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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: **DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III)**	**Docket No. 16-CRB-0003-PR (2018-2022) (Remand)**

SERVICES' JOINT RESPONSE TO COPYRIGHT OWNERS' SUBMISSION OF REGULATORY PROVISIONS

Pursuant to the Judges' July 27, 2022 Order (eCRB 27051), Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the "Services") respond to the Copyright Owners' Submission of Regulatory Provisions (eCRB 27011) ("Copyright Owners' Submission").

For the reasons set out in the Services' own Submission of Regulatory Provisions (eCRB 27005) ("Services' Submission") and those set out below, the Judges should adopt the Services' proposed regulations and reject the Copyright Owners'. *First*, even though the Initial Ruling (eCRB 27063) expressly adopted "the rates and rate structure of the PR II-based benchmark" (the Judges' phrase for the Services' proposed regulations) "[i]n all . . . respects" other than the headline rates, *see* Initial Ruling at 2, 56 & n.84, 113-114, the Copyright Owners base their proposal on the terms in the vacated *Phonorecords III* Final Determination (eCRB 3510). *Second*, despite having appealed the Judges' treatment of family and student plans, and lost, the Copyright Owners propose to eliminate that treatment from both the TCC caps and the mechanical-only floors. *Third*, the Copyright Owners chose not to appeal the Judges' elimination of per-subscriber minima for Paid Locker Services and Limited Offerings, yet now propose to reintroduce the minima into the

regulations. And *fourth*, the Copyright Owners propose—for the first time ever in this proceeding—to subject a limited subset of music service bundles to a different Service Provider Revenue rule from the one the Judges unanimously adopted.

I. The Copyright Owners' Proposed Regulations Start from the Wrong Place

Rather than working from the Services' remand proposal for rates and terms—the "*Phonorecords II*-based benchmark" that the Initial Ruling adopted (at 2, 56 & n.84, 113-114)—the Copyright Owners start with the terms from the vacated *Phonorecords III* Final Determination. *See* Copyright Owners' Submission, App. A at 2 n.1; *see also id.* App. B (providing a redline comparing their proposal to the vacated regulations). But the Initial Ruling adopted the Services' *Phonorecords II*-based benchmark, including its terms, except for the headline rates. Nothing in the Initial Ruling indicates that the starting point should be otherwise. The Judges should therefore reject the Copyright Owners' efforts to start with the vacated *Phonorecords III* Final Determination. The only course consistent with the Initial Ruling is to start with the regulations that the Services included as part of their rate proposal on remand, as the Services did. *See* Services' Submission at 2 & App. B.

It cannot be legitimately disputed that the Judges in the Initial Ruling adopted the "*Phonorecords II*-based benchmark" the Services proposed, subject to the Judges' adjustments in the headline rates. As used in the Initial Ruling, that phrase refers to the regulations the Services proposed in their April 1, 2021 remand submission (eCRB 23856): "the Services' proposed benchmark based on the *Phonorecords II* rates, rate structure, and terms (*hereinafter, PR II-based benchmark*)." Initial Ruling at 56 & n.84 (emphasis added). And the Judges found it was that "PR II-based benchmark"—when modified with the elevated headline rate—that "is more than sufficient to satisfy the legal requisites" in the Section 801(b) factors. *Id.* at 2-3 (summarizing the Judges' conclusion as to rate levels and rate structure); *id.* at 59 (concluding that the PR II-based

benchmark, with the elevated headline rate, satisfies the Section 801(b) factors); *id.* at 88 (same). At both the outset and conclusion of the Initial Ruling, the Judges reiterated that the "headline rate" would be the phased-in rates from the *Phonorecords III* Final Determination, but that, "[i]n all other respects, the rates and rate structure of the PR II-based benchmark"— that is, the Services' proposal—"shall be effective as the rates and structure throughout the *Phonorecords III* period." *Id.* at 2, 113-114. Indeed, the Judges' instruction that the parties "address" the "Copyright Owners' assertion that the Services omitted" certain aspects of the *Phonorecords II* terms from their proposal, *id.* at 114 n.164; Order at 1, was necessary precisely because the Initial Ruling adopts the Services' proposed regulations.

