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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 IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

CORRECTED WRITTEN DIRECT STATEMENT OF SPOTIFY USA INC.

Volume 1 of 5

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Spotify USA Inc.

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TAB A

Before the
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In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

CORRECTED INTRODUCTORY MEMORANDUM TO THE WRITTEN DIRECT STATEMENT OF SPOTIFY USA INC.

Since 2015, the music industry has experienced a historic turnaround. Nearly every passing week brings news of record-breaking earnings for record labels and music publishers, and eye-popping valuations for music publishing catalogs.[1] Spotify, and other services like it, are among the primary reasons for this 180-degree shift from the state of the industry a decade earlier. The section 115 regime that interactive services pay under today has been working to the mutual benefit of rightsowners and platforms alike. There is no reason or basis for radical change. Accordingly, in this proceeding, Spotify asks the Board to set a rate for the section 115 license which embodies the deal that a "willing buyer" and "willing seller," in an effectively competitive market, would enter to keep "growing the pie" for all of the relevant stakeholders. That in turn means preserving today's prevailing approach—a rate level and framework the industry twice adopted in charting its current course of unprecedented shared success, under which the more money digital services

[1] *See*, *e.g.*, Ben Sisario, "Bob Dylan Sells His Songwriting Catalog in Blockbuster Deal," *New York Times* (Dec. 7, 2020), available at https://www.nytimes.com/2020/12/07/arts/music/bob-dylan-universal-music.html; Tim Ingraham, "Here. Come. The. Giants." *Music Business Worldwide* (Oct. 7, 2021), available at https://www.musicbusinessworldwide.com/here-come-the-giants/.

make, the more royalties they pay out—subject to a variety of modest amendments to the technical terms that implement the mechanical license, reflective of the evolving marketplace.

Spotify's case consists of extensive fact and expert witness testimony. The key points of Spotify's proposal are to adopt:

- **An All-In Rate.** It continues to make sense for the Judges to start from an "all-in" rate for publishing rights. That high-level approach is important to mitigate the effects of the "Cournot complements" problem—*i.e.*, the well-recognized economic principle that multiple sellers of must-have complements will collectively charge an even higher rate than a single monopolist would—resulting from interactive streaming services' payment for both mechanical and public performance licenses for musical works.
- **At The Currently Prevailing Level.** The appropriate level of the all-in rate can be derived from a number of different sources, all of which suggest that numbers in the neighborhood of the interim rates paid today for Spotify's standalone premium and free offerings (which are themselves the product of the voluntary industry-wide *Phonorecords II* settlement) are those that a hypothetical willing buyer and willing seller would agree to, in an effectively competitive market.
- [redacted]

- **Consistent With A Tailored "Bargaining Model."** Professor Joseph Farrell presents a "bargaining model" which confirms that the real-world benchmarking evidence is consistent with the results of a carefully tailored game-theoretic exercise to analyze the outcome of hypothetical negotiations between the relevant actors. While no purely theoretical model will ever be a perfect replication of a real-world negotiation, Professor Farrell's approach at least indicates directionally what an appropriate royalty for the section 115 license would look like. Importantly, his model controls for the ubiquitous agglomeration of market power that frequently plagues publishing and other music rights licenses.

The testimony the Judges will hear in this proceeding is undoubtedly complex, and the issues the parties will litigate will unfortunately devolve, as they typically do in this forum, into parries of parries of parries, or worse. By the same token, however, in this particular rate-setting

proceeding, at this particular time, the big picture is as illuminating as the details: music rightsowners are thriving; customers have myriad choices of digital music services; and the state of the music industry is as healthy as it has been in the last two decades. The evidence and common sense alike dictate that the next five-year license period should not look radically different from the last deal the industry voluntarily agreed to.

Summary of the Written Testimony of Spotify's Witnesses

Spotify's written direct statement includes testimony from the following expert and fact witnesses.

A. Expert Witnesses

Joseph Farrell is a Professor of the Graduate School in the Department of Economics at the University of California, Berkeley. Professor Farrell's expert report uses the framework the Judges have repeatedly embraced in prior proceedings with respect to the meaning of the "willing buyer, willing seller" standard: the premise that that standard requires an assessment of the rates that would prevail in an *effectively competitive* market. Accordingly, his analysis begins with empirical observations about the relevant licensing markets for music rights and the ways in which they may *not* be effectively competitive, due to horizontal consolidation, vertical fragmentation, and a variety of other features of the commercial marketplace.

Key among these observations is that, while it is well-established that the major *labels*, as a consequence of horizontal consolidation and other conduct, are "must-haves" for interactive services, the major *publishers and PROs* also have significant market power. The need for interactive streaming services to license mechanicals and performance rights for musical works, on top of sound recording rights—in marketplaces where each category of license is replete with complementary oligopolist sellers, and each seller's agglomerated collection of rights

independently suffices to block a unique collection of streams—causes cascading, compounding "Cournot complement" problems. The result is that rates paid in the real world by interactive services, and other music users who require a similar suite of rights, are overwhelmingly likely *not* to reflect effective competition.

