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

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

**SERVICES' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE, OR IN THE ALTERNATIVE TO SUBMIT SUPPLEMENTAL TESTIMONY CONCERNING, MR. BEBAWI'S IMPROPER REBUTTAL TESTIMONY AND EXHIBITS**

The Judges should strike the bulk of Antony Bebawi's "rebuttal" testimony about the "European digital music market" and the substance of Sony's recent licenses for interactive streaming in Europe. That testimony lacks any nexus to any Service's direct case. Instead, it is offered as further support on rebuttal for the Copyright Owners' own rate proposal. It is also irrelevant, because the Copyright Owners do not offer the kind of evidence the Judges have previously held would be necessary to find foreign licenses instructive for domestic rate-setting.

The Copyright Owners dispute this, but none of their arguments is persuasive. *First*, the Copyright Owners claim that Mr. Bebawi's general testimony about Europe and Sony's European licenses rebuts Amazon's James Duffett-Smith's testimony about his attempts to [redacted]. But that rebuttal appears only in the final two paragraphs of Mr. Bebawi's testimony – which the Services do not move to strike. The rest of Mr. Bebawi's purported rebuttal is untethered to Mr. Duffett-Smith's testimony. *Second*, the Copyright Owners argue that European licenses rebut Mr. Duffett-Smith's (supposed) testimony that [redacted]. But that alleged nexus

is far too abstract to justify citing new benchmarks on rebuttal. In any event, Mr. Duffett-Smith testified that [redacted]. Sony's [redacted] in countries where no compulsory license checks its market power confirms, rather than rebuts, this. *Third*, the Copyright Owners say Mr. Bebawi's testimony rebuts the Services' rate proposals. But his testimony about the need for alternative prongs is just an untimely attempt to bolster the Copyright Owners' own rate proposal, which includes significant rate increases and many alternative prongs. That is not rebuttal.

As for relevance, the Copyright Owners do not dispute that the Judges have found foreign licenses to be poor benchmarks, including because there are structural and regulatory differences between the U.S. and foreign markets. The Copyright Owners offer no evidence that the non-U.S. jurisdictions Mr. Bebawi references are similar to the U.S., and have resisted rebuttal discovery about their foreign licenses.[1] Further, the host of issues the Judges will need to assess to make comparability determinations (including analysis of foreign copyright law) cannot, as the Copyright Owners assert, be addressed on cross-examination of Mr. Bebawi. Rather, the Judges would need to admit affirmative fact and expert evidence.

The Copyright Owners objections to striking Mr. Bebawi's testimony lack merit. They claim that the testimony is permissible because they did not know before the Written Direct Statements what the Services' rate proposals would be. But Mr. Bebawi's testimony supports the Copyright Owners' direct case; it does not rebut the Services' proposals. Finally, the Copyright Owners ignore that Mr. Bebawi's improper testimony will derail this proceeding with

[1] The Copyright Owners' refusal is the subject of a separate motion to compel. *See* Amazon and Spotify's Mot. to Compel the Copyright Owners to Produce Documents About Their New Rebuttal Benchmarks (May 24, 2022). Granting this Motion will moot the related portions of that motion.

massive amounts of new discovery and mini-trials about foreign copyright law and musical-works licensing. That is why the Judges should strike his testimony. But if they do not, the Services seek leave to submit sur-rebuttal to balance the evidentiary record.

## I. MR. BEBAWI'S TESTIMONY ABOUT THE EUROPEAN MARKET AND SONY'S EUROPEAN LICENSES IS IMPROPER REBUTTAL

### A. Mr. Bebawi's Testimony Lacks A Nexus To the Services' Direct Cases

The Copyright Owners offer three ways in which Mr. Bebawi's testimony has a sufficient nexus to the Services' direct cases. Each lacks merit.

*First*, the Copyright Owners claim (at 5) that the Services "offer[ed] testimony and exhibits concerning [redacted]," pointing to testimony from Amazon's James Duffett-Smith. But the focus of Mr. Duffett-Smith's testimony – and the exhibits "[redacted]" that the Copyright Owners reference (*id.*) – was on the [redacted] that the parties were negotiating for the *U.S. market.* Mr. Duffett-Smith's testimony did *not* put at issue European rates or the market generally. Therefore, Mr. Duffett-Smith's "[redacted]" (*id.* at 2) could be relevant only if they affected "the parties' valuations of the [U.S.] license[ ] and [its] bundled components." *Web IV* Subpoena Order at 6 (Apr. 10, 2015). But as Mr. Duffett-Smith explained, and Mr. Bebawi agrees, those efforts failed: Sony [redacted]. *See* Duffett-Smith WDT ¶ 112; Bebawi WRT ¶ 32.

