

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)**

**ORDER DENYING COPYRIGHT OWNERS' MOTION TO ADOPT
INTERIM RATES AND TERMS PENDING THE REMAND DETERMINATION**

On November 2, 2020, the National Music Publishers' Association, Inc. (the NMPA) and the Nashville Songwriters Association International (the NSAI) (collectively, the Copyright Owners), filed a Motion "To Adopt Interim Rates and Terms Pending the Remand Determination" ([Motion](#)). The Copyright Owners request that the rates and terms set forth in the *Phonorecords III Final Determination*, dated November 5, 2018 (*Final Determination*),¹ be adopted as interim rates and terms to remain in effect until the Judges publish a new final determination in this proceeding (Remand Determination) in resolution of the remand directed in the August 7, 2020 decision (Decision) by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020).

Amazon.com Services LLC (Amazon), Pandora Media, LLC (Pandora), and Spotify USA Inc. (Spotify, and, collectively, the Services) filed their response in opposition to the Motion ([Opposition](#)) on November 18, 2020. The Copyright Owners filed their reply ([Reply](#)) on November 25, 2020.

The Copyright Owners argue that the Judges have inherent authority to implement interim rates, as Congress did not set forth a contrary legislative command. Motion at 3-6. Furthermore they indicate that the requested interim rates have been found by the Judges to be reasonable based on the extensive evidence submitted in the proceeding and relied upon in the Final Determination. *Id.* at 6. The Copyright Owners acknowledge that the Decision issued by the D.C. Circuit vacated and remanded aspects of the Board's Determination, but argue that the vacatur was based on procedural grounds, seeking additional explanation from the Judges or requiring additional evidence to support the Judges' decision. *Id.* The Copyright Owners assert that the Decision did not hold any substantive aspects of the Board's rates and terms to be unreasonable. *Id.*

The Copyright Owners also argue that the Copyright Act affords the Judges broad procedural freedom in remand proceedings. They point out that neither the Copyright Act, nor the Decision, precludes the Judges from setting the appropriate interim rates in this context. *Id.*

¹ The *Final Determination* was published at 84 Fed. Reg. 1918 (Feb. 5, 2019).

at 6-8, citing 17 U.S.C. § 801(b)(1) (authorizing the Judges “[t]o make determinations and adjustments of reasonable terms and rates of royalty payments.”). The Copyright Owners go on to assert that neither the statutory provisions regarding remand, nor the related regulations, delineate the procedures the Judges must apply on remand following an appeal. *Id.* at 6-7. They contend that the Judges have acknowledged the lack of binding procedures concerning remand proceedings when implementing the “purposely flexible” regulations governing such proceedings. *Id.* at 7 (citing 74 Fed. Reg. 38,532, 38,532 (Aug. 4, 2009) (contrasting the new, flexible remand procedures with the “significant[ly] detail[ed]” procedural structure in Section 803 for proceedings to establish royalty rates and terms in the first instance)).

The Copyright Owners argue that it is necessary for the Judges to set interim rates to avoid uncertainty, disruption, unnecessary future payment adjustments, and financial harm to copyright owners. *Id.* at 8-10. The Copyright Owners assert that without the requested interim rates there would be a free-for-all as services would unilaterally select rates during pendency of the remand. *Id.* at 9-10. They suggest that the past three years (during which the Services have paid the since-vacated rates) have been marked by successful market experience, which purportedly confirms that music streaming services have thrived, and may continue to thrive, under the proposal to continue those rates during the pendency of the remand proceeding. *Id.* The Copyright Owners then urge that unless a Remand Determination is issued before February 2021, the new statutory mechanical licensing collective (MLC) will not know the required interim rates in order to carry out its mandate under federal law. *Id.* at 10 (citing 17 U.S.C. 115 (c)(1)(F), (d)(3)(G), (d)(4) (addressing the MLC obligation to collect mechanical royalties every month, and then match and pay out the appropriate shares to copyright owners monthly)). In sum, the Copyright Owners urge that the requested interim rates are appropriate in order to avoid financial disruption to copyright owners and because the D.C. Circuit’s remand Decision is very narrow. *Id.* at 11-14.

The Services argue that the proposed interim rates would conflict with the D.C. Circuit’s Decision, which they state was an invalidation of the *Final Determination* rate structure and rate levels. Opposition at 1-2, 5-7.² The Services offer that the D.C. Circuit could have preserved the *Final Determination* rate structure and rate levels by remanding without vacating, and that the Copyright Owners could have sought a revision of the Decision or requested a stay of the mandate while the remand process proceeded, but neither in fact pursued those options. *Id.* at 1-2, 6-7, 10-11.

The Services assert that the Judges cannot adopt interim rates and terms because the Copyright Act does not authorize them to do so. *Id.* at 8. They dispute the Copyright Owners’ suggestions that the Judges have inherent authority to engage in interim rate-setting as a general matter or the authority to give force of law to the precise rate structure and percentages that a federal court has vacated. *Id.* at 2, 8-9. The Services note that the Copyright Act authorizes interim rates in only one scenario (*i.e.*, in agreements between the MLC and digital music providers when the Judges have not established rates and terms for a covered activity). *Id.* at 9 (citing 17 U.S.C. § 115(d)(8)(C)).

