UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

In re	
DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords III)	**Docket No. 16-CRB-0003-PR (2018-2022) (Remand)**

CORRECTED ORDER REGARDING REGULATORY PROVISIONS FOLLOWING INITIAL RULING AND ORDER (AFTER REMAND)

On July 1, 2022, the Copyright Royalty Judges ("Judges") issued their Initial Ruling and Order after Remand (eCRB No. 26938) ("Initial Ruling"). Therein, the Judges ordered the Participants[1] to file agreed regulatory language conforming to the Initial Ruling or, if they could not agree upon such regulatory language, to file separate submissions. *Id.* at 114.

The Participants reached agreement as to most of the regulatory language. On November 8, 2022, the Judges entered an "Order regarding Regulatory Provisions following Initial Ruling and Order (After Remand)." In that order, the Judges inadvertently included text on page one regarding the Participants' proposed regulatory language and a related inadvertent reference in footnote 2 to a (non-existent) Attachment A to that Order. This Corrected Order deletes those inadvertent inclusions.[2]

However, with regard to several aspects of the Initial Ruling, the Participants were unable to reach agreement as to conforming regulatory language. Accordingly, on July 18, 2022, the Participants timely filed their respective submissions of regulatory provisions, containing their agreed-upon regulatory language and their respective differing provisions, as well as their

[1] The Participants on remand are: (i) the National Music Publishers Association and the Nashville Songwriters Association International, for the licensors (collectively "Copyright Owners"); (ii) Amazon Digital Services, LLC ("Amazon"); Google Inc. ("Google"); Pandora Media, Inc. ("Pandora") and Spotify USA Inc. ("Spotify"), for the licensees (collectively the "Services"); and (ii) George Johnson, an individual songwriter, dba GEO Music Group, appearing *pro se*. The Judges required the Services to make a joint filing with regard to the contents of the regulatory provisions.

[2] The Judges' protocol for the Participants' submission and presentment of agreed-upon and still-disputed regulatory provisions was set forth in Section V of the November 8th Order and remains in Section V of this Corrected Order.

respective explanatory notes regarding the provisions in dispute. Services' Joint Submission of Regulatory Provisions (eCRB No. 27005) (July 18, 2022) ("Services' Regulatory Provisions"); Copyright Owners' Submission of Regulatory Provisions to Implement the Initial Ruling (eCRB No. 27011) (July 18, 2022) ("Copyright Owners' Regulatory Provisions").

On July 27, 2022, the Judges ordered the Participants to respond to their adversary's differing proposals. Order Soliciting Responses Regarding Regulatory Provisions (eCRB No. 27051) ("July 27 Order"). The Participants timely submitted their responses. See Copyright Owners' Response to Judges' July 27, 2022 Order Soliciting Reponses regarding Regulatory Provisions (eCRB No. 27103) (Aug. 5, 2022) ("Copyright Owners' Response"); Services' Joint Response to Copyright Owners' Submission of Regulatory Provisions (eCRB No. 27098) (Aug. 5, 2022) ("Services' Response"); George Johnson's Response Regarding Regulatory Provisions (eCRB No. 27074) (Aug. 3, 2022) ("Johnson Response").[3]

The Judges consider below each of the issues regarding the disputed regulatory terms.

I. Introduction: The Judges' Polestars for Consideration of the Participants' Regulatory Provisions

As an initial matter, the Judges first set forth below the several key guideposts that inform their decisions regarding the establishment of regulatory provisions in this proceeding:

First, the Judges are guided – indeed commanded – by the directives of the D.C. Circuit in *Johnson v. Copyright Royalty Bd., 969 F.3d 363 (D.C. Cir. 2020)*. *See* 17 U.S.C. § 803(a)(1) ("The … Judges shall act in accordance with … decisions of the court of appeals ….") Moreover, even without this statutory command, it is patent that the Judges must adhere to the ruling of federal appellate courts. *See, e.g., Koninklijke Philips Electronics N.V. v. Cardiac Science Operating Co.*, 590 F.3d 1326, 1337 (Fed. Cir. 2010) ("Judicial precedent is as binding on administrative agencies as are statutes.").

[3] Mr. Johnson did not file proposed regulatory submissions in response to the Judges' request in the Initial Ruling. The Johnson Response expresses a concern as to whether certain features of the proposed Phonorecords IV settlement will be applicable, or should be applicable, under the post-remand Phonorecords III regulatory provisions. *Id.* at 2-4. Responding to that concern, the Judges note that there is no basis for making any of the Phonorecords IV settlement terms that may ultimately be adopted retroactive to the Phonorecords III term. This footnote thus addresses the concerns as raised in the Johnson Response. *See id.* at 1 (Mr. Johnson takes "no position on the other issues ….").

Second, the Judges adopt regulatory terms that effectuate their Initial Ruling. This was clearly stated therein by the Judges. *See* Initial Ruling at 114 (the "regulatory provisions" shall be "consistent with this ruling.").

Third, the factual record is closed, and the Judges therefore do not credit arguments set forth in the Participants' proposed regulatory provisions and their responses that are neither based on the extant evidentiary record (pre- and post-remand). More particularly, the factual record pertaining to the Phonorecords II-based benchmark issues consists only of the hearing record (pre-remand). There is no relevant post-remand supplemental factual record because, as the Participants requested, the Judges did not allow for the introduction of new evidence regarding the application of the Phonorecords II-based benchmark. *See* Order Regarding Proceedings on Remand (Dec. 15, 2020 Order) at 1 (" The [Participants] agree that the proceedings on remand should be limited to three issues: [1] the majority's rejection of the *Phonorecords II* settlement as a benchmark; [2] the adoption of a rate structure that includes an uncapped TCC prong; and [3] the adoption of a revised definition of "service revenue" for bundled offerings between issuing their Initial Determination[4] and Final Determination[5] [and] also agree that the Judges should resolve the first and third issues *based on the existing record*, after receiving two rounds of additional briefing from the parties."); *id.* at 2 ("The Judges accept the parties' proposals to resolve the issue[] concerning the use of the *Phonorecords II* settlement as a benchmark … on the basis of the existing record as supplemented by two rounds of briefing … find[ing] that approach would permit a fair and expeditious resolution ….").

Fourth, the Judges do not consider herein objections to the Initial Ruling set forth in these submissions. As stated therein, substantive objections, if any, may be made in response the Judges' forthcoming "Initial Determination embodying the Initial Ruling and the regulatory provisions as adopted in this Order." *Id.* at 114-15.

Fifth, in resolving the disputes regarding the regulatory provisions, the Judges continue to treat the Phonorecords II-based benchmark as useful. As in the Initial Ruling, the Judges rely on

[4] Majority Initial Determination and Dissent (public versions) at eCRB Nos. 1824 and 1825 respectively; redacted versions at eCRB No. 2288.

[5] Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918 (Feb. 5, 2019) (sometimes referred to herein as "Final Determination").

the Phonorecords II-based benchmark because it reflects a negotiated agreement between industrywide representatives of licensors and licensees with countervailing power, and thus generates an effectively competitive result. *See, e.g.,* Initial Ruling at 50, 88, 92.

Sixth, the Judges find that the sum and substance of the "Phonorecords II-based benchmark" are the provisions in the Phonorecords II rates and terms themselves. Thus, the Judges do not consider the Services' proposals for changes to the Phonorecords II rates and terms as part and parcel of the "Phonorecords II-based benchmark." As noted in the fifth point, *supra*, the Judges' rely on the Phonorecords II-based benchmark *because* it was the product of a voluntary negotiation between parties with countervailing power and thus reflected an effectively competitive result. Accordingly, the Services' *proposals* to augment, alter or delete elements of those negotiated rates and terms cannot logically be justified as reflecting the benefit of the very negotiations they would negate.[6]

Seventh, although the Services' *proposals* would constitute *adjustments* to the Phonorecords II-benchmark, the Judges conclude that they must consider these proposed adjustments in this order. These proposed benchmark adjustments were not addressed in *Johnson*, because the D.C. Circuit did not have occasion to consider the *particulars* of the Services' *benchmark and proposals*, but rather vacated and remanded the Final Determination with regard to its deficient rationale for rejecting *in toto* the Services' proposal, *i.e.*, *without differentiating between the benchmark and the proposed adjustments thereto*. *See Johnson* at 387 ("Because we cannot discern the basis on which the [Judges] rejected the Phonorecords II rates as a benchmark in [their] analysis, that issue is remanded to the [the Judges] for a reasoned analysis."). The Judges understand that *Johnson* – by vacating, remanding and directing that reasoned analysis – clearly required the Judges to consider whether to accept or reject any or all of the Services' proffered benchmark and proposed *adjustments* thereto. Otherwise, the issues regarding those adjustments would not have been fully and appropriately adjudicated.

