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UNITED STATES COPYRIGHT ROYALTY JUDGES

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| IN THE MATTER OF: | |
| DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III) | Docket No. 16-CRB-0003-PR (2018-2022) REMAND |

**CONDENSED TRANSCRIPT WITH KEYWORD INDEX**

**[PUBLIC TRANSCRIPT]**

Pages: 1 through 339

Place: Washington, D.C.

Date: March 7, 2022

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IN THE MATTER OF:
DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III)
Docket No. 16-CRB-0003-PR (2018-2022) REMAND

REMOTELY BEFORE:
THE HONORABLE CHIEF SUZANNE BARNETT
THE HONORABLE DAVID R. STRICKLER
THE HONORABLE STEVE RUWE
Copyright Royalty Judges

Library of Congress - Remote Hearing
Madison Building
101 Independence Avenue, S.E.
Washington, D.C.

Monday, March 7, 2022
10:05 a.m.

Reported by: Karen Brynteson, RMR, CRR, FAPR



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P R O C E E D I N G S
(10:05 a.m.)

THE CLERK: Let's raise the curtain.

MR. REYES: Please stand by.

CHIEF JUDGE BARNETT: Good morning. For the record, I am Judge Suzanne Barnett. Also present from the Copyright Royalty Board are Judge David Strickler, Judge Steven Ruwe, staff attorneys Rich Strasser and Kim Whittle, and our paralegal Richard Waldrop.

We're here for closing argument in the matter of Determination of Rates and Terms For Making and Distributing Phonorecords, Docket Number 16-CRB-0003-PR. Today's proceeding is pursuant to a remand of this proceeding from the U.S. Court of Appeals for the D.C. Circuit.

The Circuit Court's opinion and remand ruling may be found at Johnson versus Copyright Royalty Board, 969 F.3d 363, decided on August 7th, 2020.

The participants in this remand proceeding have stipulated that counsel will present oral argument relating to the identified issues on remand and will submit the matter to the Judges for deliberation and decision on that argument and the

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written materials they have previously filed.

Let's have appearances by counsel. Please introduce yourself, your colleagues, your client representatives, if any, and indicate which attorney will be lead counsel for today's hearing.

So for the Copyright Owners?

MR. SEMEL: Thank you, Your Honor. It's Benjamin Semel from Pryor Cashman for the Copyright Owners. I will be the primary counsel at the argument. Along with me also is Donald Zakarin, Frank Scibilia, Joshua Weigensberg as well. Thank you.

CHIEF JUDGE BARNETT: Thank you. Mr. Johnson waived oral argument. He is not a speaking participant, but I know he has been given attendee status and will be listening in.

For the Services, for Amazon?

MS. POPE: For Amazon, Leslie Pope along with Scott Angstreich, and our client representatives are Ajeet Pai, Stephen Worth, John Cohen, and Amy Brawn.

CHIEF JUDGE BARNETT: Thank you, Ms. Pope.

For Apple?

For Google?

MR. STEINTHAL: For Google, Your Honor, it's

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Kenneth Steinthal from King & Spalding. I'll be with my colleague David Mattern, and our client representative is Matthew Gubiotti.

CHIEF JUDGE BARNETT: Thank you.

For Pandora.

MR. MARKS: Benjamin Marks from Weil Gotshal. With me today are my colleagues Todd Larson, Aaron Curtis, David Bier, and Rachel Kaplowitz. Our client representative is David Ring.

CHIEF JUDGE BARNETT: Thank you, Mr. Marks.

For Spotify.

MR. ASSMUS: Good morning, Your Honor. Richard Assmus on behalf of Spotify U.S.A., joined by my colleagues from Mayer Brown, Jacob Ebin, Margaret Wheeler-Frothingham, and Christopher Szablewski. Also co-counsel from Latham & Watkins, Andrew Gass and Joseph Wetzel. We have a number of client representatives here today, Your Honor, Lucy Bridgwood, Adam Chen, Kevan Choset, Sara Domeier, Allison Matson, and Meredith Santana.

CHIEF JUDGE BARNETT: Thank you, Mr. Assmus.

For clarity of the record, we are conducting this hearing electronically. Participants are in our hearing room virtually through the magic of Zoom webinar technology. I'm going to give a tip of the

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hat to Veritext for their phenomenal work in this effort.

This is not the first virtual hearing for the CRB. Some of you might have participated in the first hearing, first virtual hearing, in the most recent Determination of Webcaster Rates and Terms. Your tech liaison has worked with CRB staff to make this virtual hearing possible. We have conducted rehearsals and expect a smooth presentation.

We do not anticipate technological problems, but we ask for your patience if the hearing does not go flawlessly. In the event of technological problems, including inability to hear or to hear clearly, a loss of video signal or other disruption, please immediately notify the host and the Judges so that we may pause the proceedings.

I have to make a small announcement in an abundance of caution. We were notified of some schedule -- scheduled electrical work that was scheduled for the -- this previous weekend in the Jefferson Building of the Library of Congress, and that is where at least three of us are located today.

We arranged emergency alternative connections in case the Architect of the Capitol did not complete the work as scheduled. This morning we

learned that some work is ongoing in the building, but we were assured that the ongoing work would not interfere with our hearing. We take that assurance at face value.

Nonetheless, if Ms. Whittle or I should -- or Mr. Waldrop should appear -- disappear unexpectedly, Judge Strickler will call a 15-minute recess. Our host will follow the recess protocol, and Ms. Whittle, Mr. Waldrop, and I will make haste to relocate to designated space in the Madison Building of the library and hope for the best.

We will stay in contact with the Judges to keep everyone apprised. Ms. Whittle will contact the host when we are able to recommence. Again, this is an abundance of caution. As I said, we have been assured that there will be no disruption of today's hearing.

Now, for each participant I want to ask have you had any difficulty seeing or hearing so far? We've had video and sound checks. Everyone should be okay. Any problems, please speak up now.

Are each of you --

MR. SEMEL: No, Your Honor -- no, Your Honor, but I do want to take this opportunity to put some additional appearances on the record, I'm sorry,



that I didn't come upon.

CHIEF JUDGE BARNETT: Thank -- sure, thank you, Mr. Semel. Go ahead.

MR. SEMEL: We have additional client representatives on, David Israelite, Danielle Aguirre, Chris Bates, and Ashley Joyce from the National Music Publishers Association, as well as additional attorneys from our firm, Kaveri Arora and Mona Simonian.

CHIEF JUDGE BARNETT: Thank you, Mr. Semel. Appreciate that.

Now, for each of the participants, are you in a situation that allows you to proceed with candor without regard -- without concerns regarding the confidentiality of these proceedings in the event we move into restricted session? If you have any concerns about being able to manage the restricted session, please let us know at this time.

MR. SEMEL: No concerns, Your Honor.

CHIEF JUDGE BARNETT: Thank you. I'm assuming that each of the conference room situations, that you have the ability to cut the feed or clear the room or do whatever is necessary if we go into a restricted session. Is that correct?

MR. SEMEL: Yes. Yes, Your Honor.



CHIEF JUDGE BARNETT: Thank you. As we have said, this hearing is on the record, and we do have a court reporter present. Our court reporter today is the lovely and talented Ms. Karen Brynteson. I think you are all familiar with her.

Further, to the issue of a clear record, I ask each speaker to repeat his or her identification before speaking for Ms. Brynteson's benefit.

As you are aware, our hearings are open to the public, and this hearing is no different. We are feeding into a live audio-only stream available to the public.

During these oral arguments, counsel might need to present or refer to confidential information that is in the record. When you need to quote or refer to information denoted restricted under the protective order in effect in this proceedings -- this proceeding, we will cut the public audio feed and lock out attendees who are not permitted to access the restricted information.

I call upon counsel to be vigilant about informing the Judges and the court reporter when we need to go into restricted session and when we may reopen the hearing.

I remind counsel, though I -- I'm sure I



don't need to, that we are here for presentation of oral argument, not introduction of new evidence. Because comments and argument of counsel are not evidence, we do not expect interruption of counsel's presentations with objections.

The evidence is in the record. The Judges are tasked with and capable of analyzing the evidence to which counsel may refer, and determining relevance and weight to be afforded to any evidence evoked.

In any event, should any interjection be necessary, please signal by raising your hand and be mindful that the reporter cannot record anything if more than one person speaks at a time.

It should go without saying that except for an unlikely technological disruption, no participant in this webinar may direct chat messages to the Judges or the CRB staff.

Consistent with the Judges order of February 9th, we will proceed with a just clock presentation. Each side will have a total of two and a half hours for presentation and to answer any questions of the Judges.

The Streaming Services will open and may reserve up to 15 minutes for rebuttal. The Copyright Owners will go second and may reserve up to five

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minutes for rebuttal.
Are we ready to proceed?
MR. MARKS: Yes, Your Honor.
MR. SEMEL: Yes, Your Honor.
CHIEF JUDGE BARNETT: Okay. Thank you. So who will go first for the Services?
MR. MARKS: I will, Your Honor.
CHIEF JUDGE BARNETT: Mr. Marks. You have the floor.
MR. MARKS: Good morning, Your Honors. I am Benjamin Marks, counsel for Pandora. It is a pleasure to be back before you today.
I'll be speaking first on behalf of the Services this morning. And my presentation will focus on the contested issues about the scope of the D.C. Circuit's remand of this proceeding.
I'll be followed by Mr. Assmus for -- who is counsel for Spotify. Mr. Assmus will address the working proposal that you shared with the participants on December 9th, the request for further information on that proposal in the January 6th order, the adjustments to the working proposal that are needed in order for that methodology to set a rate that satisfies and appropriately balances the four statutory factors of Section 801(b)(1), and the

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Copyright Owners' criticisms of the working proposal.
Mr. Assmus will be followed by Mr. Steinthal, counsel for Google. As you know and as will be discussed in further detail this morning, the D.C. Circuit, as part of its remand of this proceeding, has instructed the Judges to reconsider the Phonorecords II settlement as a benchmark for rate setting here.
The Services' rate proposal on remand is derived from that benchmark, and Mr. Steinthal will present the case for why Your Honors should adopt the Services' proposal.
Mr. Steinthal will also explain that the Phonorecords II benchmark confirms the reasonableness of the adjustments the Services have proposed to the working proposal, if Your Honors prefer to use a version of that proposal as the primary methodology for rate setting here.
Ms. Pope, counsel for Amazon, will close out the Services' presentation this morning. Her remarks will be directed to the D.C. Circuit's remand of the service revenue definition and its direction for the Judges to consider whether they have the legal authority to materially rework the definition of service revenue that was adopted in the initial

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determination.
As Your Honors know, virtually all of the participants at trial in Phonorecords III appealed the final determination. The appellate court affirmed some aspects of the decision, and those are not open for review or revisiting here. There are also aspects of the final determination that were not appealed, and those too are not open for review or revisiting on remand. And, of course, a number of important aspects of the final determination were vacated and remanded for further consideration.
We think Johnson is fairly straightforward, but as we note in our papers, the Copyright Owners consistently and egregiously misstated its holding.
I'll start with the very brief review of the D.C. Circuit's rulings on the issues that were actually appealed, and then turn to the Copyright Owners' misstatements.
The Court vacated the rate structure and rate levels in the final determination, based in part on its acknowledgment of the majority's finding that the major record companies have and exercise complementary oligopoly power in this market.
JUDGE STRICKLER: Mr. Marks, this is Judge Strickler. Good morning. How are you?

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MR. MARKS: I'm fine this morning.
JUDGE STRICKLER: I have a question for you right on that issue that you have highlighted. Is it your position that the -- that in Johnson, the D.C. Circuit vacated the 15.1 percent rate in the percentage-of-revenue prong?
MR. MARKS: Absolutely -- absolutely, Your Honor. We -- we think that's unmistakably clear. They vacated the rate levels. I'll come -- be coming back and talking about that further when I talk about the ways that the Copyright Owners have misstated the holdings, but it's absolutely our position that the rate percentages were vacated and remanded.
We think that's clear from not only the language where, at pages 382 and 83 of the decision, the -- the Court made clear that the interplay of the rate levels and the rate structure were open for revisiting, as well as the fact that the rate levels need to take into consideration the Phonorecords II benchmark or reconsideration of it, as well as the fact that the Circuit Court remanded for consideration of factors B through D of Section 801(b)(1).
JUDGE STRICKLER: Thank you for that. You say you'll be getting into that some more detail

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later on, so we'll -- we'll await further colloquy on that as you get to that issue.

MR. MARKS: Thank you, Your Honor.

In addition to vacating the rate structure and rate levels, the Court rejected the Services' challenge to the majority's mixing and matching of models from different experts to set a rate as arbitrary and capricious, and we do not challenge that finding here. But the Court pointedly did not endorse the rates derived from the majority's analysis.

The Court vacated the majority's change to the service revenue definition, and remanded for consideration of whether the Judges have the legal authority to materially rework that definition, following the initial determination.

The Court found that the majority had not provided a reasoned explanation for rejecting the Phonorecords II settlement as a benchmark and directed reconsideration of that settlement as a benchmark on remand.

The Court rejected the Copyright Owners' challenge to the Board's definition of subscribers to accommodate student and family plans. And the Court upheld the conclusion that an increase in rates would

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satisfy the first factor under the governing Section 801(b)(1) rate standard, but in light of its decision to vacate the rates, the Court did not address the three other statutory factors or how the factors should be balanced.

The affirmance as to factor A does not compel any particular outcome on remand, and even as to that factor, the majority's conclusion was directional and not made with respect to any particular magnitude of increase. And both the Board and the D.C. Circuit repeatedly have recognized that the -- that the statutory factors often point in opposite directions and must be balanced in order to generate an appropriate outcome.

Indeed, the Court expressly left open whether the significant hike in rate levels found in the initial -- final determination -- excuse me -- found in the final determination could have satisfied the Section 801(b)(1) factors. That's at pages 381 to 83 and 388 to 89 of the decision.

The Court also left open the Services' objection that the majority had not justified its conclusion that an increase in mechanical license royalties would lead to a decrease in sound recording royalties. That's what has been referred to as the

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inverse relationship, or more colloquially as the see-saw.

The Court instructed that, in light of the remand, the Services can present their concerns to the Board on that issue in the first instance.

So how are the Copyright Owners mischaracterizing Johnson? The Copyright Owners claim that Johnson requires the Judges to reinstate the vacated rate levels, but Johnson requires the Judges to reevaluate, not reinstate the vacated levels. This is true for at least four reasons.

First, as Your Honors recognized in the January 6th order at note 7, vacatur of the rates makes no sense if Your Honors were somehow obligated to reinstate them. The Court could and would have left those rates in place while the remand was pending if it was mandating the same result.

Second, Your Honors have also recognized Johnson permits the Judges to adopt rates derived from the Phonorecords II benchmark. No one has suggested that using the Phonorecords II settlement as a benchmark could lead to the reimposition of the vacated rates.

Third, Johnson requires evaluation of whether the rates selected by the Judges on remand

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satisfy factors B through D of Section 801(b)(1). The Copyright Owners' position is tantamount to suggesting that your reevaluation of those factors and how to balance them is meaningless and has an outcome that was preordained by the Circuit Court.

Fourth, the Copyright Owners' assertion in their additional materials order brief that Your Honors somehow acknowledged the January 6th order -- in the January 6th order, that you may not alter the 15.1 percent rate is meritless. You found precisely the opposite at page 3, page 4 note 7, and note 13.

Next, the Copyright Owners incorrectly claim that the D.C. Circuit affirmed the use of a 2.5 to 1 ratio between sound recording royalty rates and musical work royalty rates. It did no such --

JUDGE STRICKLER: Mr. --

MR. MARKS: Yes.

JUDGE STRICKLER: Mr. Marks, I'm sorry. Before we get on to the -- anything further with regard to the ratio, I want to go back to my original question because you just discussed the 15.1 percent again.

In the -- in Johnson, the D.C. Circuit spoke of how -- discussed how the 15.1 percent was derived in the mix of Professor Marx's total percent of

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revenue that was attributable under her model to the Copyright Owners and to the sound recording owners, and their application -- the application by the majority of the -- of what you were about to speak about, the 2.5 to 1 ratio.

And in connection with that, at page 386 of -- of Johnson, the -- the D.C. Circuit summed up on that by saying, "That type of line-drawing and reasoned weighing of the evidence falls squarely within the Board's wheelhouse as an expert administrative agency."

So I -- close quote.

So -- so I have problems when I read that trying to figure out how we have authority to deal with a rate other than the 15.1 percent. So let me ask you this: Are you objecting to the way in which the 15.1 percent was calculated and saying we can calculate that -- we can -- we can do a recalculation and challenge that calculation that was done by the majority?

MR. MARKS: I do believe -- I do believe that -- that you could change the calculation if you wanted to. And let me -- let me step back for a minute and address the -- the question that you posed more broadly, Judge Strickler.

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First, the -- the Services lodged three separate challenges to the rates. The first was the challenge which we -- which we are not revisiting here, which is that the mixing and matching of models from different experts was arbitrary and capricious. That was an argument that we made on appeal. The -- the D.C. Circuit made clear that mixing and matching models from different experts is within the Board's discretion, within their wheelhouse of expertise. That's the type of weighing the evidence that you're permitted to do.

We're not rechallenging --

JUDGE STRICKLER: Let -- let --

MR. MARKS: We're not rechallenging that aspect.

JUDGE STRICKLER: Okay. Let --

MR. MARKS: We do agree --

JUDGE STRICKLER: Let me interrupt you on that. And so -- but the decision by the D.C. Circuit was not simply that, as a general matter, mixing and matching can be done. Wouldn't you agree that the -- that Johnson says this particular mixing and matching that got to 15.1 percent was -- was not arbitrary and capricious?

MR. MARKS: I would agree that the Judges

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said that -- that the type of mixing and matching that was done here is within your discretion. It doesn't mandate that you come out the same way again when you go back and reevaluate -- go back and reevaluate.

Remember that there were three separate challenges. Only one was to the arbitrary -- to what we felt was arbitrary and capricious mixing and matching. The other two challenges were the rejection of Phonorecords II as a benchmark, as well as the weighing of factors B through D of Section 801(b).

The Court made absolutely clear that those two things need to be reevaluated as part of the remand, and in doing so, there's no compulsion that you need to weigh all of the evidence in exactly the same way. It did say that the type of weighing of the expert evidence was permitted in terms of not being arbitrary and capricious, but it did not reach a conclusion or affirm the outcome or any particular input to that model. It just said that's the type of weighing of evidence you're permitted to do.

But in light of the other challenges, there's no mandate that you would have to come out the same way again when -- when weighing those

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factors or that you couldn't make adjustments to take account of the Phonorecords II settlement as a benchmark or to take account of factors B, C, or D of the statutory analysis.

JUDGE STRICKLER: But my question doesn't suggest that there aren't other arguments you have, for example, with regard to the use of the Phonorecords II benchmark or an analysis of the factors.

But my question is -- is more pointed as to whether or not the calculation of the 15.1 percent is up for debate. And I take you back to page 367 of the -- of Johnson, where the Court -- at the outset, the D.C. Circuit at the outset talks about how it affirms in part and vacates and remands in part, and when they -- when the D.C. Circuit explains how it vacated and remanded and what it vacated and remanded, it says, and I quote now, "specifically, the Board failed to provide adequate notice of the rate structure it adopted." And then it goes on. I'll stop quoting. It talks about the -- the treatment of the Phonorecords II benchmark and the source -- legal source for the service definition revenue change.

Let's stay on the first one. The Board, it

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says, "failed to provide adequate notice of the rate structure it adopted." Structure. And it doesn't say anything about the particular rate in the percentage-of-revenue prong. The rate structure that was at issue was the -- what it called, what the D.C. Circuit called yoking the -- the mechanical rate, and therefore, the musical works rate to the sound recording rate.

So where in this decision -- in the D.C. Circuit's opinion do you see the -- the basis for us to revisit the calculation of the 15.1 percent? And understand my question is where do we get the authority, if at all, to -- to -- to deal with that calculation, not the application of the calculation, but the actual calculation itself?

MR. MARKS: Your Honor, I would point you to pages 382 and 83 of the decision, where the -- the Court said, "Worse still, the Board not only stripped away the total content caps, but also significantly hiked both the revenue rate and the total content cost rates the streaming services would have to pay." It then goes on to say on 383, "Therefore, the Streaming Services were not only deprived of the opportunity to voice their objections to a completely uncapped total content cost prong, they were also

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given no opportunity to address the interplay between that rate structure and the increased revenue and total content cost rates."

Again, the -- the Court vacated the rates and -- and allows -- allows you to reevaluate. The Court did not say that -- the Court did say that the type of analysis and weighing of the expert evidence that led to the generation of that rate was within your wheelhouse. It didn't mandate that you weigh the evidence in the exact same way on remand in light of the Services' other challenges and your reconsideration of those arguments.

JUDGE STRICKLER: Thank you, Mr. Marks.

MR. MARKS: Okay. Turning back to the claim that -- that the D.C. Circuit affirmed the use of a 2.5 to 1 ratio -- and, again, this is a related point -- the Court did no such thing. While they did reject our challenge to the mixing and matching of models from different experts, it just simply -- -the Court does not require adoption of any particular input to or output of the majority's Shapley-inspired analysis. Mr. Assmus will also be addressing this point in some more detail during his presentation.

Johnson did not affirm the methodology of taking a combined royalty rate and applying a ratio

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to split that rate between sound recording rates and musical work rates.

A core part of the Services' appeal was that the majority's focus on establishing a ratio between sound recording royalties on the one hand and musical works royalties on the other hand in setting a rate here, instead of focusing on the proportion of musical works royalties to Services' income led to rates that do not satisfy Section 801(b). That was a core part of our appeal and that was left open on remand.

The statute --

JUDGE STRICKLER: Mr. Marks, I want to ask you a question about that, and maybe Mr. Assmus is going to deal with this in a different way.

But one of the core arguments, the economic arguments of the Services is that, as it has been established in this proceeding, that the major record labels are complementary oligopolists.

So if the Judges were attempting to create what they understood to be a fair division of the royalties as it relates to the Services on the one hand and the -- the mechanical Rights Owners on the other, well, that would all be well and good that we did that, but if that was less than what the sound

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recording Copyright Owners, that is to say, in particular the major record companies thought was -- was more than was necessary for the Services to survive, they would just take that portion from the Services anyway in their negotiations, if we -- if we believe that, as you postulate and as we found, that there is complementary oligopoly power imbued in the majors.

And I think that's, in fact, the argument that is made by Copyright Owners and by -- by Professor Watt and Professor Spulber in their expert testimony.

So even if we did try to split it in a way that gave the Services -- allowed the Services to retain more of the revenue, because it was in some sense considered fairer, allegedly, why under your own theory of complementary oligopoly, why would it be that the record labels would allow that to stand? Why wouldn't they just take that and leave the -- leave the Services with only enough to survive?

MR. MARKS: I do think that Mr. Assmus will be getting into this as part of his presentation, but I'll address it briefly as well, Your Honor.

Again, the -- the statute requires consideration of both the Services' income and the

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Copyright Owners' revenue. That's the ratio that I think Your Honors are tasked with setting here.

It's true that the -- I think it's generally accepted that the -- that the record labels are extracting more than anyone's experts believe that they should be able to extract if the market were competitive, rather than a complementary oligopoly, but it's not your task to -- it is your task to set rates in light of the existing market conditions, not -- not to deny -- not to set rates that would prevent the copyright users from getting a fair income under the existing -- under the existing economic conditions.

