

PUBLIC VERSION

**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)**

PUBLIC VERSION
ORDER 43 ON PHONORECORDS III REGULATORY PROVISIONS

Introduction

The present Order concerns a single issue in dispute among the parties¹ regarding regulatory language implementing the Judges’ Initial Ruling and Order after Remand (“Initial Ruling”) entered in this proceeding.² Subsequent to filing dueling submissions (*see* footnote 2 *infra*), the parties filed a Joint Submission, informing the Judges that they had “agree[d] on all of the regulatory language” except for certain rate percentages contained in Table 2 of the proposed Section 385.21. Joint Submission ... Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) at 1 (Nov. 30, 2022) (“Joint Submission”) (eCRB no. 27337).

¹ The parties who have joined on this dispute (through filings after the issuance of the Initial Ruling) are the 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”). (Copyright Owners have informed the Judges that another party, George Johnson, joins in Copyright Owners’ position with respect to the issue considered in this Order.)

² The Judges instructed the parties to “prepare and submit regulatory provisions consistent with this ruling.” Initial Ruling and Order after Remand at 114 (July 1, 2022) (eCRB nos. 26938, 27063). The Judges further instructed that, “if the participants cannot agree on a joint submission, the Judges will accept separate submissions respectively from (1) Copyright Owners and (2) Services, jointly.” *Id.* The parties did not initially file an agreed-upon joint submission as to regulatory provisions, but rather filed the permitted separate submissions.

The Regulatory Language in Dispute

The dispute between the parties is whether the Judges should adopt in the Phonorecords III regulations: (1) the several “Total Content Cost” (“TCC”) rates³ set forth in the Phonorecords II-based benchmark; or (2) the single 26.2% TCC rate discussed in the Initial Ruling. This dispute relates to nine offerings made by interactive streaming services, as detailed below:

Offering	Copyright Owners’ Proposal	Services’ Proposal
<i>Standalone Non-Portable Subscription Offering—Streaming Only</i>	26.2%	The lesser of 22 % of TCC for the Accounting Period or 50 cents per subscriber per month
<i>Standalone Non-Portable Subscription Offering—Mixed</i>	26.2%	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month
<i>Standalone Portable Subscription Offering</i>	26.2%	The lesser of 21 % of TCC for the Accounting Period or 80 cents per subscriber per month
<i>Bundled Subscription Offering</i>	26.2%	21 % of TCC for the Accounting Period
<i>Free nonsubscription/ad-supported services free of any charge to the End User</i>	26.2%	22% of TCC for the Accounting Period
<i>Mixed Service Bundle</i>	26.2%	21% of TCC for the Accounting Period
<i>Purchased Content Locker Service</i>	26.2%	22% of TCC for the Accounting Period
<i>Limited Offering</i>	26.2%	21% of TCC for the Accounting Period
<i>Paid Locker Service</i>	26.2%	20.65% of TCC for the Accounting Period

Sources: Offering column text from Exhibit A to Joint Submission ... Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) at 17 (Nov. 30, 2022) (eCRB no. 27338); Services’ Proposal column text from Services’ Joint Submission of Regulatory Provisions Ex. A at 11 (July 18, 2022) (eCRB no. 27005)

³ TCC is defined in the Initial Ruling as “a shorthand reference to the extant regulatory language describing generally the amount paid by a service to a record company for the section 114 right to perform digitally a sound recording.” Initial Ruling at 4 n.8 (citations omitted).

The Issue

At a high level, the remaining regulatory issue is the following:

Whether a 26.2% TCC rate identified in the hearing record, and discussed both on appeal and on remand by the D.C. Circuit, should substitute for TCC rates in the Phonorecords III period, or whether these uncapped TCC rates should be set at the specific levels ranging between 20.65% and 22% set forth in the Phonorecords II-based benchmark adopted by the Judges in the Initial Ruling.

To frame, address, and rule on this issue, in this Order the Judges place the parties' dispute in the context of the prior rulings by the D.C. Circuit and the Judges in connection with this proceeding.

Background

On January 5, 2016, the Judges initiated proceedings to determine the appropriate mechanical license royalty rates and terms for the January 1, 2018 to December 31, 2022 period. *See* Notice Announcing Commencement of Proceedings in Phonorecords III, 81 Fed. Reg. 255 (Jan. 5, 2016). After the parties filed their written and rebuttal testimonies and engaged in discovery, they participated in a five-week evidentiary hearing presided over by the Judges. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords, 84 Fed. Reg. 1918, 1920, 1923–1925 (Feb. 5, 2019).⁴

In the Majority Opinion, the Judges adopted a “greater-of” royalty rate structure for the mechanical license, which contained a TCC rate applicable to all categories of offerings⁵. *See* 84

⁴ The Determination was not unanimous. Judge David Strickler dissented from the Majority's setting of the TCC rate, and he proposed that the appropriate rates should essentially be those proposed in the Phonorecords II-based benchmark proposed by several of the Services. Thus, for clarity, this Order refers to the “Majority Opinion” and the “Dissenting Opinion,” rather than the “Final Determination,” when discussing the respective opinions.

