

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 DENYING IN PART AND GRANTING IN PART SERVICES’ MOTION TO
STRIKE COPYRIGHT OWNERS’ EXPERT TESTIMONY AND GRANTING
SERVICES’ REQUEST TO FILE SUPPLEMENTAL TESTIMONY AND BRIEFING**

On July 27, 2021, the Services¹ filed a Motion to Strike Copyright Owners’ Expert Testimony ([Motion](#)). On August 10, 2021, Copyright Owners² filed an [Opposition](#). On August 17, 2021, the Services file a [Reply](#).

Background

On August 7, 2021, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) rendered a decision affirming in part, and vacating and remanding in part, the Final Determination of the Copyright Royalty Judges (Judges) in this proceeding. *Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020) (*Johnson*), *aff’g in part, and vacating and remanding in part, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords*, 84 Fed. Reg. 1918 (Feb. 5, 2019) (*Phonorecords III*). The D.C. Circuit remanded the vacated portions of this proceeding to the Judges “for further proceedings consistent with this opinion.” *Johnson*, 969 F.3d at 376.

Among the issues remanded to the Judges by the D.C. Circuit is the Judges’ “adopt[ion] [of] a rate structure for computing the mechanical license that uncapped the total content cost prong for every category of streaming service offered, while simultaneously increasing both the total content cost and revenue rates.” *Id.* at 380.³ The D.C. Circuit remanded this issue to the

¹ The Services who filed the Motion are Amazon Services LLC (Amazon), Google LLC (Google), Pandora Media LLC (Pandora), and Spotify USA Inc. (Spotify).

² Copyright Owners are comprised of the National Music Publishers’ Association (NMPA) and the Nashville Songwriters Association International (NSAI).

³ “Total Content Cost” – identified in the industry by the acronym “TCC” – references “regulatory language describing generally the amount paid by a service to a record company for the section 114 right to perform digitally a sound recording.” *Phonorecords III*, 84 Fed. Reg. at 13 n.38.

Judges because it agreed with the Services’ argument that the Judges⁴ had “failed to provide adequate notice of the drastically modified rate structure it ultimately adopted.” *Id.* at 381.

The following provisions within *Johnson* are of special importance with regard to the procedural ground rules the Judges must establish, including those to be applied in the resolution of the issues raised by the Motion:

1. The Judges obligation to “*create a record*” addressing their “significant, and significantly adverse, overhaul of the mechanical license royalty scheme ... is *no mere formality.*” *Johnson*, 369 F.3d at 381 (emphasis added).
2. The Judges must “provide a fair process in which each party is able to present its case or defense [and] *to submit rebuttal evidence* ... as may be required for a full and true disclosure of the facts that bear on the agency’s decisions and choices.” *Id.* (internal quotation marks omitted) (emphasis added).
3. “Interested parties’ *ability to provide evidence and argument* bearing on the essential components and contours of the [Judges’] ultimate decision not only protects the parties’ interests, it also *helps ensure that that the [Judges’] ultimate decision is well-reasoned and grounded in substantial evidence.*” *Id.* (emphasis added).
4. “If the [Judges] wish[] to pursue [their] novel rate structure, [they] will need to *reopen the evidentiary record.*” *Id.* at 383 (emphasis added).⁵
5. “[W]e vacate and remand the [Judges’] adopted rate structure and percentages for *further proceedings consistent with this opinion.*” *Id.* at 381. (emphasis added).

Thus, the Judges understand that – in order to act in a manner consistent with the D.C. Circuit’s opinion and render a determination that is “well-reasoned and grounded in substantial evidence” – they must “reopen the evidentiary record” by establishing a “fair process” that allows each party to submit rebuttal testimonial and other evidence in response to any testimonial or other evidence that is *substantively* direct in nature, regardless of how the adverse party has been denominated its submission. *Id.* at 381, 383.⁶

⁴ In this Order, the Judges use the shorthand “Judges” to reflect the authors of a Determination, whether by unanimous or majority vote. In this *Phonorecords III* proceeding, Chief Judge Barnett and Judge Feder were in the majority; Judge Strickler dissented and wrote a separate opinion. When necessary herein, the Judges distinguish between the majority and dissenting opinions.

⁵ The Judges are considering on remand the rate structure and rates they established in *Phonorecords III*.

⁶ To support their reference to the need for rebuttal evidence, the D.C. Circuit cited to a provision of the Administrative Procedure Act, 5 U.S.C. § 556(d). Pursuant to the Copyright Act, 17 U.S.C. § 803(a)(1), the Judges “shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5” (Section 556(d) is within subchapter II of chapter 5 of title 5.) The Judges have established their own rules regarding the submission of direct and rebuttal statements in rate proceedings, pursuant to 17 U.S.C. § 803(b)(6)(C)(i) and (ii). However, 17 U.S.C. § 803(d)(3) provides that “[t]he [appellate] court *may* also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a) [of section 803].” *Id.* (emphasis added). In turn (and with some circularity), “subsection (a)” requires the Judges to “act in accordance with [*inter alia*] ... “decisions of the court of appeals” 17 U.S.C. § 803(a)(1). Nothing in *Johnson* or the Copyright Act instructs the Judges to apply the exact procedure as required in the Judges’ procedural rules; rather, *Johnson* repeatedly

To carry out the D.C. Circuit’s directives in *Johnson*, the Judges entered an *Order Regarding Proceedings on Remand* (Dec. 15, 2020) (*Remand Proceedings Order*). In the *Remand Proceedings Order*, the Judges discussed the sequencing of the parties’ respective submissions and Copyright Owners’ proposal in that regard:

As to the rate structure issue ... [t]he *Copyright Owners* ... propose that ... 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.*

...