JUDGE STRICKLER: Well, the problem is -- the problem is we -- because this -- the sound recording Copyright Owners are unregulated in the interactive market, we can't control what they do. We're not supposed to control what they do.

Congress didn't want that to be controlled at all. Perhaps for very good reasons. Perhaps for debatable reasons.

But the point is we can't do anything about that. So every time I see your argument -- I don't mean you personally -- but I see your client's, the Services' arguments, about how you have to -- we have

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a set a rate that's fair even though there's this ability of the sound recording owners to take more, my margin note is always this: Are they arguing misery loves company?

In other words, we're going to have to suffer from what the Services -- from what the record companies can do, so why shouldn't that misery be shared together with the Copyright Owners? We're not going to do any better because, if the Copyright Owners don't take it, the sound recording owners will take it.

As a matter of fact, isn't that really Professor Marx's argument in her proposed split of the -- of the -- using the 15.1 percent figure but first taking off the top the assumed amount -- which is itself debatable -- the assumed amount that the record companies would take?

I know this might not be in your wheelhouse, to coin a phrase, for this argument, as opposed to Mr. Assmus.

MR. MARKS: I am happy to preview what you will hear in more detail from Mr. Assmus. It is absolutely correct that -- that the burden of the record labels complementary oligopoly exercise of market power ought to be shared equitably between the

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Services and the Copyright Owners in this proceeding.

The statute doesn't prioritize one set over the other. It says we both have to be given fair return and fair -- or fair income, and the -- the rate has to reflect our relative roles.

If you -- there's no basis in the statute or any -- or any relevant precedent for prioritizing that they should get everything that a Shapley model suggests they should get and the Services should bear the brunt by themselves of the exercise of oligopoly power that would otherwise deny it.

The fact of the matter is that, if the record labels are extracting more than they should get, it's coming at somebody's -- it's coming at expense of the others.

Your choice is you can have it come at the expense in some reasonable proportion of both the Copyright Owners and the Services, as we suggest is the appropriate way to analyze under the statute, or what happened in the final determination was it came solely at the expense of the Services.

That's what led to our -- that's one of the four grounds of our appeal. And that's one of the very issues that was remanded for further consideration.

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The Circuit Court said those issues about the interplay of rates, rate structure, et cetera, are remanded, they are closely intertwined with what you do on remand, and so the Court didn't evaluate or reach a conclusion as to our arguments on Factors B through D but, rather, said we should come back, present our arguments again, and you should take them into consideration in setting rates here.

JUDGE STRICKLER: Thank you, Mr. Marks.

MR. MARKS: Yes. Getting just back to the basic point about -- about 2.5 to 1, the -- Johnson could not have affirmed the 2.5 to 1 ratio because it does not require the use of any ratio at all.

It certainly did not affirm a ratio of 2.5 to 1 any more than it affirmed a total combined royalty rate of 53 percent, which is part and parcel of the very same model that led to a top-end rate of 15.1.

Your Honors need not reuse either input, but there would be no logic to finding yourselves bound to take one input of that model but not the other inputs to the -- to the model.

As I mentioned, the Services had multiple objections and all of those objections should be taken into consideration here as well.

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Next issue: The Copyright Owners have mischaracterized the question remanded on the definition of service revenue. Ms. Pope will speak to that in more detail.

And one additional point: The Copyright Owners have tried to contend that the language in Your Honor's initial remand order limited the scope of the remand to three specific issues and to the description of those issues in that order.

Your Honors have already rejected this argument in your January 6th order at pages 3 to 4 and it is easily disposed of. As you noted, you have clear statutory authority to modify interlocutory procedural orders. Moreover, Johnson would govern the scope of the remand in any event.

And the quote/unquote agreement as to those specific issues the Copyright Owners cite was no agreement at all. The Services' proposal for remand made abundantly clear that we were seeking reevaluation of the rate percentages, and all of the arguments we made concerning the need to set rates that satisfy all four of the statutory objectives.

Let me now turn to an important aspect of the final determination that was not appealed and, thus, has not been reopened on appeal.

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The Copyright Owners did not appeal the Judges' finding that the major record labels are a complementary oligopoly.

Your Honors have already correctly recognized that the conclusion that the major record companies are a complementary oligopoly is not subject to review at this stage of the proceeding in granting the Services' motion to strike the testimony of Professor Spulber. That's your order on the motion to strike at page 13.

The Copyright Owners' attempt to resubmit that same testimony again does not change this reality.

In the final determination Your Honors found that labels are -- must have suppliers in an unregulated market that can walk away from negotiations with the Services and effectively put them out of business.

Your Honors also made an astute observation with respect to the record companies' strategy for leveraging that market power, that I won't repeat or put on the screen since we're in open session, but it is at page 74 and Note 136 of the final determination, and it's quoted in our papers.

Your Honors correctly observed that both

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Professor Marx's and Professor Watt's models show lower combined royalties being paid by the Services than are currently paid in the marketplace. The discrepancy in total royalties between the models in the real world is explained, in part, by the absence of supra normal complementary oligopoly profits in the Shapley model and the presence of those profits in the actual model.

I won't go through all the slides, but -- but you have them. The D.C. Circuit acknowledged these findings in Johnson, and they formed a core part of the opinion vacating the rates.

The Copyright Owners' experts' assertions most recently of price competition among major record companies in their license dealings with interactive streaming services are made up out of whole cloth.

They are flatly contradicted by Your Honors' opinions in Web V, and Web IV before that, and the record label witness admissions cited in those opinions, and they ignore the consistent use of anti-steering clauses and the most favored nation provisions to foreclose price competition in that market.

There's another noteworthy aspect of the final determination that the Copyright Owners did not

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challenge. In light of a well-founded concern that a significant rate hike would be disruptive to the streaming industry, the majority phased in rate increases incrementally over the five-year period, and the Copyright Owners' proposal on remand is that the Judges should restore those rates inclusive of the phase-in.

If the Judges were to adopt the Services' remand proposal, there is no need to consider this issue.

But if the Judges were to implement a significant increase, there can be little doubt that phasing in the increase over the open period would be warranted even if this were a live issue.

First, as Your Honors acknowledged in the December 9 additional materials order, phasing in a rate increase is common when the Judges set new rates. That's at page 4.

Second, depending on the rate level selected, a failure to phase in the increase could lead to rates for the early years of the period even higher than the rates the Copyright Owners themselves are proposing. Their position on remand is that, for example, for 2018, a rate of 11.4 percent of revenue satisfies the Section 801(b) factors.

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There's no good reason to set a rate for that year that is even higher than the rate the Copyright Owners themselves agree would satisfy the objectives.

We're not aware of any prior decision by this Board that set a rate higher than the highest rate proposed by any participant for a part of the rate period or lower than the lowest rate proposed by any participant.

And, third, at least part of the rationale for phasing in the rate increase adopted in the final determination was the belief that record companies would lower sound recording royalty rates in response. With rates locked in for the rate period at issue, there's no longer even a theoretical possibility of a decline in sound recording royalties to cushion the blow.

The final topic that I will address this morning before passing the baton is the Board's authority to adopt a rate structure without a total cost of content or TCC prong.

The guidance from the D.C. Circuit on this point is clear. Your Honors are not required to adopt a rate or rate structure that has been proposed by a participant, as long as you provide adequate

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notice of what you are considering and afford the participants an opportunity to be heard.

Here, the Judges have provided more than adequate notice that you're considering a rate structure without a TCC prong. We have had two rounds of additional briefing directed specifically at the working proposal, and both the Services and the Copyright Owners have provided additional expert testimony on the proposal from multiple experts.

The participants were afforded an opportunity to probe that testimony with cross-examination and elected not to in the interest of a more expedient and efficient resolution here.

Each of the arguments lodged by the Copyright Owners in opposition to a rate structure without a TCC prong is misguided.

First, the Copyright Owners contend that the Judges may not adopt a structure without a TCC prong because the Services, they contend, did not appeal the existence of a TCC prong as part of the structure. That casts the Services' appeal far too narrowly.

Among other reasons, the Services challenged the final determination because neither the rate levels nor the rate structure was reasonable in light

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of the complementary oligopoly power of the major record labels.

One way to address that issue is to retain the rates and rate structure of the Phonorecords II benchmark as the Services have proposed. But that's not the only way.

Elimination of the TCC prong is an elegant solution to the problem identified in Johnson that the vacated rates yoked the statutory license to the market power of the labels.

The Services only advocated for a TCC prong because our proposals were based on the Phonorecords II settlement as a benchmark. If you're not using Phonorecords II as a benchmark, the rationale for yoking the statutory license to the label rates disappears.

JUDGE STRICKLER: Mr. Marks, why would it disappear? That's what the majority said was a great idea, separate and apart from the PR II benchmark. I mean, the majority in Phonorecords III said, yeah, this -- the ratio is a great thing to use, and let's make it a prong.

So they didn't need the Phonorecords II benchmark to come up with that. They relied on the testimony of the experts with regard to the Shapley

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value model.

MR. MARKS: Mr. Assmus will be getting into that in some detail. And in light of the time I will defer to him on -- on -- on why it's not appropriate to combine the TCC prong with -- with the Shapley-inspired analysis, whether it's the nature of the one that the majority used in the final determination or the working proposal.

JUDGE STRICKLER: Okay. I wanted to just jump back real fast. I respect your concern about the time.

You said there's no theoretical possibility that the sound recording rate can adjust because that time period has already passed. But if it really was the case that during the 33 months in which the Phonorecords III rates were being paid, before they reverted back to the Phonorecords II rates, were so high as to -- as to create problems, and they were then, say -- and we were to agree with Copyright Owners that they should be paid throughout the period, should have been paid throughout the period, it's certainly theoretically, to use your word, theoretically possible that if that engendered a risk of survival for one or more of the Services that the labels could -- could rebate, the sound recording

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companies could rebate, some of the royalties that were paid or work it into a new contract. It's not theoretically impossible.

You would agree with that, wouldn't you?

MR. MARKS: I will concede that it is not theoretically impossible. I will submit to you that it is not remotely realistic and there is no evidence to suggest that the record labels, as I think Your Honor pointed out in the dissent, it's a heroic assumption that the record labels would voluntarily give up hundreds of millions of dollars or would give back, voluntarily give back money that's already been paid.

So I will concede that it is within the realm of the theoretically possible, but I will submit that it is, for all intents and purposes, impossible, simply not a realistic assumption to make or a realistic expectation.

JUDGE STRICKLER: Thank you.

MR. MARKS: But two other quick points on the -- on the TCC prong. The Copyright Owners complained that a TCC prong is needed to address concerns with revenue deferral or revenue diminution. This is also wrong.

A TCC prong is not the only way to address

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that concern, as the Services' experts have explained. Revenue floors also more than adequately address concerns with revenue diminution or revenue mis-measurement. And the copyright concerns with potential revenue deferral or revenue diminution are, in any event, overblown at this stage of the proceeding.

The Services' pricing for their offerings are known for virtually the entirety of the period at issue and the Judges can take that pricing into account when setting rates.

The final point that I will make this morning: The use of a TCC prong as a rate alternative to a percentage-of-revenue would be inconsistent to the underlying premise of the working proposal.

This ties back to the question that you were just asking, Judge Strickler, and that last observation makes this a convenient place to turn the microphone over to Mr. Assmus who will be addressing that issue as part of his presentation in response to the working proposal.

Unless Your Honors have any additional specific questions for me at this point, I will yield the floor to Mr. Assmus.

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CHIEF JUDGE BARNETT: Thank you, Mr. Marks. Mr. Assmus?

MR. ASSMUS: Thank you, Your Honor.

Good morning. Richard Assmus, again, on behalf of Spotify U.S.A. As Mr. Marks indicated, I will be speaking next regarding the working proposal.

I did want to start, Your Honors, with a question that Judge Strickler posed to Mr. Marks about what Judge Strickler discussed as sort of a misery loves company issue.

And I think, Judge Strickler, the way you put it during the trial was, even if I thought rates needed to come down, how would that help you; wouldn't the labels just take all that surplus for themselves based on their complementary oligopoly power?

I will talk about this in more detail in closed session, but I wanted to address it right off the bat in open session.

So I think there are two additional responses we would make to that, Your Honor, and they relate to what we call the see-saw that Mr. Marks discussed, and what our point is, is that these label rates are sticky in both directions.

And what I mean by that is, if you see an

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increase in musical works rates, you do not see a quick decrease in label rates, and the opposite is true. These rates are sticky. So our view is you can help the Services with rate reductions.

The other point I wanted to make is we were looking at the calendars before the argument started. Actually tomorrow is the five-year anniversary of the start of the Phono III trial.

And so with respect to the Phono III period, Your Honor, and in particular Judge Strickler, you were in a unique position of being able to set the musical works rates while the label rights are bought and paid for largely. We're I think roughly 50 some months into a 60-month Phono III rate period.

So in this instance, given the retrospective nature of the rate setting which you mentioned in your colloquy with Mr. Marks regarding the disruption factor, you are in a position, in fact, to set a ratio over that period that doesn't all get swallowed right away based on the market's label power.

JUDGE STRICKLER: Mr. Assmus, I'm sorry, Mr. Assmus. Good morning.

MR. ASSMUS: Good morning, Judge.

JUDGE STRICKLER: You said that we as Judges are in a position to help right away. So it strikes

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me, and it struck me before you made this comment, that because of this stickiness that you used to describe the difference between the rates and when they may change over time, that the point is that, if we wanted to try to be fair, we can -- we can buy time for the -- for the Services by -- well, by not raising the musical works rate to a particular rate and, therefore, the total royalty rate decreases, but we buy time because under the theory of complementary oligopoly that you ascribed to, and that we have ascribed to, once the new contract period comes up, the -- the labels, the majors are free to say: Well, now they are getting, the Services are getting one particular service or another is getting more than its survival rate, thanks to the lower mechanical rate, and now we're in a position to ask for more.

But your point is they won't ask for more until that one or two-year or three-year period ends, until they have a new contract term because of this stickiness that you're alluding to.

MR. ASSMUS: That's right, Your Honor. There's a lot of friction with respect to the ability of label rates to change quickly in response to the dynamic marketplace or the dynamic for business reasons or because of regulatory changes in musical

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works rate.

These are multi-year contracts. They take a long time to negotiate. They are complex, et cetera. So I do think it's right that at a minimum you can buy time where the ratio is more aligned with the 801(b) factors. In other words, you don't have to worry that the labels will take it all right away, even if you believe they will ultimately take that.

JUDGE STRICKLER: So you are saying we have something that reduces misery for a period of time until the misery returns?

MR. ASSMUS: That's right. And I think that would have been true in 2018 when you were sitting drafting the -- the decision. It's even more true today in 2022 when the label rates, as I mentioned, are effectively set, bought and paid for.

JUDGE STRICKLER: Thank you, Mr. Assmus.

MR. ASSMUS: Thank you.

So to continue with my presentation, as you know, on December 9th last year the Board gave the parties notice it was considering an alternate rate determination mechanism. That mechanism was described in more detail by Your Honors on January 6th and became known as the working proposal.

As Mr. Marks mentioned, the Services

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appreciate the advance notice the Board has given us of that working proposal and the opportunity now to have submitted two rounds of briefing, expert and fact testimony, on the working proposal.

As you know from those filings, Your Honors, the Services have various objections to the theoretical foundation and the practical implications of the working proposal.

Later in my presentation I will detail some of those objections and how the Services believe the working proposal may be modified to address them.

But the Services believe it is important to provide the Board with the input it requested and to provide the Board with a faithful implementation of Your Honor's working proposal, and we will spend some time today going over those inputs.

So to give you a brief overview of the agenda of what I would like to cover in my section, first we're going to briefly review our understanding of the working proposal. We're going to give you the best input to use in the working proposal and address why the Copyright Owners' input should be rejected. We're going to describe our concerns with the working proposal and the modifications to the working proposal that we believe are necessary to have it

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better suit the 801(b) factors.

I mention that I have more to discuss in closed session. I did want to note for Your Honors that I will try to keep us in open session for as long as I can, but, as I will be discussing market rates and market terms, I will need to ask for restricted session in a few minutes and expect to need to stay in restricted session for the balance of my presentation.

I will point out that my -- the next two counsel will largely be open. So I think it will just be, Your Honors, this brief, at least, I won't say brief, but this one section that will be restricted.

So turning to the first of those points --

JUDGE RUWE: Excuse me. Excuse me. You indicated that it will be through the entirety of your presentation. Do you have a time estimate as to how long that will be?

MR. ASSMUS: Yes. We carved out, I would say, roughly, roughly an hour for my whole section. I think Mr. Marks ran a little bit over time, so we're going to try to keep that a little tighter, but I would say it would, you know, roughly be, and I -- because I am some of the way into it, you know,

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roughly be 40 or 45 minutes of restricted session, depending on Your Honors' questioning.

JUDGE RUWE: Thank you.

MR. ASSMUS: Thank you.

So in connection with the working proposal, the Board has focused in part on the ratio of sound recording rates to musical works rates. And as you know, that ratio is complicated by the substantial market power of the labels. Indeed, market power that can lead to supra monopoly prices given the complementary must have nature of the catalogues of the three major labels.

The working proposal is we believe anchored in that observation and takes as its input what the Services have characterized as a "survival rate." Namely, the amount that the labels decided to leave the Services after both the label rates and the musical works rates have been paid.

Now, the Copyright Owners fault the Services for calling this total royalty burden survival rate, but as we will show, the concept is taken directly from Your Honors' orders.

In the order you noted that the major -- "the majors do not retain so much of the Services revenue that they deprive the interactive service

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sector of the revenues sufficient to allow them to survive as a consumer service." The emphasis here is obviously added.

Moreover, the total royalty input you are looking for has been characterized by Your Honors in their orders as the one allowing the Services to retain the percentage-of-revenue needed to survive, according to the record companies.

But whatever you call that rate, Your Honors, the working proposal hopes to determine a musical works royalty rate by looking at market evidence of how the labels with their complementary oligopoly power act in the real world, starting with the total amount of revenue that the Services are left with after paying out those label rates and their musical works rates.

So what does that formula of the working proposal look like? It starts with two -- two things; namely, a musical works rate and a sound recording rate, which together sets a total royalty input. That is the input Your Honors were seeking in part as potential grist for the working proposals mill.

Once that total royalty input is known it's worked through a formula shown there with the .262 to

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provide -- produce a new musical works rate. That 26.2 percent that we use there, Your Honor, is equivalent to a 3.2, 3.82 to 1 ratio.

The Judges have invited the parties to give their views on that survival rate, in other words, the total royalty burden, and we will turn to that next.

Your Honors, because I am going to be talking about market rates now, I do need to ask that we go into closed session.

JUDGE STRICKLER: Just before you do go into closed session, Mr. Assmus, I want to get a response from you, if I can, with regard to the criticism by the Copyright Owners of the Judges' use of the 26.2 percent or .262 figure in the working proposal.

As I understand their criticism, they say a particular problem with that number is that it double counts a complementary oligopoly adjustment.

And if I understand them correctly, and I'm sure Mr. Semel is paying close attention so if I am getting what he is arguing wrong he will clarify it when he gets his opportunity, but what I understand is their argument is that that figure is an output from a formula which is based on two particular data points.

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One of them is Professor Marx's 53 percent assumed total royalty number, which comes from Professor Marx's model, which attempts to adjust for complementary oligopoly power by reducing or more equally equalizing more to the point of trying to equalize, not completely, equalize the number of licensors and licensees to change the arrival order -- as we're getting into the weeds a bit here -- to change the arrival orderings in the Shapley value, and because you are -- we are already using that 53 percent number, to try -- to derive the .262, to try to use it in the working proposal double counts the complementary oligopoly effect.

Can you tell me whether you agree that that's the gist of their criticism and, if so, how do the Services respond?

MR. ASSMUS: A couple ways, Your Honor. And first let me make a general observation about the way we think a ratio could be used.

Your Honor, we think if you're going to use a ratio approach similar to working proposal, there are two elements you need to do, to have in order to deal with the market label power -- label market power.

The first is you need to start with the rate

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that isn't infected by market power. You might think of that as the rate you input into the working proposal. And, second, you need to have a ratio that's not infected with market rates, with market label power -- label market power.

So unless you do those two things, Your Honor, we don't believe you're appropriately dealing with the complementary oligopoly power of the label.

With respect to your double-dipping point, the 26.2 percent TCC, which appears in the working proposal, is one that fell out of the 15.1 percent decision, Your Honors, the vacated rates from the initial determination.

And the 26.2 percent was calculated as a way to have that TCC rate tie out against some market inputs. So we don't think it's right to say that that 15.1 percent is derived from Professor Marx's Shapley value that you have indicated. That, as you know, that 15.1 rate was the combination of Dr. Marx's view on total royalties plus the 2.5 to 1 Gans Shapley ratio.

So we believe that all of those inputs are effectively Shapley values and, therefore, not ones that are appropriate to use in the working proposal where your input to the working proposal is not a

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rate that's free from market power. It's a market-based rate, an observed rate, Your Honor.

JUDGE STRICKLER: Well, your inclusion, your correct inclusion of the 2.5 to 1 ratio, that being the other input, along with the 15.1 percent rate, gets us back to the question I posed to Mr. Marks, which is when the D.C. Circuit said the line drawing that was done by the majority, mixing and matching, that's the mixing and matching of Professor -- in particular Professor Marx's 53 percent total royalty payments, and the 2.5 to 1 ratio from Professor Gans, that's the mixing and matching that the D.C. Circuit said was not arbitrary and capricious and was right in the Judges' wheelhouse.

So are you saying we can, despite that, those statements by the D.C. Circuit, we can change the use of -- change the calculation of the 2.5 to 1? Again, I am not talking about the application. That's a separate issue.

But you are saying we can change the calculation of a rate by doing something other than what the majority did and the D.C. Circuit blessed?

MR. ASSMUS: Yes, we are, Your Honor, for really all the reasons Mr. Marks indicated.

Number 1, the D.C. Circuit required you to

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reevaluate the Phono II benchmark. In our view it is, therefore, clear that that benchmark analysis might call for a change in that rate setting formula.

It also requires you to look at the factors B through D, D as in disruption, as well as evidence on the see-saw. So we think that for all of those reasons, the D.C. Circuit left you the power to revisit those inputs into the formula that left -- led to 15.1, namely, 53 percent and 2.5 to 1.

I would also point out, Your Honor, if we take those two inputs, the 2.5 to 1 and the 53 percent as sacrosanct, Your Honor, the proposals here or from the Copyright Owners are never going to leave the Services with that 53 percent.

So we think that all of those are open based on the D.C. Circuit's remand and the reasons for the remand.

JUDGE STRICKLER: You talked about, you used a phrase a moment ago revisiting. And I am not disputing for purposes of this question whether we have the ability to revisit it. And that's why I was making the distinction, more particularly than revisiting, application versus reevaluation.

Whether we can -- whether we can or should apply that approach is one question, but whether we

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can reevaluate it and say, no, it shouldn't have been 53 percent, it should have been Professor Watts' 64 percent or 67 percent, whichever one was left by the majority as the one to rely on, and it shouldn't have been the 2.5 to 1, it should have been a higher ratio, and, therefore, a lower percentage, based on the zone of reasonableness that the majority created.

