

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In re

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16-CRB-0003-PR (2018-2022)
(Remand)

**JOINT SUBMISSION PURSUANT TO NOVEMBER 10
CORRECTED ORDER REGARDING REGULATORY PROVISIONS
FOLLOWING INITIAL RULING AND ORDER (AFTER REMAND)**

National Music Publishers' Association and Nashville Songwriters Association International (collectively, "Copyright Owners") and Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the "Services" and, together with Copyright Owners, the "Participants"¹) make this joint submission in response to the Judges' November 10 Corrected Order.²

I. INTRODUCTION

Attached as Exhibit A is a copy of proposed regulatory provisions to implement the Corrected Order. The Participants agree on all of the regulatory language with the exception of the TCC rate percentages contained in Table 2 of the proposed Section 385.21.³ A redline of these proposed regulatory provisions against the regulations from *Phonorecords II* is attached as

¹ Counsel for Copyright Owners have spoken with George Johnson, who has indicated that he joins in Copyright Owners' position with respect to the TCC rate percentage. Mr. Johnson takes no position at this time with respect to the remaining joint regulatory provisions.

² See Corrected Order Regarding Regulatory Provisions Following Initial Ruling and Order (After Remand), 16-CRB-0003-PR, eCRB Docket No. 27312 (November 10, 2022) ("Corrected Order").

³ The Participants have thus inserted the bracketed comment "[SEE SECTION II OF THE JOINT SUBMISSION]" where those rate percentages arise in Table 2 of Section 385.21 in Exhibit A.

Exhibit B. In Section II below, the Services, on the one hand, and Copyright Owners, on the other, provide their respective positions concerning this discrete issue.

II. RESPECTIVE POSITIONS CONCERNING TCC RATE PERCENTAGES

The arguments set forth in Section A below are solely those of the Services, and the arguments set forth in Section B are solely those of Copyright Owners.

A. Services

Only one remaining substantive point of disagreement exists among the parties as to the regulations implementing the Initial Ruling, namely the appropriate percentage rate levels for the “TCC” prongs (which appear in Table 2 of draft Section 385.21). In particular, the Services straightforwardly propose to implement the TCC percentage rates (ranging from 20.65% to 22%) expressly set out by the Judges, both in their Initial Ruling and in their recent Order Regarding Regulatory Provisions. (eCRB 26938 at 2; eCRB 27312 at 6, FN 13). For their part, the Copyright Owners contend—for the first time—that the regulations implementing the Initial Ruling should not reflect the TCC rates the Judges adopted in these rulings, and instead should reflect the 26.2% rate previously imposed by the majority in the now-vacated pre-remand Final Determination. The Copyright Owners’ attempt to re-litigate the TCC rate now should be rejected.

As an initial matter, the Copyright Owners’ current challenge to the Judges’ TCC percentage rate is procedurally improper.⁴ The Copyright Owners included the same 20.65% to 22% TCC rates as the Services in their July submission of proposed regulations (*see* eCRB 27011 at 15-16). And, nothing in the Judges’ November order re-opened the question of the TCC rate

⁴ Indeed, the Copyright Owners admit the procedural impropriety of their objection to the percentage rate levels for the TCC prongs adopted by the Judges in the opening sentence of their submission. *See* Joint Submission at 6 (“Copyright Owners are mindful that the Corrected Order indicates that substantive objections to the Initial Ruling may be made in response to the forthcoming Initial Determination.”).

levels; the Copyright Owners provide no explanation as to what has changed between July and now to warrant any change in the regulations implementing the very same Initial Ruling with respect to the TCC rates. Indeed, the Judges have already rejected the Copyright Owners' argument twice in this remand proceeding—determining that the 20.65% to 22% TCC rates are “reasonable.” Initial Ruling and Order After Remand (July 1, 2022) (eCRB 26938) at 80; *see generally* Initial Ruling at 78-80.

Yet, rather than comply with the Judges' clear directive and straightforwardly implement the TCC percentage rates expressly set out by the Judges both in their Initial Ruling and in their recent Order Regarding Regulatory Provisions (eCRB 26938 at 2; eCRB 27312 at 6, FN 13), the Copyright Owners instead propose a change to their own previously proposed regulations⁵ and cling to an erroneous reading of *Johnson* which they maintain commands their defiance of the Judges' repeated findings. *Johnson* does no such thing. *See generally Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020).

To the extent the Copyright Owners now attempt to make a substantive objection to the Judges' findings—something the Judges' recent order explicitly forbids (eCRB 27312 at 3)—it is likewise improper and not sustainable. Once the Initial Determination has been issued, the Copyright Owners can offer whatever substantive objections they deem warranted under the standard governing re-hearing motions, or they may appeal.⁶ The Judges should not allow the Copyright Owners to short-circuit the Copyright Royalty Board's own well-defined procedures

⁵ *See* eCRB 27011 at 15-16 (implementing initial ruling with TCC rates of 20.65% - 22%).