The structure of Mr. Bebawi's rebuttal statement also refutes the Copyright Owners' assertion that his general discussion of the European market and Sony's European licenses rebuts Mr. Duffett-Smith's testimony about [redacted]. The final section of Mr. Bebawi's rebuttal statement is entitled "James

Duffett-Smith's [redacted]." Bebawi WRT ¶¶ 31-32. And it is in these two paragraphs – which the Services did not move to strike – that Mr. Bebawi rebuts Mr. Duffett-Smith. The preceding paragraphs have no nexus to Mr. Duffett-Smith's testimony.

Separately, the Copyright Owners assert (at 2 & n.3) that Google and Spotify "presented as Exhibits [redacted]." That argument fails for similar reasons. Google's and Spotify's witnesses did not testify that the Judges should rely on the European rates or terms in those licenses in setting rates for the U.S. market. Instead, their witnesses, like Amazon's, testified about the U.S. rates and terms contained in those agreements.

*Second*, the Copyright Owners claim Mr. Bebawi rebuts Mr. Duffett-Smith's supposed testimony that, "[redacted]." Opp. at 6 (citing Duffett-Smith WDT ¶¶ 27-44). But that is not what Mr. Duffett-Smith said. Instead, he testified that it is the publishers' [redacted] Duffett-Smith WDT ¶ 44. Mr. Bebawi's testimony that in Europe, where there is no compulsory license, [redacted] in no way rebuts Mr. Duffett-Smith's testimony; it [redacted]. Besides, a point so general – essentially arguing that rates should decline – is far too abstract a nexus to justify citing a broad array of new foreign benchmarks on rebuttal. *See* Mot. at 7-8.

*Third*, the Copyright Owners assert (at 7) that Mr. Bebawi rebuts "the Services' arguments that their rate proposals satisfy the willing buyer / willing seller standard" by testifying about "the need for the type of robust alternative prongs that are eliminated in the Services' proposals." But the Copyright Owners' complaint is that the Service's rate proposals do not include prongs for which the Copyright Owners advocated in their Written Direct

Statement. Mr. Bebawi's testimony about Europe is just an untimely effort to provide additional support for their proposal, not a rebuttal of any Service's proposal.

### B. Mr. Bebawi Does Not Demonstrate A Sufficient Nexus To the Services' Direct Case

The Services do not contend that Mr. Bebawi's failure to identify the precise testimony that he is rebutting is dispositive. But it illustrates that his testimony is not tied to anything in the Services' direct cases. The Copyright Owners complain (at 7-8) that Mr. Bebawi could not view restricted testimony. But in the only portion of his testimony that constitutes proper rebuttal, Mr. Bebawi describes his understanding of what is contained in restricted portions of Mr. Duffett-Smith's testimony, which he then attempts to rebut. *See* Bebawi WRT ¶ 31. That kind of explicit linkage is notably absent from the rest of his testimony.

The Copyright Owners also assert (at 3, 8-9) that Mr. Bebawi's testimony resembles the rebuttal testimony of Robert Klein, Amazon's rebuttal expert in *Phonorecords III*, which they unsuccessfully moved to strike. *See* Opp. at 8-9. But there is a "principled distinction" between the two. *Id.* at 9. Mr. Klein conducted a survey to respond to the Copyright Owners' argument that "the value to the consumer of a play of a song, or of access to tens of millions of songs, is the same regardless of the business model by which the Digital Service makes its offering." Opp. Ex. 1, at 9. And Amazon's fact and expert witnesses also relied on Mr. Klein's data to rebut specific claims made by the Copyright Owners. *See id.* at 2-3. By contrast, Mr. Bebawi introduces new foreign benchmarks only to bolster the Copyright Owners' own rate proposal.[2]

[2] The Copyright Owners claim (at 9 n.9) that Mr. Bebawi's testimony is similar to "Amazon['s] . . . rebuttal testimony from Kretschman, who [the Copyright Owners claim] cites nothing in the COs' WDT but repeatedly cites to Amazon's direct." But Mr. Kretschman is a *Spotify* rebuttal witness. And he explicitly "respond[ed] to [the] Copyright Owners' representations [redacted]" by calculating "[redacted]," Kretschman WRT ¶ 2, which Spotify's expert

## II. EVIDENCE CONCERNING NON-U.S. RATES IS IRRELEVANT

Contrary to the Copyright Owners' claim (at 10), the Services did not argue that there is an "absolute bar to the admission of evidence of foreign rates in these proceedings." But the Services did show (Mot. at 10-11), and the Copyright Owners do not dispute, that the Judges have rejected foreign benchmarks. That is because structural and regulatory differences between jurisdictions affect the comparability of foreign licenses. Those differences further explain why Mr. Bebawi's testimony "stray[s] too far" from the Services' direct case, *Web IV* Order at 2 (Apr. 22, 2015), which focused exclusively on the U.S. interactive streaming market. The Copyright Owners do not address this argument.

