

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

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

**AMAZON’S OPPOSITION TO THE COPYRIGHT OWNERS’
MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INFORMATION
CONCERNING PRICING AND BUNDLES**

The Judges should deny the Copyright Owners’ Motion as to Amazon: in part on the merits and in part because it is moot.¹ The Motion takes issue only with Amazon’s response to Interrogatory No. 2. The Copyright Owners say that Amazon’s response is deficient for two reasons. *First*, the Copyright Owners assert that Amazon “refused to respond to [the interrogatory] insofar as it concerns the Prime bundle.” Mot. at 11. That is false: Amazon responded to the interrogatory regarding the Prime bundle and provided a complete response. The Copyright Owners do not identify any specific information the interrogatory seeks about that bundle that Amazon did not already provide. The Judges should deny this aspect of the Motion on the merits.

Second, the Copyright Owners state that Amazon’s response to Interrogatory No. 2 did not address certain offers [REDACTED]. *Id.* at 11 & n.9. Those short-lived, historical offerings were not, in fact, bundles. They enabled customers to purchase two separate services simultaneously, for which they were billed separately, at the

¹ Amazon submits this Opposition to the Copyright Owners’ March 2, 2022 Motion to Compel Production of Documents and Information Concerning Pricing and Bundles (“Motion” or “Mot.”).

stand-alone prices for the component services. Nonetheless, Amazon will amend its response to Interrogatory No. 2 to address them. Had the Copyright Owners' counsel ever addressed these offerings with Amazon's counsel on one of the parties' many meet-and-confer calls or even in the body of one of their many letters, Amazon would have provided this information already. The Judges should dismiss this aspect of the Motion as moot.

I. Amazon Provided a Complete Interrogatory Response About Its Prime Bundle

Amazon's response to Interrogatory No. 2 contained a complete response about its "Prime bundle," through which customers acquire access in a single subscription to free shipping, video services, and Prime Music, among many other benefits.

That interrogatory makes a specific ask. It requests "Bundle Information," defined as (1) "the Price charged to consumers for the Bundle"; (2) "the components of the Bundle"; and (3) "the standalone published price of each of the components of the Bundle."² Kim. Decl., Ex. 1 (Copyright Owners' First Set of Interrogatories to Each of the Services (Nov. 2, 2021)) ("Copyright Owners' Interrogatories"), at 3-4, 7. If a component does not have a standalone price, and if the service provider's calculation of mechanical royalties for the bundle "involve[s] or require[s] using" the "standalone published price" of a "comparable product or service," then the interrogatory asks the service provider to disclose the comparable product or service and its "standalone published price[]." *Id.* at 3-4.

As to the Prime bundle, Amazon responded fully to the first two subparts of Interrogatory No. 2. Amazon explained that it charges "\$12.99 per month, or \$119 per year" for the Prime

² The Exhibits ("Ex.") are attached to the accompanying Declaration of Kylie C. Kim ("Kim Decl.").

bundle³ and that the full list of Prime bundle components – which includes “free two-day shipping, video content, arcade games, savings at Whole Foods supermarkets, and a host of other benefits” – is publicly available on Amazon’s website.⁴ There is no merit to the Copyright Owners’ assertion (at 13) that “Amazon refuses to provide . . . information that will identify the components of its Prime bundle . . . and the price at which Prime is offered.” The Copyright Owners also knew that information before they served this Interrogatory. As Amazon previously informed them, it is available publicly on Amazon’s website.

The Copyright Owners also already know the answer to the third part of Interrogatory No. 2 as to the Prime Bundle. First, Amazon’s response states that the only component of the Prime bundle that is available for purchase on a standalone basis is Amazon Prime Video, which has a standalone price of “\$8.99 per month.” Kim Decl., Ex. 2 (Amazon’s Amended Responses to Copyright Owners’ First Set of Interrogatories (Jan. 31, 2022)), at 3. None of the other components of the Prime bundle is available on a standalone basis or has a standalone price.