Professor Farrell's report includes a traditional benchmarking analysis, as well as a Nash-in-Nash bargaining model. With respect to Professor's Farrell's traditional benchmarking analysis, he principally relies on three sets of agreements: (1) the *Phonorecords II* settlement; (2) [redacted]. These agreements, which are frequently tainted with the "complementary oligopoly" power of the relevant rightsowners/aggregators, can be used as benchmarks to provide an upper limit on an appropriate rate for the license at issue in this proceeding. So deployed, they indicate that a reasonable all-in price for musical works licenses paid by interactive streaming services ranges no higher than an effective rate that is as low as [redacted] at the low end. At the high-end, applying the Phonorecords II benchmark without any further adjustment yields an implied rate of [redacted], though that [redacted]. Accounting for those discounted plans (as the Judges did in *Phonorecords III*) reduces the implied high-end rate to [redacted]. Supporting this benchmark analysis, Professor Farrell offers two models that together analyze and predict the outcome of a bargain between Spotify and a publisher in an effectively competitive market. First, he offers an opportunity cost analysis that is based on the results of a consumer survey conducted by Dr. John Hauser and takes as given the royalty rates for other services. That analysis provides a lower bound for a reasonable rate. Second, Professor Farrell offers a Nash-in-Nash bargaining model, relying on survey and other data, to estimate the range

of royalty rates that would result from hypothetical negotiations between a willing buyer (an interactive service such as Spotify) and a willing seller (a rightsowner such as a publisher) in an effectively competitive market. [redacted]

Dr. John Hauser is the Kirin Professor of Marketing at the Massachusetts Institute of Technology ("MIT") Sloan School of Management. Dr. Hauser is an expert in survey design, demand forecasting, product feature valuation, and measurement of consumer preferences, beliefs, and willingness to pay. Dr. Hauser testified in the *SDARS III* and *Web V* proceedings and serves as a survey expert for Spotify in this proceeding. Dr. Hauser conducted a consumer survey to measure what Spotify Premium users would do in place of listening to music on Spotify if it was no longer available. The results of Dr. Hauser's survey reveal that, putting aside the prospect of listening to other on-demand streaming services, respondents indicated that they would turn to lower royalty bearing options than Spotify.

B. Fact Witnesses

David Kaefer is the Vice President and Global Head of Business Affairs at Spotify. His testimony first summarizes Spotify's business model, products, and service offerings, focusing on the company's high-level strategy for promoting growth of both its own revenue and royalties for rightsowners.

Mr. Kaefer then testifies about Spotify's publisher and songwriter-centric discovery and marketing initiatives. Specifically, he highlights how these promotional aspects of the Spotify platform have the potential to enhance a publisher's revenue streams beyond performance and mechanical royalties. Mr. Kaefer goes on to explain [redacted]

Finally, Mr. Kaefer addresses Spotify's proposal regarding the detailed terms implementing the section 115 license, including certain modest adjustments to the treatment of non-section 115 licensed works (e.g., podcasts and music videos). Based on industry practice, he provides further context for Spotify's proposed regulatory changes regarding bundles, free trials, discounted (on a per-user basis) Premium plans, and public domain works, among other issues.

Pilar Tschollar is Spotify's Global Head of Music Publishing Licensing. [redacted].

[redacted] In her experience, [redacted] Ms. Tschollar further explains [redacted]. And lastly, Ms. Tschollar discusses [redacted].

Benjamin Kung is Senior Director in the Financial Planning & Analysis ("FP&A") team at Spotify. He discusses the concept of [redacted].

Mr. Kung next examines [redacted]

Finally, Mr. Kung analyzes [redacted]. [redacted]

Christopher Bonavia is Global Head of Label and Rights & Clearances Business Affairs at Spotify. [redacted].

[redacted] Lastly, Mr. Bonavia describes [redacted].

Niklas Lundberg is Head of New Markets and the former Head of Label Licensing at Spotify. His testimony describes how the [redacted]

[redacted]

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Respectfully submitted,

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TAB B

Subpart A—Regulations of General Application

[Explanatory Note: Spotify's proposal herein is compared against the Services' April 1, 2021 Joint Terms Proposal in the *Phonorecords III* remand proceeding.]

§385.1 General.

(a) Scope. This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) Legal compliance. Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) Interpretation. This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.

(d) Relationship to voluntary agreements. The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply *in lieu* of the rates and terms of this part.

§385.2 Definitions.