It doesn't strike me from reading the D.C. Circuit opinion that we have any ability to do that. When you talk about, well, but you still have the ability to argue in favor of the Phonorecords II benchmark as being applicable, I'm not disputing that the D.C. -- at this point in this question that the D.C. Circuit left that open as a possibility, but that would just mean that, if we were to go that route, we would be applying it, right, applying it and saying it's a better benchmark, should we decide in such a way, it's a better benchmark than the Shapley value -- a better way to decide rates, that benchmark approach, rather than the Shapley value modeling that the majority engaged in.

Not that we can change the 2.5 to 1, not that we can change the 53 percent, but just that we would find the Phonorecords II superior, or, to go to the other point you made, the -- the D.C. Circuit

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said what still needs to be decided in light of the vacating is how to apply Factors B through D where Factors B through D might change how we would apply the application of the 53 percent and the 2.5 to 1 ratio, not that we would change those, but there are -- there's other things to be done if one applies those factors and thinks those factors require an adjustment.

So isn't that really your argument, that -- it sounds like you are really agreeing with me. We can't change it, but we can -- we can look at these other points and then decide whether or how we want to apply it?

MR. ASSMUS: Yeah, so I don't know that we quite agree with respect to the way you have stated it. We do believe that in re-evaluating the Phono II benchmark and in re-evaluating Factors B and D, you can rethink that rate-setting mechanism that got you to 15.1. We think that's true.

But even if Your Honors, you don't believe that's true, we believe that the evaluation of the benchmark and Factors B through D do require some revisions to the working proposal.

And so we think you're free to both change those inputs, 2.5 to 1 and 53, and to revisit them or

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to adjust them based on your analysis of Factors B and D, and, for example, the existence or non-existence of the so-called see-saw.

JUDGE STRICKLER: Didn't the majority in Phonorecords III say that they came to the use of the 53 percent and the 2.5 to 1 by virtue of applying Factors B and C; didn't they sort of integrate their analysis of the rate and the factors jointly and say so expressly in the final determination?

MR. ASSMUS: Your Honor, I would say that I don't -- I don't believe it was that explicit, but I would say that the analysis of those factors was one of the things that was remanded to -- to Your Honors by the D.C. Circuit.

In other words, it's very clear that Factors B through D was based on that analysis and that's part of the reason we think it's reopened for you to take a look at.

JUDGE STRICKLER: You also mentioned one of the matters that could be used to address the -- the usefulness, if I may use that word, you didn't, of the 53 percent and the 2.5 to 1 combination.

MR. ASSMUS: Yes.

JUDGE STRICKLER: Was the validity or invalidity or anything in between of the see-saw

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approach. Are you going to be talking about the see-saw approach in more detail?

MR. ASSMUS: I am, yes, Your Honor, at some length.

JUDGE STRICKLER: Okay. I will await that.

MR. ASSMUS: And I don't think I have lost track, but I think we still need to go to restricted session.

CHIEF JUDGE BARNETT: Okay. Thank you. We will go into restricted session. All attendees not permitted in a restricted session will be excluded temporarily from the webinar.

I believe, Mr. Assmus, you are estimating 40 to 45 minutes. Given the time you might want to reevaluate.

MR. ASSMUS: Understood, Your Honor. Certainly will.

(Whereupon, the hearing proceeded in confidential session.)

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O P E N S E S S I O N

MR. REYES: Please stand by.

We are live on stream now.

CHIEF JUDGE BARNETT: Thank you. So we are now going to take our 15-minute morning recess. The host will please pause the public audio feed and close the virtual hearing room again. Counsel are reminded not to leave any mics open during the break. And we will be at recess for approximately 15 minutes. Thank you.

MR. REYES: We have ended the stream.

CHIEF JUDGE BARNETT: Thank you, Mr. Reyes.

(A recess was taken at 12:06 p.m., after which the deposition resumed at 12:22 p.m.)

CHIEF JUDGE BARNETT: We are back from recess then. So I believe Mr. --

MR. REYES: I will start the live stream.

CHIEF JUDGE BARNETT: Yes. Thank you. I was just confused because you said something else before. Yes, that's what -- exactly what I'd like you to do. Please reestablish the public audio feed, and notify us. I guess all the other participants have checked in. So we're ready to roll.

MR. REYES: Yes. One second.

We're live on the stream. And all

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participants, attendees are in.
CHIEF JUDGE BARNETT: Thank you, Mr. Reyes.
Mr. Steinthal, I believe you have the -- the mic, and is it correct that you will be in open session for the entirety of your presentation?
MR. STEINTHAL: Yes, that's correct, Your Honor.
CHIEF JUDGE BARNETT: Okay. You may go ahead.
MR. STEINTHAL: Thank you. And as unorthodox as it is, I'd like to start with a question, which is we calculate that we have just over 30 minutes of our time, other than rebuttal, in part, due to the time spent responding to Your Honors' questions, and you had acknowledged that at least some time associated with your questioning should be factored in, and just so we can be guided accordingly, can you provide us with a little bit of insight as to how much time we might be able to restore?
CHIEF JUDGE BARNETT: What was your original estimate for your portion and for the portion to be handled by Ms. Pope?
MR. STEINTHAL: I would say my portion, subject to questioning, I was hoping to complete

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within 15 minutes.
CHIEF JUDGE BARNETT: Okay. Ms. Pope?
MS. POPE: Fifteen minutes should be sufficient for my portion as well, so a total of half an hour, but we may go a little bit over, within that 15- to 20-minute range.
CHIEF JUDGE BARNETT: Okay. And remind me, Mr. Steinthal, the amount of time reserved by the Services for rebuttal?
MR. STEINTHAL: We have 15 --
CHIEF JUDGE BARNETT: Fifteen or 30?
MR. STEINTHAL: Fifteen.
CHIEF JUDGE BARNETT: Okay. All right. My back-of-the-envelope calculations were that we would break for lunch at about 1:30, so that gives you -- that is a total of an hour. And I think even with interruptions, maybe we'll make that.
MR. STEINTHAL: If we can have -- retain our 15 minutes for rebuttal and finish by lunchtime between the two of us, I think we'll be very -- that will be fine on our end.
CHIEF JUDGE BARNETT: Terrific. Let's -- let's plan on that. I know 1:30 is a bit late for lunch for those who are not in New York or on the West Coast, but I think we'll all make it to 1:30 for

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the break.
MR. STEINTHAL: Okay. Well --
CHIEF JUDGE BARNETT: Mr. Steinthal.
MR. STEINTHAL: Good afternoon, Your Honors. I had good morning here, but it's early afternoon on the East Coast.
I'll be addressing the Phonorecords II benchmark and why the Services think benchmarking is the best approach for you to follow.
In his dissenting opinion, Judge Strickler stated, and I quote, "Theory must meet reality." That's the lead on our first slide. The statement was prescient at the time. Judge Strickler was talking about the lack of hard evidence supporting the see-saw theory, and he turned out to be right.
And the statement that theory must meet reality is equally compelling now when evaluating the options before the Judges.
Copyright Owners continue to ask the Judges to reinstate the Phonorecords III rates based on highly theoretical Shapley models, inconsistent with what the marketplace evidence.
The Judges' working proposal also is based in several respects on theoretical assumptions. As Mr. Assmus addressed, the Services have provided

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marketplace inputs into the working proposal to yield a rate structure that would conform to real-world marketplace transactions as much as possible. And it's instructive that the results of that exercise yield rates that are very much in line with the Phono II rates.
Given the uncertainties associated with Shapley modeling, and as seems even more apparent from listening here today where Judge Strickler has emphasized the uncertainties that this remand present, why go with a theoretical model at all when there's a valid marketplace benchmark available to rely upon, meaning Phono II?
And as Judge Strickler implied in your questioning this morning, you can do that consistent with Johnson, meaning you can rely on the Phono II benchmark.
This Board in previous proceedings, particularly Web IV, has eschewed theoretical approaches when marketplace benchmarks were available. Indeed, in Web IV, and we have a slide on this, the Board recognized that benchmarking is preferable to theoretical modeling because marketplace benchmarks demonstrate how real parties understand the market and what they believe to be

reasonable. Put another way, there's no reason to engage in theory when reality is an option.

And in this proceeding, we do have a way forward that is based on real-world market transactions. As the Judges have recognized, Johnson permits you to adopt both rates and a rate structure using the Phonorecords II benchmark.

Footnote 13 of Your Honors' January 6th, 2022 order -- and I apologize for not having a slide on this one -- makes it clear that you may set, and I quote, "rates and a rate structure that differ from those in the majority's Phonorecords III determination." Such as the working proposal, and in that vein, you are free to adopt, and I quote, "the Phonorecords II benchmark favored by the dissent in the Phonorecords III determination."

And this is entirely in line with the D.C. Circuit's observation -- and we do have this on a slide -- that the majority had, and I quote, "failed to explain its rejection of a past settlement agreement" -- referring to Phono II -- "as a benchmark for rates going forward."

And there's good reason for the D.C. Circuit's order requiring you to reevaluate the Phonorecords II benchmark in these remand



proceedings. It has all of the classic hallmarks of a good benchmark. It involves the same rights at issue in this proceeding, mechanical rights for on-demand streaming. It also involves the same sellers, music publishers. In fact, the evidence was clear not only that it was the NMPA leading the negotiations for the rightsholders, but it was Mr. Israelite leading the negotiations on NMPA's behalf. So quite literally the same people were involved. And --

JUDGE STRICKLER: Mr. -- Mr. Steinthal, I have a question for you. First, good morning and afternoon.

MR. STEINTHAL: Thank you.

JUDGE STRICKLER: You said the -- the Phonorecords II benchmark that has been proposed has all -- all -- the hallmarks of a good benchmark. But one of the criticisms that -- that was made, at least by majority's counsel, on appeal, and -- well, the Board's counsel, I should say, on appeal, and was made in the pre-remand proceeding and -- and made now by Copyright Owners is that it's old, it's outdated.

Separate and apart from whether that outdating should disqualify it, wouldn't you agree that the Phonorecords II benchmark is not a current



benchmark?

MR. STEINTHAL: I think it is still a valid and current benchmark for the following reasons. Let's remember the timing here, Judge. We have -- this agreement was entered into in 2012 and submitted for authorization and approval by the Board. By the time we get to 2017, we're putting in positions for Phono III.

So the settlement itself is five years old at the time we get started. When -- and I'll put old in quotes because I don't think it's old. It is a fluid set of rates that responds to marketplace demand for services of the nature of our clients in this proceeding.

And I think everyone has recognized that the -- the beauty of Phono II in a way is it self-adjusts for the different willingness to pay that characterizes this marketplace. And it has the various floors and minima to protect against the revenue deferral issues that the Copyright Owners have raised from time to time.

So was it entered into in 2012? Yes. Was that five years before the evidence went in, in this case? Yes. But I don't think the fact that it was entered into five years earlier makes it old. If



it's still working in the marketplace, it's not old.

JUDGE STRICKLER: How do you define --

CHIEF JUDGE BARNETT: Excuse me. Mr. --

JUDGE STRICKLER: I'm sorry, Judge Barnett.

CHIEF JUDGE BARNETT: Mr. Steinthal, were there qualitative changes between 2008 and 2012? My understanding is that 2012 was based on 2008.

MR. STEINTHAL: There were -- there were changes made because the market had matured a little bit and, therefore, there were new categories of Services, Your Honor, that had to be dealt with in Phono II, and they were. So --

CHIEF JUDGE BARNETT: Okay. There were new categories, but were there qualitative or quantitative differences in the rates? And there certainly -- other than adding categories, there was no change in the rate structure; is that correct?

MR. STEINTHAL: I think that is correct, that the headline rates and the alternative percentage of TCC and per-subscriber rates, I believe, were maintained for the core services, yes.

CHIEF JUDGE BARNETT: Okay. Thank you. Go ahead.

Mr. -- excuse me. Judge Strickler, you had a question?

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JUDGE STRICKLER: Yes. Mr. Steinthal, you said the Phonorecords II benchmark was still working. How do you define "working"?

MR. STEINTHAL: I define it as enabling the growth of the market on both sides. So what we've seen in this case is a record of substantial growth, both of the Services and of the royalties paid under this license.

Dr. Zmijewski addressed the steady increase in royalties using the Phono II benchmark.

Mr. Israelite, and I am going a little bit out of order because of the questioning, but, David, if you can pull up the slide, Mr. Israelite touted five straight years of substantial growth in these royalties from 2014 to 2019.

So clearly this rate structure has enabled substantial growth, both for the Services and for the publishers and the songwriters.

JUDGE STRICKLER: Don't -- don't Copyright Owners respond in part to that by saying that that increase reflects an increase in the performance rate, rather than an increase in the mechanical rate?

MR. STEINTHAL: I don't believe there is any hard evidence that the performance rate increases, if any, were what was driving the substantial increases

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in overall publishing revenue under the 115 license.

JUDGE STRICKLER: So if I understand your answer to me correctly, you're saying that whether or not they have alleged that, there is no evidence in the record to support it?

MR. STEINTHAL: That and we do know that the performance royalties are often on a percentage-of-revenue basis as well. So as the revenues of the Services have increased, so, too, have both the mechanical royalties and the public performance royalties, along with it.

JUDGE STRICKLER: Thank you.

MR. STEINTHAL: Meanwhile, I talked about the similar sellers. The similar buyers here are quite evident.

The publishers oddly argue that the makeup of the Services marketplace was unknown to them when Phonorecords II was reached as a settlement. But it was common knowledge at the time that Google, Microsoft, Apple, and other large tech companies were either already in the market or had announced they would imminently be launching interactive streaming services. And Spotify had recently launched in the U.S.

And then when we pull up this slide, we see

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each of Google, Apple, Amazon, and Pandora, among others, were signatories to the motion to the Board for approval of the Phono II settlement.

So much for the notion that they didn't know we were in for purposes of the Phono II period.

Now, with the Phono II benchmark, we have the rare circumstance where a benchmark encompasses the exact same rights and the same with some additional comparable parties.

And going to one of your earlier questions, it was a benchmark that had already stood the test of time. And after all, the evidence was that most of the Phonorecords II settlement, as Judge Barnett indicated, was carried over from the Phono I rates and terms. So the same parties had lived with these rates for years and decided that they were appropriate to continue into the future.

As addressed in the Services' briefing, the Phono II benchmark is wholly consistent with the 801(b) factors, particularly factors B, C, and D. It is strong objective evidence of a rate that the parties agreed would involve a fair distribution of streaming revenue and would allow the industry to move forward in a manner that would not disrupt the operations of the Services while also providing a

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fair return to songwriters.

Moreover, and very importantly, the compromise struck in Phono II has worked out quite well, as I mentioned before, and we have a slide that talks about the impressive growth in royalties under it and Mr. Israelite's quote that I mentioned before.

So why abandon what has worked and what the parties themselves agreed was fair, particularly in favor of unproven theoretical approaches?

JUDGE STRICKLER: A question for you, I'm sorry to interrupt you, Mr. Steinthal.

MR. STEINTHAL: No, that is all right.

JUDGE STRICKLER: It is a problem endemic to this technology.

An argument that the Copyright Owners make is that, well, royalties may have increased, separate and apart from which royalty, mechanical or performance, but royalties may have gone up, but not nearly at the same level, to the same extent or the same rate, I should say, as the -- as the number of streams or as the number of subscribers or users of the system so, therefore, I guess, they are arguing that it is not really working as a benchmark because it is not keeping the royalties that they are earning are not increasing, we're looking at a derivative of

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the total of royalties, they are not increasing at the same rate that the -- that the streams or the subscribership or listenership is increasing and, therefore, it is not working.

How do you respond to that?

MR. STEINTHAL: I respond to it in part by citing Phonorecords III and the majority rejecting a per-play rate structure. That's just not an appropriate rate structure for here.

What we are doing is driving people to pay money for a music subscription and not instead use the Napster-type services and -- and other types of piracy that Mr. Harbison and others talked about caused the diminution in mechanical royalties in the first place, not streaming, but the use of pirate offerings.

The per-play rate was rejected for good reason. Economically it makes more sense here to look at the revenue flowing in as our Services have invested lots of money to create offerings to drive usage and drive revenue.

So I don't think looking at the plays is relevant for the very reasons that per-play rate was rejected, and, as for subscribers, obviously this is, as I mentioned before, and Your Honor has mentioned

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many times, this is a marketplace with very varying willingness to pay among users.

And Your Honors properly in our view have adopted a mechanism for student plans and family plans, which drive up numbers of users and incrementally drive up revenues and, therefore, royalties, but not bit-by-bit, not one-by-one.

We're using these kinds of offerings to drive greater revenue, avoid consumers using piracy, and ultimately having many of these family members and student plan users up-sell to a full subscription when they are out of the home or out of school.

So I think those issues are in the record, Your Honor, and directly respond to that question.

JUDGE STRICKLER: Let me follow up on your answer, particularly on the latter part about subscribers and the concept of willingness to pay varying across subscriber categories or listener categories, which, in essence, invokes the concept of price discrimination as a way to increase revenue.

The Copyright Owners argue, though, that whatever -- leaving that issue aside, that the Services have demonstrated an interest in increasing or maximizing market share, rather than maximizing profits or revenues over the period of the rate term.

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Now, those two things can exist simultaneously, can't they, the idea that you want to price discriminate to appeal to buyers or subscribers and listeners of various willingnesses to pay, and a desire to maximize the market share rather than maximize revenue; wouldn't you agree that both of those things in theory can exist simultaneously?

MR. STEINTHAL: Here's the way I would answer it: I don't think the evidence supports that we are doing what the Copyright Owners say we're doing. And the real answer, Your Honor, is in Phono II we have a number of mechanisms to make sure that the Copyright Owners are rewarded.

We have the, you know, the TCC component, albeit capped, to avoid the, you know, unyoked power of the labels, but -- or unchecked power, I should say, so we have -- we have that and then we have floors and minima.

So there are mechanisms built into Phono II which are very suitable to continue to protect against the kind of circumstance that Your Honor posits based on what the Copyright Owners are alleging. So we have -- go ahead.

JUDGE STRICKLER: Doesn't the TCC prong in the Copyright Owners' proposal, or proposal now, what

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was the majority determination before, doesn't that -- well, they claim that better protects them against revenue diminution by displacement or deferral.

How do you respond to that?

MR. STEINTHAL: I respond that there is no basis for an uncapped TCC element. That's Number 1. And, Number 2, we're proposing Phono II as a benchmark.

We would retain the existing under the Phono II framework where there is a TCC element in the first step of calculating the greater of 10 and a half percent or the lesser of a per sub number and the TCC rate.

So we're not running away from that as part of Phono II. It is not necessary to retain a TCC component in our view because of the floors and the minima, but if you want to keep it there, belt and suspenders, as it was in Phono II, that was part of our proposal.

JUDGE STRICKLER: Thank you.

MR. STEINTHAL: So where are we left? There needs to be a good reason not to use the Phonorecords II benchmark, given the good benchmark that it is and provides, given the similarity of Services, the similarity of the -- and substantial identity of the

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Services and the sellers.

In the remand proceeding, though, we haven't seen any new arguments and certainly no new evidence to support the rejection of the Phono II's benchmark. The Copyright Owners have rehashed the same arguments against the benchmark that they presented in the earlier Phono III proceeding, several of which were addressed and dismissed by the D.C. Circuit.

To start, the Copyright Owners continue to argue that a benchmark cannot be adopted without evidence of the subjective intent of the negotiating parties. Both the D.C. Circuit and this Board's original opinion were dismissive of this argument and for good reason.

We can call up a slide on this. As the Board noted, relying on a benchmark as objective evidence, rather than exploring the subjective intents of the parties, is, and I quote, "typical and appropriate." In fact, the beauty of a benchmark and benchmark evidence is that it obviates any need to explore the sometimes difficult to discern subjective intent of the parties to an agreement.

And as the Board also noted, the Copyright Owners themselves didn't seek to introduce evidence of the intent behind the benchmarks they favored in

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this proceeding.

Moreover, the Copyright Owners failed to put forth evidence of intent that would undermine the Phono II settlement as a benchmark. The Copyright Owners were party to those negotiations. If they truly thought there was relevant evidence of intent, then they should have had it and produced it.

As this Board has recognized before -- and we have a slide on this -- merely complaining about a lack of evidence, especially by a party that has access to the relevant evidence, is of no import.

The Copyright Owners also argue that the Phono II benchmark is outdated, and I think I have already addressed your question about -- in response to why we don't view the benchmark as outdated.

Now, Copyright Owners repeatedly still assert that streaming was new and that nobody could have anticipated that streaming would become the dominant form of music consumption. And, of course, they continue to insist that they didn't know that large diversified companies would exist in this market.

But these claims just can't withstand the least bit of scrutiny. The record is clear from the testimony and the documents -- and we have a slide on

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this -- that the streaming business model had already been around for a decade at the time of Phono II, that industry participants already understood that streaming was the future, and was likely to become the dominant form of music consumption, and that large multi-media companies already existed in the market and had -- and others had announced that they would be soon joining the market.

And, as I mentioned before, the emptiness of the Copyright Owners' arguments that market participants had changed so dramatically and unexpectedly is the irrefutable fact shown on this slide earlier that all the streaming parties to this proceeding, save for Spotify, were signatories to the motion to approve the Phono II settlement.

The Copyright Owners don't have any answer to this. And, in fact, one of their own experts, Mr. Timmins, offered testimony that corroborated this evidence about the state of the market at the time Phono II was entered into.

JUDGE STRICKLER: I have a question for you, Mr. Steinthal.

Isn't it a bit imprecise, shall I say, to point to the size of the entities in the phonorecords, pre-phonorecords -- well, the

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Phonorecords II period compared to Phonorecords III and to say, well, look at Yahoo was there, look at Microsoft was there, and that's -- those are big companies, and even Amazon was looking to get in, I think Google as well, in the early part of the Phonorecords III period, or was in in the Phonorecords II period because the Copyright Owners' argument, through counsel, at least, at the D.C. Circuit level, was that streaming was of no economic significance.

So while you can point to big companies and say, well, those are significant companies, and no doubt you are correct, that doesn't mean that streaming was significant at that time, at least comparing the Phonorecords II period to the Phonorecords III period.

So why is the mere pointing at big companies being in the market sufficient to show it was an economically-significant activity, that is to say, streaming, compared to where it was in Phonorecords III?

MR. STEINTHAL: Well, there are two things, Your Honor. One is part of this argument is to respond to the claim by the Copyright Owners that they had no idea that these large tech companies were

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going to be doing what they are doing. They had every idea.

It was clear from the motion for approval that Amazon, Google, and others were in this market and cared a lot about this. As to the issue of the magnitude, I don't disagree that the streaming market has grown immensely since Phono II and perhaps more than anticipated.

But my response would be why does that matter when you have a license structure that self-adjusts, as a percentage-of-revenue model does. So the Copyright Owners haven't articulated a rational argument why the growth in the size of the market should impact the headline rate.

JUDGE STRICKLER: Well, doesn't that really tie us right back to the question of the see-saw and the complementary oligopoly power of the record labels, that is, given the explosion in growth of streaming revenues, the -- the record labels are in a position to take more and more of it because, on a percentage basis, because they are still leaving enough for the Services to survive and all they are doing is basically, therefore, taking away what Copyright Owners would otherwise be able to get, if they, too, had been in a hypothetical marketplace and

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could use their purported must have power to force the record labels to split that huge increase in streaming.

