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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)**

SPOTIFY USA INC.'S OPPOSITION TO COPYRIGHT OWNERS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INFORMATION FROM SERVICES CONCERNING THEIR RATE PROPOSALS

National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI") (collectively, "Copyright Owners") filed a motion to compel discovery from the Services[1] in connection with their rate and terms proposals ("Motion"). That Motion should be dismissed for at least three reasons. First, despite significant notice of the present discovery disputes, Copyright Owners flagrantly disregarded the statutory deadline for filing a motion to compel. Second, Copyright Owners seek discovery of documents and information that were either already produced by Spotify or do not exist, rendering their demands moot. And third, they seek irrelevant and burdensome discovery that flies in the face of traditional discovery principles and the purpose of a Copyright Royalty Board rate-setting proceeding.

[1] Copyright Owners filed their Motion against all the Services, Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC, and Spotify USA Inc. This Opposition is submitted by Spotify in connection with the portions of the Motion that pertain to discovery requests propounded upon Spotify.

Copyright Owners claim they are entitled to documents and information in order to "understand, test and challenge" Spotify's supposedly "impenetrable" rate proposal (Mot. at 3)—a proposal that largely carries forward a rate structure the participants have operated under for almost a decade. Spotify has produced all the relevant inputs Copyright Owners need for a "complete and accurate picture"[2] of its rate proposal: [redacted]

Copyright Owners nonetheless demand more. Rather than address the issues in this litigation, they effectively seek an audit of every aspect of Spotify's revenue reporting under the *existing* regulations, down to the formulas, queries, code, and data repositories used by Spotify to satisfy its obligations under the existing regulations. They seek details about estimates, adjustments, and allocations related to any input to any calculation of the payable royalty pool. And they demand expansive discovery into every work paper underlying the distinct revenue, TCC, and performance royalty totals that Spotify has produced in response to more appropriate discovery requests. As expressed in the participants' meet and confer discussions, Copyright Owners' argument for why such onerous discovery requests are relevant to Spotify's proposal or written direct testimony is that Spotify has proposed a revenue-based rate structure. More specifically, Copyright Owners seem to imply that, should they uncover through discovery that a service employed some problematic method of calculating revenue under the existing regulations,

[2] *Order Granting SoundExchange's Motion to Compel NAB to Produce Certain Financial Documents*, Dkt. No. 14-CRB-0001-WR (2016-2020) (Jan. 15, 2015) ("*Web IV* Order") at 3.

that might call into question the propriety of the entire percentage of revenue scheme. Copyright Owners tilt at windmills. Section 115 anticipates and addresses such concerns by allowing Copyright Owners, via the Mechanical Licensing Collective ("MLC"), to audit digital music providers. Spotify's proposal to largely carry forward the current rate structure thus does not entitle Copyright Owners to onerous and audit-like discovery into Spotify's compliance with the existing regulations. That is not the purpose of *this* proceeding. Spotify respectfully requests that the Motion be entirely denied.

I. COPYRIGHT OWNERS' MOTION TO COMPEL SHOULD BE DENIED AS UNTIMELY

As an initial matter, Copyright Owners' Motion is untimely and may be denied for that reason alone. The Judges' Scheduling Order set the close of discovery on December 23, 2021. *Order Following Status Conference and Modifying Scheduling Orders* at 2 (Dec. 13, 2021) (eCRB Dkt. No. 25974). Counsel for the Services and counsel for Copyright Owners stipulated prior to the close of discovery that, notwithstanding that deadline, no party would file a motion to compel before January 10, 2022, given the difficulty of obtaining client input on motion to compel briefing during the winter holidays. Dukanovic Decl. ¶ 15. The Services reserved their right to challenge the timeliness of any motion to compel filed after January 10, 2022. *Id.* Copyright Owners disregarded that deadline, and did not file their Motion until January 26, 2022.

Copyright Owners have expressed in meet and confer discussions that they believe participants do not need to file motions to compel by the statutory close of written direct discovery if they provide notice of a dispute that may result in a motion to compel before the close of discovery. Copyright Owners pointed to an order from *SDARS III* as support for this position. *See Order Denying, Without Prejudice, SoundExchange's Motion to Compel the Services' Production*

of Certain Documents, Dkt. No. 16-CRB-0001 SR/PSSR (2018-22) (Sept. 13, 2016) ("*SDARS III* Order"). Copyright Owners read that Order far too broadly.