The Judges ... 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*.” 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.*

Remand Proceedings Order at 1-2 (emphasis added; citation omitted).

On April 1, 2021, Copyright Owners filed their [Initial Remand Submission](#). In their filing, they did not include any additional evidence, testimonial or otherwise, relying instead on evidence and testimony in the pre-remand record.⁷ On the same date, the *Services*, jointly and severally, filed their [direct remand statements](#), which included new facts, expert testimony, other evidence and legal briefing.

On July 2, 2021, Copyright Owners’ filed their Reply Remand Submission ([Remand Reply](#)).⁸ As part of their Remand Reply, Copyright Owners submitted almost 300 pages of new

requires only that the Judges act in a manner “consistent with this opinion.” *Id.* at 376, 381, and 396. Accordingly, the Judges have adopted post-remand procedures, including the procedures adopted in this Order, in a manner designed to carry out the directives in *Johnson*.

⁷ Neither the D.C. Circuit’s opinion nor the Judges’ *Remand Proceedings Order* prohibited reliance on pre-remand testimonial and other evidence, whether exclusively or in conjunction with new evidence. However, as noted *supra*, the D.C. Circuit indicated that new evidence would be *necessary*, by requiring that the evidentiary record must be reopened “[i]f the [Judges] wish[] to pursue [their] novel rate structure.” *Johnson, supra*, at 383. Additionally, the *Remand Proceedings Order* instructed the parties to submit “concurrent” with their initial briefing the “evidence supporting each party’s position on the rate structure issue and ... production of *all documents relied upon in connection with their initial submission.*” *Id.* at 2 (emphasis added).

⁸ The *Remand Proceedings Order* directed the parties to file “reply briefs and rebuttal submissions” which include “[s]ubmission of rebuttal evidence and concurrent production of all documents relied upon in connection with the submission (to the extent not already produced).” *Remand Proceedings Order* at 2-3. By the foregoing

expert testimony from three economists – the “Remand Written Rebuttal Testimony” of Richard Watt, Jeffrey A. Eisenach, and Daniel F. Spulber – as well as further briefing related to those testimonies. Copyright Owners also submitted in their rebuttal case 24 new exhibits (Exs. A through X) and referenced numerous exhibits from the pre-remand hearing that they had not cited in their Initial Remand Submission.⁹

The Services’ Motion

The Services make several arguments in support of their Motion seeking to strike large swaths of Copyright Owners’ testimonies and briefing submitted ostensibly as rebuttal.¹⁰ The Services argue that much of Copyright Owners’ new testimonial evidence (and briefing) does not rebut (or make arguments regarding) anything in the Services’ direct case, but rather merely “attempts to support arguments ... Copyright Owners raised in their written *direct* remand submission.” Motion at 1 (emphasis added).

The Services level this charge with regard to the rebuttal testimony of all three of Copyright Owners’ economists. In particular, the Services note that Dr. Eisenach testifies in purported rebuttal to the Service experts’ (supposed) contention that the Judges’ royalty rate structure did not cause a “disruption.”¹¹ But according to the Services, *Copyright Owners* inconsistently argue that the Services “have provided *no evidence of harm or disruption, or, indeed, of any economic impact resulting from the Final Determination.*” Motion at 8 (*comparing Eisenach Testimony ¶ 7 with Remand Reply, vol. 1, tab C, at 35-36 (Copyright Owners’ Reply Brief on Remand)*). According to the Services, because *Copyright Owners* purport that the Services did not make an argument of disruptive or other harmful impact in their direct remand submission, Dr. Eisenach’s testimony in this regard cannot constitute legitimate rebuttal testimony, but rather is only *direct* testimony attempting to affirmatively support Copyright Owners’ direct argument, in its Initial Remand Submission, that such disruptive impact had not occurred. Eisenach Testimony ¶ 7 (citing Copyright Owners’ Initial Remand Submission at 55-68). Finally, the Services argue that, had Copyright Owners properly and

parenthetical, the Judges recognized that a party could rely in its rebuttal submission on evidence it had submitted in support of its initial submission, indicating the potential for overlap in the evidence in a party’s direct and rebuttal submissions.

⁹ On even date, the Services’ filed their [Joint Reply Brief](#).

¹⁰ Specifically, the Services ask the Judges to strike as improper the following portions of the Remand Reply: Eisenach Remand Written Rebuttal Testimony, ¶¶ 8-89 & Appx. C; Spulber Remand Written Rebuttal Testimony ¶¶ 10-71 and 53-71; and Watt Remand Written Rebuttal Testimony, ¶¶ 7-18 and 42-36, and n. 51; and Copyright Owners’ Reply Brief pp. 40-41, 43-46 and 55-58.