Unless otherwise specified, terms in this part shall have the same meaning given to them in 17 U.S.C. § 115(e). For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

***Artificial Accounts* are accounts that are disabled or terminated for having engaged in User Manipulation or other fraudulent activity and for which any subscription revenues are refunded or otherwise not received by the Service Provider.**

Bundled Subscription Offering means a Subscription Offering ~~providing Licensed Activity~~ consisting of Eligible Interactive Streams or Eligible Limited Downloads that is ~~made available~~**offered** to End Users **as a bundle by the Service Provider (or an Affiliate of the Service Provider)** with one or more other products or services (including products or services

subject to other subparts)**,** as part of a single transaction **(*i.e.*, where End Users make a single payment** without **receiving separate** pricing for the ~~**subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available (*e.g.*, a case in which an End User can buy a portable device and one year access to a subscription service providing Licensed Activity for a single price).**~~**Subscription Offering in the bundle).**

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream ~~**in which the performance of the sound recording is not exempt from the sound recording performance royalty under**~~**that is an interactive stream as defined in** 17 U.S.C. ~~**114**~~**115**(~~**d**~~**e**)(~~**1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2**~~**13**).

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

End User means each unique person**, other than persons using Artificial Accounts,** that (1) ~~**Pays**~~**pays** a subscription fee for an Offering during the relevant Accounting Period or (2) ~~**Makes**~~**makes** at least one Play during the relevant Accounting Period.

~~***Family Plan* means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.**~~

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when

(1) Neither the Service Provider, the ~~**Sound Recording Company, the**~~ Copyright Owner, nor any person or entity acting on behalf of or *in lieu* of any of them receives any monetary consideration for the Offering **beyond nominal amounts (*e.g.*, $0.99 per month)**;

(2) The ~~free~~ usage does not exceed ~~30 consecutive~~ **45** days per subscriber per ~~two year~~**one year** period**, which days may be nonconsecutive**;

[Explanatory Note: The below two paragraphs are unnecessary and/or superseded by the Music Modernization Act, which creates a blanket license for the relevant uses, and gives the Mechanical Licensing Collective the sole authority to enforce the blanket license's terms.]

~~**(3) In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;**~~

~~**(4) Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;**~~

(~~5~~**3**) The Free Trial Offering is made available to the End User ~~**free of any charge**~~**for no more than a nominal amount**; and

(~~6~~**4**) The Service Provider offers the End User periodically during the ~~**free usage**~~**trial** an opportunity to subscribe to a ~~**non-free**~~**non-Free Trial** Offering of the Service Provider.

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as "GAAP" for purposes of this subpart.

***Household Plan* means a discounted Subscription Offering to be shared by two or more members of the same household for a single subscription price.**

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity~~**, as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, *via* physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and**~~, as the term is used in subparts C and D of this part, means ~~**delivery of musical works**~~**covered activity**, under voluntary or statutory license, *via* Digital Phonorecord Deliveries in ~~**connection with**~~**the form of** Eligible Interactive Streams, Eligible Limited Downloads, ~~**Limited Offerings, mixed Bundles, and Locker Services**~~**and Restricted Downloads**.

Limited Offering means a Subscription Offering providing **Licensed Activity consisting of** Eligible Interactive Streams or Eligible Limited Downloads for which—

(1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are

on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (*e.g.*, internet access service, mobile phone service) or non-music products (*e.g.*, a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (*e.g.*, download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (*e.g.*, a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

***Non-Covered Work* means either (1) a work where musical works are not included as part of the work, or are not the main focus of the work (*e.g.*, podcasts, audiobooks, and spoken word recordings) or (2) a work where music is included but is not eligible to be Licensed Activity (*e.g.*, music videos).**

Offering means a Service Provider's engagement in Licensed Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or **a** play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or **a** play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream**,** or **a** play of an Eligible Limited Download ~~**that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.**~~**caused by User Manipulation. For purposes of the definition of "Play" only, "Eligible Interactive Stream" and "Eligible Limited Download" shall each be defined to include a sound recording embodying a musical work in the public domain, if such sound recording would otherwise qualify as an Eligible Interactive Stream or Eligible Limited Download if the musical work was not in the public domain.**

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and

(1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

~~**(2) For Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;**~~

[Explanatory Note: The above provision is unnecessary in light of the Music Modernization Act, which creates a blanket license for the uses at issue.]

(~~**3**~~**2**) For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);

(~~**4**~~**3**) The Promotional Offering is made available to an End User free of any charge; and

(~~**5**~~**4**) The Service Provider provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service

Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords,

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.*, an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license

(1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, *Service Provider Revenue* shall mean**, for each Offering subject to § 385.21 of this Part**:

(i) All revenue from End Users recognized by a Service Provider ~~for~~**and directly derived from** the provision of ~~any~~**the** Offering;

(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party "in-stream" or "in-download" advertising as part of ~~any~~**the** Offering, *i.e.*, advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads~~; and~~**, except that notwithstanding the foregoing and with respect to advertisements or sponsorships that are placed between content that constitutes Licensed Activity and content that constitutes non-Licensed Activity (*e.g.*, an advertisement placed between the performance of a sound recording of a musical work and the performance of a Non-Covered Work), only 50% of revenue from such advertising will be included; and**

(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream~~ of a musical work~~; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.

