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)

PROPOSED CONCLUSIONS OF LAW OF COPYRIGHT OWNERS

PUBLIC VERSION

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COMMONLY-USED ABBREVIATIONS

TERM/ABBREVIATION	DEFINITION
CARP	Copyright Arbitration Royalty Panel
CO	Copyright Owners
COF	Copyright Owners' Proposed Findings of Fact
COL	Copyright Owners' Proposed Conclusions of Law
Copyright Law	Title 17 of the U.S. Code
COR	Copyright Owners' Proposed Rate
CORS	Copyright Owners' Proposed Rate Structure
CRB	Copyright Royalty Judges
First Factor	17 U.S.C. § 801(b)(1)(A)
Fourth Factor	17 U.S.C. § 801(b)(1)(D)
HX	Hearing Exhibit
Judges	Copyright Royalty Judges
MW	Musical Work
NOI	Notice of Intent
PROs/PRO	Performance Rights Organizations
RMs	Revenue-Based Models
Second Factor	17 U.S.C. § 801(b)(1)(B)
SR	Sound Recording
TCC	Total Content Cost
The Four Services	Google, Spotify, Pandora & Amazon
The Services	Apple, Google, Spotify, Pandora & Amazon
Third Factor	17 U.S.C. § 801(b)(1)(C)
Tr.	Hearing Transcript
Tribunal	Copyright Royalty Tribunal
WDT	Written Direct Testimony
WRT	Written Rebuttal Testimony
WST	Written Supplemental Testimony

Note on Pending Motions

The COs have moved to exclude a number of survey and internal reports that Spotify introduced at the hearing, on the grounds that they are unreliable hearsay and/or unreliable surveys and analyses without, in either case, a foundation for admission. As of the date of this filing, those motions have not been granted. The COs continue to believe that the motions should be granted, but until then consider it necessary to address the material in two of these documents (HX-215 and HX-997, each a MusicWatch survey), much of which contradicts Spotify's arguments.

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TREATISE

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I. INTRODUCTION

COL-1. The National Music Publishers' Association and the Nashville Songwriters Association International (hereinafter the "Copyright Owners" or "CO") respectfully submit their Conclusions of Law ("COL"). The COL has been organized into four sections (with multiple subsections within each section). The First Section addresses the Copyright Owners' proposed rate structure. The Second Section addresses the Copyright Owners' proposed rates. The Third Section addresses the rate structures proposed by the Services. The Fourth Section addresses the rates proposed by the Services.

COL-2. As will be demonstrated below and as shown in the accompanying Proposed Findings of Fact, the Copyright Owners' proposed rates and terms were fully supported at the hearing by the testimony of fact and expert witnesses and documentary evidence. The Copyright Owners have taken the existing complex rate structure, which decoupled mechanical royalties from the consumption of the songs for which the royalties are payable – a rate structure that is ostensibly based on a percentage of revenue but which instead has been reduced to a series of minima because the structure fostered the gerrymandering of revenue through financially engineered revenue deferment and revenue displacement business strategies – and simplifies it by recoupling the royalties with use. Moreover, the Copyright Owners' proposed rates are supported by a robust marketplace benchmarking analysis and multiple "Shapley value" analyses, which confirm its reasonableness and service of all four of the Section 801(b)(1) policy objectives.

COL-3. The rate structure proposed by the Copyright Owners is the greater of a per-play mechanical royalty of $0.0015 or $1.06 per user per month, a simple and transparent structure that directly links mechanical royalties with use and access to the songs. And the

proposed rates are supportable and fully supported, providing the Copyright Owners with a fair return.

COL-4. The Copyright Owners have undertaken to address the rate structures and rates proposed by the Services now rather than waiting to do so in reply because they believe that the juxtaposition of the competing proposals for rates and terms will be of assistance to the Judges. Further, the Copyright Owners also believe that addressing the Services' proposed rates and terms now, in both the Findings of Fact and the COL, will illuminate the Services' evidentiary failures in this Proceeding. As shown in the Findings of Fact and as will be shown in the Third and Fourth Sections below, the Services' presentation was long on argument and speculation but very short on evidence.

COL-5. The Services came into this Proceeding proclaiming that they wanted to preserve the status quo by rolling the rates and terms set by settlements in 2008 and 2012 forward. However, their notion of the status quo was, as the Judges' quickly perceived, "not the status quo," since their proposals (which differ to some extent one from the other), on their face, seek material reductions in the existing rates and terms. Moreover, the Services failed to provide any evidence supporting their starting place: the existing rates and terms. Instead, they simply presumed that the existing rates and terms needed no evidence to support their continuation into the future, a form of stasis. In short, the Services chose to ignore the fundamental requirement of the very rates and terms that they seek to roll forward: the requirement that the rates and terms be established *de novo.* As is unambiguously required under the current regulations (under the heading "Effect of rates"), in this proceeding, "the royalty rates payable for a compulsory license shall be established de novo." 37 C.F.R. § 385.17. This "de novo" provision "has an accepted meaning in the law. It means an independent determination of a controversy that accords no

deference to any prior resolution of the same controversy." *United States v. Raddatz*, 447 U.S. 667, 690 (1980) (emphasis added). Indeed, "no form of . . . deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

COL-6. In the end, the Services entirely failed to marshall evidence to justify rolling forward the existing rates and terms, let alone to support the changes to the rates and terms that their proposals seek. These post-hearing submissions demonstrate that the same is not true of the Copyright Owners' proposed rates and terms, which are supported by the clear weight of precedent, the sound reasoning of experts, and most importantly, the evidence in the record.

II. THE COPYRIGHT OWNERS' PROPOSED RATE STRUCTURE AND TERMS (THE "CORS") ARE THE APPROPRIATE STRUCTURE AND TERMS FOR A COMPULSORY MECHANICAL LICENSE FOR INTERACTIVE STREAMING

A. Mechanical Rights & The Four Factors

COL-7. The Copyright Royalty Judges (the "Judges" or the "CRB") initiated this proceeding pursuant to 17 U.S.C. §§ 803(b)(1)(A)(i)(V) and 804(b)(4) to determine reasonable rates and terms for making and distributing phonorecords for the period beginning January 1, 2018, and ending December 31, 2022, "pursuant to the statutory license in 17 U.S.C. 115." *See* Notice, *Determination of Rates and Terms for Making and Distributing Phonorecords*, Docket No. 16-CRB-0003-PR (2018-2022), 81 FR 255, 256 (Jan. 5, 2016) ("*Phonorecords III*").

COL-8. Section 115 of the Copyright Law provides that, once a phonorecord of a nondramatic musical work has been distributed to the public with the copyright owner's authority, any other person may obtain a compulsory license to make and distribute phonorecords containing that work. 17 U.S.C. § 115.

COL-9. This compulsory license – commonly referred to as a "mechanical" license – was first included in the Copyright Law in a 1909 amendment, following a Supreme Court

decision determining that a composer could not copyright a perforated piano roll of his musical work. *See Jondora Music Publ'g Co. v. Melody Recordings, Inc.*, 506 F.2d 392, 393 (3d Cir. 1974) (discussing *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908)); Final Rule, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, Docket No. 2006–3 CRB DPRA, 74 FR 4510, 4512 (Jan. 26, 2009) ("*Phonorecords I*"). To provide protection to authors from unauthorized recording of their songs, while also preventing a feared monopolization by a particular piano roll company at the time, Congress granted protection from unauthorized recordings of unreleased musical works, but instituted a compulsory license so that, once "the composer chose to license one manufacturer to make mechanical reproductions, others would be allowed to record the composition upon payment of a specified royalty." *Jondora*, 506 F.2d at 393.

COL-10. In approaching a rate setting for the Section 115 compulsory license, it is important to keep in mind, as the Third Circuit Court of Appeals explained in interpreting the statutory compulsory license:

> The copyright law is enacted for the benefit of the composer in accordance with the constitutional grant of Art. I, § 8, cl. 8:
>
> "The Congress shall have Power. . .
>
> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
>
> The amendment of 1909 was intended to protect the creative efforts of the composer, and the compulsory license provision was inserted, not in an effort to penalize him, but to prevent monopolization by manufacturers. The statute should be interpreted in that spirit.

Id. at 395-96. (emphasis added).

COL-11. The compulsory license under Section 115 was thus created to protect copyright owners and prevent monopolization by copyright users, not vice versa. The goal of

promoting "the Progress of Science and useful Arts" is achieved by granting limited monopoly power to the copyright owner, which is "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (noting "monopoly granted by copyright" has an "intended purpose of inducing the creation of new material of potential historical value.") (citations & quotations omitted).

COL-12. The CRB predecessor Copyright Royalty Tribunal analyzed the purpose of the compulsory license, concluding:

> Based on our review of the entire record in this proceeding and the legislative history of the Act, we have determined that a reasonable adjustment of the statutory rate must look to the application and operation of the regulatory system of which it is an integral part. We conclude from the record in this proceeding and the legislative history of the Act, that **the regulatory system was designed to remedy a perceived market deficiency, namely, attempts at monopolization <u>by copyright users</u>**. We therefore find that **the application of Section 115 is limited by the market deficiency which justifies its existence.**
>
> It is our opinion that the term reasonable in the statute is of dominating importance in reaching a final determination in this proceeding. …
>
> Further that in exchange for that compulsory use, the Act contemplates a per-unit rate of compensation payable to the copyright owner on an individual basis by a copyright user.
>
> Based on the entire record of this proceeding and the legislative history of the Act, we are of the opinion that **<u>the market then determines the total amount of royalties</u>** paid to each copyright owner for all uses. …
>
> Further, consistent with the anti-monopoly purpose of the compulsory license system, a reasonable adjustment of the statutory rate should work **to ensure the full play of market forces**, while affording individual copyright owners a reasonable rate of return for their creative works.

Final Rule, *Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, Docket No. 80-2, 46 FR 10466-02, 10479 (Feb. 3, 1981) ("*1981 Phonorecords*") (emphasis added).

COL-13. Critical here is to understand what the Tribunal meant by the words "anti-monopoly." As the Tribunal made clear in the above-quoted language, the singular monopoly threat behind the legislation was a downstream monopoly of the user. As the Tribunal noted, the application of Section 115 should be limited by this singular market deficiency, and should not penalize authors and copyright owners.

COL-14. To be clear, not even the 1909 Amendment which created the compulsory license was directed towards any upstream monopoly by copyright owners. On the contrary, the purpose of copyright is to grant the musical works owners a monopoly. The Section 115 compulsory license is directed towards constraining the monopoly power of the downstream copyright users, not the copyright owners. The Tribunal notes that "consistent with the [copyright user] anti-monopoly purpose of the compulsory license," the statutory rate should "ensure the full play of market forces" – that is, downstream competition – while providing the copyright owners their reasonable rate of return. *1981 Phonorecords*, 46 FR at 10479.

COL-15. This understanding of the statutory mechanical license is confirmed by the fact that, when Congress first established a copyright for sound recordings (in the Sound Recording Amendment in 1972) that is a perfect complement to the musical works mechanical right, no compulsory license was put into place. After more than 60 years of history regulating the market for reproductions of music, if Congress had any upstream monopoly concern, it would have been manifested in a reproduction compulsory license for sound recordings.

COL-16. Consistent with the foregoing purposes to be served by the compulsory license, the Judges are authorized under the Copyright Law to determine, *inter alia*, the rates and terms applicable to the Section 115 compulsory license, which "shall be calculated to achieve the following objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

17 U.S.C. § 801(b)(1).

COL-17. The four factors "pull in opposing directions," leading to a "range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees." *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal*, 662 F.2d 1, 9 (D.C. Cir. 1981) ("*Phonorecords 1981 Appeal*") (citations omitted). Certain factors require determinations "of a judgmental or predictive nature," while others call for a broad fairness inquiry. *Id.* at 8 (citations & quotations omitted). Accordingly, the CRB "is free to choose" within the range of reasonable rates, and "courts are without authority to set aside the particular rate chosen by the [rate-setting authority] if it lies within a 'zone of reasonableness.'" *Id.* at 9 (citations omitted).

COL-18. As discussed in detail in Section III.A below, in rate-setting proceedings applying §801(b)(1) such as this one, market benchmarks are analyzed to determine a zone or range of reasonable rates as a first step before applying the 801(b)(1) factors. *See, e.g.*, *Phonorecords I*, 74 FR at 4522. Establishing benchmarks entails consideration of evidence of

voluntary licenses' pricing and structure, as well as other relevant marketplace data, from comparable marketplace situations. *See id.* As the Judges have stated: "We shall adopt reasonable royalty rates that satisfy all of the objectives set forth in Section 801(b)(1)(A)-(D). In so doing, we begin with a consideration and analysis of the benchmarks and testimony submitted by the parties, and then measure the rate or rates yielded by that process against the statutory objectives to reach our decision." Final Rule and Order, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2006-1 CRB DSTRA, 73 FR 4080, 4084 (Jan. 24, 2008) ("*SDARS I*"); see also, Final Rule and Order, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2011-1 CRB PSS/Satellite II, 78 FR 23054-01, 23055 (Apr. 17, 2013) ("*SDARS II*"). After reviewing marketplace evidence and determining "the parameters of a zone of reasonableness," the Judges will evaluate "the other evidence in the record offered with respect to the four policy considerations to determine if that evidence shows that the weight of marketplace evidence we have previously reviewed requires any adjustment." *SDARS I*, 73 FR at 4094.

B. Maximizing Availability of Creative Works ("First Factor")

1. The First Policy Factor Calls For Maximizing Availability Of Works Available For Licensing By Stimulating The Creative Process, And Is Not A Call To Promote Consumption Or Low Prices

COL-19. To read the Services' arguments, one would think that past rate proceedings have never explained what the First Factor means. The Services' arguments seek to repurpose the First Factor as if it were about making music cheaper or more ubiquitous or getting the public to listen to more music. That is not its purpose. The First Factor champions the same

goal as the U.S. Constitution: properly incentivizing authors to create works and publish them, making them available to the public for licensing.

COL-20. The statutory language is: "To maximize the availability of creative works to the public." One can break this down into pieces. First, the term "availability." A full reading indicates that this means availability *for licensing*. Musical works are first used by those who perform or record them. Musical works are not first made available to passive listeners. Historically, musical works were made available to publishers, who published them in sheet music form, or to performers who performed them. They were also made available by licensing them for recordings, first in piano rolls, then in physical recordings and tapes, and thereafter in digital format, by which they were then distributed to the public.

COL-21. Making musical works "available" is thus most importantly about making works available *to be published, performed, and recorded* – in other words, by composers creating them and publishers licensing them. This flows directly from Section 115's first requirement: until a musical work is first published, it is not available *to the public* for a compulsory license. 17 U.S.C. §115(a)(1) ("When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person… may… obtain a compulsory license…").

COL-22. It is the first *license* of a musical work, thus making the work *available for licensing by the public,* that is the key to the meaning of this provision. Reading this to instead focus on public access to recorded music via distribution – which under Section 115 does not begin until the copyright owner has *already* made the musical works available to the public for licensing – misses the point. The Librarian of Congress and the Register of Copyrights made this point clear in reversing as arbitrary a holding of the CRB predecessor Copyright Arbitration

Royalty Panel ("CARP") in the 1998 PSS Rate Determination. Final Rule and Order, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 FR 25394, 25406 (May 8, 1998) ("*CARP PSS 1998*"). In a Section devoted to the First Factor, the Librarian and the Register explained:

> RIAA alleges that the Panel misinterpreted this statutory objective because it focused on "whether the Services promote the sale of sound recordings," rather than "whether the proposed rate will maximize the availability of sound recordings." [citation omitted] In support of its position, RIAA recalls the 1980 jukebox rate adjustment proceeding, where the CRT concluded, in its discussion of section 801(b)(1)(A), that jukeboxes were not crucial to assuring the public of the availability of creative works. [citation omitted] The Tribunal, however, did find that "reasonable payment for jukebox performances will add incrementally to the encouragement of creation by songwriters and exploitation by music publishers, and so maximize availability of musical works to the public." [citation omitted] On the strength of past CRT precedent and the courts' recurring observation that compensation to the author or artist stimulates the creative force, RIAA disputes the Panel's conclusion, contending that the best way to maximize the availability to the public is to ensure that copyright owners receive fair compensation for their works. [citation omitted] …
>
> The Services assert rightfully that the primary rationale for the copyright law is to stimulate the creation of artistic works for the benefit of the public… but in underscoring the primary purpose for the copyright law, the [Supreme] Court in [*Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975)] acknowledges that this aim is achieved by allowing the copyright owners to receive a fair return for their labor, the position advanced by RIAA. *Id.* ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good") [citations omitted]. The positive interplay between compensation and creation is a basic tenet of copyright law, and as such, its contribution to stimulating the creation of additional works cannot be set aside lightly. …
>
> [T]he Register finds the Panel acted in an arbitrary manner. The finding is based on the Panel's failure to consider CRT precedent and to provide a rational basis for its departure from prior proceedings construing the same statutory objective. [citations omitted] …
>
> There is no record evidence to support a conclusion that the existence of the digital transmission services stimulates the creative process. [T]he Panel…fails to discuss how the creation of a new mode of distribution will itself stimulate the creation of additional works.

COL-23. As concluded in this determination, the appropriate maximization of availability for the First Factor comes through stimulating the "creation of additional works." This understanding is echoed in other determinations as well. In raising the statutory mechanical rate, the Copyright Royalty Tribunal's determination in *1981 Phonorecords* included a section on the First Factor, in which it held that:

> [T]he [Copyright Revision Act of 1976] is intended to encourage the creation and dissemination of musical compositions. This encouragement we find takes the form of an economic incentive and the prospect of pecuniary reward—royalties payable at a reasonable rate of return.
>
> …
>
> The evidence in this proceeding shows that [the current] statutory ceiling does not maximize the availability of commercially viable musical compositions to the public.

1981 Phonorecords, 46 FR at 10479.

COL-24. The phrasing "maximize the availability of *commercially viable* musical compositions" is noteworthy. *Id.* (emphasis added). The focus is not on how many members of the public access recordings of songs but how many songs are created and made available *to be licensed and then subsequently recorded and distributed.* The purpose of the First Factor is to increase the output of songwriters and publishers. It has nothing to do with increasing end user consumption of music or making music free to the public or the like.

2. <u>The CORS Properly Serves The First Factor</u>

COL-25. Because the Copyright Owners' proposed rate structure – the greater of .0015 per stream and $1.06 per user per month – aligns royalties with usage and is transparent, it will maximize the availability of musical works by incentivizing their creation and distribution.

COL-26. A royalty based on the number of plays and the number of users aligns the compensation paid to the creators of the content with the actual demand for and consumption of

their content, whether it is the consumption of streams (per play) or the consumption of subscriptions or access (per user). (COF-23; Ghose WDT ¶ 84 (HX-1617) (under a per-play structure, "[s]ongwriters are paid each time their songs are streamed and receive a payment commensurate with the demand for their songs that is not tied to the financial outcomes of the streaming services' decisions"); Rysman WRT ¶ 9 (HX-3032) ("per-play rates reward songwriters in direct proportion to increased listening to their songs, and per-user rates reward the songwriting and publishing industry in direct proportion to increased demand for access to their repertories"); Rysman WDT ¶ 58 (HX-3026) ("per-user rates align directly with a critical value in the marketplace, namely access to music;" and "every current music streaming service is priced to the user as an 'all you can eat,' unlimited access service"); Dorn WDT ¶ 33 (HX-1611) (noting compensation for use of musical works should increase in direct proportion to use))

COL-27. As David Israelite testified: "tying the statutory rate to a narrowly defined version of the Services' revenues (one that excludes sources of revenue such as the sale of other products linked to the sale of the music) as opposed to users' consumption – the basis of most statutory rates, including the rates for Subpart A products such as downloads and ringtones – results in publishers and songwriters being paid less and less on an effective per-play basis as consumption increases. . . . It is counter-intuitive for something that is so highly valued that it gets played more and more to earn less and less." (COF-25; Israelite WDT ¶ 39 (HX-3014))

COL-28. Because "songwriters expect to be compensated appropriately for the value their creations provide to consumers," and "expect their compensation to be commensurate with the demand for their songs" (COF-32; Ghose WDT ¶ 53 (HX-1617), a royalty structure that aligns compensation with demand will incentivize songwriters to create songs; Dorn WDT ¶ 7 (HX-1611) (noting benefits of royalty structure that ensures that "songwriters who write the most

popular songs [will] receive greater compensation than those who write less popular songs because the total royalty paid is proportionate with demand")) On the other hand, a rate structure that decouples compensation from demand will likely disincentivize songwriters and publishers to create and distribute new musical works. (COF-80; Dorn WDT ¶ 33 (HX-1611) ("a rate structure under which a musical work has no recognized value and compensation for the use of that work can drop over time is detrimental to the music industry because it undercuts incentives for creating music")) Many successful songwriters will be forced to exit the profession if the compulsory mechanical rate structure does not change, as they are unable to make a living under the current structure as streaming becomes a primary method of consumption. (COF-38)

COL-29. A rate structure that is transparent engenders trust and eliminates manipulation, which also serves to maximize availability. As the Services' own experts testified, the current rate structure is "complex" and "convoluted," (COF-18; Joyce WDT ¶ 21 (HX-693)), and engenders confusion in songwriters and other payees who receive different per-stream rates across different services and in different months. (COF-20) Moreover, because the current rate structure is based on service revenue, it can also be (and has been) manipulated through bundling, discounting, accounting techniques and the pursuit of market share in lieu of profits, which further engenders confusion and distrust, as discussed below. (*See e.g.,* COF-13; COF-377; COF-569; COF-543)

COL-30. The Copyright Owners' proposed rate structure, on the other hand, is transparent and with low transaction costs. A per-play rate requires only the number of streams for calculation, and a per-user rate requires only one additional metric, the number of users, for calculation. (COF-14; COF-15) Both of these metrics are required to be calculated under the current rate structure, and pose no burden for services. A transparent royalty structure

incentivizes songwriters to create musical works and make them available, because it fosters a level of trust and certainty. COF-17. As Apple's David Dorn testified, a more transparent rate structure "helps to incentivize" copyright creators because "any time you have something that is clearly understood, that is simple and easy and is fair, it fosters a level of trust and certainly a level of understanding of how they are being paid." (*Id*; Tr. 2477:5-16 (Dorn)) Mr. Dorn provided the examples of Prince and Adele – songwriters who are also recording artists and who, as recording artists, can choose not to make their works available on streaming services – as artists who did not make their works available on streaming services because of the lack of trust and transparency in their royalty payments, and the variability of those payments. (*Id.*; Tr. 2480:15-2481:10 (Dorn))

COL-31. A more transparent royalty structure may also alleviate some of the Services' delays in payment and accounting. (COF-137) Such timely payment will allow music publishers to more accurately forecast income (which is important in modelling advances and evaluating deals), and to continue to invest in the discovery, development, exploitation and administration of new and existing music. (COF-138)

C. Fair Return For COs and Opportunity For Fair Income For Services ("Second Factor")

COL-32. The second 801(b)(1) factor is: "To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions." With respect to the copyright user, the Second Factor only addresses providing an *opportunity* for licensees to earn a fair income, and is not an attempt to guarantee any particular income to licensees. In *1981 Phonorecords*, in a section analyzing the Second Factor, the Tribunal described the determined rate as one that will "afford [licensees] the *opportunity to earn*

a fair income," and that does not "fail to afford [licensees] an *opportunity to earn* a fair income." 46 FR at 10480 (emphasis added).

