

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)

**PROPOSAL OF COPYRIGHT OWNERS FOR THE  
CONDUCT AND SCHEDULE OF THE RESOLUTION OF THE REMAND**

National Music Publishers' Association, Inc. ("NMPA") and Nashville Songwriters Association International ("NSAI" and, together with the NMPA, the "Copyright Owners") respectfully submit, pursuant to 37 C.F.R. § 351.15, this proposal for the conduct and schedule of proceedings on remand from the decision in *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020).

**Preliminary statement**

Three discrete issues have been remanded to the Board for further proceedings. *First*, the Circuit asks the Board to more fully explain why it rejected the Phonorecords II settlement agreement as a suitable benchmark for determining the rates and terms for the Phonorecords III rate period. As discussed more fully below, the Circuit's Decision ("Decision") does not direct nor even suggest reopening the evidentiary record regarding this issue, but instead directs the Board to give a fuller explanation of its holding. There is ample evidence in the record supporting the rejection of the Phonorecords II settlement as a benchmark. Even further, the Decision affirmed the Board's evidentiary findings that the existing rates were too low and should increase—findings that are inconsistent with the Phonorecords II rates.

*Second*, the Circuit directs the Board to take new agency action (namely, this remand proceeding) to correct the definition of service revenue for bundled offerings, or else to re-explain the procedural authority used in the first instance. Again, the Decision does not direct or suggest the evidentiary record be reopened regarding this issue. Rather, like the first issue, it is readily addressed on the extensive existing record. The Board's revision to the definition corrected a manifestly unreasonable term, under which digital streaming services, including services participating in the Proceeding (the "Services"), were permitted to deduct standalone prices for all non-music bundle components, ignoring the economics of bundles and leading to attribution of

zero revenues for royalty purposes from music services that were being used by millions of paying consumers.

*Third*, the Circuit directs the Board to provide the Services another window to object to certain aspects of the Board’s adopted TCC prong. Google had proposed the TCC prong rate structure that was adopted, as a means to address the Services’ practice of revenue deferral, which had created the inequitable disconnect between massive Service industry growth and limited Service revenue growth. The Board’s determination confirmed the practice of revenue deferral and its unfair results, a finding undisturbed by the Decision. Nonetheless, the Circuit concluded that the Services were “procedurally blindsided” by the structure, and should be given the opportunity to put in evidence to support speculation that the adopted TCC prong would be disruptive. Notably, we now know the answer to the speculation: the adopted TCC prong has been in force for three years with no disruption and unparalleled growth in the streaming service industry. This reality underscores the narrowness of the Circuit holding: the Decision calls only for the evidentiary door to be opened for the Services. The Services do not have to walk through that door, and it is fully appropriate for the Board to reach the same result on remand if the Services fail to or elect not to submit evidence showing disruption that would render the TCC prong unreasonable. Indeed, Copyright Owners expect that the Services in fact *do not want* the opportunity to put in additional evidence on the expansion of the TCC prong, because the evidence is contrary to their speculation. Still, the Decision did not find substantive error in the rate structure, but merely that the Services did not have sufficient opportunity to object. Copyright Owners welcome the opportunity to finally put an end to the Services’ baseless argument that fair royalty rates should be decreased because they are *victims* of market power and *facing* disruption, despite reality to the contrary.

It is black-letter law that the Board is free to reach the same result after addressing the three specific procedural issues identified by the Circuit, as agencies routinely do in similar situations. The Judges here also have full discretion to devise remand procedures that are fair, economical and efficient. Copyright Owners' proposed remand procedure meets those goals. The proposed procedure is built around the third issue, since that is where the record might be opened for new evidence, therefore implicating disclosures or discovery. The Board can address the first two issues based on its own review of the existing record and inclusion in the remand determination, although Copyright Owners propose supporting such review with briefing from the participants on the hearing record and issues. Indeed, as outlined below, the hearing record in this proceeding provides extensive evidence on all three remanded issues.

As the Board has recognized in connection with past remands, expeditious proceedings are important in this matter as well. Ending uncertainty about rates and terms that are retroactive to 2018 is vital, especially in today's uncertain times. Moreover, the next Phonorecords rate proceeding begins in less than a month, and understanding the status of the current rates is important for the orderly preparation and presentation of the evidence as to the appropriate future rates. In addition, as discussed in the Copyright Owners' interim rates motion, the Mechanical Licensing Collective ("MLC") is required by federal law to commence collecting monthly royalties from digital streaming services beginning in January 2021, and then distributing those royalties to copyright owners on a monthly basis. In addition to the critical provision of interim rates to allow the MLC to carry out its statutory duties, the expeditious resolution of the remand is important to finalize the MLC's collections and distributions under Section 115 of the Copyright Act.

The proposed remand procedure provides an ample window for the submission of any new evidence the Services may wish to offer on the TCC issue, along with briefing on the other two issues, while also promoting efficiency and minimizing the burden of the proceedings.