¹¹ “Disruption” had a particular meaning in the relevant statute (now superseded), as previously applied by the Judges. Pursuant to 17 U.S.C. § 801(b)(1) (superseded), the Judges were required to set rates and terms that were reasonable and “calculated to achieve” four itemized objectives. Objective “(D)” in this statutory scheme directed that the Judges’ rates and terms “minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.” The Judges have held that “disruptive impact” in this context means that proposed rates and terms would “directly produce[] an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the ... change and, as a consequence, such adverse impact threatens the viability of the music delivery service currently offered to consumers under the license.” *Phonorecords III*, 84 Fed. Reg. at 1959 (quoting *Phonorecords I*, 74 Fed. Reg. 4510, 4525 (Jan. 26, 2009)).

timely submitted Dr. Eisenach’s testimony as part of their initial direct case, the Services would have had an opportunity to address his analysis in their rebuttal filing.

With regard to Professor Spulber’s testimony, the Services make several arguments. They first claim that his testimony is merely supportive of Copyright Owners’ request that the Judges “readopt the same rates and terms set forth in the Final Determination.” Motion at 10 (quoting Copyright Owners’ Initial Remand Submission at 92). More particularly, the Services aver that Copyright Owners admit—in their summary of Dr. Spulber’s testimony – that they have proffered his testimony to bolster their argument as to “why the reasoning of [the Judges] was correct on the ‘see-saw’ question.” Motion at 10 (quoting Remand Reply, vol. 1, tab A, at 2 (Summary of Copyright Owners’ Remand Written Rebuttal Testimony)).¹² But according to the Services, Dr. Spulber’s testimony attempts neither to discredit nor disprove the Services’ direct testimony, as proper rebuttal should, and likewise does not “challenge” the testimony of the Services’ direct witnesses. Motion at 2.

To the contrary, according to the Services, Dr. Spulber’s testimony “belatedly seeks to fill the void left by ... Copyright Owners’ decision to submit no affirmative evidence in the direct phase” *Id.* In support of this argument, the Services point to Dr. Spulber’s testimony itself, in which he acknowledges that his proffered testimony serves to “support[] and further explain[] judgments of [the Judges] on bargaining theory in the Final Determination.” *Id.* (quoting Remand Written Rebuttal Testimony of Daniel Spulber ¶ 7(Spulber RWRT)).

Additionally, the Services note that Dr. Spulber testifies that sound recording licenses “are determined through negotiation,” and he opines on “general principles of the economics of bargaining.” The Services aver that they did not raise or discuss these two points in their direct submission; rather, Copyright Owners proffer these points to support the inverse relationship generated by their bargaining model and thus they constitute testimony that Copyright Owners could have and should have proffered in their own direct submission. Motion at 10-11.

Finally, the Services take note of Dr. Spulber’s testimony challenging the complementary oligopoly status of the Major record companies (Majors). Motion at 11. They assert that this proffered testimony is improper because: (1) the D.C. Circuit agreed with the Judges that the Majors possessed such complementary oligopoly power, *Johnson*, 969 F.3d at 372; *Phonorecords III*, 84 Fed. Reg. at 1933, 1940, 1952-53 (majority opinion); *id.* at 1964, 2005-06 (dissent); (2) Copyright Owners did not appeal as to this issue; and (3) the Services did not raise

¹² The so-called “see-saw” question relates to the issue of whether, as the majority “predicted” in *Phonorecords III*, “the sound recording copyright owners’ royalty rates would naturally decline in the course of their negotiations with interactive streaming services [in response to higher statutory mechanical rates] because the sound recording copyright owners would likely accept lower rates to “ensure[] the continued survival and growth of the music streaming industry.” *Johnson*, F.3d at 373; *see also Phonorecords III*, 84 Fed. Reg at 1953 (majority opinion) (citing favorably Professor Watt’s testimony that, under his “bargaining model” “if you increase the statutory rate, the bargained sound recording rate will go down” and the total of musical works and sound recordings royalties would stay “almost the same” in response to an increase in the statutory royalty); *id.* at 1966 (dissent) (noting that Pandora’s economic expert, Dr. Katz, characterized the sound recording royalty-mechanical royalty relationship generated by Professor Watt’s model as a “see-saw” effect). The “see-saw” terminology does not appear in the majority opinion. In this Order, the Judges refer to this proposition as the Copyright Owners’ proffered “inverse relationship” between changes in mechanical and sound recording royalties.

this issue in their direct submission, but merely identified and applied the holdings of the Judges and the D.C. Circuit stating the existence of this complementary oligopoly power. Motion at 12-13.

With regard to the testimony of Professor Watt, the Services claim that it too is not proper rebuttal because: (1) the testimony merely repeats the legal argument Copyright Owners make in their written direct submission; (2) the testimony simply provides Professor Watt's view of the Judges' Majority opinion and why, in his opinion, it is correct; and (3) the testimony merely repeats Dr. Eisenach's testimony that (as noted *supra*) the Services maintain is also improper rebuttal. Motion at 13-15.