⁵ The other prong in the “greater-of” rate structure is the percent-of-revenue generated by the interactive streaming service, *i.e.*, “service revenue.”

Fed. Reg. at 1963; *see also Johnson v. Copyright Royalty Board*, 969 F.3d 363, 372 (D.C. Cir. 2020) (summarizing the Majority Opinion). More particularly, the Majority adopted the following rates and rate structure:

2018-2022 All-In Royalty Rates: The Greater of:

	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Percent of TCC	22.0%	23.1%	24.1%	25.2%	26.2%

Majority Opinion at 1918, 1960.

The Services appealed.⁶ Among their arguments were the assertions – pertinent to this Order – that the Majority: (i) violated the Services’ procedural right to fair notice by choosing a structure that was not advanced by any party; (ii) acted arbitrarily and capriciously by simultaneously combining a TCC prong (phased-in to 26.2% of TCC) with an increase in the percentages on the revenue prong (phased-in to 15.1%); and (iii) failed to reasonably explain its rejection of the Phonorecords II settlement as a benchmark. *Johnson, supra*, at 376, 380-81.⁷

Copyright Owners argued in opposition that: (i) the Services’ procedural rights were not violated because “every component” of the Majority’s approach was contained in the hearing record; (ii) the Majority’s rate and rate structure rulings were well-reasoned, factually supported

⁶ The Copyright Owners and George Johnson also appealed; all three parties’ appeals were consolidated by the D.C. Circuit. *Johnson* at 375.

⁷ The annual phased-in rates are set forth in the Table *supra*.

and, therefore, not arbitrary and capricious; and (iii) sufficient reasons existed in the record to support the Majority’s rejection of the Phonorecords II-based benchmark. *Johnson, supra*, at 382-383; 387.

The D.C. Circuit vacated and remanded. More particularly, *Johnson* holds as follows:

1. The Majority Determination “failed to provide adequate notice of the drastically modified rate structure [they] ultimately adopted,” which was beyond “a reasonable range of contemplated outcomes” in “the parties’ pre-hearing proposals, the arguments made at the evidentiary hearing, and the preexisting rate structures.” *Johnson* at 381-82. Accordingly, as to this issue, “[i]f the [Judges] wish[] to pursue [their] novel rate structure, [they] will need to reopen the evidentiary record.” *Id.* at 383.
2. The appellate issue of whether the Majority’s adoption of the (phased-in) 26.2% TCC royalty rate was “arbitrary and capricious” could not be addressed – given the absence of “adequate notice” cited in point (1) above. *Id.*
3. The Majority’s derivation, calculation *and application* of the royalty rate of 15.1% on the revenue prong was proper.⁸ The D.C. Circuit explained that, as to *this* issue, the Majority had engaged in the “type of line-drawing and reasoned weighing of the evidence [that] falls squarely within the [Judges’] wheelhouse as an expert administrative agency.” *Johnson* at 386. More particularly, the D.C. Circuit approved of the Judges’ reliance on “substantial evidence” in the form of expert testimony to set the 15.1% service revenue rate. *Johnson*, at 384-85 (emphasis added). *See also id.* at 388 (finding “substantial evidence” for the Judges’ finding that an increase in the mechanical royalty rate was necessary to address a “marked decline in mechanical royalty income”).
4. The Majority’s rejection of the Phonorecords II-based benchmark is remanded because the D.C. Circuit “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 [Judges] for a reasoned analysis.” *Johnson* at 387.

On remand, the Judges adopted procedures that mainly followed the parties’ requests.

More particularly, the Judges followed the D.C. Circuit’s directive and reopened the evidentiary

⁸ The italicization of the word “application” serves to foreshadow a critical point discussed *infra*: The D.C. Circuit did not affirm any application of the 26.2% TCC rate, *except* for the use of that 26.2% rate as an *input* derived from a specific dataset, to set the 15.1% service revenue-based royalty rate. *Johnson, supra*, at 385-86; *see also* at 386 n.11.

record to receive evidence and testimony relating to the TCC issues. *See* Order Regarding Proceedings on Remand at 2 (Dec. 15, 2020). The post-remand supplementary record added: (1) rate evidence for the 33-months from January 2018 through September 2020, when the parties operated under the Majority’s new (but subsequently vacated) regulations including the TCC rates; and (2) new testimony from economic expert witnesses on behalf of Copyright Owners and the Services. *See* Initial Ruling, *passim*. However, none of the post-remand evidence submitted and relied upon by the parties *specifically* addressed as a separate issue the rates for the nine offerings that are the subject of the present Order.

