PUBLIC VERSION

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April 13, 2021

Via eCRB

United States Copyright Royalty Judges
Library of Congress
James Madison Memorial Building
101 Independence Ave, S.E.
Washington D.C. 20559-6000

Re: ***Determination of Royalty Rates and Terms for Making and Distributing Phonorecords, Docket No. 16-CRB-0003-PR (2018-2022) (Remand)***

Request for Conference Call Regarding Compliance with the Judges' December 23, 2020 Order

To the United States Copyright Royalty Judges:

We write on behalf of the National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners"), pursuant to the provision of the Board's December 23, 2020 Order Adopting Schedule for Proceedings on Remand, eCRB Docket No. 23413 (the "Order"), which provides that, "[t]he participants may request conference calls with the Judges where there is a good-faith belief that such conferences may avoid motion practice." Copyright Owners request a conference to address the violation by each of the Services[1] of the April 1 production obligation in the Order.

Copyright Owners have conferred with each Service, and have reached an impasse, with all four simply denying that they have the production obligation that Copyright Owners believe is plain in the Judges' Order. Copyright Owners were prepared to file motions for enforcement of the Order, although the regulatory time frame for motion briefing would eviscerate the purpose of the Order, namely to advance this core document production in light of the brief time frame to prepare rebuttals. Since the issue in dispute is limited to the Judges' own intention in the Order with respect to the scope of the April 1 production requirement, Copyright Owners believe that a discovery conference would be a simple way to avoid motion practice and vindicate the Judges' intent in the Order.

[1] "Services" refers to Amazon.com Services LLC ("Amazon"), Spotify USA Inc. ("Spotify"), Google LLC ("Google"), and Pandora Media, LLC ("Pandora").

The Order required any participant filing new evidence supporting its position on the rate structure issue on April 1, 2021 to make a concurrent production of documents, providing:

- Filing of evidence (which may include witness statements and accompanying exhibits) supporting each participant's position on the rate structure issue.

- Production of all documents relied upon in connection with the evidence (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).

(Order at 1.)[2] On April 1 the Services filed eight new witness statements amounting to new evidence on the rate structure issue. (*See* eCRB Docket Nos. 23848-23850, 23852-23853.) Because they filed new evidence, the Services were each required to make a concurrent production that complied with the Order. However, they produced only a few documents each, primarily those referenced in their witness statements. Not a single document 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" was produced by any Service, and only selected record label agreements were produced. The below chart summarizes what was received from the Services on April 1 (outside of the joint brief):

Service	Witness Statements	Filed exhibits	Summary of documents produced on April 1[3]	Documents produced concerning impact of the rate structure
Spotify	3	None	• [redacted]	None
Amazon	1	1	• [redacted]	None
Google	2	None	• [redacted] • [redacted]	None
Pandora	2	5	• [redacted] • [redacted] • [redacted] • [redacted]	None

[2] This language mirrored the concurrent production obligation set forth by the Board in its December 15, 2020 Order Regarding Proceedings on Remand, eCRB Docket No. 23390 (the "Dec. 15 Order").
[3] Some expert workpapers were also produced.

Two issues have been framed by the discussions that Copyright Owners have had with the Services over the past week concerning this matter:

- *First*, the Services each deny the applicability of the specific parenthetical inclusion clause that the Judges put in the Order, namely, that the April 1 production was to be "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." Rather, the Services now argue that this clause has no force, but is simply a list of things that they might produce in their discretion, and does not require the specific items listed. To be clear, the Services' failure to produce the documents identified by the Judges in the inclusion clause is not disputed; the Services position is that they are not required to produce these documents.

- *Second*, the Services interpret "relied upon in connection with the evidence" extremely narrowly, to mean little or nothing more than documents actually referenced in witness statements, rather than the documents that underlie the assertions in the statements. Thus, even where witnesses make sweeping statements about the rate structure and its supposed effects, and about agreements reached with record labels generally, the Services deny that anything was relied upon beyond the witnesses' memory or general knowledge, even where such knowledge plainly came from review of documents.

Copyright Owners have pointed the Services to both the history and the text of the Judges' inclusion clause, which support that the documents in the inclusion clause should have been included in the Services' April 1 productions. The text of the Order alone should be enough to reach this conclusion. The concurrent production requirement uses very specific language to identify two specific categories of documents to be included in the April 1 production. The first is "agreements with record companies from January 1, 2016 to the present." The precise date range should be enough to indicate that these documents were specifically identified to be produced on April 1. But the Services have taken the position that this language means nothing because it is overridden by the general language "relied upon in connection with the evidence," which gives the Services the discretion to ignore anything in the inclusion clause where they decide that it does not meet their interpretation of relied upon in connection with the evidence. The Services have offered no reason why the Judges would explicitly call for production of specific documents over specific date ranges, if in fact the Judges' intention was to require nothing specific.

The second requirement in the inclusion clause is likewise very specific: "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." Yet the Services take the same position that this specific language in fact requires nothing, and, as noted above, the Services produced *no* documents concerning such impact. Notably, this failure to produce any such documents amounts to an implicit claim that the Services' submission on the rate structure is

unconnected to the existence or absence of any impact on them from the rate structure, although this claim is not one that the Services openly admit anywhere in their papers. Rather, the basis for the Services' objections and appeal on this issue has always been that they faced a disruptive impact from the TCC prong which they had been deprived of an opportunity to prove. The Services cannot maintain that argument while also claiming that they in fact face no impact at all from the TCC prong.

With respect to the Services' textual argument that the Judges' inclusion clause is simply a list of optional examples, Copyright Owners pointed out that this is disproved by the Judges' Dec. 15 Order. The Dec. 15 Order adopted the inclusion clause from the Copyright Owners' Proposal for the Conduct and Schedule of the Resolution of the Remand, eCRB Docket No. 23385 ("Copyright Owners' Remand Proposal"), which framed the issue and the production requirements as follows:

> 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 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.