(2) Service Provider Revenue shall:

(i) Include revenue recognized by the Service Provider, or by any associate, Affiliate, agent, or representative of the Service Provider *in lieu* of its being recognized by the Service Provider; and

(ii) Include the value of any barter or other nonmonetary consideration**, to the extent recognized by the Service Provider as revenue under GAAP**; and

(iii) Except as expressly detailed in this part, not be subject to any other deduction or set-off other than **for Taxes and** refunds to End Users for Offerings that the End Users were

unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.

(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than ~~Offering(s), whereas~~**Licensed Activity, including delivery of Non-Covered Works. For the avoidance of doubt, in the case of** advertising or sponsorship revenue~~ derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.~~**, Service Provider Revenue shall (1) exclude revenue from advertisements or sponsorships that are embedded or served within a copy or phonorecord that constitutes a Non-Covered Work; and (2) include 50% of the revenue subject to the exception set out in paragraph (1)(ii) above.**

(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue~~,~~ not to exceed 15%.

(5) In instances in which a Service Provider provides ~~an Offering~~ to End Users **a Bundled Subscription Offering or another Offering** 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 Provider for the Offering for the purpose of paragraph (1) of this definition 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~~**, reasonably determined by** the Service Provider ~~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.~~**on a consistent basis during the Accounting Period in accordance with GAAP.**

Sound Recording Company means a person or entity that:

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of ~~the Copyright Owner of the sound recording~~**a person identified in paragraph (1) through (3)**.

*Standalone Non-Portable Subscription Offering—Streaming Only m*eans a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive

Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted Subscription Offering available on a limited basis to students.

Subscription Offering means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a bundle with one or more other products or services.

***Taxes* means any applicable tax paid by a Service Provider in connection with an Offering.**

Total Cost of Content or *TCC* means the total amount expensed by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP. As used in this definition, “Applicable Consideration” means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but

nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115. **For the avoidance of doubt, Applicable Consideration shall not include any consideration paid to a Sound Recording Company (or Affiliate thereof) for Non-Covered Works, with any allocation of TCC between Licensed Activity and Non-Covered Works to be made in accordance with GAAP.**

User Manipulation **means any behavior that artificially distorts the number of Plays, including but not limited to the use of manual (*e.g.*, click farms) or automated (*e.g.*, bots) means.**

§385.3 Late payments.

A(a) *Accrual of late fees*. Except as otherwise specified in this subparagraph, a Licensee shall pay **aan annual** late fee **of 1.5% per month, or the highest lawful rate, whichever is lower,equal to the Internal Revenue Service underpayment rate specified in 26 U.S.C. § 6621(a)(2), to be applied as specified in 26 U.S.C. § 6622(a),** for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 17 U.S.C. 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment. **Late fees shall not be owed for any adjustments to monthly reports of usage made in accordance with section 210.27(f) or (k), or for any adjustments to any annual reports of usage made in accordance with section 210.27(k)(6)(i), (ii) or (v). In the case of underpayments found after an audit pursuant to 17 U.S.C. 115(d)(4)(D), or an audit referenced in section 210.27(k)(6)(iv), interest on underpayment shall be calculated at the post-judgment rate specified in 28 U.S.C. § 1961, accrued from and after the date the payment was originally due.**

(b) *Waiver of late fees*. The Mechanical Licensing Collective may waive or lower late fees for immaterial or inadvertent failures of a Licensee to make timely payment.

§385.4 Recordkeeping for promotional or free trial non royalty bearing uses.

[Explanatory Note: The above provision has been superseded by the recordkeeping regulations issued by the Copyright Office under the Music Modernization Act, which encompass promotional uses. See 37 C.F.R. § 210.27(m).]

(a) ***General.*** **A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the**

~~promotional activities authorized, the identity of the Offering or Offerings for which the zero rate is authorized (including the internet address if applicable), and the beginning and end date of each zero rate Offering.~~

~~*(b)* *Retention of records.* A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.~~

~~*(c)* *Availability of records.* If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.~~

Subpart B – Physical ~~Phonorecord Deliveries~~Phonorecords, Permanent Downloads, Ringtones, and Music Bundles.

§385.10 Scope

This subpart establishes rates and terms of royalty payments for making and distributing **physical** phonorecords, including by means of ~~Digital Phonorecord Deliveries~~**Permanent Downloads, Ringtones and Music Bundles**, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

(a) Physical ~~phonorecord deliveries~~phonorecords and Permanent Downloads. For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) Ringtones. For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) Music Bundles. For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through

subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§385.21 Royalty rates and calculations

(a) Applicable royalty. ~~Licensees that engage in Licensed Activity~~**Royalties payable by Service Providers for Offerings** covered by this subpart ~~pursuant to 17 U.S.C. 115 shall pay royalties therefor that are~~**shall be** calculated as provided in this section, subject to the royalty floors for specific types of services described in subsection (b) of this subpart~~, provided, however, that Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part~~.

