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)**

MOTION TO COMPEL COPYRIGHT OWNERS TO PRODUCE SUBPART B SETTLEMENT DOCUMENTS

Pursuant to 17 U.S.C. § 803(b)(6)(C)(v) and 37 C.F.R. § 351.5(b)(1), Spotify USA Inc. ("Spotify"), Amazon.com Services LLC, and Pandora Media, LLC (collectively, the "Services") hereby move to compel the National Music Publishers' Association, Inc. ("NMPA") and the Nashville Songwriters Association International ("NSAI") (collectively, the "Copyright Owners") to produce "[a]ll Documents, including the settlement agreement and all negotiation Documents, concerning the Subpart B settlement between the Major Labels and [Copyright Owners] in the Current Proceeding[.]" Services' Request For Production No. 11. For four independent reasons these documents are "directly related to [Copyright Owners'] written direct statement," and thus an appropriate subject for discovery in this proceeding. 37 C.F.R. § 351.5(b)(1); 17 U.S.C. § 803(b)(6)(C)(v). *First*, Subpart B documents are directly related to Copyright Owners' contention that the new, willing-buyer/willing-seller standard requires higher mechanical royalties than the Section 801(b) factors. In express contradiction of that claim, Copyright Owners agreed to retain the *same* Subpart B rates under the new standard. The Services are entitled to explore that contradiction through discovery. *Second*, Copyright Owners' written direct statement repeatedly asserts that interactive streaming has cannibalized purchases; the Subpart B documents sought are relevant to assessing Copyright Owners' opportunity cost claims pursuant to Section 115's requirement that the Judges consider whether interactive streaming "substitute[s] for . . . the sales of phonorecords . . . or otherwise . . . interfere[s] with . . . the musical work copyright owner's other streams of revenue from its musical works." 17 U.S.C. § 115(c)(1)(F)(i). *Third*, the Subpart B settlement documents the Services seek provide market-place evidence directly related to Copyright Owners' contention that the much higher 40% total cost of content ("TCC") prong they propose is the appropriate market ratio between sound recording and musical works rates. *Fourth*, documents that shed light on Copyright Owners' motivations in agreeing to the Subpart B settlement are "directly related" to Copyright Owners' assertions in their written direct statement that publishers protect songwriters' financial interests, often at significant cost—assertions that some songwriters contend on the record are inconsistent with the Subpart B settlement terms.

I. BACKGROUND

On May 25, 2021, Copyright Owners and licensees Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. filed a *Motion To Adopt Settlement Of Statutory Royalty Rates And Terms For Subpart B Configurations* in this proceeding, informing the Judges that a settlement had been reached among those parties regarding the rates and terms under Section 115 for physical phonorecords, permanent digital downloads, ringtones, and music bundles presently addressed in 37 C.F.R. Part 385 Subpart B (the "Subpart B settlement" or "the Settlement").[1] *Phonorecords IV*, Dkt. No. 21-CRB-0001-PR (2023-2027) (eCRB Dkt. No. 25288).

[1] The Settlement also reached certain definitions applicable to Subpart B rates and terms that are presently addressed in 37 C.F.R. Part 385 Subpart A.

The Settlement proposed that the rates and terms "presently set forth in 37 C.F.R. Part 385 Subparts A and B should continue to be applicable to the Record Company Participants and all other licensees of 'mechanical' rights in musical works for the Subpart B Configurations, for the rate period covered by the Proceeding, with only a few minor editorial changes to the applicable regulations[.]" *Id.* at 3.

On November 2, 2021, the Services served upon Copyright Owners their First Set of Requests for Production which included a request for "[a]ll Documents, including the settlement agreement and all negotiation Documents, concerning the Subpart B settlement between the Major Labels and [Copyright Owners] in the Current Proceeding[.]"[2] Services' Request For Production No. 11. On November 12, 2021, Copyright Owners objected to the Request as, *inter alia*, seeking "documents outside the scope of discovery, including because it seeks broad, nontargeted discovery that is not directly related to Copyright Owners' WDS." Copyright Owners continued to press this objection both on meet-and-confer calls and in meet-and-confer correspondence.[3]

II. ARGUMENT

Documents concerning Copyright Owners' settlement of the mechanical royalty rates and terms for the forms of distribution covered by Subpart B are "directly related" to Copyright Owners' written direct statement, and thus the proper subject of discovery, for four reasons. *See* 37 C.F.R. § 351.5(b)(1).