COL-33. In *SDARS II*, the Judges found that application of the Second Factor favored a rate increase, reasoning that a lower rate would lead to "[d]ramatically expanded usage without a corresponding expectation of increased compensation," which "suggests an upward adjustment to the existing statutory rate." *SDARS II*, 78 FR at 23060.

COL-34. Indeed, the principle that copyright owners' "fair return" under this policy objective should be tied to the actual usage of their works whenever possible has held consistent throughout proceedings applying 801(b)(1), leading to a policy preference that heavily favors a usage-based fee structure over a revenue-based structure.

COL-35. The Register's 2002 *Web I* determination agreed with the decision of the CRB's predecessor (the Copyright Arbitration Royalty Panel, also referred to as "CARP" or the "Panel") to reject a percentage-of-revenue model because: "a per performance fee is directly tied to the right being licensed"; "it was difficult to establish the proper percentage because business models varied widely in the industry"; and "many webcasters generate[d] little revenue under their [then-]current business models . . . [and] copyright owners should not be forced to allow extensive use of their property with little or no compensation." Final Rule and Order, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9 CARP DTRA 1&2, 67 FR 45240, 45249 (July 8, 2002) ("*Web I*") (citations & quotations omitted).

COL-36. As the Judges stated in the 2007 determination in *Web II*, "a per-performance metric is directly tied to the nature of the right being licensed, unlike other bases such as revenue of the licensee," which "merely serves as a proxy for what we really should be

valuing, which is performances." Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 72 FR 24084, 24089 (May 1, 2007) ("*Web II*") (quotation marks and internal citations omitted). The Judges reaffirmed the "basic notion . . . that the more the rights being licensed are used, the more payments should increase in direct proportion to usage." *Id.* at 24090. As a revenue metric "is a less exact proxy" for the usage of works than performance, "because the revenue that a licensee derives, even from its music-related activities can be influenced by a variety of factors that have nothing to do with music," revenue "should only be used as a proxy for a usage-based metric where the revenue base used for royalty calculation is carefully defined to correspond as closely as possible to the intrinsic value of the licensed property." *Id.* at 24089 (quotation marks and internal citations omitted).[1] The Judges there determined that "there was no persuasive evidence offered by any commercial webcasting/simulcasting party to indicate that a usage-based metric is not readily calculable and, that as a consequence, the Copyright Royalty Judges must resort to some proxy metric in reaching their fee determination." *Id.*

COL-37. The Judges in *Web II* also identified numerous problems militating against implementing a percentage-of-revenue model, including:

1. Measurement difficulties: "identifying the relevant webcaster revenues can be complex, such as where the webcaster offers features unrelated to music." *Id.*

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[1] The Judges warned that:

[A revenue metric] could result in a situation in which copyright owners are forced to allow extensive use of their property without being adequately compensated due to factors unrelated to music use such as a dearth of managerial acumen at one or more Services. The similar potentiality that webcasters might generate little revenue and, under a revenue-based metric, produce a situation where copyright owners receive little compensation for the extensive use of their property was a concern that animated the Librarian to approve a per performance metric rather than providing for a revenue-based payment option in Webcaster I.

Web II, 72 FR at 24090 (citation omitted).

2. Definition difficulties: this metric would "demand a clear definition of revenue so as to properly relate the fee to the value of the rights being provided, and no such clear definition has been proffered by the parties." *Id.*; *see also* Final Rule and Order, *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, Docket No. 14-CRB-0001-WR (2016-2020), 81 FR 26316, 26326 (May 2, 2016) ("Web IV") (discussing a party's "valid objection" that "a percent-of-revenue rate would create uncertainty and controversy regarding the definition and allocation of revenue")

3. Audit and enforcement difficulties: a revenue-based system would give rise to "issues of interpretation and controversy related to how revenues are defined or allocated" and "multiple payment systems will augment the transactions costs imposed on the parties."

Web II, 72 FR at 24089.

COL-38. The Judges' rejection of the percent-of-revenue structure was upheld on appeal by the D.C. Circuit Court of Appeals. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 760-61 (D.C. Cir. 2009) ("*Web II Appeal*").

COL-39. Likewise, when called to review proposed rate structures in *SDARS I* in 2008, the Judges also outlined the circumstances under which it *would* be appropriate to adopt a revenue-based scheme: where there is no proposal that "attempt[s] to measure the number of listeners to any particular sound recording" (or "actual usage") and there was not "substantial evidence to indicate that a true per performance rate was susceptible of being calculated by the parties to this proceeding." *SDARS I*, 73 FR at 4086-87. Those circumstances are plainly not present here, where determining the actual per-performance usage of each copyrighted work is not merely simple, but is already in place, as all royalties are currently allocated on a per-play basis, and per-user rate prongs are already in effect. Indeed, in the following year's *Phonorecords I* determination, the Judges stated that:

> [U]nlike our recent determination in the SDARS proceeding, here we are not faced with difficult or intractable problems in measuring usage nor do we find that a

> percentage of revenue approach provides the most efficient mechanism for capturing the value of the reproduction and distribution rights at issue here. . . .
>
> In the instant proceeding, measuring usage is straightforward. Each reproduction of the musical work . . . counts as a use of the musical work. No proxies need be formulated to establish the number of such reproductions. They are readily calculable as the number of units in transactions between the parties.

Phonorecords I, 74 FR at 4515-16.

COL-40. On appeal, the Judges' reasoning in *Phonorecords I* was soundly endorsed by the D.C. Circuit Court of Appeals, acknowledging that: "This Court has validated the Board's preference for a royalty system based on the number of copyrighted works sold-like the penny rate-as being more directly tied to the nature of the right being licensed than a percentage-of-revenue rate." *Recording Industry Ass'n of America, Inc. v. Librarian of Congress*, 608 F.3d 861, 869 (D.C. Cir. 2010) ("*Phonorecords I Appeal*") (citing, *Web II Appeal,* 574 F.3d at 760-61). The Court concluded: "In the Board's view, the penny rate provided 'the most efficient mechanism for capturing the value of the reproduction and distribution rights at issue.' We find nothing unreasonable about the Board's preference for a penny-rate royalty structure." *Id.* at 870 (citation omitted).

1. <u>The CORS Provides The Most Fair Structure For A Statutory License By Aligning Royalties With The Core Economic Values In The Covered License</u>

COL-41. As Phonorecords I and II were based on settlements, this is the first proceeding in which the Judges will determine a compulsory rate for interactive streaming. In contrast, there have been a number of proceedings concerning *non*interactive streaming, and a great deal of precedent on rate setting in that context, much of which is quite relevant and is cited herein. There is, however, a fundamental difference between interactive and noninteractive streaming, and that is the on-demand access to sound recordings an musical works that is provided to users under an interactive streaming license. As was clear from the determination in

Web IV, the difference in on-demand functionality between the two markets is directly connected with different economic value that must be taken into account in determining royalty rates. *See, e.g.*, *Web IV*, 81 FR at 26353. This is the independent economic value in having *access* to works, that is separate and apart from the obvious economic value in the *listening* to music. There is significant evidence in the record confirming the exploitation of both of these values in the business models of interactive streaming services. (*See, e.g.*, COF-46 – COF-81)

COL-42. In setting a statutory rate for interactive streaming itself (as opposed to using interactive streaming as a benchmark for setting noninteractive streaming rates) that will last for five years in an industry that sees rapid changes, a rate structure with two rate prongs that are coupled with the two core economic values in the good provided via the compulsory license for interactive streaming is the best way to ensure that fair returns are provided to the copyright owners, and to protect against pricing models or practices that might undercompensate the copyright owners for a type of exploitation of musical works that had economic value. (COF-82; COF-54; Tr. 2000:11-2005:15 (Marx))

a. <u>The Value In "Plays" Is Plain And Undisputed</u>

COL-43. Per-play rates naturally align with one of the key values inherent in musical works – the value in listening to or "using" the works. (COF-24) Songs have value, representing the investments in time and money by the music publishers and songwriters in their creation. (COF-46; Tr. 2863:16-2864:11 (Ghose) ("A single, fixed per-play rate also recognizes the fact that "there is a specific cost to the songwriter and the publisher for actually creating and compiling the song")) Per-play rates reward songwriters for those songs that obtain increased usage. (COF-24)

COL-44. There can be little dispute that plays of music have economic value. As Dr. Ghose testified, "every time a song is streamed, that obviously is demand that is generated."

(COF-20; Tr. 2851:18-24 (Ghose)) And as Dr. Marx testified, an increase in actual listening (in terms of plays) is associated with an increase in economic value. (COF-48; Tr. 2004:25-2005:11 (Marx)) Dr. Katz also testified in support of a per-play rate in Web IV. (COF-107) Because plays of music have economic value, as Dr. Marx also testified, per-play royalties are "a feature of a number of statutorily set and some privately negotiated rates." (COF-49; Marx WDT ¶ 134 (HX-1065); see also discussion above (citing agreements with per play rates))

COL-45. In fact, in *Phonorecords I*, the then-existing services, represented by DiMA, proposed minimum per-play mechanical royalty payments for limited download services. DiMA stated that their proposed minima "recognize that business models are evolving and that both subscription and 'non'-subscription offerings may develop more over the next five years." DiMA proposed a per-play minimum of $0.00129 per play for plays of limited downloads to non-subscribers. (COF-99)

COL-46. The Judges, as discussed above, have repeatedly recognized that royalties should reflect usage and has adopted per-play royalties as a result. Nor is such a rate difficult to implement, as the current rate structure, at the end of all of its Rube Goldberg machine-like calculations, allocates royalties on a per-play basis, and so the Services are quite familiar with determining plays per work and paying royalties in connection with those determinations. (*See, e.g.,* 37 C.F.R. § 385.12(b); COF-100)

b. Per-Play Rates Are Also Common In The Marketplace

COL-47. Paying rightsholders on a per-play basis would not be disruptive to the Services. [redacted]. (*See, e.g.*, COF-97; COF-102A; COF-98 [redacted]

[redacted]; *see also* COF-98) [redacted]. (CO-102A; Kokakis WRT ¶¶ 4-5 (HX-3031); HX-1074; HX-1075; HX-1076) These services [redacted].[2] (COF-116)

COL-48. As noted above, even under the current rate structure, royalties are allocated on a per-play basis.

COL-49. Witnesses for the Services agree that there would be no disruption. As Apple's David Dorn testified, a per-play rate "is consistent with the rate structure used for other music distribution platforms. For example, the statutory rate for noninteractive streaming services for the performance of sound recordings is a per-play rate and the statutory rate for the mechanical license for digital downloads is a per unit rate." (COF-106; Tr. 1564:22-1568:2 (Mirchandani) ([redacted])) Furthermore, ad-supported services are effectively charging users on a per-play basis. (Watt WRT at ¶ 13 (HX-3034) ("I do not see how services which charge per-play and per-user fees to

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[2] [redacted]

their own users have complaint for paying the same type of per-play and per-user costs to the suppliers of their content. Indeed, standard 'mark-up' pricing is simplest and easiest when the structure of costs matches the structure of consumer prices.”))

COL-50. The Services' arguments that a per-play royalty will lead to cost uncertainty, or perverse incentives for Services to set limits on consumption (COF-101), are without merit, as discussed in detail in Section II.F below. Dr. Ghose testified, in response to questioning from the Judges, that the Services have experience with their users over time and collect data, and it is not difficult for Services to forecast the level of streaming on their services, and so a per-play rate would not “cause any disruptive surprises for the streaming services.” (COF-112; Tr. 2877:4-2879:20 (Ghose)) And he further testified that where there is a per-play rate, the Services can innovate on pricing, including using tiered pricing, quantity discounts, menu-based contracts, or other innovations. (COF-113-115; Tr. 2865:25-2868:12 (Ghose))

c. <u>The Independent Value In Access Is Plain And Admitted By Service Experts</u>

COL-51. One of the greatest values to the consumer of interactive streaming services is that the consumer has access to all of the music, everywhere and anytime. (COF-50) Songwriters and publishers, through their hard work and investment, create and provide the massive catalogs of songs that make it possible for streaming services like Apple, Spotify, Google Play and Tidal to offer access to catalogs of over 30 million songs. (COF-51; *see also* COF-6; Kokakis WDT ¶ 10 (HX-3018) ([redacted]); COF-3; Brodsky WDT ¶ 5 (HX-3016) ([redacted])) This access offers numerous benefits of concrete economic value.

COL-52. Access to such a vast catalog has enormous economic value, as it eliminates the cost of purchasing 30 million individual songs (or any songs, for that matter). As

Amazon's expert, Dr. Hubbard put it, interactive streaming services "appeal to consumers by moving away from a model of 'ownership' towards a model of 'access.'" (COF-52; Hubbard WRT ¶ 2.8 (HX-132)) Apple's Dr. Ghose testified that "interactive streaming services provide consumers access to a large catalog of songs that they can listen to 'on-demand' without owning the songs (and paying for that ownership)." (*Id.*; Ghose WDT ¶ 50 (HX-1617); *see also id.* ¶ 46 ("Interactive streaming… shifts the model for how we consume music from music ownership (buying an album or a song to listen to it) to music access"))

COL-53. As Dr. Marx testified: "For consumers, interactive streaming provides immediate access to an extensive catalog of songs beyond what most individual owners could accumulate, allowing free sampling and experimentation with new music." (COF-53; Marx WDT ¶ 38 (HX-1065); *see also* Ramaprasad WDT ¶ 72 (HX-1617) ("interactive streaming services have increased consumer access to a larger catalogue and, therefore, a greater variety of music"); Hubbard WDT ¶ 2.15 (HX-132) (touting "access to more titles from the catalogue" as a benefit of "premium" subscription streaming services))

COL-54. These benefits that derive from the ability to access extensive catalogs indisputably have economic value. It is clear that the benefits described above are of great value to consumers, and such value is vigorously promoted to consumers by the Services. (COF-50; *see also, e.g.,* Page WDT ¶¶ 65-67 (HX-1061) (touting increase in "the sheer number of tracks available to the public")) Dr. Rysman calls access to music "a critical value in the marketplace" (COF-50; Rysman WDT ¶ 58 (HX-3026)), and states that per-user rates naturally align with one of the key values inherent in musical works – the option value in access to the musical repertoires – as they reward the songwriting and publishing industry in direct proportion to increased demand for access to their repertoires. (COF-23; Rysman WRT ¶ 9 (HX-3032)) Dr.

Eisenach notes that on-demand access to music is a substantial value, separate and apart from the value obtained from listening to music (which alone can be obtained from noninteractive sources and radio at lower costs). This is why on-demand services market the size of the catalogs they offer, and why they feel the need to obtain (and provide to their users) access to full repertoires of music. (COF-54; Eisenach WRT ¶ 51 (HX-3033)) Dr. Marx testified that she would "expect that consumers might be willing to pay more for access to a higher quality, larger offering." (Tr. 2004:8:24 (Marx))

COL-55. In defending Apple's proposed per-user rate (for locker services), Dr. Ghose described the *independent access value* in streaming subscription services:

> A per-subscriber rate best reflects the value a consumer derives from the paid locker service. Moreover, **it ensures that copyright owners are paid even when consumers <u>use</u> the paid locker service to upload songs <u>but choose not to exercise the option to stream that music</u>**.

(Ghose WDT ¶ 90 (HX-1617) (emphasis added))

COL-56. Dr. Ghose perfectly captures the issue here: the access model provides users an "option" to stream musical works, which they may or may not "exercise." <u>Nonetheless, even where there are no streams, a royalty should be due according to Dr. Ghose</u>, because there has been "use" of the service, since the option itself is of value. Indeed, much like a gym membership, it is the access option that users are paying for (since there is no refund if they do not stream). (COF-63; Tr. 5730:6-5731:3 (Ghose)) ("It is for this ease of access that paid locker services may charge a subscription fee")) Note that Dr. Ghose's reasoning is *even more apt* in application to the standard interactive streaming offerings (rather than locker services). The standard interactive streaming offerings are functionally the same as enormous lockers with every song in the world. The "option" is thus for access to a much more valuable catalog than a personal locker. If a locker is like a gym with a couple of exercise machines, then a standard

interactive streaming offering (to some 30 million songs) is like the world's largest exercise complex with every piece of exercise equipment ever made. Membership would be far more valuable for the latter.

COL-57. [redacted]. (Tr. 2228:3-22 (Hubbard); COF-59; HX-113 at p. 6) In fact, as reflected in [redacted]. (HX-113 at pp. 6-7; Tr. 5730:6-5733:10 (Ghose); COF-62)

COL-58. Per-user rates that reflect the value of access to musical works are also consistent with how subscription services charge their customers. The right to access a musical work, on demand at any time or place, from a library of musical works, is the good or service that is being sold by the interactive streaming service in both the predominant "all you can eat" unlimited access business model (COF-66) or the subscription "locker" model (COF-63). The subscription price is an access price. The user pays the subscription fee to the Service for access to the library for a particular time period (*e.g.*, a month), and while the user may access and play thousands of songs during that month, the user may also access and play nothing during the period. In the latter case, the service does not refund any portion of the user's subscription fee. As Dr. Watt testified, the business model is akin to a buffet. The service (or the buffet owner) may lose money on certain users that stream (or eat) more than the norm, but it makes money on users that stream (or eat) at or below the norm. (COF-64; Watt WRT ¶¶ 12, 17 (HX-3034))

COL-59. Per-user rates that reflect the value of access to musical works are also [redacted]. (COF-70) [redacted]. As Dr. Rysman testified, it is because value is inherent in access that rightsholders would not be expected to provide access to their entire repertoires with no guaranteed minimum payment. (*Id.*) If the royalties payable by the service are less than the minimum guarantee – whether because the service was unable to execute its business model or for some other reason – the difference between the royalties paid to the publisher and the minimum guarantee are not refunded to the service. The minimum guarantee was the access price for the catalog of works.

d. [redacted]

COL-60. Paying rightsholders on a per-user basis would not be disruptive to the Services. [redacted]. (COF-285) In practice, [redacted]. (COF-93; Tr. 829:8-12 (Joyce) (at [redacted]))

COL-61. [redacted]. (COF-90) While Apple half-heartedly argues that, [redacted], a per-user rate is not appropriate in the context of interactive streaming services, its own rate proposal includes a per-user prong for paid locker services, promoting such a rate structure as "simple to implement and understand." (COF-94)

COL-62. [redacted].

COL-63. Per-user rates also exist in most of the categories in the current regulations that all but one of the Services are keen to roll forward. For example, the standard portable subscription category includes two separate per-subscriber prongs (the TCC prong, which is capped at $.80 per-subscriber per month, and the $.50 mechanical-only per-subscriber prong). Similar per-subscriber prongs exist in the bundled subscription service, paid locker service, and limited offering categories. *See* 37 U.S.C. § 385.22. Each of these prongs, if binding, results in a payment for access that is payable regardless of the number of streams or plays (and regardless of whether any musical works are played by any particular subscriber at all).

e. Allocation of Per-User Royalties On A Per-User Basis Is An Appropriate Proxy For Access Value, And Has Been Adopted In Voluntary Deals By Every Service Participant

COL-64. The independent economic value of access is admitted by the Service experts, and can hardly be disputed, and the method for allocating that value is unequivocal from industry history and marketplace benchmarks. In the aggregate, relative number of plays have always been the proxy for relative access value. This is the only way that it has ever been done, and is consistent with all free market deals. The record is replete with evidence of royalties based on per-user rates being allocated based on relative number of plays, and shows no evidence of [redacted]. Unsurprisingly, the industry has uniformly adopted per-play allocation of per-user access charges as the appropriate allocation, reflected in [redacted] and regulations. This is the way in which the per-user fees in the current rate structure are allocated, which states that "allocation shall be made on the basis of plays of musical works" (i.e., even where a per-user fee binds, the resulting royalty pool has always been allocated based on relative number of plays). *See, e.g.,* 37

C.F.R. §§ 385.12(b)(2) and (4), 385.22(b)(2) and (3). [redacted]. (COF-72) In fact, *each of the Services proposes per-user royalty rate prongs that would be allocated based on relative number of plays.* Apple's proposed locker service is a per-user rate allocated on a per-play basis[3], and each other Service proposes allocating royalties from models with per-user prongs based on relative number of plays.

D. Relative Roles ("Third Factor")

1. Copyright Owners Play The Essential Role In Making the Product Available To the Public

COL-65. The third 17 U.S.C. §801(b)(1) factor is: "To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication." As between the services and the copyright owners, the consideration of "relative creative contribution" favors the copyright owners. *See SDARS I*, 73 FR at 4096 ("While the SDARS' creative contributions to music channels may be relevant, it is certainly subsidiary to and dependent on the creative contributions of the record companies and artists to the making of the sound recordings that are the primary focus of those music channels."); *see also CARP PSS 1998*, 63 FR at 25407-08 (stating that recording companies and performers "make substantial creative contributions," whereas the services "were found to make no such significant contribution").

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[3] Apple's expert Dr. Ghose criticized the CORS in his rebuttal testimony for allocating per-user royalties on a per-play basis – but this is *exactly* what he himself proposes should occur in connection with locker services as part of Apple's proposal.