**Proposed remand procedure**

A. Paper proceedings

Copyright Owners respectfully submit that the remand proceeding should be conducted on papers. As discussed herein, the Board has wide latitude to determine the appropriate procedure on remand. *See Intercollegiate Broad. Sys., Inc., v. Copyright Royalty Bd.*, 796 F.3d 111, 125-26 (D.C. Cir. 2015). An extensive hearing has already been held in this matter, and while the proposed remand plan contemplates an opportunity to present additional evidence, this opportunity is circumscribed and Copyright Owners submit does not warrant an additional hearing.<sup>1</sup>

B. Direct and reply written submissions

Copyright Owners propose that the written submissions be structured in two rounds, direct and reply. As outlined above, and discussed in detail below, just three specific issues were remanded to the Judges<sup>2</sup>:

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<sup>1</sup> The Board can appropriately decide this matter on paper submissions alone. *Intercollegiate Broad. Sys., Inc.*, 796 F.3d at 126 (upholding Board’s decision to conduct paper proceeding where, in the Board’s view, doing so would be more “fair,” “efficient,” and “economical”). As the D.C. Circuit has made clear, the Board can, among other things, avail itself of the entirety of the existing evidentiary record as part of a paper proceeding. *See id.* at 126-27. While Judges retain their discretion to call for live testimony if presented with compelling reasons in the written submissions, Copyright Owners propose that the remand be scheduled to be conducted on papers. This is consistent with the Board’s recent order in the SDARS III remand, which scheduled the conduct of that remand as a paper proceeding that would include narrow presentation of additional evidence. Order Regarding Proceedings on Remand, Determination Of Royalty Rates And Terms For Transmission Of Sound Recordings By Satellite Radio And “Preexisting” Subscription Services (SDARS III), eCRB Docket No. 23252 at 2 (“SDARS III Remand Order”).

<sup>2</sup> What the three issues are on remand is not in significant dispute. Three of the Services have already filed papers agreeing that these are the three issues on remand. Opposition of Amazon, Pandora and Spotify to Copyright Owners’

- Benchmark Explanation: Explain more fully the reasons for rejection of the Phonorecords II benchmark.
- Definition Correction: Take new agency action to correct the definition of Service Revenue for bundles (or re-explain the authority for the initial procedure).
- TCC Submission: Provide an opportunity for the Services to submit evidence concerning aspects of the TCC prong adopted by the Board.<sup>3</sup>

The Circuit did not indicate any need to take additional evidence on the benchmark explanation or definition correction issues, and reopening the evidentiary record on such issues would not be proper. Both the benchmark and definition issues were raised in service proposals, allowing for no failure of notice that the Services needed to submit adequate evidence to support both positions, and the Board found that they failed to provide such evidence. *See* 84 Fed. Reg. at 1,944 & n.106; January 4, 2019 Amended Order Granting in Part and Denying in Part Motions for Rehearing (the “January 2019 Order”) at 18. Copyright Owners submit that these issues be addressed through the Board’s review of the existing record, either on its own or supported by briefing from the parties, as discussed in greater detail below. *Intercollegiate Broad. Sys., Inc.*, 796 F.3d at 124-27 (Copyright Act does not require the Board to compile a new record for remand).

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Interim Rate Motion (“Service Opp. to Interim Rate Motion”), eCRB Docket No. 22928, at 3-4 (asserting that the Circuit “identified three errors” in the Final Determination).

<sup>3</sup> The language of the proceeding has generally referred to the placement of a TCC prong into a lesser-of calculation with a per-subscriber prong as a “capped TCC prong,” while referring to a true, freestanding TCC prong (such as the one adopted by the Board) as an “uncapped TCC prong.” Whatever usefulness these shorthand expressions had for convenience has become outweighed by misdirection. To begin with, the pre-existing so-called “capped TCC” was simply *not* a TCC; it was a per-subscriber rate. The protection against revenue deferral that a TCC prong provides does not exist to the extent that the TCC is substituted with a lower per-subscriber rate. Further, a true, freestanding TCC (which Copyright Owners shall refer to herein as a “true TCC”), as adopted by the Board, is necessarily capped, namely, limited to a small percentage of the consideration provided for related sound recording rights. Thus, the nomenclature of an “uncapped TCC” is misleading because it incorrectly implies that a TCC prong of some sort remains after it has been eliminated in favor of a per-subscriber rate, and it incorrectly implies that a true TCC is an uncontrolled royalty, when in fact it is tied and limited by sound recording rates that services choose to pay (and that the marketplace has shown are quite stable rates).

The Services and Copyright Owners could each provide briefing for their positions on these two issues in their respective direct submissions, and their responses to the other positions in the respective reply submissions.<sup>4</sup>

The Circuit's concern on the TCC issue was its view that, despite the proposed structure emanating from Google, the Services were "procedurally blindsided" and did not have full opportunity to object to aspects of the adopted TCC prong. Providing an opportunity for the Services to submit such evidence is properly a part of these remand proceedings. The grant of this additional opportunity is aimed squarely at the Services in the first instance. Concurrent direct submissions of evidence on this issue are not necessary, as Copyright Owners are not lodging an objection to the Final Determination in this regard. A suitable procedure is to have an initial submission from the Services, and then after disclosures and/or discovery, Copyright Owners can reply to that submission. *See Intercollegiate Broad. Sys., Inc.*, 796 F.3d at 125-26 (noting with approval the Board's efforts to "promote administrative efficiency and reduce costs" in remand proceedings).<sup>5</sup>

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<sup>4</sup> This approach is consistent with the SDARS III Remand Order, in which the Judges allowed for discovery and subsequent submissions on both remanded issues. The appeal decision in that case counseled for this approach. The remand in SDARS III on the Internet transmissions issue clearly requires additional evidence to decide, as all participants agreed in their remand plan submissions. Moreover, on the defensive audits issue, while the remand calls for provision of a "reasoned explanation," the Circuit explicitly directs the Judges to "reconsider" the audit definition, noting a need for substantial evidence and concerns with a lack of evidence cited by the Judges. *See Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 427 (D.C. Cir. 2020). SoundExchange's proposal to provide additional evidence to "aid the Judges in evaluating the audit issue" is reasonable in light of the Circuit's holdings on that issue. By contrast, here, the Phonorecords II benchmark was one of the primary issues litigated at the hearing, and as discussed below, the Circuit affirmed evidence supporting rejection of that benchmark, noting only concerns with the way the Board explained its benchmark rejection (and not directing any reconsideration of that rejection). The correction of the Service Revenue definition was remanded purely for the procedure taken to adopt the correction, which the Circuit explicitly provided to be rectified through this remand proceeding.