In *SDARS III*, the Judges analyzed the 60-day statutory discovery deadline and found that "it would have sufficed if SoundExchange had simply placed the Services on notice that a discovery '*dispute*' existed (rather than filing a motion) because the Services had not yet produced the requested discovery, and that a subsequent motion might ensue." *Id.* at 3. Placing the Services on notice was sufficient in *SDARS III* because the dispute at issue was related to promised but not-yet-produced discovery; an earlier motion would have been premature. But the Judges' holding in that Order is inapplicable here. Spotify first communicated to Copyright Owners that it would not produce these documents because the requests were overboard and audit-like in November 2021, a month before the close of discovery. *See* Dukanovic Decl. ¶ 3. Indeed, it communicated this position at least four times before the close of discovery. *See id.* ¶¶ 3-4. There was no reason for Copyright Owners to wait two months to file this motion, and interpreting 17 U.S.C. § 803(b)(6)(C)(iv) to allow such an unwarranted delay would establish a rule in which any participant could wait until the eve of the evidentiary hearing in a rate-setting proceeding to file a motion to compel—just so long as they mentioned the dispute before the end of the statutory discovery period. *See, e.g.*, *Lovitky v. Trump*, 949 F.3d 753, 760 (D.C. Cir. 2020) ("A 'statutory outcome is absurd if it defies rationality by rendering a statute nonsensical or superfluous or if it creates an outcome so contrary to perceived social values that Congress could not have intended it.'" (quoting *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010))). Copyright Owners' Motion is untimely and should be denied.

II. SPOTIFY ALREADY PRODUCED DOCUMENTS AND INFORMATION SUFFICIENT TO SHOW THE PAYABLE ROYALTY POOL UNDER SPOTIFY'S PROPOSAL

Copyright Owners have moved to compel production of documents sufficient to show Spotify's payable mechanical royalty pool under Spotify's rate proposal, claiming that Spotify "refused" to produce this information. Mot. at 5-6. But Spotify has *already* produced this information to Copyright Owners.

Specifically, Spotify produced [redacted][3] Dukanovic Decl. ¶¶ 19-20; Ex. 8 [redacted] *See* Ex. 10 (Spotify Amended Responses to Copyright Owners' First Set of Interrogatories) at 94.[5] [redacted]

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[3] On December 23, 2021, Spotify produced the original version of this spreadsheet. Ex. 7 [redacted] On January 26, 2022, [redacted] Dukanovic Decl. ¶ 18. On February 2 2022, [redacted] Ex 8 [redacted] Ex. 10 (Spotify Amended Responses to Copyright Owners' First Set of Interrogatories) at 95-96.

[4] The parties agree the relevant time period with respect to Copyright Owners' RFPs and Interrogatories is 2017 to present.

[5] [redacted]

[redacted]. *See* Ex. 8 [redacted] at 80-81.

In direct response to Copyright Owners' Request No. 3(a), [redacted]. *Id.* ([redacted]) at 82-83. This is exactly what Copyright Owners requested and provides a "complete and accurate picture" of the payable royalty pool under Spotify's proposal. *See Web IV* Order at 3. [redacted] Ex. 2 (Dec. 26, 2021 Email From Dukanovic to Weigensberg) at 21; Ex. 3 (Jan. 5, 2022 Discovery Response Letter) at 25-26. And it was prepared to answer any questions that Copyright Owners may have had about the contents of the step-by-step spreadsheet during the parties' many meet and confer calls. Instead, Copyright Owners forged ahead with their Motion. That Motion should be denied as moot with respect to RFP 3(a).[6]

Copyright Owners also demand that Spotify identify "all estimates" that it used from 2017 to present to calculate its mechanical royalties and, for each one of those estimates, whether the estimate was subsequently adjusted and by how much. Mot. at 6. In response to Copyright Owners' Interrogatory No. 8, [redacted]

[redacted]. *See* Ex. 9 ([redacted]); Ex. 10 (Spotify Amended Responses to Copyright Owners' First Set of Interrogatories) at 96.

[6] If Copyright Owners have specific questions about the calculations and inputs provided in the produced document, they are entitled to depose and/or cross-examine Spotify's designated financial witness(es) as needed.