COL-66. In *1981 Phonorecords*, the CRB predecessor Copyright Royalty Tribunal (the "Tribunal") determined that this factor supported an upward adjustment of rates. 46 FR at 10480. It noted that "the songwriter is the provider of an essential input to the phonorecord: The song itself," (emphasis added) and that "[t]he music publisher collaborates with the songwriter in the creative process." *Id.* While the copyright user had substantial risks and costs to doing business, the Tribunal found that those companies could control those risks and costs and pass them along to others. *Id.*

COL-67. This factor might weighs in favor of a copyright user only in a rare instance, such as discussed in *SDARS II*, where the Judges found that Sirius XM had invested billions in satellites orbiting the globe and held that this investment merited consideration. *SDARS II*, 78 FR at 23069. However, the Judges also noted that these financial outlays were "unique to Sirius XM, which has developed a proprietary music distribution system, *rather than use the existing internet framework . . .*" *Id.* (emphasis added). Notably, that sort of proprietary development and infrastructure investment is not present here. Rather, the Services do exactly what the Judges found would *not* merit consideration under this Factor: the Services here merely use "the existing internet framework."

2. <u>The CORS Best Suits The Third Factor Because It Properly Allocates Risk And Reward</u>

COL-68. Dr. Gans explained how the CORS is appropriate to balance relative contributions and risk, allowing the Services to keep the gains from their innovation, while not passing on the downside of their unilateral business decisions on to the copyright owners. (COF-86; Tr. 4184:13-4185:24; 3978:5-3987:8 (Gans)) [redacted] (COF-88; Tr.

4043:5-4047:25 (Gans)) Dr. Rysman also testified at length as to how the CORS properly reflects relative roles. (COF-89; Tr. 4262:9-4271:15) Dr. Ghose further supported the idea that a per-unit rate structure balances relative contributions by appropriately allocating risk and reward between the upstream and downstream (Tr. 2848:11-2851:13 (Ghose)) As Dr. Ghose testified:

> [A] percent-of-revenue structure does not always appropriately balance the rewards to songwriters and streaming services. …
>
> Another feature of the percent-of-revenue structure is that it may expose songwriters to variable compensation across different streaming services even if the demand for their songs does not vary. Because different streaming services may have different business models (e.g., ad-supported, subscription-based), and may make different business decisions such as how to price their services (for subscription-based services) or how to place and what to charge for ads (for ad-supported services), their revenues may vary. It is plausible that different streaming services might pay different royalties to the same songwriter for the same number of streams under the percent-of-revenue structure. …
>
> Because streaming services do not have to pay per stream under a percent-of-revenue structure, they could be incentivized to use a loss leader strategy. …
>
> For the streaming services, the percent-of-revenue structure decreases the upside rewards of innovation because songwriters share those rewards. …
>
> Therefore, a per-play rate structure is a more appropriate rate structure for streaming services, and is more likely to balance the rewards to songwriters and streaming services. …
>
> Because other prominent forms of music distribution are based on a per-unit royalty structure, as the music units sold increase, the royalty payments increase commensurately. In contrast, if royalty payments to publishers and songwriters are calculated as a share of revenues, there is no guarantee that the royalty payments would increase commensurately with music consumption. For example, if the growth of streaming music consumption, as measured by number of streams, outpaces associated revenues (and any royalties calculated as a percentage of those revenues), there will be a divergence between the growth in music consumption on the one hand, and royalty payments to publishers and song writers on the other. This was indeed the case in the ad-supported streaming industry in recent years…
>
> As interactive streaming becomes a major means of music consumption, it is reasonable to bring the streaming rate structure in line with that of other key methods of music delivery. Since copyright owners continue to lose guaranteed per-unit income for reproduction of their works in these other forms, bringing the structure of interactive streaming royalties in line with those methods would

> provide copyright owners with protection against those losses. Indeed, the finding by the Copyright Royalty Board in its 2008 opinion that a per-unit rate (or a per-play rate, in this case) is appropriate for permanent downloads because it appropriately balances the rewards to songwriters and publishers with the costs to distributors also applies to streaming services. As with the previous forms of music distribution, a per-play rate structure is needed to appropriately compensate copyright owners.

(COF-89; Ghose WDT at ¶¶ 62-81 (HX-1617))

COL-69. Apple's executive, Mr. Dorn, further explained that the risks Apple faced as a streaming service market entrant were no different than risks faced in other industries, and does not justify insulating services from their business judgments and forcing rightsholders to share in those risks by departing from the standard fixed per-unit cost structure:

> A rate system without a per-play minimum shifts some of [the] risk to the songwriters and publishers whose music is being used because it allows services to use the songwriters' and publishers' songs while paying them a very low rate (or, in some circumstances, if there is no minimum in place, without paying them at all). . . . Given that most of the risks Apple faced when entering the interactive streaming market were not unique to this industry, I believe it makes sense to treat the interactive streaming industry like all other industries, such that service providers must pay a fixed amount for songs (which are the inputs on which their services are based) regardless of their revenue.

(COF-83; Dorn WDT at ¶ 60 (HX-1611))

COL-70. And despite the other Service experts attempts to contrive arguments in opposition, Dr. Katz could not escape his own testimony on behalf of Pandora in Web IV that a revenue-based rate structure would be a "tax on innovation" (COF-10) and Dr. Leonard could not defend forcing the risks taken by the services onto the upstream rightsholders. (Tr. 5238:12-5244:7) (Leonard))

E. Minimize Industry Disruption ("Fourth Factor")

1. The Fourth Factor Addresses Adverse Impacts That Participants Cannot Adequately Adapt To And Threaten The Viability Of The Industry, And There Is No Evidence Of Any Threat Of Disruption From The CORS

COL-71. Section 801(b)(1)(D) sets forth an objective to "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." The question of the disruptive effect from rate structure was addressed by the Judges in *Phonorecords I*:

> As the Judges indicated in the SDARS proceeding, ''disruption'' typically refers to an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the industry participants to adequately adapt to the changed circumstances and, as a consequence, such adverse impacts threaten the viability of the music delivery currently offered under the license in question. See 73 FR at 4097. In the instant proceeding RIAA offers no persuasive evidence of a causal relationship between any specified past level of record industry revenue shortfalls and the structure (as distinguished from the amount) of this one component of industry expenses (as distinguished from several other major cost components) over the same period. Nor does the RIAA offer any persuasive evidence that would in any way quantify any claimed adverse impact on projected future revenues stemming from the continued application of a penny-rate structure over the course of the license period in question.
>
> Then, too, RIAA's and DiMA's asserted claims of the relative advantage of their proposed revenue-based structures fail to adequately consider negative impacts on copyright owners. For example, RIAA's claim that a pure percentage rate allows more pricing flexibility than a penny rate appears exaggerated and unfairly ignores the disadvantages of the pure percentage rate for copyright owners. RIAA contends that ''With a fixed cents rate, record companies cannot lower their prices below a certain threshold without losing the margin needed to cover their very significant costs.'' Yet the record of evidence in this proceeding does not identify such a threshold, but rather indicates that even under the current penny rate the record companies have been able to reduce prices.

Phonorecords I, 74 FR at 4516 (citations omitted).

COL-72. There is no evidence that the CORS would be disruptive to the streaming service industry. As discussed above, per-user or per-play rates, or combinations involving both types of rates, are [redacted]. Indeed, there is no

evidence in the record of interactive streaming content agreements that are based [redacted], and the vast majority of interactive streaming royalties paid by each of the Services (which is primarily made up of [redacted]) are currently paid based upon [redacted], not [redacted]. (COF-72; COF-98; COF-102A) The current statutory rates involve per-user rate prongs, and mechanical royalties are currently allocated on a per-play basis across the industry. A transparent per-unit structure that involves rate structure prongs that are already in use, and that couples royalties with the core economic values of the product, is not disruptive to the interactive streaming industry.

F. There is No Evidence Or Sound Economic Theory Behind The Services' Hypothetical "Disincentivization" Arguments That Per-Unit Royalties Might Somehow Limit Streaming Pricing Models, And These Arguments Are Contradicted By Market Evidence And Are Just Requests For Lower Royalties That Have Been Rejected In Rate Proceedings

COL-73. One of the great red herrings promoted by the Services in this proceeding is that a per-unit royalty rate structure – the structure preferred in rate proceedings, utilized throughout the music industry for a century, and present in nearly all other industries – would "disincentivize" Services from either pursuing certain types of consumers or from encouraging consumption, and thus should be avoided. (*See e.g.*, Spotify Opening Statement discussing alleged "inefficiencies [that] disincentivize Spotify to price efficiently" to capture users with low willingness to pay, at Tr. 46:15-23)

COL-74. The initial red flag that this argument has no merit is the reliance on the word "incentives" instead of *effects* when referring to rate structures *that already exist*. The current mechanical rates include per-unit rate prongs. Every single Service pays per-user [redacted]

[redacted], and per-play rates are [redacted] as well, as discussed above.

COL-75. Yet not a single witness was able to identify harmful incentives *that have actually materialized in market behavior*. Rather, the hearing saw a parade of witnesses making purely speculative comments about hypothetical disincentives *that should already have manifested if they had weight*, and then admitting that they actually had no analysis or evidence to show any actual effects.

COL-76. The Service expert perhaps most invested in disincentivization arguments, Dr. Marx, admitted at the hearing that she had no evidence that any of the theoretical disincentives she discussed from a per-play rate actually had any material effect, even though they have already been implemented in the noninteractive streaming space (as well as in the interactive space in a number of situations, as discussed above):

> Q. You -- you were discussing incentives that you -- you noted in connection with a per-play fee, but you have no evidence, correct, that -- that those theoretical incentives actually have a material effect on the pricing decisions of streaming services, correct?
>
> A. I don't think I have a natural experiment where I can point to those things, so I think that's correct.
>
> Q. Well, you also know, for example, that there are per-play rates in the non-interactive space and we do not see these things that you are talking about as being potentially terrible incentives, correct? Or at least you can't point to any of them, correct?
>
> A. I don't have something, a particular example to point you to.

(COF-42; Tr. 2024:11-2025:2 (Marx))

COL-77. Mr. McCarthy's testimony at the hearing concerning his written testimony about incentives perfectly captures how the Services argument on these theoretical points is

nothing but a pretext to petition for unfairly low royalties. Mr. McCarthy was pointed to a paragraph in his WDT that stated:

(McCarthy WDT at ¶ 71 (HX-1060))

COL-78. He was then asked:

(Tr. 2148:9-2152:1 (McCarthy))

COL-79.

COL-80. Dr. Watt made this point directly at the hearing:

[redacted]

(Tr. 3051:9-22 (Watt))

COL-81. Precisely the same type of argument as the Services have made in this proceeding was offered to and rejected by the Judges in *Phonorecords I*. In response to the "claim that a pure percentage rate allows more pricing flexibility" for the licensees, it was held that:

> RIAA's and DiMA's asserted claims of the relative advantage of their proposed revenue-based structures fail to adequately consider negative impacts on copyright owners. For example, RIAA's claim that a pure percentage rate allows more pricing flexibility than a penny rate appears exaggerated and unfairly ignores the disadvantages of the pure percentage rate for copyright owners. RIAA contends that ''With a fixed cents rate, record companies cannot lower their prices below a certain threshold without losing the margin needed to cover their very significant costs.'' Yet the record of evidence in this proceeding does not identify such a threshold, but rather indicates that even under the current penny rate the record companies have been able to reduce prices.
>
> Record companies may have other costs such as overhead that also could serve as the source for further potential price reductions. [T]his purported business flexibility 'advantage' raises serious questions of fairness precisely because the percentage of revenue metric may be a less than fully satisfactory proxy for measuring more usage or the actual intensity of the usage of the rights in question. It is not fair to fail to properly value the reproduction rights at issue in this proceeding. Such a result is at odds with the stated policy objective of the statute to afford the copyright owner a fair return for his creative work. 17 U.S.C. 801(b)(1).

Phonorecords I, 74 FR at 4516-17 (citations omitted).

COL-82. This holding is remarkably apt to this proceeding. [redacted]

[redacted].[4] The record in this proceeding also shows [redacted]. (HX-2749 at SPOTCRB0005701; Tr. 2128:10-2131:8 (McCarthy)) And in this proceeding, the Services' various "flexibility" arguments raise serious questions of fairness, as they decouple royalties from the access to and usage of musical works.

COL-83. Moreover, Mr. McCarthy's testimony [redacted]. Apple, Amazon, Google and the other Services hardly need subsidization of their discounting and marketing costs.

COL-84. In *SDARS I*, the Judges further noted the same concern as Dr. Watt that the licensees' proposed revenue-based rate did not obligate them to actually carry out any of the good deeds that they claimed would be available to them from lower royalties. There, the SDARS argued in favor of their proposed rate structure[5] stating that:

---

[4] In connection with their current discounted plans, the Services pay the record labels [redacted]. No Service witness explained why alleged disincentives from the CORS per-unit rates should be expected to cause effects when no such effects have manifested as a result of [redacted].

[5] Note that the rate structure proposed by the SDARS was referred to as a "per play" metric, but bears no similarity to how that word is now understood or to the per-play rate structures at issue in this proceeding. Indeed, the terminology used in *SDARS I* was quite misleading, as "[t]he SDARS 'per play' proposal makes no attempt to measure the number of listeners to any particular sound recording, but rather transforms the revenue-based metric into a 'per play' metric by applying that revenue rate to the transmission of a sound recording without regard to the number of listeners who tune in or listen to the transmission," and the SDARS' expert admitted that, "the [SDARS' proposed] per play rate is not even as good a proxy for usage as revenue without further annual adjustments for growth in subscribers." *SDARS I*, 73 FR at 4086.

> [The SDARS' proposed rate structure] would preserve their incentives to improve the quality of their service (by leaving them with more revenue to acquire more attractive nonmusic programming or to improve the quality of their radio devices)…

The Judges rejected this argument and held that the purported advantage of the proposed rate structure:

> is not an advantage equitably experienced by both parties. Rather, the advantage runs to the SDARS who stand to gain revenue while the copyright owner experiences a decline in the value of the performance rights at issue in this proceeding. Again, this is because number of plays can be reduced with a less than proportionate reduction in listenership. **Furthermore, there is no guarantee that the SDARS will spend any additional revenue so acquired to improve the quality of their services; thus "preserving an incentive" is not the equivalent of insuring action of the type suggested by [SDARS] based on that incentive.**

SDARS I, 73 FR at 4086 (emphasis added).

COL-85. Notably, Spotify's other financial witness, Mr. Vogel, also submitted testimony about incentives, but admitted he had no actual evidence to support his speculation:

[redacted]

(Tr. 5334:14-5335:18 (Vogel))

COL-86. Not content with only one unfounded economic theory of disincentivization, the Services also offer empty arguments that per-unit rates would lead them to discourage consumption from their own users. But Service expert Dr. Ghose explicitly disagreed with the testimony of Amazon's Mr. Mirchandani as to such hypothetical disincentivization, namely a purported "perverse incentive for Services to set limits on consumption," expressing his opinion that this position was "invalid," and explaining that:

> No known profit-maximizing corporation that I know of will want to reduce the quality of the service they provide or create an inferior quality product or service, especially in this case, they can very easily come out with pricing innovations.
>
> …
>
> So when you have a [per-unit] structure like this, you can come up with tiered pricing, you can come up with quantity discounts, you can come up with menu-based contracts, there is various pricing innovations that Services can do to leverage any potential limitation that they might face from this.

(Tr. 2865:25 – 2868:12 (Ghose))

COL-87. Beyond the lack of any empirical evidence behind the Services' claimed disincentives, there is also no theoretical basis for their economic efficiency and incentivization arguments. As Dr. Watt explained at the hearing:

> I see no evidence or no theory, to -- to be honest, about a hypothesized incentive to discourage consumption, simply because there's a positive input price, which is something that - that troubled me, I suppose, by -- by reading through Dr. Marx's report. Input -- positive input prices are universal pretty much, everywhere, in all sorts of markets and in all sorts of scenarios. And yet they don't lead to the output supplier attempting to -- to limit consumption or to turn -- to turn consumers away.

(Tr. 3038:22-3039:8 (Watt))

COL-88. Moreover, as Dr. Watt also explained, the Services' unpersuasive arguments about their own purported incentives omits the most obvious incentive from their proposed revenue-share rates – royalty avoidance:

> If interactive streaming services are faced with paying a fraction of their revenue as a royalty, then the clearest incentive of all is created – they will take actions that reduce the reported revenue that attaches to interactive streaming. In essence, this is not at all dissimilar to the very well-known effects that income taxation has upon the amount of reported income. Income tax leads to tax avoidance (strategic income reporting aimed at reducing the tax to be paid). In the case of a royalty based on revenue sharing, we should expect that it will lead directly to "royalty avoidance", that is, accounting and business practices that divert revenue away from the "taxed" business line and into non-taxed business lines.
>
> Notice that such behavior need not imply that the taxed business line is not profitable, or is not in actual fact earning significant revenue. It simply means that part of that revenue is diverted away from the report corresponding to that business line, and into others. …
>
> In conclusion, Dr. Marx's assertions around the incentive effects of per-unit royalty structures as opposed to share of revenue royalty structures are misleading. One cannot form an economically reliable argument in support of revenue sharing royalty models over per unit royalties based on the incentives created for interactive streaming services. In fact, an accurate argument would point to the less distortionary structure being a royalty per-unit of consumption rather than revenue sharing.

(Watt WRT at ¶ 19-21 (HX-3034)) Unlike the phantom disincentives posited by Service witnesses, there is real evidence in the record that the Services do engage in royalty avoidance under the current revenue-based rates by recognizing revenue attributable to interactive streaming offerings in other business lines. (COF-552, COF-330)

G. <u>The Copyright Owners' Rate Structure Is Reasonable For All Interactive Streaming Business Models</u>

1. <u>The Statutory Rate Structure Should Be Business Model Neutral</u>

COL-89. The Judges should not establish compulsory rates and terms that favor any music distribution business model over any other. The drastic changes in the market, even over

the past five years since the *Phonorecords II* proceeding, show that the compulsory license set by the Judges cannot possibly contemplate every single business model that may develop in the ensuing time; therefore, the license should be neutral as to what business models it may apply to. (*See* COF-127, COF-633, COF-634, COF-729, COF-730, COF-731, COF-732, COF-733, COF-735, COF-736, COF-737). As the Judges recently found:

> [T]he Judges do not find that a separate rate category for simulcasters is warranted. The NAB's arguments in favor of a separate rate category for simulcasters lack support in the record, or are otherwise unpersuasive. The bulk of relevant evidence in the record persuades the Judges that simulcasters and other commercial webcasters compete in the same submarket and therefore should be subject to the same rate. Granting simulcasters differential royalty treatment would distort competition in this submarket, promoting one business model at the expense of others.

Final Rule and Order, *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, Docket No. 14-CRB-0001-WR (2016-2020), 81 FR 26315, 26323 (May 2, 2016) ("*Web IV*").

COL-90. Indeed, to the extent that new business models develop during the 2018-2022 period, the Services will do as they have done in the past: negotiate licenses directly with the copyright owners as needed. As Pandora's President and CFO testified regarding the ongoing experimentation and development in interactive streaming business models:

> [redacted]
>
> [redacted]
>
> [redacted]

Tr. 887:2-14 (Herring).

2. Subpart C Locker Service Are No Longer Material Market Offerings, And Should Not Receive Special Rate Treatment

COL-91. Subpart C created two categories of interactive streaming rates for so-called "locker services." "Paid locker services" are a business model whereby a Service, in exchange for a subscription fee, will scan whatever digital music files are on the subscriber's hard drive (which may have been acquired lawfully or unlawfully) and then, provided such files have been licensed by the Service and exist on its servers, provide such subscriber streaming access from any device to copies of those files that are already on its servers.[6] 37 C.F.R. § 385.21 (definitions of "locker service" and "paid locker service"); *see also* 37 C.F.R. § 385.12 (definition of "subscription service"). "Purchased content locker service[s]" are a business model whereby a Service will provide to a consumer that has purchased from such Service a digital download or physical product (*e.g.*, a CD or a vinyl record) streaming access from any device to a digital copy of the sound recording(s) embodied in the download or physical product that the consumer has purchased. 37 C.F.R. § 385.21 (definitions of "locker service" and "purchased content locker service"). The regulations provide different rates for these two different business models. *See* 37 C.F.R. § 385.23.