<sup>5</sup> Similar to regular proceedings before the Board, Copyright Owners do not propose a third round of submissions responding to replies. If Copyright Owners submitted new evidence in their reply to the Services' TCC submission, Copyright Owners would make the required disclosures described below and the Services could take discovery on

For efficiency, the Copyright Owners propose that the respective direct submissions as to all of the issues be made together, and the respective reply submissions be made together. This streamlined approach “strikes an appropriate balance that will enable an efficient, yet thorough, presentation of the evidence and arguments that the Judges will need to resolve the issues before them.” SDARS III Remand Order at 1-2 (adopting remand schedule with two rounds of briefing, direct and responsive).

C. Discovery and disclosures

The Copyright Owners submit that extending the remand proceeding schedule to accommodate a prolonged discovery period is not efficient. At the same time, experience shows that truncated discovery periods can render the discovery process ineffective. Copyright Owners propose to avoid these competing concerns by providing for disclosure of core documents concurrently with any remand submission that contains new evidence. Since new evidence should relate to the TCC disruption issue, certain core documents can be predicted. In particular, the Services have made clear that their argument turns on the allegation that major record labels wield undue market power and the Services thereby face disruption from a true TCC rate. It is plain that core documents in connection with any such claim will include license agreements with record labels, as well as financial information and analysis related to the impact of the TCC prong on service success and growth. Thus, to support expedient remand proceedings while still ensuring that the parties are able to properly address any new evidence submitted, Copyright Owners

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such evidence as described below. If additional response was warranted, the Judges could address at that time scope and timing for any subsequent submissions, in their discretion. This is consistent with the Judges’ approach in SDARS III. SDARS III Remand Order at 2 (“After the filing of reply briefs the Judges will determine, in their discretion, whether to request additional briefing and/or live testimony.”).



propose a requirement that any participant submitting additional evidence in any submission produce the following documents concurrently with such submission:

- All documents relied upon in connection with such submission. (If previously produced in the proceeding, the participant may simply reference the production number.)
- All not previously produced agreements with record companies that cover any period between January 1, 2016 and the present.
- All documents concerning the impact of the TCC prong on company growth, revenues, profits, company value, brand or ecosystem.

For evidentiary topics that are raised in submissions and not covered by the above three categories, the Copyright Owners propose the following discovery procedures:

- A participant may serve discovery requests for relevant documents at any time after receipt of a submission that proffers new evidence;<sup>6</sup>
- Mandatory meet and confer within one week from service of requests;
- Written responses and objections due within one week from service;
- Productions of responsive documents due within three weeks from service;
- Expedited procedures for addressing discovery disputes with the Judges, including:

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<sup>6</sup> The proposed procedure here appropriately diverges from the SDARS III Remand Order in its approach to discovery, yet still furthers that Order's stated goal of streamlining the procedure to serve the interests of judicial economy. While the SDARS III Remand Order begins with a round of document requests, interrogatories and depositions prior to simultaneous submissions from the participants on all issues, the proposed procedure here begins with simultaneous briefing on the benchmark and definition issues, along with the Services' submission including additional evidence concerning the expansion of the true TCC prong. As noted above, there is no need for simultaneous direct submissions on the expansion of the true TCC prong, because the Circuit did not find any substantive error in the Board's holding on this prong, but simply held that the Services did not have the opportunity to voice all of their objections and submit all supporting evidence, making clear that the burden of supplying additional evidence falls on the Services. Any such evidence would not involve discovery from Copyright Owners. The Service arguments concerning expansion of the true TCC prong are arguments about record label market power. The issue of record label market power was also a part of the hearing, raised by multiple Service witnesses. The issue did not involve discovery from Copyright Owners then, and would not involve discovery from Copyright Owners now. If the Services are somehow facing disruption from the expansion of the true TCC prong, evidence of that would be in the Services' possession, custody or control, not with Copyright Owners.

- Participants may request conference calls with the Judges to discuss discovery disputes where there is a good-faith belief that such conferences might avoid motion practice;
- Participants do not need to wait until after production to raise disputes that become apparent earlier;
- Participants shall conduct expedited discovery motion briefing (similar to procedures outlined in the First Prehearing Order in the proceeding) whereby oppositions are due three business days after receipt of the motion.

D. Proposed timing

The Copyright Owners propose the following schedule for the two sets of submissions described above:

ACTION	DEADLINE
Direct Remand Submissions  (including any TCC evidentiary submission and associated production by the Services)	Feb. 11, 2021
Reply Remand Submissions  (including any reply TCC evidentiary submission and associated production by the Copyright Owners)	April 1, 2021

**Discussion of remand scope and procedure**

A. Benchmark Explanation: Rejection of Phonorecords II settlement as a benchmark for rate levels

1. *Scope of Remand*

The Circuit remanded for further explanation of the Board’s rejection of the Phonorecords II rates as a benchmark. *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 387 (D.C. Cir. 2020). Notably, the Circuit listed several reasons supporting the rejection of the benchmark that had been offered on appeal, including that the benchmark was too low, that it was outdated, and that the lack of evidence of subjective intent rendered the benchmark unreliable. *Id.* However, the Circuit explained that it must judge the Board’s action only on the reasons invoked by the Board, and these other reasons were not clearly stated in the Final Determination, and thus “the Board’s fail[ed] to adequately explain itself in the Final Determination.” *Id.*; *see also id.* at 381 (“the Board did not provide a reasoned explanation for its refusal to treat the Phonorecords II settlement as a benchmark when setting the total content cost and revenue rates”). The Circuit thus remanded “for a reasoned analysis,” “[b]ecause we cannot discern the basis on which the Board rejected the Phonorecords II rates as a benchmark in its analysis.” *Id.* at 387.