So doesn't the argument about the growth really just take us back to -- away from the benchmark and towards the Shapley modeling with all the positives and negatives attached to that type of approach?

MR. STEINTHAL: I don't think so because this proceeding is governed by 801(b). And when you look at the factors, in particular the need to have a fair return for the Services, as well as obviously a fair return for the Copyright Owners, what Phono II has enabled is a percentage-of-revenue structure, so as revenues increase, royalties increase, with various bells and whistles that protect against revenue deferment and the like.

And it has worked so well. The fact that the labels have unchecked market power, I mean, Mr. Assmus, you know, went -- addressed the whole issue of how to account for that oligopoly power.

You are here to make sure that the publishers don't extract what would be perhaps oligopoly power. You're here to set a rate that is consistent with 801(b)(4).

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And this rate structure has led to a prolific growth in the marketplace to the great benefit of the Copyright Owners. And let me segue --

CHIEF JUDGE BARNETT: Excuse me, I'm sorry, Mr. Steinthal.

I hear this argument from the Services over and over again, some sort of alleged cause and effect between the PR II rates and the rate structure and the growth in the industry.

I think there may be a correlation, but I don't see the causation. I don't see that those PR II rates effectuated this growth in streaming or facilitated or promoted the growth in streaming.

MR. STEINTHAL: Well, is your question, Your Honor, how the rates facilitated consumer increases in streaming behavior or is it more the --

CHIEF JUDGE BARNETT: Well, it's your argument that the PR II rate structure is responsible for all of this explosive growth. So let me know how that works.

MR. STEINTHAL: Your Honor, I think that the most we've said is that this rate structure has facilitated the growth in the market and far greater royalties being paid in than probably anybody anticipated at the beginning of the term.

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So I am not saying it caused it, but it certainly was a rate structure agreed to in a marketplace settlement where all the players, think about the fact that any one of these major publishers or the NMPA could have said, you know what, it doesn't make sense. Let's -- if this was so unfair and not a good structure, they could have easily said let's -- let's do what we're doing now. Let's litigate to get a rate structure.

They didn't. They agreed --

CHIEF JUDGE BARNETT: But they have now.

MR. STEINTHAL: Well, but this is still evidence of what the marketplace developed as a benchmark and they have not come in and shown how they were disadvantaged by that benchmark.

In fact, the amount of money flowing through is phenomenal, as Mr. Israelite talked about in the press release that we put a slide up on.

And -- and I note there's this -- that the argument that the Phono II rates are simply too low, that the Copyright Owners continue to press that, and as already addressed earlier by Mr. Marks, the Copyright Owners' assertions that the D.C. Circuit's opinion already locked in a certain rate and that the rates have to go up, simply are not supported.

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The D.C. Circuit was clear that the Board needed to reevaluate the Phono II benchmark in the context of setting the rate level and the rate structure. That's in Footnote 13 of your January 2022 decision.

The Copyright Owners' interpretation of Johnson on that score just isn't supported. Now, we acknowledge, and I want to come back to this, Judge Barnett, we absolutely acknowledge that the Johnson decision indicated in its evaluation of the first of the four 801(b) factors, relating to maximizing the availability of works to the public, that this factor favored an upward adjustment in the rate.

But, as indicated in our written submissions during these remand proceedings, when the four 801(b) factors are considered as a whole, the evidence strongly supports an outcome consistent with the Phono II benchmark rates.

That includes the recent testimony of Drs. Marx and Leonard who opined about certain appropriate adjustments that should be made to the Board's working proposal and which would generate a rate very consistent with the Phono II benchmark.

Finally, the Board may recall testimony from the original trial about how the growth of the

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streaming industry has essentially saved the music industry from piracy by getting consumers to pay for music again.

We have put in quantitative evidence of this through Dr. Zmijewski, and in this remand proceeding, in particular in the April 2021 submissions, we offered uncontroverted evidence that these trends showing an overall up-surge in royalties paid continues.

So while I understand their sensitivity to the songwriters and the songwriter testimony, I want to close with something that you might find a little controversial but we believe the record supports.

The publishing market is healthy. That health is being driven by growth in streaming that occurred during the Phono II rates. In our remand briefing, we noted many reports of songwriter/publisher catalogue sales for hundreds of millions or billions of dollars.

Viewing the entire picture it is clear that songwriters and publishers are not being held back by too low mechanical rates.

If the songwriters themselves have any reason to complain, frankly, it is a function of how much of the money paid by the streaming services to

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music publishers have been retained by the publishers rather than distributed to the songwriters.

We addressed this issue and the evidence of the publishers' huge profit margins at pages 41 to 42 of our initial April 2021 remand submission.

And unless Your Honors have more questions, I will pass it to Ms. Pope.

JUDGE STRICKLER: I do have a question for you, Mr. Steinthal. It is a higher-level question in terms of the generality, not high level in terms of the brain power.

When we have to select the benchmark, in the first instance we're cabined to use a word, I think, that was used by -- by former judge, Chief Judge Wolf, federal judge, and that is we're cabined by the evidence we're provided and we're cabined by the proposals that the parties have made.

So when this case came to us, Copyright Owners had their own proposal. It was a greater of proposal of per-play rate or a per-subscriber rate. Apple had its own particular proposal.

And the Services basically were using the Phonorecords II benchmark as a proposal but get rid of the mechanical floors, to -- to summarize it briefly.

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Well, the Judges ultimately in Phonorecords II -- excuse me, Phonorecords III, didn't go along with either one of those. And the majority put together what they thought was an appropriate way to do it while using what we call the inverse relationship or the see-saw, and using that to set a specific percent of revenue rate and to set a specific TCC rate and make that two greater of prongs.

The D.C. Circuit said that wasn't done properly or wasn't proper. Take your pick as to how you want to argue that.

Then it was kicked back to us. And rather than risk blindsiding or -- well, I will just say blindsiding, which is the word that the D.C. Circuit used, when we came up with a particular alternative we decided to share it with the parties, workshop it, as it were, so that you would know nobody would be blindsided.

Of course that was only one possibility and one criticism that has been raised that can be taken quite seriously, not that all of them are not taken seriously, but quite seriously is the absence of a TCC prong in the working proposal when Phonorecords II, and the Phonorecords II proposal, in fact, has a

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TCC prong as does the majority's proposal that has now become Copyright Owners's proposal.

So that's an introduction that maybe I didn't need to do, but there it is. The question I have for you is this: Given that background, do we need to pick the best bad benchmark we have? I am thinking back to the movie Argo, when -- when the guys who were scheming up a way to rescue the hostages, they said: That's your plan? That's the plan you got? That's it? And the answer was, well, it's the best bad plan we've got.

Is this one of those situations where there's -- not that they are bad benchmarks, but they are imperfect benchmarks and we have to pick the -- the better of the two or, if you add the working proposal, the best of the three?

MR. STEINTHAL: Your Honor, as I sat here today listening to -- and it was your word, uncertainties, all the uncertainties that surround the theoretical effort here to establish rates based on Shapley and all the adjustments that each of the parties feel is appropriate to various of the expert economists' Shapley analyses, I am persuaded by the Phono IV determination that when you have a benchmark, benchmarks --

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JUDGE STRICKLER: You mean Web IV?

MR. STEINTHAL: Web IV, yeah, you don't have to go venture into all the uncertainties associated with Shapley modeling here. Is this the perfect benchmark? Is there such a thing as a perfect benchmark?

I think this is a very, very strong benchmark when you look at the identity of the rights, the identity of the sellers, the identity of the buyers, the overwhelming, you know, the fact that those mirror one another, yes, the -- the -- the industry has grown phenomenally.

But, again, and, Judge Barnett, I'm not taking credit, I don't think that the Phono II rate is the sole thing that caused the growth in this industry, but I think it is a significant element of it. It created a structure that permitted, in the face of complementary oligopoly power by the labels as well, it permitted the growth of this market in a way that has been mutually beneficial.

And that makes it a wonderful benchmark, consistent with 801(b), sub-factors B, C, and D. So I think you do have a very excellent benchmark here. It's not in the shadow of an existing statutory rate, because either party could have made the

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determination that it wasn't a reasonable structure.

So I hope that answers your question, Judge Strickler, and, if there are any others, I am happy to respond.

JUDGE STRICKLER: It did answer me. Thank you.

CHIEF JUDGE BARNETT: Thank you, Mr. Steinthal.

Ms. Pope, are you ready to proceed? You are muted.

MS. POPE: Yes, I am. Good afternoon, Your Honors. My name is Leslie Pope. And I represent Amazon.

I will address the reasons Your Honors should keep the Phonorecords II definition of service revenue from the initial determination. And I plan to address three topics.

First I will address the two procedural pathways Your Honors have for addressing the legal error the D.C. Circuit identified in Johnson, namely, the Judges have not identified a statutory provision to give them legal authority to substantively change the initial determinations service revenue definition.

Your Honors can offer a fuller explanation

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and say more about your earlier reasons, or you can take the new agency pathway and offer new reasons. But the procedural path you choose does not change the threshold legal question that needs to be answered about Your Honors' authority, nor does it change the answer.

Second, I will address the specific question Your Honors asked in your February 9 order, whether you may use your rehearing authority by deciding that the Copyright Owners' February 2018 motion for clarification was, in fact, a motion for rehearing and granting that motion.

Johnson already answered that question. And the answer it gave was no. That decision is binding here. But even if it wasn't, as the Judges correctly decided in 2018, the Copyright Owners' motion was not a motion for rehearing and did not satisfy the exceptional cases standard.

But, third, while we submit that you cannot and should not reach the merits of the service revenue definition in this remand, I will briefly address the evidence that supports the Phonorecords II definition that the Services timely proposed and Your Honors adopted in the initial determination. This definition reflects an approach to bundles that

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the parties agreed on in Phonorecords II.
It is an approach that grows the overall royalty pool by incentivizing beneficial price discrimination. It reaches listeners who would otherwise not pay for music. And that's a bright line easily administered rule.
This slide shows the two different procedural pathways that are open to the Judges in this remand. There is the fuller explanation pathway, the top pathway on the slide, which allows Your Honors to say more about the reasons you have cited you had authority to change the initial determination service revenue definition in October 2018.
On that pathway, Your Honors would be limited to your original reasons. You could not offer new reasons because that would be impermissible post hoc reasoning.
If there was more to say about your original reasons, that would be consistent with Johnson, Your Honors could offer that fuller explanation and then reach the merits of the service revenue definition.
But if, as we have shown to be the case, there is nothing more to say about those original reasons, it would be consistent with Johnson, the

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only lawful result would be to keep the initial determinations service revenue definition.
The new agency action pathway, the bottom pathway on the slide, allows Your Honors to give entirely new reasons for finding that you have authority to change the initial determinations to the service revenue definition. You're not limited to the reasons you had in October of 2018. But you are still bound by the decision that the D.C. Circuit issued in Johnson.
If there was a reason that Your Honors had authority to change the initial determination of service revenue definition, that was not already ruled out by Johnson, Your Honors could identify that reason and reach the merits of the service revenue definition.
JUDGE RUWE: Ms. Pope, I have a question.
If we're revisiting aspects of the rates, which could impact, how those rates would impact bundled offerings, why can't we also necessarily revisit whether the definitions in the initial determination may frustrate the implementation of those updated rates?
MS. POPE: Yeah, there is a distinction between the issues that are bound up with the issues

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of rate and rate structure that the D.C. Circuit addressed in Johnson that were inherent in the initial determination, and this particular change that happened between the initial determination and the final determination.
So, for example, the Copyright Owners in their briefing focused on the caps on TCC. So if you were to adopt caps on TCC, it would be appropriate to consider whether those caps should be -- should be adjusted for student and family plans. And that is something that the parties have submitted dualing proposed regulations on.
But this particular change, which is a change that was made between the initial determination and the final determination and wasn't bound up with those questions of the rates and rate levels that were appealed in Johnson, can't be revisited in that way.
JUDGE RUWE: Any kind -- any adjustment to the rate would affect the entirety of the rate structure, I mean, every aspect of this rate, if we are, as you guys are advocating, revisiting aspects of the rate, it works entirely, I mean, we can consider what the -- what the -- what the implementation of the rate is and, therefore, what

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frustrates it.
I don't see, you know, why is there -- why is it cordoned?
MS. POPE: That might be true if the -- if when the questions before Your Honor were whether to adopt a revenue-based rate structure at all, for example, which is sort of bound up with this question of whether you have a service revenue definition, but given that we are operating in a world where there is a set universe of questions that Your Honors are considering on remand, and that is premised on the idea that you do have a revenue-based structure, and you have already decided in that revenue-based structure to facilitate beneficial price discrimination, that's one of the virtues of having such a structure and with different frameworks for different offerings, none of that suggests that you can reopen the service revenue definition.
JUDGE RUWE: Thank you.
MS. POPE: The Copyright Owners argue that if both of these procedural pathways required Your Honors to address your authority, this remand would be pointless. That's wrong.
On appeal the D.C. Circuit could only consider what the Judges originally said about their

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authority. This remand gives the Judges an opportunity to consider whether there is anything else to be said.

JUDGE STRICKLER: Is it your position that there is nothing else to be said?

MS. POPE: It is, Your Honor. There is nothing else to be said that would be consistent with Johnson and the holding of Johnson.

JUDGE STRICKLER: Let me point you to page 392 of -- of Johnson. And that's when one might say counsel on behalf of -- of the Board was grasping for a way to respond to the D.C. Circuit's questions.

And the question, quoting from the Panel there during oral argument was: Is that an inherent power? Is that what you're putting under -- and then a particular -- Section 803(a) -- I wrote over it, 803(c), I believe?

And the answer was: "I mean, I think it is both, right, sometimes it will fall under 803(c)(4), sometimes it will fall under the 803(c)(2) rehearing power," and the answer went on.

But the D.C. Circuit said then on that same page "vacillating gestures to uninvoked authority will not do." Those vacillating gestures were gestures by DOJ attorneys on appeal, and the

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uninvoked authority was the authority uninvoked by the majority in the determination.

Then the D.C. Circuit goes on: "We must vacate the final determination's bundled offering service revenue definition and remand for the Board either to provide a fuller explanation of the agency's reasoning at the time of the agency action" -- that's the first prong that you talked about as an alternative -- "or to take new agency action accompanied by the appropriate procedures."

If that's the response, and it is, of the D.C. Circuit to the grasping arguments by the DOJ, why is it not within the authority of the Judges now to look at what the DOJ was grasping at and that the D.C. Circuit did not reject but said we don't want to hear you talk about it, it has got to be the Judges, the CRB Judges who are talking about it, why can't we talk about it in a new agency action?

MS. POPE: So, Your Honor, this is exactly where I was going. And you can talk about it. It is just that we think the answer is, when you look at the statute, there is no statutory source defined.

So it is true, and it is the case that Johnson ruled out three specific statutory sources of authority in Section 803. And the D.C. Circuit

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observed, just as you pointed out on that page, that the Board might on remand be able to identify another source of statutory authority that would allow them to make fundamental changes as appropriate to the initial determination as suggested by appellant's counsel.

Our position is that where -- while you are free to look for such a reason on appeal -- on remand, no such reason exists. That is, there is no statutory source that provides you with that authority.

And one thing the D.C. Circuit did rule out on agreement, on appeal, is the possibility that you could sort of have inherent authority that it doesn't -- isn't located any place in the statute. You do have to locate your authority somewhere in the statute.

We believe that all of the possibilities have already been ruled out by Johnson, and there is no additional source to find. But it is absolutely correct that the D.C. Circuit that left open the door for you to look for such a source and to address that on remand.

JUDGE STRICKLER: I appreciate your -- your pointing, again, to the statute and say we're --

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we're restricted, limited by what the statute permits. I, of course, agree with you.

But the statute is -- is rather general. And it says, on the question of rehearing, in particular, and it says we can only grant a rehearing in exceptional cases. And then the regulation uses some different words, and in previous decisions, orders by the Judges, we fleshed that out, basically patterning our standard after the standard that is used to apply Federal Rule of Civil Procedure 59(e).

Now, as the D.C. Circuit said, they said the Board found the Copyright Owners did not meet the exceptional standard for granting rehearing motions, but, of course, they also say that Copyright Owners went out of their way, really, maybe that is my phrase, not theirs, to point out they were not filing as a rehearing order.

Well, because they weren't, isn't anything we have to say about it being a rehearing order somewhat in the nature of dicta, they didn't argue the point, they didn't argue that the standard applied or that the standard should be modified in a regulatory sense, certainly not in a statutory sense, it still has to be an exceptional case, but because they didn't address the motion or style the motion or

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advocate for the motion as a motion for rehearing, when we look for new agency action, and I think you are correct that we have to find our authority somewhere in 803 or anywhere else within the statute to do this, but why can't it be -- this is why we asked the belated 11th hour question -- why can't it be, that authority, be found in the motion for rehearing since there never was a motion for rehearing? All we were told was that we didn't have a motion for rehearing.

MS. POPE: So the rehearing, in order to invoke the rehearing authority there are the two requirements. One, that it has to be upon motion of a participant, and the other that it has to be an exceptional case. And those two statutory criteria are not met here.

First you didn't have the motion of a participant because, as you say, the Copyright Owners didn't style their motion as a motion for rehearing. It wasn't a motion for rehearing. It didn't meet the exceptional cases standard. It didn't even make any attempt to satisfy the exceptional cases standard.

And it wasn't an exceptional case. So looking both to Your Honors' prior rehearing orders and to the Rule 59(e) cases that you cite from the

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D.C. Circuit and D.C. District Courts, it is apparent that this motion didn't meet the exceptional cases standard.

The Copyright Owners were pulling -- making arguments pointing to evidence that they could have introduced during the hearing and did not -- chose not to as a matter of litigation strategy. And that choice, whether it was intentional or simply the lack of due diligence, is not a basis for a rehearing order.

Your Honors have repeatedly rejected bona fide motions for rehearing that raised arguments that could have been raised during the hearing but weren't on the grounds that the party was seeking a second bite of the apple. And that is simply not the purpose of rehearing and cannot meet the exceptional cases standard.

JUDGE STRICKLER: Let me ask you this question: If one were to look at the federal case law for analogous reasoning, not necessarily dispositive, but analogous reasoning, and under 59(e) cases there are cases where the Federal District Court judge said, he or she got it wrong, made a mistake, and wants to fix it, and 59(e) was invoked to that end and was affirmed by the D.C. Circuit or

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was never appealed and was left to stand; why would that not be appropriate authority for us to say, since we have always analogized our rehearing authority to 59(e), that we could also rely on those cases to be able to engage in new agency action under -- under that approach so as to cure something that the judges may say we just missed, we just simply missed this, it was a mistake, and 59 -- and if it was in a federal court, 59(e) would allow us to do it, why can't we do it here as well after we have been remanded back by a federal -- had it remanded back by a federal court?

MS. POPE: A lot of reasons, Your Honor. First, to think of this as Your Honor's mistake would, I think, be the wrong framework. To the extent that there was any mistake here, it was the Copyright Owners' mistake.

They didn't propose an alternative rule. They had plenty of notice of the Phonorecords II rule that the Services had proposed. That rule had been in effect since 2012. They simply made the choice not to raise this issue during the hearing or to put in evidence supporting their rule.

Given that backdrop, it cannot be Your Honor's mistake to not have adopted a rule that the

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Copyright Owners had not proposed at the initial determination stage. So I think that just as a preliminary matter that is sort of the wrong framework for thinking about it.

But Copyright Owners didn't even argue that Your Honor should be thinking about this as a clear error. And even if it were the context of clear error, the Rule 59(e) cases that you are referring to still apply this second bite at the apple rule and there are limits to the discretion that can be applied.

So, for example, we cite a case in our papers, a D.C. Circuit case that reverses a District Court granting rehearing, where the District Court reopened a case in order to give the plaintiff its award in dollars, where the award had been in euros, because the plaintiff had previously asked for euros.

The mistake was not -- that was a choice, a litigation choice, that was made by the plaintiff that they simply had to live with. And that's the right framework if you're looking at the Rule 59(e) cases to think about it, this is a case where the Copyright Owners simply made a choice, and you do not get rehearing where you suffer some prejudice as a result of your own lack of diligence or your

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litigation choices.
And then I would sort of add that, even if you were to think about this as an error, it doesn't fall within the type of error that allows for reopening in our Rule 59(e) context.
So the Slate DDC case that we cite in our briefing explains this a little bit and talks about the kinds of clear errors that can be the basis for a hearing.
And there it really can't be something where there is any area for disagreement, like this, where you are talking about a rule that has been in place for a decade and simply can't be the kind of clear or obvious error. That case uses very colorful language about the kind of error that would qualify, so they say it has to be the kind of error that stinks of being incorrect in the way that a five-week-old unrefrigerated fish would. And that's just not the situation that we have here.
JUDGE STRICKLER: Well, there goes my lunch.
(Laughter.)
JUDGE STRICKLER: But this is an argument I think Copyright Owners make. They vigorously opposed throughout the pre-remand proceeding any revenue-based royalty. They said, you know, because

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of their arguments about revenue displacement and revenue deferral, they didn't want to -- and by way of example, they talked about how bundled revenue was used in a manner of -- of lowballing, or eliminating completely in the case of Amazon, your client, Amazon Prime, from the revenue prong completely.
And so they made the point, the substantive point in a larger context to say that shows that all revenue-based approaches are bad, but they did make the argument about bundling, I agree with you and they would as well, they never proposed -- they would have to -- they never proposed to carve out a separate definition saying: Well, if you're going to go with a kind of revenue-based, change the service bundle revenue, the bundled service revenue definition to at least minimize this problem.
But they did raise the general question, and if the Judges think that the Judges got it wrong, isn't the fact that they raised it in the context of disparaging or criticizing all revenue-based rates, isn't that sufficient to say they did raise it, they did raise the argument and the Judges can fix that as an agency action that's new here under the statute?
MS. POPE: Your Honor, I would interpret that to say that that actually means that it is even

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more inexcusable that they didn't raise this particular issue. That is, they were on notice that the service revenue definition was doing some work here. There was discussion about this in proposed findings of fact and conclusions of law. As you note, they focused on the Amazon Prime example.
And they made all of these arguments in service of the argument that you should get rid of a revenue-based rate structure entirely. They made the litigation strategy decision not to propose an alternative definition of service revenue, even though they were well aware that this was an issue and were well aware of the rule that the Copyright Owners -- that the Services had proposed with the Phonorecords II rule for calculating service revenue, and simply made the choice.
And that, I think, makes it all the more unexcusable that they didn't address this directly.
JUDGE STRICKLER: Thank you for that answer. I wanted to ask you one other question. I think this part goes to Judge Ruwe's question and, if it doesn't or if he wants to elaborate on it, of course he will.
I want a good definition to be clear about the phrase new agency action. And one way I perceive of the ambiguity is when something is remanded back

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for new agency action, is the quoted phrase "new agency action" so it's new agency action, or are we being -- is it remanded back as new, now we quote "agency action," which is to say can we just engage in any action we think is appropriate on remand regardless of whether we have -- we can point to a particular place in the statute for it or do we still have to go back under what -- under what was said in Johnson and identify it, put our finger on one or more sections of the statute and say: It's this agency action that we're now going to apply newly, so it's our new application of an existing agency action.
Which is it? Do we get carte blanche to just address the problem or do we still have to point to an existing, an existing agency action, not just statutory, but regulatory as well?
MS. POPE: So, Your Honor, I believe this question gets to the question of what is the problem. So which are the two paths that you choose, and Johnson leaves open two different paths, procedural paths, the fuller explanation path or the new agency action path.
But whichever path you choose you have to deal with the problem that the D.C. Circuit

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identified in -- on the appeal. And the problem, the remand in question that you have to answer is whether you have authority to substantively refine the service revenue definition.

