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

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

SERVICES' JOINT RESPONSE TO COPYRIGHT OWNERS' MOTION FOR CORRECTION OF TYPOGRAPHICAL ERRORS IN THE REHEARING ORDER

Amazon Digital Music LLC, Apple Inc., Google Inc., Pandora Media, Inc., and Spotify USA Inc. ("Services") submit this Joint Response to the National Music Publishers' Association and the Nashville Songwriters Association International's ("Copyright Owners") Motion for Correction of Typographical Errors in the Rehearing Order ("Motion"). The Services submit their Joint Response pursuant to the Judges' Order Soliciting Motion and Response dated December 10, 2018 ("Order") concerning the Order Granting in Part and Denying in Part Motions for Rehearing dated October 29, 2018 ("Rehearing Order").

INTRODUCTION

In their Motion, the Copyright Owners ask the Judges to adopt a proposed "correction" to address what they claim are typographical errors in the final paragraph of Section III.C of the Rehearing Order. But the conflation of Limited Offerings and Limited Downloads is not merely a typographical error and the Copyright Owners' proposed "solution" does nothing to solve the confusion they claim to be addressing. Instead, it would render the paragraph inaccurate and

more confusing—not less. Moreover, it would make the Rehearing Order incompatible with the Final Determination and the Regulations.

The Copyright Owners do not dispute the accuracy of the additional corrections that the Services proposed, suggesting that clarity and accuracy are not their true objectives. Instead, it appears the Copyright Owners are attempting to again re-litigate the absence of a per-subscriber minimum ("PSM") for Paid Locker Services and Limited Offerings—categories that may incorporate interactive streaming but have substantial limitations compared to fully interactive, full catalog streaming services. Specifically, the Copyright Owners ask the Judges to rewrite a portion of the Rehearing Order to suggest that Paid Locker Services and Limited Offerings are not, and can never be, streaming services. This proposal is entirely at odds with the governing regulations, which make clear that Paid Locker Services and Limited Offerings may involve interactive streaming. The effect of the Copyright Owners' proposal would be to call into question whether Paid Locker Services and Limited Offerings that do allow for interactive streaming can avail themselves of the rates that the Judges explicitly set forth for such services. This cannot be what the Judges intended.

Without disputing that Paid Locker Services and Limited Offerings can be, and oftentimes are, streaming services (albeit with substantial limitations compared to fully interactive, full catalog offerings), the Copyright Owners simply claim that the Services' proposed corrections are not typographical and argue that the Services are attempting to undermine a bright-line distinction between Limited Offerings and other types of streaming services. In reality, however, it is the Copyright Owners who are using this motion as a stalking horse to introduce substantive confusion over what constitutes a Paid Locker Service and Limited Offering, and their proposed alteration would introduce a new, more problematic

technical error by implying that such services can never offer any degree of interactive streaming.

If the Judges choose to exercise their power to fix clerical and technical errors, they should only make the changes proposed by the Copyright Owners if they also add the clarifying language set forth below and in the Services' accompanying proposed order. This will ensure the language at issue is accurate in both the Rehearing Order and the Final Determination.

ARGUMENT

I. Paid Locker Services And Limited Offerings Can Involve Interactive Streaming

Pursuant to Section 385.2 of the Regulatory Terms, *Locker Service* means an "Offering providing digital access to sound recordings of musical works in the form of *Interactive Streams*, Permanent Digital Downloads, Restricted Downloads or Ringtones . . . ." § 385.2 (emphasis added).[1] Similarly, *Limited Offering* means "a subscription plan providing *Interactive Streams* or Limited Downloads for which . . . [t]he particular sound recordings available to the End User over a period of time are substantially limited relative to Services in the marketplace providing access to a comprehensive catalog of recordings . . . ." *Id.* (emphasis added). As such, while Paid Locker Services and Limited Offerings need not necessarily involve interactive streaming, both can and often do involve some degree of interactive streaming. By definition, Paid Locker Services and Limited Offerings are types of streaming services.[2] The Copyright Owners do not dispute this basic premise.

[1] A Paid Locker Service means a Locker Service for which the End User pays a fee to the Service. § 385.2.

[2] The Judges recognize as much in the Final Determination in discussing their decision to combine old subparts B and C, noting that "it appears limited offerings . . . are not different in kind from interactive streaming and limited downloads." Final Determination at 77.