More broadly, the Services contend that Copyright Owners knew full well that all three proffered rebuttal witness submissions actually constitute *direct* testimony. They contend that Copyright Owners delayed submitting these three testimonies until the rebuttal phase in order to conduct "trial by ambush," utilizing this inappropriate "gamesmanship" to avoid simultaneous direct submissions of new evidence. *Id.* at 5-6. The Services further aver that, by this strategy, Copyright Owners had "flouted" the Judges' *Remand Proceedings Order* that had rejected Copyright Owners' "own preferred schedule" whereby *only the Services* would file a direct remand statement as to the rate and rate structure issues, and then *only Copyright Owners* would file a *rebuttal* remand statement. Motion at 6-7. The Services argue that the striking of the offending portions of Copyright Owners' rebuttal submission would correct for the latter's improper strategy. *Id.* at 18.

Copyright Owners' Opposition

Copyright Owners oppose the Motion on a number of grounds, some specific to the testimony of all three experts proffered as rebuttal testimony, and others broadly in opposition to the premises of the Motion itself.

First, with regard to Dr. Eisenach's testimony, Copyright Owners' maintain that his testimony is "directly related" to the Services' direct testimony, as demonstrated by his thirty citations to the Services' direct submission. Opposition at 12. Copyright Owners further maintain that even if the Services are correct that Dr. Eisenach's testimony *could* have been submitted as direct testimony, Copyright Owners had no duty to anticipate and respond to the arguments the Services' might make in their own simultaneously-filed direct submission. *Id.* Additionally, Copyright Owners characterize the Services' attempt to strike Dr. Eisenach's testimony as an illegitimate attempt to "suppress their own records in order to conceal that the Services' overall royalty rates did not increase during the interregnum in which the *Phonorecords III* royalty rates were in effect. *Id.* at 3.

Turning to Professor Spulber's testimony, Copyright Owners argue that "the 'see-saw' theory is the *Services'* core argument on direct," and that, by contrast, they (Copyright Owners) "reference the 'see-saw' theory in just one subsection of their initial submission" *Id.* at 14. By contrast, Copyright Owners note, their "direct arguments" regarding the "rate structure issue" do not otherwise relate to the "see-saw" argument, but rather "are built around the overwhelming evidence in the [pre-appeal] record concerning revenue diminution and the need for an effective alternative royalty prong, together with many admissions by the Services – as well as their own

rate proposals – that support the reasonableness of, and need, for the true TCC prong.” *Id.* By contrast, Copyright Owners note, the Services referenced the “see-saw” theory more than 220 times in their direct submission, making the subject ripe for Copyright Owners to address in their rebuttal testimony. And finally, with regard to Professor Spulber’s rebuttal testimony as to the complementary oligopoly power of the Majors, Copyright Owners assert that the Judges have “already ruled,” in their Order on Copyright Owners’ Motion to Compel,¹³ that “this subject matter directly relates to the Services’ direct testimony.” *Id.* at 15 n.13.

As for Professor Watt’s testimony, Copyright Owners note that Professor Watt cites therein the Service experts’ written direct remand testimony nine times in his own written testimony. Opposition at 13. More particularly, Copyright Owners point out that, although the Services characterize Professor Watt’s testimony as substantively “direct” because he explains why, in his opinion, “the Majority got it right in relying on his prior testimony” regarding bargaining theory, Professor Watt’s testimony is proper rebuttal to the Service experts’ claim that “the Majority got it *wrong*” when it relied on Professor Watt’s testimony regarding bargaining theory.” *Id.* Finally, with regard to Professor Watt’s testimony, Copyright Owners assert there is no impropriety, as the Services claim, in Professor Watt’s referencing or incorporating in his own testimony Dr. Eisenach’s testimony also submitted in the rebuttal phase. *Id.* at 14 n.12.

Finally, Copyright Owners rely on the *Phonorecords III Discovery Order*, in which the Judges required the Services to produce certain documents that they had withheld. Copyright Owners point out that, in the *Phonorecords III Discovery Order*, the Judges found that the subject matters as to which they sought discovery were “directly related” to the Services’ direct case submissions. Opposition at 4, 10-12. Copyright Owners aver that the subject matters at issue in that discovery dispute include the same issues that the Services now claim, in the present Motion, to be unrelated to their direct case submissions. Thus, Copyright Owners contend, the Judges have already acknowledged the nexus between these issues and the Services’ direct case, thereby justifying Copyright Owners’ submission of testimony on these same issues in their rebuttal filings. *Id.* at 11-12.