And if you don't have that authority, you can't then reach the merits of the service revenue definition. And it doesn't matter which of the two procedural pathways you choose, that's the initial remand question and it has to be addressed. So this gets to the mandate rule cases that we cited in our briefing, where the mandate rule requires you to answer the question that is remanded to you by the appellate court and to follow the letter and spirit of that decision.

And so the cases we have cited illustrate that you have to first deal with the problem that was identified by the D.C. Circuit, and here the problem that was identified was that you didn't have legal authority to change the initial determinations definition of service revenue.

And so the Ali vs. Pompeo case we cite is a good example of that.

That is a case where the District Court was reviewing the revocation of a passport and found that the State Department had made an error by not

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considering an argument that it was relying on a statement of the applicant that was alleged to have been involuntary in violation of the Fifth Amendment.

The State Department then on remand took new agency action, was allowed to take new agency action, it gave new reasons for revoking the passport, but it continued to rely on that same confession, without looking into whether it was voluntary and seriously considering the problems that the District Court had raised.

And so the District Court said, again, you have to go back, you have to follow the mandate of this Court, and deal with the problem that we identified. In that case the problem was not considering whether the confession was voluntary or not.

JUDGE STRICKLER: So your position is under the -- excuse me -- the precedents that you have been citing, even if the Judges, as the Board is presently constituted, are certain that this was an incorrect ruling, that had they had it back they would have done it differently, their hands are tied because there is no statutory way to get from the incorrect, what they believe to be an incorrect decision to what they believe now to be the correct decision?

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MS. POPE: That's correct, Your Honor. And that's inherent in the structure that Congress chose for Section 803, where they made the reasonable decision to limit the circumstances in which the Board could revisit its initial determination.

And it made that calculation, balancing efficiency and putting the burden on the participants to raise their argument and put in their evidence at the appropriate time.

JUDGE STRICKLER: And if I understand the outline of your argument, that we have -- myself in particular -- have consistently interrupted, so I apologize, you are going to now argue in the alternative that, even assuming it was done as a rehearing motion, it would still be something that would need to be rejected in any event?

MS. POPE: That's correct, Your Honor. So I can skip -- well, I would like to dwell on this slide for just one minute, because this is responsive to an argument that the Copyright Owners have repeatedly made about Your Honor being able to bypass the remanded question entirely.

JUDGE STRICKLER: So if you're going to get to the rehearing arguendo point later, that's fine. I will wait for it.

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MS. POPE: So the point of this particular slide is that if the Judges were to bypass the remanded question, the limits Congress placed on the agency in Section 803 would be a nullity and that would be contrary to Johnson.

So the Copyright Owners argue that the Judges should be able to bypass the remanded question if they take new agency action, and this hypothetical demonstrates why that needs to be wrong because, if the Copyright Owners were correct, then the agency could adopt Rule A and then on rehearing change Rule A to Rule B without identifying its statutory authority to do so, because no statutory authority existed to make that change.

If no party appeals, Rule B would stand. And if there was an appeal the D.C. Circuit would hold, just as it did in Johnson, that the agency made a legal error by failing to identify the source of its legal authority to change the rule. And then the Court would remand.

If the Copyright Owners were right, the agency could bypass the question of its authority to change the rule, go straight to the merits and readopt Rule B. And that can't be right because it would nullify the limits that Congress placed on the

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agency's authority to change its decisions, and, as the D.C. Circuit explained in Johnson, these restrictions have to have bite.

So, Your Honors, I see that it is already 1:30. But I would like to have, very quickly, answer Judge Strickler's questions about what would happen in the world where they had moved for rehearing.

So we think that Johnson already decided the question about whether or not Your Honors can exercise rehearing authority and found that this circumstance just didn't fit Section 803, and that rehearing authority can't be used here, but we submit that even if it -- Johnson hadn't resolved this question, Your Honors couldn't exercise rehearing authority here both because the motion was not a motion for rehearing, as you correctly decided in 2018, and because the motion itself didn't meet the exceptional standard for rehearing.

And we have briefed both of those points in our February 24th submission, and I am happy to either stand on that submission or go through -- or answer questions. I do want to ensure that the Services are able to reserve their rebuttal time.

CHIEF JUDGE BARNETT: If you want to reserve rebuttal time, then we need to wrap up right now.

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MS. POPE: All right.

CHIEF JUDGE BARNETT: Okay? Thank you, Ms. Pope.

MS. POPE: Thank you, Your Honors.

CHIEF JUDGE BARNETT: Okay. We will now break for lunch. We will take one hour. By my reckoning, it's 1:32, which means we will reconvene at 2:32, unless everyone else -- unless everybody comes back by 2:30 on the dot.

Will the host please pause the public audio feed and close the virtual hearing room, please.

MR. REYES: Please standby.

We're off the record now.

CHIEF JUDGE BARNETT: Thank you.

Counsel are again reminded not to leave any open mics during this break. And we will reconvene at 2:32. Thank you.

(Whereupon, at 1:32 p.m., a lunch recess was taken.)

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A F T E R N O O N S E S S I O N

(2:32 p.m.)

CHIEF JUDGE BARNETT: Thank you. We're about to get back from our lunch break. I'll ask the host to please reestablish the public audio feed and notify the Judges when all of the participants have checked back in to the hearing room.

MR. REYES: Please standby.

We are live on the stream. And I do believe all participants are in.

CHIEF JUDGE BARNETT: Thank you, Mr. Reyes.

We are back from our break. And I believe it's the Copyright Owners' opportunity. Mr. Semel, you're the -- you're the sole survivor over there, so to speak?

MR. SEMEL: Yeah. Thank you.

CHIEF JUDGE BARNETT: It looks to me like at about 3:45, we could take a 15-minute break, but I'll let you gauge that according to where you are in your presentation. And so we will have a 15-minute break and then wrap it up.

So you have the floor, Mr. Semel.

MR. SEMEL: Thank you, Your Honors. And good afternoon, and thank you for your -- your time and attention in this matter. Five hours of attorney

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argument on a Monday is not something I would wish on most people to start their week, but your time is appreciated.

I will say right upfront I do not have a two-and-a-half-hour speech prepared, and I do not intend to walk through a two-and-a-half-hour PowerPoint presentation. I'm not a sadist, and I don't think it would go well.

But I am really hoping to answer your questions. I have -- I have a number of slides, as you all have, and I think of them as talking points. The most important really, though, is to get the questions that you have out and to discuss them.

So please interrupt, although I expect you will when you want to.

Two and a half hours -- or I guess now it is even longer than that, probably -- seems both far too long and yet too short for the closings here. You know, on the one hand, when we look at these issues, the remand is so narrow, the issues are so straightforward, and the lack of evidence submitted by the Services was so stark that for us most of these issues, all of these issues don't really get past the gating questions.

On the other hand, the -- the number of

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arguments that, you know, when I -- when I watched this morning's presentation, I at times was unsure what remand I was watching a presentation for. The Services' perspective on what this remand is about is so different than what was both mandated and what was set forth in the remand plan that there are just so many different arguments to address.

And I think the dismantling of the arguments that the Services have offered is a lot of what led to these 17 expert reports in this case and what makes it difficult to conceive of summing this up in two and a half hours, even though in our mind most of these issues don't get past the gating questions.

But I do think the framing for the remand is important to start with. And for us the framing starts in three places; final determination, Johnson, and then the remand plans and the order that noticed this proceeding and the scope of the proceeding.

And, you know, we start with the final determination. Most of the findings in the final determination were not appealed. These include the findings concerning revenue diminution and the competition for the market.

Most of the appealed findings -- most of the findings that were appealed were affirmed. Not a

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single holding was reversed. Not a single holding was remanded on substantive grounds. The three holdings -- and at this point I will throw up a slide. Do you all see the slides?

CHIEF JUDGE BARNETT: Yes, we were able to fix my screen while we were at break.

MR. SEMEL: Very happy to hear. I hope that the slides live up to it, to the work.

So, you know, we have sort of sketched out here what the Johnson holdings were concerning the Copyright Owners and the Services' arguments. And, again, we see most of the findings were affirmed and we have these three procedural remands.

Again, none remanded on substantive grounds. And from here we go to the remand plans in order. And, again, this was, I think, really where I saw a stark difference between our understanding of this remand and what was noticed and the way the Services describe it.

The -- the parties, you know, agreed on three issues for this remand, right? And they -- and they were framed by Johnson in terms of what the remanded aspects -- what the remanded action was. So for the -- for the Phonorecords II settlement as a benchmark, it was a further explanation.

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For the definition of service revenue, it was either a further explanation or to address it afresh. And there was a remand to provide the Services an opportunity to object to the expansion of what we have tried to recast as the true TCC prong, but uncapped seems to have stuck, and we are having trouble dislodging it.

So you will hear me refer to it as an uncapped TCC prong, sometimes as well as the true TCC prong.

This was agreed to by the parties. And this is the order that set forth the proceedings on the remand. And, in particular, we see on the rate structure issue, the issue is the adoption of a rate structure that includes an uncapped TCC prong.

That was the issue that the parties agreed on. That was the only issue on which evidence was allowed in this proceeding.

And even more so, if you go back to the Services' remand plan, I'm sure you recall they proposed to not have any evidence in this case, the remand, right? They proposed that the parties should submit it on the papers. They said the record was fully complete to deal with everything in the original -- on the original hearing record and that

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there was no need to put in further evidence.

What then did they say would be the result of that? Capping the TCC prong. That's what they said. In their mind, this remand proceeding could have proceeded with no evidence whatsoever with the outcome being capping the TCC prong.

They didn't suggest that there would be another action that the Board would take beyond that. And so, you know, when I hear now, you know, for example, Mr. Assmus describes Judge Strickler asked him about the burden with regard to the see-saw, and he mentioned, well, since the see-saw relates to the Copyright Owners, the rates that the Copyright Owners want to put in place, they have the burden.

Well, I'm sorry, the only evidence that was allowed in this proceeding was on the rate structure issue that relates to an uncapped TCC prong. So if, in fact, Mr. Assmus is saying that the see-saw issue relates to rates that we want, then they had no right to put evidence in on that issue.

Now, this was an issue we complained about at the time, that they were trying to expand the scope of the remand, it was never addressed, but throughout their presentation I hear a discussion of evidence that they submitted pursuant to the notice

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in this proceeding that was to be limited to evidence on the adoption of a rate structure that includes an uncapped TCC prong that they are now saying was, in fact, evidence towards a reevaluation of the entire final determination or resetting of rates and everything else.

And, again, these are in our mind important APA issues. This was the notice of the proceeding. This was the proceeding that we proceeded on. And to try to recast adoption of a rate structure that includes an uncapped TCC prong, which the Services proposed could be resolved by taking no evidence and capping it, as instead being notice to Copyright Owners that we were instead having a remand proceeding to reevaluate the entire -- all of the findings in the final determination, because, again, if you are, as Judge Ruwe, you mentioned earlier, if you are saying that the rate structure and the rates are open, everything is open. That's all that was done in this case, right?

If you are saying that the rate structure and the rates are open, then you are saying that nothing was affirmed by Johnson, that proceeding in accordance with Johnson's instructions meant that there was no restriction on what could be done. In

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our mind this was very differently a much narrower proceeding.

I think if you go back and read the remand plans, you see at the time we all saw this as a very narrow proceeding.

JUDGE STRICKLER: Mr. Semel?

MR. SEMEL: Yes.

JUDGE STRICKLER: Mr. Semel, may I ask you a question? Good afternoon, sir. Nice to see you again.

MR. SEMEL: Yes. Good to see you.

JUDGE STRICKLER: Taking the screen, the issues on the screen that you have, the issues on remand, just first commenting on what you said, obviously the Services promoted a strategy about saying that there should be no further facts to stay with the record.

Well, that strategy didn't work, the Judges rejected that. So I appreciate the accurate summary on your part. We didn't go that direction.

Now, let's take the document on the screen. There is three issues and it says here the Services and Copyright Owners agree. So there is three issues. I want to take them one at a time and ask you the same question with regard to each of them.

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MR. SEMEL: Yes.

JUDGE STRICKLER: The first issue, the majority's rejection of the Phonorecords II settlement as a benchmark, which party has the burden of proof on that issue, according to Copyright Owners?

MR. SEMEL: Well, I think what we're talking about is further explanation. So in our mind both parties should be providing the Judges with evidence on which the Judges can further explain their rejection of the Phonorecords II settlement.

JUDGE STRICKLER: The ultimate decision as to whether or not the Judges should adopt the Phonorecords II settlement in whole or part, would you say that burden is on the Copyright Owners or on the Services?

MR. SEMEL: I don't -- I don't know that I would -- I think the benchmark was put forward by the Services, so they absolutely have the burden of showing that the benchmark should be put in place.

And we have this, I believe, a slide on this later, and Your Honors' rulings are clear that a party who advances a benchmark has the burden of proof to substantiate that benchmark.

And so if you're talking about -- right,

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they would have that argument, but I would say even further that the issue remanded did not imply that the Judges need to reevaluate the rejection of the Phonorecords II settlement. We will get to this in a second but, again, the Board is on record with multiple reasons why it should be rejected.

It would be extremely difficult for the Board to not reject that -- that settlement, given that they have explained in great detail why it needs to be rejected.

It is true that it wasn't elucidated in detail in the determination. I mean, Your Honors put forth a 100-page determination. To fault you for not including something in it seemed to me a little bit of a ticky-tack foul, but, nonetheless, I think implicit in that determination were a lot of reasons.

The fact that you didn't specifically tie the threads of them together, I don't think opens it up to saying that now we can go back and say those threads don't exist and then we can ignore that those threads are, in fact, in the determination.

So -- sorry, long-winded answer.

JUDGE STRICKLER: Okay. So I understand your point there. So you are saying the burden originally was on the Services, and it is still

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remains on the Services, but the record is replete with reasons why the Services have not -- have not satisfied that burden?

MR. SEMEL: Correct. And -- correct.

JUDGE STRICKLER: Let me move on to the next issue. There are three issues that you point out that the Services and Copyright Owners agree to. The second issue, adoption of a rate structure that includes an uncapped TCC prong. Which party has the burden of proof on that issue?

MR. SEMEL: Again, the issue remanded was the Judges needed to open the evidentiary record to allow the Services an opportunity to voice their objections to the majority's institution of the uncapped -- of a rate structure with an expanded uncapped TCC prong.

JUDGE STRICKLER: The -- the D.C. Circuit's opinion in Johnson says, as I recall -- I am paraphrasing it a bit here -- that if the Judges wish to pursue that -- that structure, they will have to reopen the evidentiary record.

Well, it's a bit of an odd statement, if the Judges wish to pursue. The Judges can allow it to be pursued, but we're not a -- we don't do a notice of proposed rule-making and propose a rate or a rate

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structure. It was vacated. Somebody had to pick up the mantle and, indeed, Copyright Owners picked up the mantle and said, no, this is a good rate structure, we want this rate structure to be adopted after remand.

So with that background in mind, let me repeat my question. Which party has the burden of proof with regard to the adoption of a rate structure that includes an uncapped TCC prong?

MR. SEMEL: So, again -- and I hope I am meeting your question on this -- I think the Services have an opportunity to voice objections that raise an issue with the majority's determination in the first place.

Again, this was not reversed on substantive grounds. This was not reversed. It was not the remanded on substantive ground. There was absolutely no ruling by Johnson that the findings in the final determination that -- many of which were not appealed, including the revenue diminution bases and these other bases for the TCC prong, there was no finding that those were wrong.

So what was found was that the Services weren't given an opportunity to object to them, so what all the Board needs to do is give them that

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opportunity to object. Then if they are unable to raise meritorious problems with it, then I -- then nothing stands in the way of the Judges readopting it. In fact, that is very common in agency remands.

Something is remanded for a lack of notice. You give the parties notice. You see what evidence they put in. Now, again, the -- the -- it's for lack of notice to voice objections to the TCC prong. So we weren't voicing objections to the TCC prong. We didn't appeal it.

So that's why we proposed in the first instance that the way that made sense is let them voice their objections. We will respond to them. And Your Honors will decide whether they were meritorious objections voiced, that required something further.

So --

JUDGE STRICKLER: It seems to me, Mr. Semel, what you're answering is a slightly different question. The question was who has the burden of going forward?

And your argument is the burden -- the party who has the burden of going forward given this context was the Services. And the Services presented evidence. And then Copyright Owners presented

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evidence.

But my question, again -- and I guess you said you hope you are getting to my question with your answer -- so I think your answer to -- you know, I want you to answer it any way you think is appropriate, but your answer has to, I think, to respond to my question, has to respond to the phrase "burden of proof."

Who has the burden of proof? I understand your answer to mean burden of going forward, burden of producing evidence. Services produce evidence, expert testimony, good, bad, otherwise. Who has the burden of proof?

MR. SEMEL: I think the -- again, and I'm sorry if I am not meeting you directly on it, I think the Services have a burden -- have the burden of proof of finding problems with the -- of raising meritorious problems with the final determination's rate structure, which, again, was not vacated on substantive grounds. It was vacated for a lack of notice, and has, within the final determination, lengthy justifications for it.

So, you know, those justifications are there. If they are unable to raise meritorious objections to even cross the threshold, raise

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meritorious objections to that rate structure, I don't see why there is anything further that needs to -- why this -- and this is where I was talking earlier about gating questions.

Again, I think if you were to hypothesize a scenario in which the Services raised meritorious objections that -- that showed that the majority -- that the Board's rate structure was unreasonable, then I think we maybe need to go from there and Your Honors would -- this is where we talked about maybe we would have further proceedings, we would talk about what needs to be done now to address that.

The Services didn't put in anything on the rate structure, right? They put in something on the see-saw, which they are now admitting was, in fact, not about the rate structure, but was about rates.

And so, again, I know you're talking about the burden of proof to justify this rate structure, I almost feel like de novo. And I guess the point I am trying to make is I don't believe this is a rate structure coming in de novo.

When -- even on a vacatur, it is being vacated for further proceedings consistent with the opinion, right?

The opinion was saying it's vacated because

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they didn't get notice and an opportunity to object, not because it needed to be built up from scratch again. You know, again, there are lengthy reasons, that incredibly detailed discussion of the rate structure in the final determination, none of that was vacated on any kind of substance issue.

And so in our mind that's where we are starting. And they are getting an opportunity to voice their objections. And we will -- I have some slides about this. We will see what they argued to the D.C. Circuit, why they needed that, and that's what they got.

And, again, to me the gating question before we get any further, okay, here is your objection, raise them. What have we got?

Now, if they can pass that threshold, show that there is a problem here, you're right, now, Your Honor, now we have to build this up from scratch, right? If they show that the unkept TCC rate structure is unreasonable or the expansion is unreasonable, et cetera, and Your Honors are persuaded by that, well, now we have to go back and we have to figure out what we're going to do from there.

But my point is they didn't even approximate

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passing that gating question. Because even as they are admitting in these closings, they didn't actually put in evidence on that issue. They put in evidence on another issue, and they tried to sell it as evidence on the rate structure issue.

And now they are coming clean that they actually, in our mind, violated the remand order and put in evidence that wasn't related to rate structure in their rate structure section.

And I want to also be clear, they could have said -- they could have asked for a different plan in the first place, right? They could have come in in December and said: Your Honors, we think we need to go into the rate derivation methodology. We need to look at the rates. We think Johnson is opening everything up. We have got to start from scratch. And it is really important that we get evidence on everything, right? They didn't take that approach.

They took the approach of: We don't need any evidence, you can cap the TCC or, fine, we have to put in some evidence? All right. We will put in evidence on the uncapped TCC rate structure. That's what they went with.

And so, you know, again, I think this is all, you know, this all speaks to this, to a very

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clear and consensused scope on this remand, which admittedly has been turned upside down recently, but as we -- a point we tried to make in the motion to reconsider, this is an APA issue. This is the proceeding that was remanded.

They can try to go back now and revise history, but it doesn't stand up to review of their own rate proposal -- sorry, their own remand plan proposal.

JUDGE STRICKLER: Well, are you saying that there's a -- that the Judges should be operating under a presumption that a vacated rate structure is correct subject to -- only to any arguments to the contrary to upset that presumption, that are presented through evidence by the Services?

MR. SEMEL: So, yeah, I think the -- I think the short answer is yes. I think that the Board is bound to operate in -- consistent with its precedent.

JUDGE STRICKLER: What is the precedent? What is the precedent?

MR. SEMEL: The binding in the final determination, which are the findings of the Board, which have not been -- not been reversed or vacated on substance. Those are findings of the Board. Those are findings of fact on the record.

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And I think the Board is bound to act consistently with that determination, which --

JUDGE STRICKLER: Well, the D.C. Circuit, as I understand it, wasn't simply concerned with the fact that -- well, you know, it wasn't fair, they should have had an opportunity on the Services side to be able to respond to this structure, which came out in the majority determination for the first time -- I know you differ and you say that Google already presented it, so I understand your point would be somewhat different than mine -- but so the argument goes that this was presented for the first time.

So to go back to what the Judges said before they had an opportunity to get a response from the Services, doesn't that make what the Judges decided a determination based on an incomplete record, so that they needed to create a -- an entirety of the record, having both sides have an opportunity to weigh in?

Is there a bit of the thumb on the scale to say, well, whatever the Judges decided when they didn't have an opportunity to hear from the Services or the Copyright Owners, for that matter, because you didn't present any evidence on this issue either because this wasn't even your proposal, right, this

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greater-of structure?

So why would the Judges have any kind of a presumption that this is correct based on the evidence, when Services didn't weigh in and, as I add, you didn't have anything to say about this because you didn't even propose it?

MR. SEMEL: Well, so -- I think I hear what you're saying. And speaking to whether or not the final determination is -- I guess I'm wondering what standard -- maybe I should step back.

When I say that the Board, I think, is starting with its reasoning in the final determination, I mean that those are reasons that were set forth by the Board in a published determination. And those are findings. Those are holdings of the Board, and I don't think can be disregarded. And so that's what I mean by saying it is a starting point.

To your point of what Johnson is saying is that the Services didn't have their opportunity. And so the record is not complete. I agree. That's what this remand was for, right? And they got that opportunity.

I don't think you are throwing out the final determination and starting from scratch. I think

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what you are doing is you are taking the final determination and you are building on it. And this is, again, I am coming back to, this is the gating question, right?

Had the Services come in with something that when combined with the record that led to the final determination took Your Honors to a different place, okay, now we have to deal with that. But they didn't do that. They didn't put in any evidence that undermines in any way, shape, or form the majority's -- you know, the determination in the -- the final determination's rate structure.

So I agree with you in the sense that I'm not saying that the final determination's rate structure is set in stone. I think it is subject to the evidence that is put in on the remand. But I also don't think -- it's not nothing. It is -- these are holdings of the Board that I don't think can be disregarded.