Despite all of this, the Copyright Owners have refused to use the PR II-based benchmark as a starting point. Instead, their proposed terms "largely track[ ] the regulations annexed to the original Final Determination." Copyright Owners' Submission, App. A at 2; *see also id.* at 18 ("This section maintains the general description of mechanical-only royalty floors used in Phonorecords I and II and the original Final Determination.").

The Copyright Owners thus have not "prepare[d] and submit[ted] regulatory provisions consistent with [the Initial Ruling]." Initial Ruling at 114. The Judges should instead start with the Services' proposal, which faithfully uses the rates and rate structure of the "Phonorecords II-based benchmark" the Services proposed during the remand proceeding while replacing the headline rates in the Services' remand proposal with the "all-in" headline rates set by the Judges in the Initial Ruling.

II. The Judges Should Reject the Copyright Owners' Latest Attempt to Eliminate Student- and Family-Plan Accommodations

The Copyright Owners once again try to eliminate welfare-enhancing accommodations for student and family plans. *See* Copyright Owners' Submission, App. A at 15, 18 & n.4. The Judges

initially adopted these accommodations—treating family plans as having 1.5 subscribers and student plans as having 0.5 subscribers—as part of the Final Determination. The Copyright Owners appealed that aspect of the ruling, but lost, with the D.C. Circuit concluding there was "no merit" to the "Copyright Owners' protest." *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 389 (D.C. Cir. 2020). Despite having lost the issue at every turn, the Copyright Owners now take a third bite at the apple. The Judges should again reject this effort.

First, *Johnson* forecloses the Copyright Owners' last-minute about-face. As the Judges emphasized, "*Johnson* affirmed" the Final Determination's "setting of . . . price discriminatory features, *e.g.*, the family and student plan provisions," over the Copyright Owners' objection. Initial Ruling at 74 (citing *Johnson*, 969 F.3d at 392-93). As a result, there was no reason for the Judges to revisit this issue as part of the remand—it had already been decided. Even if there were merit to either of the Copyright Owners' arguments (there is not), this issue was not even up for reconsideration at this stage of the litigation. *United States v. Kpodi*, 888 F.3d 486, 491 (D.C. Cir. 2018) (courts cannot "reconsider[] issues that have already been decided in the same case" (internal quotation marks omitted)).

Second, even if *Johnson* did not foreclose the Copyright Owners' position (it does), the Copyright Owners failed to object to the Services' proposed treatment of student and family plans *at all* during the remand proceeding. To the contrary, the Copyright Owners embraced it, proposing that the Judges readopt the *Phonorecords III* regulations, which *included* accommodations for student and family plans. Initial Ruling at 3. Yet all the Copyright Owners offer in support of this complete reversal in position are: (i) the incorrect assertion that the Initial Ruling "does not state that it is adopting student or family discounts"; and (ii) the unsupported claim that there would be "significant financial harm to copyright owners" from "combining such

discounts with removal of royalty protections and adoption of Phonorecords II-based terms." Copyright Owners' Submission, App. A at 18 n.4.

As to the first claim, the Copyright Owners are mistaken—the Initial Ruling intended to and did incorporate student- and family-plan accommodations. As explained above, the Initial Ruling adopts "the rates and rate structure of the PR II-based benchmark"—"the Services' proposed benchmark" in the remand proceeding"—"in all . . . respects," other than the headline rates. Initial Ruling at 2, 56 & n.84, 113-114. Indeed, in a footnote following the definition of the phrase "PR II-based benchmark," the Initial Ruling recognizes that the Services' proposal "update[s] the *Phonorecords II* terms to include terms . . . that were upheld in *Johnson . . . including terms relating to student and family plan products*." *Id.* at 56 n.84 (emphasis added).