II. The Copyright Owners' Proposed Changes To The Rehearing Order Would Introduce A Technical Error

Implementing the Copyright Owners' proposal would create a new and more problematic technical error by implying—contrary to the terms of the regulations—that Paid Locker Services and Limited Offerings never involve interactive streaming.[3] Mot. at 2. Under the Copyright Owners' proposal, the final paragraph of Section III.C of the Rehearing Order would read in relevant part as follows:

> Paid Locker Services and ***Limited Offerings are*** licensed uses that are of a nature ***totally different from streaming 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.

Rehearing Order at 12 (emphasis added).

Although it is true that Paid Locker Services and Limited Offerings are different from *other* fully interactive streaming services (because, for instance, they are substantially limited relative to services that provide complete, on-demand access to a comprehensive catalog of recordings), it is wrong to say that they are "totally different from streaming services." As noted above, in certain instances, they *are* streaming services. For the same reason, it is also wrong to refer to Paid Locker Services and Limited Offerings as "non-streaming" services. As a result, without further clarification, the Copyrights Owners' proposal would render this portion the Rehearing Order less accurate and more confusing.

[3] The language at issue also appears in the Final Determination. *See* Final Determination at 38. As such, any changes ultimately made to the Rehearing Order should be mirrored in the Final Determination.

III. If The Judges Use Their Authority Under § 803(c)(4) To Make the Changes Requested By The Copyright Owners, Then They Should Also Make The Technical Corrections Proposed By The Services

If the Judges decide to make the Copyright Owners' proposed changes to the paragraph of the Rehearing Order now at issue, the Judges should avoid creating the above-noted new technical error. Fortunately, there is a simple fix—all that is needed are two additional minor changes to the text. As set forth below, the addition of the word "other" before streaming services and the removal of the words "non-streaming" will make the text technically accurate and avoid introducing the confusion inherent in the Copyright Owners' proposal:

> Paid Locker Services and Limited ~~Downloads~~ **Offerings** are licensed uses that are of a nature totally different from **other** streaming 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.[4]

Although the Copyright Owners suggest otherwise, there can be no doubt that the Judges have the authority to make such a correction. Under Section 803(c)(4), the Judges have continuing jurisdiction to "issue an amendment to a written determination to correct any technical or clerical errors in the determination . . . ." 17 U.S.C. § 803(c)(4). Correcting the paragraph at issue to avoid any suggestion that Paid Locker Services and Limited Offerings are not streaming services is just the type of technical error that the Judges are empowered to

[4] The Services' earlier email to Ms. Whittle proposed changing "streaming services" to "other Subpart C services." Email from B. Marks to K. Whittle dated Dec. 10, 2018. Either version is acceptable to the Services.

correct. *See, e.g.*, 80 FR 25333, 25335 (May 4, 2015) ("The Register concludes that the CRJs' power to 'correct any technical . . . errors' in determinations encompasses the power to resolve ambiguity in the meaning of regulations adopted pursuant to those determinations."); 74 FR 6832, 6833 (Feb. 11, 2009) (relying on 803(c)(4) to "clarify potential confusion facing users of the license at issue"). If the Judges use their authority to correct any clerical and technical errors in the paragraph at issue, they should make the Services' additional proposed changes to avoid creating unnecessary confusion.[5]

IV. The Copyright Owners Offer No Valid Reason For Why The Judges Should Not Fix A Technical Error

The Copyright Owners do not dispute the accuracy of the Services' proposal. Instead, they oppose the additional technical corrections on two principal grounds. Neither is valid.

First, the Copyright Owners argue that the Services' proposed changes do not fix strictly "typographical errors" and thus must be denied. *See, e.g.*, Mot. at 3-4. But Section 803(c)(4) authorizes the Judges to correct "technical" and "clerical" errors, not merely "typographical" errors. Even if one were to accept the premise that the asserted conflation of Limited Offerings and Limited Downloads were typographical errors, the Copyright Owners' emphasis on typographical errors is misplaced.

Second, the Copyright Owners assert that the Services are attempting to "modify the Rehearing Order so that it does not contrast Limited Offerings as strongly with streaming services." Mot. at 4. That argument is meritless. The Services' proposed changes merely rectify technical errors to bring the Rehearing Order's text into line with the definitions of Paid Locker

[5] The text at issue was incorporated by reference into the Final Determination and thus is amenable to correction under Section 803(c)(4). 17 U.S.C. § 803(c)(4); *see also* Final Determination at 2.

Service and Limited Offering in the regulations. Indeed, the Services' proposed text still strongly contrasts Paid Locker Services and Limited Offerings with other streaming services. *See, e.g.*, Section III ("Paid Locker Services and Limited ~~Downloads~~ **Offerings** are licensed uses that are of a nature totally different from **other** streaming services."). The only difference is that the Services' proposal is accurate while the Copyright Owners' is not.