COL-92. It should first be noted that these "locker services" are examples of why the regulations implementing the compulsory license should not attempt to address particular niche business lines of particular licensees. While the Services were very interested in locker services during the negotiations of the 2012 Subpart C settlement, these services decreased in popularity and significance, and have largely disappeared, as permanent downloading has

[6] If the consumer has files that do not match the Service's files, the Service will upload those files and provide such consumer access to his or her uploaded files.

become less prevalent and interactive streaming more prevalent (since the purpose of lockers is to give users mobile access to download libraries, which functionality is largely unnecessary to users with access to streaming services). (COF-127; Tr. 159:25-11 (Levine)) As Mr. Mirchandani admitted, locker services never scaled for Amazon or anyone. (Tr. 1458:5-1461:4 (Mirchandani)) In other words, "lockers" are essentially tied to an ownership model, and the evidence is clear that consumers are shifting away from purchasing downloads and CDs towards interactive streaming. (*See, e.g.,* COF-128; Mirchandani WDT ¶ 33 (HX-1) (customers are "migrating to streaming offerings in droves"))

COL-93. Presumably for these reasons, neither Spotify nor Pandora offers any type of locker service. Apple once had a paid locker service, but it no longer offers it to new customers. (COF-130; Tr. 2523-24 (Dorn)) Apple still offers a purchased content locker service. (*Id.*)[7]

COL-94. Google offers a locker service, which is a "scan and match" locker service similar to a paid locker service, but which it gives away for free to both subscribers and non-subscribers. (COF-124) However, because Google does not charge for the service, it does not technically meet the requirements of a "paid locker service" set forth in the regulations (as the regulations define paid locker service to mean "a locker service that is a subscription service," and define subscription service as a "digital music service for which end users are required to pay a fee to access the service for defined subscription periods . . . ."). (*See also* COF-124; Tr. 269:7-9 (Levine) (Google does not offer a paid locker service))

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[7] Like Apple's proposal for standard interactive streaming offerings, which could result in payments of zero mechanical royalties, Apple proposes a per-subscriber rate for the paid locker service (which it no longer offers) and a zero royalty for the purchased content locker service (which it offers). (COF-130; Apple Inc.'s Proposed Rates and Terms, at 10-13)

COL-95. Amazon also offers a free locker service that allows anyone to access tracks or albums purchased at Amazon's music store and up to 250 additional music files on their hard drive (and "acquired through alternative channels"). (COF-131) Because it is offered for free, Amazon's locker service also is not technically a paid locker service under the regulations. Amazon does offer a paid locker service that permits users to access up to 250,000 tracks (i.e., if on the user's hard drive and matched to Amazon's server copy) for a fee of $24.99 per year. (COF-131) This service appears to be the only locker service offered by any of the Services that would actually qualify as a paid locker service under the statute. But again, as Mr. Mirchandani admitted, this is not a service that Amazon actually considers meaningful. (Tr. 1458:5-1461:4 (Mirchandani))

COL-96. The Services have offered no principled reason why there should be different royalties for streams delivered via a "locker" business model and streams delivered via a "standard" interactive streaming business model, such as portable standalone subscription. At bottom, as a matter of technology or copyright law, there is no difference between a stream that is delivered to a user via a "locker" business model and a stream delivered to a user via any other interactive streaming business model (*e.g.*, portable standalone subscription). In all cases, a reproduction of the musical work is made on the server of the streaming Service, and another, separate reproduction is delivered to the end user via streaming technology. (COF-121) As is the case with "standard" interactive streaming services, the files that the Services stream to "locker" users are in virtually all cases not the users' individual files but rather the single "master

file" contained on the Services' server. *See id.*[8] They are also the same files that the Services use to stream to interactive streaming service subscribers. (*See* COF-122)

COL-97. Apple's Dr. Ghose testified that "a locker service gives users access to all of their music without the inconvenience of physically carrying a collection of CDs," and that "[i]t is for this ease of access that paid locker services may charge a subscription fee, a portion of which is paid (as royalty payments) to copyright owners." (COF-129; Ghose WDT ¶¶ 89-90 (HX-1617)) This access value is no different from the access value offered by portable standalone subscription services and advertiser-supported services, and so there is no reason why the different business models should bear different rates.

COL-98. The Services posit just two reasons why the rates for locker services should be different.[9] First, they argue that paid locker services "only allow consumers to listen to music they already own." (*See* COF-119; Dorn WRT ¶ 4.8 (HX-1612); Ramaprasad WRT ¶ 57 (HX-1616)) But the Services have no evidence of this. Rather, the evidence confirms that in most instances, it is not the copy owned by the consumer that is being streamed and in the rare instances where the copy being streamed is from the consumers locker, it is entirely possible that most of the music being scanned and matched and thereby accessed was illegally downloaded or ripped from CDs that were not purchased by the locker users. It also entirely possible that a user can rip a CD, upload it to the locker (or have the file scanned by the service so that the user

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[8] With Services offering 30 million plus recordings to interactive streaming users, recordings on users' hard drives that do not match master files on the Services' servers will be rare indeed.

[9] To be clear, with respect to the four Services who are seeking to essentially "roll over" the existing rates with certain modifications that benefit them, the existing locker service rates would not necessarily result in lower royalty payments than the existing rates for other "standard" interactive streaming service offerings.

obtains access to the service's master copy), and then sell the CD, which would also be an infringing act. (*See* Tr. 5745:21-5746:16 (Ghose))

COL-99. The second argument, which is offered by Apple, is that, for the purchased content locker, the rate should be zero because the service "is merely for the ability to re-download [a purchased] song to [a user's] device. Maybe their device was stolen. Maybe the device burned in a fire or was damaged in some way or they buy a new device." (COF-119; Tr. 2520:22-2521:2 (Dorn)) But it has never been true that when you purchase one copy of a musical work you are entitled to a lifetime supply of additional copies of those works whenever you lose one or one is destroyed (and Apple certainly doesn't give you a new iPhone or iPod for free if your "device burned in a fire"). And that argument says nothing about permitting mobile streaming access to that download from the cloud ***after*** the file has been "re-downloaded."

COL-100. As noted above, with the exception of the Amazon $24.99 per year paid locker service, the handful of locker services remaining in the market are being offered for free as promotional tools to entice users to purchase subscriptions or downloads or physical products. If the Services and Copyright Owners all get value from such promotions, they can certainly negotiate deals outside of the compulsory licensing construct for such promotional tools. Or, if only the Service gets value from the promotion, then the Service can incur the cost as it would any other advertising or marketing expense.

H. The Copyright Owners' Other Terms Are Reasonable And Proper For A Statutory License

1. The CORS Late Fee Term Is Standard And Necessary To Ensure Fair Royalty Payments

COL-101. Timely payment of mechanical license fees is a persistent problem. Although the current statute sets out a timeframe for payment of royalties, *see* 17 U.S.C.§ 115(c)(5); 37 C.F.R. §§ 210.12, 210.16, as several Copyright Owner witnesses testified, payments by

Services to writers and publishers are chronically late and, in some cases, are not made at all. (COF-132)

COL-102. These delayed payments create problems for songwriters – particularly those who financially depend upon what is already a declining mechanical income stream – as well as for publishers, as the delayed payments further increase the difficulty of forecasting mechanical income from both new and existing songs. (COF-13)

COL-103. The Services have never disputed that their mechanical royalty payments are chronically late. In fact, their own witnesses, documents, and interrogatory responses confirm the fact.

COL-104. [redacted] (COF-140, Appendix B to HX-3372) [redacted]. (COF-141)

COL-105. [redacted]

COL-106. [redacted]. (COF-142)

COL-107. The imperative of a late fee is underscored by the fact the Services intentionally exploit their ability to pay late for economic benefit. [redacted] (Tr. 2141:25-2142:24 (McCarthy [redacted]

COL-108. Because of the persistently late payment of mechanical royalties, the Judges in the 2008 *Phonorecords I* proceedings adopted the Copyright Owners' proposal that royalty payments that are not timely made are subject to a late fee of 1.5% per month (or the highest lawful rate), calculated from the date on which payment was due until the date it is received by the Copyright Owner.

COL-109. While the Copyright Owners contemplated that the late fee would apply to all licensees, the Judges placed the late fee provision in Subpart A of the regulations (at 37 C.F.R. § 385.4) after a litigated proceeding. Because the participants reached a settlement with respect to rates and terms that would come to be embodied in Subpart B of the regulations, the Subpart A provisions were derived separately. Just as the Copyright Owners contemplated that the late fee would apply to all licensees, not merely Subpart A licensees, they believe that it was

the Judges' intent to apply the late fee to all Section 115 licensees. The Services do not agree and have not paid any late fees.

COL-110. Regardless of the Judges' intent at the time of *Phonorecords I*, there is no reason why one group of licensees should be subject to a late fee provision while another group of licensees, who consistently make late payments (the Services), should not be subject to such a provision. As the Judges determined in *Phonorecords I*, a late fee is appropriate to "provid[e] an effective incentive to the licensee to make payments timely," and that a fee of 1.5% per month is not "so high that it is punitive" and achieves the correct balance. *Phonorecords I*, 74 FR at 4528 (quoting *SDARS I*, 73 FR at 4099). Those determinations are no less applicable to royalty payments by the Services in this proceeding.

COL-111. [redacted]. (COF-146) [redacted]. (*Id.*)

COL-112. [redacted]. This blame-the-victim argument will not withstand scrutiny.

First, the Copyright Owners' late fee proposal relates to the compulsory license, which is not a blanket license (as some services have entered into with certain music publishers). Rather, it is a license that is obtained via the statutory process, on an individual song basis. The licensee must serve a notice to obtain a compulsory license (or "NOI") on the copyright owner of the ***particular musical work*** that the licensee wants to use ***prior to*** distributing a phonorecord of that work. 17 U.S.C. § 115(b)(1), (2). Thus, under the statutory regime that has been in place for decades, the licensee needs to know the identity of the copyright owner ***prior to*** exploiting the work. *Id.* It cannot make a decision to illegally use music without a license

COL-114.

(COF-143)

(Id.)

Id.

[10] There is an exception to this rule that provides further protection to the Services. If a licensee has (and provides an affirmative statement confirming that it has) searched the registration or other public records of the Copyright Office with respect to a particular work, and has confirmed that those records do not identify a copyright owner of that work and an address at which notice can be served, the licensee may file an NOI with the Copyright Office. 37 C.F.R. § 201.18(f)(3); §201.18(d)(vi). Mr. Kokakis testified that certain Services have engaged in automated processes to search the Copyright Office records, and that such processes have resulted in the Services claiming to be unable to identify the owners of songs by even such writers as Billy Joel, Paul Simon or Jon Bon Jovi, whose ownership could plainly have been identified from those records with minimal (manual) effort. (COF-145; Kokakis Tr. 3286:19-3289:11)

[redacted] (COF-144) [redacted]. (*Id.*)

2. Other Proposed Definitions In The CORS Are Identical To Those Proposed By The Services And Are Not In Dispute

COL-115. Given the simplicity of the CORS, only a handful of defined terms are necessary. The Copyright Owners therefore propose to eliminate all of the definitions currently in 37 C.F.R. § 385.11 and §385.21, other than the definitions of "interactive stream," "licensee," "licensed activity," "limited download," and "streaming cached reproduction," as under their proposal, no other defined terms are referenced.[11] None of these definitions appears to be in dispute, as each of the Services proposes the exact same definitions. (*See* Apple Inc.'s Proposed Rates and Terms; Amazon Digital Services LLC's Proposed Rates and Terms; Google Inc.'s Proposed Terms; Proposed Rates and Terms of Pandora Media, Inc.; Proposed Rates and Terms of Spotify USA Inc.)

3. The Definition Of "Play" Is Important To Clarify An Ambiguity, And Follows Current Industry Practice

COL-116. The Copyright Owners propose to add a definition of "play." The Copyright Owners believe it is useful to include this definition to make clear that a royalty is payable for each play of a limited download, a fact that also is not in dispute, [redacted]

[11] Note that Copyright Owners have submitted an Amended Proposed Rates And Terms with minor amendments, including to definitions of terms such as "interactive stream" and "licensee" (as shown in the accompanying blacklined proposed regulations). These changes were made to clarify definitions or conform them to those in the current regulations and Service proposals, with the intention of reducing the terms in dispute and thereby streamlining the issues to be resolved in the Judges' determination.

[redacted]. (*See, e.g.,* COF-420; HX-2657 [redacted]; *see also* Apple Inc.'s Proposed Rates and Terms, at 2 (proposing that licensees shall pay a mechanical royalty for each stream or play of a limited download"))

4. <u>The Definition Of "End User" Is Necessary, Follows Current Industry Practice, And Has Been Amended To Clarify Any Uncertainty</u>

COL-117. The Copyright Owners also propose to add a definition of "end user." This definition is necessary to ensure that the CORS per-user rate – [redacted] – is properly calculated and paid. The Copyright Owners have made some modifications to the definition from their original proposal (as shown in the accompanying blacklined proposed regulations). These amendments are intended to clarify what the Copyright Owners had intended the meaning of "end user" to be rather than to change it, in order to reduce the disputed terms and streamline the issues for the Judges' determination. (*See* Tr. 1441:23-1448:7) These proposed terms are consistent with the definition of "active subscriber" contained in Section 385.13(a)(4) of the current regulations (which establish the minima for bundled subscription services).

5. <u>The Definitions Of Plays In A Statutory License Should Include Plays of Any Length</u>

COL-118. The Copyright Owners believe that the definition of "play" and "stream" in a statutory license should include plays or streams of any length. The current regulations contain no temporal limitation on what qualifies as a royalty-bearing stream or a play of a limited download, *see* 37 C.F.R. § 385.11 (current definitions of "interactive stream", "stream", and "limited download"). This is consistent with the definition applicable to streams under the compulsory license for noninteractive streaming. *See* 37 C.F.R. § 380.7 ("Performance means each instance in which any portion of a sound recording is publicly performed…)

COL-119. Yet, during the proceeding, counsel for one Service ([redacted]) advanced an argument, without legitimate evidentiary support, [redacted] For this reason, the Copyright Owners believe it is important to clarify that a stream or a play of a limited download is the transmission of <u>any portion of</u> a sound recording in the form of an interactive stream or limited download.[12] The Copyright Owners' proposed "any portion of" language is consistent with the definition cited above of "performance" in the implementing regulations for noninteractive streaming at 37 C.F.R. § 380.7.

COL-120. Under Apple's rate proposal, no royalty would be payable for interactive streams or limited download plays that are less than 30 seconds in length. Apple's Proposed Rates and Terms at 2. Apple is the only Service that proposes such a limitation.

COL-121. [redacted], (COF-72A), [redacted].

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[12] The Copyright Owners define "play" as "the digital transmission of *any portion of* a sound recording of a musical work in the form of an interactive stream or limited download, and (a) in the case of an interactive stream, each subsequent playback of any portion of a sound recording of a musical work from a streaming cache reproduction, or (b) in the case of a limited download, each subsequent playback of any portion of a sound recording of a musical work from the limited download in accordance with the restrictions contained in the definition of limited download." Similarly, the Copyright Owners propose to retain the definition of "stream" in 37 C.F.R. § 385.11, but, for clarity, to add the language "any portion of" after the phrase "digital transmission" and before "a sound recording." See accompanying blackline of proposed regulations.

COL-122. As noted above, under the current regulations, at the end of the "greater of" calculation called for under each product category, the resulting royalty pool is allocated to the musical works based on the number of plays. *See, e.g.,* 37 C.F.R. § 385.12(b); *see also* COF-100. No Service fact witness testified that statutory license royalties have not been calculated and paid based on *all* streams, regardless of length. Nor have any of the Services other than Apple included in their proposed rates and terms any modifications that would limit the streams or plays or limited downloads for which they are required to account to streams or plays of 30 seconds or greater.

COL-123. None of the Services have offered any admissible data breaking down plays on their Service of under 30 seconds. While Apple claims that the basis for the 30 second limitation is to avoid royalties being paid on "fraudulent plays" or on brief "skips," (Dorn WDT ¶¶ 87-88 (HX-1611)), they have offered no evidence or expert testimony regarding the frequency with which "fraudulent plays" occur (or whether they occur at all), or what constitutes a "skip."

COL-124. [redacted]. (Marx WRT ¶ 117; Tr. 5522:19-5523:4; 5525:9-11 (Marx)) [redacted] C.F.R. § 210.16(c)(2)(i); 210.16(f).

COL-125. Dr. Hubbard states that "the length of streams is not explicitly reported" to HFA, but "promotional streams, which are typically streams less than 30 seconds in length," are

excluded from the mechanical rate calculation. (COF-74) Dr. Hubbard incorrectly equates "promotional streams" with any stream [redacted] of less than 30 seconds. But a "promotional stream" has a precise definition in the regulations. Promotional streams are streams that are offered in the context of a free trial period for a Section 115 subscription streaming service, and that are authorized by a record company that owns the sound recordings that are the subject of the promotion. (*Id.*)[13] They are decidedly ***not*** full-length interactive streams offered through subscription or ad-supported services where the end user chooses to play only a portion of the song (even if the portion played is less than 30 seconds). It is simply false to assert that any stream of less than 30 seconds is a "promotional stream" and that any stream of 30 seconds or greater is a "non-promotional streams." (Hubbard WRT ¶ 6.10 (HX-132)) Dr. Hubbard's mistaken invocation of an entirely inapplicable (and carefully circumscribed) statutory provision regarding promotions authorized by record labels that are subject to a zero rate as applicable to streams of less than 30 seconds is simply wrong.[14] (*See* COF-75; Tr. 5994:3-5995:13 (Hubbard))

6. <u>The Copyright Owners' Proposed Definition of "Copyright Owners" Simply Conforms Subparts A and B</u>

COL-126. The Copyright Owners propose, for clarity, to add a definition of "copyright owners," which they have simply imported from 37 C.F.R. § 385.2. "Copyright owners" is a term used in Subpart B, and it should have the same meaning as in Subpart A.

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[13] There are several other requirements, including that the primary purpose of the promotional use is to promote the sale or other paid use of sound recordings through established retail channels. *Id.* § 385.14(a)(1)(i). The service also must maintain records of the promotional activity. 37 C.F.R. § 385.14(a)(1)(iii)(A).

[14] Dr. Hubbard's calculation of effective per-play royalties contained in Table 4 of his WDT is also flawed because it is entirely based on a hearsay statement from a blog (that was not even admitted into the record as evidence for its truth) that 35% of Spotify streams were "skipped" before 30 second had lapsed. *Id.* & n.151.

Given that the Services have argued that because the late fee provision is included in Subpart A but not Subpart B it does not apply to them, for clarity, the Copyright Owners request that the definition of Copyright Owners be included in both Subparts to avoid ambiguity.

7. The Copyright Owners' Proposed Definition of "Accounting Period" Is Purely Clarifying And Is Consistent With The Applicable Accounting Regulations

COL-127. The Copyright Owners have added to their original proposed rates and terms a definition of "accounting period" with reference to the monthly statutory accounting provisions embodied in the controlling statute for purposes of this Proceeding. *See* 17 U.S.C. § 115(c)(5). This term is used in the current regulations but not specifically defined. The Copyright Owners have included this definition to provide certainty to licensees of their obligations under the compulsory license, especially in light of the modifications the Copyright Owners have proposed to the existing rates and terms. The proposed definition is consistent with the applicable accounting regulations embodied at 37 C.F.R. § 210 enacted pursuant to the statutory authority at 17 U.S.C. § 115.

8. The Copyright Owners' Remaining Terms Are Reasonable And Are Not In Dispute

COL-128. The Copyright Owners propose to retain without change 37 C.F.R. § 385.10 (the "General" section which addresses the "scope" of the subpart, and the issues of "legal compliance" and "interpretation"), §385.16 ("Reproduction and distribution rights covered")m and 385.17 ("Effect of rates"). Each of the Services is requesting that these same terms be adopted, and so they are not in dispute.[15] *See* Apple Inc.'s Proposed Rates and Terms;

[15] Google, Spotify and Pandora have proposed additional language to Section 385.10 relating to the relationship to voluntary agreements, but these services have not altered any of the existing language in this section.

Amazon Digital Services LLC's Proposed Rates and Terms; Google Inc.'s Proposed Terms; Proposed Rates and Terms of Pandora Media, Inc.; Proposed Rates and Terms of Spotify USA Inc.

III. THE COPYRIGHT OWNERS' PROPOSED PER-PLAY AND PER-USER RATES (THE "COR") ARE REASONABLE AND ARE THE APPROPRIATE RATES FOR A COMPULSORY LICENSE FOR INTERACTIVE STREAMING

A. Economic Benchmarking Based On Marketplace Agreements Supports the COR

1. Economic Benchmarking Must Be Based On Market Agreements

COL-129. "A benchmark is a marketplace point of reference…" *CARP PSS 1998*, 63 FR at 25404. Although one would expect this bedrock principle of economic benchmarking to be a given, it is instead one of the most contested points in this proceeding. In a series of sky-is-green arguments, the Services push the Judges to abandon the principles of benchmarking and pursue decidedly non-marketplace benchmarks in place of marketplace benchmarks. The authority is not in the Services' favor. The CRB could not have been much clearer in *SDARS II*, in a Section entitled "The Prevailing Statutory Rate," holding that a settlement between participants that results in a statutory rate "is a rate that was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate." *SDARS II*, 78 FR at 23084 (emphasis added).

COL-130. The marketplace in economic benchmarking is the unregulated free market. The whole point of economic benchmarking is to use the information that an *unregulated* market provides in order to inform a *regulated* market. As discussed at length in *Web IV*, the value of market benchmarks lies in the economic understanding that they can be

presumed to bake in important information about fair and relative market values precisely because they are made in the free market:

> An important aspect of the benchmarking approach is that it credits sophisticated business entities that have carefully negotiated their agreements with an understanding of market forces. That is, there is a presumption that marketplace benchmarks demonstrate how parties to the underlying agreements commit real funds and resources, which serve as strong indicators of their understanding of the market.

Web IV, 81 FR at 26326-7.

COL-131. This understanding of the market is not found in statutory rates or agreements made in the shadow thereof. As was discussed during the proceeding, statutory proceedings (and negotiations thereunder) are a game of trying to predict what rate-setting bodies will do, and cannot be said to reflect the market. (*See Tr.* 4591:15-17 (Eisenach)) Dr. Marx admitted that to determine fair market rates, one would look to "market-determined" or "competitive" benchmarks, not benchmarks under the influence of rate-setting bodies. (Tr. 1919:9-1921:9 (Marx); Eisenach WRT ¶ 29, n.30 (HX-3033)[16]

COL-132. On the question of fairness, Dr. Marx testified as follows:

> Q. And a benchmark analysis that was assessing fair outcomes, would generally have, from an economic perspective, some component to it of an analysis of fair market outcomes, correct?
>
> A. As I mentioned before, economics doesn't have a unique definition of fair, so it is going to depend on what you mean by "fair."

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[16] Dr. Marx further admitted that her benchmark analysis was aimed only at the Fourth Factor, and that <u>an analysis of proper benchmarks to serve the other three Factors might lead her to entirely different benchmarks, but she did not analyze that question!</u> (Tr. 1916:5-1917:2 (Marx)) This disconnect highlights how unsuitable it is to use non-marketplace benchmarks. How does it inform the proceeding to pick a benchmark that (allegedly) serves only one Factor, while ignoring the question of whether the other Factors would be served by an entirely different benchmark (and thus perhaps an entirely different rate)? This is simply cherry-picking. As discussed below, prior rate determinations make clear that *marketplace benchmarks serve all of the Policy Factors*, which is why they are the only appropriate benchmarks to consult.

> JUDGE STRICKLER: A question for you. And this is a question I will confess that always bothers me. If you've got fair market value because counsel asked the question about fair market value, does fair, in your mind, as an economist, is that an adjective that describes "market value" or does fair describe the type of market that creates the value?
>
> THE WITNESS: When I hear the word "fair market value," I as an economist, I think of the three words fair market value as all together, the three of them together, fair market value, as having a particular meaning. And that's thinking of, in valuation exercises, thinking about having a willing buyer and a willing seller in a hypothetical market where there is good information and no compulsion to trade. There is a whole structure behind this notion of fair market value.