Ex. 4 (Spotify's Amended Responses and Objections to Copyright Owners' Second Set of Interrogatories) at 43-44. Dukanovic Decl. ¶ 10. . *See id.*

Copyright Owners fail to articulate how the historical estimates and adjustments requested in Interrogatory No. 8 are directly related to Spotify's written direct statement, or relevant to any claim or defense by any party in this proceeding. Dukanovic Decl. ¶ 8; Ex. 2 (Dec. 26, 2021 Email From Dukanovic to Weigensberg) at 21-22; *see also* 37 C.F.R. § 351.5(b). As noted above, and in Spotify's response to this interrogatory, Ex. 4 (Spotify's Amended Responses and Objections to Copyright Owners' Second Set of Interrogatories) at 43-44. That entire process takes place under 37 C.F.R. § 210.27, which the Copyright Office adopted and is not directly at issue in this proceeding. Contrary to Copyright Owners' position, the production of historical estimates and adjustments to Spotify's mechanical royalties from 2017 to present will not "elucidat[e]" Spotify's current rate proposal. Mot. at 3. It has nothing to do with that rate proposal. And in any event, if Copyright Owners want to assess the royalties paid and "the impact of [Spotify's] proposed estimates," *id.* at 6,

Separate and apart from the relevance issue, compliance with Interrogatory No. 8 would be unduly burdensome. Dukanovic Decl. ¶ 9. For all of these reasons, the Judges should deny Copyright Owners' motion to compel any additional response to Interrogatory No. 8.

III. COPYRIGHT OWNERS' REMAINING AUDIT-LIKE REQUESTS ARE NOT DIRECTLY RELATED TO SPOTIFY'S WRITTEN DIRECT STATEMENT AND NOT PROPORTIONATE TO THE NEEDS OF THIS LITIGATION

Copyright Owners next ask the Judges to compel Spotify to compile and produce granular data and documentation that demonstrates exactly how it calculates the mechanical royalty pool under 37 C.F.R. § 385.21. Copyright Owners contend such discovery is warranted because Spotify's proposal supposedly "affords [it] tremendous discretion . . . as to what revenues are included in Service Provider Revenue and what amounts can be deducted," and "permits [Spotify] to calculate revenues and royalties in opaque and inscrutable ways." Mot. at 3. Putting aside that Copyright Owners are free to challenge proposed rates and terms as "opaque" or "inscrutable" without any discovery, they provide no indication about what they find "opaque and inscrutable" about a proposal that largely carries forward a rate structure the participants have operated under for the better part of a decade. That Spotify is proposing a continuation of that structure entitles Copyright Owners neither to audit the accuracy of Spotify's prior reporting under the existing

regulations nor to seek expansive discovery into every internal work paper, calculation, estimate, and adjustment ever considered or conducted by Spotify. That is an unworkable standard that finds no support in the statute or CRB precedent. *See* 37 C.F.R. § 351.5(b).

A. Requests Concerning Revenue Calculations (RFP 3(f), 3(g), RFP 4, RFP 173, Interrogatories 5 and 6)

Copyright Owners demand that Spotify produce "documents and information showing how revenues for [its] respective offerings have been reported to musical work and sound recording licensors, and the Mechanical Licensing Collective ('MLC')."[7] Mot. at 8. [redacted] Dukanovic Decl. ¶ 23. That should moot Copyright Owners' Motion. Copyright Owners nonetheless also seek information used to prepare those revenue reports in order to "test and challenge how [Spotify] has calculated and reported" under the existing regulations. Mot. at 9. That information is irrelevant to the task at hand.

For example, RFP 173 seeks "[a]ll documents *underlying* each distinct revenue total" reported to the MLC or any sound recording or musical work licensor "in any period for any product or service . . . including *all data, formulas and code referenced or used to calculate the revenue total*." *Id.* at 8 (emphases added). Interrogatory No. 5 similarly asks that Spotify "[i]dentify and explain how [it] calculate[s] Revenues for each of [its] Offerings, including *which data repositories are queried, all queries and code used in the data gathering and Revenues*

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[7] [redacted]. Dukanovic Decl. ¶ 23.

calculation process, which data points are gathered, any processes for inserting estimates, modifications, adjustments or allocations into the calculation process . . . ." *Id.* at 9 (emphasis added).

Copyright Owners thus ask the Judges to compel Spotify to create and produce a detailed blueprint of its internal reporting and accounting processes that explains exactly how Spotify calculates each of its revenue inputs, describes all the data gathered for those revenue calculations, identifies what data repositories were used, what formulas, queries and code were run, and the processes for estimating, adjusting, or allocating any aspect of those calculations. But this is not an audit or any other exercise warranting this type of burdensome discovery. Copyright Owners' Motion on these requests should be denied for two principal reasons:

First, as described above, Spotify produced everything Copyright Owners need in order to have "a complete and accurate picture" of Spotify's rate proposal—which Copyright Owners agree is the relevant inquiry here. *Id.* at 3, 5 (citing *Web IV* Order at 3). Copyright Owners have

[redacted].[8] Dukanovic Decl. ¶¶ 11, 23.

