

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

ORDER REGARDING PROCEEDINGS ON REMAND

On December 10, 2020, the Copyright Royalty Judges (Judges) received proposals¹ for the conduct of proceedings in this matter following the U.S. Court of Appeals for the District of Columbia Circuit’s (DC Circuit) vacatur of the Judges’ Final Determination ([Determination](#))² and remand for further proceedings. *See Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020).

The Services and Copyright Owners agree that the proceedings on remand should be limited to three issues: the majority’s rejection of the *Phonorecords II* settlement as a benchmark; the adoption of a rate structure that includes an uncapped TCC prong; and the adoption of a revised definition of “service revenue” for bundled offerings between issuing their Initial Determination and Final Determination. *See* Services’ Proposal at 3-4; Copyright Owners’ Proposal at 1-2. The Services and Copyright Owners also agree that the Judges should resolve the first and third issues based on the existing record, after receiving two rounds of additional briefing from the parties. *See* Services’ Proposal at 5-6, 9-10; Copyright Owners’ Proposal at 4-6. Both parties advocate for a proceeding conducted on the papers, although the Services propose, in addition, that the Judges hear oral argument after the briefing is complete. *See* Services’ Proposal at 5-6; Copyright Owners’ Proposal at 4.

As to the rate structure issue, the Services propose that the Judges confine their consideration to the existing record and briefing by the parties. *See* Services’ Proposal at 6-9. The Copyright Owners, by contrast, propose that the Judges take additional evidence on this issue, and afford the parties the opportunity to conduct limited discovery. *See* Copyright Owners’ Proposal at 6-9. Under the Copyright Owners’ proposal, the Services would prepare an initial submission in which they would state and seek to substantiate their objections to an uncapped TCC rate structure, after which the Copyright Owners would have an opportunity to make a rebuttal submission. *See id.* Any participant submitting new evidence would concurrently produce any documents on which they rely, including any agreements with record

¹ *See* Services’ Proposal for Remand Proceedings (Dec. 10, 2020) ([Services’ Proposal](#)); Proposal of the Copyright Owners for Conduct and Resolution of the Remand (Public) (Dec. 10, 2020) ([Copyright Owners’ Proposal](#)). The Services consist of Amazon.com Services LLC, Google LLC, Pandora Media LLC, and Spotify USA Inc. The Copyright Owners consist of National Music Publishers’ Association, Inc. and Nashville Songwriters Association International. The Judges did not receive a proposal from Mr. George Johnson, who was also a party to the appeal.

² *See* 84 Fed. Reg. 1918 (Feb. 5, 2019).

companies covering the period between January 1, 2016 and the present, and certain financial documents. *See id.* at 8. Parties would then have an opportunity to request relevant documents not covered by the initial disclosure. *See id.*

The Judges accept the parties' proposals to resolve the issues concerning the use of the *Phonorecords II* settlement as a benchmark and the definition of "service revenue" for bundled offerings on the basis of the existing record as supplemented by two rounds of briefing. The Judges find that approach would permit a fair and expeditious resolution of those two issues.

With regard to the rate structure, the Judges note that the DC Circuit stated "[i]f the Board wishes to pursue its novel rate structure, it will need to reopen the evidentiary record." *Johnson*, 969 F.3d at 383. By proposing that the Judges not reopen the record, the Services' would effectively preclude the Judges from "pursu[ing]" the rate structure adopted in the Determination. The Copyright Owners' proposal, by contrast, would leave that avenue open to the Judges, without predetermining the outcome. The Judges will thus adopt that element of the Copyright Owners' proposal and reopen the evidentiary record for the limited purpose of resolving the rate structure issue.

The Judges, however, decline to adopt the Copyright Owner's proposal to have the Services make an initial submission on the rate structure issue, followed by a rebuttal submission by the Copyright Owners. That element of the Copyright Owners' proposal appears to be premised on the assumption that "the burden of supplying additional evidence falls on the Services." Copyright Owners' Proposal at 8 n.6. The question of which party bears the evidentiary burden on this issue, or any sub-issue raised with regard to the rate structure, is as yet undecided by the Judges, and is a matter that the parties should address in their upcoming briefing and at any subsequent point in the remand proceeding, as warranted. In the meantime, the Judges find it appropriate to accept submissions from both parties stating the affirmative cases for their respective positions and providing evidence therefor, followed by rebuttal submissions from the parties.

The Judges are as yet undecided on the question whether to hold oral argument or hear live witness testimony. The Judges will consider and decide that issue after they have reviewed the written submissions.

The proceedings on remand will entail the following steps:

- Submission of written briefing and reply briefing on each of the issues remanded to the Judges, subject to reasonable page limits.
- Submission of evidence supporting each party's position on the rate structure issue and concurrent production of all documents relied upon in connection with the submission (including agreements with record companies covering the period between January 1, 2016 and the present, and documents concerning the actual or expected impact the uncapped TCC prong has had or will have on company growth, revenues, profits, company value, brand, or ecosystem).³
- Submission of rebuttal evidence and concurrent production of all documents relied upon in connection with the submission (to the extent not already produced).

³ A party may refer to the production number of any document relied upon that was previously produced in the proceeding in lieu of producing the document anew.

- Discovery relating to any submission that proffers new evidence.
- After the filing of reply briefs and rebuttal submissions the Judges will determine, in their discretion, whether to request additional briefing, oral argument, and/or live testimony.

The Judges **ORDER** the parties to meet and confer and submit a joint proposed scheduling order⁴ no later than Tuesday, December 22, 2020, that includes the foregoing elements, sets forth specific deadlines for each of them, establishes a process and schedule for discovery, and establishes reasonable page limits for the briefs and reply briefs.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: December 15, 2020

⁴ The parties shall use the new docket number in the caption of this order.