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

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

SERVICES' SUPPLEMENTAL SUBMISSION REGARDING THE IMPACT OF THE PHONORECORDS III INITIAL REMAND RULING ON PHONORECORDS IV

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As the Judges are aware, the question the Copyright Act charges the Judges with answering in *Phonorecords IV* is different from the question the Judges were responding to in *Phonorecords III* and the Initial Remand Ruling. Congress changed the operative rate-setting standard between *Phonorecords III* and *Phonorecords IV*. *Phonorecords III* addressed the rates and terms that should be established to satisfy "four itemized objectives, or factors, which, as the D.C. Circuit stated, set forth 'competing priorities,'" which were previously codified in 17 U.S.C. § 801(b)(1). Initial Remand Ruling at 5. The Judges' task in *Phonorecords IV*, by contrast, is to identify "the rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 115(c)(1)(F). The Judges have previously interpreted the essentially identical mandate governing the Section 114 compulsory license to "call for the establishment of rates that would have been set in an effectively competitive market." *Web V* at 59454. The Judges should follow the same approach when applying the new Section 115 standard.

The "headline rates" the Judges adopted in the *Phonorecords III* Final Determination and held they were legally bound to retain in the Initial Remand Ruling are not the product of an analysis designed to determine rates that would emerge in an effectively competitive market. The Initial Remand Ruling recognizes this, noting that the Judges were "not stating" that distribution of revenues among labels, publishers, and services under those headline rates reflects "an effectively competitive (or even healthy) market[.]" Initial Remand Ruling at 12 n.22. *Phonorecords IV* requires the Judges to embark on an inquiry with respect to headline rate levels that *Phonorecords III* did not purport to conduct.

On the other hand, with respect to the rate structure and terms, the Initial Remand Ruling uses an approach that is consistent with the statutory directive that governs *Phonorecords IV*.

Specifically, the Initial Remand Ruling relies on a "benchmarking" exercise, ascribing significant weight to a voluntary marketplace agreement as the source of non-headline-rate terms and structures that satisfy the *Phonorecords III* legal standard. *See* Initial Remand Ruling at 64-70. That exercise considers "[t]he four classic characteristics of an appropriate benchmark," *id*. at 64, using a legal standard borrowed from *In re Pandora Media*—a case addressing the question of what result "approximate[s] the result that would be set in a competitive market." *In re Pandora Media*, 6 F. Supp. 3d 317, 353-54 (S.D.N.Y. 2014), *aff'd sub nom Pandora Media Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015). The benchmarking portion of the Initial Remand Ruling sheds valuable light on many issues *Phonorecords IV* presents.

Finally, the Initial Remand Ruling repeatedly recognizes the procompetitive effects of the forms of price discrimination in which the Services engaged, which is also relevant to *Phonorecords IV*. *See* Initial Remand Ruling at 65-69, 73-78, 109-13. The Judges identified, for instance, the importance of adopting rules for "bundles" that promote price discrimination and capture additional revenues for all stakeholders in the industry by capitalizing on the "lower WTP [that is, willingness to pay] of consumers" at different points along the demand curve. *Id*. at 109. The Judges' reasoning applies equally here, where the Copyright Owners are proposing the same bundles rule, using the same economic arguments, that the Initial Remand Ruling unanimously rejects. In addition, Amazon submits that the Initial Remand Ruling supports its proposal for Prime Music, and Apple submits that the Initial Remand Ruling supports its proposal for a new rate for services with limited functionality, and all Services agree that the Initial Remand Ruling undermines the Copyright Owners' reliance on agreements tainted by the

Final Determination's bundles rule that the Judges rejected.[1]

I. With Respect To The Headline Royalty Rate, The *Phonorecords III* Initial Remand Ruling Addresses A Different Question From The One Presented Here

The 15.1 percentage-of-revenue headline rate re-adopted in the *Phonorecords III* Initial Remand Ruling (phased in over the statutory period) is derived from the pre-appeal *Phonorecords III* Final Determination. It is not the product of an inquiry into what rates would result under effectively competitive conditions. More precisely, in the Initial Remand Ruling "[t]he Judges determine[d] that they are clearly bound by the D.C. Circuit's decision in *Johnson* to maintain the 15.1% revenue rate" from the Final Determination. Initial Remand Ruling at 11. The Final Determination applied the then-effective Section 801(b) factors, rather than the willing-buyer-willing-seller approach Congress enacted in October 2018 for use in future Section 115 proceedings. The Initial Remand Ruling thus did not purport to answer the legal question presented in *Phonorecords IV*.