To the extent Interrogatory No. 2 asks for information about comparable products to the remainder of the Prime bundle and their standalone prices, it does so *only* insofar as Amazon’s “mechanical royalty calculation involved or required using” such a proxy price. Kim Decl., Ex. 1 (Copyright Owners’ Interrogatories), at 3. Amazon has already answered this question as well. Under the rules promulgated in the since-vacated *Phonorecords III* Final Determination,

³ Amazon increased the price of its Prime bundle to \$14.99 per month, or \$139 a year, as of February 18, 2022, for new customers. The new price will go into effect for existing customers on March 25, 2022. Amazon plans to include this update in the supplemental interrogatory response discussed below.

⁴ See Kim Decl., Ex. 2 (Amazon’s Amended Responses to Copyright Owners’ First Set of Interrogatories), at 3 (“Additional information on the benefits offered as part of an Amazon Prime membership is publicly available online. See Amazon, *About Amazon Prime Insider & Prime Membership Benefits*, <https://www.amazon.com/primeinsider/about> (last accessed Nov. 15, 2021).”).

the only component of the Prime bundle for which Amazon had to identify a proxy price for royalty calculation purposes was Prime Music itself. An Amazon witness testified [REDACTED]

[REDACTED]. See Written Direct Statement of James Duffett-Smith ¶¶ 199-200. [REDACTED]

[REDACTED] *Id.* ¶¶ 200-203; Amazon Ex. 92, at 7 (Appendix A); see Kim Decl., Ex. 3 (Ltr. from C. Young to K. Arora (Jan. 7, 2022)), at 2 (pointing to “Amazon Ex. 92, App’x A”). Amazon was not required, for rate calculation purposes, to develop a proxy price for any other element of the Prime bundle under *Phonorecords III*.

In contrast, under *Phonorecords II*, Amazon was required to identify a proxy price for one other portion of the Prime bundle: free shipping. But the Copyright Owners already know this information as well. As explained above, the standalone published price for Prime Video is \$8.99 per month – accounting for all but \$4 of the \$12.99 monthly price of the Prime bundle. And in the *Phonorecords III* proceeding – from which “[a]ny material or testimony . . . may be used in this [*Phonorecords IV*] Proceeding”⁵ – Amazon [REDACTED]

[REDACTED]. See Kim Decl., Ex. 4 (Mar. 16, 2017 Closed Hr’g Tr. 1483:1-1484:1 (testimony of R. Mirchandani)) [REDACTED]

Those two elements of the Prime bundle – alone – exceed the cost of the Prime bundle, leaving

⁵ Amended Protective Order at 2 (Nov. 4, 2021).

\$0 in Service Provider Revenue to be attributed to Prime Music, for which Amazon paid mechanical royalties under the separate floor prong in *Phonorecords II*. Amazon was not required to – and did not – develop a proxy price for any other element of the Prime bundle for purposes of complying with *Phonorecords II*.

Dissatisfied with what they already know, the Copyright Owners claim (Mot. at 14) they need more information to assess “Apple’s and Google’s proposals to determine revenue from bundled offerings.” They do not explain this point – and for good reason. Google’s proposal for calculating mechanical royalties for such bundles is “TBD based upon final, non-appealable determination in *Phonorecords III*.” Corrected Google Written Direct Statement Volume I, Tab B, at 2 (Mar. 3, 2022). Apple’s proposal refers only to the *actual* “stand-alone retail price of each product or service[] in the Bundled Subscription Offering.” Amended Apple Written Direct Statement Volume I, at 2 (Mar. 8, 2022). Apple’s proposal says nothing about how to address components of a bundle that lack stand-alone prices. That proposal does not – in the words of the “Bundle Information” definition incorporated in Interrogatory No. 2 – require Amazon to derive proxy prices for additional elements of the Prime bundle.

Amazon has fully answered Interrogatory No. 2. Nothing about the text of that interrogatory required Amazon to determine the standalone price of products comparable to other components of the Prime bundle, such as Amazon Photos or Personal Shopper. Amazon has never been required to do so for rate calculation purposes.