On July 1, 2022, the Judges issued their Initial Ruling⁹ – applying *Johnson* and considering the entire record developed pre-remand and post-remand. In their Initial Ruling, the Judges made several findings that bear upon the issue at hand, *viz.*, whether to adopt in the Phonorecords III regulations the 26.2% TCC rate or the TCC rates (ranging from 20.65% to 22%) from the Phonorecords II-based benchmark. In particular, in the Initial Ruling, the Judges stated the following:

1. The Phonorecords II-based benchmark incorporates price discriminatory features for product differentiation as between: (a) subscription and ad-supported services; (b) portable and non-portable services; and (c) unbundled and bundled services. *See* Initial Ruling at 67-68 (noting the salutary price discriminatory nature of the Phonorecords II-based benchmark).
2. The Phonorecords II-based benchmark “reflect[s] a rate structure with an adequate degree of competition, because there was a balance of bargaining power [“countervailing power”] between the two negotiating industrywide trade

⁹ The findings and conclusions in the Initial Ruling were adopted by a majority of the Judges, but two Judges filed separate opinions. *See* Initial Ruling at 2 n.5. One Judge, former Chief Judge Suzanne Barnett, dissented from the Majority’s adoption in the Initial Ruling regarding the *Phonorecords II* rate structure (section II of the Initial Ruling), though not from the exception to that benchmark with regard to the headline rate of 15.1% and the imposition of a cap on the TCC rate prong. *See* Chief Judge Barnett’s “Dissent re Benchmark” (July 1, 2022) (eCRB no. 26943). The other opinion was issued by Judge Strickler, who dissented from the *reasoning* relating to the adoption of the definition of Service Revenue (section V), but concurred in the *adoption* of that definition. *See* Judge Strickler’s “Dissent in Part as to Section IV of the Initial Ruling and Order after Remand” (July 1, 2022) (eCRB no. 26965).

- associations, offsetting the complementary oligopoly effects in place when a “Must Have” licensor bargains separately with each licensee.” Initial Ruling at 69.
3. Based upon the available record evidence, the Judges find ... the Services’ Phonorecords II-based benchmark ... “more than sufficient to satisfy the legal requisites for application, as well as a practical benchmark, when used in conjunction with the 15.1% headline revenue rate advocated by Copyright Owners.” Initial Ruling at 59.
 4. “Substantial evidence demonstrates that the Phonorecords II-based benchmark rates, other than the headline rate, are not ‘too low.’” Initial Ruling at 73.
 5. A Copyright Owner expert witness opined that “the evidence ... indicates that the relative valuation ratios implied by the current Section 115 compulsory license [*i.e.*, the Phonorecords II-based benchmark] implies a “*lower bound on the relative market valuations* of the reciprocal percentage of the value musical works rights relative to sound recording rights [*i.e.*, TCC rates] [of] 22% and 21 %.” Initial Ruling at 78 (emphasis therein).
 6. The royalty rates and terms within Subpart C of the Phonorecords II-based benchmark – *which include the rates and term for the offerings at issue in this Order* – are expressly “covered by [the] foregoing analysis.” Initial Ruling at 93. In rejecting all of Copyright Owners’ arguments for different treatment of Phonorecords II-based benchmark rates in Subpart C therein, the Judges declined to adopt Copyright Owners’ “re-assert[ion] [of] the same arguments with respect to subpart C” that Copyright Owners advanced in opposing the Phonorecords II-based benchmark “for interactive streaming in subpart B.” *See* Initial Ruling at 93-94 (“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 That means, however, that the various “headline” rates for these subpart C offerings must also adjust to 15.1%,¹³¹ *whereas the alternative rates (identified in subpart C as “minima” and “subminima”) rates shall remain unchanged.*”) (emphasis added).
 7. The D.C. Circuit had affirmed that: (a) the “headline” percentage royalty rate (not a TCC rate) of 10.5% was too low; and (b) that the Majority had not improperly exercised its authority when it increased that revenue royalty rate to 15.1% (as phased-in over the five-year rate term). Accordingly, on remand, the Judges maintained the 15.1% (phased-in) percentage royalty rate. *See, e.g.*, Initial Ruling at 4, 17.
 8. The D.C. Circuit affirmed the Majority’s *derivation and calculation* of the 26.2% TCC rate for use as an input in calculating the 15.1% (phased-in) service revenue percentage royalty rate. However, *Johnson* vacated and remanded the Majority’s *application and inclusion* of the 26.2% TCC rate. Initial Ruling at 19-20.

For these reasons, the Judges decided in the Interim Ruling that: (1) the overall

Phonorecords II rates comprise a “useful benchmark,” when the 15.1% headline percentage rate

replaces the 10.5% headline percentage rate for the offerings in Subparts B and C of the Phonorecords II-based benchmark; and (2) “[t]he (phased-in) 26.2% rate [is] unreasonable.” Initial Ruling at 50 n.77; 88; and 93-94.