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[6] Alternately stated, the Phonorecords II provisions constitute the *benchmark*, and the Services' proposals to deviate from that benchmark constitute proffered *adjustments* to the benchmark. *See* Final Determination, 84 Fed. Reg. at 1936 n. 83 ("The issue for economists and for the Judges is to identify the differences, weigh the importance of those differences, and then … rely on the benchmark, …adjust the benchmark so that it is probative, or find that the proffered benchmark is so inapposite that … even with any proffered adjustments it must be disregarded."); *see also id.* at 1999 (Dissent) ("In choosing a benchmark *and determining how it should be adjusted*, a rate court must determine … the degree of comparability of … the parties, the rights," the economic circumstances and the degree of competition.) (emphasis added).

Eighth, the Judges attached the Services' "Joint Rate Proposal" as Appendix A to the Initial Ruling to serve as a handy summary of the Services' proposals, including both the Phonorecords II-based benchmark and the Services' proposed adjustments to that benchmark. *See* Initial Ruling at 2 n.7 ("The Services include in their Joint Rate Proposal a chart summarizing the proposed rates for their offerings. That chart is attached as Appendix A to this Initial Ruling.") (emphasis added).

To be clear, the Judges appended this rate proposal from the Services only as a useful guide to what the Services were representing to be their position – *not as indicative of the Judges' rulings with regard to any particular elements of the Phonorecords III provisions*.[7] Obviously a "proposal" is not synonymous with a "benchmark"[8] and, most certainly, a "proposal" is not, by its mere submission, *ipso facto* adopted by the Judges.[9]

Ninth, and finally, because the disputes considered herein relate to the Services' proposals for adjustments to the Phonorecords II-based benchmark which they proffered, they bear the burden of proof as to whether those proposals are warranted. *See* 5 U.S.C. § 5556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *see also* Initial Ruling at 3 (applying § 556(d)); 17 U.S.C. § 803(a)(1) (noting the applicability to the Judges' statutory authority of sections of the Administrative Procedure Act that include § 556(d)).[10]

[7] The Judges emphasize this point as a polestar for their analysis because the Services' incorrectly argue that: (*i*) their *proposed adjustments* to the Phonorecords II-based benchmark had been adopted by the Judges' through the inclusion of Appendix A in the Initial Ruling; and (*ii*) were part of the "Phonorecords II-based benchmark."

[8] A "benchmark" can constitute a "proposal," but not all "proposals" are "benchmarks."

[9] If the Judges had intended to adopt the Services' proffered regulatory provisions as set forth on Appendix A, there would have been no need for the Judge to order post-Initial Ruling submissions to establish regulations consonant with the Initial Ruling. *See* Copyright Owners' Response at 2 n.2 (noting that the Services' position is inconsistent with the Judges' directive that the parties 'confer" on the creation of joint regulatory provisions, or else submit separate proposals.").

[10] The Judges apply the preponderance of evidence standard when considering the Services' proposals for adjustments to the Phonorecords II-based benchmark. *See Steadman v. SEC*, 450 U.S. 91, 101 n.21 (1981) ("The use of the 'preponderance of evidence' standard is the traditional standard in … administrative proceedings." (quoting *Sea Island Broad. Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980)).

II. Should a Student Plan Subscription Be Counted as only .5 Subscribers, and Family Plan Subscriptions as only 1.5 Subscribers with respect to TCC Caps?[11]

Introduction

In the Phonorecords III Final Determination, the Judges decided that each Student Plan subscription shall be counted for per-subscriber royalties on the Mechanical Floor[12] as only .5 subscribers. They also ruled therein that each Family Plan subscription shall be counted for per-subscriber royalties on the Mechanical Floor as 1.5 subscribers, rather than by counting each authorized family user as an individual subscriber. Final Determination at 1961-62 (expressly "adopt[ing] the Services' proposal, noting that, although "the Services are, to some extent, focusing more on growth of market share than growth of revenue" … the Judges also recognize that marketing reduced rate subscriptions to families and students is aimed at monetizing a segment of the market with a low WTP (or ability to pay) that might not otherwise subscribe at all.").

The Copyright Owners appealed this aspect of the Final Determination, but the D.C. Circuit affirmed the Final Determination in this regard. *Johnson* at 393 (affirming the Student and Family-Plan discounts because "[t]he [Judges'] finding about the willingness (and ability) of students and families to pay" that was their basis for applying these two discounts "is grounded in substantial record evidence.").

Because the Final Determination did not remove the Mechanical Floor provisions, but did remove the Phonorecords II "caps" on TCC rates,[13] in the Final Determination the Judges could

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[11] The Copyright Owners represent that this issue pertains to proposed new sections 385.21 and 385.22. *See* Copyright Owners' Regulatory Provisions, Tab A at 14 n. 3 & 18 n.4. The Services do not identify in the body of their submissions any regulatory sections pertaining to this issue. However, the Services address the substance of this issue in their exhibit proposals for a revised new section 385.21(b). *See* Services' Regulatory Provisions, Ex. B at 11; Ex. C at 6.

[12] The Mechanical Floor rate binds "[i]f the All-In Rate calculation [would] result[] in a dollar royalty payment below the stated Mechanical Floor rate …." *Final Determination* at 26 n. 59. *See also* 37 C.F.R. §§ 37 C.F.R. § 385.13, 385.23 (2014) (superseded Phonorecords II rates); *Johnson*, 369 F.3d at 370 (citing these sections as defining the "Mechanical Floor" as "the minimum mechanical license payment.").

[13] By adopting the Phonorecords II-based benchmark, the Judges' Initial Ruling contains two rate prongs that comprise a "greater-of" approach, *i.e.*, the greater of (1) the new 15.1% "headline" rate; or (2) the lesser-of a specified TCC rate and (when applicable) a per-subscriber rate. Because of the lesser-of feature, the per-subscriber rates serve as "caps" on the TCC rates (and vice versa). *See, e.g.*, 37 C.F.R. § 385.13(a)(3) (superseded) (Phonorecords II regulation for "standalone portable subscriptions) (the All-In royalty is calculated as the "lesser

not (and did not) apply these discounts to these removed TCC "caps." However, in the post-remand Initial Ruling, the Judges have re-adopted the Phonorecords II-based benchmark which includes these TCC "caps" and, as they must (per *Johnson*) the Judges have also adopted the Student and Family-Plan subscriber-count discounts on the Mechanical Floor. Accordingly, the post-remand dispute as to this issue is whether the Judges should apply these two subscriber-count discounts to the re-adopted TCC "caps," *in addition to* the application of these two discounts to the Mechanical Floor rates.

The Services' Position

According to the Services, *with respect to TCC Caps*, Student and Family-Plan subscriptions should be counted in the same manner as they are treated in the Initial Ruling *with respect to Mechanical Floors*, *i.e.*, each student on a student subscription should be counted as one-half (.5) of a subscriber for royalty purposes, and each family plan should be equated with 1.5 subscribers for royalty purposes. Services' Response at 2. In support of this position, the Services make the following initial arguments:

1. These discounted subscription counts are "consistent with the Initial Ruling*'s* directive to adopt the Services' remand proposal but for the headline percentage-of-revenue rates…." Services' Regulatory Provisions at 1.
2. These discounted rates are "consistent with … the conclusions reached in *Johnson* and by the Judges throughout the Initial Ruling regarding the benefits of price discrimination." *Id.* at 2-3.
3. The Copyright Owner present "no principled basis" for applying these discounted subscriber counts under the mechanical floor provisions but not under the lesser-of rate prong as "caps" on the TCC rates, noting that in both contexts the discounted subscriber counts will constitute "price discrimination [which] benefits not just the Services, but the Copyright Owners and consumers as well." *Id.* at 3.

In their subsequent filing, the Services elaborated with the following points:

1. Because *Johnson* had affirmed the salutary use of price discriminatory features for Student and Family-Plans specifically with regard to Mechanical Floors, "there was no reason for the Judges to revisit this issue as part of the remand–it has already been decided." Services' Response at 4.

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of": (i) 21% of the TCC rate (if the label is not the section 115 licensee); and (ii) 80¢ per subscriber – if that All-In calculation is greater than 10.5% [now 15.1%] of Service revenue).

2. "Copyright Owners failed to object to the Services' proposed treatment of student and family plans *at all* during the remand proceeding." *Id.* at 4 (emphasis in original). More particularly, the Services assert that the Copyright Owners "embraced" this subscriber-count discounting of Student and Family-Plans on remand by urging the Judges to "readopt [all] the *Phonorecords III* regulations" (which included this discount for the Mechanical Floor per-subscriber rates). *Id.*

3. The Services' remand *proposal* uses this subscriber count-based discounting of Student and Family-Plans as "caps" for TCC rates as a benchmark. *Id.* at 5.[14]

4. The Copyright Owners "do not "attempt to explain why the treatment of student- and family- plan subscriber counts should differ from other per-subscriber rate prongs." *Id.* at 6.