If they were, on a subsequent appeal, would be put right in the Board's face, right? I don't think the Board could disregard its findings in the final determination, make different findings without a different -- without having been -- without having been shown new evidence, in other words, any new

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findings on top of those would have to come from the new evidence.

I don't think the Board can go back now, change its interpretation in the final determination, not based on new evidence in this remand and not have a problem because that's the precedent of the final determination.

So I'm not saying it's -- it's -- it's impossible. I guess the point I'm saying is this is the gating question.

The Services would have had to cross that threshold and they haven't even really attempted to cross that threshold. So, you know, did that work? Did I answer the question?

JUDGE STRICKLER: Well, you answered a couple of times. I'm not going to ask you for another one.

MR. SEMEL: Well, if I'm getting it wrong, keep hitting me until I get it right.

JUDGE STRICKLER: Well, all I want you to do is express your -- you know, your understanding of the record and the argument and make the best argument you can make. And I don't want to press you beyond that, so please, let's go ahead.

MR. SEMEL: Okay. Fair. Thank you.

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All right. So let me go back. So we were talking about the, the framing of the remand, right, so I talked about the final determination and then Johnson and then the remand planned submissions and the remand order.

And, again, this to us is the way we have to frame this remand. And the evidence that was put in, and, again, when you look at the evidence that the Services put in on this remand, it all should be seen in the context of the fact that they were only allowed to put in evidence on the adoption of a rate structure that includes an uncapped TCC prong.

So either the evidence they put in relates to that or they improperly put in evidence on a topic that wasn't open for evidence on the remand.

So with that, I am going to move in to the three different issues that were remanded. And in the middle I am going to address Your Honor's working proposal and the additional materials orders.

I'm going to try to move quickly with them and let Your Honors interrupt, when you have a question, because I don't know really what is something that is something you have questions about.

Again, the benchmark was remanded for further explanation because they couldn't discern the

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basis. Again, not because the basis wasn't there, as, you know, the Board on appeal noted a couple reasons, a reason was noted in the final determination, and there are a number of reasons that we believe are implicit in the final determination.

But those specific threads weren't tied by the Board in Johnson's opinion. So here are reasons that we can walk through for rejection of the benchmarks. And we have got to group them by how they were sort of presented or not.

There's one that was explicit in the final determination, a failure to support with evidence. There are reasons that are implicit in the final determination, and explicit on appeal from the Board, and then there are others that we feel are clearly implicit in the final determination, even if not stated, and then even further those that are manifest in the record; all of which are open for Your Honors to reference in a further explanation of the rejection of the benchmark.

JUDGE STRICKLER: When you say the -- some of the reasons are implicit in the final determination, I don't see a cite to the record.

Can you tell me where in the final determination these implicit reasons are set forth?

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MR. SEMEL: Hopefully I have cites when we go through the slides on them. If not, I will get you cites. I know certainly I have some cites throughout these, when we get to details. I have slides below these, sorry, to be clear.

JUDGE STRICKLER: Let me ask you another question, going back to the -- well, that slide -- no, I guess it was the one before that, that further explained, where you have the quote from Johnson.

MR. SEMEL: This?

JUDGE STRICKLER: Yes, thank you. They end, the Panel ends by saying, "that issue was remanded to the Board for a reasoned analysis."

Let's say for argument's sake, purely for argument's sake, the Judges can't come up with another reason that they think is sufficient. They look at what you say is implicit, or we -- not they -- we say we throw up our hands and say: No, we don't see a reasoned analysis that supports throwing out the Phonorecords II benchmark.

That's a hypothetical. Assume that arguendo for the sake of the question.

Under your reading of the D.C. Circuit's decision in Johnson, then what becomes of the use or non-use of the Phonorecords II benchmark?

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MR. SEMEL: Well, if you look at Your Honor's general treatment of benchmarks, and I will say, you know, this Panel probably addresses more benchmarks than anybody, you have to deal with lots of proposed benchmarks all the time.

And you have a variety of ways in which you deal with them. Sometimes they are used as a -- as a guidepost for, you know, a maximum or a minimum. Sometimes you look at them for one purpose or another. Sometimes you find them more compelling on one reason or another.

I will say -- and this is important to note -- that you will see in this, it was -- the basis on which the Board rejected the Phonorecords II rates, right, these are the Phonorecords II settlement rates. I was very surprised by Mr. Steinthal's presentation, because his entire presentation dealt with the Phonorecords II settlement as a rate structure benchmark.

But most of the Phonorecords II rate structure was, in fact, adopted by the Judges. This was the great -- the great conflict between us. We lost on that issue, right? We wanted a rate structure that was a per-play and a per-subscriber. They wanted a rate structure that was primarily

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revenue-based rate with back-stops. And that's basically what was put in place.

So on rate structure, the Phonorecords II was a substantial influence on the rate structure. That's not what Johnson was dealing with. This -- if we were to go back up, I don't want to give people slide dizziness, but this is under the rate level section, right?

The benchmark rejections were under the rate level section. They were not under the rate structure section. There was nothing about the Johnson remand that addresses the Judges to look at the rejection of the Phonorecords II settlement as a rate structure benchmark, primarily because it wasn't really rejected as a rate structure benchmark. It was used in a lot of ways as a benchmark on rate structure.

So this just gets at rates. And -- yeah.

JUDGE STRICKLER: Okay. Thank you.

MR. SEMEL: Does that work? Okay.

So looking at specific evidence, so we start with the explicit reason. And I note there was a lot of discussion that has been on sort of subjective intent, but in our mind the subjective -- the lack of evidence of intent was really just one aspect of a

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repeatedly discussed complete lack of evidence supporting the settlement in the hearing, right?

There were numerous times when Your Honors admonished the parties that they needed to put some evidence in relating to the terms, the rates and terms that they were putting into evidence, that they were proposing, rather. The final determination noted that they didn't.

Both the dissent and the majority decision discussed the fact that the Services based their case on a status quo argument, and further on this business model argument that they based their business models in reliance on, but sort of a status quo/reliance argument, and that those were categorically rejected by both the majority and dissent opinions.

So -- and the dissent even made a note, while the dissent -- obviously, Judge Strickler, you can correct me because you know better -- but our reading of the dissent is not that it was based upon the Phonorecords II settlement as a benchmark to be adopted, but, rather, that it was based on a broader record examination. And, that, in fact, it was found that support for the Section 115 rates would have to be found elsewhere, outside of simply this status quo

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of the prior rates.

So, you know, in our mind it was just a much broader lack of evidence. And that, again, lack of evidence alone is a reason to reject a benchmark. Now, this came to a question you asked earlier, who has the burden of proof here? Without question, the Services have the burden of proof here. That cannot be disputed.

Now, I do want to address a response to this might be: Well, there are sort of self-justifying market benchmarks, right? So sometimes we don't ask for further explanation of a benchmark if it is, you know, because it is a market benchmark that bakes in all of the aspects of the market. But this is quite clearly not a market benchmark.

And, you know, this was something that Your Honors addressed in Web V recently actually in another context, but if you look at the testimony, it was made clear that streaming in 2012, I think one of Your Honor's references earlier, was inconsequential. And Copyright Owners testified how the settlement was motivated not by a market great analysis, but by avoidance of litigation costs, the tremendous expense of the prior proceedings and just, you know, settling out the litigation.

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Even Google admitted that issues other than rate dominated it. So this was not a market settlement. Now, Your Honors dealt with this exactly in Web V. This was the exact reason why a benchmark was rejected in Web V, right?

Because settlement agreements, unlike voluntary agreements, are not free from the tradeoffs motivated by avoiding litigation costs. And that the Services, the party promoting the benchmark did not perform any analysis to disaggregate those tradeoffs.

That is exactly what happened in this case with Phonorecords II, right? The evidence is that it was motivated by avoiding litigation costs. The Services agreed that it was not rate-driven, and they put in no analysis whatsoever.

Personally, I don't see how it would not be arbitrary and capricious for the Board to adopt the Phonorecords II settlement given this holding in the last determination by the Board that you cannot adopt that without -- unless there is some attempt made to disaggregate the tradeoffs.

So it's not adequately informed. And, again, it is not adequately informed of a willing buyer/willing seller rate, but that doesn't matter in this context, right? In this context you are using

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it to try to get at a market rate. So the fact that we're under a different standard doesn't change this aspect of the adequacy of the benchmark.

It is not a market benchmark. And, again, further, this is something that the -- that everybody understood, that this is not a market benchmark, right? The Services' experts talk about that, if you want to get market rates, you do things that are not under the influence of the rate-setting body, that are not under compulsions to trade.

So, you know, the idea of the settlement as a -- the settlement is not a market benchmark. And not as a market benchmark, it really highlights the complete lack of evidence that the Services put in to support the benchmark.

And, again, in our mind, like this, as you see, as I walk through these benchmark issues, each one of these is a fatal flaw, right? Each one of these is, by itself, I believe, makes it -- makes it improper for the Board to adopt it. Together it is an overwhelming case for the inappropriateness of the benchmark. But this is just one of many that by itself makes this benchmark inappropriate to rely on.

Now, again, Your Honor, in -- Judge Strickler, in your dissent, you talked about other

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things around the Phonorecords II rates that you discussed and relied on, but that's not what was remanded here.

What was remanded here was simply a further explanation of the rejection of the Phonorecords II settlement as a benchmark for rates. And that, again, I think the evidence is overwhelming that it is an awful benchmark.

So we will get to the next reason, outdated. This was raised by Your Honor earlier. And you appropriately anticipated our objection. Yes, we believe it is wildly outdated.

The streaming business at the time of the 2012 settlement was insignificant. To respond to Mr. Steinthal's comments, he pointed to these signature pages on the Phonorecords II settlement. He pointed to Apple being on the page, and Amazon being on the page. Well, they were in the download business back then. They were not in the streaming business back then. And they would not get into the streaming business for a long time.

They were in the download business. So, you know, the idea that these -- and, you know, we have discussed that issue, but the -- at that time there were, you know, none of the diversified companies

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that entered the market and would not for years enter the market, and the notion that Mr. Steinthal has that, oh, people knew that eventually they would get into this phase, but that's not what this is about.

The point is that it was insignificant and they weren't in the space, so no one knew what their business models would be. No one knew what Amazon Prime Music was going to be in 2012. Nobody had the ability to foresee that event or to foresee the entire change that the diversified businesses would bring to this market.

So to say that, you know -- and also I will note, if you look at the signatories on that agreement, a lot of them never entered the 115 space. So it's not like you would look at those, that laundry list of signatories and say: Oh, I know these people are going to be entering the streaming market and they are going to be doing X, Y, Z, and I need to prepare for that years in advance.

That's not a retort to the outdatedness of the settlement. And another thing I will also note on the outdated point, you saw some slides by -- I believe it was slide 40 from the Services that Mr. Assmus presented, that talked about some outdated benchmarks that they talked about. And those

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benchmarks were from about five, six years ago, which they believe are outdated now because of that time frame.

They argued in their paper, in their papers on the additional materials order, that benchmarks from 2017 are long outdated.

Well, this is from 2012, these benchmarks. Again, if that's the standard we're using -- now, we think they are outdated for a lot of other reasons beyond that. In fact, in 2017, these players were all in the market, and the market was much more developed. So we believe it is an even worse comparison to take now to 2017, versus 2017 to 2012, when, really, in 2012 you had no idea what would be coming.

Now, this is a slide from our opening statement five years ago tomorrow. Now, I'm going to postpone to a restricted section the next slides that show some of the growth in the metrics, but what you can see here is the development of the market after the Phono II.

Between Phono I and II, nothing happened, right? Yes, Spotify trials began, but as Mr. Steinthal noted, Spotify wasn't even a party to that settlement. Spotify wasn't even in the mix in the

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U.S. at that time.
They had started trials, but they weren't even collecting revenues and really making any market moves. It was only right at around after Phono II that Spotify even starred with an ad-supported plan, and no one else came in for years. So this is really a completely different market.
Now, we will see this in the restricted session, we will see this when we add the growth numbers on this, which are stunning, but even just looking at the entry, because I'll tell you, in my opinion, it's actually the diversification that is even more of a change than the growth.
I mean, the growth is a big change, and by itself would make the benchmark outdated, but it's the change in the business models that drive the market that make it a particularly inapt benchmark.
JUDGE STRICKLER: Which change in business models are you talking about or which changes?
MR. SEMEL: So the incredible growth in revenue displacement and the growth for diminution -- I mean -- so we have often made the difference between deferral and displacement. Both exist and both were there.
JUDGE STRICKLER: Wait. Let's back up a

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second. You said it's the change in the models, right, that made the difference.
MR. SEMEL: Right.
JUDGE STRICKLER: So what models -- which models are you talking about? I am not talking about displacement or deferral. I am asking which models. I am trying to find the detail behind your answer.
MR. SEMEL: Right. Sure. So Amazon Prime Music is a good example, right? That's a -- again, when you said model, I am not sure what you mean, but this is --
JUDGE STRICKLER: You're the one who used the phrase. You're the one who used the phrase, right? Why don't you tell me what you meant.
MR. SEMEL: Great. Thank you. So what I meant was a strategy, a business strategy for the market. Right?
JUDGE STRICKLER: Okay.
MR. SEMEL: So a difference in a model might be a pure place versus a diversified entity that is trying to make money by bundling or by displacing revenues into device sales or this and that. To me those are two different business models, so that's what I mean by the change in models.
And also there are more specific models.

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Again, like an Amazon Prime bundle or something like that that might not have been anticipated. And what I mean by that is a bundle with your own other products and services, right?
Maybe people saw a bundle that you might have with a different product or services, but, you know, bundles with other products and services of your own and this incredible incentive to displace and diminish your revenue base.
JUDGE STRICKLER: What about -- what about business strategies that try to attract listeners or subscribers who have a lower ability or willingness to pay, so they try to underprice on that basis to be able to get people who otherwise would not be listening to interactive music in the first place?
Would you describe that as a different business model?
MR. SEMEL: I would describe that as not just a business, different business model, but a business model that the Services have not yet adopted, because their discount plans are not aimed at low willingness-to-pay people. Their discount plans are aimed at high, lifetime-value consumers, right?
College students are going to make a lot

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more money in the future than 18- to 21-year olds who are not in college or senior citizens. And that's why they don't have senior citizen discounts, and they don't have discounts for 18- to 21-year-olds who are not in college. They have discounts for college students, not because they will pay less, but because they are going to make more in the future and they want to lock them into their ecosystem.
I don't want to get off on that tangent too much, but we obviously thought quite a lot about this at the hearing. We vehemently object to the idea that anything the Services are doing is aiming to get consumers that don't give them a lot of money in the future.
Their goal is to get them consumers that are going to give them a lot of money in the future, which is why college students get way more of a discount at Amazon than people who are on government benefits, although I think it's very hard to argue that people on government benefits have a higher willingness to pay than people who are enrolled in college.
So, anyway, we disagree on the fundamentals of the notion of willingness to pay as a motivator in this market, but -- but that's -- I don't want to go

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down that route at all. To Your Honor's point, that would probably be a different business model that you could put into play.

Certainly I think, you know, any different strategy for the market, you know, that would change the way you would want to have your royalties calculated would be -- sorry, I am being alerted that sometimes I knock my PowerPoint out -- that any change in a business model that would change how you would want to have your royalties calculated is an appropriate thing to look at as a reason why parties would not see an old deal as a deal they would want to do.

And I guess this brings me to a point that Chief Judge Barnett, you kind of pointed out during Mr. Steinthal's presentation, you know, we talk about outdated, you know, this deal was done in 2012, and, you know, Your Honor made the point, but it wasn't done in 2017.

And that is almost the most powerful point to make here, is that this deal was not done in 2017. The Services made clear that they were seeking the status quo. There was absolutely no doubt that regardless of the fact that they put in some posturing in their proposals, that they wanted to

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drop it, they made very clear they were seeking the status quo.

And the Services -- and the Copyright Owners were unwilling to do that deal. So the settlement they accomplished in 2012, they were unable to accomplish in 2017. That's an outdated benchmark. That's -- that's your evidence right there that that deal was not still working for Copyright Owners in 2017.

And the reasons why are all these things we're talking about, the market had changed so much, all these things had developed. It was now a very economically consequential market. All of these other things had happened.

So, all right, sorry, I will bring us back to the slides.

So rates too low. This was one of the explicit points that the Board made on appeal. And it is, I think, a pretty straightforward and unavoidable point.

The Board did make the point that rates need to go up. And that by its nature says that the old rates are not a good benchmark.

They are inconsistent with all of the reasons that the Board had for determining that the

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rates need to go up. And, again, this is only a remand to explain the rejection of the settlement as a benchmark for rates.

Rate structure is not at issue here. They won mostly on the rate structure. It's the rates that are at issue here. And so a determination that the rates are too low is kind of at the end of your benchmark that the old rates -- it is almost a direct contradiction of the old benchmarks.

JUDGE STRICKLER: I have a question for you, Mr. Semel.

MR. SEMEL: Absolutely.

JUDGE STRICKLER: On page 388 in this slide you cite to pages 384 to 388, I thought I saw, yes, 384 to 388, about what the Board found. And maybe you could help me out because there may be more than one place and I am missing it, but on page 388, the quote from the D.C. Circuit Panel is, "beginning with factor A, the Streaming Services argue that no substantial evidence supports the Board's conclusion."

I'm trying to find out where I was looking here a moment ago. I think it was in connection with that factor that they said the rates were too low, which is a point I think the Services made in their

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argument this morning.

Separate and apart from the D.C. Circuit saying that under factor A the rates are too low, is there another place where the D.C. Circuit says the rates were too low and needed to be increased?

MR. SEMEL: I'm not aware that there is different holdings beyond that holding on too low. We can look and see. But you are talking about Johnson or you are talking about the final determination?

JUDGE STRICKLER: Johnson.

MR. SEMEL: I'm --

JUDGE STRICKLER: It might be in 384 because you started there.

MR. SEMEL: Yeah, I think Johnson talks about it in the context of that, yeah. Again, although in our mind, the holding -- I guess -- I guess I'm not sure whether that changes the application to the benchmark. I think it still puts itself in conflict with the benchmark at the current rates, but, yeah, I am not aware of -- of Johnson referencing it in another place. Yeah.

And we actually talk about that, I think we put that in this context, I want to say in the next slide, yeah. So this is talking about it not being

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inconsistent with the 801(b) factors and now we're coming back to what Your Honor just talked about, right, so factor A, the Board held that the benchmark rates do not comport with factor A, and not just that they were too low, but they were a contributing factor in the decline in songwriter income.

And that decline led to fewer songwriters. So, again, a problem with these rates for them being used as a benchmark.

JUDGE STRICKLER: Well, how do you --

MR. SEMEL: This was affirmed.

JUDGE STRICKLER: How do you respond to -- it was affirmed. The Services' point this morning was, well, it was affirmed in the context of factor A, and the factors point in different directions.

So, you know, ceteris paribus, if factor A was all we had to go with, the rates were too low and needed to be increased, but their argument, regardless of what the merits of the argument may be, their argument is, well, that's not dispositive because that's a factor that adjusts whatever reasonable rate you found. And then you have to integrate factors B and C and D, if you even have a factor D argument that you are raising.

So how would you respond to that?

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MR. SEMEL: Absolutely. So I think that argument, and we actually talk about 801(b) later as well, that argument goes to the larger overall balancing of the factors, but here we're talking about the impact of the factors on the evaluation of the Phonorecords II settlement as a benchmark for rates.

So I agree with you that factor A is not the only factor and that in the larger picture of evaluating rates, structure and rates, those all factors are looked at. And we address all of the factors later.

But particularly here, a holding that the rates of the Phonorecords II settlement are too low is un -- that's not -- that's not counterbalanced by something like -- you know, if you say the benchmark might be good for this, it might be good for that, and it is bad for this, okay, it is still bad for this.

Like I don't -- I think that is still a flaw, a significant flaw in the benchmark. I don't think that -- you know, maybe this gets to a question you mentioned earlier of if we're only dealing with bad benchmarks or we're choosing only among bad benchmarks.

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First of all, I don't think that's the entire framing for this remand. I don't think we're going back to now choose between bad benchmarks.

That's what the final determination was about, was finding a path through that that worked.

But, again, first of all, there's nothing in their argument that factors B, C, and D are redeeming factor A for this benchmark. I guess maybe that's the best way to say it, right?

On the benchmark issue, factor A is a clear knock on -- clearly inconsistent with the Phonorecords II settlement rates. Factors B, C, and D don't help that. They don't redeem that.

If we look at factors B, and C, everybody said this is -- this is the Shapley, right, that's how that was dealt with on the record in that case.

There was -- both sides, both sides looked at it that way. Both sides addressed that. The Shapley-derived rates are factor B and C fulfilling. And everybody discussed that as being an appropriate way to analyze that.

And as part of factor D, they abandoned factor D. You noted that earlier. And we're going to get into that a little later, how they didn't just abandon factor D, they abandoned impact completely.

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So they have nothing to redeem the failure of the benchmark under factor A, maybe is the way to word it.

Again, this last point, we want to talk about is just we raised this earlier, is just the problem with the Phonorecords II settlement, given the framing of the -- of the original settlement as being non-precedential and the new rates to be established de novo, and the notion -- you know, their notion is, again, their -- they kind of admit, I think they do admit that they did not explain the benchmark. They were trying to argue that you don't need to explain benchmarks.

And that's the whole market benchmark issue that we addressed earlier. But, again, it seems inconsistent with the idea of an experimental deal that is supposed to be non-precedential and de novo that you're going to somehow slip in without any evidence as a benchmark that you don't have to explain, seems to me an end run around that.

And then, Your Honor, the register has dealt with this issue in a prior case, a long way back in the CARP case, but they did talk about it being arbitrary for the Judges to rely on something with non-precedential -- that had an indication that it

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was to be non-precedential and to ignore that indication and just take it as a benchmark, they felt, was arbitrary.

And we believe that there is an arbitrariness to that here as well, that the parties -- and, again, this dovetails, I think, with all of these arguments, right, that it is not a market benchmark, that there were tradeoffs on litigation. They haven't disaggregated those tradeouts.

It is outdated. The market has changed completely. The Copyright Owners were not willing to do this in 2017. And all of these reasons combined explained why this should have been dealt with de novo.

And to end run around all of that and sneak it in as a benchmark where we're -- to which they don't have to put any evidence in, again, we feel that's in conflict with the findings of the register in the past and the Board.

So let me --

JUDGE STRICKLER: You used the word there "precedent." And that was the word that was used by the register in this -- in this slide that you have.

But correct me if you disagree, but I don't think either my dissent or the argument that the

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Services are making now is that there is a legal precedent, that we have an obligation to continue legally to follow what we did before, the argument that they are making now after the remand is factually it is -- it is a good and sufficient benchmark.

And I understand the points you make about it being outdated, and it may have other value in there, so that could make it a really bad benchmark, but whether it's a good benchmark or a bad benchmark is a completely separate question, isn't it, from whether or not it is precedential or non-precedential? Precedent goes to law, not to fact.

MR. SEMEL: So I guess the -- the distinction I would try to make there, and the nuance I would try to add there is they are not supporting this benchmark with any evidence. Right?

In other words, they are trying to get the benchmark adopted. They didn't put any witnesses, they didn't discuss any of the rates, how they got -- what they are, what the reason behind them is. In other words, it is not like they built up this benchmark with an analysis of its reasonableness.