Procedures following the Post-Remand Initial Ruling

In the Initial Ruling, the Judges directed the parties to attempt to submit jointly agreed-upon regulatory provisions implementing the Initial Ruling, for the Judges to consider. The Judges further ruled that, if the parties could not agree on all the regulatory language, they should make separate submissions regarding regulatory provisions in dispute. *See* Initial Ruling at 114.

The parties agreed to many regulatory provisions but disagreed as to several such provisions. Accordingly, they filed separate submissions and respective replies, regarding the regulatory provisions. Services’ Joint Submission of Regulatory Provisions (July 18, 2022); Copyright Owners’ Submission of Regulatory Provisions to Implement the Initial Ruling (July 18, 2022); Services’ Joint Response to Copyright Owners’ Submission of Regulatory Provisions (Aug. 5, 2022); Copyright Owners’ Response to Judges’ July 27, 2022 Order Soliciting Responses Regarding Regulatory Provisions (Aug. 5, 2022).

The Judges considered those submissions and entered an order addressing the disputed regulatory provisions. *See* Corrected Order regarding Regulatory Provisions following Initial Ruling and Order (After Remand) (Nov. 10, 2022) (“November 10th Order”).¹⁰

In the November 10th Order, the Judges directed the parties once more to file a joint submission “of regulatory provisions that embody the rulings set forth in *Johnson*, the Initial Ruling and this [November 10th] Order, and any aspects of the [Majority] Determination (pre-

¹⁰ The November 10th Order corrected an otherwise substantively identical order issued two days earlier, on November 8, 2023, which had inadvertently included a small amount of text. *See* November 10th Order at 1.

remand) that the parties understand to remain effective after the foregoing rulings.” November 10th Order at 31.

On November 30, 2022, the parties made the Joint Submission (as also identified at the outset of the present Order), in which they provided joint regulatory language no longer in dispute that applied the binding rulings of the Judges and the D.C. Circuit. However, as also noted above, the parties identified the single issue in dispute that relates to the nine service offerings described *supra*.¹¹

The Parties’ Respective Arguments in their November 30th Joint Submission

Copyright Owners’ Arguments

According to Copyright Owners, 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.” Joint Submission at 6. More particularly, Copyright Owners aver that, according to the Judges’ Initial Ruling, “the D.C. Circuit affirmed the Majority’s derivation and calculation of the 26.[2]% ... TCC rate” and further that “both rate prongs” – the service revenue rate and the TCC rate – were “derived from the same analyses.” Initial Ruling at 19; Joint Submission at 6-7 (quoting Initial Ruling at 19 (emphasis removed)). Further to this point, Copyright Owners rely on the Judges’ additional language in the Initial Ruling that the pre-remand Final Determination’s “*derivation and calculation* of the TCC rate [i.e., the 26.2%

¹¹ On January 10, 2023, Spotify USA Inc., Amazon.com Services LLC, Google LLC, Pandora Media, LLC, National Music Publishers’ Association, Inc. and the Nashville Songwriters Association International filed a joint Motion (eCRB no. 27418) requesting modification of the previously proposed language for 37 C.F.R. section 385.3, which governs fees owed for late payment. There was no opposition to the January 10, 2023 joint Motion. The Judges find good cause to adopt the modified language, which provides that “where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment.”

rate] ... is not subject to further consideration on remand by the Judges.” Joint Submission at 7 (quoting Initial Ruling at 20 (emphasis in Initial Ruling)).¹²

According to Copyright Owners, the foregoing points are consistent with the limited scope of the remand, which “was not opened for new evidence concerning TCC rate percentages.” Joint Submission at 7 (citations omitted). Accordingly, Copyright Owners emphasize that “there is no evidence in the record after remand to support changing the (phased-in) 26.2% TCC rate percentage. Joint Submission at 7. Copyright Owners – characterizing the former Phonorecords II TCC rates now at issue as newly derived and calculated – maintain that these “new” TCC rate percentages therefore are “foreclosed” by the Initial Ruling and post-remand orders cited above. Joint Submission at 7-8.

Copyright Owners also assert that the TCC rate at issue here – “was not appealed by the Services or challenged during the remand, nor called into question by the Circuit in *Johnson*.” Joint Submission at 8 (emphasis removed). The absence of an appeal as to this issue, according to Copyright Owners, means that the only TCC rate supported by *Johnson* is the 26.2% TCC rate. Joint Submission at 8.

The Services’ Arguments

According to the Services, the Judges should adopt in the regulations the TCC percentage rates – ranging from 20.65% to 22% – because those rates are contained in the Phonorecords II-based benchmark adopted by the Judges and thus essentially have been “expressly set out by the Judges” in two prior decisions. Joint Submission at 2 (citing Initial Ruling at 2; November 10th Order at 6 n.13). In light of these prior Orders, the Services characterize *Copyright Owners’ position as the new argument*, improperly seeking regulatory provisions that “reflect the 26.2%

¹² However, Copyright Owners disregard the Initial Ruling’s observation that *Johnson* vacated and remanded the Majority’s *application and inclusion* of the 26.2% TCC rate. Initial Ruling at 19.

rate previously imposed by the [M]ajority in the now-vacated pre-remand Final Determination.”
Id.