5. "Consistent application of the student- and family- plan … per-subscriber rate prongs was part of the Services' remand proposal … the Judges' [allegedly] adopted in the Initial Ruling, except for the headline rate." *Id.*

The Copyright Owners' Position

Copyright Owners assert that the discounted per-subscriber counts do not apply with respect to the per-subscriber rates within the lesser-of rate prong and that serve as functional TCC Caps in that prong. In support of this position, the Copyright Owners make the following initial arguments:

1. "[S]tudent and family discounts to mechanical-only floors were not instituted by the Initial Ruling" [and] [t]he Initial Ruling does not address inclusion of such discounts in the rates, let alone indicate their extension beyond the scope of the original Final Determination." Copyright Owners' Regulatory Provisions, Tab A at 14 n. 3.[15]

2. "[T]he original Final Determination imposed such discounts [but] only '[f]or purposes of calculating a mechanical floor rate ….'" *Id.*

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[14] As noted *supra*, the Services mischaracterize their *proposed adjustments* to the Phonorecords II-based benchmark *as the benchmark itself.*

[15] The Judges note the misleading nature of this particular argument. The Initial Ruling expressly adopts – *as it must* – the rulings in *Johnson*. *See* Initial Ruling at 3 ("In establishing a royalty rate structure and the rates within it in the context of this remand proceeding, the Judges are guided by the rulings in *Johnson*." One of those rulings by the D.C. Circuit was the affirmance of the application of the student and family discounts to Mechanical Floors. *See id.* at 74 (citing *Johnson*, 969 F.3d at 392-93). Thus, there was no authority, let alone need, for the Judges to consider on remand whether to adopt these subscriber-count discounts for the Mechanical Floor, a consideration that would have been tantamount to disregarding or second-guessing the D.C. Circuit's holding on this issue in *Johnson*. And yet the Copyright Owners do just that – disregarding *Johnson* by striking from their proposed new language *Johnson's* holding that the Mechanical Floor rates for Student and Family-Plan subscriptions shall be computed as one-half (.5) subscriber for each Student subscriber and 1.5 subscribers for each Family subscriber. See Copyright Owners' Proposed Regulatory Provisions, Tab A at 19.

3. "*Johnson* expressly observed that the discounts were addressed to the mechanical floor." *Id.*[16]

4. Neither the remand nor the Initial Ruling addresses or analyzes "the financial impact of … an "expanding [of] such discounts to all-in per-subscriber 'caps.'" *Id.*

5. "The *Phonorecords II* terms … did not provide for discounts to royalty floors for student or family plan offerings." *Id.* at 18 n. 4.[17]

In their subsequent filing, the Copyright Owners elaborated with the following points:

1. "*Johnson's* affirmance of student and family plan discount terms is solely in connection with the mechanical floor." Copyright Owners' Response at 6.[18]

2. "Neither the original [Final Determination] nor *Johnson* contemplated applying those discounts to the TCC caps [and] [t]here have never been student or family plan royalty reductions in connection with the TCC caps, whether under Phonorecords I, II, the [o]riginal [Final Determination, the Dissent to the [o]riginal Final Determination, or otherwise." *Id.*

3. A detailed actual argument for the rejection of the Services' proposal, which states:

> [T]he TCC cap levels set forth in *Phonorecords II* already[19] equate to heavily discounted pricing [with] [t]he highest of the TCC caps, for standalone portable subscription services … a mere 80-cents per subscriber per month, all-in [and] other TCC caps are even lower, at 50-cent per subscriber per [and] thus 8% and 5%, respectively, of the standard $9.99 premium subscription price point, nowhere remotely close to the 15.1% [revenue rate] ….
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> Importantly, the TCC cap levels set forth in *Phonorecords II* already equate to heavily discounted pricing, including through student and family discount plans. The highest of the TCC caps, for standalone portable subscription services, is a mere 80-cents per subscriber per month, all-in. *See* 37 C.F.R. § 385.13(a)(3) (2017). The other TCC caps are even lower, at 50-cents per subscriber per month, all in. *See* 37 C.F.R. § 385.13(a)(1)-(2) (2017). Those cap levels are thus 8%

[16] Copyright Owners apparently used the verb "observed," rather than the appropriate verb "affirmed," because they choose to elide the fact that that the D.C. Circuit rejected their appeal on this issue, finding reasonable the ruling in the Final Determination that the subscriber-count discounts were applicable to Mechanical Floor rates.

[17] Again, it is appropriate to state up-front that the Phonorecords II provisions were explicitly supplemented by the holding of the D.C. Circuit in *Johnson* to apply these subscriber-count discounts in Phonorecords III. Thus, there is no argument on remand that would affect this holding.

[18] This Copyright Owner argument is apparently in conflict with Copyright Owners' prior points suggesting that the Judges might eliminate these subscriber count discounts on the Mechanical Floor.

[19] That is, even without including the subscriber-count discounting on Student and Family-Plans.

> and 5%, respectively, of the standard $9.99 premium subscription price point, nowhere remotely close to the 15.1%
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> Without any student and family discounts, these cap levels equate to a consumer price discount of nearly 50% in the case of the 80-cent cap and over 65% in the case of the 50-cent cap (at the affirmed and implemented 15.1% revenue rate).
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> Put another way, these rates are already so low that they would not bind unless a Service drops its average pricing by at least 50% relative to the standard $9.99 price point.
>
> To apply student and family discounts *again* to these already uncorrelated low caps would magnify the losses from these revenue diminution strategies.

Id. at 6-7.

The Judges' Analysis and Conclusion

The Final Determination, before appeal and remand, eliminated all "capped" TCC rates, leaving only "uncapped" TCC rates in the (pre-remand) Final Determination. Thus, the question of whether the subscriber count "caps" for Student and Family-Plans should be discounted had been mooted; such capped rates simply were not part of the Final Determination. However, *Johnson* vacated the Final Determination in that regard, essentially "unmooting" that issue.

More particularly, *Johnson* vacated the Majority's rejection of the Services' proffered Phonorecords II-based benchmark. *Johnson* at 387 ("Because we cannot discern the basis on which the [Judges] rejected the Phonorecords II rates as a benchmark in its analysis, that issue is remanded to the Board for a reasoned analysis."). Accordingly, the Judges' "reasoned analysis" post-remand requires them to address the following specific question that had not been considered: whether the Judges should adopt or reject that part of the Services' rate proposal which includes their *proposal to augment* their benchmark to apply the discounted subscriber counts to the TCC caps. That is, because the D.C. Circuit neither affirmed nor rejected the specific application of the subscriber count Student and Family-Plan discounts to the per-subscriber rates on the rate prong that had the effect of placing a "cap" on TCC rates, this remand proceeding is the proper context for the Services to argue, as they have, for an adjustment to the Phonorecords II-based benchmark that would add this "cap" on TCC rates. To foreclose the Services from making this argument, as the Copyright Owners apparently urge, would be improper and unfair.

To evaluate the Services' argument in support of this proffered adjustment to the benchmark, the Judges of course need to consider the evidentiary record. *See generally* 17 U.S.C. § 803(a)(1) ("The … Judges shall act [*inter alia*] on the basis of a written record …."). As noted *supra*, the parties proposed – and the Judges agreed – that the evidentiary record would not be re-opened and supplemented on remand with regard to any issues other than whether the Judges should "adopt[] … a rate structure that includes an uncapped TCC prong." Dec. 15, 2020 Order at 1. Thus, the Judges evaluate factual issues relating to the Services' Phonorecords II benchmark and proposed adjustments based solely on the only record relevant to this issue – the *pre-remand* evidentiary record.

As noted *supra*, the D. C. Circuit did address these two discounts, but only in connection with a different issue, raised in Copyright Owners' appeal: Whether these subscriber-count discounts were properly applied by the Majority in the Final Determination to reduce royalty rates on the "Mechanical Floors." Although the analysis by the D.C. Circuit in *Johnson* on this aspect of the Student and Family-Plan discounts was not applied to the (mooted-by-vacatur) issue of whether to apply these discounts as TCC "caps," the D.C. Circuit's analysis is relevant, albeit not dispositive, as to the Judges' consideration here. That is, the Judges must regard J*ohnson* as they would any D.C. Circuit decision. *See* 17 U.S.C. § 803 ("The … Judges shall act in accordance with … decisions of the court of appeals …."). Further, as with any decision by the D.C. Circuit, the Judges must consider whether *Johnson* presents sufficiently analogous facts and reasoning with regard to the application of these subscriber-count discounts in the Mechanical Floor context as to provide support for extending those subscriber-count discounts to the "capping" of the TCC rates, or whether *Johnson* is distinguishable in that regard.

Considering *Johnson*, the Judges find important that when the D.C. Circuit considered the application of discounting the counts of Student and Family-Plan subscribers, it did so only in the context of applying those discounts on the Mechanical Floor rates. *See Johnson* at 373, 375. The D.C. Circuit did not hold, or even suggest, that these subscriber-count discounts could *also* be applied to the per-subscriber calculations that served as a "cap" on the TCC rates in the Phonorecords II-based benchmark. That omission is unsurprising, because, as noted *supra*, *Johnson* simply remanded the Final Determination for an undifferentiated new review of the Majority's rejection of the Services' Phonorecords II proposals, without commenting on, or

distinguishing among, the specific points raised by the Services, such as the present issue – the use of these subscriber-count discounts in the capping of the TCC rates *in addition to* their inclusion in the Mechanical Floor rates.