The Services also showed (at 11) that Mr. Bebawi's testimony is irrelevant because the Copyright Owners offer no evidence that the foreign markets he cites are comparable to the U.S. market. The Copyright Owners' retort (at 9-10) that they "did not offer the European agreements as benchmarks" elevates a label over substance. The Copyright Owners are attempting to use these licenses to support the reasonableness of their proposed rate increases. If anything, the fact that "their experts do not cite to or use them in their analyses," Opp. at 10, only confirms why the Judges should strike Mr. Bebawi's testimony. As the Judges have stated, their decision will not rest "on a particular individual's perspective on the market as it applies to him or her" or on a "hand-picked[ ] segment of the market." *Phonorecords IV* Google Order[3] at 5. The Services identified (at 12) a host of issues the Judges will need to hear testimony about to put the rates and

then used to "respon[d] to Professor Watt's assumptions regarding publisher substitutability," Farrell WRT ¶ 45. That kind of nexus is absent from Mr. Bebawi's testimony.

[3] Order Granting in Part Google's Mot. to Compel Docs. and Info. from Copyright Owners (Apr. 28, 2022).

terms Mr. Bebawi cites into context. These issues require affirmative evidence and are not mere topics for "cross-examination" of Mr. Bebawi, as the Copyright Owners posit. Opp. at 11.

The Copyright Owners also argue (at 10-11) that the Judges rejected a similar argument in *Phonorecords III*. But that ruling is distinguishable. There, the Services filed an omnibus motion to strike, among other things, testimony offered by David Kokakis about rate structures for interactive streaming outside the U.S. After confirming that Mr. Kokakis's testimony was about the rate structure only, the Judges admitted his testimony "provisionally." *See Phonorecords III* Hr'g Tr. 3243:23-25, 3244:12-17 (Mar. 27, 2017). In a later ruling, the Judges held that they would "follow applicable rules of evidence and to apply the rules to all participants in this proceeding." *Phonorecords III* Order[4] at 4. And, in their Final Determination, the Judges did not cite UMPG's European licenses, confirming those deals had no relevance to setting the U.S. rates. Nothing in the *Phonorecords III* Order condones the Copyright Owners' belated attempt to introduce evidence about the European market generally and the rates in Europe.

## III. THE JUDGES SHOULD STRIKE MR. BEBAWI'S TESTIMONY

The Copyright Owners concede (at 14) that, if "the Judges do not believe Mr. Bebawi's testimony is rebuttal testimony . . . they can strike it." That is the appropriate remedy. Sur-rebuttal testimony will not cure the prejudice caused by the Copyright Owners' sandbagging.

The Copyright Owners deny (at 11-12) that their testimony comes too late, because they "could not possibly have known or addressed" the Services' rate proposals in their direct case. But the Copyright Owners' direct case both stressed their views on the need for [redacted]

[4] Order on Motions in Limine, Dkt. No. 16-CRB-0003-PR (2018-2022) (*Phonorecords III*) (July 24, 2017).

[redacted] – the core points Mr. Bebawi makes in his rebuttal. *See* Mot. at 9.

Nor does the fact that Mr. Bebawi cites Sony's agreements with the Services excuse the Copyright Owners' conduct. Their suggestion (at 13) that the Services could "have cited these agreements in their WDS" and then "tried in some way to distinguish them" only confirms that the Copyright Owners view these licenses as affirmative evidence. Had the Copyright Owners wanted to rely on Sony's (or any other publisher's) European licenses to support their rate proposal, they should have cited them in *their* Written Direct Testimony. But they did not, even though they could have. It is improper for them to do so only now in rebuttal.

The Copyright Owners also ignore that requiring the Services to now build a factual record about non-U.S. musical-works licenses would impose immense burdens, with trial only a few weeks away. It would require massive amounts of new discovery and testimony from new Service fact witnesses, and could even force the Services to amend their expert reports or serve new ones.[5] At trial, the Judges would need to determine whether foreign licenses are meaningful benchmarks and, if so, which ones, and what adjustments would be necessary.