Contrary to the Service intimations in opposition to the Interim Rate Motion, the Decision does not even suggest that the Board need reconsider whether to use the Phonorecords II rates as a benchmark (let alone as the rates themselves). Instead, it simply focused on the clarity of the explanation in the Final Determination. Indeed, the adoption of the Phonorecords II rates would be inconsistent with the Decision.<sup>7</sup>

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<sup>7</sup> Notably, the remand here is not simply limited to further explaining the rejection of the Phonorecords II settlement as a benchmark, but to explaining the rejection of it as a benchmark on the issue of rate levels only (*i.e.*, “percentages”).

The limited remand for further explanation is underscored by the Circuit’s affirmation of findings by the Board that conflict with the Phonorecords II rates. As the Circuit observed when affirming the Board’s Shapley methodology and analysis:

[T]he Board found that the Phonorecords II mechanical license royalties were too low and that the sound recording rightsholders were extracting more than their fair share of royalties. 84 Fed. Reg. at 1951–1954. The Board then carefully analyzed the competing testimony and drew from it rates that were grounded in the record and supported by reasoned analysis.

*Id.* at 384-85 (*citing* 84 Fed. Reg. at 1,951–1,954).

The Decision further noted the Board’s finding that the experts on both sides agreed “that the ratio of sound recording to musical works royalty rates should decline.” *Id.* at 385 (*citing* 84 Fed. Reg. at 1,951–1,952). That finding necessitated a rise in mechanical royalty rates (and hence itself supports the finding that the Phonorecords II rates were unsuitable). *See e.g.*, 84 Fed. Reg. at 1,952. The Decision then walked through the analytical steps that the Board took “[t]o select the specific revenue rate that would respond to that problem,” and affirmed these steps as: supported by “substantial evidence”; an exercise of “weighing of evidence and decision to proceed cautiously [that was] well within the Board’s discretion”; and the “type of line-drawing and reasoned weighing of the evidence [that] falls squarely within the Board’s wheelhouse as an expert administrative agency.” *Johnson*, 969 F.3d at 385-86. The Decision explicitly rejected the Services’ arguments that the methodology or analysis underlying the Board’s determination of the rate percentages was arbitrary. *Id.* at 384-86.

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*Id.* at 384; *see also id.* at 381 (discussing the Board’s treatment of Phonorecords II “as a benchmark when setting the total content cost and revenue rates”). The Decision does not raise any concerns with the Board’s rejection of the Phonorecords II settlement as a benchmark for rate *structure*, as discussed in the Final Determination’s Section IV (“Analysis of Rate Structure Proposals”). The Decision addresses only the Board’s discussion from the Final Determination’s Section V (“Determining Royalty Rates”), concerning potential benchmarks for rate levels. *Id.* at 387 (*citing* 84 Fed. Reg. at 1,944). The additional explanation called for is thus particularly confined.

The Decision also affirmed the Board’s analysis and conclusions under factor A of the former section 801(b)(1) test in full, explicitly rejecting the Services’ argument and finding that substantial evidence supported the Board’s determination “that an increase in the royalty rates for mechanical licenses was necessary ‘to ensure the continued viability of songwriting as a profession.’” *Id.* at 387-88. The Circuit went further than affirming the Board’s conclusion here, by upholding numerous findings of fact by the Board, including that “there was ‘ample, uncontroverted testimony that songwriters have seen a marked decline in mechanical royalty income over the past two decades,’ making it increasingly difficult for non-performing songwriters . . . to earn a living practicing their craft”; that “this decline has led to fewer songwriters”; and that, “[i]f this trend continues, the availability of quality songs will inevitably decrease.” *Id.* at 388 (quoting the Final Determination) (citations omitted) (upholding such findings as “a reasonable reading of the record”).

2. *Remand standards and procedure*

The Circuit’s instruction is a commonplace remand to an agency to provide greater explanation for an action it has taken. *See e.g., Stewart v. McPherson*, 955 F.3d 1102, 1103-04 (D.C. Cir. 2020) (remand “for further consideration and clarification” satisfied by letter “adher[ing] to the initial decision” that set forth grounds for the decision without reopening the evidentiary record); *Friedman v. FAA*, 890 F.3d 1092, 1096-99 (D.C. Cir. 2018) (following appeal in which the Circuit held agency had failed to explain “its denial of [the petitioner’s] application” and remanded to agency to “offer reasons for its denial[,]” agency satisfied Circuit’s instruction by articulating explanation that “fill[ed] the analytical gap identified in [the prior] opinion”); *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 139 (D.D.C. 2018) (after Circuit remanded on grounds that agency’s original “single paragraph” discussion of issue was insufficient, agency satisfied mandate

by revising its decision to include “a much more fulsome discussion” of the issue); *Menkes v. Dep't of Homeland Sec.*, 662 F. Supp. 2d 62, 68-70 (D.D.C. 2009), *aff'd sub nom. Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319 (D.C. Cir. 2011) (upholding as reasonable Coast Guard’s “further explanation for its previous decision” after case was remanded by D.C. Circuit “for further explanation”). By the Board reviewing the hearing record, supported by briefing from the participants, and thereafter providing further explanation in the remand determination for its rejection of the Phonorecords II benchmark, the Judges will fulfill the direction for “further proceedings consistent with this opinion” in connection with this remand issue.

3. *Hearing record*

The reasonableness of the proposed remand procedure on this issue is supported by the hearing record, which provides all of the necessary evidence for a fuller explanation of the Board’s holding. The task on this remand issue will be facilitated by briefing that extracts from the voluminous record the evidence showing the fundamental problems with the use of the Phonorecords II rates as a benchmark for rates in Phonorecords III.