The Services support their proposal for this *additional* application of these Student and Family-Plan subscriber-count discounts by pointing to the D.C. Circuit's reliance, in other contexts, on the general price discriminatory structure of the Phonorecords II-based benchmark, and, in particular, its reliance on expert testimony that the discounted subscriber counts would promote industrywide beneficial price discriminatory rates downstream, Services' Regulatory Provisions at 2-3; *see also Johnson* at 392-93 (finding that the Judges' application of the Student and Family-Plan discounts to the Mechanical Floor rate were "grounded in substantial record evidence" in the form of expert testimony regarding the lower "Willingness-to-Pay" of subscribers to these plans).

The Judges find that language in *Johnson* distinguishable. Importantly, that analysis by the D.C. Circuit did not address *whether it would be appropriate to apply these subscriber-count discounts twice* – once as caps on the TCC rates and a second time on the Mechanical Floor rates. *But this is precisely what the Serves are seeking on remand*. As to this point, the Services did not identify any evidence that would support the *dual application* of these two subscriber-count discounts on the Mechanical Floor and as caps on the TCC rates.

On remand, the Services have not pointed to any evidence that would support the dual application of these subscriber-count discounts. Nonetheless, in the interest of completeness, the Judges have considered the Services' pre-remand submissions for testimony or other evidence that would bear on this issue. In this review of the pre-remand record, the Judges recognize, as noted *supra*, that it was (and remains) incumbent upon them to provide sufficient evidence as to this issue, because the burden of proof lay with the Services, as the parties proposing the provisions.

In their pre-remand proposals, the Services, sought to adjust their proffered Phonorecords-II based benchmark by arguing for the elimination of the Mechanical Floor from the Phonorecords II provisions. See Services' Joint Proposed Findings of Fact ("SJPF") ¶¶ 127,

160-161.[20] Thus, the Services did not contemplate – *and thus never advocated for* – a double-application of the student and family-plan subscriber count discounts by including them in a Mechanical Floor and as "caps" on the TCC.

The Copyright Owners' argument, though, *does pertain to the issue at hand*: whether those discounts should be applied *an additional time*, given that they have already been applied to the Mechanical Floor. On this issue, the Copyright Owners correctly note that the Services have not pointed to any evidence at the hearing explicitly regarding such a *dual use* of these subscriber-count discounts, because they had advocated (unsuccessfully) for a benchmark adjustment eliminating the Mechanical Floor. Of course, the Services cannot to point to any *post-remand* evidence, because they successfully stipulated to limiting the evidence regarding the Phonorecords II-based benchmark to the hearing record.

As noted *supra*, the burden of proof with regard to this issue lies with the Services, because on remand they are proffering the application of Student and Family-plan subscriber count discounts as part of the Phonorecords III regulatory terms, in addition to the application of these discounts to the Mechanical Floor rates by the D.C. Circuit in *Johnson*. But the only argument the Services make for this dual application of the student and family-plan subscriber count discounts is an implicit one; their post-remand assertion that the discounts should be "treated consistently," and that "[i]t makes no sense to treat these subscriber-counts differently in

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[20] The Judges (in the Majority *and* in the Dissent) rejected that proposal, and maintained the Mechanical Floor provisions. The Dissent explained that the Phonorecords II-based benchmark *structure* could not be broken-up *piecemeal*, when the rationale for its use as a benchmark was that – as a *comprehensive* structure – it reflected a marketplace bargain. As noted in the Dissent:

> [T]he Mechanical Floor was part of the trade-off of consideration within the 2012 benchmark settlement. … [T]he Services, contrary to their basic argument, seek to disrupt the status quo that they otherwise recommend, in order to obtain a *better bargain* than contained in that benchmark. To put the point colloquially, the Services cannot have their cake and eat it too. … … [T]he Mechanical Floor was a bargained-for feature of the benchmark structure on which the Services rely, distinguishing that benchmark status from the Services' proposal for "*removal* of the Mechanical Floor ….")

Phonorecords III, 84 Fed. Reg. at 1998 & n. 278, 2029 (Dissent). Adding Student and Family-Plan discounts to the Phonorecords II per-subscriber "caps" on the TCC rates likewise would constitute a *piecemeal* change to that industrywide agreement. The Judges recognize, like the proposed *elimination* of the Phonorecords II Mechanical Floor rates, the proposed *addition* to the Phonorecords II rates of the per-subscriber Student and Family-Plan discounts is an *adjustment* to the Phonorecords II-based benchmark. (For clarity, by comparison, the increase in the "headline" rate is not inconsistent with this point because it did not alter the *structure* of the rates, and, more importantly, the increase to 15.1% was affirmed in *Johnson*.)

the two regulatory scenarios (as Mechanical Floor discounts and as TCC "caps"). Services' Regulatory Provisions at 2-3.

The Judges disagree. By that argument, the Services conflate a *duplicative* application of the same discounts with a *consistent* application of those discounts. Although the Services maintain that the Copyright Owners fail to set forth a "principled basis" for *opposing* the double application of these subscription-count discounts, *id.* at 3, it is the Services' argument that lacks a basis *for* such a double application.

In similar fashion, in the Services' Response, they repeat their conflation of "consistency" and "duplication," *id.* at 6. Specifically, the Services argue that the Copyright Owners are trying to "sneak" the differing treatment of subscriber-count discounts into the regulations in this "eleventh hour" drafting process and "without any evidentiary support." *Id. at 5-6.* But this argument suffers from a fair amount of projection. It is not the Copyright Owners who are trying to insert anything new into the Phonorecords II-based benchmark; rather, the Services seek to add these new subscriber-count discounts to reduce the TCC caps, by declaring this addition as *part* of that benchmark, rather than what it actually is – a proposal to *adjust* the benchmark, as discussed *supra*. And, as also noted *supra*, because it is *their* proposal, the Services have the burden, under section 556(d) of the Administrative Procedure Act, to establish that a duplicate inclusion of these subscriber-count discounts would be appropriate. But they have not identified any evidence that would support this duplicate inclusion. Rather, the Services simply fall back on the rationale for the D.C. Circuit's affirmance of the Judges' application of these subscriber-count discounts *to the Mechanical Floor*, which does not address the issue at hand: whether to *duplicate* this express discount as "caps" on the TCC rates.[21]

In the end, the Services' are left with a single argument: their reliance on the general benefits of price discrimination – built into the industrywide negotiation itself, and as specifically relied upon by the D.C. Circuit to affirm the Final Determination's inclusion of these subscriber-

[21] As noted *supra*, in the Copyright Owners' Response, their attorneys attempt to engage in a factual analysis – s*ans* evidentiary citations – to urge the Judges to reject this further use of the subscriber-count discounts. The Judges disregard this argument given the lack of citation to the record and the absence of any post-remand evidence on the point (given the parties' stipulation and the resulting December 15, 2020 Order adopting their agreement). However, although the Copyright Owners failed to support their fact-based argument with record evidence, the existence of their argument highlights the glaring failure *of the Services* to identify record evidence that would support the dual use of these subscriber-count discounts, an absence which is critical because, as noted *supra*, the Services have the burden of proof as to this issue.

count based discounts on the Mechanical Floor rates. But that price discrimination policy argument is distinguishable from the Services' proposal to *compound* a specific price discriminatory approach through a *double-application* of the discriminatory discount. Although the Judges on remand have found merit in the *bargained-for* price discriminatory features of the Phonorecords II-based benchmark, the Judges do not find that any *unbargained-for* price discrimination – let alone one that would constitute a second application of the same price discrimination device – should be presumptively consistent with effective competition or otherwise sufficient to satisfy the statutory criteria.[22] Rather, such an argument would need to be supported by economic evidence, which simply does not exist in the record.[23]

Based on the entirety of the record and for the reasons set forth herein, the Judges find and conclude that the Phonorecords III regulations shall not include a discount on the subscriber count for Student and Family-Plan accounts.

[TEXT CONTINUES ON THE FOLLOWING PAGE]

[22] *Johnson* found the price discriminatory features of the subscriber-count discounts to be sufficiently supported by the record to affirm the inclusion of those discounts on the Mechanical Floor rates, without addressing the import of their absence from the Phonorecords II-based benchmark. The Judges are not permitted to second-guess the D.C. Circuit's ruling in this (or any other) regard (which is not to imply that the Judges would have disagreed with the D.C. Circuit as to this issue).

[23] The Judges' ruling on this issue should not be misunderstood as suggesting that a sufficient case could not have been made to support a double application of these discounts as Services propose, but rather that the Services failed to proffer evidence to make that case. To repeat, the Judges also recognize that the Services' inability to make a clear and sufficient case was in significant part self-inflicted, because they stipulated to the exclusion of new evidence on the Phonorecords II-based benchmark approach on remand.