⁶ Per the Copyright Royalty Judges Rules and Regulations, rehearing requests “must be filed within 15 days *after the date on which the Copyright Royalty Judges issue an initial determination.*” (Copyright Royalty Judges Rules and Procedures, 37 C.F.R. § 353.4) (emphasis added). And even if timely filed, rehearing requests may be granted only “in exceptional cases” and only “upon a showing that any aspect of the determination may be erroneous.” *See id.* at §353.1; 17 U.S.C. §803(c)(2). The Copyright Owners could not satisfy this high standard even if they were to file a motion for rehearing at the appropriate time.

and specific orders in this proceeding requiring that any rehearing motion be filed after the issuance of an initial determination (which has yet to occur).

While the Copyright Owners point to the Judges' Initial Ruling for support for their ill-timed and unfounded objection, noting that "the D.C. Circuit affirmed the Majority's derivation and calculation of the 26.[2]% TCC rate," (eCRB 26938 at 19), they omit the next clause of that statement wherein the Judges acknowledged that the D.C. Circuit "vacated and remanded the Judges' application and inclusion of that rate prong in the rate structure." *Id.* As the Services have explained in numerous filings throughout this remand proceeding—and as the Judges have themselves agreed—*Johnson* does not compel the Judges to simply reinstate their original pre-remand TCC rates. *See, e.g.*, eCRB 26219 at 3. As the Judges further acknowledged—and contrary to what Copyright Owners now assert—while the "defect that generated the vacating on this issue was *procedural*...the consequence of the D.C. Circuit's action, however, was *substantive*." *Id.* at 20 (emphasis in original).

Furthermore, the Judges rejected the Copyright Owners' argument for a second time in their recent Order Regarding Regulatory Provisions. In their Response to the Judges' July 27, 2022 Order Soliciting Responses Regarding Regulatory Provisions (August 5, 2022), the Copyright Owners argued (again) that, under *Johnson*, the 26.2% rate prong was not subject to revision by the Judges. (eCRB 27103 at 2-3). The Judges rejected this argument in favor of the currently existing rates of 20.65% - 22% and, indeed, did not even substantively address the topic of TCC rates because that determination was already made in the Initial Ruling. eCRB 26938 at 2; eCRB 27312 at 6, FN 13.

Copyright Owners' repeated, erroneous arguments on this point depend on a wholesale misunderstanding of *Johnson*. There, the Services challenged, among other things, the Judges'

“rejection of the Phonorecords II and Subpart A settlements as rate benchmarks” and the “conclusions with respect to the four statutory objectives.” *Johnson*, 969 F.3d at 384. As to the former, the D.C. Circuit concluded it could not “discern the basis on which the Board rejected the Phonorecords II rates as a benchmark” and “remanded” that issue to the Judges “for a reasoned analysis.” *Id.* at 386–87. That error, in combination with “fail[ure] to provide adequate notice of the drastically modified rate structure” adopted by the Judges, led the D.C. Circuit to “vacate [the] rate structure *and percentages*” in the Final Determination. *Id.* at 381 (emphasis added). The D.C. Circuit in *Johnson* thereby foreclosed the argument that Copyright Owners once again make. Indeed, the Judges have already recognized that this “meritless” reading of *Johnson* would be “inconsistent” with the decision and “would render the D.C. Circuit’s vacating and remanding of the proceeding without force or effect.” (eCRB 26007 at 3, 4 n.7).

The Copyright Owners also ignore the evidence in the record supporting the *Phonorecords II* TCC percentages. As the Judges were required to do, they reevaluated the *Phonorecords II* benchmark during the remand and properly reached the conclusion that it is the “better of the benchmarks proposed by the parties” and is one that “satisfies the requirements of 17 U.S.C. § 801(b)(1) in all respects,” including with respect to the *Phonorecords II* TCC rates. Initial Ruling at 2, 65 (cataloging why the *Phonorecords II* benchmark is useful), 73 (noting that the Judges endeavored “to determine if [the TCC rates] are supported by record evidence”). That benchmark plainly constitutes “evidence in the record after remand” and fully supports not returning to the vacated, pre-remand TCC rates and instead adopting those found in the *Phonorecords II* benchmark.