(b) Rate calculation. Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider ~~includes~~**offers** different Offerings, royalties must be calculated separately with respect to each Offering ~~taking into consideration~~**provided that** Service Provider Revenue and ~~expenses~~**TCC** associated with ~~each Offering~~**such different Offerings shall be allocated between such different Offerings in accordance with GAAP to prevent subjecting all or any portion of Service Provider Revenue and TCC to a royalty calculation of more than one Offering in an Accounting Period**. For purposes of calculating rates pursuant to this section and all of its subparts, a ~~Family~~**Household** Plan shall be treated as 1.5 subscribers per month, prorated in the case of a ~~Family~~**Household** Plan in effect for only part of a calendar month and a Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month. **Artificial Accounts shall not be counted as subscribers.**

(1) Step 1: Calculate the All-In Royalty for the Offering. For each Accounting Period, the all-in royalty for ~~all Offerings~~**each Offering** in this subpart (other than Plays subject to subpart D of this part) shall be the greater of (A) the applicable percent of Service Provider Revenue as set forth in in Column A of the table below and (B) the applicable percent of TCC or TCC amount as set forth in Column B of the table:

Offering	**Column A** **% of Service Provider Revenue**	**Column B** **TCC % or TCC Amount**
Standalone Non-Portable Subscription Offering—Streaming Only	**10.5 %**	**The lesser of 22 % of TCC for the Accounting Period or 50 cents per subscriber per month**
Standalone Non-Portable Subscription Offering—Mixed	**10.5 %**	**The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month**
Standalone Portable Subscription Offering	**10.5 %**	**The lesser of 21 % of TCC for the Accounting Period or 80 cents per subscriber per month**
Bundled Subscription Offering	**10.5 %**	**21 % of TCC for the Accounting Period**
Mixed Service Bundle	**11.35%**	**21% of TCC for the Accounting Period**

Limited Offering	**10.5%**	**21% of TCC for the Accounting Period**
Paid Locker Service	**12%**	**20.65% of TCC for the Accounting Period**
Purchased Content Locker Service	**12%**	**22% of TCC for the Accounting Period**
Free nonsubscription/ad-supported services free of any charge to the End User	**10.5%**	**22% of TCC for the Accounting Period**

(2) ***Step 2***: Subtract Applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalty that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also engaging in public performance of ~~musical works that does not constitute Licensed Activity~~**Non-Covered Works**. In the case in which the Service Provider is also engaging in the public performance of ~~musical works that does not constitute Licensed Activity~~**Non-Covered Works**, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity ~~uses~~ through the relevant Offering ~~as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per play information is unavailable because of *bona fide* technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4.~~**on the basis of GAAP.**

(3) *Step 3*: Determine the Payable Royalty Pool. The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of

(i) The result determined in step 2 in paragraph (b)(2) of this section, and

(ii) The royalty floor (if any) set forth in the following table:

Offering	Royalty Floor
Standalone Non-Portable Subscription Offering—Streaming Only	15 cents per subscriber per ~~month~~ **Accounting Period**
Standalone Non-Portable Subscription Offering—Mixed	30 cents per subscriber per ~~month~~ **Accounting Period**
Standalone Portable Subscription Offering	50 cents per subscriber per ~~month~~ **Accounting Period**

Bundled Subscription Offering	25 cents per month for each Active Subscriber during that ~~month~~ **Accounting Period**
Mixed Service Bundle	n/a
Limited Offering	n/a
Paid Locker Service	n/a
Purchased Content Locker Service	n/a
Free nonsubscription/ad-supported services free of any charge to the End User	n/a

Computation of royalty floors. For purposes of this paragraph (b)(3), to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete ~~calendar~~ months, prorating in the case of End Users who were subscribers for only part of a ~~calendar~~ month **(such proration taking into account the End User's monthly billing period)**, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D, except in the case of a Bundled Subscription Offering where subscriber-months shall be determined with respect to Active Subscribers. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

(4) *Step 4*: Calculate the Per-Work Royalty Allocation. This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by **the Mechanical Licensing Collective by (1)** dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part) to yield a per-Play allocation, ~~and~~**(2) identifying and locating copyright owners of each musical work and shares thereof, or determining whether such work is in the public domain, and (3)** multiplying ~~that result~~**the per-Play allocation** by the number of Plays of each **matched** musical **work or matched share of such** work (other than Plays subject to subpart D of this part **and/or Plays of public domain works**) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this step 4 only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section.

Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished

in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

(~~a~~c) Overtime adjustment. For purposes of the calculations in ~~step~~Step 4 in ~~this~~ paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

(1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays

(2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays

(3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays

(4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays

(5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays

~~(6)~~ For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

Subpart D – Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty rates.

*(a) Promotional Offerings***.** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.

(b) Free Trial Offerings. For Free Trial Offerings ~~**for which the Service Provider receives no monetary consideration**~~, the royalty rate is zero.

(c) Certain Purchased Content Locker Services. For every Purchased Content Locker Service ~~**for which the Service Provider receives no monetary consideration**~~, the royalty rate is zero.

[Explanatory Note: The above deletions are to remove language that is duplicative of the definition of Free Trial Offerings and Purchased Content Locker Services.]