The Services’ Reply

In their Reply, in connection with Dr. Eisenach’s testimony, the Services note that Copyright Owners have confirmed in their Opposition that Dr. Eisenach’s testimony regarding the alleged absence of disruptive “impact” from the Majority’s rates and rate structure was addressed by Copyright Owners in the latter’s own Initial Remand Submission. Reply at 3-4 (citing Opposition at 10). The Services also dismiss Copyright Owners’ argument – based on the latter’s simple counting of the number of citations in Dr. Eisenach’s testimony to the Services’ testimony – as insufficient to connect rebuttal testimony substantively to an adversary’s prior direct testimony. Reply at 4. Finally, with regard to Dr. Eisenach’s testimony, the Services rebut Copyright Owners’ claim that they could not have predicted the Services’ direct testimony at the time Copyright Owners made their own direct filing. Rather, the Services maintain that – because the Judges’ *Remand Proceedings Order* rejected Copyright Owners’ proposal to defer

¹³ See *Order Granting in Part and Denying in Part Copyright Owners’ Motion to Compel Production of Documents and Information from Services* (Jul. 14, 2021) (*Phonorecords III Discovery Order*).

their remand submission until after the Services filed their initial submission – Copyright Owners’ needed to proffer any new evidence in their initial and direct submission, particularly with regard to the supposed absence of disruption or other negative impact arising from the Majority’s rates and rate structure (while they were in effect).¹⁴ *Id.* at 4-5. Finally, the Services reject Copyright Owners’ assertion that the former’s request to strike Dr. Eisenach’s testimony is an effort to suppress the Services’ own royalty records. *Id.* at 5. According to the Services, their objection pertains to Dr. Eisenach’s analysis and presentation of his opinions regarding those facts, which, the Services note, Copyright Owners had obtained from the Mechanical Licensing Collective (MLC) before they filed their Initial Remand Submission.¹⁵

The Alternative Relief Requested by the Services

The Services propose that – if the Judges elect not to strike the portions of the three expert testimonies and briefing submitted by Copyright Owners as rebuttal – the Judges should “allow the Services to submit supplemental testimony and briefing addressing the challenged Copyright Owners’ expert testimony submitted in the rebuttal phase.” Motion at 16. In that regard, the Services preview seven arguments they anticipate addressing in such a new submission. *Id.* at 16-17.

Copyright Owners respond to the Services’ alternative request for relief by first averring that “[t]he Services cannot possibly have suffered prejudice by being confronted *with their own royalty statements* that they improperly withheld in discovery.” Opposition at 16-17. Rather, Copyright Owners maintain, *they* would suffer prejudice if the Services were “rewarded” for their discovery recalcitrance by being permitted to file an additional substantive submission. *Id.* Finally, Copyright Owners claim that the Services’ previewed responding arguments “show the lack of merit” in the Services’ proposed surrebuttal. *Id.* at 17-18.

In their Reply, with regard to Copyright Owners’ claim that *they* suffered prejudice arising from the Services’ failure to produce their own royalty data, the Services note that, because Copyright Owners had acquired possession of the same data independently from the MLC, they did not suffer any actual prejudice in connection with the discovery dispute relating to that data. *See* Motion at 2 & n.1. Rather, the Services reemphasize their allegation that they – not Copyright Owners – suffered prejudice because they have been deprived of the “opportunity to respond to hundreds of pages” of what they characterize as “inaccurate and misleading opinion testimony.” Reply at 7.

¹⁴ The *Phonorecords III* royalty rates and rate structure were in effect from January 1, 2018, the (retroactive) effective date of that Determination, through September 30, 2020, after the D.C. circuit vacated the *Phonorecords III* Determination with respect its rates and rate structure. Since October 2020, the effective royalty rates and rate structure have been those in effect immediately prior to January 1, 2018. *See* Eisenach Remand Testimony ¶ 6; Mirchandani Remand Testimony ¶ 9.

¹⁵ The Services object to Copyright Owners’ obtaining the Services’ confidential royalty records from the MLC without providing the Services with notice and an opportunity to object, and without seeking the authority for the issuance of a subpoena from the Judges, given the non-party status of the MLC. *See* 17 U.S.C. § 803(b)(6)(C)(ix). Motion at 2 n.1. Copyright Owners maintain they have legal authority to obtain these royalty records from the MLC. Opposition at 4 n.1. The Services have filed a separate motion in this regard, now pending before the Judges.

Additionally, the Services maintain that Copyright Owners’ “defense of the substance of their experts’ new testimony” highlights the need for the Services to be allowed to submit further testimony and briefing in response. *Id.* (citing Opposition at 16-19). Finally, the Services assert that Copyright Owners’ failure to file the identified portions of their economists’ testimonies and related briefing in the direct phase of this remand proceeding not only deprives the Services of their right to rebuttal, but “also deprived the Judges of a comprehensive record.” Reply at 7.

The Judges’ Analysis

To begin the analysis, the Judges find that a review of the relevant statutory and regulatory provisions is instructive. The Copyright Act defines “Written Direct Statements,” in pertinent part, as follows:

[W]itness statements, testimony, and exhibits to be presented in the proceedings, and such other information *that is necessary* to establish terms and rates ... as set forth in regulations issued by the [Judges].

17 U.S.C. § 803(b)(6)(C)(ii)(II) (emphasis added). In turn, the Judges’ regulations provide, in pertinent part:

All parties who have filed a petition to participate in the hearing must file a written direct statement.... The written direct statement *shall* include *all* testimony, including each witness's background and qualifications, along with all the exhibits.