The Services argue that the statute does not allow the Judges to set interim rates without following any of the statute’s prescribed rate-setting processes, such as issuing a decision

² The Copyright Owners counter that the Services offer no support for the conclusion that the Judges cannot re-adopt the *Final Determination* rates and terms without violating the D.C. Circuit’s Decision. Reply at 5.

supported by a written record and findings of fact, being subject to review for legal error by the Register of Copyrights, and publication of a determination in the Federal Register. *Id.* at 9-10 (citing 17 U.S.C. §§ 803(c)(3), (c)(6), 802(f)(1)(D)). The Services acknowledge the Copyright Owners’ observation that the Copyright Act does not delineate the procedures the Judges must apply on remand following an appeal, but assert that the requested interim rates and terms are not “procedures”; they are substance. *Id.* at 10.

The Services dispute the Copyright Owners’ assertion that the absence of interim rates would lead to confusion, disruption or a free for all with the Services selecting the applicable rate. The Services instead contend that the clear statutory effect of the D.C. Circuit’s vacatur was to reinstate the preceding rates and terms in the regulations (derived from the parties’ settlement in *Phonorecords II*), pending a Remand Determination of rates and terms by the Judges, which will have retroactive effect back to the start of the *Phonorecords III* rate period. *Id.* at 2-3 (citing 17 U.S.C. § 803(d)(2)(B)).³ The Services argue that the proposed interim rate order would only add complexity and transaction costs for everyone by requiring an additional transition to an interim rate and from an interim rate upon final resolution of the remand, at which point the statutory true-up (or true-down) process for previous payments will occur. *Id.* at 11 (citing 17 U.S.C. § 803(d)(2)(C)(ii)). The Services offer that by the time the Motion is fully briefed and decided, the deadline for payment of October 2020 royalties would have come and gone and that October 2020 royalties would be paid at *Phonorecords II* rates. *Id.* at 12. They add that even if the Judges denied the Motion, there would be as many as three sets of rates and terms in play when calculating final true-ups under § 803(d)(2)(C)(ii): *Phonorecords III* (pre-October 2020), *Phonorecords II* (October 2020 and later), and the rates adopted on remand. The Services indicate that if the Judges granted the Motion, there would be yet another set of rates that all parties would have to incorporate into the true-up process, imposing more transaction costs. *Id.*

The Services argue that the errors in the Judges’ Determination that the D.C. Circuit identified are foundational issues, that the remand Decision was not a “narrow” one, and that it dictates that the Judges cannot assume that the *Phonorecords III* rates are reasonable. *Id.* at 13. They offer that resolving the issues noted by the D.C. Circuit is the purpose of the remand proceedings, and the Judges should address it through the proper process. *Id.*

Finally the Services argue that the Motion rests on a variety of factual assertions unsupported by any record evidence and that relying on such assertions would be inappropriate and inconsistent with the requirement that rate-making decisions must be based on substantial evidence. *Id.* at 14.

Having considered the entirety of the papers submitted, and all other matters presented, the Judges find that regardless of the question of the Judges’ authority for, or prohibition from, adopting interim rates, inherent or otherwise, any adoption of rates requires a thorough consideration of and reliance on record evidence, and that the interests of administrative economy indicate that such efforts should be directed toward arriving upon final rates in a

³ The Copyright Owners dispute the suggestion that the Final Determination rates do not apply in the absence of the requested interim rates. Reply at 1, 2-3 (citing 17 U.S.C. § 803(d)(2)(B)) (offering that the provisions concerning rate succession says nothing about vacatur, and reflects an intent to maintain the most-recently determined rates pending successor rates).

Remand Determination.⁴ The Judges also observe that the Services have indicated that they intend to make payments pursuant to the *Phonorecords II* rates during pendency of the remand, and those circumstances provide further support for the Judges’ decision to decline to exercise discretion, if any, to adopt interim rates.⁵ The Services also correctly observe that the Remand Determination shall be applicable to the entire rate period from 2018 through 2022, with a requirement to account for statutory true-up (or true-down) for previous payments. The true-up or true-down will address any temporary payment imbalance placed on either the Copyright Owners or the Services. The Motion is hereby **DENIED**.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: December 21, 2020.

⁴ The Judges are moving forward with the remand proceedings. See *Order Regarding Proceedings on Remand* (Dec. 15, 2020).

⁵ See Opposition at 11 n.3 (suggesting the Services would be “using . . . the Phonorecords II rates and terms (post-mandate)” until new final rates are set after the remand). To the extent this is disputed by the parties, the Judges do not address the question of the D.C. Circuit’s vacatur pursuant to 17 U.S.C. § 803(d)(2)(B), pending a new Remand Determination. Neither party requested that the Judges reach any conclusion of law on this question, and neither party cited any statutory authority pursuant to which the Judges could issue an order as to this issue. The Judges are not persuaded that such a conclusion of law would constitute a determination of reasonable royalty rates that is within the Judges’ jurisdiction, rather than a statement in the nature of an advisory opinion.