Id.* at 376. The D.C. Circuit also left open whether the Board’s “conclusions with respect to the four statutory [Section 801(b)(1)] objectives were unreasoned and unsupported by substantial evidence.” *Id.* at 384. Concluding that this fourth issue is “largely bound up in the remand,” the D.C. Circuit determined that it “need not at this juncture address whether the Board adequately considered [Section 801(b)(1) factors (B) through (D)].” *Id.* at 384, 389.²

The Services respectfully submit that the remanded issues can and should be resolved expeditiously on the existing record, with page-limited briefing. There is no need to reopen the record to entertain new evidence. First, every party already had ample opportunity to build the record upon which the Judges must make their determination and the Judges already have at their disposal the record evidence necessary to address each remanded issue. Where, as here, “each party had ample opportunity to present its case,” *Web III Remand*, 79 Fed. Reg. 23,102, 23,103 (April 25, 2014), there is no need to reopen the record. Second, with the *Phonorecords IV* proceeding expected to commence in a few months and the *Phonorecords III* rate period nearly sixty percent finished, certainty and speed are paramount and weigh heavily in favor of promptly releasing a revised Final Determination that addresses the issues the D.C. Circuit remanded. Reopening the record and the attendant discovery would result in an unwarranted delay in

² The D.C. Circuit concluded that the Board did adequately consider the first 801(b)(1) factor. *Id.* at 387-389.

providing the Services and Copyright Owners with certainty as to the final rates and terms governing the entire *Phonorecords III* period. All outstanding issues can be addressed efficiently through limited briefing to aid the Judges as they craft their Final Determination after remand.³

Background

As noted, in *Johnson*, the D.C. Circuit unanimously identified three errors in the *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 was “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 382-383. As a result of this legal error, the Services “were not only deprived of the opportunity to voice their objections to a completely uncapped total content cost prong, they were also given no opportunity to address the interplay between that rate structure and the increased revenue and total content cost rates.” *Id.* at 383.

Second, the court found that the Judges had not sufficiently explained why they rejected the *Phonorecords II* settlement 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

³ Many findings in the Final Determination were not challenged on appeal and, as a result, may not be revisited. *See, e.g., United States v. Thomas*, 572 F.3d 945, 949 (D.C. Cir. 2009).

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* settlement 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 Section 801(b)(1)(B)-(D) statutory factors. *See id.* at 389. As the court explained, the Judges’ analysis of whether the rate levels chosen on remand satisfy the Section 801(b)(1) factors on remand will be necessarily “intertwined with the nature of the rate structure ultimately imposed by the Board” and can only be done after properly considering the *Phonorecords II* benchmark. *Id.*

Third, the court held that the Order on Rehearing and Final Determination “failed to explain” the legal basis for the decision to change the definition of Service Revenue for bundles found in the Initial Determination. *Id.* at 389. The court found that Section 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 391-392.

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 381.⁴

⁴ The Copyright Owners have recently characterized the vacatur as a “partial, narrow remand that largely asks the Board to provide additional explanation.” *E.g.*, Reply in Support of Motion of the Copyright Owners to Adopt Interim Rates and Terms Pending the Remand Determination at 7, Dkt. No. 22934. But nowhere in the *Johnson* opinion does the court describe its vacatur as partial and narrow. *Compare Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 430 (D.C. Cir. 2020) (“We vacate Part IV(D) and Part XI(A)(3)(g) of the Final Determination.”). And if the court had concluded “there [was] at least a realistic possibility that [the Judges] will be able to substantiate the [Final Determination] on remand,” under circuit precedent the court would have remanded *without* vacating. *E.g.*, *Clean Wisconsin v. EPA*, 964 F.3d 1145, 1177 (D.C. Cir. 2020).

Proposed Conduct of and Schedule for the Remand Proceeding

The Services respectfully submit that having two rounds of supplemental briefing directed to the remanded issues would assist the Judges as they craft a new Final Determination. Specifically, the Services propose the following:

- Within 60 days of the Judges issuing an order calling for further briefing on the existing record, the Services and the Copyright Owners shall each submit briefs addressing only the issues *Johnson* remanded, including, if desired, an appendix containing proposed final regulations. The Services and the Copyright Owners (including George Johnson) will each be entitled (collectively) to no more than 100 pages per side, excluding any accompanying proposed regulations. The Services may submit a joint brief or individual briefs (or a combination thereof), so long as the total number of pages across all Service briefs does not exceed the allotted 100 pages. The Copyright Owners and Mr. Johnson similarly may submit a joint brief or individual briefs, with the combined total pages not to exceed the 100-page limit.
- Within 45 days from the submission of the opening briefs, the Services and the Copyright Owners shall each file responsive briefs, not to exceed 75 pages for each side. The Services may submit a joint brief or individual briefs (or a combination thereof), so long as the total number of pages across all Service briefs does not exceed the allotted 75 pages. The Copyright Owners and Mr. Johnson similarly may submit a joint brief or individual briefs, with the combined total pages not to exceed the 75-page limit.