A. The Headline Rates In The Phonorecords III Final Determination Were Not The Product Of A Willing-Buyer-Willing-Seller, Effectively Competitive Marketplace Analysis

The Majority in the Final Determination derived the percent-of-revenue headline rate, which the Judges recently held they were bound by *Johnson* to re-adopt, largely from a combination of "Shapley value" bargaining models. *See* Initial Remand Ruling at 15 (referring to 15.1% as a "Shapley-based rate"). Shapley value bargaining models are not a tool for analyzing or predicting rates that would emerge under effectively competitive conditions. *See* Farrell WRT at 11-13; Marx WRT at 38-41; *see also* Farrell WRT at 60-62 (explaining how Professor Gans's "Shapley-inspired" model fails to reflect effective competition); *see also* Watt

[1] Google joins Sections I, II, and III.A of this Supplemental Submission.

8/9/22 Dep. Tr. at 110:18-111:20 (admitting that a Shapley value model would not control for market power resulting from the merger of competitors, and that individual players in the Shapley model will be afforded their "full degree of market power, short of colluding with other players in secret transactions"). A transaction in an effectively competitive marketplace is one in which both counterparties can viably turn to substitutes in lieu of consummating the deal. *Cf. In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 975 (N.D. Cal. 1979) ("If . . . 'demand substitutability' . . . and 'supply substitutability' . . . are sufficient checks upon defendant's power to control price, then the market is effectively competitive. If not, defendant is a monopolist."). "Shapley value" game theory exercises do not factor such potential substitutions into the distributions that they model. Farrell WRT at 12-13.[2]

The Shapley-related models the Majority used in the Final Determination to select the 15.1% headline rate figure did not purport to identify an effectively competitive rate. That figure was largely the product of combining one element of Dr. Marx's model with certain other inputs, including a particular ratio of sound recording royalties to publishing royalties drawn from Professor Gans's analysis. Final Determination at 1959 ("The Judges have determined a rate that is computed based on the highest value of overall royalties predicted by Professor Marx's model and the ratio of sound recording to musical work royalties determined by Professor Gans's analysis."). But Professor Marx explained that "[t]he Shapley value model is not meant to replicate a market outcome and is thus inappropriate in a setting such as [*Phonorecords IV*] in which rates are meant to approximate what a willing buyer and a willing seller would negotiate

[2] Even if a specific Shapley value model includes such a supply of substitutes, the methodology does not restrict attention to the incremental contribution with all those substitutes present. Rather, it reports an average that also includes scenarios in which no substitutes are present, and in which some but not all of the modeled substitutes are present. *See* Farrell WRT at 12.

in an effectively competitive market." Marx WRT ¶ 85. That is why Professor Marx proposed a Shapley model in *Phonorecords III* but not here: while a proper Shapley analysis may shed light on the "fairness" considerations embedded in the Section 801(b) factors, it does not and cannot mimic effective competition. *Id*. ¶¶ 87-98. And nothing in the Final Determination suggested that applying Professor Gans's ratio to the top end of Professor Marx's overall royalty range was supposed to accomplish the latter.