They are trying to get the benchmark adopted

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in toto in the absence of any evidence supporting it, simply as a "benchmark." And understanding that in market benchmarks, you can do that, right?

If you have a market benchmark that indicates that two parties in the market properly weighed everything, you can say sometimes that will bake in the kinds of nuances that you want, and you will take it.

But they didn't separately support this. But all of these issues that I have identified here are identifying problems with taking benchmarks in toto without supporting evidence.

So when you say they are not saying we're going to do that, they are saying we're taking it as a reasonable benchmark, but, no, they are not. They not making a case that it is a reasonable benchmark. They put no evidence in on this benchmark.

They are seeking to have it adopted in toto because of its existence. And that's what all of these issues are saying you can't -- is a problem, right? They didn't -- if they had put in a bunch of witnesses that laid out all of the reasonableness and the reasons why and the economic analysis and all of that to show why these rates and terms were appropriate, I agree with you, you would be dealing

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with a very different thing, and this argument wouldn't be what it is.

They would be saying: No, we built -- we showed the reasonableness of this. They didn't do any of that.

JUDGE STRICKLER: In that -- you made that argument or your appellant counsel made that argument before the D.C. Circuit. And on page 387, the D.C. Circuit goes to that issue and they say, "The Copyright Owners for their part attempted to defend the Board's rejection of the Phonorecords II settlement based on the lack of evidence of subjective intent."

And they go on to discuss your argument, not unlike the argument in substance the same as the argument you are making now.

And what's the D.C. Circuit's response to that argument? One word, a one-word sentence, "perhaps."

MR. SEMEL: Right.

JUDGE STRICKLER: So, in other words, it is a question. It may be, perhaps, that the fact that it works in the marketplace and everybody is making money and getting fat and happy -- well, not everybody, but enough people are getting fat and

happy on those rates is enough to show it is a good benchmark. Maybe not. Perhaps. That's what the word "perhaps" means, right?

MR. SEMEL: Well --

JUDGE STRICKLER: So that explanation which they describe as a post hoc explanation, that's what the Board had said before, cannot make up for the Board's failure to adequately explain itself. So here we are. The issue is now joined.

You are properly raising the point that this may be a really bad benchmark without the subjective intent with regard to other values, and that's an argument that needs to be evaluated. But the word "perhaps" is doing a lot of work there, saying perhaps it is the other way.

So we have to make a decision as to whether a benchmark in toto, to use your phrase, a benchmark in toto can be sufficient in that way or perhaps not. Perhaps it has to be done exactly the way you're presenting.

So the D.C. Circuit really hasn't spoken on the issue or the issue is joined, right?

MR. SEMEL: I agree with you, that the D.C. Circuit has not weighed in on that issue. And I -- I agree with you that the "perhaps" is saying that it



-- that that's not something you said in the determination, right? That's the first talk issue.

But, again, I guess the point I would make is that that does, in my mind, does not diminish the issue of something that was supposed to be explicitly non-precedential as being something that the register has found inappropriate to take in toto as a benchmark. I guess that's all I am saying.

JUDGE STRICKLER: Because --

MR. SEMEL: I agree with you this is for the Judges to reevaluate, but I still think this point here is a legitimate issue with regard to taking that as a benchmark.

JUDGE STRICKLER: Well, certainly there is a question of what weight, if any, to give it.

MR. SEMEL: Yes.

JUDGE STRICKLER: I don't think we're in dispute about that. But Section 115 specifically says that the Judges may consider settlement agreements as benchmarks. That doesn't mean you must. It doesn't mean you have to give them any weight or a certain amount of weight, but certainly they are benchmarks, punitive benchmarks, shall we say, they are not disqualified as benchmarks unless we find that they have no weight and then they are



tantamount to being disqualified.

MR. SEMEL: I agree with you that I don't think anything per se is disqualified as a benchmark. Everything has to be evaluated on its merits, although I would say that a settlement agreement for which they have provided no evidence for the disaggregating the tradeoffs for litigations by your own holding is not something that could be adopted as a benchmark.

Because that has an infirmity that Your Honors just identified in Web V as being something that makes it unreliable as a benchmark. But I think we're in agreement in general that this issue is something to be addressed.

And I have hopefully laid out here the many infirmities that we see with it.

With that, I am ready to move on to another section, but I want to give you any opportunities to raise issues or questions that I may not have gotten to with regard to the benchmark. No? Okay. Thanks.

So the next issue that we have teed up is the issue for which evidence was allowed into the record, the expansion of the uncapped TCC prong.

Again, I have reverted to the uncapped usage, have gone back on my own principle.



And we start with, as we try to start with all of these, the scope of this issue on remand. Again, it was a procedural remand. We talked about this a bit at the beginning, that it was vacated for lack of notice.

And particularly it explicitly contemplates the Board reinstating the exact same rate structure, right?

JUDGE STRICKLER: Well, it contemplates that as a possibility, right?

MR. SEMEL: Exactly. That's what I mean. That's all I mean.

JUDGE STRICKLER: Well, that is pretty unremarkable, isn't it?

MR. SEMEL: I think -- I don't know that it is unremarkable, but for us, I think it's an important point to make.

JUDGE STRICKLER: Okay. So it also contemplates rejecting it completely as well, right, possibly, depending on what we do?

MR. SEMEL: Yeah, I don't -- right, I think it leaves open that, although I think the point I am making is that it is not -- we have made this point in our papers as well, it's not unusual for courts to reinstate their rulings.

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And, in fact, in this case there is nothing about Johnson that implied that that would be wrong.

The Services have often tried to imply a number of holdings that Johnson said something, I believe Mr. Steinthal said that Johnson implied that the Phonorecords II benchmark was -- was not a -- was it -- well, I think it was some implication that Johnson had impugned some of the Board's holdings when it didn't.

And so I wanted to make clear here that there is nothing that Johnson said that implies that this rate structure could not be put back in place.

And then I want to talk about the, what exactly the issue on remand is because I think it is important to frame it properly, because in our view it is a much narrower scope than it might be seen to be.

And, you know, it is not about the concept of an uncapped TCC or an uncapped TCC in principle because, again, all of the Services that proposed that, in fact, on this remand, every Service proposes an uncapped TCC for most of the service offerings.

So the principle, the concept of it, it's not economically unsound. It is rather a more practical question of impact.

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And this is something that we see in their papers. They -- that -- and Johnson got that. Johnson was aware that Google had proposed an uncapped TCC across the board, but went further to say that the lack of notice in that was that -- it was the uncapping across the board for all categories which was what was not known, because it was aware that everybody had proposed uncapped TCC prongs for something, even before and throughout the proceeding.

So -- again, right, this is going through somewhat what I'm saying, every proposal has included those, and the Services in our mind have to reconcile how a rate structure could be, by definition, unreasonable for some offerings while perfectly reasonable for other offerings, which on its face would be arbitrary and capricious and require some sort of explanation.

And the Services have offered an argument on this. And -- which is impact and disruption, right? That's the argument that they made on this and the only -- the only argument that they made on this, which is that certain less economically consequential offerings of uncapped TCC prongs, they have limited economic risks for these. That's why it would be reasonable and, in fact, in their mind, preferable to

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have uncapped TCC prongs for a number of offerings, and yet unreasonable to have them for other offerings.

So we've framed this now. This is about impact, and this is about the impact of expanding the uncapped TCC prong to the additional offerings. That's the framing that we have for that.

And now I believe I'm about to go into restricted, but I want to stop for a second and I want to kind of jump into the restricted portion -- into two slides that are not restricted that are in the restricted portion. And I want to bring them up because I'd like to talk about them before we go into a restricted session because I think they're important and I think they really address some of the issues that we heard this morning from the Services.

So I am going to reshare, once I've skipped over the restricted slides. This had been a few slides later, but I want to jump ahead because I think it's important to discuss this.

On remand, the Services not just abandoned their appeal argument on disruption, they abandoned an argument of any impact whatsoever from these rates and from the TCC, uncapped TCC in particular, right? So every single one of them stipulated that they were

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not putting in evidence about impact.

Now, I think we can all agree that means we can assume there is no impact, because they cannot -- not put in evidence and still maintain a position that they have impact when we sought to get that evidence, they refused it, and they refused discovery on it and they didn't put in evidence.

So they have basically taken the position on this remand that there is no impact or no impact that they need to put any evidence in of the Phonorecords III rates or the uncapped TCC prong.

Now, let's talk about how different this is from what they argued on appeal. On appeal, they argued that, you know, this was what got them that remand, right? If you read Johnson, it's clear from Johnson that that -- that struck a cord. The runaway rates, the economic harm, the serious adverse consequences might effectively destroy them. They put in their brief to the D.C. Circuit that the injury to them is easily demonstrated. And they -- and they talked about the dissent's concern. They said they were -- this isn't about us. This is -- you know, Your Honor, you had talked about they needed -- Judge Strickler, there was a lack of notice. That was a point you made in your dissent,

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and that was a point that the D.C. Circuit agreed with you on, they had a lack of notice to show the impact of the uncapped TCC.

And that's what they sold the D.C. Circuit on. Judge Strickler said we didn't get an opportunity to show impact. We didn't get an opportunity to show impact. There's runaway rates. There's economic harm. It will be easily demonstrated.

Then what happened when they walked into the hearing? Or walked into the remand? No impact. Forget disruption, no impact. And, you know, when I say impact means it doesn't matter, right? If there's no impact, it doesn't matter.

I don't know -- I don't know what people -- how people define impact to be, but if people said to you: Well, there's going to be no impact from this, you can pretty much conclude that it doesn't matter, right?

So they're effectively saying these rates don't matter. The uncapped TCC prong doesn't matter. Or it certainly doesn't matter enough for us to put in evidence to make a case that it matters, which is such a -- a turnaround from what got this appeal and what frames this issue on remand.

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And to hear the way they -- they discussed the remand and discussed the issues in this morning is really remarkable.

So I -- with that, I think we probably need to go back and start into the restricted session. I've tried to lump everything together, so I hope it's not too disjointed. I actually took some slides out of the first section and some slides out of the last section and tried to jam all the restricted together, so we don't have to keep coming in and out. But we do have enough now that I think we -- we probably need to go into a restricted session.

CHIEF JUDGE BARNETT: What do you anticipate the length of the restricted session?

MR. SEMEL: Oh, it's -- it's a hard one. It could be long. I mean, you know, in this section, we're dealing with the sort of -- the additional materials orders and the working proposal and the uncapped TCC. I was -- the plan was to bring it back for the service revenue definition, to have that be not restricted, so it -- I think the questioning may determine a good bit of the length.

I'm much longer than I thought I would be at this point, but I would say it's probably going to be at least an hour or an hour and a half.

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CHIEF JUDGE BARNETT: In that case, I think this is a good time for us to take our afternoon recess. We haven't been back that long, but we -- before we launch into another hour, we will take our 15-minute recess.

Will the host please pause the public audio feed and close the virtual hearing room?

MR. REYES: Please standby.

The feed is off the record.

CHIEF JUDGE BARNETT: Thank you.

Counsel are reminded not to leave any mics open during the break.

And, Mr. Reyes, we will hear from you when we are out of the room.

MR. REYES: We still have a couple.

Okay. I think everyone that remains could be on.

CHIEF JUDGE BARNETT: Okay. Thank you.

Then we will be at recess for 15 minutes.

(A recess was taken at 3:41 p.m., after which the hearing resumed at 3:56 p.m.)

CHIEF JUDGE BARNETT: Mr. Reyes, I think you can go ahead and establish the public audio and notify us when all of the participants are -- have checked back into the hearing room.

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MR. REYES: Please standby.

We are back on-line. Out of 19 attendees, we only have so far 10. I'm not sure if these are the necessary ones.

THE CLERK: Mr. Johnson is not back yet.

MR. SEMEL: I think he is in -- this would be a restricted session, so he would not be allowed in this session.

CHIEF JUDGE BARNETT: We haven't -- we haven't announced it as restricted yet.

MR. SEMEL: Oh, apologies. Sorry.

CHIEF JUDGE BARNETT: But he -- so might have anticipated that. So would each of the participants let us know if one of your colleagues is missing? It looks like we're missing some folks.

Thank you for the message from Mayer Brown.

JUDGE STRICKLER: Judge Barnett, I have a visitor here, I don't think she can hear what's going on. Do I need to remove her from the premises or can she stay?

CHIEF JUDGE BARNETT: I -- I was just admiring your visitor. I think she should stay.

JUDGE STRICKLER: Okay. If she walks across the keyboard again, she's out of here.

CHIEF JUDGE BARNETT: She looks like a

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civet. Do you know the -- the wild cat called a civet?

JUDGE STRICKLER: Yes, I do. She does resemble them.

CHIEF JUDGE BARNETT: Some -- some stripes and some dots.

JUDGE STRICKLER: Yeah.

THE CLERK: I think we have everybody that we're expecting.

CHIEF JUDGE BARNETT: Okay, great.

We are back from our recess. And I want to just confirm with Mr. Steinthal, you have nothing further in open session; is that correct? I mean, for now?

MR. SEMEL: Is that Mr. Semel, you mean? Yes, me, sorry.

CHIEF JUDGE BARNETT: Steinthal? Oh, Semel. I'm sorry. I'm --

MR. SEMEL: No, I'm ready to go right into restricted material now, yes.

CHIEF JUDGE BARNETT: Okay, thank you. Mr. Steinthal box is right next to yours. I apologize. I just read that right automatically.

Okay. So now that we're back on-line, we will go into restricted session, which means all

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attendees not permitted in a restricted session will be excluded temporarily from the webinar. We estimate this restricted session might go as much as an hour.

So will the host please cut the public audio feed and close the virtual hearing room.

MR. REYES: Please standby.

(Whereupon, the hearing proceeded in confidential session.)

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O P E N S E S S I O N

MR. REYES: The feed is live.

CHIEF JUDGE BARNETT: Thank you.

So, Mr. Semel, to your question, I -- I personally would like to have your argument on the service revenue definition. I know that Judge Strickler and you could probably have an economic debate that would last well into the night, but it's one of the three issues and I'd like to have your argument on that issue, and then we can see where we are.

JUDGE STRICKLER: Save us from ourselves, Judge Barnett. Thank you.

CHIEF JUDGE BARNETT: Pardon me?

JUDGE STRICKLER: Save us from ourselves.

CHIEF JUDGE BARNETT: I'm doing the best I can.

Mr. Semel?

MR. SEMEL: Absolutely, Your Honor. I will -- and I will try to deal with it as quickly as I can so that we can go back and address some of the points that we left.

So the service revenue definition. You know, remarkably absent from, we felt, the Services' presentation was any discussion of new agency action

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or dealing with things afresh, which is what we think this is really about.

Johnson sent back with two options: Further explain the reasoning at the time or deal with it afresh on remand, which is what new agency action is.

And, you know, we have historically looked at the procedural question first and then the definitional and kind of the briefing and the Services, but I think it's a -- it's good idea to look at the definitional question first, because I think it highlights something that I think, Judge Strickler, you got out, which is, ultimately, the Services are advocating to get it wrong. That's ultimately what their -- their proposal winds up to be. And they're advocating to get wrong to force this on go back on a second remand on substantive grounds to deal with it on substantive grounds. That and is not at all what the case law says and it makes no sense.

And I think we see that when we start with the definitional question. And, again, you know, the -- you know, it's clear that this is an issue. The -- the service revenue is a definitional issue. Even Spotify called it a loophole. I mean, it's almost a joke, this definition, right? Nobody has proposed it

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on Phono IV. Not even Amazon dares to propose it, even though Phono IV is like a war on language in the definition sections. Nobody has even dared to propose this definition because it's a joke in terms of reasonableness. And they all know it.

And so, you know -- and the economic indeterminacy problem is in error. There's no free market deals that ever have used this definition. Nobody ever agreed to this definition in the market.

And so, you know -- and so, you know, it's -- the weight of the definition is clearly on the definition -- on the definition that the Judges put in place saying it was reasonable.

JUDGE STRICKLER: A question for you, Mr. Semel. I went back and checked because I wasn't sure. The definition of a bundled service revenue that was in the initial determination was the same exact definition that was in Phonorecords II and I'm going to go out on a limb and assume Phonorecords I as well, although I didn't check for that.

Do you agree with me with regards to Phonorecords II?

MR. SEMEL: I do.

JUDGE STRICKLER: It's the same one?

MR. SEMEL: Yes.

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JUDGE STRICKLER: So, I mean, you could argue that that was a settlement. You could argue that that was a compromise, but it's hard to say that market participants didn't agree to it because then NMPA agreed with it in its negotiation with DiMA to be able to set a settlement rate for Phonorecords II. However you might qualify the market-based aspect of that, it existed in a transaction between two participants.

So to call it a joke sounds like the laugh is on your client.

MR. SEMEL: Again, I -- look, I do not dispute that it was agreed to. But, again, it was agreed to at a time when no one had any idea what the market was going to look like, right? It was -- when I say it's a joke I mean it's a joke at the time of Phonorecords III, right? At the time it was implemented, no -- there was no market. No one had any idea.

And -- and I agree with you, market participants agreed to it, but, again, there were no free market deals. We talked about this earlier in the benchmark context. These -- this was an economically insignificant market. And we had a serious litigation that we were settling that was

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driven largely by litigation tradeoffs and issues.

And so I don't dispute with you, market participants agreed to this. It was in the settlement. I agree with that. And in that sense, I don't think you could say in 2012 that it was a joke, but I do think you could say later when it became clear how it was being used in the market and abused in the market, at that point I think you can say it was a joke.

But I -- I don't want to use my disparaging language. I think you can just say it's an extremely unreasonable definition. How about that?

JUDGE STRICKLER: It's -- it's mildly humorous, you think?

MR. SEMEL: Okay. That's right. Well, no, I think it's extremely unreasonable. I don't -- I don't think there's any mild about the problems with it, but your point is taken.

And, again, Your Honors ruled on this in -- you know, in a determination a while back. A party that relies on a bundle of values to support or oppose a rate should introduce competent and persuasive evidence of the separate values of the bundles. Now, they've admitted they haven't done that. They've admitted in this case they have not

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made any attempt to address the economic indeterminacy question. Right?

And Copyright Owners put in substantial record evidence -- I'm not going to go through it because it would be restricted, they were in our brief -- but substantial evidence showing the proposal to be reasonable and not just their -- our -- the new definition to be reasonable but the old definition to be unreasonable. Lots of evidence on that.

So at the end of the day, we do have a definition that, you know, we can say we -- you took it theoretically earlier, assume that the -- the definition put in place, the final determination is the reasonable one. I think we can say it is definitively the more reasonable one. Now the Services are effectively arguing -- when you get to the procedure, they're arguing for you to get it wrong.

They're trying to explain to you why you have to get it wrong, which then means we would have to take it back down on -- on appeal. Again, Your Honors said it was unreasonable. On appeal, your brief on appeal, the Board's brief, said that it was -- allowed the Services to unfairly manipulate

revenue. How is that going to be defended by the Board on a subsequent appeal?

What they seem to be saying is that the Board needs to knowingly let this go up wrong, in which case, presumably, if we were to appeal it, the Board wouldn't even defend it on appeal because the -- the Board is saying we don't even want this definition in place; we have to put this definition in place because of some handcuffing. We don't actually think -- we -- if we were to appeal the substance of the definition, the Board presumably wouldn't even defend that, forcing it to come back down and then fix it.

That is not what -- that's not how this is supposed to work. The whole point of this is to get it right. And new agency action is to deal with it afresh and get it right.

So, firstly, I think I can skip over these. This is about how the -- the precursors for doing a new agency action have been met. There's no requirement to take new evidence. The appropriate procedures have been met. I don't think there's any dispute over this.

But new agency action is to deal with the problem afresh. You're not following the procedures



from the prior action. You're following the procedures from the current action, which is the remand procedure. And those have been met.

The post hoc framework, that whole thing is inapplicable now because now you have a new determination -- you're now -- you're not putting out a final determination now. You're putting out another initial determination. And that determination, obviously, does not have to show how it differed from some previous initial determination that was then superseded, which was then vacated.

JUDGE STRICKLER: Mr. Semel, I want to address your -- your point about the Judges would have to accept a result that they know is wrong. Let's say, for argument sake, we get a motion for rehearing in the ordinary course, and it's styled as a motion for rehearing, and it's very compelling and it's clear that it should be granted.

But instead of being filed within the -- what do our -- our regulations say, 15 days, I believe, after the determination, it's filed 45 days after the determination. We would probably reject it as out of time even though it would be -- if we read it, we'd say, wow, this is really correct. Boy, did we screw this up. Or, gee, was this screwed up or



overlooked.

So there's times when courts, judicial authorities, or administrative judicial authorities have to say rules are rules, and if somebody doesn't adhere to the rules, we have to stick with what we got under the rules.

So it's not unjust in the sense that sometimes procedure has to control. It's a -- it's sometimes a rather delicate question. And sometimes it's a rather bright-line question.

So your statement really seems like an exaggeration that we would have to accept something that was in error. It could well be that we're just accepting something because procedurally it was not appropriate.

MR. SEMEL: Well, I mean, the distinction I would make with the hypothetical you had is there is a particular illogicality and lack of judicial economy in this scenario.

In your scenario the party would presumably be barred on appeal from raising, you know, whatever issue they wanted to have for rehearing, and therefore they wouldn't have a challenge to the determination.

But in this scenario, the proposal is that



Your Honors put out a determination with a known, unreasonable component with it, which you, yourselves, know is unreasonable, which would then be subject to a reversal because it's known to be unreasonable.

I mean, how could it not be reversed? You say it is unreasonable. You argued on appeal it is unreasonable. You're going to now put it in a determination. We, of course, can now appeal that, right?

We're not precluded from appealing -- the fact that like in order -- the definition that went in the last one was in our favor. Of course, we're not going to appeal that. That was our definition.

If the other definition goes in, then, of course, we can appeal that in the same way they appealed this one. So there is a certain futility to the proposal that they are -- that they are proposing.