The Services respectfully request oral argument following the submission of reply briefs

on a date convenient to the Judges.

Discussion

I. The Judges Should Not Reopen the Record Because All Parties Had Ample Opportunity to Present Their Evidence

The *Phonorecords III* record is unquestionably robust. It includes live testimony from 37 witnesses, including 15 expert witnesses, heard over the course of a five-week evidentiary hearing; written testimony from all of these same witnesses and six others; and over 1,100 admitted exhibits.⁵ Final Determination 5-6. In addition, the Judges already have at their disposal two comprehensive rounds of post-trial proposed findings of fact and conclusions of law, containing extensive record citations and amounting to thousands of pages of material.

The record already contains the necessary evidence to address all of the issues the D.C. Circuit remanded—nothing more is needed. With respect to the rate structure, while the D.C. Circuit did note that reopening the record would be necessary (though not sufficient) to readopt an uncapped TCC prong at the rate levels set forth in the Final Determination, *Johnson*, 969 F.3d at 383, the Judges can cap the TCC prong at appropriate rate levels *without* reopening the record. The record already contains extensive evidence supporting a capped TCC prong (and for rejecting an uncapped TCC prong), much of which was marshaled in Judge Strickler’s dissenting opinion. *See, e.g.*, Alternate Dissenting Determination 3-8. There is also ample record evidence addressing appropriate TCC prong caps. Caps at appropriate rate levels were part of the various Service rate

⁵ Among many other things, the existing record comprehensively covers the prior Phonorecords settlements (including the use of the *Phonorecords II* settlement as a benchmark), a variety of other proffered benchmarks, various economic rate-setting models, the business strategies and related economic issues faced by the Copyright Owners and the Services, detailed economic evidence regarding costs, users, revenues, and royalties, and evidence regarding the appropriate treatment of bundled offerings for purposes of calculating service revenue. And, critically, each side had ample opportunity to rebut what the other had to say about each of these issues, as they were all raised in direct cases or rate proposals that were submitted with sufficient time for the opposing side to respond.

proposals and were supported by abundant record evidence that the Services adduced. *See, e.g.*, Final Determination 11-13, 18-23, 29-38 (and citations therein), Alternate Dissenting Determination 26-29, 39-41, 48-73, 83-88 (and citations therein).

Moreover, the Copyright Owners had every opportunity to respond to this record evidence by presenting evidence of their own. Had they wanted to argue that an uncapped TCC-prong is necessary or appropriate, they could have marshaled and presented evidence on that issue in the rebuttal phase of the proceeding after each of the Services proposed a rate structure that included capped TCC-prongs. But, as the D.C. Circuit recognized, they chose not to. *See Johnson*, 969 F.3d at 381. There is no principled or equitable basis for affording the Copyright Owners the opportunity to do for the first time on remand what they could have done as part of their rebuttal case. *See Web III Remand* at 23,103 (declining to reopen the record and accept additional evidence where each party had ample opportunity to present its case); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 115-116, 131 (D.C. Cir. 2015) (affirming Board’s decision to maintain a closed record on remand where the Board had determined, *inter alia*, that “each party had ample opportunity to present its case” and reopening the record “would be neither fair, nor efficient, nor economical” (quotation marks omitted)).

Furthermore, if the Judges were to reopen the record to allow the parties to present evidence addressing the dangers of an uncapped TCC prong, particularly at the elevated rate levels the Majority adopted, the remand proceeding would be substantially prolonged, costs would significantly increase, and rate-certainty would be materially delayed. To comply with the governing procedures for the admission of record evidence, there would need to be additional written fact and expert witness testimony from the parties, as evidence cannot be admitted without

a sponsoring witness. *See, e.g.*, §351.10(a) (requiring a witness to sponsor “evidence, including exhibits”). Written testimony would then have to be followed by a discovery period during which the parties can request any documents that are “directly related” to that testimony. *See, e.g.*, §351.5(b) (allowing discovery of documents that are “directly related” to a written statement); §351.5(c) (allowing for broad discovery requests not tied to written statements only for proceedings scheduled to commence *prior* to January 1, 2011). And there would have to be third-party discovery, given that much of the pertinent information, to the extent it exists, likely lies with the record labels—entities that are no longer parties to the proceeding. Finally, there would have to be a live hearing to provide the parties the opportunity to engage in direct, cross, and re-direct examination of each witness. *See, e.g.*, § 351.10(b) (entitling the parties to direct, cross, and re-direct examination of any testifying witness). In addition, were any party to seek evidence from the period after the prior discovery cutoff, there would likely be numerous disputes about the scope of any updating of the existing record through discovery that would be necessary in light of the potential for the selective and misleading admission of only some post-cutoff evidence. Indeed, it would be highly inappropriate to issue a Final Determination after remand based on a record that ends on one date for the vast majority of issues and on a much later date for a narrow, and incomplete, subset of those issues. This is particularly so given the many moving pieces that went into the analysis of the rate structure and rate levels in the Final Determination.