The Copyright Owners' second argument not only lacks any evidentiary support, but also is exactly backwards. The Judges and the D.C. Circuit embraced the student- and family-plan accommodations because they promote welfare-enhancing price discrimination to the *benefit* of Copyright Owners (as well as the Services and consumers). *See*, *e.g.*, *id*. at 67-68 (explaining that by moving down the demand curve, more revenue and royalties are generated and noting that "the parties' otherwise dueling economists agreed on this point"); *id*. at 73-81 (summarizing the economic testimony regarding the many benefits of price discrimination, including as it relates to student and family plan plans); *Johnson*, 969 F.3d at 392-93 (upholding the Judges' conclusion that the "practice of 'marketing reduced rate subscriptions to families and students' was sensibly 'aimed at monetizing a segment of the market with a low [willingness to pay] (or ability to pay) that *might not otherwise subscribe at all*' to a streaming service" (emphasis added)). The Copyright Owners' much-too-late argument—presented after the close of the remand proceeding and only through the submission of proposed regulatory terms (and, at that, without any

evidentiary support)—is precisely the sort of objection to the Initial Ruling that the Judges' "admonish[ed]" the parties not to engage in. Initial Ruling at 114.

Third, asking the Judges to both ignore the D.C. Circuit's explicit directive regarding student- and family-plan accommodations, and embrace the Copyright Owners' eleventh-hour attempt to interject the issue into this remand proceeding, is not all the Copyright Owners now seek. Their proposed regulations are also structured so that, even if those accommodations were maintained, they would apply only to the "mechanical-only" floors, and not also to the per-subscriber TCC "caps." *Compare* Copyright Owners' Submission, App. A at 15, *with* Services' Submission, App. A at 10. Rather than attempt to explain why the treatment of student- and family-plan subscriber counts should differ from other per-subscriber rate prongs, the Copyright Owners try to sneak this through by drafting regulations based on the vacated *Phonorecords III* regulations (which did not include any per-subscriber TCC caps) instead of starting with the Services' remand proposal, as the Judges required. *See supra* Section I.

As the Services have explained, consistent application of the student- and family-plan accommodations to all per-subscriber rate prongs was part of the Services' remand proposal—the proposal the Judges adopted in the Initial Ruling, except for the headline rate. *See* Services' Submission at 2-3. Moreover, uniform treatment of subscriber counts for student and family plans is consistent with *Johnson* and the Judges' decisions throughout the Initial Ruling regarding the many benefits of price discrimination. *See Johnson*, 969 F.3d at 392-94; Initial Ruling at 65-70, 73-81, 90-91,109-113. These conclusions apply with the same force to per-subscriber TCC caps and to mechanical-only floors: both further welfare-enhancing price discrimination. The Copyright Owners, on the other hand, have offered nothing that suggests otherwise—they have

simply tried to sneak this change by the Judges without explanation. The Judges should reject this effort, as well as the Copyright Owners' belated attempt to override *Johnson*.

III. The Judges Should Reject the Copyright Owners' Proposal to Add Per-Subscriber Minima for Limited Offerings and Locker Services

The Judges directed the parties to address the Copyright Owners' footnote emphasizing that the *Phonorecords II*-based benchmark adopted here does not include per-subscriber minima for Paid Locker Services and Limited Offerings. *See* Order at 1 (citing Copyright Owners' Reply (eCRB 25423), App. B at 5 n.5).[1] But outside of that footnote, the Copyright Owners never asked the Judges to add these per-subscriber minima during the course of the remand proceedings before they submitted their proposed regulatory provisions on July 18, 2022. *See* Copyright Owners' Submission, App. A at 14 n.3, 16. The Judges should reject the Copyright Owners' last-minute request because it is contrary to the law of the case, the parties' remand proposals, and the Initial Ruling.[2]

First, the Judges have already decided this issue and cannot reconsider it on remand. In 2018, the Judges rejected the Copyright Owners' argument, in their Motion for Clarification, that the Initial Determination should have included these per-subscriber minima, making clear that the Judges' omission of the per-subscriber minima "was not inadvertent." Order on Motions for Clarification (eCRB 3472) at 11-12. Instead, "it was a feature of the regulatory overhaul" that increased the headline rate by 44% (a rate now reinstated) and provided substantially higher royalties to the Copyright Owners overall. *Id.* at 12. The Copyright Owners did not appeal this

[1] The Copyright Owners misleadingly refer to these minima as "floors," Copyright Owners' Reply, App. B at 5 n.5, despite the Judges' previous holding that the "existing minimum" for each of these offerings under *Phonorecords II* "was not a mechanical floor," Order on Motions for Clarification (eCRB 3472) at 12.