More pointedly, the Services argue that the Judges’ Initial Ruling already expressly considered and rejected application of the 26.2% TCC rate. *Id.* (citations omitted). Further, the Services maintain that it is because the Judges rejected the 26.2% TCC rate in the Initial Ruling that the Judges had no need to “substantively address the topic of TCC rates” in their November 10th Order. *Id.* at 4.

The Services further maintain that “*Johnson* does not compel the Judges to simply reinstate their original pre-remand TCC rates.” *Id.* To this point, the Services rely on the Judges’ post-remand finding that, although the error made by the Majority in adopting the 26.2% TCC rate in the pre-appeal Phonorecords III Determination was procedural, the “consequence ... was *substantive*.” *Id.* (emphasis herein).

For the above reasons, the Services maintain that the Judges could not possibly be required on remand to adopt an express 26.2% in any portion of the Phonorecords III regulations.

Turning from their argument that the 26.2% TCC rate was rejected by the Judges, the Services focus on the Judges’ finding in the post-remand Initial Ruling that the “*Phonorecords II* benchmark ... is the ‘better of the benchmarks proposed by the parties ... one that satisfies the requirements of 17 U.S.C. § 801(b)(1) in all respects.’” Joint Submission at 5 (quoting Initial Ruling at 2). Because the Phonorecords II benchmark includes the TCC rates now at issue – ranging from 20.65% to 22% – the Services maintain that those rates should properly be included in the Phonorecords III regulations. *Id.*¹³

¹³ The Services also argue that Copyright Owners’ assertion *at this time* that the 26.2% TCC rate should substitute for the Phonorecords II-based benchmark rates is *procedurally* untimely and improper. The Judges only partially agree with Services’ argument in this regard. If Copyright Owners had wanted to timely make this argument, they

The Judges' Analysis and Ruling

Having considered the parties' submissions, the Initial Ruling and all other pertinent material, the Judges rule that the 26.2% TCC rate cannot and shall not be applied in the regulatory provisions now at issue. Rather, the Judges rule that the TCC rates set forth in the Phonorecords II-based benchmark shall be applied in the nine regulatory provisions now at issue, because they are consistent with and give effect to the Judges' Initial Ruling. The more particular bases for this ruling are set forth below.

Most fundamentally, the Judges note at the outset that in the Initial Ruling they expressly *did not apply* the 26.2% TCC rate in any manner other than as an input – using that TCC rate only as the D.C. Circuit directed – to calculate the 15.1% of service-revenue royalty rate. *See, e.g.,* Initial Ruling at 41 (“[A] careful reading of the remand testimony by Copyright Owners’ economists, Professors Watt and Spulber, reveals that *neither of them actually testifies that there is sufficient theoretical and empirical evidence to support the ... 26.2% TCC rate* (emphasis in original). *See also id.* at 40-41 n.69 (contrasting the improper application of the 26.2% TCC

should have done so during the post-remand period *before* the Judges entered their Initial Ruling (or, of course, during the initial proceeding pre-appeal). In that sense, Copyright Owners failed to avail themselves procedurally of the right to make this substantive challenge. However, the Judges have afforded the parties the procedural right to propose regulatory language that they claim would implement the Initial Ruling; a procedural right exercised by both parties, as evidenced by, for example, their arguments in the Joint Submission. In that narrow sense, Copyright Owners’ present argument is not procedurally improper. As a matter of *substance* though, as explained in “The Judges Analysis and Ruling” *infra*, the Judges have considered herein Copyright Owners’ present arguments and found them inconsistent with the Initial Ruling.

Finally, with regard to subsequent substantive challenges to the Initial Ruling, the parties correctly understand that such challenges can be made after the Judges issue their post-remand “Initial Determination” (a statutorily-mandated ruling). *See* Joint Submission at 9 (Services agreeing with Copyright Owners’ understanding that they continue to properly “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.”).

as a separate statutory rate from the use of the 26.2% TCC rate as input from a “bargaining model” solely to increase the service revenue rate to 15.1%).¹⁴

In this regard, the Initial Ruling has relied upon the clear distinction made in *Johnson* between the 15.1% service revenue rate and the 26.2% TCC rate. Compare *Johnson, supra*, at 385 (affirming the Majority’s *application* of the “revenue rate of 15.1%” as “the type of line-drawing and reasoned weighing of the evidence falls squarely within the[ir] wheelhouse as an expert administrative agency”) with *id.* at 382-83 (vacating the Majority’s decision for “significantly hiking the TCC rate to 26.2% from approximately 17% to 22%” without allowing the Services an opportunity to address the issue – an error that was even “worse” than the elimination of caps on certain other TCC offerings.).