37 C.F.R. § 351.4(a) & (b)(1) (emphasis added).

The Copyright Act neither defines nor identifies the required contents of the “Written Rebuttal Statement” (although it references them at clauses (i), (iv), (v) and (xi) of 17 U.S.C. § 803(b)(6)(C). The Judges’ regulations provide for the filing of Written Rebuttal Statements “in the same form and manner as the written direct statement,” 37 C.F.R. § 351.11, but otherwise does not define or set forth the required contents of a Written Rebuttal Statement.

In the present case, the Services maintain that the identified portions of these expert economic testimonies are purely direct and thus must be stricken. Reply at 3 n.4 (“The Services are not arguing that ... Copyright Owners’ testimony should be stricken because it *also* supports their initial submission, but because it *only* supports that initial submission.”). On the other hand, Copyright Owners maintain that the challenged portions of the testimonies by Professors Spulber and Watt and Dr. Eisenach are clearly rebuttal in nature. Opposition at 2-3 (asserting that these testimonies specifically “respond to Service testimony ... in particular to the Services’ ... ‘see-saw’ argument,” placing these testimonies “miles beyond the threshold for constituting proper rebuttal testimony.”). Unlike the Services’ argument, though, Copyright Owners do not go so far as to reciprocally assert unequivocally that these testimonies are *purely rebuttal*. See *id.* at 7 (“[R]ebuttal evidence is not subject to exclusion merely because it could have been offered in a direct submission.”); *id.* at 12 (acknowledging that Dr. Eisenach’s “royalty analysis”

perhaps could have been set forth as “direct” testimony as well as rebuttal, but claiming that such a dual purpose is “irrelevant”).¹⁶

The Judges have previously set forth guideposts as to what is acceptable rebuttal testimony. See *Order Denying Licensee Services’ Motion to Strike*, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 2, 2015) (*Web IV Order*). In that *Web IV Order*, the Judges first stated that “[m]ere relevance to the subject ... in [Party B’s witness’s] written direct testimony does not disqualify [his or her] rebuttal testimony on the same subject.” *Id.* at 6. But, the Judges further stated that testimony labeled by Party B as “rebuttal” that “*strays so far* from focusing on the subject ... and the direct testimony [of Party A’s witness] [is] nothing more than an untimely addition to [Party B’s] written direct testimony.” *Id.* at 6-7. Thus, there is no “bright line” test, but rather a “continuum, on which rebuttal testimony that has the appropriate ‘nexus’ is acceptable, but rebuttal testimony that ‘strays too far’ from the opposing party’s direct testimony is inappropriate.” *Id.* at 7.

Moreover, within this continuum, the Judges noted that certain rebuttal submissions could constitute *both rebuttal and direct testimony*. Specifically, in the *Web IV Order*, the Judges noted the *general* context in which the issue often presents:

1. The witnesses for Party A (here, the Services) refer to particular subjects in their Written Direct Testimonies.
2. Adverse Party B (here, Copyright Owners) submit witness testimonies and related briefing in its own Written Rebuttal Statement to add new facts and opinions that
 - (a) rebut the testimonies of the witnesses for Party A (here, the Services’) witnesses

but also

 - (b) bolster the prior Written Direct Statement of Adverse Party B (here, Copyright Owners).

Web IV Order at 6.¹⁷

In the present case, the Services rely on the polar extreme of this standard that supports its position. Motion at 5, 8-9, 13-14 (arguing that the testimonies of Copyright Owners’ economic experts are merely untimely additions to Copyright Owners’ own direct case). However, Copyright Owners’ argument is less absolute; they aver that their challenged rebuttal submissions constitute valid rebuttal testimony, notwithstanding that they could also have served as direct testimony. Opposition at 8.

¹⁶ Although Copyright Owners acknowledge that witness submissions can constitute *both* direct and rebuttal testimony, as noted *supra* they oppose the Services’ request for alternative relief in the form of a right to submit supplemental testimony in further rebuttal. The Judges discuss *infra* the Services’ request for alternative relief.

¹⁷ To be clear, here the Services’ witnesses (Dr. Leonard and Professors Katz and Marx) are the Party A direct witnesses, and Copyright Owners’ witnesses (Dr. Eisenach and Professors Spulber and Watt) are the Party B witnesses.

The Judges find that (with one exception discussed *infra*), the challenged testimonial evidence of Copyright Owners’ economic expert witnesses serve the dual purposes of direct and rebuttal statements. Broadly, the Judges find that Copyright Owners’ challenged rebuttal-phase submissions address the two overarching rate and rate structure issues on remand, and constitute direct as well as rebuttal testimony and argument. The first such issue is whether the now-vacated mechanical rates and rate structure adopted by the Judges in *Phonorecords III* will cause sound recording rates to fall. This is a matter of *prediction* for the economic expert witnesses. Copyright Owners’ economic witnesses testify by opining “yes,” such an offsetting fall will occur, *ceteris paribus*. Watt Remand Testimony ¶¶ 28-36. That testimony is an affirmative statement regarding the fundamental issue on remand, and therefore certainly in the nature of direct testimony. But it was submitted by Copyright Owners as part of their rebuttal case, semantically formulated as an opinion that, “no,” the Services’ economists are wrong in arguing that the “see-saw” effect will not occur.¹⁸ As a matter of logic, each side’s position on this issue could have been cast either as a direct statement, or as a rebuttal to the other side’s position.