To the extent the headline rate the Majority adopted in the Final Determination was influenced by considerations beyond the Shapley-related discussion, those other considerations also did not purport to address, let alone definitively answer, the question of what headline rate would emerge in a hypothetical negotiation between willing buyers and willing sellers over the mechanical license under effectively competitive conditions. For example, in applying Section 801(b)(1) Factor A, the Majority considered evidence regarding the royalty splits between music publishers and songwriters. *See* Final Determination at 1957. But in *Phonorecords IV*, the Judges have recognized that "the issue of songwriter shares of publisher royalty income appears irrelevant to the application of the section 115 standard." Mot. to Compel Order at 5. The Final Determination is replete with discussions of other issues that similarly "appear irrelevant to the application of the section 115 standard." *E.g.*, Final Determination at 1958 (discussing approaches to maximizing "upstream" and "downstream" availability of copyrighted works, pursuant to Factor A, which is no longer operative); *id*. at 1959 (discussing Factor D without reference to any analog in an analysis of what an effectively competitive rate would be).

In short, the analysis that yielded the headline rates in the *Phonorecords III* Final Determination does not answer the question *Phonorecords IV* presents.

B. In Re-Adopting The Final Determination's Headline Rates, The Initial Remand Ruling Does Not Analyze Hypothetical Negotiations Under Effectively Competitive Conditions

To the extent that the Initial Remand Ruling's decision to re-adopt the Final Determination's headline rate could be read to rely on considerations other than those in the Final Determination, those additional considerations also did not purport to answer the question presented in *Phonorecords IV*.

The remand analysis proceeded from the *Johnson* decision's affirmation of the majority's Factor A analysis, which included a finding that "largely anecdotal . . . evidence points strongly to the need to increase royalty rates" above *Phonorecords II* levels. Final Determination at 1958. From there, the Judges engaged in a limited re-analysis of Section 801(b)(1) Factors B through D. Neither the starting point nor the subsequent analysis was, by its terms, an analysis of what rate a willing buyer and willing seller would agree to under conditions of effective competition. Factors B and C are concerned with providing a "fair return" and "fair income" to the licensors and licensees, respectively, based on their relative contributions to making streamed music available to the public. *See* Initial Remand Ruling at 15 n.31. The Initial Remand Ruling addresses these factors principally by reference to Professor Marx's Shapley value model, which as noted above, Professor Marx explains in this proceeding does not address the willing-buyer-willing-seller standard. *See* Marx WRT ¶¶ 83-86. Factor D addresses the need to "minimize disruptive impact," meaning "an adverse impact that is substantial, immediate and irreversible in the short run." Initial Remand Ruling at 16. While mitigating disruptive effects might also be relevant to willing buyers and willing sellers negotiating under effectively competitive conditions, there is no reason to believe that they would limit their consideration of disruptions to the short-run disruptions the Judges held were the only ones relevant under Factor D.

The Initial Remand Ruling also suggests that the headline rate increase in the Final Determination is warranted because industry revenues have increased. *See id.* at 65. But as other tribunals applying the willing-buyer-willing-seller standard rather than the section 801(b)(1) factors have recognized, increasing industry revenues do not require an increased percentage-of-revenue music royalty in order to be effectively competitive, given that the increase is automatically shared between the parties under the percent-of-revenue formula. *See In Re Pandora*, 6 F. Supp. at 356-57 (rejecting the argument that higher revenues justify a higher rate on the basis that "an escalating rate is not necessary for the licensor to share in the success of the licensee: with a single rate as a percentage of revenue a joint interest is created between the parties in the growth of the licensee's business"); *In re Application of MobiTV*, 712 F. Supp. 2d 206, 248 ("In fact, ASCAP has boasted that its [static percent of revenue] cable television network licenses are a prime example of ASCAP's success in structuring deals 'that allow [ASCAP's] revenues to grow as the new media revenues grow.'") (S.D.N.Y. 2010), *aff'd by ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). In sum, even setting aside the substantial differences in the record evidence between *Phonorecords III* and *Phonorecords IV*, the relevance, if any, of increasing industry revenues under the present rate-setting standard will differ.[3]

II. With Respect To Rate Structure And Terms, The *Phonorecords III* Initial Remand Ruling Uses A Benchmarking Analysis That Supports The Services' Position Here