But more so, that's just not what the law says new agency action is. New agency action is to deal with a problem afresh. You know, they constantly talk about the "too late in the game." Too late in the game and afresh, if you are interpreting "afresh" to mean "too late in the game,"

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well, those are two different things.
New agency action is about dealing with it afresh. You're not limited to coming up with reasons why it had to be dealt with before.
And none of the cases they cite say anything remotely like that. There is absolutely no precedent for this idea that you are supposed to get it wrong.
Rather, what the courts repeatedly say is that on this remand, you need to get it right. You need to -- it needs to be consistent with the record, consistent with precedent, following appropriate procedures.
That's about getting it right. So the new agency action says: Go back on new agency action, and, agency, get it right. What the Services are saying is: Oh, go back under and get it wrong, send it back up so that we can send it back down again, and then it can go back another time and you can get it right that time because nobody -- nobody could dispute that if it is a known, unreasonable definition, it would have to come back down again, and that you would have to reverse it. Like it would have to come back on a second remand. And then it could definitely get picked.
All right. So moving ahead, I do want to

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discuss -- and if you have questions about the new agency action, what it means, please let me know. We think it is very clear that new agency action just means deal with the definition afresh.
Again, it was the definition that was vacated, not the procedure for reaching the definition. The definition itself was vacated, which means you have to put a new definition back in place.
How are you going to do that? The wrong definition cannot -- is not what the law is saying, that we remand this to you, the agency, vacate the definition, and direct you to put the wrong one back in place. No law says that. No courts would set up that procedure. It is completely backwards.
So we think -- again, I am going to move on because I do think -- I would like to talk, because I think there is some interesting aspects of this, what we can talk about in the route of further explanation, but what Your Honor raised in a number of ways about talking about what happens in this period between initial and final determination.
And I think it is valuable to talk about because Your Honors have consistently through your practice over the years done what was done in this case, right, in SDARS, SDARS II, Web IV, you take

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motions, you don't grant rehearing, but you make changes to the determination to fix things.
It is a tried and true practice at the CRB. And it is pursuant to a reg you changed in 2006. Before 2006, your reg said that upon receiving a rehearing motion, you had to either deny it or hold a rehearing.
Now, you changed your regs, the Judges changed their regs in 2006 so that now it just says: Upon receiving a motion for rehearing, you will issue an appropriate order. Right?
It gives you much more discretion to deal with what you have to deal with. You're not going to get every single period right in your initial determination. And not just periods. You're not going to get every single term right. There are going to be little things that have to be changed.
SDARS changed the revenue definition in exactly this procedure. And so, you know, I think that, you know, if you look at the statute as well, if you look at -- let's look at (c)(4), for example, (c)(4) is the continuing jurisdiction.
That talks about how you can -- you can correct technical or clerical errors, but also modify terms. And then it says, such amendments shall be

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set forth in a written addendum, et cetera, that shall be published in the Federal Register.
Well, that doesn't apply to something that happens before the final determination comes out, because the final determination hasn't been published in the Federal Register. If you have a change before the final determination comes out, that's going to get folded into the final determination.
So my point is that (c)(4) deals with continuing jurisdiction. I don't think you're even in continuing jurisdiction in between the initial and the final determinations. You're in your core primary jurisdiction.
This is the period where Your Honors need to get it right, and your goal is to get it right. You have your plenary authority under 801(c) to make any necessary procedural or evidentiary rules to get it right. And you are not -- you don't have anything published in the Federal Register. You're not in your continuing jurisdiction.
You're in your core jurisdiction. And I think you are absolutely within your plenary authority to do what you need to do to get it right during that period.
Now, yes, there is a proceeding -- there is

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a paragraph that talks about you do a rehearing and you have to file it within a certain number of days, and then these other issues.

Now, I will also say I think that standard is easily met. I do think that Your Honors, if you look again at the exceptional cases standard, I think even under your standard, you realize it is discretionary.

I will note you can also look at Octane Fitness, Supreme Court, Sotomayor in 2014, they made clear those specific words, exceptional cases, that just means discretion. You have no higher standard than that for exceptional cases.

It just means stands out from the pack, right? So Your Honors, I guess the thing I want to say is don't do it this way through further explanation. You're in a new agency action. Just do this right through a new agency action. That would be our -- that is our proposal.

But I also think Your Honors can plant a flag in the ground and Your Honors should be confident and clear you have got a lot of jurisdiction in here. This is your core jurisdiction.

Nobody should be -- you should not be

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getting it wrong because of some feeling that there is a procedural problem or if there is a concern, I would ask the register for comment on this because I think it is -- the arguments the Services are making are very troubling. They are very troubling arguments.

They are basically trying to sell you on the idea that you're supposed to get this wrong and that that's what the D.C. Circuit is telling you to do. And that's absolutely not, I think, how this plays out under any scenario, whether under new agency action or under your original jurisdiction.

So my pitch would be do this under new agency action, but also don't be -- be confident to get it right in your own core jurisdiction up until your final determination.

JUDGE STRICKLER: Mr. Semel, there was the opportunity, right, for Copyright Owners to say before the initial determination this definition stinks, this is a bad definition, take a look at what you did in Web V, take a look at what -- well, Web V wasn't in existence. Take a look at what you did in SDARS 3. There's a better way to do this. Here is the way to do it.

You could have done that. Nobody was

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stopping you from doing that. But whether it is through intention, as a matter of strategy, as Ms. Pope suggested, or overlooking it, you didn't put it in there.

And you are asking us to say: Well, okay, you get another proverbial bite of the apple, try it on appeal.

MR. SEMEL: So, if I may, I had a closing slide on this definition. It is outrageous to say that we didn't object to that. I had a slide in my closing on this definition.

It is like we objected up and down to this definition. The notion that we had to put in a rate proposal with an alternative definition makes no sense. You put in one rate proposal. Our rate proposal was for a per-subscriber rate and a per-play rate.

We're not going to have a definition for service revenue in that rate proposal. And nothing in Your Honors' procedural practice or history implies that to contest something, you need to put an alternative to it, a direct alternative to that definition that takes into account the rate structure that you object to in order to object to it.

Like, that just makes no sense. How could

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we have objected to this? We didn't have a revenue definition in our rate proposal. I mean, don't get me wrong, I'm sorry, we did object to it. How would we have objected to it through a rate proposal?

We objected to it by objecting to it. Like we put it on the record. And I had a slide in my closing, we talked about how outrageous the definition was. We talked about it at length.

Like, if there is an appeal, there is no problem for us to show our preservation of an objection to this through hearing and remand. We have an incredibly strong record of our objecting to this term.

The Services are trying to say that those objections mean nothing if we didn't codify them in a rate proposal, but that's just not how anything works in the scenario. There's no rule that objections have to be codified in a rate proposal.

Like, our objection was this is a horrible definition. And you look at it with all the other horrible definitions, and you need to do this.

Okay. You didn't agree with us. We get that. But that's not a waiver of our argument. I mean, I don't know what more I could have done to talk about how bad this definition was during the

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case.
The idea that I had to put -- we had to put in a rate proposal that completely contradicted our rate -- anyway, I think I have said enough on that. But let me know if that didn't make sense or if I left anything on the table there.
CHIEF JUDGE BARNETT: Thank you, Mr. Semel, I think the table is quite full.
MR. SEMEL: Thank you. Thank you for your patience.
CHIEF JUDGE BARNETT: Thank you. Now we have, the Services have reserved 15 minutes for rebuttal --
MR. SEMEL: Oh, I'm sorry. I did want to, and, I mean, you have a right to cut me off. I do believe we're still sort of below time on the Services on this by a decent amount.
And I would like to at least have an opportunity to address some of Judge Strickler's comments. If you don't want me to, obviously you can cut me off, but I do want to say we are significantly below the time they had. And I did not get to get to everything.
CHIEF JUDGE BARNETT: Which is what you represented you would be but, nonetheless, if you

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have a specific issue you would like to address to Judge Strickler, or, Judge Strickler, if you have a specific issue you would like to have addressed, let's do it.
JUDGE STRICKLER: Well, the ball is in Mr. Semel's court. I have no further questions at this time.
MR. SEMEL: Yes. I think there is one thing in particular that I think I would like to talk about, which carries on from our conversation about effective competition, which is -- and it comes from just the last submission.
In the last submissions, Professor Marx cites in one of her footnotes to Vertical Merger Guidelines that the DOJ utilizes and talks about them as comparable. She talks about double marginalization, double markups is comparable to this complementary oligopoly problem, right, with these multiple markups. And she talks about how they are a key role.
What she does not note in there is that the FTC withdrew those guidelines. And the DOJ is now re-evaluating their subscription to those guidelines. The FTC withdrew them because it determined that this whole intuition, this whole construct that the

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Services are trying to sell about this complementary oligopoly theory is a particularly flawed economic theory with no basis for support in the law and market reality.
And it goes on, you know, she says they are comparable. And I think it is important to note the serious problems with assuming what she is saying and what all of their experts are saying with regard to this.
And, again, it talks about it is theoretically and factually misplaced. In particular I think what we want to focus on is it is very limited to specific factual scenarios.
And empirically you can be highly skeptical that you're going to be able to find those effects actually happening. So this is not to say that Cournot did not have a theory about complementary oligopoly. He did.
But what this is saying -- and, again, these are the same -- she is right in the fact that these are the same thing. Double marginalization is a very similar issue that you are talking about here.
And, in fact, when you talk about the 2012 FTC letter that people have talked about a number of times, that's on this issue, right? That was a

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merger. And it was an analysis of a merger. And it was addressing this issue of double marginalization or double markup.
JUDGE STRICKLER: Are you talking about -- can you go back to slide 75?
MR. SEMEL: Yeah.
JUDGE STRICKLER: This was her -- the FTC's Vertical Merger Guidelines that were withdrawn. When we talk about complementary oligopoly, we're talking about a form of double, as I understand it, a double marginalization that exists on the horizontal level; in other words, the complementary oligopoly is even worse than monopoly, so the theory goes, because each complementary oligopolist treats itself as an island of monopoly and doesn't look and see how its maximization of its margin impacts negatively the -- the maximization of the margin of a vertical competitor.
When Chair Khan removed the Vertical Merger Guidelines, she was talking, I think, and, again, this is a hard slide to analyze because there is not a full record on this here, but because it was vertical, I think she was talking about the double marginalization that -- that a supplier will try to avoid with regard to its downstream purchasers, who

distribute their product.
You don't want each level of the vertical chain to try to exert market power because that will dilute the upstream companies, in this case, the -- the record companies or the musical works owners from maximizing their own profits.
So I think we're -- we may, again, I am not sure here, it sounds like we're confusing horizontal double marginalization, which is Cournot's point, and vertical marginalization.
MR. SEMEL: So, I mean, I would just first call attention to the fact that Professor Marx is the one who is saying that these are comparable. But also, again, so this is the trick, right, horizontal is typically seen as a substitute, as a competitor to substitutes.
When you get into complementary, horizontal looks like vertical, right?
So vertical is the idea that you have multiple necessary things in a vertical path. Horizontal --
JUDGE STRICKLER: I don't understand that at all. I mean, when you have must-have products, they are complementary. And they are -- each one is essential, so it is essential and, therefore, anybody



has to have all of them, so each one is like a monopoly and it is impacting the others.
Now, if implicitly each one is able to figure out what the other one is going to do, they are able to successfully tacitly conclude, not illegally collude, and engage in conscious parallelism and they can set a nice monopoly price for themselves and avoid that double marginalization and then sell downstream at the monopoly price.
But it just seems like this doesn't take us anywhere in this case because we don't have enough background to know what Chair Khan was talking about with regard to the vertical merger and how that relates to what Professor Marx is talking about. And I don't know what Professor Marx meant.
I mean, I understand it is her quote, but I don't understand necessarily how the analogy works. And maybe it doesn't.
So in that case I know I had never put any particular stock in this point. So it is interesting as far as it goes. I just don't think it is going very far.
MR. SEMEL: I hear you, Your Honor. I think what I would point to is, again, this issue is explained in detail in this context by Professors



Spulber and Watt and Dr. Eisenach.
What I am pointing to is Professor Marx, again, she is the one noting that the double marginalization is comparable.
And, again, I do believe it is comparable. If you look -- if you review this, you will see that the issue is that you are talking about successive -- you're talking about the double markups. Again, when you're in a -- when you have complementary products, what you are talking about, this multiple markup, double markup, double marginalization, that's what makes it comparable to a vertical situation where you have multiple markups in a row.
The double marginalization is you get it in the complementary space because they are not substitutes. You need both of them. So you have two -- you have two people who can extract, right? In the vertical sense you have two people who can extract and in the complementary sense you have two people. We're not competing against each other but they are additive.
So, again, I don't want to say that this -- to me this is highlighting the issue. Again, she is the one who notes it is comparable. We have addressed the issue directly in the context of these



industries, in Professor Spulber and Watt's testimony.
And I just think this highlights it because, again, she is saying this is comparable. And we have the FTC is basically making the same arguments that Spulber, Watt, and Eisenach are making in this comparable scenario.
I just feel like it shines a spotlight. I don't believe that reading, you know, the Lina Khan and the majority's opinion in that. I would read Spulber, Watt, and Eisenach, but I just hope this gives you -- gives you more -- gives you more confidence in -- in taking those concerns seriously.
JUDGE STRICKLER: Thank you for that.
MR. SEMEL: With that, I guess I am not going to belabor the point. I know you talked about maybe wanting to talk about bargaining power, but if, Your Honor, you don't have any questions about the Nash issue any further, then I will rest.
JUDGE STRICKLER: I have nothing further.
MR. SEMEL: Thank you, Your Honor. Thank all of you.
CHIEF JUDGE BARNETT: Thank you, Mr. Semel.
Mr. Marks, are you going to be the Services' rebuttal spokesperson?

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MR. MARKS: Your Honor, I expect that more than one of us may speak, as we have been going between an hour and a half and two hours, may I ask for a short recess so that the Services can confer and make their remaining remarks as short and concise and work out an order?

CHIEF JUDGE BARNETT: Yes, we can have a ten-minute recess. I will ask the host to please pause the public audio feed and close the virtual hearing room for a ten-minute recess.

And, Mr. Marks, 15 minutes is the limit, regardless of how many people speak.

MR. MARKS: Understood, Your Honor.

CHIEF JUDGE BARNETT: Thank you.

MR. MARKS: Thanks.

MR. REYES: Please stand by, Your Honor.

The feed has been stopped.

CHIEF JUDGE BARNETT: Thank you. Recess for ten minutes.

(A recess was taken at 5:54 p.m., after which the hearing resumed at 6:04 p.m.)

CHIEF JUDGE BARNETT: I think we can begin the process of ending our brief recess. I will ask the host to please reestablish the public audio feed and notify the Judges when all participants have

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checked back in.

MR. REYES: Great. Standby. The feed is live.

CHIEF JUDGE BARNETT: Thank you.

MR. MARKS: Your Honor, Ben marks. I will go first. Should I be waiting for your queue?

CHIEF JUDGE BARNETT: Yes. We're waiting for Mr. Reyes to tell us that everyone is back.

MR. MARKS: I just wanted to make sure I wasn't wasting time.

MR. REYES: Your Honor, I believe we do have everyone.

CHIEF JUDGE BARNETT: Okay. Thank you. Mr. Marks?

MR. MARKS: Good evening, Your Honors.

Very briefly, I will lead off the presentation. We're going to follow the same sequence. And I am going to hit a few topics before passing the microphone.

The first is Mr. Semel's suggestion that somehow they didn't know that the Services were challenging the rate levels on remand is just -- could not be further from the truth. It is a frivolous position, frankly.

I have got right here from our proposal on

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the remand, and we will provide these slides as well, this comes straight out of our proposal for the remand, makes it clear that we were challenging the rate levels.

You will recall also that this was an issue that was litigated at the outset of the proceeding when the Copyright Owners moved for interim rates to be set at the same level as the final determination. We objected.

Your Honors already addressed the issue of whether the scope of the remand in Johnson was narrow or broad. Here you can see that we had argued it was not partial or narrow. It was broad.

Your Honors recognized that breadth, at least our position on the breadth of Johnson, in the order denying the motion to adopt interim rates. You can see here, again, at the very outset of this process, we made clear that Johnson was not a narrow remand and that the D.C. Circuit had identified foundational issues that went directly to the rates, and the unlikelihood that you could end up with the same rates following the remand.

So I think that should be a dead issue as far as we're concerned.

The next issue that I would like to address

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is Mr. Semel's repeated suggestion that there is no evidence in this record of market power or complementary oligopoly power of the labels. Again, that's just not consistent with reality.

There was expert testimony, both in the original proceeding and on remand about the labels' market power and the existence of a complementary oligopoly. There was fact testimony, both original and remand, from numerous witnesses. There were all of the agreements in evidence with anti-steering provisions and MFN provisions.

I will point you to the joint -- our joint proposed findings of fact and conclusions of law, sections 6A, 9B1, those are pages 83 to 86 and 126 to 29 from the original proceeding. And obviously it has been addressed at length in our papers on the remand, including in the additional materials order.

The next point I would like to make is he keeps saying that we have waived our arguments under factor D, disruption. Again, couldn't be further from the truth.

I point you -- we addressed disruption in our arguments about factor D in each of our four filings on remand, pages 29 to 30 of our April 1, '21 filing; pages 36 to 37 and 43, note 12 of our July

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2nd, '21 filing. And we will follow up with a letter so that you don't have to -- so there is no question about the page cites -- January 24 filing at page 19, and our February 24 filing at pages 26, 27.

So the notion that we somehow waived our arguments on disruption, again, couldn't be further from the truth. We will rest on what we put in the papers as to that point.

JUDGE STRICKLER: Just to illuminate on that, Mr. Marks, is it your position that you argued about the existence of disruption as it's specifically defined in our prior determinations under factor D or was it a different use of the word disruption or both?

MR. MARKS: We have made arguments that -- that -- that the disruption factor here is met as that has been discussed in prior determinations of the Board.

And, again, that's set forth in our papers and we will rest on that.

And -- and the final point I want to make is that Mr. Semel suggested that because there was a -- because the majority used a Shapley-inspired analysis that automatically satisfies factors B and C, and we have nothing to complain about. Again, that couldn't

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be further from the truth, because the Services did not get the income that those very Shapley analysis suggested that we should.

If the rates had been set in such a fashion that the Services would get 47 percent of their revenues as income, we wouldn't be complaining. We didn't get it. We're entitled to challenge it and he is just simply wrong.

With that, I will pass the microphone so that my colleagues have time for their presentations.

MR. ASSMUS: Thank you, Your Honors.

CHIEF JUDGE BARNETT: Thank you. Mr. Assmus?

MR. ASSMUS: Thank you. I just wanted to address one factual point that Judge Strickler asked me during the morning session. Judge Strickler, you asked whether the record contained information sufficient to determine 2017 rates for industry-wide that has a potential input into the working proposal.

The record, Your Honor, does not contain sufficient information to make that calculation. We have Spotify headline and effective rates from 2017, as well as headline rates for the other three remaining Services, but we don't have sufficient information to do an industry-wide number.

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Related to that point, Mr. Semel put up slide 43 of his presentation, which was purported to show rates for the Services from 2017 in comparison in this case to 2018. We did want to note for Your Honors that we did address why those calculations in Dr. Eisenach's report, they were drawn -- that figure was drawn from his report, why those calculations were incorrect.

We just wanted to give you the cite to that in our briefing. It was our February 24th briefing, Your Honors, at pages 20 to 22 of that February 24th brief that addressed Dr. Eisenach's calculations that were featured on slide 43.

And with that, I am going to turn it over to Mr. Steinthal. Thank you.

CHIEF JUDGE BARNETT: Thank you. Mr. Steinthal?

MR. STEINTHAL: Yes, I am going to do a 90-second drill on Phono II.

First, we did introduce witness testimony supporting our position in Phono II from Ms. Levine, Adam Parness and, of course, the cross-examination of Mr. Israelite, so there is that testimony.

That there was not a lot of time spent negotiating rate issues, you may recall the testimony

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that the focus was more on new rate categories and that was simply because everyone had lived with and was comfortable with the rate from the prior Phono I proceeding, and that had gone on for five years, and they were focused on broadening categories for the very emerging marketplace that folks were contemplating.

The fact that the publishers didn't know all the different revenue opportunities that would evolve doesn't diminish this particular benchmark when it provides for flexibility among service offering types and gives publishers upside revenue as the revenue for the industry grows while protecting them with floors, minima, and TCC protection on revenue deferral.

The notion that Johnson did not leave open the question of rate level as well as rate structure is nonsense. We showed this slide from the quotes from Johnson. And I read you from your footnote 13 in the January 2022 decision.

The notion that Johnson said rates -- that the rates were too low, Judge Strickler you pointed out at page 387 of Johnson that's not what happened.

And, finally, the notion that the Phono III -- the Phonorecords 2 benchmark is not a market

benchmark, why not? It is an agreement among almost every one of the market participants in the market to agree upon a set of rates and a rate structure. How is that not a market benchmark?

After today and all the uncertainties associated with Shapley modeling that have been aired, I would submit to you that the benchmark agreement seems the best way to go in this set of circumstances, either entirely or as support for the working proposal as adjusted in the manner the Services have proposed.

Thank you.

CHIEF JUDGE BARNETT: Thank you, Mr. Steinthal.

Ms. Pope?

MS. POPE: Good morning, Your Honors. I would like to make clear that while we believe that Your Honors cannot reach the merits of the service revenue definition, we do believe that the Phonorecords II rule is the better rule. And it is the rule -- and the only rule that is supported by the evidence.

And we collected the evidence that supports our position in our April and July 2021 briefs. And, in particular, I would point Your Honors to pages 68



to 76 of our April 2021 brief, our initial brief in the remand.

Mr. Semel made light of the idea that the Copyright Owners needed to put in a proposed rule on service revenue definition if they wanted Your Honors to adopt it. And I think that that is entirely wrong. They did need to put in a proposal. They didn't necessarily need to put it in in what they called their rate proposal, but they needed to give Your Honors a rule, an alternative, and support it with evidence if they wanted Your Honors to adopt it.

And one place and where they could have done this is in response to the famous loophole comment. So the famous loophole comment comes from a paragraph of Spotify's proposed findings of fact, where Spotify proposed a tweak to the service revenue definition for third-party bundles.

In response, the Copyright Owners could have offered a different alternative to Your Honors and given reasons for adopting such an alternative.

Instead, they threw the baby out with the bath water and made a litigation choice to say that these were reasons that the -- a revenue -based rate structure should be thrown out entirely and Your Honors should use a per-user or per-play rate



structure instead.

Finally, the argument that Mr. Semel made about plenary authority is entirely new and in any case foreclosed by Johnson because Johnson made clear that Your Honors need to ground the source of authority in the statute. Thank you.

CHIEF JUDGE BARNETT: Thank you, Ms. Pope.

Mr. Semel, would you like your five minutes of rebuttal?

MR. SEMEL: Hi, Your Honors. I don't think I am going to take much time. I do want to give Judge Strickler, I want to give you a cite for the effective rates evidence.

There is a substantial amount, it is not industry-wide, but it covers all of the Services and it is pretty detailed. It is Eisenach's Appendix C. And in his written rebuttal -- sorry, his rebuttal testimony, so the one from last year, the July testimony.

The whole Appendix C but, in particular, when you get to C-9, you will see, but you will see there is a whole bunch of charts back there that give you a good bit of detail on that.

JUDGE STRICKLER: You are saying that is his rebuttal testimony on remand?



MR. SEMEL: Correct, sorry, yeah, remand written rebuttal testimony, right. Thank you. I don't want to lose the acronyms.

JUDGE STRICKLER: Thank you.

MR. SEMEL: And then lastly with regard to what Ms. Pope just said on the discussion we had about authority and plenary authority, I would refer you to -- to the record in this case, our brief on December 13, 2018 to the register in the register's review for legal error in this case, we dealt extensively with this topic and these issues and the authority of the Board on that.

So I'm not going to get into the other little points that were made, so we will rest with that, if Your Honors have no questions.

CHIEF JUDGE BARNETT: Thank you, Mr. Semel.

I am not going to permit any questions at this hour.

Thank you all. This has been a very long day, and a very enlightening day for all of us. We never tire of the quality of the representation of the parties who appear before the Copyright Royalty Board and today is no exception. Thank you all.

We will now be adjourned for the day. I will ask the host to cut the audio feed and indicate

adjournment and to close the virtual hearing room. Thank you and good night.

MR. REYES: The feed has been stopped.

(Whereupon, at 6:17 p.m., the hearing concluded.)



C O N T E N T S

CONFIDENTIAL SESSIONS: 60-103, 223-298

AFTERNOON SESSION: 159



CERTIFICATE

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

3/7/22 Karen Brynteson
Date Signature of the Court Reporter

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