III. Should the TCC Rate Prong for "Paid Locker Services" and "Limited Offerings" Include any Per-Subscriber Minima? [24]

Introduction

The Phonorecords II-based benchmark included per-subscriber minima on the TCC rate prong for (1) "Paid Locker Services"[25] and (2) "Limited Offerings"[26] in former Subpart C (*i.e.*, Subpart C under the Phonorecords II regulations). Although the Services had advocated for maintaining the entirety for the Subpart C provisions (which include these two minima) in their pre-remand submissions, after remand they changed course and propose the elimination of the per-subscriber minima on these two products. *Compare* Services' Joint Proposed Findings of Fact ¶130 (advocating for the Phonorecords I-based benchmark by emphasizing: "[T]he

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[24] The Copyright Owners represent that this issue pertains to proposed new sections 385.21. *See* Copyright Owners' Regulatory Provisions, Tab A at 14. The Services do not identify the regulatory provision to which this issue pertains in the bodies of their two submissions, but identify in their proposal for suggested language the same provision as referenced by the Copyright Owners, section 385.21. *See* Services' Regulatory Provisions, Ex. A at 11-12; Ex. B at 11-12; Ex. C at 7-9.

[25] A "Locker Service" is defined as

> an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license."

37 C.F.R. § 385.21 (Phonorecords II regulations).

A "Paid Locker Service" is "a Locker Service for which the End User pays a fee to the Service Provider." *Id.*

The parties agree on the use of these definitions in the Phonorecords III regulations. *Compare* Services Regulatory Provisions, Ex. A, pp. 3-4; *with* Copyright Owners' Regulatory Provisions, Tab A, pp. 4-5. (The Judges have moved these definitions into the new Phonorecords III Subpart A, at §385.2.) The per-subscriber minima for a "Paid Locker Service" was 17¢ per subscriber per month. 37 C.F.R. § 385.23(a)(4)(ii) (Phonorecords II regulations).

[26] The Participants agree that the definition of a "Limited Offering" (substantively the same as in the Phonorecords II regulations) is

> a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—(1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streams only from a monthly playlist consisting of a limited set of recordings).

Compare Services' Regulatory Provisions, Ex. A, p. 3; *with* Copyright Owners' Regulatory Provisions, Tab A, p. 4. *Cf.* 37 C.F.R. § 385.21 (Phonorecords II regulations). (The Judges have moved this definition into the new Phonorecords III Subpart A, at §385.2.) The per-subscriber minima for a "Limited Offering" was 18¢ per subscriber per month. 37 C.F.R. § 385.23(a)(3)(ii) (Phonorecords II regulations).

parties … negotiated vigorously over the rates that would apply to new service types, including cloud locker services, that would be embodied in Subpart C of 37 C.F.R. § 385…. [T]he parties agreed on a structure … comparing a headline percentage of revenue royalty rate against TCC *and per-subscriber minima*) (emphasis added) with Appendix A to Initial Ruling (Services' proposal omitting – without explanation – the *per-subscriber minima* for "Paid locker Services" and "Limited Offerings").

By contrast, Copyright Owners on remand propose to maintain these two per subscriber minima, given their inclusion within the Phonorecords II-based benchmark for which the Services had advocated and as to which the Judges have endorsed on remand. *See* Copyright Owners' Regulatory provisions, Tab A at 14, n. 3 (first paragraph); Copyright Owners' Response at 7-8.

By way of background, in the Initial Determination (pre-remand), the Majority noted that "the existing [Phonorecords II] subscriber-based royalty floors shall remain in effect during the new [Phonorecords III] rate period." Initial Determination at 1. However, the Copyright Owners argued in their subsequent (still pre-remand) Motion for Clarification that the Paid Locker Services and the Limited Offerings had subscriber-based royalty "floors," but that these purported "floors" had been wrongly omitted from the Majority's Regulatory Terms, through what the Copyright Owners claimed "appears [to be] an oversight…." Copyright Owners' Motion for Clarification at 7. The Services argued that although the Initial Determination had maintained Mechanical Floors, the per-subscriber minima are *not Mechanical Floors*, and thus were not preserved by the Majority in the Initial Determination. Services' Response to Copyright Owners' Motion for Clarification at 6-7.

The Majority ruled in favor of the Services on this issue by declining to adopt these minima for Paid Locker Services and Limited Offerings, explaining that *the elimination of these minima was dictated by the Majority's elimination of all capped TCC rates.* More particularly, the Majority first explained its rationale for its *adoption* of the Mechanical Floors:

> *[T]he Judges revamped the entire mechanical rate structure. In that process, they attempted to anticipate negative consequences that might result from the structural overhaul.* For subscriber-based services, the Judges introduced an external rate comparison factor (TCC) [to] address[] the Copyright Owners' concerns regarding revenue manipulation …. Further, the Judges acknowledged, without fully

> accepting, the potential for consolidation or integration of sectors of the music industry that might result in manipulation of the TCC factor. *The Judges accepted mechanical floors for those licenses that enjoyed mechanical floors under the previous rate scheme as an additional backstop against this unknown potential.*

Amended Order Granting in part and Denying in part Motions for Rehearing at 12 (Jan. 4, 2019) (Amended Clarification Order) (emphasis added).[27] Therein, the Majority also *distinguished* the Mechanical Floors from the minima for "Paid Locker Services" and "Limited Offerings":

> *The existing minimum for these services was not a mechanical floor. … The Judges' choice not to establish a minimum for Paid Locker Services and Limited Offerings* was not inadvertent; it *was a feature of the regulatory overhaul so necessary for these mechanical licenses.*

Id. (emphasis added). In their Final Determination, the Majority incorporated their ruling as to this issue from the Amended Clarification Order, reiterating that "[t]he existing minimum for these non-streaming services was not a Mechanical Floor." Final Determination, 84 Fed. Reg. at 1936.

However, after *Johnson* vacated and remanded that Final Determination, the Judges issued the Initial Ruling, in which they eliminated the "regulatory overhaul" to which the Majority referred, *supra* (that had fully uncapped TCC rates in the Final Determination). Instead, the Judges have adopted the Phonorecords II-based benchmark for all of Subpart C, which includes the provisions for "Paid Locker Services" and "Limited Offerings." Initial Ruling at 93-94. Thus, the rationale for eliminating these per-subscriber minima, *i.e.*, that they were never Mechanical Floors, became moot upon the issuance of the Initial Ruling., and their prior Phonorecords II benchmark status as per-subscriber minima was returned to the regulatory scheme.

Now, in crafting the regulatory provisions, the Judges must consider whether these per-subscriber minima are part of the Phonorecords II-based benchmark that should be adopted in the Phonorecords III regulations, or whether the Judges should *adjust that benchmark* by eliminating those minima.

[27] The Amended Clarification Order corrected a typographical error and an inadvertent word choice in an otherwise substantively identical (and identically named) Clarification Order previously entered on October 29, 2018. *See also* Order on Motion for Correction of Rehearing Order at 2 (Jan. 4, 2019) (stating that the October 29th Clarification Order would be amended to incorporate only these corrections).

The Services' Position

In support of their argument for an elimination of per-subscriber minima for these two products, the Services make the following initial arguments on remand:

1. Although the Services acknowledge that, pre-remand, they proposed to include both of these two Phonorecords II-based benchmark minima in the Phonorecords III regulations, on remand they have sought an adjustment to the Phonorecords II regulatory provisions that would remove these per-subscriber minima. Services' Regulatory Provisions at 3 (citing Appendix A to the Initial Ruling).
2. The Judges' Initial Ruling provides that the Judges would incorporate into the new regulations "updates" proposed by the Services that were unchallenged by the Copyright Owners on appeal, and that the Copyright Owners had not challenged the removal of these per-subscriber minima on appeal. *Id.*[28]
3. The Judges had already rejected the Copyright Owners' request to "reinstate" these two per-subscriber minima in the Judges' post-hearing Order, a ruling that likewise was not appealed by the Copyright Owners. *Id.* Thus, the prior rulings by the Judges on this issue constitute "law of the case," precluding the reinsertion now of these two per-subscriber minima.

In their subsequent filing, the Services elaborated on the foregoing points and added the following arguments:

1. On 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 two per-subscriber minima. Services' Response at 8 & n.3 (citing four submissions by the Copyright Owners).
2. The elimination of the two per-subscriber minima remains appropriate post-remand now that the "headline" rate has been increased by 44%, from 10.5% to 15.1% upon the full phase-in for 2022. Id. at 8-9.
3. The Judges' general "unchanged" adoption (via the Initial Ruling) into the Phonorecords III provisions of subpart C provisions from Phonorecords II did not reflect a specific intention to maintain these two per-subscriber minima. Rather, the Judges' expressly adopted the "unchanged" Subpart C provisions only as a rejection of the Copyright Owners' argument that those Subpart C offerings were "essentially obsolete." *Id.* at 9 (citing Initial Ruling at 93-94).
4. The Copyright Owners did not appeal this issue and thereby forfeited it, because *Johnson* constitutes the "law of the case," and the Judges cannot revisit this issue at this procedural stage. *Id.* at 7-8 (citing; *Williams v.*

[28] As explained *supra*, the Services are mistaken; the Judges did not agree to adopt the Services' proposed *adjustments* to the Phonorecords II-based benchmark.