In contrast to the headline rates, the Judges found that *Johnson* did not require re-adoption of the Final Determination's rate structure and terms. Instead, as to those aspects of the

[3] With respect to those factual differences, for example, Spotify's proposed benchmarks in *Phonorecords IV* besides the *Phonorecords II* settlement were entered during a period in which industry revenues had already increased; its bargaining model likewise incorporates present-day revenues—those analyses nevertheless yield effective headline rates between [redacted] and [redacted] Farrell ACWDT at 57-64.

regulations, the Initial Remand Ruling uses an approach that is consistent with the question presented in *Phonorecords IV*. It relies primarily on a benchmarking approach that has long been the hallmark of willing-buyer-willing-seller music rights rate-setting cases. *See*, *e.g.*, *Web II* at 24091 ("[C]opyright owners and commercial services agree that the best approach to determining what rates would apply in such a hypothetical marketplace is to look to comparable marketplace agreements as 'benchmarks' indicative of the prices to which willing buyers and willing sellers . . . would agree."); *Web IV* at 26383 (May 2, 2016) (applying benchmarking approach).

The Initial Remand Ruling uses a test for determining an appropriate benchmark lifted directly from a case setting rates under the ASCAP consent decree. There, as here, the core judicial task is to identify "the price that a willing buyer and a willing seller would agree to in an arm's length transaction" in a "competitive market." *MobiTv*, 712 F. Supp. 2d at 232. Specifically, the Initial Remand Ruling explains that:

> [t]he four classic characteristics of an appropriate benchmark are: (1) the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, (2) the comparability of the rights in question, (3) the similarity of the economic circumstances affecting the earlier negotiators and the current litigants, and (4) the degree to which the assuredly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements it has spawned.

Initial Remand Ruling at 64 (citing *In Re Pandora*, 6 F. Supp. 3d at 354).

Because it expressly applies a test derived from cases using the same standard that applies in *Phonorecords IV*, the non-headline-rate benchmarking approach in the *Phonorecords III* Initial Remand Ruling is consistent with the approach the Judges should take in this proceeding. In the Initial Remand Ruling, the benchmarking analysis focuses primarily on the rate structure and non-rate "terms" of the agreement between music streaming services and

copyright owners settling *Phonorecords II*, concluding that it is a "useful benchmark" and according it significant weight.[4] Some Services rely on that settlement as a benchmark in this proceeding as well.[5] Nothing will have changed in the several months between the issuance of the Initial Remand Ruling and the start of the *Phonorecords IV* trial that would justify assessing the evidentiary value of the non-headline-rate portions of the *Phonorecords II* benchmark any differently.[6]

More broadly, the general approach to benchmarking in the Initial Remand Ruling underscores the utility and appropriateness of the benchmarks on which the Services rely, and the irrelevance and inappropriateness of the Copyright Owners'. Beyond the *Phonorecords II* settlement, the Services' *Phonorecords IV* benchmarks consist principally of license agreements between the participants in this proceeding, on one hand, and music publishers or their representatives (performing rights organizations, or "PROs"), on the other.[7] Particularly in light of the same willing-buyer-willing-seller rate-setting backstop available when services negotiate with the two largest PROs and when labels negotiate with publishers for PDDs, these deals shed

[4] The Judges found, *inter alia*, that "[t]he Services' *Phonorecords II*-based benchmark is the better of the benchmarks proposed by the parties," "reflect[s] a rate structure with an adequate degree of competition," and represents a "bargained-for multi-tiered rate structure . . . that allows for price discrimination but tempers its impact on royalties through the use of minima and floors." Initial Remand Ruling at 2, 69, 84.

[5] For reasons Amazon has explained, Amazon believes that the *Phonorecords II* settlement corroborates its rate proposal and supports its benchmarking analysis, but Amazon does not rely on that settlement as a standalone benchmark. *See* Amazon WDS Introd. Mem. at 3-4. Apple relies on certain elements of the *Phonorecords II* settlement, but similarly does not propose the wholesale use of that settlement as a benchmark.