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[2] The Services also sought the same with respect to settlement preceding the *Phonorecords III* proceeding, but do not move to compel as to that demand.

[3] Pursuant to 37 C.F.R. § 351.5(b)(1), the Services certify that they met and conferred with Copyright Owners on this issue in a good faith effort to resolve the dispute raised in this Motion, including in letters dated November 29, 2021, December 16, 2021, and December 23, 2021, and in teleconferences on November 22, 2021, December 14, 2021, and January 6, 2022. The parties were unable to reach agreement.

***First*,** documents related to the Subpart B settlement are relevant to the Copyright Owners' argument that the new, willing-buyer/willing-seller standard that governs this proceeding requires higher mechanical royalties than the previously applicable Section 801(b) standard did. Copyright Owners make that contention multiple times in their written direct statement. For example, Copyright Owners' expert Jeffrey A. Eisenach. Ph.D. testified that "the 801(b) factors . . . were generally understood to create a downward bias relative to free-market rates. Recognizing this, Copyright Owners were among the advocates for adoption of the new willing buyer/willing seller standard in the MMA." Eisenach WDT ¶ 29 (footnotes omitted). Similarly, Peter Brodsky of Sony Music Publishing ("SMP") testified that "SMP has always believed that the Section 801(b) standard that governed *Phonorecords III* suppresses rates below what could be achieved under the new 'willing buyer/willing seller' standard that has long existed for sound recording licensors under Sections 114 and 112[.]" Brodsky WDT ¶ 63; *see also* Bogard WDT ¶ 25 ("[Earlier] laws . . . caused songwriters to be paid drastically below market value for nearly a century. The MMA changed the standard to a market-based 'willing buyer/willing seller' royalty rate standard, which mandates a rate upon which a willing buyer and a willing seller would agree.").

The Services must be permitted to explore why, then, Copyright Owners agreed with the record labels to retain the *same* Subpart B rates despite the shift from the Section 801(b) standard to the willing-buyer/willing-seller standard. To the extent the Subpart B settlement documents the Services seek ultimately reveal that the changed standard had no impact whatsoever on Copyright Owners' negotiations with the record labels, those documents would tend to refute Copyright Owners' position regarding the import of the changed standard in this proceeding and show that it is simply a litigating position. *See* Joint Record Company Participants & Copyright Owners

Comments in Further Support of Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations at 4 (Aug. 10, 2021) (eCRB Dkt. No. 25577) ("While the commenters understand and appreciate that Subpart B configurations continue to represent a not immaterial source of revenue for some publishers and songwriters, it is far from clear that either licensors or licensees could expect a material change in statutory mechanical royalty rates for Subpart B configurations if they were to litigate at this time.").

Second, Copyright Owners *repeatedly* claim in their written direct statement that interactive streaming has cannibalized the mechanical royalties associated with purchasing activity. For example, David Kokakis of Universal Music Publishing Group ("UMPG") testified that interactive streaming services "substitute for and do not promote the sales of phonorecords" and that the availability of streaming "resulted in the almost complete evisceration of other sources of mechanical royalty income, including from physical product and digital downloads." Kokakis WDT ¶ 86. And Thomas Kelly of SMP testified that streaming's growth "[redacted]" Kelly WDT ¶ 8; *see id.* ¶¶ 10, 59. Likewise, Annette Yocum of Warner Chappell Music, Inc. testified that interactive streaming has "supplanted, rather than promoted, the sale of physical recordings and digital downloads, [redacted]" Yocum WDT ¶ 9; *see id.* ¶¶ 59-60; *see also* Bogard WDT ¶ 18 ("The destruction of the sales market has accelerated since 2011 when Spotify started in the U.S. and the streaming services, instead of paying 9.1 cents per record sold or downloaded, instead pay micropennies despite the increased access and additional listeners."); Hunte WDT ¶ 22 ("As music streaming took hold of the industry, replacing physical and digital download sales, my mechanical royalties declined."); Yeary WDT ¶ 18 ("During the physical and digital download sales era, I would have earned significant mechanical royalties from my songwriting success. However, streaming has diminished that success by paying less than pennies for streaming my songs."); Brodsky WDT ¶ 57 ("[P]art of the dramatic increase in the percent of mechanical income attributable to interactive audio streaming is due to its growth, but a very significant part of that percentage is also due to [redacted]."); Beekman WDT ¶¶ 53-81.