(Copyright Owners' Remand Proposal at 7-8.) As is clear, these are the three bullets that are reflected in the Order; each is a category to be produced, not optional examples, concurrently with any remand submission containing new evidence. Copyright Owners' Remand Proposal discussed

the manifest point that the two inclusion clause categories contain "core documents" that are relied upon necessarily by the Services in presenting their new evidence and arguments on the rate structure issue, which turn on their record company agreements and the impact of the TCC prong. These categories were not optional examples that could be dispensed with by the Services in their discretionary interpretation.

In the Dec 15 Order, the Judges summarized the Copyright Owners' proposal on this issue using *the same inclusion clause language* as used in the Order:

> Under the Copyright Owners' proposal… [a]ny participant submitting new evidence would concurrently produce any documents on which they rely, including any agreements with record 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 use of the same "including" language to paraphrase Copyright Owners' proposal as is then used in the Order seems to unmistakably indicate that the Judges viewed the phrasings as saying the same thing, and that they intended to carry over the proposal requirements into the Order. And as discussed above, this seems also the plain language reading of the inclusion clause. Nonetheless, the Services openly reject that interpretation, did not produce most of their label agreements from 2016 to the present, and did not produce any documents concerning impact, despite submitting eight witness statements on the rate structure issue.

In addition to reading out the inclusion clause, the Services' position adopts an impossibly narrow interpretation of the phrase "relied upon in connection with the evidence." For example, the Services argue that, "[t]he record labels have not agreed to lower royalties in response to Copyright Owner rate increases"; that "[s]ound recording rates have not declined in response to increases in musical works royalty rates"; and that "[f]or most services, sound recording rates have not changed at all since the Initial Determination issued." (*See* Services' Joint Written Direct Remand Submission (Public), eCRB Docket No. 23856, Services' Joint Opening Brief at 45, 48.) Yet, as shown above, the Services did not produce all of their agreements with labels, but cherry-picked just a few agreements. The Services also admonish the Board for not taking "a more balanced approach that accounts for the real-world impact of the record labels," while simultaneously failing to produce any documents concerning such impact and arguing that their submissions are somehow unconnected to impact. (*Id.* at 56.)[4]

[4] The Services also make sweeping statements about the content of their negotiations with record labels over sound recording royalties, yet do not produce the negotiation histories of which those pronouncements are made. They contend that "[t]he actual negotiations between record labels and Services since the Initial Determination issued in January 2018 belie Professor Watt's predictions of a see-saw effect." (*Id.* at 48.) Pandora's witness offers a few hand-picked negotiation emails to support an argument, while omitting the other emails from the negotiation that did not suit the arguments. (*See* Written Direct Remand Testimony of George White (Public).) Amazon's witness testifies that "[d]uring those [label] negotiations, the Majors never suggested that they might agree to decrease sound recording

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The participants and the Judges understood that, at three months, the period for discovery and preparation of rebuttal submissions in this remand proceeding is short. For this reason, the specific concurrent production provision for submissions proffering new evidence was added, to advance production of certain core documents. The Services' refusal to produce these documents has already caused meaningful delay, and Copyright Owners respectfully request a conference with the Judges as soon as they are available to discuss this matter in hopes of avoiding motion practice.

Respectfully submitted,

Benjamin K. Semel

royalty rates in response to increasing mechanical royalties or the outcome of *Phonorecords III*." (*See* Supplemental Testimony of Rishi Mirchandani (Public), eCRB Docket No. 23859 ("Mirchandani Testimony"), ¶ 14.) Amazon now takes the position that it owes no production concerning those alleged communications since the testimony came from memory, not documents. Spotify likewise put forward a witness to testify regarding "the rates in effect since 2017 and negotiations related thereto" (Written Direct Remand Testimony of Christopher Bonavia (Public), eCRB Docket No. 23860, ¶ 2), and similarly claims no need to produce any documents in connection with those negotiations.

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) (Remand)

DECLARATION OF BENJAMIN K. SEMEL
REGARDING RESTRICTED INFORMATION

1. I am a partner at Pryor Cashman LLP, counsel for the National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI" and, together with the NMPA, the "Copyright Owners") in the above-captioned proceeding (the "Proceeding").

2. Pursuant to Section IV.A of the Protective Order issued in the above-captioned Proceeding on July 28, 2016 (the "Protective Order"), I submit this declaration in connection with the April 13, 2021 letter on behalf of the Copyright Owners requesting a conference with the Copyright Royalty Judges (the "April 13, 2021 Letter").

3. I have reviewed the April 13, 2021 Letter. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions that the Copyright Owners have indicated are to be made to the April 13, 2021 Letter and that they will make in the publicly filed version of the April 13, 2021 Letter is necessitated by the designation of one of the participants in this proceeding as "Confidential Information" under the Protective Order. Because the Copyright Owners are bound under the Protective Order to treat as "Restricted" and to redact information designated "Confidential Information" by participants, they are doing so. Copyright Owners

reserve all rights and arguments as to whether any such information is, in fact, "Confidential Information."

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: April 13, 2021
New York, New York

/s/ Benjamin K. Semel

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Counsel for Copyright Owners

Proof of Delivery

I hereby certify that on Tuesday, April 13, 2021, I provided a true and correct copy of the April 13, 2021 Letter to Copyright Royalty Board (Public) to the following:

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

Spotify USA Inc., represented by A. John P. Mancini, served via ESERVICE at jmancini@mayerbrown.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

Google LLC, represented by David P Mattern, served via ESERVICE at dmattern@kslaw.com

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

Signed: /s/ Benjamin K Semel