Further, the offerings now at issue were contained in the Phonorecords II-based benchmark, and the Judges’ application of that benchmark in the Initial Ruling is unambiguous: Other than the new and increased headline rate of 15.1%, “the rates and rate structure of the *Phonorecords II*-based benchmark proposed by the Services ...) shall constitute the rates and rate structure for the *Phonorecords III* period.” Initial Ruling at 2. Accordingly, with regard to the single remaining issue, pertaining to the nine offerings listed *supra*, the regulatory provisions proposed by the Services in the Joint Submission are fully consistent with the Initial Ruling.

By contrast, Copyright Owners’ proposed language introduces a change in the Phonorecords II-based benchmark rates that was never the subject of an evidentiary proceeding

¹⁴ The Services claim that this distinction constitutes a semantic twisting of words. See Joint Submission at 7. The Judges reject that characterization. Rather, their ruling is substantive, not semantic, because they have relied upon the testimony of several economic expert witnesses, including one of Copyright Owners’ own economic experts, who identified five reasons that the Judges found to preclude adoption of the 26.2% TCC rate as a separate statutory rate. See, e.g., Initial Ruling at 41. Moreover, not a single economist who testified at the hearing proposed that the Judges adopt the 26.2% TCC rate as a statutory rate, see Initial Ruling at 38, further supporting the Judges’ adoption in the Initial Ruling of the consensual negotiated TCC rates contained in the Phonorecords II-based benchmark for the nine offerings at issue.

pre-or post-remand, whether through live or written testimony. But perhaps more importantly, as a matter of *substance*, Copyright Owners’ proposed regulatory provisions are inconsistent with the language and a key purpose of the Initial Ruling, which is to adopt the Phonorecords II-based benchmark rates, the basis of which were generated consensually by the parties, through negotiations between industrywide trade associations, which prevented unwarranted and disproportionate complementary oligopoly market power from affecting the royalty rates. See Initial Ruling at 69-70.¹⁵

The Judges also reject Copyright Owners’ argument that by maintaining the 20.65% through 22% TCC rates in the Phonorecords II-based benchmark they would be violating their prior rulings regarding the scope of the remand. Citing to the Judges’ Order Regarding Proceedings on Remand at 1 (eCRB no. 23390) (“Remand Order”), Copyright Owners state in their Joint Submission that that the remand “was not opened for new evidence concerning TCC rate percentages.” Joint Submission at 7. But the decision to re-open the existing, and robust, evidentiary record only as to rate *structure*, did not limit the *scope* of the remand itself, nor consideration of evidence from the underlying proceeding.

Moreover, the Judges find no language in either the Remand Order or the Remand Scheduling Order, and no other basis, that would support Copyright Owners’ characterization of

¹⁵ The Judges also note that their adoption of these 20.65% through 22% TCC rates in the Phonorecords II-based benchmark – because they are lower than the 26.2% rate proposed by Copyright Owners – is consistent with their rationale for adopting that benchmark. As the Judges explained *repeatedly and throughout the Initial Ruling*, their adoption of the Phonorecords II-based benchmark purposefully incorporates into the Phonorecords III regulations the beneficial price discriminatory features that are hallmarks of that benchmark. *See, e.g.*, Initial Ruling at 65 n.98 (“[T]he granular discriminatory features that the parties had negotiated ... reflect an “appropriate form and extent of price discrimination ...” The Judges emphasized this point repeatedly. *See generally* Initial Ruling, *passim*.

Further, as the Services note, Copyright Owners themselves – even when advocating for an otherwise across-the-board 26.2% TCC prong -- had continued to propose the 20.65% to 22% TCC rates for the nine offerings at issue now. *See* Copyright Owners’ Submission of Regulatory Provisions to Implement the Initial Ruling at 15-16) (July 18, 2022); see also Joint Submission at 6.

the 20.65% through 22% TCC rates in the Phonorecords III-based benchmark as new evidence, given that they were expressly included in that benchmark which had been proffered at the hearing *prior to the remand*.

Further, the present issue of whether the regulatory provisions implementing the Initial Ruling should apply the Phonorecords II-based benchmark TCC rates or the 26.2% TCC rate is *not* a dispute regarding the derivation or calculation of a *new* TCC rate. The Phonorecords II-based benchmark rates are self-evidently *not new rates*, because they existed in that *prior* benchmark. Moreover, the present dispute relates to whether the language and reasoning in the Initial Ruling are consistent with maintaining the rates contained in the Phonorecords II-based benchmark for the nine offerings at issue, or whether the Initial Ruling calls for abandoning those benchmark rates and replacing them with the 26.2% TCC rate proffered by Copyright Owners. As explained *supra*, the 26.2% TCC rate was properly utilized by the Majority as an *input* (combined with other evidence) in order to calculate the 15.1% service revenue royalty rate. The record reflects no other context in which the 26.2% TCC rate can be utilized, let alone must be utilized. Indeed, as explained *supra*, the record reflects the Judges' rejection of the 26.2% TCC rate as a stand-alone statutory royalty rate.