The Services made their argument regarding the relationship between the sound recording rate and the mechanical rate in their direct submission. Copyright Owners, though, eschewed introducing their expert economic testimony in their direct case, keeping their powder dry until rebuttal, after they had seen the direct testimony by the Services’ economic experts. But Copyright Owners had no procedural right to sequence their contested submissions in this manner. As noted *supra*, the Judges *rejected* Copyright Owners’ request to do just that in the *Remand Proceedings Order*.

The second overarching issue, unlike the first, is not a matter of *economic prediction*, but rather one of *economic interpretation* of actual events, *viz.*, the movements, *vel non*, of mechanical rates, sound recording rates and the combination of the two, during the period from January 2018 through September 2020 when the *Phonorecords III* rates and rate structure were in effect. This is an empirical question. Both sides had the same data necessary to analyze this

¹⁸ Copyright Owners’ argument that the “see-saw” effect is the Services’ argument, not their argument, is a semantic red herring. Copyright Owners assert, through Professor Watt, that as mechanical rates increase, sound recording rates will decrease, assuming that pre-royalty interactive profits (the Shapley Surplus) and/or non-content costs are unchanged. Watt Remand Testimony ¶¶ 28-36. Professor Watt calls this a predicted effect of his “bargaining model,” whereas Professor Katz metaphorically coined the same phenomenon as a “see-saw” effect. *Compare Phonorecords III*, 84 Fed. Reg. at 1953 (Majority) (“[T]he Judges rely on Professor Watt’s insight (demonstrated by his bargaining model) that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works.”) *with id.* at 1966 (Dissent) (“the majority is ... *assuming* that the sound recording rates will adjust downward[,] bas[ing] their assumption on the testimony of Professor Watt, who identified what another economic witness (Professor Katz, for Pandora) described as the ‘see-saw’ effect.”). As noted *supra*, the Judges describe Professor Watt’s opinion in this regard as his proposed “inverse relationship” between changes in the mechanical royalties and the sound recording royalties. To be sure, the experts may dispute how to detect and measure this inverse relationship, and whether certain *ceteris paribus* conditions are relevant or have been satisfied, but that does not change the fact that the likelihood that any such inverse relationship exists is a fundamental issue on remand, regardless of the name an expert uses to describe the economic effect in dispute. *Johnson*, 969 F.3d at 372 (vacating and remanding the Judges’ “predict[ion] that the sound recording copyright owners’ royalty rates would naturally decline in the course of their negotiations with interactive streaming services.”).

issue.¹⁹ Again, although Copyright Owners could have made this argument as proper direct testimony, they instead waited until their rebuttal submission. The Services, on the other hand, made their empirical case in their direct submission.²⁰

Thus, the issue for the Judges is how to deal with a situation when one party has elected to omit relevant testimonial evidence from its direct case, and proffer that testimony in its rebuttal case, when the testimony could properly have been introduced in either case.

Given the dual direct-and-rebuttal nature of the three economic testimonies (and related briefing) filed by Copyright Owners, the Judges have the discretionary authority, pursuant to 17 U.S.C. § 801(c),²¹ to strike Copyright Owners' submissions as delinquent direct testimonial evidence (and argument). However, for the reasons considered *infra*, the Judges instead **DENY** the Services' request that the Judges strike the cited testimonies and briefing (except for one portion),²² but **GRANT** the Services' requested alternative relief. Specifically, the Judges accept the testimonial evidence of Copyright Owners' three economic experts as rebuttal and direct testimony (and accept Copyright Owners' related briefing), and provide the Services an opportunity to file supplemental testimony and briefing in opposition.²³

The Judges grant this alternative relief in large measure because of the particular procedural posture of this proceeding. As noted *supra*, the D.C. Circuit found that the need for a sufficient procedure going forward is "no mere formality." Accordingly, the D.C. Circuit "instructed the Judges that, on remand, any consideration of this "novel rate structure" must be based on an evidentiary record that is "fair," in that, *inter alia*, the parties are able to present their case and to submit rebuttal evidence as may be required for a full and true disclosure of the facts that bear on the Judges' decision." *Johnson*, 969 F.3d at 381. The Judges conclude that, to best satisfy this appellate directive and generate a full and robust record, the Services must have an opportunity to file rebuttal evidence (and related briefing) as ordered herein. *See Web IV Order* at 9 (granting similar relief as ordered here, because "the Judges are disinclined ... to allow their procedural rules to prevent them from obtaining a full evidentiary record.").²⁴

¹⁹ *See Eisenach Remand Testimony* ¶ 13 n.19 (the MLC data on which Dr. Eisenach relied was attested to and generated by the Services).

²⁰ Copyright Owners aver that they did not anticipate that the Services would make the empirical case they did, because, according to Copyright Owners, the Services' position is so disingenuous that Copyright Owners could not have anticipated that the Services would have presented it. It may be the case that Copyright Owners did not anticipate the Services' empirical argument when the former was preparing its direct case, but, that does not alter the fact that Copyright Owners' data-based analysis of rates during the January 2018 through September 2020 period constitutes direct evidence in support of its position – irrespective of how the Services applied the same data.