(Tr. 1918:1-1919:1 (Marx))

COL-133. Yet, ignoring her own understanding that fair market value excludes a "compulsion to trade," Dr. Marx then adopted *only* benchmarks that involved a compulsion to trade, and explicitly rejected all the market benchmarks where there was no compulsion to trade. Her conclusory claim that this is a feature, not a bug, masks that she offers no economic rationale for her assumptions. (Tr. 1844:14-19 (Marx) ("Q. Was it a concern to you in using those two benchmarks or three benchmarks that they were set in the so-called shadow of the compulsory license? A. No, it wasn't a concern. I thought of it as an advantage.")) Dr. Marx testified that:

> Q. And as part of your analysis, you concluded that you wouldn't have a reason to believe market outcomes would likely reflect the 801(b) factors?
>
> A. I agree.
>
> Q. Which led you to reject in general benchmarks that were negotiated agreements, correct?
>
> A. I didn't think those were the best benchmarks.

(Tr. 1912:10-18 (Marx))

COL-134. For purposes of this hearing, Dr. Marx thus inexplicably concludes that "fair market value" should be divorced from the analysis of "fair returns" and "fair income," and further concludes without any explained reason (and incorrectly, as discussed below) that

marketplace agreements would not reflect the Policy Factors. Dr. Marx's conclusion that an economic understanding of reasonableness and fair value should be divorced from fair *market* value is not consistent with a sound economic approach. *See, e.g.*, Strickler, D., *Royalty Rate Setting for Sound Recordings by the United States Copyright Royalty Board: The Judicial Need for Independent Scholarly Economic Analysis*, 2015 Review of Economic Research on Copyright Issues 12(1/2), at 5 ("[T]he law utilizes a number of different phrases to describe a price, rate or value established in a market. These phrases include, in addition to the 'willing buyer/willing seller' phrase: 'fair market value,' 'fair value,' and 'reasonable rates.'").

COL-135. Then-Circuit Court Judge Ruth Bader Ginsburg reinforced this principle in writing the decision on appeal of a Copyright Royalty Tribunal decision based upon a reasonableness standard, holding that courts have consistently upheld "employing a market value approach to 'reasonable' rate setting." *Nat'l Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 185 (D.C. Cir. 1983) (citation omitted).

2. The Path To Determine Rates Begins With Marketplace Benchmarking, And Then Looks At The Policy Factors To See If Any Adjustment Is Necessary

COL-136. The importance of starting a determination of statutory rates with marketplace benchmarks runs through proceedings that apply the Factors. The Judges found in *SDARS I* that:

> [T]he path for the Copyright Royalty Judges is well laid out. We shall adopt reasonable royalty rates that satisfy all of the objectives set forth in Section 801(b)(1)(A)-(D). In so doing, **we begin with a consideration and analysis of the benchmarks and testimony submitted by the parties, and then measure the rate or rates yielded by that process against the statutory objectives to reach our decision.**

SDARS I, 73 FR at 4084 (emphasis added).

COL-137. The Judges further clarified that:

> We reject the notion, however, that Section 801(b)(1) is a beauty pageant where each factor is a stage of competition to be evaluated individually to determine the stage winner and the results aggregated to determine an overall winner. Neither the Copyright Royalty Tribunal nor the Librarian of Congress adopted such an approach. See 46 FR 884 (January 5, 1981) (jukebox proceeding); 46 FR 10466 (February 3, 1981) (mechanical license proceeding); 63 FR 25394 (May 8, 1998) (PSS proceeding). Rather, **the issue at hand is whether these policy objectives weigh in favor of divergence from the results indicated by the benchmark marketplace evidence**. Therefore, we next evaluate the other evidence in the record offered with respect to the four policy considerations to determine if that evidence shows that the weight of marketplace evidence we have previously reviewed requires any adjustment.

Id. at 4094 (emphasis added).

COL-138. Specific application of these principles by the CRB to an evaluation of the Factors is further instructive. With respect to the First Factor, the Judges have held:

> a. Maximizing the Availability of Creative Works to the Public
>
> While the SDARS and SoundExchange offer various arguments to suggest that they are each respectively the largest contributor toward the achievement of this policy objective, those arguments miss the mark. **The ultimate question is whether it is necessary to adjust the result indicated by marketplace evidence in order to achieve this policy objective**. We agree with Dr. Ordover that "voluntary transactions between buyers and sellers as mediated by the market are the most effective way to implement efficient allocations of societal resources." [citation omitted] An effective market assures absence of both below-market prices and supra-competitive prices, so that suppliers will not reduce output and innovation in response to the former and consumers will not experience a reduction in consumer welfare in response to the latter. In other words, an effective market determines the maximum amount of product availability consistent with the efficient use of resources.

Id. (emphasis added).

COL-139. Interestingly, the Judges' conclusion here goes beyond the First Factor to call for the maximization of musical works availability[17] to be made "consistent with the

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[17] The "product availability" here is *musical works available for licensing* – the First Factor is *not* addressed to maximizing the number of *licensees* of musical works or maximizing *distribution* of already-licensed musical works or maximizing end user consumption. [*see supra, First factor section*]

efficient use of resources." This last gloss is not a part of any of the Factors. Rather, it comes from marketplace benchmarking. As the quote above explains, voluntary transactions – *i.e.*, marketplace benchmarks – lead to efficient allocation of resources. The Judges thus underscored here that the Factors do not *substitute* for marketplace benchmarks, but should be interpreted *alongside* marketplace benchmarks. Taken alone, as discussed above, the First Factor counsels simply for the highest rates for the Copyright Owners, as higher royalties stimulate the creative process. However, the First Factor is not the only principle that guides the Judges here.

COL-140. Indeed, even together, the four Factors are not the only principles that guide this process, and the different principles must be balanced. As the D.C. Circuit explained:

> [T]he statutory factors pull in opposing directions, and reconciliation of these objectives is committed to the Tribunal as part of its mandate to determine "reasonable" royalty rates. Both the House and Senate had originally passed bills whose only instruction to the Tribunal was to assure that the royalty rate was reasonable, . . . although the House report had stated objectives that it "anticipated that the Commission will consider." . . . As part of the compromise that produced the final structure of the Tribunal, most of those objectives were written into the statute… but the Tribunal was not told which factors should receive higher priorities. To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a "zone of reasonableness."

Phonorecords 1981 Appeal, 662 F.2d at 9 (citations omitted).

COL-141. Thus, towards the ultimate goal of determining "reasonable" mechanical royalty rates, the "path" for the Judges is to begin with <u>marketplace</u> benchmarks and then consider the four factors – which "pull in opposing directions" and as to which there is no guidance as to "which factors should receive higher priorities." In the end, "the term reasonable in the statute is of dominating importance in reaching a final determination" in mechanical license rate proceedings (*1981 Phonorecords*, 46 FR at 10479) – and a "reasonable rate" is one

of the phrases in the law that is typically used to describe a price, rate or value established in a market.

3. Precedent Holds That Marketplace Benchmarks Inform All Four Policy Factors And Alone Can Provide The Basis For Rates That Adequately Serve The Factors

COL-142. Precedent makes clear that marketplace benchmarks are more than just a starting point. Rather, marketplace benchmarks do most, if not *all*, of the heavy lifting in determining reasonable rates. This is because properly evaluated and adjusted marketplace benchmarks should themselves "serve adequately" each of the four Factors.

a. The First Factor

COL-143. As noted above, in *SDARS I*, the CRB expressly considered that marketplace benchmarks should be consistent with the First Factor, viewed in context,[18] noting that the marketplace operates to determine "the maximum amount of product availability consistent with the efficient use of resources," and so concluded that the First Factor's policy goal was already reflected in the market-based benchmark rates the Board had identified. *See SDARS I*, 73 FR at 4095.

b. The Second Factor

COL-144. Many of the key elements of the Factors themselves are captured in appropriate fair market rates. The Second Factors essentially instructs the CRB to determine a fair value for the copyright – namely, one that affords the copyright owner a fair return and the

[18] Again, the words "viewed in context" are critical here. Taken alone, the First Factor just calls for higher royalties. But the Judges must balance that Factor against the other Factors and against the mandate to set a reasonable rate. Thus the Judges conclusion here is that marketplace benchmarks "adequately serve" the goal of maximizing musical works availability, as balanced against general reasonableness and adequately serving other Factors.

copyright user the opportunity to earn a fair income. As noted above, these plan language terms are themselves consistent with market rates as the law has traditionally interpreted them. *See, e.g., Strickler, Royalty Rate Setting for Sound Recordings by the United States Copyright Royalty Board: The Judicial Need for Independent Scholarly Economic Analysis*, at 4. Thus, in the context of the Second Factor, arriving at fair value is an exercise in quantifying fair market value. The Supreme Court has defined "fair market value" as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." *United States v. Cartwright*, 411 U.S. 546, 551 (1973) (citation omitted). As noted above, Dr. Marx agrees precisely with this definition. Marketplace transactions by their nature inform the CRB's determination of fair value and serve the Second Factor.

c. <u>The Third Factor</u>

COL-145. The Third Factor calls for consideration of "the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication." 17 U.S.C. §801(b)(1)(c). Notably, a very similar provision exists in Section 114(f)(2)(B), which calls upon the Judges to consider two factors, the second of which is "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk." 17 U.S.C. §114(2)(B)(ii).

COL-146. In assessing this factor, the Panel in Web I noted that it is baked into marketplace agreements:

> the Panel found that both copyright owners and licensees made significant creative, technological and financial contributions. It concluded, however, that it was not necessary to gauge with specificity the value of these contributions in the case where actual agreements voluntarily negotiated in the marketplace existed, since such considerations… would already have been factored into the agreed upon price.

Web I, 67 FR at 45243-44. [19]

COL-147. The same logical economic conclusion applies with respect to the Third Factor, which is "adequately served" by marketplace agreements. It bears emphasis that enumeration of four policy objectives in the statute is in no way a statement by Congress that these policy objectives are not adequately served by marketplace benchmarks. The Factors provide the Judges with flexibility and latitude to set a reasonable rate – but there is nothing in the precedent or in economic logic that calls for the Judges to utilize their judicial discretion to depart from the considerable economic wisdom baked into marketplace rates, and certainly not without good reason and good evidence *necessitating* such a departure. *See SDARS I*, 73 FR at 4094 ("ultimate question is whether it is **necessary** to adjust the result indicated by marketplace evidence in order to achieve this policy objective") (emphasis added). Indeed, a fair market rate cannot seriously be questioned as a "reasonable rate," the ultimate standard for this proceeding. *Phonorecords 1981 Appeal*, 662 F.2d, at 9. In contrast, departing from fair market rates in

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[19] Interestingly, this precise quote from Web I was cited by a Service in this proceeding – Pandora – in its proposed conclusions of law in Web IV, wherein it argued that "the Librarian again concluded that no separate analysis [of this factor] was required" and that, "[a]ccording to the Librarian, the Panel was correct in finding that the rates and terms contained in proffered benchmarks already reflected the business judgments of licensors and licensees regarding the two factors enumerated in Sections 112(e)(4) and114(f)(2)(B)." Pandora FF/CL, Web IV, page 29. Pandora also noted that the same holding was echoed in Web II, which concluded that, "[b]ecause we adopt a benchmark approach to determining the rates, we agree with Webcaster I that such considerations 'would have already been factored into the negotiated price' in the benchmark agreements." *Web II*, 72 FR at 24092, 24095 (quoting *Web I*, 67 FR at 45244). (*Id.*)

setting a fair and reasonable rate should call for specific explanation and persuasive supporting evidence.

d. The Fourth Factor

COL-148. As the Judges held in Web IV:

> Benchmarks based on marketplace agreements, by their very nature, reflect the parties' need for rates that allow them to project a sufficient ROI and enable them to implement their respective business models."

Web IV, 81 FR at 26329. These baked-in ingredients, including a rate that enables licensees "to implement their respective business models," satisfies a standard far beyond what the Fourth Factor considers. The Fourth Factor merely seeks to minimize industry disruption – which has been held to be limited to "an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the industry participants to adequately adapt to the changed circumstances and, as a consequence, such adverse impacts threaten the viability of the music delivery currently offered under the license in question" *Phonorecords I*, 74 FR at 4516 (citing *SDARS I*, 73 FR at 4097). A rate that affirmatively enables industry participants "to implement their respective business models" cannot plausibly be said to threaten the viability of the industry, and the Judges have explained that benchmarks based on marketplace agreements lead to such rates.[20]

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[20] Marketplace benchmarks are also the only benchmarks that can be relied upon to bake in "adequate compensation" for licensors. In *Web IV*, the Judges rejected the need for a percentage-of-revenue prong to provide protection against per-play rates that were too low precisely because the per-play rates were measured against marketplace benchmarks. ("The Judges have taken great care to discount any proposed rate that they believe would be too low to compensate adequately the licensors for the rights under the licenses. As discussed below, the per-play rates that the Judges adopt for commercial webcasters are consistent with rates negotiated in marketplace agreements.") *Web IV*, 81 FR at 26326.

COL-149. The value of marketplace benchmarks is especially apparent in the present proceeding, where the Services cry loudly about disruption fears, but present nowhere near the financial evidence necessary to determine if any disruption would occur. The lack of evidence supporting the Service complaints here is even worse than in *Web IV*, where the Judges concluded: "[E]ven if the Judges were to attempt to ascertain…whether a particular business model could be sustained, the present record would preclude such an analysis. The Judges would require much more detailed financial and economic data regarding the parties' costs and revenues before attempting to make such determinations." *Web IV*, 81 FR at 26329.

COL-150. The Services here have provided no business analysis concerning disruption, but instead have merely sought to spin the COR in the most extreme light and then read aloud selected projected percentage increases in mechanical royalties for certain service plans (discussed in detail below in) – as if some particular percentage increase for particular plans would in and of itself be "disruptive" under the law. The percentage increases (especially where inflated by inclusion of Spotify's Ad Tier and other loss leader services) do not equate to disruption, and there is nothing in the statute or regulations, or in common sense economic analysis, that says that a particular percentage increase would or would not be disruptive. Rather, one would have to look at historical practices, along with the totality of costs and revenues of the services, as well as options to adjust such costs and revenues and business models, to determine whether disruption is likely to occur. And not a single service has presented a single analysis that sheds light on this question. (COF-109; COF-111)

COL-151. Although the Copyright Owners requested documents seeking all business analysis or forecasts of the effects of changes in mechanical royalties on pricing or the viability of the services, not one Service produced such a business analysis, as evidenced by the fact that

there are none in the record. Indeed, there is no evidence in the record of any business analysis by any Service of when their business might *actually* be disrupted by a change in mechanical royalty rates.

COL-152. There is an obvious answer why there are no such analyses. Because these Services know full well that the mechanical royalty rate, the least of their content cost inputs, is not going to determine the fate of their operations. Even under the COR, mechanical royalties will remain a small fraction of label royalties and voluntary discounts. (COF-231) The voluntary discounts that the Services improperly seek to include in the compulsory license terms, including 15% of revenue for app fees, family plan and student plan discounts, and Amazon's 16 2/3% annual plan discount, themselves dwarf the totality of the mechanical royalty rates sought.

COL-153. The Services are consumed with fighting for market share, playing a high-stakes game for the right to serve a music access business model to the public. (COF-377; COF-210; COF-394; COF-395) The Services that survive will win the right to collect and mine data on users' most personal choices – what music they listen to and where and when they do so, and who they share it with. (COF-391; COF-392) Not only does this data have enormous value in and of itself, but the winners in the competitive fight will have the natural increasing profits that come with great scale. The tech sector is built around building stores of user data to leverage for sales and advertisements of all manner of products and services. The music space is one of the most coveted areas, and the failure to forecast or even analyze any business fallout from mechanical royalty rates shows that the Services – including three of the largest companies in the world – will not be sidetracked by the relatively small royalty rates, rates that are only a fraction of [redacted]. (COF-42; COF-108-COF-117)

COL-154. The Services pay [redacted]. (COF-231) They also give discounts to the public that are vastly more than they pay in mechanical royalties. (COF-377) Increases in royalties over what some, but not all, Services currently pay are significant more for showing how little *some* of the Services are currently paying under a rate structure that is decoupled from usage and which the Services have used to gerrymander revenue away from royalty calculations through revenue deferment and displacement strategies (as discussed in detail below).

COL-155. Moreover, there is an enormous disparity between what different services currently pay on a per-unit basis. As discussed in Section II.C above, CRB precedent explains that per-unit royalties are most appropriate for statutory rates, as they couple royalties with usage, a naturally fair and transparent rate structure that minimizes transaction costs and can deliver a fair return when fixed at the appropriate rate. The byzantine current rates and terms, typical of a settlement where multiple parties sought to address theoretical future business models, most of which never come to pass, opened the door to, but failed to really anticipate and therefore balance the interests of songwriters and publishers with, the types of business plans that would be developed by new market entrants such as Spotify and Amazon.

COL-156. As a result, the existing rate structure has enabled Services to pay absurdly low royalties while stockpiling value in deferred or displaced revenues. Normalizing the rate structure to be consistent with CRB precedent and the Factors will necessarily bring into line Services that have heretofore gamed the royalty system and successfully underpaid mechanical royalties (even by comparison to their own competitors under the same statutory rate), even if that means they will pay a multiple of what they currently pay. Using the emphatic style of the Services, a nickel is ***400 percent more*** than a penny. But it is still just a nickel. Change *itself* is

not disruption, and focusing on percentage change without proving the impact of the COR as a rate does not prove a case of disruption.[21]

COL-157. The Services have failed to show that they cannot or would not be able to pay the COR (with or without minor adjustments to their pricing or plans or other costs), and their focus on the fact that they have gotten away with paying much less under the currently-broken rate structure is not a substitute for showing the evidence of actual industry disruption that would make interactive streaming industry no longer viable that is required to adjust downward the COR, which is already well below marketplace benchmark rates. *See Final Rule, 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecords*, Docket No. CRT 80-1, 46 FR 884-01, 889 (Jan. 5, 1981) ("*1980 Jukeboxes*"); *Phonorecords 1*, 74 FR at 4510, 4516, 4525 (citing *SDARS I*, 73 FR at 4097))

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[21] It is ironic that these tech-sector Services (including three of the five most valuable companies in the world), who fetishize little nomenclature as highly as being considered "disruptive," now portray themselves as the victims (in the safety of a proceeding subject to strict confidentiality restrictions), not the usual protagonists, of disruption. But the Services cannot even use the term "disruption" consistently, instead applying it haphazardly and inconsistently (perhaps a result of so many years of striving to apply the term to themselves at every opportunity, no matter how tenuous). The Services claim their voluntary $5/month discounts are *not* disruptive, and yet claim that a cost of [redacted] – a *tenth* of their voluntary discounts – *is* disruptive? The Services apply *30 percent price increases* ($3/month) at the drop of a hat to accommodate new costs (Marx WDT at n.99) and claim this is *not* disruptive – and yet argue here that a [redacted] – to cover a new cost would be *impossible* and *disruptive*? Amazon undercuts what was the so-called "uniform" industry user price by [redacted] for its new Unlimited Service and the Services claim that this is *not* disruptive, yet the Services argue that their uniform user price must remain unchanged (forever?) or else there will be *disruption*. There is simply no credibility to their empty cries of potential disruption – to go along with the absence of any *evidence* of such potential disruption from the COR.

B. The Eisenach Benchmark Analysis Shows The Reasonableness of the COR

1. The Core Benchmark, Interactive Streaming Marketplace Agreements For SR Rights, Is A Highly Apt and Comparable Benchmark From A Perfectly Complementary Good

COL-158. Dr. Eisenach engages in a robust and empirical economic benchmarking analysis that is consistent with CRB precedent and economic principles. Working from the premise, laid out above, that marketplace benchmarks are the appropriate starting points, Dr. Eisenach identifies an excellent marketplace benchmark: sound recording licenses for the very same Services at issue here. Sound recording licenses for interactive streaming are of course not subject to compulsory licenses and, as such, provide an ideal set of data points from which to estimate the reasonableness of mechanical royalties.

COL-159. Moreover, multiple CRB proceedings have looked at the sound recording ("SR")/musical work ("MW") relationship and at least two have found the relationship comparable enough for one to be a benchmark for another. The use of SR/MW comparability has been limited in past proceedings, however, because there was no *bona fide* analysis of comparability offered by past participants, including no proper adjustment analysis to account for the differences between the two goods. Here, Dr. Eisenach does a robust and thorough adjustment analysis (his "relative value benchmarking," discussed below and at COF-239; COF-240; COF-241; COF-242; COF-249), and his results as to adjustments between SR and MWs are further confirmed by the Shapley Analyses of three experts, including Spotify's economic expert, and also in additional conclusions from Service experts.

a. Past Proceedings Have Referenced The Relationship Of SR and MW Royalties In Third-Party Agreements (As Opposed to Deals Between SR and MW Owners) As Relevant For Benchmarking

COL-160. The first use of the SR/MW relationship for benchmarking was in the *CARP PSS 1998* rate proceedings, which found, in setting rates for sound recording performance rights, that "the negotiated license fees for the performance of music embodied in the sound recordings offers specific information on what the Services actually pay for the already-established performance right of one component of the sound recording. The Panel recognized this reference point's usefulness and used it to further support its choice of a royalty rate." *CARP PSS 1998*, 63 FR at 25404 (citation omitted). In particular, the Panel determined that the MW performance right determined the upper limit of the zone of reasonableness for the SR performance right.[22] However, the Panel found that the participants did not put useful evidence into the record to allow a determination of relative valuations of SRs and MWs. Thus, the Panel specifically found that the musical works royalty was not "determinative of the marketplace value of the performance right in sound recordings," but merely formed a bound of the zone of reasonableness. *Id.* The particular problem the Panel faced in *CARP PSS 1998* that led to this holding was the lack of informative evidence put forward by the participants. Both sides seemed to provide only cursory analyses of mechanical royalties. The Panel found that the labels put forward unpersuasive evidence based on an inapposite analysis of revenues from record sales, while the services made "no attempt to tie the value of the rights" at issue together.

[22] "The Panel determined that the record companies and performers were not entitled to more royalties for their public performance right than those received by the copyright owners in the underlying musical works for the public performance of their works." *Id.* at 25398.

COL-161. The services tried to ride the holding of the *CARP PSS 1998* determination for the next several years, repeatedly over perfunctory arguments (apparently with no analysis or evidence) that the SR performance royalty should be set to be no more than the MW performance royalty. This occurred in *Web I*, *Web II* and *SDARS I*. These service arguments were generally rejected by the rate-setting tribunals.