The Judges also reject Copyright Owners' argument that the Services somehow waived their argument for maintaining the 20.65% through 22% TCC Phonorecords II-based benchmark rates. More particularly, Copyright Owners incorrectly assert that these rates were "not appealed by the Services" Joint Submission at 8. Rather, the D.C. Circuit stated unambiguously: "[T]he Streaming Services object to the [Judges'] ... rejection of the Phonorecords II ... settlement[] as [a] rate benchmark[]." *Johnson*, 969 F.3d at 384; *see also id.* at 386 ("The

Streaming Services argue ... that the [Judges] arbitrarily rejected ... [a] potential rate benchmark[] ... the Phonorecords II settlement—without adequate explanation.”).

Moreover, the D.C. Circuit repeatedly noted that it was vacating and remanding the Majority’s Determination with regard to, *inter alia*, the Majority’s improper decision to reject the Phonorecords II-based benchmark *writ large, i.e.*, without qualification by the appellate panel that some parts of that proffered benchmark might have been correctly rejected. *See Johnson*, 969 F.3d at 367, 376, 381, 387. Obviously, virtually all the elements of the Phonorecords II-based benchmark – including the offerings now at issue – were appealed, and not waived, foregone or forfeited by the Services.

Likewise, Copyright Owners are wrong in their claim that the Services had never “challenged” these rate issues “during the remand.” Joint Submission at 8. Rather, the Services argued on remand for the Phonorecords II-based benchmark to be applied *comprehensively*, without itemizing every element of that proffered benchmark. *See Services’ Joint Opening Brief (post-remand) at 19-44 (Apr. 1, 2021) (detailing why “the Services’ proposal based on the Phonorecords II settlement is reasonable”); see also Services’ ... Submission of Regulatory Provisions at 2 (July 18, 2022) (“Services’ July 18th Submission”) (“[T]he Services have faithfully implemented the task at hand—to use the rates and rate structure of the “Phonorecords II-based benchmark” proposed by the Services during the remand proceeding”).*¹⁶

Finally, the Judges find and conclude that their ruling in this Order sets forth reasonable rates satisfying the four objectives in the then-applicable (but now superseded) statutory rate

¹⁶ The decision in *Johnson* could be construed as rejecting *one* element of the Phonorecords II-based benchmark, viz., the 10.5% headline rate, because the appellate panel affirmed the higher Majority’s adoption of the (phased-in) 15.1% headline royalty revenue rate. The Initial Ruling is consistent with that ruling, and this rate is not now in dispute. *See Services’ July 18th Submission at 2 (the Services acknowledge that in their proposed regulatory provisions they “replac[ed] the headline rate” of 10.5% with the headline royalty rate “set by the Judges [15.1%] in the Initial Ruling.”)*.

standard contained in 17 U.S.C. §801(b)(1).¹⁷ First, with regard to Factor (A),¹⁸ the Judges recognize and follow the D. C. Circuit’s ruling that the Majority’s decision to increase in the “headline” service revenue royalty rate by 44% from 10.5% to 15.1% was supported by substantial evidence. *Johnson* at 387-88.

Further with regard to Factor (A), the Judges understand their analysis and reasoning in the Initial Ruling – applying the Phonorecords II-based benchmark and thus rejecting the 26.2% TCC rate – to be applicable to the present dispute regarding the adoption of regulations to implement the Initial Ruling. Accordingly, the Judges adopt by reference herein their analysis and reasoning set forth at pages 90-91 of the Initial Ruling. For those reasons, the Judges decide, as they did in the Initial Ruling, that there is no basis for yet a *further* increase in the royalty rate based on Factor (A), finding “no evidence to suggest that the price discriminatory rates should be changed, in order to address the connection between price discrimination and the objective of Factor (A).” *Id.* at 91.

Next, in considering Factors (B) and (C),¹⁹ the Judges’ Initial Ruling adopts the Majority’s reasoning that the 15.1% service revenue royalty rate provided a “*fair* allocation of revenue between copyright owners and services” and it would be “substantively unwarranted to

¹⁷ The D.C. Circuit expressly declined to adopt most of the Majority’s application of the explicit statutory objectives. As to Factor (A), regarding the objective of “maximiz[ing] the availability of creative works to the public,” the D.C. Circuit held that the Majority’s finding that “an increase in the royalty rates for mechanical licenses was necessary to ensure the continued viability of songwriting as a profession” was “supported by substantial evidence.” *Johnson* at 387-388. However, with regard to the remaining statutory factors, *Johnson* instead vacated and remanded consideration of those matters to the Judges. *See Johnson* at 389. The Initial Ruling after remand considered these statutory objectives in detail. *See* Initial Ruling at 90-93. (The parties made no express argument regarding the application of these statutory objectives in their Joint Submission.).