~~***(d) Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject***~~

~~to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.~~

[Explanatory Note: The above deletion is to remove language that has been superseded by the Music Modernization Act. In particular, the Mechanical Licensing Collective has responsibility for ensuring compliance with the terms of the statutory license, pursuant to regulations adopted by the Copyright Office.]

TAB C

Index of Witness Testimony

Tab	Witness	Title
A	Joseph Farrell, DPhil	Partner, Bates White, LLC and Professor of the Graduate School in the Department of Economics at the University of California, Berkeley
B	John R. Hauser, Sc.D.	Kirin Professor of Marketing, Massachusetts Institute of Technology Sloan School of Management
C	David Kaefer	Vice President and Global Head of Business Affairs, Spotify USA Inc.
D	Pilar Tschollar	Senior Director, Global Head of Music Publishing Licensing, Spotify USA Inc.
E	Benjamin Kung	Senior Director, Financial Planning & Analysis and the Head of Strategic Planning and Licensing Finance, Spotify USA Inc.
F	Christopher Bonavia	Global Head of Label and Rights & Clearances Business Affairs, Spotify USA Inc.
G	Niklas Lundberg	Head of New Markets, Spotify USA Inc.

TAB D

Index of Exhibits

Ex. No.	Restricted	Sponsored By	Description
Spotify Ex. 1	Yes	Bonavia	[redacted]
Spotify Ex. 2	Yes	Bonavia	[redacted]
Spotify Ex. 3	Yes	Bonavia	[redacted]
Spotify Ex. 4	Yes	Bonavia	[redacted]
Spotify Ex. 5	Yes	Bonavia	[redacted]
Spotify Ex. 6	Yes	Bonavia	[redacted]
Spotify Ex. 7	Yes	Bonavia	[redacted]
Spotify Ex. 8	Yes	Bonavia	[redacted]
Spotify Ex. 9	Yes	Bonavia	[redacted]
Spotify Ex. 10	Yes	Bonavia	[redacted]
Spotify Ex. 11	Yes	Bonavia	[redacted]
Spotify Ex. 12	Yes	Bonavia	[redacted]
Spotify Ex. 13	Yes	Bonavia Lundberg	[redacted]
Spotify Ex. 14	Yes	Bonavia Lundberg	[redacted]
Spotify Ex. 15	Yes	Bonavia Lundberg	[redacted]
Spotify Ex. 16	Yes	Bonavia Lundberg	[redacted]
Spotify Ex. 17	Yes	Bonavia	[redacted]

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Ex. No.	Restricted	Sponsored By	Description
		Lundberg	[redacted]
Spotify Ex. 18	Yes	Bonavia Lundberg	[redacted]
Spotify Ex. 19	Yes	Bonavia Lundberg	[redacted]
Spotify Ex. 20	Yes	Tschollar	[redacted]
Spotify Ex. 21	No	Hauser	Share of Ear Q2 2021
Spotify Ex. 22	Yes	Hauser Kaefer	[redacted]
Spotify Ex. 23	Yes	Kaefer	[redacted]
Spotify Ex. 24	Yes	Kaefer	[redacted]
Spotify Ex. 25	Yes	Kaefer	[redacted]
Spotify Ex. 26	No	Kaefer	2019.10.21 Andrew Nusca, "Spotify Saved the Music Industry. Now What?" Fortune
Spotify Ex. 27	Yes	Kaefer	[redacted]
Spotify Ex. 28	Yes	Kaefer	[redacted]
Spotify Ex. 29	Yes	Kaefer	[redacted]
Spotify Ex. 30	Yes	Kaefer	[redacted]
Spotify Ex. 31	No	Kaefer	2021.10.10 Hot Country Playlist
Spotify Ex. 32	Yes	Kaefer	[redacted]
Spotify Ex. 33	Yes	Kaefer	[redacted]
Spotify Ex. 34	No	Kaefer	2021.10.10 Rap Caviar Playlist
Spotify Ex. 35	Yes	Kaefer	[redacted]
Spotify Ex. 36	No	Kaefer	2021.10.10 Rock This Playlist
Spotify Ex. 37	No	Kaefer	2021.07.28 Shareholder Letter Q2 2021
Spotify Ex. 38	No	Kaefer	2021.02.03 Shareholder Letter Q4-2020
Spotify Ex. 39	No	Kaefer	2021.02.05 Spotify Technology S.A. 20-F Registration Statement or Annual Report for Foreign Private Issuers (FY 2020)
Spotify Ex. 40	Yes	Kaefer	[redacted]
Spotify Ex. 41	Yes	Kaefer	[redacted]