Romarm, SA, 756 F.3d 777 (D.C. Cir. 2014); *Kimberlin v. Quinlan*, 199 F.3d 496 (D.C. Cir. 1999)).

The Copyright Owners' Position

In support of the inclusion of per-subscriber minima for these two products, the Copyright Owners make the following initial arguments:

1. The Initial Ruling provides that the alternative rates (identified in subpart C as "minima" and "subminima") shall remain unchanged. Copyright Owners' Regulatory Provisions at 14 n.3.
2. These unchanged alternative rates include the per-subscriber rates for "Paid Locker Services" and "Limited Offerings.," which are calculated as "All-In" rates (mechanical + performance rates), unlike Mechanical Floors (that exclude performance rate). *Id.*
3. These minima were not only part of the Phonorecords II regulations, but also were part of the Services' original pre-remand proposals. *Id.*

In their subsequent filing, the Copyright Owners elaborated with the following points:

1. The Services had included these two minima in their original Phonorecords III rate proposals. Copyright Owners' Response at 8.
2. The Services never provided a basis for removing these per subscriber minima on remand, while still advocating for Phonorecords II-based rates and terms. *Id.* at 8.
3. The Initial Ruling unambiguously states that the subpart C "minima" and "subminima" rates shall remain unchanged from Phonorecords II. *Id.* (citing Initial Ruling at 93.
4. The Judges found that the Services had "inexplicably omitted these two minima from their proposed subpart C rates" in their post-remand proposal. *Id.* at 7 (citing July 27th Order at 1).
5. The Services' post-remand "law of the case" argument is inapplicable, because the pre-remand Final Determination only omitted those minima because it had also uncapped *all* TCC rates, as explained in the Judges' Amended Clarification Order. Now on remand, the Judges, have "reinserted" the per-subscriber "caps," removing the rationale in the Final Determination and the Amended Clarification Order for removing these per-subscriber caps. *See id.* at 8-9.

The Judges' Analysis and Conclusion

The Judges find and conclude that the per-subscriber minima in subpart C must be included in the Phonorecords III regulatory terms. The Judges reach this decision for several reasons.

First, as noted *supra*, an overarching reason for the Judges' reliance on the Phonorecords II-based benchmark on remand is that it was forged through industrywide negotiations by trade associations with the backdrop of a statutory rate proceeding that blunted the complementary oligopoly power of the mechanical rights licensors. Altering that balanced agreement by eliminating these two individual bargained-for elements, absent some compelling reason to do so, is inconsistent with this persuasive reason for applying the Phonorecords II provisions.

The Judges have previously extended this rationale broadly to the (former) Subpart C regulations, which include the provisions governing "Paid Locker Services" and "Limited offerings." The unambiguous language of the Initial Ruling is that "[t]he Judges find no reason on remand to treat the subpart C offerings differently than the manner in which they are treating the subpart B interactive streaming offerings, for the reasons set forth in the Dissent at 118-119." Initial Ruling at 94. The Dissent stated in this regard that "the Subpart C rate structure has the same attributes of a useful benchmark as does the Subpart B rate structure," noting the "the parties' prior arm's length negotiations of the Subpart C structure [that]… reflects their understanding of the different use values" for subpart C products. Dissent at 118-119.

Second, it is clear that the Final Determination and the Amended Clarification Order removed the subpart C per-subscriber minima for Paid Locker Services and Limited Offerings *only* because of the uncapping of all TCC rates. That is, these per-subscriber minima were omitted because, under the Final Determination, *all per-subscriber caps on TCC rates had been eliminated*.

Thus, the Services' "law of the case" argument is inapposite. The Services correctly note the "law of the case" doctrine provides that a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when an opportunity to do so existed, becomes the law of the case for future stages of the same litigation. Services' Response at 8 (quoting *Kimberlin at* 500).

However, the D.C. Circuit has identified an exception to this "law of the case" doctrine:

> The doctrine of law of the case … contains an exception when the law itself has changed … or when an intervening interpretation of the law has been issued by a controlling authority[including] when the intervening interpretation of the law comes from an authority whose views are only conditionally controlling."

NTEU v. FLRA, 30 F.3d 1510, 1515 (D.C. Cir. 1994). This exception is applicable here.

The Judges' Initial Ruling – *eliminating* the uncapped TCC rates in the Final Determination and adopting instead capped TCC rates from the Phonorecords II-based benchmark – is a changed interpretation of the law, and the Judges constitute such "an authority whose views are … controlling," even if "conditioned" upon any potential differing result after a possible rehearing or upon an appellate rejection of the Judges' ruling in this regard.

Third, and related to the "law of the case" exception considered above, the Judges do not find informative the fact that the Copyright Owners did not specifically appeal the elimination of the per-subscriber minima for the Paid Locker Services and Limited Offerings in subpart C. The Copyright Owners were attempting to preserve the uncapped TCC rates and rate structure, and they could not reasonably have foreseen that the Judges on remand would apply the Phonorecords II-based benchmark and broadly adopt Subpart C and raise on appeal that non-issue.[29]

Moreover, the case law on which the Services rely for their law-of-the-case argument is not supportive of their position. In *Kimberlin*, the court took note of the exception to the law-of-the case doctrine cited above, (but omitted from the Services' Response), stating that "[t]he law-of-the-case may be revisited … if there is an intervening change in the law." *Id.* at 500. Here, as explained *supra*, *Johnson* and the Judges' Initial Ruling have combined to generate such an intervening change in the law.

In *United States v. Kpodi*, 888 F.3d 486, 491 (D.C. Cir. 2018), also relied on by the Services, the court applied the law-of-the-case doctrine to the specific facts, while noting that the

[29] Copyright Owners could have appealed the Judges' decision that these per-subscriber minima were distinguishable from the Mechanical Floor rates under the Final Determination's rationale. But on remand the present argument on which the Copyright Owners rely is premised *on* the very rational from the Final Determination – that the per-subscriber minima are different from the Mechanical Floor. The Copyright Owners hardly could have had the clairvoyance to anticipate the post-remand change in the law effected by the Interim Ruling.

doctrine is applied "generally," thus admitting to the existence of specific exceptions, such as the intervening change in the controlling authority discussed *supra*. Thus, the Services' mere recitation of a general rule, without applying the applicable exception, is not supportive of its argument.

Another case upon which the Services rely, *Williams v. Romarm, SA*, 756 F.3d 377 (D.C. Cir. 2014), concerned an appellate party's failure to raise an issue in a brief, rather than a law-of-the-case issue. *See id.* at 383. And, to the extent the Services may be relying on the fact that this per-subscriber minima issue was not briefed in *Johnson*, the Judges reject that argument, because Copyright Owners were not clairvoyant; they could not have predicted that the Initial Ruling would have adopted the Phonorecords II-based benchmark. Indeed, any argument based on the Copyright Owners' failure to anticipate every future change in the regulatory provisions between the vacated Final Determination and the Initial Ruling would have required the Copyright Owners (and the Services) to brief multiple hypothetical combinations of regulatory terms, which would have been a speculative, inappropriate and an unnecessary use of legal resources.

Fourth, it is noteworthy that the Services had *included* these subpart C per-subscriber minima for Paid Locker Services and Limited offerings in their pre-remand proposals for Phonorecords III rates and terms. *See* Copyright Owners' Response at 8 & n.8 therein. This indicates that the Services themselves understood the consonance between their overall argument for adopting the Phonorecords II-based benchmark and the retention of these subpart C per-subscriber minima.

Fifth, the Judges find persuasive that, as the Copyright Owners note, not only are the royalty rate minima for "Paid Locker Services" and "Limited Offerings" calculated in a fundamentally different manner. That is, these "minima" are calculated on an "All-In" basis and "Mechanical Floor" rates are calculated without regard to the performance royalty. This fundamental difference in the method of calculation belies the assertion that these minima were "Mechanical Floors."

Sixth, the Judges reject the Services argument that the elimination of the two per-subscriber minima remains appropriate post-remand because *Johnson* affirmed the phased-in increase in the "headline" rate from 10.5% to 15.1%. Nowhere in *Johnson* does the D.C. Circuit so much as suggest that these minima should be jettisoned in light of the higher "headline" rate.

Further, *Johnson* did not question the Majority's reasoning in its Final Determination (and in the *Amended Clarification Order*) that these two minima had only been eliminated because of the Majority's comprehensive "uncapping" of TCC rates (rejected in the post-remand Initial Ruling).

Accordingly, on the basis of the foregoing analysis, and in consideration of the entirety of the record, the Judges include in the Phonorecords III regulations the per-subscriber minima that were part of Subpart C for "Paid Locker Services" and "Limited Offerings" in the Phonorecords II-based benchmark.