The Services are entitled to challenge Copyright Owners' claims about the opportunity cost of licensing their works to the Services by investigating the supposed value associated with Copyright Owners' apparently preferred alternative form of distribution. Indeed, as discussed below, the new willing-buyer/willing-seller standard requires the Judges to assess in this proceeding whether interactive streaming does or does not "substitute for . . . the sales of phonorecords . . . or otherwise . . . interfere with . . . the musical work copyright owner's other streams of revenue from its musical works." 17 U.S.C. § 115(c)(1)(F)(i). The Subpart B valuation analyses and negotiation documents the Services seek will provide insight into Copyright Owners' contemporaneous view on the market for the purchase of physical phonorecords and permanent digital downloads, including whether or not Copyright Owners (and the record companies they negotiated with) believe there is opportunity for revenue capture in those markets, and whether or not any decrease in royalties in those markets is the result of consumers "substituting" streaming for purchases, rather than other market forces—piracy, for example.

Indeed, songwriter comments submitted in response to the Subpart B settlement suggest that Copyright Owners' claims regarding the impact of streaming on purchasing activity may be overblown. For example, a group of organizations representing songwriters expressed their "strong objection to mischaracterizations by the Major Music Conglomerates (joined by NSAI) that Subpart B uses of music have declined to the point of insignificance." Second Comments Submitted by the Songwriters Guild of America, Inc., the Society of Composers & Lyricists, Music Creators North America, and the individual music creators Rick Carnes and Ashley Irwin at 12 (Nov. 22, 2021) (eCRB Dkt. No. 25940). Their Comments continued:

> [S]uch claims are patently untrustworthy. . . . [W]hile no one can plausibly argue that "traditional" mechanical uses of music have not shifted significantly toward streaming on demand in the digital age, that is not to say that Subpart B uses in the US are disappearing or anything close to it. Subpart B mechanical royalty income remains a substantial and continuing revenue source for many music creators and independent music publishers, almost certainly amounting to tens of millions of dollars per year out of the $823.5 million in mechanical royalties NMPA reports are generated annually in the US.

Id. at 12-13. The Services should be permitted to explore whether Copyright Owners expressed similar views about the Subpart B market in the context of the Subpart B settlement negotiations, or in internal valuation documents created in preparation for those negotiations.

Third, the Subpart B settlement documents the Services seek are directly relevant to Copyright Owners' proposed greater of, TCC rate structure. In this proceeding, Copyright Owners have proposed a TCC prong that demands 40% of a Service's content costs. Copyright Owners' Proposed Rates and Terms at 7. Copyright Owners contend this percentage corresponds to the "appropriate market ratio between sound recording and musical works rates (2:5:1)." *Id.* The Subpart B settlement provides direct, real-world evidence of what Copyright Owners and sound recording owners believe to be the appropriate ratio of sound recording to publishing royalties, where all parties are operating under the willing-buyer/willing-seller standard. Discovery into the Subpart B settlement is necessary to reveal contemporaneous evidence that shows why Copyright

Owners agreed to a rate that provides them with a substantially smaller proportion of royalties vis-à-vis the record labels than Copyright Owners argue in this proceeding is the "appropriate market ratio between sound recording and musical works rates." *Id.* Having put the ratio between sound recording and publishing royalties directly at issue, Copyright Owners cannot obstruct the Services' access to relevant evidence of what Copyright Owners and the record labels apparently believe that ratio is, and why.

Fourth, a core theme in the Copyright Owners' written direct statement is that publishers protect songwriters' financial interest, often at significant cost. David Kokakis (UMPG) testified, for example, that publishers "protect their songwriters' legal rights" and "create and maximize value for songwriters and their works." Kokakis WDT ¶ 7. Peter Brodsky (SMP) stated that publishers "protect songwriters' interests," "help songwriters realize the economic value from their creative works," and "incur significant costs to engage in [these] activities." Brodsky WDT ¶¶ 8-9. And Timothy Cohan of peermusic testified that publishers "provide financial and creative support to songwriters" and that those services "require significant costs, which continue to rise, and carry significant risk." Cohan WDT ¶ 39.

