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

In the Matter of: DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III)	Docket No. 16–CRB–0003–PR (2018–2022)

COPYRIGHT OWNERS' MOTION FOR CORRECTION OF TYPOGRAPHICAL ERRORS IN THE REHEARING ORDER

The National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners") submit this motion pursuant to the Judges' Order Soliciting Motion And Response dated December 10, 2018 to address certain typographical errors in the Order Granting In Part And Denying In Part Motions For Rehearing dated October 29, 2018 ("Rehearing Order"), the "reasoning and rulings" of which are incorporated by reference in the Final Determination in this proceeding, and to address the substantive edits to the Rehearing Order proposed by the Services to the Judges via email.

As required by 37 CFR 350.4, a Proposed Order is also attached that proposes language to resolve the questions.

I. There Are Two Straightforward Typographical Errors In The Rehearing Order Where "Limited Downloads" Is Inadvertently Used Instead Of "Limited Offering"

The Services agree that the Copyright Owners identified two straightforward typographical errors in the penultimate paragraph on page 12 of the Rehearing Order (the "Page 12 Paragraph"). The Page 12 Paragraph is in the section of the Rehearing Order entitled "Omission of Royalty

Floors for **Paid Locker Services and Limited Offerings**" (emphasis added) that begins on page 11, and involves a discussion of **Paid Locker Services and Limited Offerings**. In keeping with its subject matter, the section makes repeated written reference to "**Paid Locker Services and Limited Offerings.**" It appears that the Page 12 Paragraph unintentionally replaces the word "Offerings" with "Downloads" in two places, stating that, "Paid Locker Services and Limited Downloads are licensed uses that are of a nature totally different from streaming services… The Judges' choice not to establish a minimum for Paid Locker Services and Limited Downloads was not inadvertent; it was a feature of the regulatory overhaul so necessary for these mechanical licenses." (Emphases added.)

It seems inescapable that Limited Offerings were the intended words in these two sentences rather than Limited Downloads. Limited Downloads are not a subject of discussion in the section and the Judges of course did not make a "choice not to establish a minimum for… Limited Downloads." A Limited Download is not a type of Offering that would have its own royalty formula (and to the extent that Limited Downloads are offered through one of the Offerings identified in 37 CFR 385.22(a)(2)-(4), their use remains subject to the minima for those Offerings). The Judges did of course make a choice not to establish a minimum for Paid Locker Services and Limited Offerings, and those are the words that make sense in the context of that paragraph.[1]

[1] The Services' remarkable argument by email that *correcting admitted typos* "would render parts of that section misleading, inaccurate, and confusing," amounts to an objection to the reasoning of the Judges and should not obtain.

The Copyright Owners thus raised this apparent typographical error by email, as it appeared uncontroversial. Notably, the Services' email counterproposal also proposed to make this obviously appropriate correction.[2]

II. The Services' Attempt To Add Two Additional Changes That Do Not Involve Typographical Errors Should Be Denied

While admitting that the use of "Limited Downloads" in the Page 12 Paragraph was a typographical error, the Services' response and counterproposal transmitted by email proposed that the Page 12 Paragraph be rewritten additionally as follows:

> Paid Locker Services and Limited ~~Downloads~~ **Offerings** are licensed uses that are of a nature totally different from ~~streaming~~ **other Subpart C** services. The existing regulations treated them differently and afforded them an alternative minimum royalty. The existing minimum for these ~~non-streaming~~ services was not a mechanical floor. The Judges adopt the reasoning of the Services and incorporate it as an enhanced explication of their reasoning in the Initial Determination. The Judges' choice not to establish a minimum for Paid Locker Services and Limited ~~Downloads~~ **Offerings** was not inadvertent; it was a feature of the regulatory overhaul so necessary for these mechanical licenses.

This proposal includes the two straightforward typos discussed above, but adds two other changes that are plainly not corrections of typographical errors. Rather, these changes appear to be based on the Services' argument that the reasoning was incorrect in the Rehearing Order, and seek to modify that reasoning.