[6] Subject to the same accommodations for "student plans," "family plans," and assorted other additional terms that the Services understand the Judges to have called for in the Initial Remand Ruling.

[7] Spotify's benchmarking analysis, presented by Professor Farrell, [redacted] Farrell ACWDT at 6-7. Amazon, through Professor Marx, uses benchmark agreements between Pandora's non-interactive service and PROs, the Subpart B settlement, and Amazon's direct licenses for Prime Music to calculate an all-in percentage-of-revenue royalty rate for Amazon's services besides Prime Music. Marx WDT at 4. And Apple and Google rely on their direct agreements with PROs or publishers in support of their proposals. Segal WDT ¶¶ 13, 65-68; Prowse WDT ¶¶ 279-284; Higginson WDT § IV; Leonard WDT ¶¶ 43-82.

valuable light on the effectively competitive rate for a license to use the very same copyrighted musical compositions at issue in this proceeding, on the very streaming services at issue. *See* Initial Remand Ruling at 87 (explaining that a compulsory rate-setting mechanism can "negate the power of any entity to simply refuse to strike a deal" and thus "blunts the complementary oligopoly power of licensors of 'Must Have' repertoires (whether musical works or sound recordings), making a benchmark agreement reached in the so-called 'shadow' advantageous in establishing an effectively competitive rate").

The Copyright Owners' *Phonorecords IV* benchmarks, by contrast, are infected by a number of characteristics that render them uninformative with respect to the determination of an effectively competitive rate. One such category consists of license agreements concerning the use of *sound recordings* on music streaming services, which Copyright Owners seek to translate into benchmarks for *musical composition* licenses using an independently-derived ratio of relationship between royalties for the two types of works. That approach does not pass muster under the analysis prescribed in the Initial Remand Ruling several times over—first because the "comparability of the rights in question" is too attenuated; second because the proposed ratio is derived from inapposite sources;[8] and third because "yok[ing] the mechanical license royalties to the sound recording rightsholders unchecked market power" still means, as the D.C. Circuit recognized in *Johnson*, "leav[ing] the Streaming Services exposed" to the sound recording copyright holders' "oligopoly power." 969 F.3d 363, 382 (D.C. Cir. 2020).

The Copyright Owners' second category of benchmark agreements—certain deals authorizing the use of musical compositions on services that synchronize music with *video*

[8] *See generally* Farrell WRT ¶¶ 15-17, 140-154 (criticizing Copyright Owners' ratio approach); Marx WRT ¶¶ 140-161 (criticizing Professor Eisenach's benchmarks).

content (referred to as "synch licenses" or "A/V" benchmarks)—fare no better. As party and non-party discovery has confirmed, these particular contracts concern different rights from those at issue in this proceeding, are entered by different parties, and license different products sold by licensees that compete in markets that are not comparable to the audio-only, on-demand music-streaming market that is the subject of *Phonorecords IV*. *See*, *e.g.*, Farrell WRT ¶¶ 155-156; Marx WRT ¶¶ 162-178; Prowse ¶¶ 152-158; Lowy Decl. ¶¶ 5-16. That suite of characteristics cannot satisfy the requirements for a useful benchmark set out in the Initial Remand Ruling—and for the same reasons, Judges in prior proceedings have repeatedly rejected the invocation of similar deals as benchmarks, using an analytical approach consistent with the operative one here.[9]

II. The Initial Remand Ruling Rejects The Service Revenue Definition For Bundled Offerings The Copyright Owners Propose Here And Supports Amazon's Rate Proposal For Prime Music And Apple's Proposal Apple's Proposal For Full Catalog Limited Offerings