Objections filed in response to the Subpart B settlement expressly contradict Copyright Owners' characterization of their work on behalf of songwriters: numerous songwriters stated on the record that Copyright Owners did *not* represent songwriters' interests in negotiating the Subpart B settlement. *See, e.g.*, Comments of Helienne Lindvall, David Lowery and Blake Morgan at 21 (July 26, 2021) (eCRB Dkt. No. 25533) ("[W]e respectfully ask the Judges not to impose those frozen rates on everyone else without their participation and consent as well as evidence. What is good for the goose may be anathema to the gander."); Comments Submitted by the Songwriters Guild of America, Inc., the Society of Composers & Lyricists, Music Creators

North America, and the individual music creators Rick Carnes and Ashley Irwin at 7 (July 26, 2021) (eCRB Dkt. No. 25535) ("[A]doption by the CRB of the [settlement] . . . will cause great harm to the US and global songwriter and composer communities."); Comment of Michelle Shocked at 2 (July 26, 2021) (eCRB Dkt. No. 25532) ("Major publishers that agree to freeze the statutory rate are simply leaving more money in the pockets of the labels that are their sister companies. We, on the other hand, are trying to preserve the only sources of revenue that we have." (citation omitted)); *see also* Comment of Gwendolyn Seale at 2 (July 26, 2021) (eCRB Dkt. No. 25534) ("The NMPA's board is comprised of representatives of the publishing company corporate affiliates of the three major labels on the other side of the negotiating table."). Evidence related to the Copyright Owners' motivations in agreeing to the Subpart B settlement, and whether they contradict their professed commitment to songwriters' financial interests, is thus fairly within the scope of discovery.

Finally, while the Judges denied a similar motion in *Phonorecords III*, the changed rate-setting standard and Copyright Owners' current written direct statement require a different outcome here. First, the new rate-setting standard states that the Judges "*shall* base their decision," in part, on "whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works." 17 U.S.C. § 115(c)(1)(F) (emphasis added). That statutory requirement has led the Judges to consider evidence of licensors' opportunity cost associated with licensing the categories of services at issue in the proceeding, including opportunity cost associated with potential lost sales. *See* Final Determination, *Webcasting V*, 86 Fed. Reg. 59452, 59497 & n.133 (Oct. 27, 2021) (relying on what was "essentially an 'opportunity cost' model" in a proceeding governed by the willing-buyer/willing-seller standard); Final Determination, *Webcasting IV*, 81 Fed. Reg. 26316, 26366 (May 2, 2016) (explaining that, "on the licensors' side of the market (the sellers' side), the limit on the willingness to supply recordings at reduced rates is reached when the licensor determines that any further reduction in the rate will not be sufficiently to cover all marginal and recurring fixed costs (including opportunity costs) for its particular repertoire" (emphasis omitted)).[4] As such, the new standard renders the perceived value of the royalties associated with other distribution activities, and thus the Subpart B settlement documents the Services seek, core to this proceeding. And, as shown above, Copyright Owners made the opportunity cost of licensing their works to the Services a key feature of their written direct statement. Copyright Owners also made numerous assertions in their written direct statement here—about their view of the effect of the change in rate-setting standard; about the ratio between sound recording and musical works rates that would be set in an effectively competitive market; and about their own purported zealous efforts to protect songwriters' economic interests—to which the Subpart B documents are directly related. For all these reasons, the Services must be allowed access in this proceeding to evidence that bears on—and in fact may rebut—the Copyright Owners' contentions in their written direct statement.

III. CONCLUSION

For the foregoing reasons, the Services respectfully request that the Judges compel Copyright Owners to produce "[a]ll Documents, including the settlement agreement and all negotiation Documents, concerning the Subpart B settlement between the Major Labels and [Copyright Owners] in the Current Proceeding[.]" Services' Request For Production No. 11.

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[4] *Cf.* Final Determination, *SDARS III*, 83 Fed. Reg. 65210, 65210 (December 19, 2018) (noting that, in determining the SDARS rates, the Judges relied "heavily" on an opportunity cost analysis).

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Monday, January 10, 2022, I provided a true and correct copy of the Motion to Compel Copyright Owners to Produce Subpart B Settlement Documents [Public]] to the following:

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