As just some examples of affirmative evidence supporting the Board’s holding, the record shows how the music streaming industry changed rapidly and dramatically between the time of the 2008 and 2012 settlements and the 2017 hearing, in terms of number of customers, number of streams, and on other metrics, and further that at the time of the 2012 settlement, every participant Service had either not entered the U.S. interactive streaming market (Apple, Google, Amazon, Pandora) or had just entered the market and was nascent (Spotify). (*See Copyright Owners’ Proposed Conclusions of Law (“COPCL”), Section IV.C.1.b, “The Tectonic Shift In The Streaming Market Since 2012 Confirms That The Phonorecords Settlements Cannot Be Informative As Benchmarks,”* at COL-339 through COL-347.) In short, the hearing record

establishes that the Phonorecords II settlement was from a different and discrepant era in the streaming industry, underscored by the fact that five of the ten Phonorecords II rate configurations were never even mentioned in the testimony of Service witnesses during the Phonorecords III proceeding.

The record also establishes that the Services simply failed to carry their burden to justify the Phonorecords II rates as a benchmark. *See* 5 U.S.C. § 556(d) (“the proponent of a rule or order has the burden of proof”). *This alone* is an entirely sufficient and appropriate reason to reject a benchmark. *See, e.g., Intercollegiate Broad. Sys., Inc., v. Copyright Royalty Bd.*, 574 F.3d 748, 764-65 (D.C. Cir. 2009) (affirming rejection of proposed benchmark where Board had found proponent failed to provide evidence on “the parties’ expectations” and other key aspects of the benchmark). The Final Determination explains in detail the evidentiary deficiencies and lack of analytical rigor in the Services’ proposal of the Phonorecords II settlement as a benchmark.<sup>8</sup> The Board observed that the Services “[did] not examine in detail the particular rates within the existing rate structure”; that “the Services’ economists elected to rely on the 2012 rates as objectively useful without further inspection”; and that the Services also “could have called witnesses and presented testimony regarding the negotiations that led to the 2012 (and 2008) settlements, but did not,

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<sup>8</sup> Moreover, the then-current regulations contained an express requirement that the compulsory license for mechanical royalties “be established de novo.” 37 C.F.R. § 385.17 (2014) (“In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.”). Accordingly, rates had to be established with no deference given to the resolutions of the prior Phonorecords proceedings: “The phrase ‘de novo determination’ has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy.” *United States v. Raddatz*, 447 U.S. 667, 690 (1980) (dissenting opinion); *see also Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) (“When *de novo* review is compelled, no form of appellate deference is acceptable.”); *Doe v. United States*, 821 F.2d 694, 698 (D.C. Cir. 1987) (Ginsburg, J.) (“De novo means here, as it ordinarily does, a fresh, independent determination of ‘the matter’ at stake . . . Essentially then, the district court’s charge was to put itself in the agency’s place, to make anew the same judgment earlier made by the agency[.]”). The Services failed to satisfy this *de novo* requirement.

rendering the 2012 benchmark similar to other benchmarks taken from other markets.” *See* 84 Fed. Reg. at 1,944 & n.106. The failure to proffer evidence is all the more glaring since the Board pointedly advised the Services of the need to present such evidence at the outset of the hearing. Tr. 15:4-22.<sup>9</sup>

B. Definition Correction: Service Revenue for bundles<sup>10</sup>

1. *Scope of Remand*

The remand to correct the revenue definition is again purely procedural. The Circuit concluded that the Board had provided an unclear or conflicted explanation of the procedural authority under which the definition was revised, noting that the Board “cannot maintain in the same order both that the statutory rehearing standard has not been satisfied and (in the alternative) that the order could be considered as granting a rehearing.” *Johnson*, 969 F.3d at 391. As a result of this perceived inadequate explanation, the Circuit remanded to the Board to either provide “a fuller explanation of [its] reasoning at the time of the agency action” or to “take new agency action.” *Id.* at 392 (quotations omitted).

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<sup>9</sup> Instead of evidence supporting the Phonorecords II rates and terms, the Services offered a pretextual argument for application of the Phonorecords II settlement as a benchmark, claiming “that they relied on the continuation of the existing rates in developing their business models.” *See* 84 Fed. Reg. at 1,944. Putting aside that *none* of the Services in fact proposed continuing the Phonorecords II rates unmodified, the Board “categorically reject[ed]” this specious argument, which it found “incredible.” *Id.* While the Services who proposed a roll-forward of the Phonorecords II rates – with significant reductions – had sought to portray their proposals as maintaining the “status quo,” that mischaracterization fell apart under judicial scrutiny. *See* Tr. 235:7-21 ( [REDACTED] ) ( [REDACTED] )

<sup>10</sup> Both the Decision as well as the Board’s January 2019 Order referred to the defined term at issue with the shorthand phrase, “Service Revenue,” rather than the complete phrase from the regulation, “Service Provider Revenue.” *See* 37 C.F.R. § 385.2. Copyright Owners’ use of the shorthand phrase “Service Revenue” in this submission similarly encompasses and refers to the full phrase, “Service Provider Revenue.”