Accordingly, while the Services continue to reserve their rights to challenge any aspects of the Judges’ ultimate determination at the appropriate time, there is no basis for Copyright Owners’

assertion that *Johnson* requires the Judges to reinstate the vacated pre-remand 26.2% TCC rate. Such a challenge, which has now been rejected by the Judges on two separate occasions, is both procedurally improper—indeed the Copyright Owners themselves included 20.65% to 22% TCC rates in their July submission implementing the Initial Ruling—and a substantive misreading of *Johnson* and its mandate to the Judges in this remand. It should therefore be rejected as contrary to the Judges’ own rulings and to the ruling in *Johnson* and the original TCC rates of 20.65% - 22% — previously blessed by the Judges *and both sides* — should be retained.

B. Copyright Owners

Copyright Owners are mindful that the Corrected Order indicates that substantive objections to the Initial Ruling⁷ may be made in response to the forthcoming Initial Determination. *Corrected Order* at 3. However, the Corrected Order also directs the Participants to propose regulations “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 ruling.” *Id.* at 31. As a result, Copyright Owners raise the matter of TCC rate percentages at this time.

As Copyright Owners first indicated in their August 5th response to the Judges’ July 27, 2022 Order, the Initial Ruling appears to plainly acknowledge that, in light of *Johnson*, the derivation and calculation of the (phased-in) 26.2% TCC rate percentage cannot be changed.⁸ The Initial Ruling correctly found “that the D.C. Circuit affirmed the Majority’s derivation and calculation of the 26.1% [sic] TCC rate” and further that “both rate prongs” – meaning both the

⁷ See *Initial Ruling and Order After Remand*, 16-CRB-0003-PR, eCRB Docket No. 26938 (July 1, 2022) (“Initial Ruling”).

⁸ See *Copyright Owners’ Response To Judges’ July 27, 2022 Order Soliciting Responses Regarding Regulatory Provisions*, eCRB Docket No. 27103 (August 5, 2022) (“August Submission”) at 2-3.

revenue rate and the TCC rate – were “derived from the same analyses.” Initial Ruling at 19 (emphasis removed). As the Judges stated:

[B]ecause the identical analysis was performed by the Judges to derive **the 26.2% TCC rate** as was done to derive the 15.1% revenue rate, the Majority’s finding with regard to the *derivation and calculation* of the TCC rate likewise **is not subject to further consideration on remand by the Judges.**

Initial Ruling at 20 (added emphasis in bold).

This understanding was also reflected in the conduct of the remand, which was not opened for new evidence concerning TCC rate percentages. *See* Order Regarding Proceedings on Remand, eCRB Docket No. 23390, at 2; Order Adopting Schedule for Proceedings on Remand, eCRB Docket No. 23413, at 1. Indeed, there is no evidence in the record after remand to support changing the (phased-in) 26.2% TCC rate percentage. Deriving new TCC rate percentages after the close of the remand record by using the *Phonorecords II* benchmark – indeed, calculating new TCC rate percentages from any source – is foreclosed. As the Judges explained in the Initial Ruling, *Johnson* analyzed the derivation and calculation of that 26.2% rate percentage in detail and affirmed it.

The Services suggest above that *Johnson* can somehow be evaded by characterizing a change in the TCC rate percentage as a change in the “application” or “inclusion” of the TCC rate prong in the overall rate structure. But words cannot be twisted so far from their meaning. Deriving a new TCC rate percentage is just that. 26.2% cannot simply become 21% without the *reconsideration* of the rate percentage derivation that the Judges acknowledge is not allowed. The issue here is not one of application or inclusion. The Judges do not in the Initial Ruling “not apply” or “not include” the TCC rate prong. Rather, the Initial Ruling *includes* and *applies* the TCC rate prong, and the question here is what TCC rate *percentage* is *derived*. *Johnson* affirmed the 26.2% answer from the pre-remand Final Determination (and no new evidence was subsequently taken on the issue during the remand).

Furthermore, *Johnson* cannot be evaded by framing the Initial Ruling as creating a new TCC rate prong that is not subject to *Johnson*'s holdings. The TCC rate prong structure for bundled and ad-supported offerings has *never changed* at all. Bundled and ad-supported offerings have always had a greater-of, uncapped TCC rate prong, both under the *Phonorecords II* structure as well as under the structure set forth in the *Phonorecords III* pre-remand Final Determination. Indeed, the uncapped TCC rate prong structure for bundled and ad-supported offerings from the pre-remand Final Determination *was not appealed by the Services or challenged during the remand*, nor called into question by the Circuit in *Johnson*. Rather, *Johnson* acknowledged that the Services had themselves proposed uncapped TCC prongs for bundled and ad-supported offerings and took issue only with respect to the decision to uncap the TCC prong “*across the board*,” meaning for *other* offerings. 969 F.3d 363, 382 (D.C. Cir. 2020). This uncapped TCC rate prong for bundled and ad-supported offerings appropriately was not changed by the Judges in the Initial Ruling. The Judges in the Initial Ruling thus adopt the exact TCC rate structure for bundled and ad-supported offerings in which *Johnson* reviewed and affirmed the 26.2% TCC rate percentage. Recalculation of this rate percentage, as acknowledged by the Judges, would run directly afoul of *Johnson*. Initial Ruling at 20.