A. The Initial Remand Ruling Rejects The Copyright Owners' *Phonorecords IV* Bundles Proposal

The Copyright Owners propose "carr[ying] over the provision from the *Phonorecords III* Final Determination concerning calculating revenue in the case of Bundled Subscription Offerings." CO Proposed Rates & Terms at 19; *see id.* at 17. The Copyright Owners also proposed reinstating that provision in the *Phonorecords III* Remand. The Initial Remand Ruling rejected that provision on the merits, finding that it "would eliminate price discrimination, except under the terms Copyright Owners could impose via their complementary oligopoly power." Initial Remand Ruling at 113 n.162; *see id.* at 111 (finding that the rule the Copyright Owners endorsed improperly "de-link[ed] the royalty rate from the WTP of purchasers of bundles"). In

[9] Final Determination at n. 98; *Phonorecords I* at 4519.

support of adopting that rule here, the Copyright Owners' expert witness, Dr. Eisenach, offers the same flawed economic arguments the Initial Remand Ruling rejects. *Compare* Initial Remand Ruling at 109-13 *with* Eisenach WDT ¶¶ 60-61, 155-159; Eisenach WRT ¶¶ 87-94.[10]

B. The Initial Remand Ruling Supports Amazon's Prime Music Proposal And Refutes The Copyright Owners' Criticisms[11]

The Initial Remand Ruling also recognized the importance of adopting a "royalty structure" under which "bundling and its price discriminatory effect [is] incentivized by . . . reflect[ing] the lower WTP of consumers who subscribe by paying for a Bundle." Initial Remand Ruling at 109. The Judges illustrated this mutually beneficial price discriminatory effect through a comparison of Amazon Music Unlimited and Prime Music:

> Amazon pays [redacted] for listening by the more casual consumers who use the limited catalog Prime Music service at no additional charge beyond their Prime membership fee, compared to consumers who want the full repertoire provided by Amazon Music Unlimited on their Echo devices. These royalty obligations demonstrate the combination of price discrimination, product differentiation and "derived demand" in action; that is, the [redacted] are derived from the lower demand of consumers of the limited Amazon Prime Music service compared with subscribers to Amazon Music Unlimited on their Echo devices, which in turn drive higher revenues.

Id. at 74 (citation omitted); *see id.* at 112 (quoting, with approval, testimony from Amazon's expert witness that "Prime Music, which is bundled with an Amazon Prime service … sort[s] out customers' willingness to pay, with an idea of trying to maximize the number of customers"). The record in *Phonorecords IV* confirms that [redacted]. *See* Hurwitz WDT

[10] Among other things, the Judges rejected the argument — which Dr. Eisenach repeats, *see* Eisenach WDT ¶ 156 & n.143—that the *Phonorecords III* Final Determination's bundles rule is consistent with *SDARS III* and *Webcasting IV*. *See* Initial Remand Ruling at 112 (noting that *SDARS III* rejected a rule that "eliminated the payment of any royalty at all," while the ice cream cone discussion in *Webcasting IV* is "[e]ven more distinguishable" because it "had nothing to do with bundling or isolating the WTP for different products or services").

[11] The arguments in this section are made by Amazon and are not joint Service arguments.

¶¶ 28, 47-49, 79. The Copyright Owners' internal documents [redacted][12]

The Initial Remand Ruling also supports Amazon's per-play rate proposal for Prime Music. As the Judges explained, while they rejected the *Phonorecords III* Final Determination rule on the merits, they re-adopted the *Phonorecords III* Initial Determination rule because they must "choose between the proposals that are in the record." Initial Remand Ruling at 113 n.162. Here, in contrast, the record contains evidence about [redacted] Duffett-Smith WDT ¶¶ 86-120. That per-play approach avoids the [redacted] Marx Depo. Tr. 219:10-14; *see id.* at 49:3-6, as it avoids the need to attribute any revenue to Prime Music—the very dilemma the Initial Remand Ruling recognized.