Under either approach, the Board is free to adopt the same Service Revenue definition it included in the Final Determination (the “Final Definition”), a definition that comports with the definition it used in other proceedings (and which also is fully supported by the evidence in this case). *See e.g., Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29–30 (D.C. Cir. 2005) (Garland, J.) (explaining that absent direction to the contrary by the reviewing court, “an agency that cures a problem identified by a court is free to reinstate the original result on remand”); *Intercollegiate Broad. Sys., Inc.*, 796 F.3d at 121 (affirming Board’s determination on remand that reached substantially similar conclusion as earlier determination the Circuit had vacated in prior decision). *See also, e.g., FEC v. Akins*, 524 U.S. 11, 25 (1998) (“If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency’s action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason.”). Notably, the Circuit expressly stated that its remand did not go to the substance of the adopted definition. *Johnson*, 969 F.3d at 392 (“Because the Board failed to identify any legal authority for adopting the new Service Revenue definition, we have no occasion to address the Streaming Services’ separate argument that the definition was arbitrary, capricious, or unsupported by substantial evidence.”).<sup>11</sup>

## 2. *Remand standards and procedure*

As noted, the Circuit lays out two paths to address the procedural defect. While the Board may provide “a fuller explanation of [its] reasoning at the time of the agency action,” this remand proceeding offers a straightforward path to take “new agency action.”

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<sup>11</sup> The Services did not even challenge on appeal the reasonableness of the revised definition. Rather, the Services’ challenge on “substance” was the argument that the new definition was unsupported by record evidence, which is unsustainable in light of the indisputable record evidence on this issue, some of which is cited *infra*. (See Services Final Initial Brief at 57-63; Services Final Reply Brief at 25-30.)

“‘[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 USC 551(13); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (citing 5 USC § 551(13) in explaining what constitutes “agency action”). The remand determination will be plainly a “new agency action.” As the Supreme Court has explained, a “new agency action” is simply one that “deal[s] with the problem afresh,” *see DHS v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1908 (2020) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 200-201 (1947)), by “performing the function delegated to it by Congress,” *Chenery Corp.*, 332 U.S. at 201. The law makes clear that “new agency action” can consist of issuing a new determination on remand. *See Friends of the River v. Nat’l Marine Fisheries Serv.*, No. 2:16-cv-00818-JAM-JDP, 2020 WL 6391314, at \*1-2 (E.D. Ca. Nov. 2, 2020) (explaining that a “new agency action” by the subject agency, the National Marine Fisheries Service, would consist of issuing a new opinion that would supersede the opinion struck down on appeal); *Fisher v. Pension Benefit Guar. Corp.*, 468 F. Supp. 3d 7, 19, 19 n.5 (D.D.C. 2020) (new decision issued by agency on remand qualified as “new agency action”).

As the new agency action here is a determination after remand proceedings, the Board is largely free to chart its own procedural course. The Board is not required to undertake any of the procedural steps set forth in 17 U.S.C. § 803(b) in order to take such “new agency action.” *See* 17 U.S.C. § 803(d)(3) (requiring only that on remand further proceedings be taken “in accordance with subsection (a)”); 37 C.F.R. § 351.15; *Intercollegiate Broad. Sys., Inc.*, 796 F.3d at 125 (“[N]either the Copyright Act nor the Board’s regulations prescribe any particular procedures on remand.”) The Circuit’s instruction that the action be “accompanied by the appropriate procedures[,]” *Johnson*, 969 F.3d at 392, refers to these flexible rules. *See also Oceana, Inc.*, 321 F. Supp. 3d at 136 (explaining that when remanding to an agency, a court generally “may not

dictate to the agency the methods, procedures, or time dimension, for its reconsideration”) (quotations and citation omitted).

The proposed remand procedure, which provides for the participants to submit briefing on the revision to the Service Revenue definition for bundles, based on the expansive hearing record, after which the Judges can address the revision “afresh” in the remand determination, would meet the Circuit’s remand instruction. As noted, the Board is free to adopt the same definition—the reasonableness of which has never been challenged—on remand. *See e.g., Heartland*, 415 F.3d at 29–30.

### 3. *Hearing record*

The appropriateness of the proposed remand procedure on this issue is supported by the hearing record, which contains robust evidence showing the unreasonableness of the prior definition, together with the reasoning and precedent pointing to the revised definition as reasonable. As the record indicates, the Services have never attempted to argue the reasonableness of the prior definition of Service Revenue for bundles, whether at the hearing, when opposing the Copyright Owners’ motion for clarification, or on appeal. The initial definition was an unexplained carry-over from Phonorecords II regulations that, on its face, failed to address the “‘economic indeterminacy’ problem inherent in bundling” appropriately and in a way consistent with Board precedent. (*See* January 2019 Order at 17-18.) Under the initial definition, Service Revenue for bundled subscriptions was to be measured by taking the revenues recognized from the bundle (*i.e.*, the price paid by the subscriber) and then subtracting out “the standalone published

price” for all *non*-music components of the bundle.<sup>12</sup> The Board had already found such an approach to be fundamentally unfair in *Web IV*, explaining, “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.” 81 Fed. Reg. 26,316 at 26,382 (May 2, 2016); *see also* 83 Fed. Reg. 65,210, 65,264 (December 19, 2018) (SDARS III) (rejecting proposed deductions by service from bundle revenues because of the “acknowledged ‘economic indeterminacy’ problem inherent in bundling”).

The unreasonableness of the initial definition, and the resulting unreasonable royalty rates, was manifest in the hearing record. [REDACTED]

[REDACTED]

[REDACTED] E.g., Tr. 1432:15-1434:12 [REDACTED] ([REDACTED]); COPCL at COL-

364. This unreasonable result was punctuated by the fact that [REDACTED]

[REDACTED]

[REDACTED]. *See e.g.*, Tr. 1484:3-1487:18, 1511:7-1514:17, 1579:21-1585:9, 1596:8-1598:1 [REDACTED]; COPCL at COL-360-387. No attempt was made to justify the prior definition. On

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<sup>12</sup> *See* Initial Determination, Regulatory Terms (Attachment A) at 7-8 (“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 contrary, [REDACTED], which alone is substantial evidence of its unreasonableness. Tr. 1481:2-13 [REDACTED] ([REDACTED] [REDACTED]). Together with the reasoning from the Board in this proceeding as well as Web IV and SDARS III, the hearing record provides substantial evidence for adoption of the revised Service Revenue definition in the remand determination (*i.e.*, the “new agency action”). The proposed remand procedure fulfills the remand direction on this issue.