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[2] In the course of preparing these papers, the Copyright Owners also noticed an additional typographical error. Section 385.22(a)(3) of the Regulatory Terms annexed as Attachment A to the Final Determination reads:

> *Standalone portable Subscription Offering*. Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, the royalty floor for use in step 3 of **§385.12(b)(3)(ii)** is the aggregate amount of 50 cents per subscriber per month. (emphasis added)

The bolded and underlined cross-reference appears to be a typo, as there is no §385.12. It appears plain that the Judges meant to refer to §385.**21**(b)(3)(ii), the same provision referred to in the other subparagraphs 385.22(a), (a)(1), (a)(2) and (a)(4).

The attempt of the two additional changes proposed by the Services is to modify the Rehearing Order so that it does not contrast Limited Offerings as strongly with streaming services. The Judges explained why they drew a sharp line in removing the Limited Offerings minimum, noting that they are "of a nature totally different from streaming services."[3] The Copyright Owners submit that this is an appropriate distinction, and moreover it is the very reasoning that underlies the decision to remove the royalty minimum for Limited Offerings, a change that was not requested by any of the Services.

The fact that Limited Offerings are sufficiently different than streaming services to call for the removal of the minimum is intentionally emphasized twice by the Judges in the Page 12 Paragraph. The two additional changes now proposed by the Services are aimed at reducing those two points of emphasis. The Copyright Owners submit that the streaming language the Services are now attempting to remove is simply not a typographical error, and does not call for modification of the Rehearing Order (and the Final Determination via its incorporation of the reasoning and rulings of the Rehearing Order).

Superficially, while these two additional proposed changes might appear inconsequential—they do not change the operative language in the regulations—the Copyright Owners are justifiably concerned about the context of the requested changes. The removal of the minimum for Limited Offerings has increased the incentive for a Service to attempt an end run around the Judges' rates by "recharacterizing" Offerings as Limited Offerings. Services should not be emboldened to argue, for example, that by simply modifying an Offering to have millions

[3] "Streaming service" is not a defined term in the regulations, and the Services themselves alternately use the term "streaming service" to sometimes mean a digital service provider (see, e.g., Services' Joint Reply To Copyright Owners' Proposed Findings of Fact And Conclusions of Law ("Joint Service COF Reply"), Reply to COF-64, page 70) and to sometimes mean an interactive streaming offering to the public (see, e.g., Joint Service COF Reply, Reply to COF-21, page 42).

instead of tens of millions of tracks, they can turn a fully interactive streaming service into a Limited Offering and evade any royalty minimum.

The Copyright Owners respectfully submit that, outside of the two agreed typos (namely, replacing "Limited Downloads" with "Limited Offerings" twice in the Page 12 Paragraph), the language in the Rehearing Order, which appropriately speaks to the fundamentally different nature of Limited Offerings, does not require wordsmithing or warrant modification.

Dated: December 14, 2018

Respectfully submitted,

PRYOR CASHMAN LLP

By: _____

Donald S. Zakarin
Frank P. Scibilia
Benjamin K. Semel
7 Times Square
New York, New York 10036
Tel.: 212-421-4100
dzakarin@pryorcashman.com
fscibilia@pryorcashman.com
bsemel@pryorcashman.com

Counsel for the Copyright Owners

Proof of Delivery

I hereby certify that on Friday, December 14, 2018 I provided a true and correct copy of the Motion for Correction Of Typographical Errors In The Rehearing Order to the following:

Spotify USA Inc., represented by Anita Lam served via Electronic Service at alam@mayerbrown.com

Amazon Digital Services, LLC, represented by Stacey L Foltz Stark served via Electronic Service at sfstark@winston.com

Google Inc., represented by Katherine Merk served via Electronic Service at kmerk@kslaw.com

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

Apple Inc., represented by Mary C Mazzello served via Electronic Service at mary.mazzello@kirkland.com

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

Signed: /s/ Benjamin K Semel