The Services also argue that Copyright Owners' position is “procedurally improper” because Copyright Owners did not propose the (phased-in) 26.2% TCC rate in their July 18th submission of proposed regulations.⁹ But the July submission was pursuant to a very different order. The Initial Ruling directed a July regulatory submission consistent only with the Initial Ruling, and “specifically admonish[ed] the parties that they shall not use these submissions as a

⁹ See *Copyright Owners' Submission Of Regulatory Provisions To Implement The Initial Ruling*, eCRB Docket No. 27011 (July 18, 2022) (“July Submission”) at 2-3.

basis to object to this Initial Ruling, either explicitly or implicitly by proposing regulatory provisions inconsistent with this Initial Ruling.” Initial Ruling at 114.

Copyright Owners specifically noted the narrowness of this direction in their July submission, stating:

Copyright Owners make this submission pursuant to the specific directive in the Initial Ruling to submit regulatory provisions “consistent with this ruling,” and the specific admonishment that the parties “shall not use these submissions as a basis to object to this Initial Ruling, either explicitly or implicitly by proposing regulatory provisions inconsistent with this Initial Ruling.” Copyright Owners thus submit these regulatory provisions solely because they have been directed to do so without objection in the Initial Ruling, despite the fact that they do not reflect Copyright Owners’ proposed rates and terms in this proceeding. Copyright Owners reserve all rights with respect to the Initial Ruling, any implementing regulations and any Initial and Final Determination, including the right to challenge any of the foregoing.

Copyright Owners’ July Submission at 1, fn. 1.

This statement was followed up in the Copyright Owners’ August Submission with the explanation that, “the directive in the [Initial] Ruling appears to call for rolling back the TCC rate level calculation in the [pre-remand Final Determination], even though that runs expressly counter to another holding in the [Initial] Ruling acknowledging that the Judges cannot change the [pre-remand Final Determination] rate level calculation,” and explicitly notes that, “*Johnson* would foreclose this tribunal from changing the 26.2% TCC rate level calculation.” August Submission at 2-3. Copyright Owners thus made clear in the July and August submissions that the narrow regulatory submission directed by the Judges in July did not reflect a TCC rate percentage that comports with *Johnson* or even with parts of the Initial Ruling itself.

It is in this context that Copyright Owners read the Corrected Order, which gives a very different directive, namely to submit 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.” Corrected Order at 31. This broader directive leads to this submission. As expressed from the beginning of this regulatory drafting process, Copyright Owners do not believe that deriving and calculating new TCC rate percentages is consistent with *Johnson* or parts of the Initial Ruling.¹⁰

The TCC issue remanded by *Johnson* – the expansion of the uncapped TCC rate prong structure to standalone offerings – was determined by the Judges in the Services’ favor, and the TCC rate prong was re-capped for standalone offerings. The question of the TCC rate *percentages* was not addressed in the remand, in keeping with the holding in the Initial Ruling that “the *derivation and calculation* of the [26.2%] TCC rate... is not subject to further consideration on remand by the Judges.” Initial Ruling at 20.

Copyright Owners thus respectfully submit that the TCC rate percentage that embodies the rulings set forth in *Johnson* and prior rulings before the Judges is the (phased-in) 26.2%, and this is the rate that should be incorporated into the final determination and regulations after remand.

In order to incorporate this TCC rate percentage, Copyright Owners propose that the bracketed text in Section 385.21(b)(1) at Table 2 of the attached joint proposed regulations (Exhibit A hereto) be replaced with “**the applicable percent of TCC, as set forth in Table 1 above**” and that Table 1 be revised to add an additional row of TCC rate percentages, so that it reads as follows:

Table 1					
Royalty Year	2018	2019	2020	2021	2022
Percent of Service Provider Revenue	11.4	12.3	13.3	14.2	15.1
Percent of TCC	22.0	23.1	24.1	25.2	26.2

¹⁰ Copyright Owners’ August Submission further explains how the Judges’ adoption of student and family plan discounts highlights the impropriety under *Johnson* of changing the TCC rates. *See August Submission* at 2-5.

November 30, 2022

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Wednesday, November 30, 2022, I provided a true and correct copy of the Joint Submission Pursuant to November 10 Corrected Order Regarding Regulatory Provisions Following Initial Ruling and Order (After Remand) to the following:

Google LLC, represented by David P Mattern, served via E-Service at dmattern@kslaw.com

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Nashville Songwriters Association International, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

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Signed: /s/ Richard M Assmus