[2] The Services expand on their prior argument on this issue, *see* Services' Submission at 3-4, in response to the Judges' question in the Order and the Copyright Owners' argument in their Submission.

issue and thereby forfeited it. *See Williams v. Romarm, SA*, 756 F.3d 777, 783 (D.C. Cir. 2014). As a result, the decision constitutes the law of the case, and the Judges cannot revisit it at this late stage. *See Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) (noting that "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation" (internal quotation marks omitted)).

Second, *no party's* remand proposal requested that the Judges adopt per-subscriber minima for these offerings. To the contrary, on at least *four* separate occasions, the Copyright Owners asked the Judges to "readopt the same rates and terms set forth in the [*Phonorecords III*] Final Determination," which did *not* include these per-subscriber minima.[3] The Copyright Owners' eleventh-hour request to add terms that no party proposed in this remand and that the Copyright Owners did not support with any evidence is contrary to the D.C. Circuit's admonition that "the ultimate proposal adopted by the Board has to be within a reasonable range of contemplated outcomes." *Johnson*, 969 F.3d at 382. Although the Copyright Owners note that these per-subscriber minima were "part of the Services' original rate proposals in the original proceeding," CO's Submission, App. A at 14 n.3, the Services' original proposals were superseded by their remand proposal, which did *not* include these per-subscriber minima. In any event, the per-subscriber minima for Paid Locker Services and Limited Offerings included in those original proposals on an all-in basis were part of packages containing, among other features, a much lower 10.5% headline rate. The Judges declined to adopt the Services' proposed headline rate and instead

[3] *See* Copyright Owners' Initial Remand Submission (eCRB 23866) at 92; Copyright Owners' Reply (eCRB 25423), App. B at 6, App. C at 9; Copyright Owners' Brief in Response to the Additional Materials Orders (eCRB 26062) at 47; Copyright Owners' Rebuttal Brief Concerning the Additional Materials Orders (eCRB 26216) at 21-22.

adopted a much higher one, thus making the elimination of the minima appropriate. Initial Ruling at 2.

Finally, the Copyright Owners' proposal is contrary to the Initial Ruling. That decision set the headline rate at 15.1%, but made clear that, "[i]n all other respects, the rates and rate structure of the PR II-based benchmark"— that is, the Services' proposal—"shall be effective as the rates and structure throughout the *Phonorecords III* period." Initial Ruling at 2, 113-114. As the Initial Ruling explained, the Services' PR II-based benchmark is "based on the *Phonorecords II* rates, rate structure, and terms," with "update[s]" to reflect terms "that were not challenged by either the Copyright Owners or the Services" on appeal, including TCC prongs for Paid Locker Services and Limited Offerings with no per-subscriber minima. *Id.* at 56 & n.84, *see also id.*, App. A at 116. The Copyright Owners contend that the Initial Ruling reinstated these minima when it indicated that "the alternative rates (identified in subpart C as 'minima' and 'subminima') . . . shall remain unchanged," but the Judges merely made that statement in rejecting the Copyright Owners' request to completely eliminate "the subpart C provisions as essentially obsolete." *Id.* at 93-94. The Initial Ruling did not suggest that this general statement about retaining the Subpart C offering categories would override the portions of the Services' PR II-based benchmark updated to reflect terms that no party challenged on appeal. Nor could it, because such a decision would have been inconsistent with both the law of the case and the parties' remand proposals.

IV. The Judges Should Reject the Copyright Owners' Proposed Addition to the Definition of Service Provider Revenue

The Copyright Owners proposal adds to the Services' PR II-based benchmark an additional definition of Service Provider Revenue unique to some bundles that include § 115 music services. *See* Copyright Owners' Submission, App. A at 9-10. That is, they propose that *most* such bundles would be subject to the definition the Judges unanimously adopted in the Initial Ruling (at 109-

13), but *some* such bundles—those that meet the definition of Mixed Service Bundles[4]—would be subject to a different, greater-of rule, copied from the *Phonorecords II* regulations. *See* 37 C.F.R. § 385.21 (2016) (definition of Subpart C service revenue, subpart (5)). The Judges should reject that proposal, which is contrary to the Initial Ruling.