COL-162. The primary reason that the services' arguments were rejected was the repeated failure to undertake a real analysis providing foundation to support their "theoretical model," and the failure to reconcile marketplace data of unequal royalties with the idea that SR and MW royalties should simply be identical.[23] *Web I* is particularly instructive on this point, as the Librarian provided a lengthy discussion explaining the finding in the *CARP PSS 1998* that the services failed to put in evidence, and characterizing that determination as "an invitation to the parties to provide whatever evidence they could adduce in this proceeding to establish the value of the sound recording." *Web I*, 67 FR at 45247. Instead, the Panel determined that the participants in Web I did not provided useful evidence, and the Panel utilized other benchmarks. *Id.*

COL-163. *Web II* noted that the services' arguments regarding using MWs as benchmarks for SRs "appears to be little more than a hasty attempt to revive and rehabilitate some similar arguments that failed to prevail in Webcaster I." 72 FR at 24094. Remarkably, the services in *SDARS I* seem to have cut-and-pasted the same failed arguments again, and the Judges remarked that the service SR/MW benchmark analysis, "tracks some similar arguments that failed to prevail in Webcaster II." 73 FR at 4089. Notably, however, the Judges <u>nonetheless</u>

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[23] The determination in Web I also noted that the decision was made to rely on marketplace agreements as benchmarks, rather than the regulated musical works royalties. (*Web I*, 67 FR at 45246, 45263)

recognized the relationship between SR and MW royalties and adopted the MW rate as a benchmark, holding that it formed the lower boundary of the zone of reasonableness. *Id.* at 4090.[24]

COL-164. These prior determinations thus establish that there is a relationship between SR and MW royalties that is conducive to benchmarking from one to the other. It was the failure of any prior participant to actually examine marketplace data and submit a benchmarking adjustment analysis that limited the tribunals to using the SR/MW relationship as a boundary. Dr. Eisenach provides a true benchmarking analysis for the SR/MW relationship, evaluating and adjusting using empirical marketplace evidence.

2. Dr. Eisenach Presents A Robust Analysis For Adjusting The Core SR Benchmark To the Hypothetical MW Market By Surveying Third-Party Agreements That Inform The Relative Value Of SRs and MWs

COL-165. The Copyright Owners agree that the relative valuation of SRs and MWs must be evaluated in light of marketplace evidence, and this is precisely what Dr. Eisenach has done in detail. In addition, fair relative royalties for SRs and MWs have been evaluated using Shapley Analyses by experts for both the Copyright Owners and the Services, and the results are remarkably consistent with Dr. Eisenach's marketplace analysis results. Moreover, the results of Dr. Eisenach's analysis, and the multiple Shapley Analyses, are consistent with the marketplace evidence and show the COR to be reasonable and in fact at the low end of the range of projected fair royalty rates.

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[24] Interestingly then, the tribunals evolved from using the MW performance right as an upper bound for the SR performance right to using it as a lower bound for the SR performance right. (This was not likely the outcome that the services were hoping for in repeating the same rejected arguments while ignoring the tribunals' "invitation" to provide instead a useful comparability analysis.)

a. Dr. Eisenach Establishes Boundaries For A Reasonable Range

COL-166. In order to assess the comparability of the core SR benchmark, and make the necessary adjustments to determine comparable MW royalties, Dr. Eisenach undertook a survey of what he describes as "relative valuation benchmarks," in which he looked at markets where third-party licensees were obtaining licenses for both SRs and MWs for the same use. Following the precedent that "[a] benchmark is a marketplace point of reference, and as such, it need not be perfect in order to be considered in a rate setting proceeding" (*CARP PSS 1998*, 63 FR at 25404), Dr. Eisenach includes in his relative value benchmark survey a variety of markets, including those where SRs or MWs are set partially or fully by regulation. As noted in *CARP PSS 1998*, such analogies are appropriate so long as they are appraised "to reflect the differences in both the respective markets (*e.g.*, with respect to volume and industry structure) and the regulatory environment." (*Id.*)

COL-167. Dr. Eisenach's survey of relative value benchmarks determined a range of relative valuation for SR:MW rights of between [redacted]. Although some Services suggest that the breadth of this range was too large, in fact, the breadth of Dr. Eisenach's zone is quite similar to the breadth of the zone of reasonableness for a reasonable royalty as determined by the Judges in *Phonorecords I* (noting range between 5.8 cents and 24 cents). 74 FR at 4522

i. The Section 115 Statutory Rates and Direct Licenses Under the Section 115 Shadow Provide a Reasonable Upper Bound for the Relative Valuation of SR and MW Rights

COL-168. Dr. Eisenach considered the current rates and the direct licenses in the shadow thereof, because he thought "it was important to consider all possible candidates." The current statutory rate structure encompasses prongs that are explicitly calculated as a percentage of payments made for SR rights (validating the idea that the rights are conducive to

benchmarking), often referred to as "TCC" or "total content cost" rate prongs. (Eisenach WDT ¶ 82 (HX-3027)) For example, for ad-supported music services, the TCC rate prong is 22 percent of sound recording payments; for portable subscriptions, the TCC rate prong is 21 percent (assuming no pass-through by record labels). (*Id.*) These TCC rates correspond to ratios of SR and MW royalties of 4.55:1 and 4.67:1, respectively. (*Id.*) Dr. Eisenach also looked at direct licenses under Section 115, describing the agreement terms, [redacted]. (*Id.* at ¶¶ 84-91)[25]

COL-169. As a benchmark, however, Dr. Eisenach finds the current statutory structure is of very limited value. (*Id.* at ¶ 83) First, the current rate structure was agreed in 2008 and renewed in 2012 prior to the establishment of the interactive streaming industry and the success of interactive streaming services such as Spotify. (*Id.*) Second, the structure was negotiated under the shadow of the compulsory license, creating an asymmetric effect on the bargaining power of the two parties. (*Id.*) Finally, the ratios derived from the current rate structure are for rate prongs that are part of greater-than or lesser-than formulas in a larger structure where other rate prongs may predominate. (*Id.*)

COL-170. Based on a review of the foregoing agreements, Dr. Eisenach concluded that the relative valuation of SR rights to MW rights implied by the current statutory structure and agreements negotiated in its shadow, which he finds ranges from [redacted], represents an upper bound on the relative market valuations of the two rights. (*Id.* at ¶ 92) (To be clear, by "upper" bound, Dr. Eisenach means the higher SR:MW *ratio*.) Since the ratio is applied to adjust actual SR royalties to determine what would be fair market MW royalties, the upper

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[25] As Dr. Hubbard admitted, a statutory rate acts as a ceiling in private negotiations and that it would be hard to imagine a party voluntarily paying more than the statutory rate. (Tr. 2205:19-24, 5949:13-5950:16 (Hubbard); COF-711)

bound of the *ratio* will represent the *lower* bound for resulting rates. Thus, mechanical royalties determined via benchmarking using the SR:MW ratio implied by the current rate structure (and related deals in the shadow thereof) would represent the lower bound of a reasonable range of royalty rates.

ii. Synch and Micro-Sync Agreements for Limited Use Applications Provide a Reasonable Lower Bound for the Relative Valuation of SR and MW Rights

COL-171. Synchronization license provide the right to synchronize a musical composition to audiovisual images on, for example, film and television. These licenses are not subject to the Section 115 compulsory license and, as such, are freely negotiated between buyers and sellers without the shadow of the compulsory license. [redacted] (*Id.* at ¶¶ 94-95) Synchronization licenses provide relevant benchmarks because they are negotiated outside of the shadow of a compulsory license. Dr. Eisenach also observes the [redacted] ratio in "micro-sync" licenses, which are essentially "blanket" synch licenses, in that the license grants the right to synchronize not just one particular song, but any song in the publisher's catalog. (*Id.* at ¶ 96) These are more comparable to the "blanket" licenses seen in the interactive space. At the conclusion of his analysis, Dr. Eisenach finds that these synch and micro-sync licenses – at a [redacted] ratio – form the lower bound for the relative valuation *ratio* (which again means that mechanical royalty rates implied by these licenses would represent the *upper* bound of a reasonable range of mechanical royalty rates).

iii. The Pandora Opt-Out Agreements Provide A Relative Valuation Benchmark That Is Partially Under The Shadow And Reveals The Impact Of Regulation On The Relative Valuation

COL-172. As part of his relative valuation benchmark analysis, Dr. Eisenach undertakes a comprehensive analysis of the "natural experiment" that occurred over several rounds of licenses between music publishers and Pandora for its noninteractive service during a period of regulatory uncertainty, and that analysis is described in detail in his written testimony. (*Id.* at ¶¶ 103-129) The markets and parties involved in these Pandora agreements are comparable to the markets and parties involved in the Section 115 licenses at issue in this proceeding. Accordingly, these Pandora "opt-out" agreements provide significant insight into the relative value of SR and MW rights in this proceeding, and particularly on the interplay of regulation and those relative values.

COL-173. In particular, the evolution of these deals reveals the impact of regulation on the SR:MW relative valuation. Dr. Eisenach explains in detail the empirical data, as well as his rationale and assumptions, in assessing the Pandora opt-out deals, and then undertaking a linear regression analysis to project them as benchmarks. (*Id.*)

COL-174. At the hearing, Dr. Eisenach explained further his reasoning behind the linear regression model that he undertook to estimate a relative market valuation of [redacted] based upon the Pandora agreements. (Tr. 4612:21-4619:3 (Eisenach)) He explains that he is not putting forward his ratio as a "precise estimate," since "I don't think there's any empirical way to arrive at a precise answer," but explains that:

[redacted]

(Tr. 4618:22-4619:3 (Eisenach))

COL-175. Despite hollow complaints by the Services that try to leverage what they plainly consider to be loaded terms like "effective competition" and "market power" to argue for ignoring this natural experiment, there is no evidence in the record of any abuse of market power in any of these agreements, let alone abuses of such magnitude that they explain the material change in the relative valuation of SR and MW rights when the shadow of the rate courts was partially lifted. As Dr. Eisenach explained, the analysis involves "[t]he application of economic judgment and rational criteria, objective criteria, to assessing values," (Tr. 4618:19-21 (Eisenach)) and his assessment matches not just the facts but the judgment of a federal court and the Copyright Office. (Eisenach WDT ¶ 104, 108, 120 (HX-3027))

COL-176. The Copyright Office itself concluded in 2015 that:

> There is substantial evidence to support the view that government-regulated licensing processes imposed on publishers and songwriters have resulted in depressed rates, at least in comparison to noncompulsory rates for the same uses on the sound recording side.

U.S. Copyright Office, *Copyright and the Music Marketplace*, at 159 (Feb. 2015).

COL-177. Dr. Eisenach's analysis as to the Pandora agreements is an appropriate component to his relative valuation benchmarking survey, and further supports his reasonable benchmark range and the COR.

b. <u>YouTube Agreements Are An Excellent Relative Value Benchmark (Although Not A Proper Service Rate Benchmark)</u>

COL-178. Dr. Eisenach also evaluated YouTube licenses, which he found to be an "excellent benchmark for both the relative values and for the statutory effect," (Tr. 4620:9-11 (Eisenach); Eisenach WDT ¶¶ 100-102 (HX-3027); Eisenach WRT ¶¶ 56-66 (HX-3033);

Eisenach WST ¶¶ 3-7 (HX-3393) The business uses are "remarkably comparable," (Eisenach WRT ¶ 59 (HX-3033)) As he testified:

> [redacted]
>
> [redacted] Dr. Marx further notes that the RIAA puts YouTube and Spotify's ad-supported service in the same distribution category as well, and that YouTube would be a destination for "the vast majority of [Spotify's] subscribers" if Spotify no longer offered an ad-supported tier.

(*Id.* at ¶ ¶ 59-60)

COL-179. While YouTube may have audiovisual content, so do numerous interactive streaming providers, including Spotify (Tr. 2130:8-9 (McCarthy)) and Apple (Eisenach WDT ¶ 28 (HX-3027)), and YouTube is considered throughout the digital music industry to be a participant in the on-demand streaming market and a competitor to on-demand streaming services. (COF-265) Indeed, Google (which owns YouTube) does not separate its subscriptions to its Section 115 service, Google Play Music, and YouTube RED, offering them together as a single subscription. (*Id.*) Google's executive further testified [redacted] YouTube is already a direct competitor of the interactive streaming services, and integrated with an actual Section 115 interactive streaming

offering, [redacted]

COL-180. The persuasiveness of the YouTube benchmark increases on review of the rights at issue. In many way YouTube is itself a natural experiment, as it involves the identical rights, uses and parties as interactive streaming offerings, but is exempt from Section 115 due to something of a definitional quirk. Section 115 of the Copyright Act subjects phonorecords to a compulsory licensing scheme that authorizes any person who complies with its provisions to obtain a license to make and distribute phonorecords. Phonorecords are defined by the Copyright Act as:

> [M]aterial objects in which sounds, **other than those accompanying a motion picture or other audiovisual work**, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

17 U.S.C. § 101 (emphasis added).

COL-181. Since, as discussed above, the mechanical compulsory license grew from a concern about monopoly by a particular piano player company, and the definition excepts "audiovisual works" from the compulsory license. Thus, although YouTube is virtually identical to interactive streaming offerings in every measure of comparability, it cannot avail itself of a compulsory license as to uses involving audiovisual works. Dr. Marx, an expert witness for Spotify in this proceeding, [redacted]." (COF-264) [redacted]

[redacted]" (COF-263)

COL-182. These facts lead Dr. Eisenach to opine that: "Without the ability to get free-market benchmarks from within the Section 115 context, benchmarking using YouTube licenses is an almost perfect substitute (indeed, the unique and arbitrary definitional carve out of audiovisual works from the statutory scope makes YouTube an almost scientifically-designed case for benchmarking relative royalty rates for sound recordings and musical works)." (Eisenach WRT ¶ 64 (HX-3033); COF-267)

COL-183. However, Dr. Eisenach makes clear that: "YouTube is not a good benchmark, however, for determining absolute royalty rates for Section 115 services, as YouTube has an enormous bargaining advantage against both labels and publishers that is unavailable under Section 115, namely the potential safe harbor of the Digital Millennium Copyright Act," and for the same reason it is not a good benchmark for rate structure. (COF-268; Tr. 4622:1-19 (Eisenach)) Nonetheless, since the DMCA safe harbor applies equally to SR and MW copyrights, Dr. Eisenach concludes that there is no reason to think that their relative valuation would be affected.

COL-184. As part of YouTube's offerings, consumers may stream music in ways comparable to a consumer of an interactive streaming service. (COF-250) YouTube publisher agreements provide [redacted] (*Id.*; COF-256; COF-257)

COL-185. Due to the definition of "phonorecord" in 17 U.S.C. § 101, one of these uses is subject to the Section 115 compulsory, while the other is not, providing an excellent window into the effects of the statutory rate. As Dr. Eisenach explained at the hearing:

(Tr, 4619:11-4620:24 (Eisenach))

COL-186. Dr. Eisenach examines both the SR and the MW agreements that license the two uses described here, which can be called

[redacted], making agreements concerning such uses highly comparable benchmarks for determining the relative value of MW and SR rights. (COF-250 – COF-258)

COL-187. [redacted]

COL-188. [redacted]

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[26] There is also a category of uses on YouTube called [redacted] - both the Services' expert and the Copyright Owners' experts agree that [redacted] are the least comparable use for a benchmark analysis. (COF-250)

(COF-260; COF-261)

COL-189.

Indeed, the Librarian specifically notes that "the regulatory environment" needs to be appraised in the benchmarking process. *CARP PSS 1998*, 63 FR at 25404. Notably, this effect will only be present where MW rates are *below fair market rates*. If mechanical royalties were set at a rate that captures the appropriate market value for MW,[27]

[27] As discussed above in Section III.A, the mechanical compulsory license was not put into place to hobble musical works owners, but rather to prevent a downstream manufacturer monopoly, and multiple courts and rate-setting bodies have noted that it should be interpreted to the full benefit of copyright owners. *See Jondora*, 506 F.2d at 393; *1981 Phonorecords*, 46 FR at 10479 ("We conclude from the record in this proceeding and the legislative history of the Act, that the regulatory system was designed to remedy a perceived market deficiency, namely, attempts at monopolization by copyright *users*.") (emphasis added). Copyright was *designed* to provide a monopoly to copyright *owners* to reward them. *Harper & Row*, 471 U.S. at 546. In other words, Section 115 rate setting is not intended to deprive copyright owners of the returns that they would earn in the free market from their properly secured copyrights. This approach has particular force where, as here, the Services have adduced no evidence in the record supporting any downward adjustment from marketplace benchmarks. As noted in *Web IV*, marketplace agreements are presumed to provide services with sufficient income to implement their business models, and the Services in this proceeding provide no evidence to support their hollow cries for protection from the free market. *See Web IV*, 81 FR at 26326-27.

3. The COR Fits Well Within The Range of Reasonable Per-Play and Per-User Rates Calculated By Dr. Eisenach Using Actual SR Royalties, Applying The Two Relative Value Benchmarks and Disaggregating Performance Royalties Using Two Entirely Independent Methods, Which Corroborate Each Other's Results

a. Dr. Eisenach Calculations To Determine The Benchmark Mechanical Royalty Per-Play And Per-User Rates Are Well-Supported By Record Evidence And Are Appropriate

COL-190. Dr. Eisenach laid out in detail in his testimony the precise steps he took and the data that he used in calculating reasonable mechanical royalty rates based upon the SR benchmark, and the documents and data on which relied were entered into evidence. (Eisenach WDT ¶ ¶ 131-165 (HX-3027); Tr. 4655:18-4660:3 (Eisenach))

COL-191. Dr. Eisenach's calculation of the reasonable per-play and per-user royalty rates using the core benchmarks is straightforward. He avoids the complexities of scrutinizing many different compensation terms by using actual payments for arm's-length marketplace uses of SR rights by interactive services. (Eisenach WDT ¶ 133, 136 (HX-3027)) He uses data "from a combination of royalty statements and HFA data" for thirteen different interactive streaming services that "covers nearly all interactive streaming for the period," and he obtained sufficient information to determine total number of interactive streams, the number of user months, and the total sound recording royalties paid for the service in the period.[28] (*Id.* at 146-147) The tallies are straightforward and reported in tables in his written testimony. (*Id.* at Tables 10, 11)

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[28] Certain Service expert witnesses criticized Dr. Eisenach's survey of interactive streaming services, claiming he should have included other offerings. The basis for omitting Spotify is discussed in detail below in Section III.C. As for other alleged omissions, it is much ado about nothing. The Services present no evidence that the addition of any other services would have had any material effect on the rate calculations. Dr. Eisenach confirmed that he looked at all of the various combinations and gathered additional data referenced by the Services, "and none of them affect the ultimate outcome." (Tr. 4639:20-4640:19 (Eisenach))

COL-192. Since these SR royalties cover both performance and reproduction/distribution rights, Dr. Eisenach then disaggregates the performance rights. (*Id.* at 139) He does this using two different methods, which reach remarkably similar results. *The consistency of these results cannot be emphasized enough.* The two methods that Dr. Eisenach uses are completely different – there is *no interrelation* between the variables such as would lead to an error in one to correlate to an error in the other. The fact that they both lead to virtually the same result is highly corroborative of their accuracy.[29]

COL-193. The two analyses used by Dr. Eisenach to disaggregate performance royalties from his benchmark analysis are distinct both in concept and in data. Method One identifies the market value of SR performance rights and removes it, such that the ratio is applied only against the value of the SR reproduction/distribution rights.[30] In other words, in Method One, Dr. Eisenach subtracts the value of the statutory performance right for noninteractive services from the observed 2015 all-in SR royalty for interactive services, then applies the relative value ratios to arrive at a range of MW mechanical royalties. (*Id.* at ¶ 140-141)

COL-194. Method Two determines the all-in relative value of the MW and then removes actual MW performance royalties, which allows identification of the mechanical royalty rate that, together with MW performance royalties, delivers all-in royalties that match the

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[29] Importantly, these two entirely independent methods are also the only two logical methods to use for the task, so there can be no claim that he selected only methods that come out similarly. This is in contrast to the Service experts, who plainly attempted to cobble together "corroborative" evidence by cherry-picking or simply fabricating contrived "tests" so that they come out similarly. An example of this is found in the WDT of Spotify's expert Dr. Marx, who engages in a faux benchmark analysis that plucks data points about record sales and "conversion ratios" from third-party press releases out of context such that they line up similarly.

[30] As Dr. Eisenach testified at the hearing, he did not consider any "ephemeral" rights in SRs to be material to his analysis. Notably, none of the nine Service experts that submitted rebuttal testimony made a case that such ephemeral rights would have any material independent market value.

relative value of the SR benchmark for all-in royalties. In other words, in Method Two, Dr. Eisenach applies the relative value ratios of SR rights to MW rights to actual 2015 SR royalties paid by interactive streaming services, resulting in a range of equivalent all-in MW royalty, from which actual 2015 MW performance royalties are subtracted, arriving at a range of MW mechanical royalties. (*Id.* at ¶ 142-143)

COL-195. With respect to the per-user component of the COR, only Method Two is able to be used to arrive at a range of reasonable results, as there is no per-user statutory webcasting rate (a necessary input for Method One). Using Method Two, and starting from the per-user SR royalty payments found in interactive streaming agreements, Dr. Eisenach applies the range of relative value ratios to arrive at a range of reasonable, all-in MW per-user royalties, from which he subtracts actual 2015 per-user MW performance payments, resulting in a range of reasonable per-user MW mechanical royalty rates. (*Id.* at ¶ 159-165)

COL-196. The Service experts attack one or another of Dr. Eisenach's methods, but both methods are entirely legitimate. Indeed, *Dr. Marx advocates for a method identical in concept to Dr. Eisenach's Method Two* in her own (deeply-flawed) attempt to benchmark off SR revenues. (Marx WDT ¶ ¶ 111-115 (HX-1065)) Moreover, none of the Service experts can explain why these two, independent methods – which utilize entirely independent variables – are both incorrect and also output such similar results.