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Ex. No.	Restricted	Sponsored By	Description
			[redacted]
Spotify Ex. 42	No	Kaefer	2021.10.11 Today's Top Hits Playlist
Spotify Ex. 43	No	Kaefer	2021.09.13 U.S. Recorded Music Revenues Return to Double-Digit Growth: RIAA Mid-Year Report
Spotify Ex. 44	Yes	Kaefer	[redacted]
Spotify Ex. 45	Yes	Kaefer	[redacted]
Spotify Ex. 46	Yes	Lundberg	[redacted]
Spotify Ex. 47	Yes	Lundberg	[redacted]
Spotify Ex. 48	Yes	Lundberg	[redacted]
Spotify Ex. 49	Yes	Lundberg	[redacted]
Spotify Ex. 50	Yes	Tschollar	[redacted]
Spotify Ex. 51	Yes	Bonavia	[redacted]
Spotify Ex. 52	Yes	Tschollar	[redacted]
Spotify Ex. 53	Yes	Tschollar	[redacted]
Spotify Ex. 54	Yes	Tschollar	[redacted]
Spotify Ex. 55	Yes	Tschollar	[redacted]
Spotify Ex. 56	Yes	Tschollar	[redacted]
Spotify Ex. 57	Yes	Tschollar	[redacted]
Spotify Ex. 58	Yes	Tschollar	[redacted]
Spotify Ex. 59	Yes	Tschollar	[redacted]

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Ex. No.	Restricted	Sponsored By	Description
			[redacted]
Spotify Ex. 60	Yes	Tschollar	[redacted]
Spotify Ex. 61	Yes	Tschollar	[redacted]
Spotify Ex. 62	Yes	Tschollar	[redacted]
Spotify Ex. 63	Yes	Tschollar	[redacted]
Spotify Ex. 64	Yes	Tschollar	[redacted]
Spotify Ex. 65	Yes	Tschollar	[redacted]
Spotify Ex. 66	Yes	Tschollar	[redacted]
Spotify Ex. 67	Yes	Tschollar	[redacted]
Spotify Ex. 68	Yes	Tschollar	[redacted]
Spotify Ex. 69	Yes	Tschollar	[redacted]
Spotify Ex. 70	Yes	Tschollar	[redacted]
Spotify Ex. 71	Yes	Tschollar	[redacted]
Spotify Ex. 72	Yes	Tschollar	[redacted]
Spotify Ex. 73	Yes	Kung	[redacted]
Spotify Ex. 74	No	Kaefer	2021.09.23, Anna Nicolaou, "Wall Street Weighs In On What Music Is Really Worth," Wall Street Journal
Spotify Ex. 75	Yes	Bonavia	[redacted]

TAB E

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 IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

DECLARATION AND CERTIFICATION OF SARANG VIJAY DAMLE ON BEHALF OF SPOTIFY USA INC.

1. I am counsel for Spotify USA Inc. ("Spotify") in this proceeding.

2. On July 20, 2021, the Copyright Royalty Board ("CRB") entered a protective order that limits the disclosure of "confidential information" to outside counsel of record and their staff, personnel supplied by any independent contractor with whom such attorneys work, and any outside independent consultant or expert who is assisting a participant to this proceeding ("Protective Order"). *See* Dkt. No. 25482. The participants agreed that in this proceeding, "confidential information" protectable under the Protective Order (hereinafter referred to as "Restricted materials") "shall consist of commercial or financial information disclosed by any means (including, but not limited to, through documents, testimony, or argument), and that the Producer has reasonably determined in good faith would, if disclosed, (1) result in a competitive disadvantage to the Producer, (2) provide a competitive advantage to another Participant or entity, or (3) interfere with the ability of the Producer obtain like information from other Participants or entities in the future." *Id.* at § III. Prior to the production of Restricted materials, participants must (1) mark these materials "with a conspicuous label of 'RESTRICTED – Subject to Protective

Order in Docket No. 21-CRB-0001-PR (2023-27) (Phonorecords IV)"; (2) mark these materials "with highlights or brackets"; and (3) "deliver with all Restricted materials an affidavit or declaration signed under penalty of perjury listing a description of all materials marked with the 'Restricted' stamp and the basis for the designation." *Id.* at § IV.A.

3. Pursuant to the Protective Order, I submit this declaration in support of Spotify's designation of certain testimony and documents as "Restricted."

4. I have reviewed Spotify's Introductory Memorandum, witness testimony, and accompanying exhibits. After consultation with my client and with the witnesses who submitted testimony in support of Spotify's Written Direct Statement, I have determined to the best of my knowledge, information, and belief that portions of Spotify's Introductory Memorandum, witness testimony, and accompanying exhibits contain non-public Restricted material protected under the Protective Order. Restricted material is redacted in the public copies of Spotify's filing, highlighted in gray in the restricted copies of Spotify's filing, and described in more detail below.

5. The Restricted materials include, but are not limited to, testimony and exhibits involving (a) contracts, contractual terms, and contract strategy that are proprietary, not available to the public, competitively sensitive, and often subject to express confidentiality provisions with third parties; (b) confidential internal business information, financial projections, financial data, user data, and competitive strategy that are proprietary, not available to the public, and commercially sensitive; and (c) communications between Spotify and content providers concerning activities that, if disclosed, would disrupt ongoing partnerships and collaborations, and interfere with future partnerships and collaborations.