First, as explained above, the Judges in the Initial Ruling adopted the "rate structure of the PR II-based benchmark," which is a phrase the Judges used to refer to the Services' proposed regulations. Initial Ruling at 113-114. As the Judges recognized, the Services' proposed regulations "update[d] the *Phonorecords II*" regulations in a number of respects, including by incorporating terms from *Phonorecords III* "that were not challenged" on appeal. *Id.* at 56 & n.84. One such term was the Judges' adoption of a single rule for calculating Service Provider Revenue for *all* bundles including *any* Section 115 music services. In seeking clarification of the Initial Determination, the Copyright Owners complained about the rule the Judges adopted, but not about its uniform application.[5] And no party appealed the decision to adopt a uniform Service Provider Revenue rule for all music bundles. That is why the Services, in the Copyright Owners' words (*see* Copyright Owners' Submission, App. A at 2 n.1), "omitted" the *Phonorecords II* Subpart C rule for certain music bundles from their rate proposal on remand.

The Copyright Owners, however, claim that they "understand" that the old Subpart C rule "is properly included pursuant to the Judges' Initial Ruling." Copyright Owners' Submission,

[4] A "Mixed Service Bundle," under both the Services' and the Copyright Owners' proposals, is an offering that lets consumers purchase, as part of a single transaction, one or more non-music goods or services, plus one or more of the following § 115 offerings: Permanent Downloads, Ringtones, Locker Services, or Limited Offerings. *Compare* Copyright Owners' Submission, App. A at 5, *with* Services' Submission, App. A at 3.

[5] *See* Copyright Owners' Motion for Clarification (eCRB 2026) at 11-13. The Copyright Owners' proposed order included the uniform Service Provider Revenue rule the Judges adopted in the Final Determination, but rejected in the Initial Ruling. The proposed order did not include a separate Service Provider Revenue rule for Mixed Service Bundles.

App. A at 2 n.1. But they do not support their understanding with a citation to the Initial Ruling. And nothing in the Initial Ruling could give rise to such an understanding. The Initial Ruling discusses Subpart C briefly (at 93-94), but as discussed above, the Judges' ruling as to Subpart C is a single paragraph (at 94) that does nothing more than reject the Copyright Owners' proposal that the Judges eliminate Subpart C in its entirety. Moreover, when the Copyright Owners complained that the Services had omitted the Subpart C minima from their proposed regulations, they did *not* complain that the Services had proposed a uniform Service Provider Revenue rule for all music bundles. *See* Copyright Owners' Reply, App. B at 5 n.5. Indeed, the Copyright Owners did not mention the Subpart C rule in *any* of the many briefs filed in the remand.

Second, the Judges' unanimous rationale for adopting the Initial Determination's uniform rule over the Final Determination's uniform rule also supports rejecting the Copyright Owners' belated attempt to add a separate Service Provider Revenue rule that applies only to Mixed Service Bundles.[6] As the Judges explained, they "must choose between the proposals that are in the record," lest they "'blindside' the parties." Initial Ruling at 113 n.162. Because the "Copyright Owners did not propose . . . alternatives" to either the Initial Determination or the Final Determination rule, the options available were a uniform rule that "incentivizes price discrimination and pays royalties on the bundled music" or a uniform rule "that would eliminate price discrimination, except under the terms Copyright Owners could impose via their complementary oligopoly power." *Id.* The Judges correctly "favored" the former and adopted it. *Id.* Had the Copyright Owners wanted to propose that Mixed Service Bundles should be subject

[6] Judge Strickler's separate conclusion that the Copyright Act and *Johnson* compel re-adoption of the Initial Determination's uniform rule, likewise requires rejection of the Copyright Owners' belated attempt to subject Mixed Service Bundles to a separate rule. *See* Dissent in Part as to Section IV of the Initial Ruling and Order After Remand by Judge David R. Strickler (eCRB 27064) at 4-15.

to a Service Provider Revenue rule different from the rule that applies to all other Section 115 music bundles, they had ample opportunity on remand to do so. They never did. The Judges' request that the parties submit proposed regulations implementing the Initial Ruling was not an eleventh-hour opportunity for the Copyright Owners to re-litigate this issue.

CONCLUSION

The Judges should adopt the Services' proposed regulations.

August 5, 2022

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Friday, August 05, 2022, I provided a true and correct copy of the Services' Joint Response to Copyright Owners' Submission of Regulatory Provisions to the following:

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