COL-197. Under Method One, Dr. Eisenach arrives at an average MW mechanical royalty of between [redacted] excluding Spotify, as follows:

MUSICAL WORKS MECHANICAL PER 100 PLAYS RATE CALCULATION (METHOD 1)

SR_{IS} per 100	SR_{NIS} per 100	"Mechanical Rate" for Sound Recordings per 100	$RV_{SR/MW}$	MR_{MW}
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(Eisenach WDT, Table 12 (HX-3027))

COL-198. Using Method Two, Dr. Eisenach arrives at an average MW mechanical royalty of [redacted], excluding Spotify, as follows:

MUSICAL WORKS MECHANICAL PER 100 PLAYS RATE CALCULATION (METHOD 2)

SR_{IS} per 100	$RV_{SR/MW}$	All-In Rate per 100 for Musical Works	Average PR_{MW} per 100	MR_{MW}
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(Eisenach WDT, Table 14 (HX-3027))

COL-199. Using Method Two, Dr. Eisenach arrives at a reasonable range of per-user mechanical royalties of [redacted] per user:

MUSICAL WORKS MECHANICAL PER-USER RATE CALCULATION (METHOD 2)

SR_{IS} per User	$RV_{SR/MW}$	All-In Rate per User for Musical Works	Average PR_{MW} per User	MR_{MW}
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(Eisenach WDT, Table 18 (HX-3027))

COL-200. In all cases, the COR is well within the reasonable bounds identified by Dr. Eisenach's analysis and, in all cases, towards the lower end of such ranges.

b. The Calculated Rate Is Corroborated By Amazon's Marketplace SR Per-Play Rates

COL-201. The rates for MW royalties calculated by Dr. Eisenach in his analysis are further corroborated by recent, direct licenses produced by Amazon in his proceeding and confirm that the [redacted]. In these agreements, Amazon licensed sound recordings from [redacted] for use in its Prime Music and Music Unlimited Services. (COF-381; Tr. 1561:5-1563:15, 1564:22-1568:2, 1568:25-1570:1 (Mirchandani); HX-2618; HX-1146; HX-975; HX-3006)

COL-202. Under each of Amazon's agreements with the major labels for its Prime Music service (which is a limited catalog streaming service offered to Amazon Prime subscribers as a benefit of their subscription), [redacted]. (Eisenach WRT ¶ 70 (HX-3033)) Moreover, the headline rates paid by Amazon under these agreements are [redacted]. Specifically, the average Service payments were [redacted]. (*Id.*)

COL-203. Under each of Amazon's agreements with the major labels for its Amazon Unlimited music service is [redacted]. (HX-2737; HX-2739; HX-2740) In the [redacted]

C. Spotify Was Properly Excluded From Dr. Eisenach's Calculation Of Current Fair Market SR Royalties For Interactive Streaming

1. Spotify's Licenses With The Labels Are Not Arms' Length, And The Royalties Accounted For By Spotify Do Not Capture All Of The Value That The Labels Have Received From Spotify In Return For SR Rights

COL-204. As Dr. Eisenach explained at trial, his opinion is that royalties paid by Spotify to the record label SR owners should not be averaged into the industry numbers to determine the marketplace benchmark because, [redacted] (Tr. 4635:18-23 (Eisenach); Eisenach WDT ¶ 150 (HX-3027)) Dr. Eisenach's conclusion that arm's-length negotiations are important for marketplace benchmarks has been echoed by the Librarian, who noted that, when balancing the copyright owner's right to a fair return with the copyright user's right to a fair income under the second 801(b)(1) factor, "[u]sually th[e] balance is struck in the marketplace through *arms-length negotiations*[.]" *CARP PSS 1998*, 63 FR at 25409 (emphasis added; citations omitted). Even Pandora, one of the Services in this proceeding, acknowledged the superiority of arm's-length deals as benchmarks in Web IV, arguing that its agreement with Merlin was the "best benchmark" in part because that agreement was "a competitive and *arms-length* direct license." *Web IV*, 81 FR at 26358 (emphasis added)

COL-205. Consistent with the criterion that a benchmark should be between unrelated parties, Spotify's SR royalties should be automatically excluded because the vast majority of SR royalties are paid to [redacted] (COF-290) [redacted]

. (COF-294)

(COF-294; HX-3277 at SPOTCRB0013790)

COL-206. (COF-291) (COF-292)[31]

COL-207. (COF-291) It is irrelevant whether the Labels . For benchmark purposes,

[31] (COF-293).

COL-208.

COL-209. While Spotify has provided no evidence (COF-297) While it is understandable why the Services would want to use Spotify for benchmark purposes

COL-210. There is further evidence in the record supporting Dr. Eisenach's benchmarking assumptions. In addition to the As Dr. Watt noted, the lack of any comparable Section 115 ad-supported offerings from other Services leads to only two reasonable conclusions: either

having a Section 115 ad tier like Spotify's is not important or valuable or the Labels have elected to not permit any further free ad supported services:

> The ad-supported thing, you know, if you want -- if you want to offer that service, if that service is good for society, good for consumers, then it would have to have value, right? It would have to be something when you offer it, it has value.
>
> If it has value, why don't more Services offer it? As I understand, there's only one Service offering this -- this product. The other Services aren't offering it.
>
> So if that's the case, should I be led as an economist to believe that there is no value in it; therefore, I should disregard it? Well, that's one option. Another option is that there is some barrier to entry for the other Services that prohibits them from -- from taking advantage of this -- of this great product.
>
> And if I think that way, what barrier to entry may there be? And it certainly isn't the mechanical rate, right, that they can -- they can have access to the musical works copyright.
>
> And the only other copyright that they need to offer the Services is the sound recording one, so perhaps there's some barrier to entry there.

(COF-296; Tr. 3048:6-3050:3 (Watt)) No evidence was presented by the Services to explain why Spotify's competitors do not have a similar Section 115 ad-supported service (assuming it had some value), and Spotify's CFO remarkably testified that [redacted]

(COF-363; Tr. 2115:8-25 (McCarthy))

COL-211. Pandora has nearly 80 million monthly users, and a history as the market leader in developing an advertising market for music streaming. (Herring WDT at ¶¶ 11, 35 (HX-880)) The Labels just negotiated . . (COF-399; COF-72; COF-419) While Pandora is well-familiar with ad supported services (as its non-interactive service has long been ad-supported), there is no indication that .

COL-212. In any event, the evidence fully supports Dr. Eisenach's decision to exclude Spotify's Label deals from his marketplace benchmarking industry calculations under a standard principle for evaluating what is a market rate. Nor can more be expected given the history of discovery in this proceeding. The Copyright Owners moved to compel production of documents from Spotify concerning the valuation of the terms of its licensing agreements, including . Spotify responded that it possessed no such documents, and has failed to produce any documents indicating that should somehow be disregarded. *Order Granting In Part And Denying In Part Copyright Owners' Motion To Compel Production Of Documents Concerning* (Feb. 9, 2017), at 4.

2. Including Spotify's Subscription Service In The Calculation Would Not Change The Conclusion From The Benchmarking Analysis That The COR Is A Reasonable Rate

COL-213. Perhaps even more important than the evidence that Spotify's SR royalty rates are not suitable for benchmark analysis is that, even if Dr. Eisenach had included the SR royalty rates for Spotify's subscription service as benchmarks, his conclusions as to the reasonableness of the COR would be unaffected, a fact that he confirmed at the hearing. (Tr. 4635:24-4636:8 (Eisenach); Eisenach WDT ¶ 150, n.131 (HX-3027))

COL-214. The weighted average value of the all-in sound recording right in 2015 including Spotify's subscription service was [redacted] (as compared to [redacted], the value excluding Spotify), and the average musical works performance royalty per 100 plays including Spotify's subscription service was [redacted] (as compared to [redacted], the value excluding Spotify). (COF-272; Eisenach WDT ¶¶ 145-50, Table 11, Table 15 (HX-3027)) Had Dr. Eisenach used these inputs for both of his methods of calculating the value of the mechanical right for musical works per 100 plays that is implied by SR deals, [redacted] (at or around the [redacted]).

COL-215. Similarly, the weighted average of sound recording payments in 2015 was [redacted] per user including Spotify's subscription service (as compared to [redacted] excluding Spotify), and the average musical works performance royalty was approximately [redacted] per user including Spotify's subscription service (as compared to [redacted] excluding Spotify). (COF-276; COF-278) Had Dr. Eisenach used these inputs in his calculation of the mechanical per-user rates implied by SR deals, the [redacted] (between the [redacted] and the [redacted]).

D. Under No Circumstances Would It Be Reasonable To Average Into A Calculation Of Marketplace Interactive Streaming Royalties The Royalties Paid By Spotify's Ad Tier, Which Is Not Fully Interactive And Does Not Represent A Legitimate Interactive Market Segment, But Is A Loss Leader Marketing Tool

1. Spotify's Ad Tier Is Not A Fully Interactive Offering

COL-216. The Services argue that, to set the rates in this proceeding, the SR royalty rates Spotify pays for its ad-supported service should be averaged in with the SR royalty rates that other companies pay for their truly interactive services. Averaging in Spotify's SR royalty rates from its Ad Tier is entirely inappropriate because Spotify's Ad Tier is a *highly limited interactive service offering*, and [redacted].

COL-217. Spotify's witnesses testified that [redacted]. (COF-365) Importantly, the mobile version of the Ad Tier lacks a critical function – perhaps *the* critical function -- of an interactive service: mobile Ad Tier users *cannot choose to stream a particular song they want to hear*. (COF-356; COF-365) Rather, the mobile Ad Tier provides the user with a less interactive shuffle service.

COL-218. [redacted] (COF-260) [redacted]

(COF-360; Tr. 2143:23-2145:8 (McCarthy)) Other Spotify witnesses similarly testified that (COF-361) Spotify's expert witness, Dr. Marx, also admitted that Spotify's mobile Ad Tier is "similar" to Pandora in functionality and that (COF-361; COF-362)

COL-219. Notably, *no Service witnesses opined that Spotify's mobile Ad Tier has a "similar" functionality to the fully-interactive subscription plans with who the Services want to average in the Spotify Ad Tier royalty rates*. Indeed, while Spotify's mobile Ad Tier is not eligible for a Section 114 statutory license, it is plainly *more* "similar" to Pandora's noninteractive offering than to the fully interactive subscription offerings that no Service witness considers similar.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(Tr. 5619:18-5623:10 (Marx))

COL-220. But as we have seen, the Spotify mobile Ad Tier already lacks the most distinguishing feature of a Section 115 service, on-demand streaming, and there is of course no evidence in the record for the untenable proposition that *consumers* make any market distinction between whether an offering, such as Spotify's Ad Tier and Pandora's noninteractive tier, obtained licenses under Section 114 or 115.

2.

COL-221. The lack of full interactive functionality in Spotify's Ad Tier is not without reason. (COF-364) For example, (HX-925 at SPOTCRB0006229-0006231)

(COF-364; HX-924 at SPOTCRB0006044, SPOTCRB0006112-0006114 ( ) (referring to offering as the); HX-2765 at SPOTCRB0005596-0005597 ( )).

COL-222. The limited interactivity of Spotify's mobile Ad Tier was even noted in the Web IV determination, where it was referred to as a "Shuffle service," although the Judges noted that the limited service was also not sufficiently noninteractive to meet the test for the statutory license under Section 114.[32] (*See Web IV*, 81 FR at 26353) Spotify's Ad Tier thus lies somewhere in between noninteractive and fully interactive offerings. It does *not* offer the option for users to choose songs on demand on mobile, its most

[32] All of the Participants in this proceeding have proposed terms that carry forward the current definition of "interactive stream." This definition refers to the statutory license test under Section 114 as the boundary for defining "interactive stream" functionality. In other words, the rate for interactive streaming being set in this proceeding is understood by all in the industry to apply to streaming activities that do not meet the test under Section 114 for being noninteractive offerings.

popular platform, and thus it is not at all comparable to truly interactive services. But it allows limited interactive functionality that takes it outside the realm of statutory noninteractive services.

COL-223. In *Web IV*, the Judges rejected the use of Spotify's Ad Tier as a benchmark for noninteractive services (without adjustment, which was not proffered), holding that "the increased degree of interactivity would be taken into account in setting royalty rates." (*Id.* at 26353) Of course, *the very same logic applies in disqualifying Spotify's Ad Tier as a benchmark for fully interactive services*. The deeply *decreased* degree of interactivity of Spotify's mobile Ad Tier relative to fully interactive services [redacted]. There is no economic rationale for averaging into the benchmarks for on-demand services the royalties paid for an offering that is [redacted].

3. Spotify's Ad Tier Does Not Represent A Legitimate Interactive Market Segment

COL-224. As the record shows, no company offers a portable, fully interactive music streaming service that is ad supported. Moreover, Spotify is the only Participant with an ad-supported offering that falls outside of the Section 114 statutory license limits. Amazon does not have an ad-supported streaming offering at all. Apple has a Section 114 noninteractive radio offering. (Dorn WDT at ¶ 17 (HX-1611)) Google has a Section 114 noninteractive radio offering. (Joyce WDT at ¶¶ 7-9 (HX-693)) Pandora of course has its Section 114 noninteractive radio offering. (*See* COF-68)

COL-225. Spotify claims that its Section 115 Ad Tier is critical to the survival of its interactive streaming business model, [redacted] (COF-363) As noted above, Spotify's CFO only [redacted]

[redacted] (*Id.*) If Spotify's Ad Tier is as critical to its business as Spotify claims, [redacted] The record is replete with Spotify's [redacted]. (*See e.g.*, HX-799, HX-2705, HX2710) [redacted]

COL-226. Perhaps more importantly, Spotify's CFO, Mr. McCarthy, debunked the whole notion that [redacted]. On the contrary, he admitted that [redacted] – which the Copyright Owners have not sought and which adoption of the Copyright Owners' proposal would not require – [redacted] (Tr. 2168:11-2169:11 (McCarthy)); (COF-452)

COL-227. [redacted], the record is clear that such models do not constitute an interactive market segment. There is only evidence that one service, Spotify, operates a Section 115 Ad Tier, and it [redacted] severely limited interactive functionality.[33] From an economic perspective, as Dr. Watt testified, it is problematic to base an industry-wide rate around a single product offering by one company, which no other

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[33] While the Services make reference to nonparticipants that have paid royalties under the ad-supported model provisions of the current Section 115 regulations, [redacted] (*See e.g.*, Tr. 5961:6-5963:21 (Hubbard)). No witness testified that any of these other purported ad-supported offerings had anything close to full interactive functionality, and the evidence indicates otherwise.

company offers – either because there is no special value in it or because barriers to entry prevent them from doing so. (COF-296)

COL-228. If, despite the evidence, the Judges nonetheless decide to take into account Spotify's Ad Tier royalty rates when setting Section 115 statutory rates for interactive streaming, such accommodation should be in a rate calculated *independently* from the rate for fully interactive services, *and the availability of a compulsory license at such rate must be subject to the same limitations on functionality* [redacted].[34] Adopting the Services use of Spotify as a rate setting version of a human shield, used to average down [redacted]

COL-229. Further, if the Judges were inclined to consider affording any rate differential for Spotify's Ad Tier, the Copyright Owners submit that it should be for a limited period of time during which the appropriate full interactive streaming compulsory rate set by the Judges is phased in. At the end of any such limited and defined period of time, the full compulsory rate would be applicable to the free ad-supported service. As discussed below,

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[34] As discussed above, the functional limitations of Spotify's mobile Ad Tier [redacted]. To be clear, the COs oppose the creation of a second, lower Section 115 rate for ad-supported services, [redacted]. For one, the creation of such a special, low rate for one particular service would violate principles of business neutrality, particularly as Spotify's competitors may very well continue to face exogenous barriers to entry which prevent them from availing themselves of such a rate (assuming there is some special value to the offering). But creating a lower Section 115 rate for limited-functionality ad-supported services for a limited time would certainly be better than gutting the entire interactive streaming mechanical royalty regime by averaging down the rate for true interactive services to match a massively scaled freemium offering [redacted] that does not even allow on-demand song choice.

Spotify has been incredibly successful, [redacted] and has already had years of opportunity to increase its revenues through pricing innovation, monetization of its ads and user data, and incentives for its users to convert to its subscription service. There is no reason to accommodate it as part of *interactive* streaming rate setting at all, let alone to provide it any discounted rate that is not rapidly phased out.[35]

COL-230. It should be obvious to the Judges what the Services are about and the unfairness that would be produced by skewing the statutory rate by including services that offer different functionality than what is available under the statute and pay different rates. In *Web IV*, the Board rejected as benchmarks a number of agreements pertaining to streaming services with "extra-statutory functionality," as such "additional functionality would be expected to push the royalty rates up." (*See* Web IV, 81 FR at 26352-53) One such service, in fact, was Spotify's "Shuffle" service, which was recognized as neither fully interactive nor fully noninteractive.

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[35] Service arguments that the COR might be disruptive have not focused on the industry (which is plainly thriving and seeing significant entry), but on this atypical offering. As discussed though, Spotify's Ad Tier is [redacted] and is not truly a part of any interactive streaming market segment, but is a loss leader marketing device intended and [redacted]. The Services offered empty and misleading argument that, [redacted], they might be revenue generated from consumers unwilling to pay for interactive streaming. As discussed herein, though, [redacted].

The hearing contained questioning concerning whether approaches existed that might accommodate what is an outlier in the industry, or whether, as the Judges queried, "you might find that the problem cannot be solved in a way that creates a market. So certain markets just cannot exist because the pricing just doesn't work." (Tr. 2891:1-4 (Ghose)) To be clear, the Copyright Owners do not believe that there is business or legal justification for providing lower rates for licensees on the argument that they cannot afford to pay reasonable market rates, even if the argument were proven, which it has not been in this proceeding. Rather, as was also discussed at the hearing, if a particular discounted business model makes sense for licensor and licensee, economics accurately predicts that the parties will negotiate a mutually beneficial direct agreement outside the compulsory rate. (Tr. 4845:2-4847:1 (Eisenach))

(*Id.*) The same economic logic applies here in reverse. Spotify's Ad Tier has markedly lower functionality than fully interactive services – a limitation which is [redacted] The Spotify Ad Tier's SR rates thus should not be averaged into the rates for the rest of the Services, all of which offer only fully interactive offerings under Section 115 (*i.e.*, offerings allowing the user to choose the songs she wants to hear without restriction).

COL-231. The SR royalties that Spotify pays for its Ad Tier are, moreover, even lower than Spotify would have the Board believe – and in fact [redacted]. Although Dr. Marx's testimony obscures this fact, her own numbers, reflected in her workpapers admitted as hearing exhibits, show that [redacted]. (HX-1741) The statutory rate for noninteractive ad-supported services from Web IV is $.0017 per play. Thus, [redacted] (COF-298; s*ee also* Marx WDT at ¶ 33, Figure 7 (HX-1069))[36]

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[36] Dr, Marx presents her numbers as royalties paid "per hour" rather than royalties paid per play, which obscures this fact. She reports that Spotify's Ad Tier paid SR royalties of [redacted] per hour (subtracting her [redacted] MW per-hour royalties figure from her [redacted] combined SR/MW per-hour royalties figure). (Marx WRT at Figure 7 (HX-1069)). Dr. Marx also reports that [redacted] paid [redacted] for SR royalties per hour. (*Id.*) [redacted] – which would be significant enough – but this obscures Dr. Marx's assumptions as to song length used to create her per-hour estimates. Dr. Marx estimated song length of [redacted] (HX-1069, Figure 7 notes), but [redacted]. Looking directly at Dr. Marx's workpapers reveals that [redacted] the statutory noninteractive per-play rate from Web IV of .0017. (COF-298). Note that [redacted] The current Section 115 rates provide for an all-in royalty rate of 22% of SR royalties, while current [redacted]

COL-232. By comparison, as Dr. Eisenach demonstrates, the average effective SR per-play rate for other on-demand services is [redacted], nearly [redacted] Spotify's Ad Tier rate. (COF-272) Spotify itself pays SR royalties of [redacted] per play for its fully on-demand service, or nearly [redacted] what it pays in SR royalties for its limited functionality Ad Tier. (COF-297) [redacted]

4. Spotify's Ad Tier Is A Loss-Leader Marketing Tool And Is Not A Unique Offering That Requires Special Accommodation

COL-233. The record is replete with evidence that Spotify's Ad Tier is a marketing tool for Spotify. Spotify described it as a "funnel" for its subscription service, and Spotify's CFO, Barry McCarthy, [redacted] (COF-369) This "funnel" is a loss leader for Spotify. Mr. McCarthy testified that [redacted]. (COF-353) Indeed, Spotify's financials show [redacted]

[redacted]. Thus, COs receive [redacted] Note also that [redacted]

[redacted] (COF-354)

COL-234. Spotify's Ad Tier is, thus, a *promotional tool and marketing cost to Spotify*. It is an expenditure that Spotify willingly makes to bring in future business. It is not a standalone offering, as reflected by [redacted] (COF-366; COF-367; COF-368; COF-364)

COL-235. While used as a promotional tool, Spotify's Ad Tier's efficacy is unclear relative to Spotify's other marketing avenues. Spotify presents no evidence that its rate of subscription growth would decrease were it to reallocate the net amount it spends on its Ad Tier to other marketing efforts, such as buying more advertising or offering more free trials. It similarly has adduced no evidence that its freemium funnel is more effective at raising paid subscription numbers than having only free trials – which is what its competitors use (alongside noninteractive streaming offerings). [redacted]

[redacted]

(COF-369; Tr. 2113:17-2114-13 (McCarthy))

COL-236. There is of course no doubt that a free trial is not a legitimate market segment, but rather is a marketing tool. Thus, [redacted]. This truth about ad-supported interactive services is surely unsurprising to the Judges, as it was expressly recognized in Web IV. There, the Judges rejected criticisms of a survey conducted by Larry Rosin because they found that ad-supported interactive services serve precisely this role as marketing for subscription services:

> The Judges also reject the criticism that Mr. Rosin should not have indicated that an alternative to noninteractive services was to listen to "free" FM radio and that another alternative was to "pay" for a subscription to an interactive service, because interactive services do offer "freemium" subscriptions, which begin as free subscriptions subject to a conversion option. The Judges find that Mr. Rosin's language **meaningfully reinforces the different pricing and pricing strategies that exist in the market**, because FM radio is free to the listener and **on-demand services are designed to obtain paying subscribers, whether at the outset of the subscription period or by using ad-supported services as a "freemium" tool to convert listeners into subscribers. (Indeed, SoundExchange's economic expert, Dr. Rubinfeld, testified that he did not even use interactive ad-supported rates as a benchmark because they were designed as tools to convert listeners into subscribers**.)