Accordingly, striking Mr. Bebawi's testimony is the best remedy. But if the Judges allow it, sur-rebuttal is necessary to create a balanced evidentiary record. The Judges allowed similar supplementation in *Web IV*, finding it necessary to ensure "a comprehensive record" about

[5] Contrary to the Copyright Owners' suggestions (at 13), responding to Mr. Bebawi's testimony would require the Services to identify new witnesses, including witnesses to testify about the copyright regimes in ex-U.S. markets. And, while the Copyright Owners claim (at 11 n.10) there has been no "parade of horribles," even with "worldwide rates" already in participants' exhibits, that is because the Services did not offer any testimony about those non-U.S. rates.

purported benchmarks. *Web IV* Mot. to Strike Order[6] at 11. And a balanced evidentiary record would benefit the Judges, who otherwise would be left with a cherry-picked record based on a single publisher's agreements in a handful of non-U.S. jurisdictions.

## CONCLUSION

The Judges should grant the Services' Motion.

Dated: June 6, 2022

Respectfully submitted,

*/s/ Joseph R. Wetzel*
Joseph R. Wetzel (Cal. Bar No. 238008)
Andrew M. Gass (Cal. Bar No. 259694)
Brittany N. Lovejoy (Cal. Bar No. 286813)
LATHAM & WATKINS LLP
505 Montgomery Street
San Francisco, C.A. 94111
Tel.: (415) 391-0600
joe.wetzel@lw.com
andrew.gass@lw.com
brittany.lovejoy@lw.com

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

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

*Counsel for Spotify USA, Inc.*

*/s/ Joshua D. Branson*
Joshua D. Branson (D.C. Bar No. 981623)
Aaron M. Panner (D.C. Bar No. 453608)
Leslie V. Pope (D. C. Bar No. 1014920)
Scott Angstreich (D.C. Bar No. 471085)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
jbranson@kellogghansen.com
apanner@kellogghansen.com
lpope@kellogghansen.com
sangstreich@kellogghansen.com

*Counsel for Amazon.com Services LLC*

*/s/ Benjamin E. Marks*
Benjamin E. Marks (N.Y. Bar No. 2912921)
Todd Larson (N.Y. Bar No. 4358438)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel.: (212) 310-8000
benjamin.marks@weil.com
todd.larson@weil.com

*Counsel for Pandora Media, LLC*

[6] Order. Den. Licensee Services' Mot. to Strike, Dkt. No. 14-CRB-001-WR (2016-2020) (*Web IV*) (Apr. 2, 2015).

/s/ Ryan S. Benyamin
Gary R. Greenstein (DC Bar No. 455549)
WILSON SONSINI GOODRICH & ROSATI
1700 K Street, N.W., 5th Floor
Washington, DC 20006
Tel. (202) 973-8849
Fax: (202) 973-8899
ggreenstein@wsgr.com

Victor Jih (Cal. Bar No. 186515)
Lisa D. Zang (Cal. Bar No. 294493)
Ryan Benyamin (Cal. Bar No. 322594)
WILSON SONSINI GOODRICH & ROSATI
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071-2027
Tel.: (323) 210-2900
Fax: (866) 974-7329
vjih@wsgr.com
lzang@wsgr.com
rbenyamin@wsgr.com

Maura L. Rees (Cal. Bar No. 191698)
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304-1050
Tel.: (650) 493-9300
Fax: (866) 974-7329
mrees@wsgr.com

Jeremy Auster (NY Bar No. 5539101)
WILSON SONSINI GOODRICH & ROSATI
1301 Avenue of the Americas 40th Floor
New York, NY 10019-6022
Tel.: (212) 999-5800
Fax: (212) 999-5899
jauster@wsgr.com

*Attorneys for Google LLC*

/s/ Dale M. Cendali
Dale M. Cendali (N.Y. 1969070)
Claudia Ray (N.Y. 2576742)
Mary Mazzello (N.Y. 5022306)
Johannes Doerge (N.Y. 5819172)
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-6460
dale.cendali@kirkland.com
claudia.ray@kirkland.com
mary.mazzello@kirkland.com
johannes.doerge@kirkland.com

*Attorneys for Apple Inc.*

# Proof of Delivery

I hereby certify that on Monday, June 06, 2022, I provided a true and correct copy of the Services' Reply in Support of Their Motion to Strike, or in the Alternative to Submit Supplemental Testimony Concerning, Mr. Bebawi's Improper Rebuttal Testimony and Exhibits (PUBLIC) to the following:

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

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

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

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

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at joe.wetzel@lw.com

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

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

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

Signed: /s/ Joshua D Branson