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

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

JOINT SUBMISSION PURSUANT TO ORDER 65
REQUESTING ADDITIONAL BRIEFING FROM PARTICIPANTS

National Music Publishers' Association and Nashville Songwriters Association International (together, "Copyright Owners"), together with Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the "Services" and, together with Copyright Owners, the "Settled Participants"), make this joint submission in response to the Judges' January 5, 2023 Order 65 Requesting Additional Briefing From Participants ("Order 65").

In Order 65, the Judges state that George Johnson "appears to have requested a rate for activity that may not be part of the settlement, which he describes as an 'unlimited, limited download,'" and direct the participants to provide briefing "as to whether and how this proceeding may address such activity." (Order 65 at 1; *see also* 87 Fed. Reg. 80448 (Dec. 30, 2022) ("Final Rule") at 80543 n.22.). As discussed below, the Settled Participants respectfully submit that no further action need be taken in this proceeding with respect to such activity.

With respect to Mr. Johnson's filings, he does not define what he intends by the term "unlimited limited download," and it appears that his use of this term may relate to a misimpression

that the recently published rates and terms (the "Published Rates") include a "loophole" whereby royalties are not paid in connection with Eligible Limited Downloads, or that such downloads can be retained and used indefinitely. (*See*, *e.g.*, Comments and Second Response in Opposition to the Subpart C Proposed Settlement, eCRB Doc. No. 27371, at 2 n.3; *see also id.* at 12.). However, pursuant to Subpart C of the Published Rates, the Judges did set a rate for Eligible Limited Downloads, so that royalties are due for that activity, and the definition clearly sets limits on the activity. (*See* Published Rates § 385.20 ("This subpart establishes rates and terms of royalty payments for… Eligible Limited Downloads of musical works….").). There is thus no "loophole" as to Eligible Limited Downloads for the Judges to address.

It is also possible that, as the Judges noted in the Final Rule, Mr. Johnson's use of "unlimited limited download" may be a reference to a proposal included in Copyright Owners' WDS to address a download that is not permanent but also does not qualify as an Eligible Limited Download. (87 Fed. Reg. at 80452 n.16, citing Copyright Owners WDS at 23–24.). Insofar as Order 65 is directed to such downloads, the Settled Participants also believe no further action need be taken in this proceeding.

First, while the Published Rates establish a rate for Eligible Limited Downloads (as noted above), the lack of a rate for certain Restricted Downloads that are not Eligible Limited Downloads is not inconsistent with current industry practice. The Settled Participants are not aware of any service offerings in the U.S. that involve Restricted Downloads that are not Eligible Limited Downloads (other than in connection with Purchased Content Locker Services, for which the Published Rates establish a rate). The Settled Participants do not believe that the Judges at this time need to adjudicate a rate for activity that does not appear to exist in the marketplace.

Second, the lack of a rate for certain Restricted Downloads that are not Eligible Limited Downloads (for offerings other than locker services) that Copyright Owners raised and that the Judges cited has been an aspect of the compulsory mechanical license since *Phonorecords I*. *See* 37 C.F.R. § 385.11 (2010) (definition of "limited download"); 37 C.F.R. §§ 385.11 (definition of "limited download"), 385.21 (2014) (definitions of "restricted download" and "limited download"); 37 C.F.R. § 385.2 (2020) (definitions of "Restricted Download" and "Eligible Limited Download"). The Settled Participants reasonably agreed to carry over that same scope in resolving this proceeding.

Third, the Copyright Act addresses rate-setting for a new covered activity offered in the marketplace for which no rate has been set. In such a situation, the Act states that a rate and terms set in a subsequent *Phonorecords* proceeding "shall be retroactive to the inception of activity." *See* 17 U.S.C. § 803(d)(2)(B). Further, in the interim until a rate and terms are set by the Judges, "the mechanical licensing collective and any digital music provider may agree to an interim rate and terms for such activity under the blanket license." 17 U.S.C. § 115(d)(8)(C)-(D). Any such interim rate and terms would be nonprecedential, and any rate and terms later established by the Judges, "shall supersede the interim rate and terms and apply retroactively to the inception of the activity under the blanket license." *Id*. These provisions would apply in the event a service provider engaged in covered activity for which no rate had been set.

For these reasons, the Settled Participants respectfully submit that the Judges need not further address this potential activity in this proceeding. The Settled Participants each reserve all rights with respect to any such activity should it occur, including with respect to the rate and terms that should apply to such activity.

DATED: January 20, 2023

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Friday, January 20, 2023, I provided a true and correct copy of the Joint Submission Pursuant to Order 65 Requesting Additional Briefing from Participants to the following:

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