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[8] For Interrogatory No. 6, which requests that Spotify "[i]dentify and explain each instance in which [it] reported to any Licensor different revenues in connection with any Eligible Digital Music Service", [redacted] Dukanovic Decl. ¶ 23. [redacted] *Id.* ¶ 12.

Second, section 115 already provides sufficient mechanisms for ensuring—or rather "testing and challenging"—the accuracy of a digital service provider's mechanical royalty payments, revenue calculations, or reporting under the applicable regulations. *See* 17 U.S.C. § 115(d)(4)(D). This rate-setting proceeding is not the appropriate forum for Copyright Owners' demands to invasively examine Spotify's reporting and royalty calculation practices and procedures. It is to evaluate the participants' respective rate and terms proposals. Consistent with that purpose, Copyright Owners must establish that their discovery requests are directly relevant to a participant's rate proposal under 37 C.F.R. § 351.5(b). They have failed to do so.

Finally in this category, Copyright Owners also move to compel production of documents sufficient to show (i) all revenue Spotify's associates, Affiliates, agents, or representatives recognized *in lieu* of Spotify recognizing that revenue; and (ii) the value of any barter or nonmonetary consideration Spotify recognized as revenue under GAAP. Mot. at 7. They further demand that Spotify produce the "type(s)" and "amount(s)" of revenue associated with each of these categories. *Id.* at 8. But Spotify does not have any documents responsive to this request in its possession, custody, or control.[9] So this is yet another request for which Copyright Owners' motion is moot.

B. Requests Concerning Revenue Allocations (RFPs 3(b), (d), (e), (k), (l), 4, 5, 33, and 34)

Copyright Owners also seek an order requiring Spotify to produce certain documents concerning revenue allocations based on Spotify's proposed clarification of the definition of

[9] Copyright Owners did not raise these specific sub-parts of RFP 3 (subparts (f) and (g)) during the meet and confer process. Dukanovic Decl. ¶ 14. Had they done so, Spotify would have advised them that no such documents exist. *Id.*

"Service Provider Revenue" to confirm that the term only covers revenue that is "directly derived from" section 115 licensed activity, and should exclude revenue derived from delivery of "Non-Covered Works" (*e.g.*, podcasts). Mot. at 9. Spotify does not dispute that it proposes these changes to the current regulations. It does, however, dispute Copyright Owners' representation that it has "refused to produce" documents related to these proposed allocations.

i. Revenue "Directly Derived From" Licensed Activity

Contrary to Copyright Owners' representation, Spotify has already produced documents sufficient to show the revenue that is and is not "directly derived" from the provision of its "Offerings." [redacted] Dukanovic Decl. ¶ 23, [redacted] *id.* ¶¶ 19-20, 23; Ex. 11 [redacted] Ex. 8 ([redacted] Effectively, all Copyright Owners need to do to "assess the impact of [Spotify's] proposed changes on the payable royalty pool" is [redacted] *See* Mot. at 7. And in any event, even if this were not the case, Copyright Owners have failed to articulate why the revenue data produced by Spotify is insufficient.

Indeed, far from "refusing" to produce *any* documents showing its revenue not directly derived from section 115 licensed activity, [redacted]. Dukanovic Decl. ¶ 23. [redacted]

[redacted]. *Id.* Copyright Owners, however, seek unfettered discovery into any and all non-royalty bearing, non-music revenue generated by Spotify, broken down by amount and type. Non-royalty bearing, non-music revenue is not directly related to Spotify's written direct statement, and thus Copyright Owners' demand for intrusive discovery into such information should be outright rejected by the Judges.

ii. ***Revenue Allocated Between Section 115 and Non-Section 115 Activity***

Additionally, despite being told no responsive documents exist, Copyright Owners move to compel Spotify to produce *inter alia*: "[a]ll revenue" from advertisements and sponsorships placed between section 115 and non-section 115 works; "[a]ll revenue" from advertisements and sponsorships embedded or served within Non-Covered Works; and "[a]ll analysis" concerning Spotify's proposal that 50% of revenue from advertisements placed between section 115 and non-section 115 content be allocated to the revenue base. Mot. at 10-11. [redacted] Dukanovic Decl. ¶ 13. [redacted] Copyright Owners' Motion with respect to RFPs 3(d), (e) and 34 should be denied as moot. [redacted]

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[10] [redacted] *See* Ex. 8 ([redacted]); *see also* Ex. 10 (Spotify Amended Responses to Copyright Owners' First Set of Interrogatories) at 95-96.