C. TCC Submission

1. *Scope of remand*

The Circuit found that the Board “failed to provide fair notice” of the TCC prong that it was adopting, and the Services were “deprived of the opportunity to voice their objections.” *Johnson*, 969 F.3d at 383. Although the TCC prong structure was proposed by Google in its individual post-hearing Proposed Findings of Fact and Conclusions of Law,<sup>13</sup> the Circuit found that the Services “had no notice that they needed to defend against and create a record addressing” the TCC prong. *Id.* at 381.<sup>14</sup> Based on these findings, the Circuit held that the Board “will need to reopen the evidentiary record” in order to maintain its TCC prong. *Id.* at 383.

Critically, the Decision did *not* find the adopted TCC prong to be unfair, unreasonable or inequitable in any way, but merely remanded because it believed the Services “were procedurally blindsided.” *Id.* at 381. The Decision makes clear that it is addressed to the “ability to provide

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<sup>13</sup> With the exception of Apple, the other four services submitted both joint Proposed Findings of Fact and Conclusions of Law and also individual submissions.

<sup>14</sup> The Circuit also held that, “the other parties never had a chance to submit evidence regarding the problems with Google’s proposal,” *id.* at 383, although failing to recognize that no appellant Service put in any finding of fact or conclusion of law objecting to Google’s proposal, while each had that opportunity as part of reply findings of fact and conclusions of law, and that “[a] party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party.” 37 CFR § 351.14.

evidence” concerning the TCC prong, and not to any substantive problem with the TCC prong’s reasonableness:

Interested parties’ ability to provide evidence and argument bearing on the essential components and contours of the Board’s ultimate decision not only protects the parties’ interests, it also helps ensure that the Board’s ultimate decision is well-reasoned and grounded in substantial evidence . . . That vetting by the parties did not occur here because the Streaming Services were procedurally blindsided.

*Id.*; see also *id.* at 380 (holding “the Board violated [the appellant Services] procedural right to fair notice”), 383 (explaining “we have vacated the rate structure devised by the Board for lack of notice”). The Circuit expressly stated that the Decision did not take up the Services’ arguments that the TCC prong was arbitrary or not grounded in substantial evidence. *Id.* at 383. On the contrary, the Circuit expressly provided that the Board could “pursue its novel rate structure” on remand, provided it “reopen the evidentiary record.” *Id.* at 383.

Nothing therefore precludes the Board from maintaining the same TCC prong after remand, and even under the same compelling reasoning laid out in the Final Determination, once the Services are provided an opportunity to “voice their objections” as the Decision required. See *Heartland Reg’l Med. Ctr.*, 415 F.3d at 29–30 (explaining that “the usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand” and observing that agency that had reached same result following remand had “complied with the [prior appellate] judgment . . . by filling the analytical gap identified in that opinion”); see also *FEC v. Akins*, 524 U.S. 11, 25 (1998); *Intercollegiate Broad. Sys., Inc.*, 796 F.3d at 121.<sup>15</sup>

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<sup>15</sup> Given the clear authority that the Board can reach the same result after remand, the claim of the three Services opposing the interim rate motion that “re-adopt[ing] the *Phonorecords III* rates and terms . . . would violate the D.C.

Notably, the Services appealed for the reversal of the TCC prong as substantively unreasonable. *See* Final Sealed Initial Brief for Appellants/Intervenors Pandora Media, LLC, Google LLC, Spotify USA Inc. and Amazon.com Services LLC (“Service Appeal Brief”) at 28-38. This request was *not* granted by the Circuit. *Johnson*, 969 F.3d at 383. The appellant Services have never marshaled evidence that a true TCC prong (which each of them *requested* in their proposed rate structures) was unreasonable, or that they would suffer disruption or harm from the expansion of the true TCC prong.

However, the Services also appealed on a procedural argument that they “had no opportunity to be heard.” Service Appeal Brief at 25. This is the narrow ground on which the Circuit remanded. This opportunity to be heard is just that, and does not imply that the Services in fact have evidence to support their arguments or a meritorious case to make. Copyright Owners have repeatedly pointed out that the evidence does not support their claims concerning label market power or disruption from a true TCC prong. The Services should now have the opportunity to be heard, and the ensuing burden to provide evidence. What they should not be permitted to do is fail to provide evidence while still proclaiming that they have something to say.

## 2. *Remand standards and procedure*

The Decision does not indicate any need to take additional evidence with respect to any other aspect of the Final Determination apart from the TCC prong. Moreover, the instruction to reopen the evidentiary record to allow the Services an “opportunity to voice their objections” does not expand to objections to a true TCC prong *in principle*. *Every* appellant Service *proposed* the

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Circuit’s judgment and mandate” (Services’ Opposition to the NMPA and NSAI’s Interim Rates Motion at 5) is baseless and incorrect. In reaching the same result on remand, the Board would not ever trigger additional scrutiny in a subsequent appeal. *See City of Los Angeles v. U.S. Dep’t of Transp.*, 165 F.3d 972, 977–78 (D.C. Cir. 1999).

use of true TCC prongs for some offerings, and were definitively *not* prevented from objecting to such prongs in general or in principle.<sup>16</sup> As the Circuit discussed:

[T]he fact that some of the Streaming Services’ proposals contemplated continued use of an uncapped total content cost prong for a small number of preexisting categories does not mean they anticipated that the Board would uncap the total content cost prong *across the board*. That is quite different. . . .

Uncapping the total content cost prong across all categories leaves the Streaming Services exposed to potentially large hikes in the mechanical license royalties they must pay.