V. The Copyright Owners' Ultimate Disagreement Is Substantive, And Thus Inappropriate For Correction Under The Judges' Continuing Jurisdiction

The Copyright Owners' opposition to what should be uncontroversial technical corrections boils down to an apparent substantive disagreement with the Judges' decision to include a service category for Limited Offerings with no PSM. *See* Mot. at 4-5.

The Copyright Owners litigated and lost this issue at trial. After the hearing, they again asked the Judges to reinstate the PSM, arguing that it must have been an "oversight" for the Judges not to have included one. *See* Copyright Owners' Mot. for Clarification or Correction, at 7 (Feb, 12, 2018). After full briefing, the Judges disagreed, explaining that their decision was "not inadvertent" and was "necessary" for the licenses at issue. Rehearing Order at 12.

The Copyright Owners now take a third bite at the same apple, this time attempting to shutter the Limited Offering category altogether. The only plausible rationale for the Copyright Owners' current position appears to be to enable them to argue—on the basis of the language at issue—that to qualify as a Limited Offering (or Paid Locker Service), a service must not allow for any interactive streaming whatsoever. But as the definitions in the regulations make clear, a Limited Offering is a type of streaming service—namely, one that is limited in meaningful respects in comparison to a full catalog, fully on-demand offering. Those meaningful limitations create precisely the important "differen[ces]" that the Judges emphasize in the Rehearing Order.

CONCLUSION

The Services respectfully submit that if the Judges exercise their authority under 17 U.S.C. § 803(c)(4) to modify the Rehearing Order, they should make both sets of changes discussed above.

Dated: December 20, 2018

Respectfully submitted,

KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.

/s/ *Scott H. Angstreich*_____
Scott H. Angstreich
Leslie V. Pope
Rachel Proctor May
Julius P. Taranto
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 326-7900
Fax: (202) 326-7999
sangstreich@kellogghansen.com
lpope@kellogghansen.com
rmay@kellogghansen.com
jtaranto@kellogghansen.com

WINSTON & STRAWN LLP

Michael S. Elkin
Thomas Patrick Lane
Daniel N. Guisbond
200 Park Avenue
New York, NY 10166
Phone: (212) 294-6700
Fax: (212) 294-4700
melkin@winston.com
tlane@winston.com
dguisbond@winston.com

Attorneys for Amazon Digital Services LLC

KIRKLAND & ELLIS LLP

/s/ *Dale M. Cendali*
Dale M. Cendali
Claudia Ray
Johanna Schmitt
Mary Mazzello
Phil Hill
601 Lexington Avenue
New York, NY 10022
Phone: (212) 446-4800
Fax: (212) 446-6460
dale.cendali@kirkland.com
claudia.ray@kirkland.com
johanna.schmitt@kirkland.com
mary.mazzello@kirkland.com
phil.hill@kirkland.com

Attorneys for Apple Inc.

KING & SPALDING LLP

/s/ *Kenneth Steinthal*
Kenneth Steinthal
Joseph Wetzel
101 Second Street
Suite 2300
San Francisco, CA 94105
Telephone: (415) 318-1200
Facsimile: (415) 318-1300
ksteinthal@kslaw.com
jwetzel@kslaw.com

J. Blake Cunningham
500 W. 2nd St.
Suite 1800
Austin, TX 78701
bcunningham@kslaw.com

WEIL, GOTSHAL & MANGES LLP

/s/ *Benjamin E. Marks*_____

Benjamin E. Marks
Jacob Ebin
Samuel Zeitlin
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
benjamin.marks@weil.com
jacob.ebin@weil.com
samuel.zeitlin@weil.com

Counsel for Pandora Media, Inc.

MAYER BROWN LLP

/s/ *A. John P. Mancini*_____

A. John P. Mancini
Allison L. Stillman
1221 Avenue of Americas
New York, New York 10020
Telephone: (212) 506-2295
Facsimile: (212) 262-1910
jmancini@mayerbrown.com
astillman@mayerbrown.com

Richard M. Assmus
71 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
rassmus@mayerbrown.com

Counsel for Spotify USA Inc.

Proof of Delivery

I hereby certify that on Friday, December 21, 2018 I provided a true and correct copy of the Services' Joint Response to Copyright Owners' Motion for Correction of Typographical Errors in the Rehearing Order to the following:

National Music Publishers Association (NMPA) et al, represented by Benjamin Semel served via Electronic Service at Bsemel@pryorcashman.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

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

Signed: /s/ Daniel N Guisbond