C. Requests Concerning Revenue Deductions (RFPs 3(m) and 4)

Copyright Owners further seek to require Spotify to produce documents "concerning the quantum of advertising-related costs" it would be able to deduct under its proposal from the relevant discovery time period. Mot. at 12. They claim this includes documents sufficient to show the "costs of obtaining advertising and sponsorship revenue," along with the types and amounts of advertising and sponsorship revenue. *Id.* However, Copyright Owners never raised this specific sub-part of RFP 3 or RFP 4 during the meet and confer process. Dukanovic Decl. ¶ 14. And they provide no explanation in their Motion for how this burdensome discovery is proportionate to the needs of this proceeding.

With respect to the advertising-cost deduction, Spotify's proposal is simply to continue the status quo. . *Id.* ¶ 23. The reasonability of the proposed advertising deduction turns on that percentage, and not on the "quantum of advertising-related costs." Mot. at 12. Regardless,

Their request for additional, burdensome discovery underlying past-period reporting they have already accepted is yet another audit-like request that has no place in this proceeding. The Judges should therefore deny Copyright Owners' motion to compel with respect to RFP 3(m).

D. Requests For All Underlying Documents and Information Concerning TCC, Performance Royalty, and Subscriber Totals (Spotify RFPs 174-176)

[redacted] Dukanovic Decl. ¶ 23. However, RFPs 174-176 seek sweeping discovery into all of Spotify's underlying materials and calculations.

- Spotify RFP 174: **All Documents underlying each distinct Total Content Costs total that You have reported** to The MLC or any musical work licensor in any period for any product or service that includes any of Your Eligible Digital Music Services, **including all data, formulas and code referenced or used to calculate the revenue total.**[11]

- Spotify RFP 175: **All Documents underlying each distinct Performance Royalty total that You have reported** to any musical work licensor in any period for any product or service that includes any of Your Eligible Digital Music Services, **including all data, formulas and code referenced or used to calculate the revenue total**.

- Spotify RFP 176: All documents underlying[12] each distinct subscriber total that You have reported to . . . any sound recording or musical work licensor in any respective period for any product or service that includes any of Your Eligible Digital Music Services, **including all data, formulas and code referenced or used to calculate the revenue total**.

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[11] Copyright Owners also rely, in part, on a decision from *Phonorecords III* [redacted]

[12] The Motion quotes RFP 176 as requesting merely "[d]ocuments sufficient to show" subscriber totals. Mot. at 15. In reality, however, RFP 176 is a much broader request that seeks "*[a]ll documents underlying*" subscriber totals. *See id.* at A-6.

Mot. at 14-15, A-6 (emphases added).

Such discovery is not directly related to Spotify's written direct statement and puts an unreasonable burden on Spotify, requiring it to produce any document containing "all data, formulas and code" that Spotify has ever "referenced" or "used" in any way to calculate any revenue amount it reported to any musical work licensor. Copyright Owners' desire to re-calculate the numbers Spotify has already produced is beyond the scope of relevant discovery in this proceeding, is beyond the scope of Spotify's written direct statement, and is disproportionate to the needs of this case. The purpose of this proceeding is not to "test and challenge" every shred of possible data, every variation of a formula, or all the underlying code for calculating revenue totals. It's to determine whether a participant has presented an economically sound rate structure within the bounds of the statute. Copyright Owners transparent attempt to obtain irrelevant and overwhelming backup materials is nothing more than an unauthorized audit. Copyright Owners' motion to compel production of Spotify RFPs 174-176 should therefore be denied.

IV. CONCLUSION

For the foregoing reasons, Copyright Owners' Motion should be denied.

DATED: February 3, 2022

Respectfully submitted,

By: *____/s/ Joseph R. Wetzel_____*

Joseph R. Wetzel (Cal. Bar No. 238008)
Andrew M. Gass (Cal. Bar No. 259694)
LATHAM & WATKINS LLP
505 Montgomery Street
San Francisco, California 94111
Tel.: (415) 391-0600
joe.wetzel@lw.com
andrew.gass@lw.com

– and –

Sarang Vijay Damle (D.C. Bar No. 1619619)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
Tel.: (202) 637-2200
sy.damle@lw.com

– and –

Allison L. Stillman (N.Y. Bar No. 4451381)
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Tel.: (212) 906-1200
alli.stillman@lw.com

Counsel for Spotify USA Inc.

Proof of Delivery

I hereby certify that on Thursday, February 03, 2022, I provided a true and correct copy of the Spotify USA Inc.'s Opposition to Copyright Owners' Motion to Compel Production of Documents and Information from Services Concerning their Rate Proposals [Public] to the following:

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

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

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

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

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

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

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

Signed: /s/ Joseph Wetzel