6. If the Restricted materials were to become public, it would place Spotify at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of

Spotify, and jeopardize Spotify's business interests. Information related to Spotify's confidential contracts and their relationships with content providers could be used by their competitors, or by other content providers, to formulate rival bids, bid up Spotify payments, or otherwise unfairly jeopardize Spotify member stations' commercial and competitive interests.

7. With respect to the financial information, I understand that Spotify has not disclosed to the public or the investment community the financial information that it seeks to restrict here, including its internal financial projections and specific royalty payment information. Consequently, neither Spotify's competitors nor the investing public has been privy to that information, which Spotify has treated as highly confidential and sensitive, and has guarded closely. In addition, when Spotify discloses information about their finances to the market as required by law, Spotify provides accompanying analysis and commentary that contextualizes disclosures by its officers. The information that Spotify seeks to restrict by designating it confidential is not intended for public release or prepared with that audience in mind, and therefore was not accompanied by the type of detailed explanation and context that usually accompanies such disclosures by a company officer.

8. The written direct testimony of Spotify's economic expert, Professor Joseph Farrell, and the accompanying appendices contain material non-public information concerning the particular rates and terms agreed to by specific Spotify's direct licensors; material non-public internal financial data concerning Spotify's subscriber counts, royalty payments, and cost structure; and Spotify's internal financial projections and business strategies. None of this information is publically known or available. Disclosure of this information would competitively disadvantage Spotify.

9. The written direct testimony of Spotify's survey expert, Dr. John R. Hauser, and select exhibits accompany his testimony, contain material non-public information concerning Spotify's internal subscriber data and business strategy. Disclosure of this information would, for the reasons discussed above competitively disadvantage Spotify.

10. The written direct testimony of David Kaefer, Vice President and Global Head of Business Affairs at Spotify, and certain exhibits accompanying his testimony, contain material non-public information concerning the particular rates and terms agreed to by specific Spotify's direct licensors including contracts, contractual terms, and contract strategy in negotiations with those direct licensors; material non-public internal financial data concerning Spotify's subscriber counts, listening statistics, royalty payments, and cost structure; and Spotify's confidential business strategies. Disclosure of this information would, for the reasons discussed above competitively disadvantage Spotify. Mr. Kaefer's testimony and the exhibits accompanying his testimony also contain material non-public terms of license agreements that are subject to confidentiality provisions.

11. The written testimony of Pilar Tschollar, Senior Director, Global Head of Music Publishing Licensing at Spotify Ltd, a corporate affiliate of Spotify USA Inc. and in the same corporate family of companies as Spotify AB, and certain exhibits accompanying her testimony, contain non-public information concerning the particular rates and terms agreed to by Spotify in license agreements with direct licensors; non-public information concerning Spotify's license agreement negotiation history; and confidential internal financial information surrounding those negotiations. None of this information is publically known or available. For the reasons discussed in paragraphs 6 and 7, disclosure of this information would competitively disadvantage Spotify.

Ms. Tschollar's testimony and the exhibits accompanying her testimony also contain material non-public terms of license agreements that are subject to confidentiality provisions.

12. The written direct testimony of Benjamin Kung, Senior Director in the Financial Planning & Analysis ("FP&A") team and the Head of Strategic Planning and Licensing Finance at Spotify, contains confidential competitive financial information and protections. Disclosure of this information would, for the reasons discussed above competitively disadvantage Spotify.

13. The written testimony of Christopher Bonavia, Global Head of Label and Rights & Clearances Business Affairs at Spotify, and certain exhibits accompanying his testimony, contain non-public information concerning the particular rates and terms agreed to by Spotify in license agreements with record labels for sound recording rights and non-public information concerning Spotify's license agreement negotiation history. None of this information is publically known or available. For the reasons discussed in paragraphs 6 and 7, disclosure of this information would competitively disadvantage Spotify. Mr. Bonavia's testimony and the exhibits accompanying his testimony also contain material non-public terms of license agreements with record labels that are subject to confidentiality provisions.

14. The written testimony of Niklas Lundberg, Head of New Markets at Spotify, and certain exhibits accompanying his testimony, contain non-public information concerning the particular rates and terms agreed to by Spotify in license agreements with record labels for sound recording rights and non-public information concerning Spotify's license agreement negotiation history. None of this information is publically known or available. For the reasons discussed in paragraphs 6 and 7, disclosure of this information would competitively disadvantage Spotify. Mr. Lundberg's testimony and the exhibits accompanying his testimony also contain material non-public terms of license agreements with record labels that are subject to confidentiality provisions.

15. The contractual, commercial and financial information described in the paragraphs above must be treated as restricted confidential information in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Spotify to provide the Judges with the most complete record possible on which to base their determination in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct, and that I executed this Declaration on October 13, 2021 in Washington, D.C.

Sarang Vijay Damle

Proof of Delivery

I hereby certify that on Friday, October 29, 2021, I provided a true and correct copy of the Corrected Written Direct Statement of Spotify USA Inc. (Vol. 1 of 5) [Public Version] to the following:

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

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

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Signed: /s/ Joseph Wetzel