IV. Should the Phonorecords III Regulations Define Revenue Differently for Subpart C "Mixed Service Bundles" Compared to the Revenue Definition for Bundles in Subpart B?[30]

Introduction

In the Phonorecords II regulations, revenue identification and calculation for Subpart C "Mixed Service Bundles" was based on a "greater-of basis." More specifically, such revenue was calculated as the greater of:

(a) revenue under the definition for bundled subscription offerings; and

(b) either 40% or 50% of the "standalone published price of the licensed music component of the bundle, depending on the number of subscribers to the Mixed Service Bundle.

37 C.F.R. § 385.21 ("Subpart C service revenue, subparagraph 5) (Phonorecords II regulations).[31]

[30] The Copyright Owners represent that this issue pertains to proposed new sections 385.21. *See* Copyright Owners' Regulatory Provisions, Tab A at 2 n.1; 14. The Services do not identify the applicable regulatory provisions, but in their Regulatory provisions, their version of the rate calculation is likewise contained in section 385.21. *See* Services' Regulatory Provisions, Ex. C at 7-9.

[31] Although the parties *disagree* as to the regulatory language that provides for the *calculation of revenue* (and thus royalties) from a "Mixed Service Bundle," they *do agree* to the following definition of a "Mixed Service Bundle":

> [O]ne or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (*e.g.*, internet access service, mobile phone service) or non-music products (*e.g.*, a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering*." Compare* Copyright Owners' Initial Regulatory Provisions Regulatory Provisions*,* Tab A at 5 *with* Services' Initial Submission*,* Ex. A at 3.

This definition is substantively identical to the definition of a "Mixed Service Bundle" in the Phonorecords II regulations. See 37 C.F.R. § 385.21 (Phonorecords II regulations). (The Judges have moved this definition into the new Phonorecords III Subpart A, at §385.2.)

By contrast, Subpart B in the Phonorecords II regulations contained different language for revenue identification and calculation regarding "Service Revenue" for a "bundle" subject to Subpart B:

> Service Revenue shall be the revenue recognized from End Users for the Bundle less the standalone published price for End Users for each of the other component(s) of the Bundle …

Initial Ruling at 94 (quoting from the Phonorecords II regulations, Subpart B). In their (pre-remand) Initial Determination, the Judges (in the Majority and in Dissent) adopted the latter approach for the Phonorecords III regulatory provisions.[32]

On remand, in the Initial Ruling, the Judges have re-adopted the bundled-revenue calculation language that, pre-remand, the Judges had approved in the Initial Determination. Initial Ruling at 113. As the Judges explained, this is the same regulatory language as in the Phonorecords II-based benchmark. *Id.* ("because … the Judges here do partially rely on the PR II-based benchmark, [they] thus find that it supports the Bundled Revenue definition contained in the Initial Determination.").

Thus, the present dispute concerns whether – for the (former) Subpart C "Mixed Service Bundles" – revenues should be calculated: (*i*) pursuant to the (former) Subpart B language adopted in the Initial Ruling expressly for (former) Subpart B bundles; or (*ii*) pursuant to the (former) Subpart C language, also adopted in the Initial Ruling. The Services urge the Judges to adopt alternative (*i*) above, and the Copyright Owners argue that the Judges should adopt alternative (*ii*) above.

In economic terms, the Services are arguing for the elimination of the "greater-of" prong that calculates royalties based on a percentage of the standalone price of the music component of

[32] By way of background, in the Amended Clarification Order, and again in their Final Determination, the Majority replaced this Phonorecords II language with other language suggested by the Copyright Owners. *See* Amended Clarification Order at 21; Phonorecords III, 84 Fed. Reg. at 1962. But on appeal, the D.C. Circuit vacated and remanded the adoption of the Subpart B-related bundled revenue definition, finding deficient the Majority's procedural approach to changing the definition from what they had adopted in the Initial Determination. *Johnson* at 389-92. The Participants' prior disagreement with regard to the re-adoption of the method for revenue calculation with regard to (former) Subpart B bundled subscription offerings is now moot. Accordingly, the vacated (former) Subpart B method for calculating bundled revenue in the Final Determination is not one of the alternatives at issue now being the parties.

the "Mixed Service Bundle," whereas the Copyright Owners seek a provision that includes this "greater-of" feature.[33]

Copyright Owners' Position

In support of maintaining the separate Phonorecords II-based benchmark regulation for calculating revenue from "Mixed Service Bundles," the Copyright Owners make the following initial arguments:

1. Because the Initial Ruling adopted the Phonorecords II-based benchmark (save for the "headline" rate), the specific methodology for identifying and calculating revenue for "Mixed Service Bundles" must also be realigned on remand with the regulatory language in Phonorecords II. Copyright Owners' Initial Regulatory Provisions at 2 n.1.
2. This regulatory language was also contained in the Services' original rate proposals in the pre-remand proceedings. *Id.*
3. No evidence was taken on remand regarding the financial impact of omitting this language while simultaneously reinstituting other terms from Phonorecords II.

In their subsequent filing, the Copyright Owners elaborated with the following points:

1. In the Phonorecords II regulations, revenue identification and calculation for Subpart C "Mixed Service Bundles" were based on the "greater-of basis" in (former) 385.21 described *supra*.
2. The Services omitted the separate service regulatory language regarding revenue treatment for "Mixed Service Bundles" from their proposed regulations, and failed to provide an explanation or evidence for their omission. *Id.* at 9-10.
3. These Phonorecords II-based revenue terms must be readopted because they were part of the Phonorecords II settlement, which included this greater-of revenue definition. *Id*. at 9.

It would be "arbitrary and capricious" for the Judges to have adopted the (former) Subpart C terms but not the definitional and revenue-calculation provisions applicable to the Subpart C-based "Mixed Service Bundles." *Id.* at 10.

[33] Not surprisingly, comparatively, the Services' approach apparently would reduce the revenues, and thus the royalties paid in many instances, and the Copyright Owners' approach would appear to increase revenues and resulting royalties in many circumstances.

The Services' Position

In support of their position, the Services initially did not specifically address their omission of the "second-prong" definitional and calculation language related to revenue derived from a "Mixed Bundle Service. *See* Services Initial Regulatory Provisions, Ex. A at 11; Ex. B at 11. Instead, they relied solely on their broad argument that they "understand the Initial Ruling as accepting their *proposed* rates and terms from the remand proceeding, with the exception of the headline rates." *Id.*, Ex. C at 7 (emphasis added).[34]

In their subsequent filing, the Services made the following points:

1. The Copyright Owners wrongly seek to *add* a definition of Service Provider Revenue unique to Mixed Service Bundles. Services' Response at 9.
2. The use of the Copyright Owners' regulatory language with respect to Mixed Bundle revenue is different from the revenue provisions the Judges established for other bundles. *Id.* at 9-10 (citing Initial Ruling at 109-113).
3. Copyright Owners neither challenged on appeal nor sought in the remand proceedings (until this "eleventh-hour" drafting of proposed regulations) provisions to adopt the Mixed Bundle revenue provisions. *Id.* at 10, 12.
4. The Initial Ruling only rejects the Copyright Owners' attempt to eliminate the former Subpart C provisions in their entirety, and is not inconsistent with the Judges' setting of a single rule for defining and calculating bundled revenue. *Id.* at 11.
5. In the Initial Ruling, the Judges properly established a uniform rule for identifying the portion of bundled revenue that would serve as a royalty base that would incentivize (as opposed to eliminate or reduce) beneficial price discrimination.

The Judges' Analysis & Conclusion

The Judges find and conclude that the regulatory provisions pertaining to the rates for "Mixed Service Bundles" shall be the same as those set forth in the Phonorecords II regulatory provisions. Again, the Judges rely on the fact that these Phonorecords II provisions were *included in the benchmark* for which the Services advocated in the pre-remand hearing. The Services have not set forth any argument sufficient to adjust the terms of the Phonorecords II-

[34] As noted *supra*, the Judges reject the Services' characterization of the Phonorecords II-based *benchmark* as inclusive of their post-remand *proposals*.

based benchmark with regard to the calculation of revenue from "Mixed Service Bundles" under (former) Subpart C.

More particularly, and as the Judges have noted *supra*, a principal rationale for the Judges' adoption of the Phonorecords II-based benchmark is that it was forged through a voluntary negotiation and settlement between industrywide participants (through their respective trade associations), in the shadow of a statutory rate hearing that would occur if they failed to reach an agreement, a potentiality that blunted the exercise of the complementary oligopoly market power of the licensors in those negotiations. As also noted *supra*, the Services' post-remand proposed benchmark *adjustments* are not part of the negotiated Phonorecords II-based benchmark and thus must be justified, if at all, on their own individual merits.