*Johnson*, 969 F.3d at 382 (emphasis in original). The Services’ evidence on remand should thus be focused on the precise issue identified by the Circuit: expansion of the true TCC prong “across the board” or “across all categories.” A party cannot claim to have been deprived of the opportunity to object to the reasonableness of an aspect of rate structure *that they themselves proposed*. As this quote indicates, it was only the *expansion* of the true TCC prong *across the board* that was unanticipated, not the use in principle of the true TCC prong.

The proposed remand procedure, which would provide the Services an opportunity to submit additional evidence of disruption due to the expansion of the true TCC prong across the board, followed by a reply submission from the Copyright Owners, along with targeted disclosures and discovery, satisfies the remand instruction in an fair and efficient manner.

The Services’ complaints concerning the expansion of the true TCC prong revolved around speculative disruption from exposure to alleged “unchecked market power” of major record labels. *Johnson*, 969 F.3d at 382. Now, after three years of royalties under the expanded true TCC

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<sup>16</sup> Under the Phonorecords II rates and terms, only certain service offering types had a per-subscriber rate that could eliminate the TCC prong through a lesser-of calculation. Others were true TCC prongs. See 37 C.F.R. §§ 385.13 (2014), 385.23 (2014).



prong—and the Services’ commensurate exposure to the alleged label market power—there is no need to speculate further. The remand proceeding can admit the conclusive evidence that the disruption or harm that the Services speculated would flow from the adopted TCC prong simply never occurred. Rather, the reasoned conclusions in the Final Determinations on the reasonable expected outcomes in a market of rational economic actors were in fact borne out. The service industry is thriving more than ever, and the emptiness in the Services’ claims that they were deprived of the opportunity to show that the adopted TCC prong “would be disastrous” (Services Appeal Reply Br. at 4) can be laid to rest by the incontrovertible reality of what in fact occurred.

3. *Hearing record*

The proposed remand procedure on this issue is also appropriate in light of the hearing record. The remand submissions would allow for additional evidence, which would supplement the extensive hearing record on this issue. Despite the Circuit’s holding that the Services were “procedurally blindsided” by the TCC prong, the hearing looked directly at the issues underlying the Board’s adoption of the TCC prong, as well as the Services’ unsupported complaints about record label market power.

The concerns that drove Google to propose expanding the true TCC prong, and drove the Board to adopt such an expansion, were overwhelmingly documented and generally admitted by the Services. The Board found that “an uncapped TCC prong effectively imports into the rate structure the protections that record companies have negotiated with services to avoid the undue diminution of revenue through the practice of revenue deferral.” 84 Fed. Reg. at 1,934-1,935.

That such diminution of revenue occurred, and led to unreasonably low royalties, was well-established at the hearing. The Board found that the Services had indeed deliberately diminished their short-term revenues in favor of growth (revenue deferral). *See, e.g., id.* at 1,927 (“The Judges

find that the record in this proceeding indicates that the Services do seek to engage to some extent in revenue deferral to promote a long-term growth strategy.”), *id.* at 1,934-1,935. The record overwhelmingly supports these holdings, showing that revenue diminution is a fundamental part of the Services’ business strategy. *See, e.g.*, Tr. 2081:13-2084:15 (McCarthy); Tr. 1472:4-1475:15, 1481:24-1484:11 (Mirchandani); HX-3007; HX-113 at 2; HX-3225; HX-546 at 6; HX-3209 at 7, 18, 20, 22; HX-2704 at 23.

In contrast, the Service arguments for the ill-described “capped TCC”—the illusory lesser-than rate prongs that are effectively just minimal per-subscriber rates—was always “speculative.” *See* 84 Fed. Reg at 1,965 (dissenting opinion). The Services claimed that without it, record labels might put them out of business by raising sound recording royalty rates or refusing to license to the Services in favor of “in-house” streaming services the labels may someday create. *See* Service Appeal Brief at 34-35, 48. The absence of any evidence to back up these speculations is confirmed by the absence of any actual effects over the rate period.

The hearing record also informs the scope of argument and evidence that the Services should be permitted to make on remand on this issue. As noted above, it is clear from the Decision that the reopening of the evidentiary record in connection with the TCC prong should not extend to allowing Services to put in new evidence on issues that were plainly noticed, let alone litigated, at the hearing. This includes such things as the reasonableness in principle of a true TCC prong—which is something that every appellant Service *proposed*—and the myriad other TCC issues that were presented at the hearing. Google proposed a universal true TCC prong, and so cannot be heard to object to the reasonableness of that structure in principle. Indeed, Google proposed findings of fact extolling the fairness of the true TCC prong. *See* Google’s Proposed Findings of Fact at GPFF67-73 (“The uncapped TCC prong . . . will ensure that Copyright Owners always will

receive a portion of overall royalties commensurate with their contributions, regardless of how a licensee structures its business.”)

The hearing record is thus not merely replete with evidence supporting the Board’s findings in connection with the TCC prong, but presents the many issues, arguments and admissions related to the TCC prong that were already raised and should thus demarcate the limitations on the additional evidence that the Services should be allowed to submit on remand.

**Conclusion**

Copyright Owners respectfully submit that the procedure proposed herein be adopted for resolution of the remand, providing for a paper proceeding with briefing to support the Judges’ review of the hearing record, along with an opportunity for submission of new evidence on issues relating to the expansion of the true TCC prong that were not presented during the hearing, and expedited disclosure and discovery procedures. The proposed procedure is fair, economical and efficient, and fulfills the remand directions in the Decision.

Dated: December 10, 2020

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# Proof of Delivery

I hereby certify that on Thursday, December 10, 2020, I provided a true and correct copy of the Proposal of the Copyright Owners for the Conduct and Schedule of the Resolution of the Remand (Public) to the following:

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