II. The Copyright Owners’ Motion to Compel a Response About Amazon Music Unlimited Bundles Is Moot

The Copyright Owners claim (at 11 n.9) that Amazon’s response to Interrogatory No. 2 failed to include certain offers [REDACTED] *See* Declaration of Benjamin Semel In Support of Mot. (Mar. 2, 2022) (“Semel Decl.”), Ex. 6 (AMZN_Phono

IV_00015981 ([REDACTED]), at -15995 [REDACTED].

As a preliminary matter, although the document the Copyright Owners cite [REDACTED] [REDACTED]. For example, Amazon Music Unlimited subscribers, who were not existing Disney+ subscribers, could get an extended free trial of Disney+, but only by signing up separately on the Disney+ website and entering their credit card information on that site. After the free trial ended, they were billed separately each month for Amazon Music Unlimited and Disney+. In addition, after the free trial, customers could cancel one service while continuing to receive the other. *See id.* [REDACTED]. These offerings are not “bundled subscription offerings” as that term is used in *Phonorecords II* and *Phonorecords III*. Nor would they be treated as such under the proposal of any participant here. Nonetheless, in the interest of compromise, Amazon will conduct an additional search for information about these offers and similar ones and will amend its response to Interrogatory No. 2 to include that information.

In all events, Amazon did not “simply ignore[]” the Copyright Owners’ request to supplement Interrogatory No. 2 with information about the [REDACTED] Mot. at 11 & n.9. The parties had many meet-and-confer telephone calls, but the Copyright Owners never raised this issue on any of them. The Copyright Owners also sent many letters regarding discovery, but this issue was never elevated to the body of a letter. The only time the Copyright Owners ever referenced these [REDACTED] before filing this motion was in a nine-page schedule to a February 4, 2022 letter. Semel Decl., Ex. 7 (Ltr. from K. Arora to K. Kim (Feb. 4, 2022) at 7 (Schedule A)). While Amazon missed that buried reference, the

Copyright Owners never mentioned it to Amazon before filing this motion. Had they done so, Amazon would have provided the information above.

Dated: March 11, 2022

Respectfully submitted,

/s/ Joshua D. Branson

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**DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)**

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

DECLARATION OF KYLIE C. KIM

(On Behalf of Amazon.com Services LLC)

1. I am an associate at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., counsel for Amazon in the above-captioned proceeding.

2. I respectfully submit this declaration in connection with Amazon’s Opposition to the Copyright Owners’ Motion to Compel Production of Documents and Information Concerning Pricing and Bundles. I am authorized by Amazon to submit this declaration on their behalf, and I am fully familiar with the facts and circumstances set forth herein.

3. Attached as Exhibit 1 to this Declaration is a true and correct copy of the Copyright Owners’ First Set of Interrogatories to Each of the Services (Nov. 2, 2021).

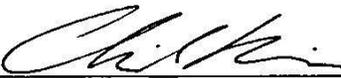
4. Attached as Exhibit 2 to this Declaration is a true and correct copy of Amazon’s Amended Responses to Copyright Owners’ First Set of Interrogatories (Jan. 31, 2022).

5. Attached as Exhibit 3 to this Declaration is a true and correct copy of the January 7, 2022 letter from Christopher Young to Kaveri Arora.

6. Attached as Exhibit 4 to this Declaration is a true and correct copy of an extract from the March 16, 2017 Closed Hearing Testimony of Rishi Mirchandani, Dkt. No. 16-CRB-0003-PR (*Phono III*) (comprising transcript pages 1374-1377, 1482-1485, and 1642, 1650-1651).

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

Dated: March 11, 2022
Washington, D.C.


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Exhibits 1-4

*Restricted – Subject to Protective Order in
Docket No. 21-CRB-0001-PR (2023-2027)
(Phonorecords IV)*

Omitted from Public Filing

Proof of Delivery

I hereby certify that on Friday, March 11, 2022, I provided a true and correct copy of the Amazon's Opposition to the Copyright Owners' Motion to Compel Production of Documents and Information Concerning Pricing and Bundles (PUBLIC) to the following:

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

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

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

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

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

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

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.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

Signed: /s/ Joshua D Branson