Moreover, even with such fact and expert witness testimony, party discovery, third-party discovery, and a hearing, there would not be sufficient support for the Board to re-adopt an uncapped TCC prong. There can be no dispute at this point that the record labels “have considerable market power vis-à-vis interactive streaming service providers, and they have

leveraged that power to extract excessive royalties.” *Johnson*, 969 F.3d at 382. Without a cap on the TCC rates, the mechanical royalties paid by the interactive services would be “yoke[d]” to the record labels’ “unchecked market power.” *Id.* Such a result is, by definition, unreasonable. Under these circumstances, reopening the record to determine if there is evidence that could support re-adopting an uncapped TCC prong would not only be expensive and time-consuming, but also would be futile and, accordingly, the record should remain closed. *See Intercollegiate Broad. Sys.*, 796 F.3d at 125-126 (noting that 37 C.F.R. § 351.15 should be used to “promote administrative efficiency and reduce costs.” (internal citation omitted)).

With respect to the rate level issues the D.C. Circuit remanded—addressing the *Phonorecords II* benchmark and assessing whether the new final rate levels chosen satisfy Section 801(b)(1) factors (B) through (D)—there is also no need to reopen the record. The *Phonorecords II* benchmark was one of the primary areas of focus in the prior evidentiary hearing. All of the Services presented evidence regarding the probative value of the *Phonorecords II* benchmark and the Copyright Owners responded to that evidence. *See, e.g.*, Final Determination 29-34, 55-57 (and citations therein); Alternate Dissenting Determination 48-73, 83-88, 108-110, 117-119 (and citations therein). And each party also already presented the Judges with extensive record evidence regarding the application of the Section 801(b)(1) factors, addressing whether rates at various levels (including those implied by the *Phonorecords II* benchmark) satisfy those factors. *See, e.g.*, Final Determination 77-89 (and citations therein); Alternate Dissenting Determination 119-152 (and citations therein). What is more, Judge Strickler’s Alternate Dissenting Determination thoroughly evaluated the *Phonorecords II* benchmark and specifically addressed whether the rates derived from that benchmark satisfy each of the four statutory Section 801(b)(1) factors. Alternate

Dissenting Opinion at 83-88, 108-110, 115-152. Put simply, existing record evidence is all that is needed for the Judges to appropriately address the *Phonorecords II* benchmark and the Section 801(b)(1) factors, and the focused briefing that the Services have proposed can assist to compile that evidence and provide the Judges with the parties' views regarding the import of that evidence.

There is also no sound reason to reopen the record to address the definition of Service Revenue as it relates to bundled offerings—doing so would be futile. The D.C. Circuit concluded that the Order on Rehearing and Final Determination failed to provide a legal basis for changing the definition of Service Revenue that was adopted in the Initial Determination, rejecting the purported bases in the Order on Rehearing and Final Determination, as well as those that counsel for the Judges and the Copyright Owners raised for the first time in the D.C. Circuit. *See Johnson*, 969 F.3d at 389-392. Reopening the record will do nothing to cure that absence of authority. Moreover, the Copyright Owners already had ample opportunity to submit evidence in response to the Services' proposed definition of Service Revenue as it relates to bundled offerings, but they chose not to. Giving the Copyright Owners a second bite at the apple—particularly when the opportunity only presents itself because the Services were able to successfully demonstrate that there was no legal basis for changing the definition of Service Revenue in the first place—would plainly be unfair. Like with the uncapped TCC prong, reopening the record to revisit the definition of Service Revenue would be both futile and unfair, and it would serve no purpose other than to cause unnecessary delay and expense. *Web III Remand* at 23,103; *Intercollegiate Broad. Sys.*, 796 F.3d at 125-126.

Finally, the D.C. Circuit's remand in *Johnson* differs materially from its remand in *Music Choice*, and the Judges' recent decision to reopen the record in *SDARS III* to address that remand

does not support reopening the record here. In *Music Choice*, the D.C. Circuit noted that certain necessary facts regarding “the precise scope of Music Choice’s service offering as it actually existed on July 31, 1998” were not in the existing record. 970 F.3d at 427-28. Both Music Choice and SoundExchange agreed that the record should be reopened for a brief, roughly two-month period to obtain facts on this discrete issue, which requires no non-party discovery and which did not concern post-discovery-cutoff evidence. While those parties disagreed about the need for additional evidence on the second remanded issue, involving “defensive audits,” SoundExchange proposed to obtain any evidence on that issue in the same two-month period addressing Music Choice’s 1998 service offering. The Judges concluded that adopting SoundExchange’s “streamlined approach” served the “interests of administrative economy.” Order Regarding Proceedings on Remand at 1, Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (Remand) (Dec. 1, 2020). The same conclusion could not be reached with respect to any proposal to reopen the record here.