In this regard, the Services have failed to carry their burden of proof for this proposed adjustment. More particularly, the Services have not identified any evidence, or made any persuasive argument, why the Phonorecords II-based benchmark should be adjusted in order to conform to a different provision for treating revenue from other bundles. Several reasons support this decision, in addition to the overarching rationale – noted *supra*, that the Phonorecords II-based benchmark is useful because it was a negotiated settlement between trade associations with sufficient countervailing power to generate an effectively competitive result.

First among these several additional reasons, the Services did not request this change in their original rate proposal or at the hearing. Thus, there is no pre-remand record to support the change. Further, because the Judges agreed with the Services' proposal (made jointly with the Copyright Owners) that there would be no new evidence proffered in the post-remand proceedings regarding the Phonorecords-II based benchmark, the Judges have no basis in the record to support this change.

Second, the Judges' adopted in their (post-remand) Initial Ruling their method of calculating revenue derived from the other form of bundling – "bundled subscription offerings" – after the D.C. Circuit had identified a procedural error by the Judges requiring a remand as to that calculation method. *Johnson* at 389-92. The correction of that procedural error is separate and apart from the Judges post-remand re-adoption of the (former) Subpart C provisions. Indeed, in the Initial Ruling, the Judges ruled that the other (former Subpart B) bundled revenue provisions should be adopted *because they had been part of the Phonorecords II-based*

benchmark, in order for the Judges to be consistent with their reliance on that benchmark, and the other price discriminatory provisions within (former) Subpart B of that benchmark.

But the "Mixed Service Bundle" revenue provisions are at once the same yet distinguishable. They are the *same in the manner of their genesis*, in that they were part and parcel of the negotiations between the industrywide trade associations that culminated in the 2012 adoption of Subparts B and C. And yet they are *different definitionally*, because in those negotiations the Services agreed to maintain the different and unique bundled revenue provision for (former) Subpart C. It is the sameness of their genesis that the Judges find controlling.

Third, and relatedly, the Judges' concern in the Initial Ruling for maintaining the beneficial price discrimination provisions from the Phonorecords II-based benchmark – a point on which the Services rely – does not override the parties' negotiated decision to eschew for "Mixed Service Bundles" in (former) Subpart C the price discriminatory aspects of (former) Subpart B. Price discrimination *can* be beneficial – particularly when setting royalties, but not when there is insufficient evidence to support its application. *See* Dissent at 128 ("[A] price discriminatory upstream rate structure is appropriate *not because it is* either *necessary* or the *only way in which this market can be structured*, but rather because the record indicates it is a rate structure (among all the "second best" economic options) that *has* aligned well the characteristics of both the upstream and downstream markets ….") (emphasis in original). Consistent with this point, there is no basis in the record evidence for the Judges to extrapolate from (*i*) the factual finding that the *actual negotiated price discrimination* that "*has* aligned well" the upstream and downstream markets to (*ii*) a non-evidentiary finding that proposed new (and not negotiated) price discrimination be added to the regulations. Moreover, even if the general benefits of price discrimination in this context could be construed as specifically applicable to the present issue, those benefits are overridden by (*i*) the fact of the Services' agreement to the particular "Mixed Service Bundle" revenue calculation in the Phonorecords II-based benchmark and (*ii*) the Services' prior ongoing advocacy for maintaining the *entirety* of the (former) Subpart C regulatory provisions.

Fourth, and related to the immediately preceding point, in the Initial Ruling, the Judges agreed with the Services' position regarding (former) Subpart C and thus expressly adopted *in toto* the provisions therein, which were part of the Phonorecords II-based benchmark. *Id.* at 94

("[T]he Services urge the Judges to use the subpart C rate structure as the benchmark for rates in the forthcoming period for the same reasons as they urge the use of the subpart B rates as an appropriate benchmark. … The Judges find no reason on remand to treat the subpart C offerings differently than the manner in which they are treating the subpart B interactive streaming offerings, for the reasons set forth in the Dissent at 118-119."). On the present issue regarding the language of the regulatory provisions, the parties have not presented any reason to depart from that finding.

Fifth, the Judges reject the Services' argument that – because the Copyright Owners did not specifically appeal from the elimination of the Subpart C treatment of the "Mixed Service Bundle" revenue provisions – they cannot now seek a re-adoption of those terms. The Copyright Owners argued on appeal in favor of the (ill-fated) revenue treatment for "Mixed Service Bundles" that was set forth in the later vacated and remanded by *Johnson*. The Judges find no reasonable basis to find that the Copyright Owners cannot now pursue this issue merely because they did not have the clairvoyance to anticipate an unfavorable change in that bundled revenue definition as adopted in the later Initial Ruling. With regard to this issue, the Services' argument is essentially a reprise of its "law-of-the-case" argument that the Judges have rejected, *supra*, for the same reason, *i.e.*, a change in the applicable regulatory application of the statutory standards for rates and terms constitutes a judicial exception to the general "law-of-the-case" doctrine.

Sixth, the Judges find problematic the Services' failure to explicitly note in their post-remand proposals (which the Judges attached as Appendix A to the Initial Ruling) their elimination of the Phonorecords II regulatory language in (former) Subpart C governing revenue calculation for "Mixed Service Bundles." That failure suggests that the Services may have understood that their argument was inconsistent with their own (successful) advocacy for a widespread adoption of the Phonorecords II-based benchmark, and they sought to slip this change in without notice. That suggestion ripened into a suspicion when the Services failed to provide an explanation for this omission in their Regulatory Provisions submission.

Seventh, the Judges also take issue with the Services' argument – made for the first time in their Response – that the Copyright Owners are wrongly seeking to *add* a definition of Service Provider Revenue unique to "Mixed Service Bundles." Quite the contrary, the Services are wrongly seeking to *delete* the regulatory language from their own benchmark.

For these reasons, and on the basis of the entirety of the record, the Judges reject the Services' request to eliminate from the Phonorecords III regulatory provisions the specific revenue calculation provisions for "Mixed Service Bundles" contained in the (former) Subpart C in the Phonorecords II-based benchmark.

V. The Parties' Subsequent Steps

The parties shall confer to establish an agreed-upon entire set of regulatory provisions that embody the rulings set forth in *Johnson*, the Initial Ruling, this Order, and any aspects of the Final Determination (pre-remand) that the parties understand to remain effective after the foregoing rulings. Their agreed-upon complete set of regulatory provisions shall be filed **no less than ten (10) calendar days**[35] **from the date of this Order.**

If the parties are unable to agree upon the entirety of the regulatory provisions, they shall file their own submissions, inclusive of the otherwise agreed-upon regulatory provisions. Their separate submissions (if any) shall be contained in a single *joint* filing, to be submitted **no less than twenty (20) days from the date of this Order**.[36]

The following rules shall apply to the new submission(s):

1. The parties shall immediately meet and confer in an attempt to agree on and submit joint complete clean and redlined versions of the proposed new regulations, with the redlining contrasting them with the Phonorecords II regulations.
2. To the extent the parties are unable to agree on all aspects of the proposed new regulations, they shall make a *joint* submission containing: (a) each party's explanation of its position with regard to each and every remaining difference between them; and (b) replies to the explanations provided by the adverse party, pursuant to paragraph 2(a) herein. To allow for these replies to the explanations to be included in the submission to the Judges due twenty (20) days from the date of this Order, each party shall provide to its adversary its explanations required by paragraph 2(a) herein **within fifteen (15) days of the date of this order**.

[35] Notwithstanding section 303.7.

[36] In their prior submissions regarding proposed regulatory provisions, the parties made a number of textual changes that were not required by *Johnson*, not contained in the Phonorecords II regulations and went beyond the itemized disputes substantively addressed in their submissions. These submissions included proposed tabular information, as replacements for regulatory language from Phonorecords II. *See, e.g.*, Copyright Owners' Response at 10 ("The Services inexplicably propose deleting § 385.22 in its entirety and replacing it with a table of rates."). Those submissions were less than helpful. To avoid the problems inherent in such items, the Judges have set forth the process contained in this section of the Order.

3. In every submission required by this order, all sections of the proposed new regulations shall be accompanied by language indicating:

   (a) the provision(s) of the Phonorecords II regulations to which it conforms, if any;

   (b) the ruling(s) in *Johnson* to which it conforms, if any;

   (c) the specific finding(s) in the Initial Ruling to which it conforms, if any;

   (d) the specific findings(s) in this Order to which it conforms, if any; and

   (e) the specific decision(s)n in the Final Determination (pre-remand) to which it conforms, if any, together with an explanation of why the party believes that a provision of the Final Determination (pre-remand) remains effective after *Johnson*, the Initial Ruling and this Order.[37]

SO ORDERED.

Dated: November 10, 2022

David Shaw
Digitally signed by David Shaw
Date: 2022.11.10 16:18:28 -05'00'

David P. Shaw
Chief Copyright Royalty Judge

[37] The Judges agree with the reorganization of Part 385 into new Subparts that differ from those in Phonorecords II, including the definitional provisions in new Subpart A. However, even for the reorganized sections (including the definitional provisions) the parties must identify (in their joint or separate submissions) where the reorganized provisions (including the definitions) were set forth in the Phonorecords II regulations.