²¹ "The ... Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter ..." 17 U.S.C. § 801(c).

²² That one portion of Copyright Owners' remand rebuttal submission is discussed *infra*.

²³ Any such new Services' filings would more accurately be characterized and identified as "supplemental rebuttal" filings rather than "surrebuttal" filings, because the purpose of any new filings is only to rebut the portions of the testimonies of Dr. Eisenach and Professors Spulber and Watt, and Copyright Owners' arguments related thereto, that the Judges have found herein to constitute direct as well as rebuttal testimonies.

²⁴ The Judges also note that their rules do not specifically address the procedures to be followed on remand, further indicating that any remand procedure they adopt must be in the spirit of the D.C. Circuit's decision. *See supra* note

Thus, as noted *supra*, with one exception, the Services’ request to strike the testimony and briefing in its rebuttal-phase submissions is **DENIED**. The one exception relates to the Spulber Remand Testimony, ¶¶ 53-71, in which Professor Spulber disputes the existence of licensors’ complementary oligopoly power in the sound recording industry. *See Johnson*, 969 F.3d at 372, 382; *Phonorecords III*, 84 Fed. Reg. at 1940. The Judges agree with the Services that this issue: (1) was not raised before the Judges; and (2) not raised on appeal to the D.C. Circuit; and (3) not remanded by the D.C. Circuit to the Judges for further consideration. Motion at 10-13. Rather, the Judges and the D.C. Circuit acknowledged the presence of this complementary oligopoly power in the sound recording market, as found in prior decisions. Thus, when the Services referenced this power in their direct submissions, they were not, as Copyright Owners now contend (*see* Opposition at 12), raising an issue that triggered a right to rebuttal by Copyright Owners, but rather simply acknowledging that prior decisions had found the presence of this complementary oligopoly power. *See* Reply at 6.²⁵

ORDER

The Judges **DENY** the Services’ request to strike the material identified in footnote 10, *supra*, except for ¶¶ 53-71 of the Spulber Remand Testimony, as to which the Motion is **GRANTED**.

The Judges **GRANT** the Services’ request for leave to file supplemental testimony and a twenty (20)-page brief, responding to all other material identified in footnote 10, *supra*. The

6. Additionally, because the Judges find that Copyright Owners’ remand testimonies (and related briefing) substantively constitute both direct and rebuttal submissions, the parties’ several arguments attempting to pigeonhole those testimonies (and related briefing) in only one of those categories are moot.

²⁵ The Judges reject, though, the Services’ argument that the Judges should strike Copyright Owners’ testimony and briefing regarding the alleged “disruptive impact” of the proposed new rates and rate structure. Contrary to the Services’ argument, one of their expert economic witnesses, Professor Katz, in fact did testify, at some length, on the future disruptive and negative impact of the proposed rates and rate structure set forth in *Phonorecords III*. Katz Remand Testimony ¶¶ 3, 7, 99-108. Although he did not opine in this cited testimony as to any *actual* disruptive or negative impact, Professor Katz did testify as to the alleged likelihood of such results if the proposed rates and rate structure were to persist throughout the five-year rate period. Dr. Eisenach, in his testimony, analyzed the *actual* rate changes that ensued during the 33-month interregnum when the new *Phonorecords III* rates and rate structure were in effect, to *rebut* Professor Katz’s *predictions*. But Dr. Eisenach’s empirical claims also *directly* support Copyright Owners’ affirmative claims of an alleged absence of a negative impact arising from the *Phonorecords III* rates and rate structure. Moreover, because Copyright Owners are the proponents of the *Phonorecords III* rates and rate structure in this remand proceeding, any remand testimony that their witnesses have proffered to demonstrate how the facts should be applied to the statutory standard (including, here, Factor D in 17 U.S.C. § 801(b)(1)) constitutes substantive *direct* testimony as well. The Judges also reject the Services’ request that they strike Professor Spulber’s testimony regarding the sound recording-interactive service negotiation process, in which, *inter alia*, he predicts that the record companies “will consider the compulsory royalty rate for Copyright Owners.” Motion at 11 (quoting Spulber Remand Testimony ¶ 17). That testimony is not only in the nature of direct testimony supporting Copyright Owners’ bargaining model, but also in the nature of rebuttal to the Services’ direct argument that Spotify and Pandora were expressly told by record company negotiators that the latter would not offer sound recording royalty rate relief because of increases in the mechanical rates. *See* Services’ Joint Written Direct Remand Submission at 48 (and citations to certifications therein).

supplemental testimony and briefing shall be filed no later than 45 days from the date of this Order.²⁶

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: October 1, 2021

²⁶ Copyright Owners request that the Judges strike the final portion of the Motion in which the Services preview arguments they might assert in supplemental filings; the additional material resulted in the Motion exceeding the 5,000-word limit for motions and necessitated Copyright Owners exceeding the word limit for responses. Opposition at 17 & n.16. *See* 37 C.F.R. § 303.3(c)(1) & (2). However, the Judges find the preview, and Copyright Owners' opposition to the previewed arguments, not ripe for consideration and, for that reason, have not considered the previewed arguments or opposition thereto. The word-limit issue is thus moot.