¹⁸ Factor (A) provides that rates shall be calculated to achieve the objective of “maximize[ing] the availability of creative works to the public.” 17 U.S.C. § 801(b)(1)(A).

¹⁹ The Factor (B) objectives (providing a “fair return” and a “fair income” to the licensors and licensees respectively) and Factor (C) objectives reflecting their relative roles in making the streamed music available to the public) are typically considered jointly, because of their overlapping concerns. *See* Initial Ruling at 15 n.31 (citing *Johnson*, 969 at 388). In this Order, the Judges likewise jointly address Factors (B) and (C).

engage in any new consideration on remand of the impact, if any, of Factors (B) and (C) on the otherwise reasonable 15.1% revenue rate. *Id.* at 15-16.

In their Joint Submission, the parties have presented no arguments specifically addressing how Factors (B) or (C) might support their proposed TCC rates now at issue. Examining the record, the Judges find and conclude that maintaining the Phonorecords II-based rates ranging from 20.65% to 22% embodies the fairness associated with rates negotiated between industrywide trade associations wielding relatively comparable bargaining power, as discussed *supra* and in the Initial Ruling.²⁰ This notion of fairness is embodied in the determination of the reasonable rate and, as can be the case, when one of the four itemized statutory objectives of section 801(b)(1) is bound-up and appropriately addressed within the broader context of setting a reasonable rate, no further adjustment is necessary through an invocation of an itemized statutory factor. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) 84 Fed. Reg. 1918, 1955, 2015 (Feb. 5, 2019) (Majority and Dissenting Opinions agreeing that “to the extent market factors may implicitly address any (or all) of the four itemized factors, the reasonable, market-based rates may remain unadjusted.”).

Finally, the Judges see no reason to alter their adoption of the Phonorecords II-based benchmark rates for the nine offerings at issue in this Order based upon the final listed statutory objective, Factor (D).²¹ In the Joint Submission, Copyright Owners did not make an express argument relating to this factor (nor did the Services). Independently considering the potential

²⁰ In this regard, the Judges agree with the Services’ argument. *See* Initial Ruling at 61 (summarizing the Services’ position as to Factors (B) and (C)).

²¹ “Factor (D) ... instructs the Judges to consider the ‘competing priority’ of ‘minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.’” Initial Ruling at 16. More particularly, “disruption” potentially remediable under Factor (D) requires that the contemplated rate “directly produce[] an adverse impact that is substantial, immediate and in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change” Initial Ruling at 53-54.

application of Factor (D), the Judges find no evidence that the continuation of the Phonorecords II-based benchmark rates for the offerings at issue in this Order would cause any disruption that Factor (D) is intended to address. Further, as noted *supra*, the Judges have phased-in an *increase* in the headline service revenue royalty rate from 10.5% to 15.1% – a 44% increase – rendering unreasonable any argument that the present decision to maintain the Phonorecords II-based TCC rates is “disruptive” to Copyright Owners under the statutory Factor (D) standard.

Moreover, the Judges reassert their point in the Initial Ruling that there is no need to independently consider any potential disruption under the Factor (D) standard because the Judges have already found an application of that rate to be unreasonable. *See* Initial Ruling at 50 n.77. Further, the D.C. Circuit was aware of the existence of the 20.65% to 22% TCC rates in the Phonorecords II-based benchmark for these nine offerings now at issue, and not only declined to affirm the Majority’s increase in those rates to 26.2% – a significant increase of 19% to 27%.²² – but also condemned that increase. *See Johnson* at 383 (“Worse still ...the [Judges] also raised the total content cost [TCC] rate to 26.2%. ...That rate previously fell between approximately 17% and 22%”). Nothing in the record suggest that the Judges can or should utilize the narrow statutory “disruption” standard in Factor (D) of section 801(b)(1) as a basis to override the position of the D.C. Circuit or the Judges’ analysis in the Initial Ruling as to the inapplicability of the proffered 26.2% royalty rate.

²² An increase from 20.65% to 26.2% is a 5.55 percentage point increase, which is an increase of 27% (rounded). An increase from 22% to 26.2% is a 4.2 percentage point increase, which is an increase of 19% (rounded).

ORDER

For the foregoing reasons, the Judges shall adopt in the regulatory provisions²³ the several “Total Content Cost” (“TCC”) rates set forth in the Phonorecords II-based benchmark as proposed by the Services.²⁴

Within two days of the date of issuance of this Restricted Order, the parties shall file an agreed proposed redacted version for public viewing.

Dated: April 26, 2023

/s/
David P. Shaw
Chief Copyright Royalty Judge

²³ As addressed herein, the Judges find good cause to adopt the joint proposal for modified language regarding late fees, in 37 C.F.R. § 385.3.

²⁴ The Initial Determination shall issue forthwith.