The Initial Remand Ruling also undermines Dr. Eisenach's reliance on [redacted]. *See* Eisenach WRT ¶¶ 113-114. The [redacted] were negotiated against the backdrop of a rule that—as the Initial Remand Ruling holds—"eviscerated the 'derived demand'-based link between royalties and bundled offerings" and "eliminate[d] price discrimination, except under the terms Copyright Owners could impose via their complementary oligopoly power." Initial Remand Ruling at 113 n.162. Indeed, that flawed *Phonorecords III* Final Determination bundles rule was what [redacted]. *See* Duffett-Smith WDT ¶¶ 131-45 ([redacted]); Duffett-Smith WSRT ¶¶ 17-28 ([redacted]. In that way, [redacted] embody the very phenomenon that led the

[12] [redacted].

Judges to repudiate the *Phonorecords III* Final Determination bundles rule: [redacted] Duffett-Smith WDT ¶¶ 143-44; Duffett-Smith SWRT ¶ 17.[13] That demand, backed by a rule that the Judges now have held unduly penalized bundles like Prime Music, unsurprisingly produced [redacted]

The now-rejected bundles rule explains why Amazon's [redacted] *See* Eisenach WRT ¶ 118 & Table 8. The [redacted] were skewed by the *Phonorecords III* Final Determination bundles rule, and [redacted] The latter, by contrast, reflected a willing-buyer-willing-seller negotiation, in which the parties to the contract negotiated a rate structure that brought their agreement outside of the shadow of the regulations. As the Initial Remand Ruling confirms, the Judges should reject Dr. Eisenach's reliance on the former.

C. The Initial Remand Ruling Supports Apple's Proposal For A Distinct Mechanical Floor For Limited Functionality Full Catalog Offerings[14]

The Initial Remand Ruling supports Apple's proposal for a new pricing tier for full catalog offerings with limited functionality. First, the ruling endorses a statutory structure that allows for price discrimination to attract low WTP consumers, and recognizes that attracting such consumers benefits the Copyright Owners. *See, e.g.*, Initial Remand Ruling at 84, 91. Second, the ruling rejects the Bargaining Room approach to rate setting, under which the Judges

[13] *See also* Madaj WRT ¶ 11 (Warner Chappell witness [redacted].

[14] The arguments in this section are made by Apple and are not joint Service arguments.

set rates with the idea that parties can negotiate lower ones for services that attract low WTP consumers if the rates are too high. *Id.* at 68. As the Judges explained, they have a duty to set rates consistent with the statutory standard. *Id.* Relying on the Bargaining Room approach improperly takes rate setting for offerings targeting low WTP consumers out of the Judges' hands and subjects the parties to a "purely market-based rate-setting approach[.]" *Id.* at 68. These findings point in one direction: the Judges should adopt rates and terms for limited functionality full-catalog offerings, such as voice-activated plans, that are designed to improve subscribership among low WTP consumers.[15] Segal WRT ¶¶ 54-56. Failing to include this new category in the statutory structure stifles creativity and forces all services to either fit within pre-defined buckets, even as technology changes, or turn to marketplace negotiations that the Initial Remand Ruling explains do not meet the statutory standard.

III. Conclusion

In conclusion, the headline rate determination in the *Phonorecords III* Initial Remand Ruling is the product of an analysis that answers a question different from the one presented in *Phonorecords IV*. The benchmarking analysis with respect to issues other than the headline rate in the Initial Remand Ruling, by contrast, uses an approach that is equally applicable to the determination of effectively competitive rates and terms under the *Phonorecords IV* legal standard. And the Initial Remand Ruling's decision on bundled offerings both rejects the Copyright Owners' position on that issue here, while supporting Amazon's and Apple's proposals and undermining the Copyright Owners' arguments against them.

[15] This analysis also supports adopting adjustments to minima for other discounted and promotional offerings, such as family and student plans.

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Proof of Delivery

I hereby certify that on Tuesday, August 23, 2022, I provided a true and correct copy of the Services' Supplemental Submission Regarding the Impact on the Phonorecords III Initial Remand Ruling on Phonorecords IV to the following:

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

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

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

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

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

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

Joint Record Company Participants, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

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

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

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

Signed: /s/ Joseph Wetzel