II. Reopening the Record Would Create Unwarranted Delay in Providing the Copyright Owners and Services with Final Rates and Terms to Govern the *Phonorecords III* Period

The beginning of the fourth year of the period covered by *Phonorecords III* is fast approaching. At this point, it is possible that there will not be final rates and terms applicable to the *Phonorecords III* period until after the *Phonorecords IV* proceeding is well under way. While the Services believe it is appropriate to allow the participants to submit briefs on the issues *Johnson* remanded—to assist the Judges with marshaling the existing record evidence and to provide the Judges with their views as to the import of that evidence—reopening the record could easily substantially delay a final resolution. This is especially so if the Judges were to reopen the record

for the purpose of considering whether to re-adopt an uncapped TCC prong given that third-party discovery would be necessary.⁶

Although it is true that the Services and the Copyright Owners can eventually “true up” or “true down” any payments that are made during the interim remand period, the continued uncertainty as to the final rates and terms that will ultimately govern the *Phonorecords III* period burdens both the Services and Copyright Owners, all of which are trying to make business and financial decisions that are affected by the mechanical royalties at issue. In light of the above, the Services respectfully submit that the benefits of moving expeditiously counsel strongly in favor of having limited remand proceedings and keeping the record closed.

Conclusion

For the foregoing reasons, the Services respectfully request that the Board issue an order (1) that it will decide the remand on the existing record; and (2) setting a briefing schedule for the remand proceedings consistent with the schedule and limitations set forth above.

Dated: December 10, 2020

Respectfully submitted,

By: /s/ Richard M. Assmus

By: /s/ Scott H. Angstreich

Richard M. Assmus (IL Bar No. 6255570)
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 701-8623
rassmus@mayerbrown.com

Scott H. Angstreich (D.C. Bar No. 471085)
Leslie V. Pope (D.C. Bar No. 1014920)
Julius P. Taranto (D.C. Bar No. 230434)
Kellogg Hansen Todd Figel & Frederick, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 326-7900
sangstreich@kellogghansen.com
lpope@kellogghansen.com
jtaranto@kellogghansen.com

Attorneys for Amazon.com Services LLC

⁶ As discussed above, this issue would be even more pronounced if the Judges were to allow for post-cutoff discovery.

A. John P. Mancini (NY Bar No. 2356319)
Jacob B. Ebin (NY Bar No. 4774618)
Allison Aviki (NY Bar No. 5532379)
Mayer Brown LLP
1221 Avenue of the Americas
New York, NY 10020
Tel: (212) 506-2295
mancini@mayerbrown.com
jebin@mayerbrown.com
aaviki@mayerbrown.com

Andrew M. Gass (CA Bar No. 259694)
Joseph R. Wetzel (CA Bar No. 238008)
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel: (415) 391-0600
andrew.gass@lw.com
joe.wetzel@lw.com

Allison L. Stillman (NY Bar No. 4451381)
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022-4834
Tel: (212) 906-1200
alli.stillman@lw.com

R. Peter Durning, Jr. (CA Bar No. 277968)
Latham & Watkins LLP
355 South Grand Avenue, Suite 100
Los Angeles, CA 90071-1560
Tel: (213) 485-1234
peter.durning@lw.com

Counsel for Spotify USA Inc.

By: /s/ Benjamin E. Marks

Benjamin E. Marks (NY Bar No. 2912921)
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
benjamin.marks@weil.com

Counsel for Pandora Media, LLC

By: /s/ Kenneth L. Steintal

Kenneth L. Steintal (CA Bar No. 268655)
Jason Blake Cunningham (CA Bar No. 261559)
David P. Mattern (D.C. Bar No. 1024564)
King & Spalding LLP
50 California Street, Suite 3300
San Francisco, California 94111
Tel: (415) 318-1200
ksteinthal@kslaw.com
bcunningham@kslaw.com
dmattern@kslaw.com

Counsel for Google LLC

Proof of Delivery

I hereby certify that on Thursday, December 10, 2020, I provided a true and correct copy of the Services' Proposal For Remand Proceedings to the following:

National Music Publishers Association (NMPA) et al, represented by Benjamin Semel, served via ESERVICE at Bsemel@pryorcashman.com

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

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kellogghansen.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Google Inc., represented by Kenneth L Steinthal, served via ESERVICE at ksteinthal@kslaw.com

Pandora Media, Inc., represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Apple Inc., represented by Dale M Cendali, served via ESERVICE at dale.cendali@kirkland.com

Signed: /s/ Richard M Assmus