Web IV, 81 FR at 26328 (emphasis added). Thus, the Judges recognized that ad-supported "freemium" models in the interactive space do not reflect meaningful pricing strategies, but rather are marketing tools to obtain subscribers. Spotify's Ad Tier fits this mold precisely (and again, there is no evidence in the record concerning the functionality or interests of any other Section 115 ad-supported offerings, and [redacted]). If Spotify's Ad Tier represented a true interactive market segment, rather than a tool to obtain market share and subscribers, then

Soundexchange's objection to Mr. Rosin's survey was correct. However, as the evidence in this proceeding confirms, the Judges' reasoning in Web IV was correct, and the same reasoning applies here. Spotify's Ad Tier has the same market dynamic as a free trial – it is a marketing tool that should not be accounted for or accommodated in the statutory rates. No statutory royalty rate should be set based on the economics of a marketing tool.[37]

5. [redacted]

COL-237. Contrary to Spotify's dire proclamation that MW royalties would decrease industry wide if Spotify's Ad Tier shut down, the evidence that Spotify has introduced in this proceeding shows that Spotify operates its Ad Tier at the expense of overall MW royalties.

COL-238. The evidence in the record shows that streaming consumers "multi-home" significantly, meaning they use multiple services at the same time. The most common services that consumer use in addition to Spotify's Ad Tier are [redacted]. (COF-263; Page WDT ¶ 47 (HX-1061)) And, as Spotify's CFO testified, [redacted]. (COF-360) As shown above, if Ad Tier users migrated to noninteractive services, [redacted]. And this is true if not a single Ad Tier user converted to a paid subscription. But many would convert. [redacted]

[37] Of course, there is no evidence that the parties to the Phonorecords I and II settlements even anticipated that the ad-supported rate model would be used as a loss-leader marketing tool in the way that Spotify has used it, let alone at the scope (unlimited use and duration) that Spotify has used it, rather than for an actual, standalone ad-supported business model. At the time of the Phonorecords I settlement when the rate model was conceived, Pandora was the largest streaming service, operating with an actual advertising-based business model.

(COF-370; Tr. 2168:11-25 (McCarthy)) These converted customers would mean even more additional MW royalties.[38]

COL-239. The same result holds true even for users

[38] . (COF-355; HX-1037 at 26). Given the drastic difference in royalties that subscriptions bring in, combined with the fact that

(COF-268; HX-2693)

COL-240. Per Dr. Marx's sources,

. (COF-299)[39]

(COF-370; COF-355)

COL-241.

[39]

[40]

(COF-300)

COL-242. Even under the current, deeply undervalued statutory rates, . (COF-300)

(COF-300) . (COF-263; COF-355)

. (COF-300)

E. <u>There Is No Evidence Supporting A Downward Adjustment for "Market Power" (Which Shapley Analysis Confirms Would Result In An Unfair Outcome)</u>

COL-243. Some of the Services' experts argue that royalties flowing from voluntarily negotiated agreements between interactive streaming services and SR owners are inappropriate rate benchmarks, or need to be adjusted, because the major record labels supposedly have "market power" which "inflates" the royalties they earn. (*See e.g.*, Tr. 5085:24-5086:4 (Katz), 5533:21-5534:8 (Marx), 5563:8-18 (Marx))

COL-244. To begin with, the Copyright Owners include the word "supposedly" because while the Services have argued that the major record labels have "market power" which allegedly inflated the SR royalties, they have not, in fact, introduced evidence to support the argument. On the contrary, as will be shown below, among the contrary evidence adduced at the hearing is documentary evidence showing that [redacted].

COL-245. Downward adjustment of the benchmark rates on such an argument would be inconsistent with the Factors and clearly expressed Congressional policy. In the 1998 Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings proceeding, the Librarian found that the negotiating leverage which record labels have in the interactive streaming space is not an accident to be corrected but rather a market feature which Congress expressly permitted:

> The Register acknowledges RIAA's uneasiness with the possibility that the rate which is ultimately adopted may have precedential value for their negotiations with other digital services, but such concern is misplaced. The rate under consideration applies only to the non-interactive digital audio subscription services… Congress, fully recognizing the threat that interactive services pose to the record companies, crafted the law so that they were ineligible for the compulsory license. The result

> of this decision is that record companies have an opportunity to negotiate an appropriate marketplace rate for a digital performance license with these services.
>
> Interactive services, which allow listeners to receive sound recordings "on-demand," pose the greatest threat to traditional record sales, as to which sound recording copyright owners (of sound recordings) must have the right to negotiate the terms of licenses granted to interactive services. (S. Rep. No. 104-128, at 24 (1995))

CARP PSS 1998, 63 FR 25408-09.

COL-246. Congress (and the Librarian) could not have been clearer that there was a vital distinction between Congressional intent *vis-à-vis* interactive versus noninteractive services. Interactive services pose "the greatest threat" to traditional music industry revenues by virtue of their power to cannibalize sales and other traditional revenue sources, and there should be no interference with the ability of SR owners to negotiate for royalties in the free market. Given Congress' clear mandate that SR owners "must have the right to negotiate" their interactive streaming deals because of that threat, there is no basis for artificially circumscribing those deals in a benchmarking analysis, or for setting a statutory rate that effectively alters those deals (the right to which Congress wanted to protect) and which deprives MW owners of that same protection.

COL-247. Of course, the threat posed by interactive services is just as large for MW owners as for SR owners. Moreover, as noted in Section II.A above, the mechanical license was not implemented to penalize MW works owners, but rather to address a <u>downstream</u> monopoly concern. Consistent with established precedent, Section 115's compulsory license should be interpreted to ensure <u>downstream</u> competition and "the full play of market forces," and to ensure MW owners reasonable compensation. It would be inequitable and contrary to the Factors to reduce MW royalties due to a theory of "market power" – particularly absent a strong evidentiary showing of actual *abuse* of market power, which the Services have failed to make.

COL-248. To the contrary, there is ample evidence in the record disproving the Services' conclusory "market power" theory. As detailed below, the downstream market is thriving, as shown by the massive growth in subscribers, revenue, and number of companies in the interactive streaming space, as well as the billions of dollars invested in the industry in recent years. Moreover, as Dr. Eisenach testified, the market entry of large, diversified firms like Google, Apple, and Amazon, each of which has many other ways of earning revenues and yet has knowingly decided to enter the interactive streaming market, indicates that the license agreements with those Services would not suffer from abuse of market power by SR owners, but are appropriate market benchmarks:

> So as Google, Apple, and Amazon are sitting down to decide whether or not to enter the market for interactive streaming or to continue innovating in the market, to continue introducing new products, as they're making those decisions, they're thinking about these rates.
>
> And they're sitting across the table from the publishers. And the publishers' ability -- or the -- or the labels. And the Rights Owners' ability to extract rents, extract quasi rents, is what we call them in economics, from the -- from the Services in that context is limited by the difference between the interactive services' investment return and the return on the next best thing.
>
> And it may be smart cars. It may be drones. It may be rockets to Mars. These people are engaging in lots of investments. But your hold-up capability is limited by the return on the next best investment.
>
> And when you['re] Apple, Google, and Amazon, or for that matter -- for that matter Pandora, you have lots of different investment alternatives. And I think your ability to hold up -- the ability of the publishers or the rightsholders to hold up those firms is extremely limited by that fact.
>
> JUDGE STRICKLER: But do the rightsholders really suffer very much if Amazon, Google, and Apple decide to go to Mars, instead of licensing music because the threat is not a great threat, I think one of the arguments is made, because the Copyright Owners can still license to Spotify, to Pandora, and to any other interactive streaming service, so the threat -- they may -- those larger companies may well act on the threat, but it's not particularly costly to the Copyright Owners?
>
> THE WITNESS: But -- but the relevant point – I'm an empiricist at the end of the day, and the relevant point -- I'll come back to that – let's look at what happened

> in the marketplace. They didn't choose -- those firms did not choose. So the benchmarks that I'm looking at are benchmarks of actual agreements entered into by those firms under those circumstances.

(Tr. 4596:12-4598:7 (Eisenach)) During the hearing, Google's Director of Product Management of Google Play Music Paul Joyce [redacted]

COF-325; Tr. 789:14-790:12 (Joyce))

COL-249. As Dr. Eisenach explained in his rebuttal report, the Services' argument regarding Label market power is further undermined by evidence that interactive streaming services such as Spotify have the same roughly 70/30 split in favor of rightsholders (SR and MW) as companies that distribute non-music digital content. (Eisenach WRT ¶ 79 (HX-3033)) Video streaming services Netflix and Hulu, for example, enjoy the same 70/30 split. (*Id.*; COF-288) Indeed, Spotify's general counsel has recognized that paying 70% of revenues back to content creators is "as it should be." (COF-287; Eisenach WRT ¶ 79 (HX-3033); HX-2745)

COL-250. Dr. Gans provides additional evidence contradicting the Services' market power theory. As he explains, [redacted] (Gans WRT ¶ 72 n.67 (HX-3035)) Further, [redacted] (*Id.*) [redacted]' supposed abuse of their alleged market power [redacted] (*Id.*)

COL-251. The Services' market power argument is further belied by the fact that [redacted]

(COF-91; COF-92; COF-418) (COF-418; *see also* Levine WDT ¶ 55 (HX-692); (HX-542))

COL-252. Furthermore, (Tr. 207:16-208:12 (Levine)) (Tr. 209:23-210:1 (Levine))

COL-253. More proof of this point is in

[redacted]. (COF-419)

COL-254. [redacted]

F. Shapley Analysis Confirms The Reasonableness Of The COR And The Results Of Dr. Eisenach's Relative Value Benchmarking, And Explains The Range In SR:MW Ratios That Arises From The Interplay Of Regulation And Royalties

1. Shapley Analysis Is Perfectly Suited To Inform This Proceeding

COL-255. Drs. Gans, Watt and Marx all evaluate fair mechanical royalties using "Shapley value" methodology (hereafter "Shapley Analysis"). The results of the Shapley Analyses confirm Dr. Eisenach's core conclusions as to the relative values between SRs and MWs. The Shapley Analyses also confirm that overall MW mechanical rates should increase, and they outline the fair division of royalties between the Services and COs in a manner that independently confirms the reasonableness of the COR.

COL-256. Shapley Analysis models a cooperative game wherein parties can reach value-generating agreements to participate (coalitions), and it produces a value (the Shapley value) that represents the share of the economic value (producer surplus, *i.e.*, profits) from the joint endeavor that is to be received by each participant. (COF-220) The methodology of the Shapley Analysis involves considering all the possible permutations of coalitions that could result between the parties and studying how the addition of a particular participant, in each particular sequence, adds to the combined surplus in each case. (COF-221) The additions to the

combined surplus represent the contributions made by each party in each permutation of the coalitions between the parties. (*Id.*) The Shapley value for a particular party in the game is the average contribution made across all of the possible coalition permutations. (*Id.*) This framework can be used to determine royalty rates that would result from negotiations between rightsholders and interactive music services in a hypothetical non-compulsory market. (*Id.*)

COL-257. Parties' costs do not change the Shapley values themselves, which represent the fair share of profits that rightsholders and services should receive from the endeavor, but they affect the amount of royalties that would have to be paid to deliver these profits to publishers and labels. (COF-222) The profits would be delivered to Labels and MW COs by paying each an amount of royalties equal to their Shapley values plus their respective incremental costs. (*Id.*)

COL-258. The Shapley Analysis is particularly useful in Section 115 proceedings such as this because of its fitness for serving the second and third 801(b)(1) policy factors (affording a fair return/fair income and reflecting the relative roles of the copyright owner and copyright user). Dr. Watt – whose work on Shapley Analysis was cited by Drs. Marx and Katz in their written direct testimony – remarked on how well the Shapley Analysis informs the analysis that the Judges must undertake here, similar to its usefulness in a rate setting proceeding for a statutory license for terrestrial radio in which he testified:

> [THE WITNESS:] …[L]et me take the opportunity while I'm here and in the Court to – just to express my – my excitement that – that the Shapley model is being used for such an important process and such an important procedure here.
>
> JUDGE BARNETT: That sentence could only have been spoken by an economist.
>
> THE WITNESS: Exactly. I'm sorry about that. But, you know, it's -- it is something that -- not only an economist, a theoretical economist, right? It's great to see economic theory making a difference. And I think it's wonderful that this Shapley modeling is being embraced by both – by lots of the experts in this proceeding and by both sides. It's not surprising that that happens probably because

> you've already asked me about the factors. The Shapley model is written essentially – although it was written, I don't know how the timing worked, but the Shapley model accommodates two of these factors perfectly, the second and third. So, you know, it fits so nicely that it isn't surprising at all that – that it's brought into play and people seem to like it. I think it's also worthwhile to point out that it has been used before in similar settings. I -- as I said, when -- when I was introduced that I was involved in a rate setting process in New Zealand some eight years ago, something like that. I provided a Shapley analysis there, and that was what was convincing to the Court, and they took -- they paid attention to that and liked it. So it seems to work. And I'm really happy that -- that it's still in play, right? Okay.

(COF-218; Tr. 3056:8-3057:16 (Watt)) Dr. Gans notes that he too "recognize[s] the usefulness of Shapley values in determining royalty rates which are consistent with the objective of providing a 'fair return' for rightsholders and 'a fair income under existing economic conditions' for copyright users." (COF-218; Gans WRT ¶ 10 (HX-3035)) Spotify expert witness Dr. Leslie Marx further testified that Shapley Analysis is "a particularly good fit for the goals that are laid out in the second and third 801(b) factors because it is a way for an economist to operationalize the notion of fairness. And it is fairly tightly tied to this idea of reflecting the relative roles of Copyright Owners and copyright users." (COF-218; Tr. 1831:19-1832:3 (Marx)) The Judges also noted in a recent proceeding that Shapley Analysis is the optimal economic approach to determining allocations of total fair market value among various licensors and licensees in a market. *See Final Distribution Determination, Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2008-1 CRB CD 98-99 (Phase II), 80 FR 13423, 13429-30 (March 13, 2015).

COL-259. In this particular proceeding, the Shapley Analysis has a number of benefits, as discussed in the sections that follow:

- It provides a window into the interrelation of two upstream inputs – SRs and MWs – and allows estimation of the relative values of those two inputs. It thus can (and does) corroborate the benchmarking analysis of Dr. Eisenach;

- It allows estimation of a fair allocation of revenues that controls for any abuse of market power; and

- It provides an economic tool for the Judges to analyze the effects on relative valuation of complementarity and substitution in the upstream and downstream markets.

2. Dr. Eisenach's Relative Valuation Of SR and MW Royalties Is Confirmed By All Three Experts' Shapley Analyses, Including Spotify's Expert

COL-260. Spotify's and the Copyright Owners' economists all agree that, under a Shapley Analysis of the interactive streaming market, the licensors of the SRs and the licensors of MWs have equal Shapley values. This is reflective of the fact that their respective goods are equally necessary to the creation of coalitional surplus. Both are equally essential, and so should be accorded by the model the appropriate surplus that would be earned by entities providing such necessary contributions. This, however, does not mean that the total "payoff" that SR and MW licensors receive would be identical, because the total payoff is a combination of the Shapley value and also a "reimbursement" of appropriate costs, which is taken out of the coalition revenues prior to dividing the surplus. [redacted]

(COF-227)

COL-261. The ratios of fair relative valuation as between SR and MW owners that were reached by the experts through the Shapley Analysis were uniformly within the range of reasonable ratios determined by Dr. Eisenach, and were generally even below the midpoint ratios seen by the most comparable benchmarks. This indicates that, if any departure were to occur from marketplace benchmark rates based on SR royalties as a result of concerns about fair outcomes, it should be towards an *increase* from the royalties determined by the marketplace SR benchmark.

COL-262. As discussed above, Dr. Eisenach's benchmarking analysis resulted in a range of ratios of rates paid for SRs compared to rates paid for MW, of between [redacted] and [redacted].

(*See* COF-241) He determined that for the most comparable and reliable of the benchmarks, the YouTube agreements, the relative value ratio lay between [redacted] and [redacted]. (Tr. 4621:19-25 ((Eisenach)) Notably, as discussed below, the midpoint of the YouTube benchmark ratio – [redacted] – is nearly *identical* to the ratio of relative value of SR and MW royalties determined by Dr. Marx in her Shapley Analysis.

COL-263. Dr. Gans, Dr. Watt, and Dr. Marx each used the Shapley Analysis to show relative allocations of surplus as between sound recordings and musical works in the interactive streaming market. The ratios of SR payments to MW payments that result from their respective analyses corroborate the ratios from Dr. Eisenach's benchmarking analysis.

COL-264. Dr. Gans in his direct testimony uses a Shapley Analysis to determine the ratio of sound recording royalties to musical works royalties that would prevail in an unconstrained market. (COF-226) According to his "top down" analysis, the Shapley value-based ratio of sound recording to musical works royalties is [redacted]. (COF-229) When Dr. Gans applies his [redacted] ratio to the actual SR royalties as evaluated by Dr. Eisenach, he obtains a corresponding fair mechanical royalty rate of [redacted] per-play and [redacted] per user, a [redacted], thus indicating that the COR is quite reasonable by comparison to the Shapley results.[41]

COL-265. Dr. Marx conducts two different Shapley Analyses. Under her "alternative" analysis, she models two entities in the upstream market: a SR owner and a MW owner, and concludes that MW owners' total royalty income is [redacted] of upstream

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[41] As Dr. Gans noted at the hearing, the COR is consistent with the Policy Factors "in a conservative way," and that the reasonable fairness complaint as to the COR would come from rightsholders, who would still be getting less than the fair royalties that the Shapley Analysis calculates. (Tr. 4162:25-4163:16 (Gans))

revenue and SR owners' total royalty income is [redacted] of upstream revenue, implying a ratio of [redacted].[42] (COF-233) The ratio that Dr. Marx derives through her Shapley Analysis [redacted].

COL-266. Dr. Watt responds to Dr. Marx's model to address its methodological problems, and as part of his evaluation performs an independent Shapley Analysis. As he was responding to Dr. Marx's model, he stayed with her use of share-of-revenue metrics – but all the experts agreed that the Shapley Analysis does not speak to the rate structure, and fair shares from a Shapley Analysis could be delivered by any viable structure. (Tr. 1917:15-17 (Marx) ("I think of [my Shapley value analysis] as not being informative one way or the other about structure.") (Watt WRT at Appendix 3 Introduction (last page) (HX-3034) ("It should not be assumed that by presenting this Shapley model I in any way endorse revenue sharing as an appropriate form of compensation for copyright holders. The analysis here presented is only in response to my task of responding to and correcting the Shapley analysis provided by Dr. Marx… Once the sharing rule is established via the Shapley values of each player, one can then consider any one of a number of different options for operationalizing the sharing rule.")

COL-267. Dr. Watt concludes that a *conservative* estimate of the fair and reasonable royalty payment from downstream interactive streaming firms to upstream copyright holders from the Shapley Analysis would amount to approximately 67% of downstream revenue. Noting

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[42] Dr. Marx simulates nine different scenarios in her alternative Shapley Analysis that show a range of relative values of SR-to-MW royalties of between [redacted], with an average ratio of [redacted]. (Marx WDT, ¶ 201, Figure 33, page B-8 (HX-10695))

that SR and MW owners each have veto rights over the business and thus will receive equal net surplus, and then factoring in each side's respective non-content costs, he concludes that 43.5% of royalty payments should be paid to MW owners, which equates to approximately 29.1% "of total downstream revenue should be paid as royalties to the copyright holders in musical works." (Watt WRT at ¶ 35; HX-3034) Dr. Watt's analysis implies a SR-to-MW royalty ratio of 1.29:1, which if applied to actual SR royalty rates [redacted]. (COF-234) (As discussed below, Dr. Watt further analyzes how the SR-to-MW ratio changes in the presence of a statutory rate for the MW input that is below fair market value.)

COL-268. Dr. Gans also independently corrects for errors in Dr. Marx's model and demonstrates that, with the appropriate corrections, Dr. Marx's model implies a SR-to-MW royalty ratio of [redacted]. (COF-761) This [redacted].

3. Shapley Analysis Controls For Abuse Of Market Power While Maintaining The Value Of Essentiality That Is At The Heart Of Fair Market Outcomes

COL-269. While the Shapley Analysis recognizes that SR rights and MW rights are each an essential input and therefore accords them the appropriate surplus reflecting their necessity, it also removes the possibility of abuse of that market power, which is why it is seen as so apt for determining outcomes through a lens of "fairness." As Dr. Watt explained during the hearing, it does this by eliminating the possibility that a party in control of either of these essential inputs could choose to act as a hold out, because under the Shapley Analysis, each party arrives randomly to the coalition.

COL-270. However, controlling for the *abuse* of market power by players must not be confused with tampering with the market power of players that relates to whether they are

making valuable and essential contributions. In discussing why Cournot complementarity would not amount to an abuse of market power, Dr. Watt testified:

> [I]f a good is necessary, if it's an essential input, and another is another, a second essential input, well, that's a reflection on the reality of -- of the world. And that -- those two essential inputs need to be -- need to be valued.
>
> So when would it be an abuse of market power? Well, if -- if the fact that you have an essential input, in an unregulated environment, the fact that you have an essential input implies that, you know, time after time in every bargaining negotiation that happens, you can hold out. You can always be the last person at the table, and nobody gets anything until you sign.
>
> If that always happens, then there's -- there is an argument there for abuse. There would be argument for abuse if I have an essential input and I only -- I only decide to negotiate with some of -- of the potential users of their input, not all . . . So how does [the Shapley model] remove this abuse of market power? Simply by making sure that each of the players arrives randomly, they have no choice that at every single instance of bargaining, they always arrive last, for example, or that at every instance of bargaining, they eliminate some of the potential users. All of the players are introduced into the model, all of them in each of the – in each of the positional orderings of -- that create this -- this good that's going to be shared. And so there's no way that that model allows an abuse of – of market power.

(COF-217) Tr. 761 (Watt); *see also* Tr. 3149:3-24 (Watt) (distinguishing between the existence of monopoly power and the abuse of that power, *e.g.*, through a holdup scenario or strategic collaboration with other input suppliers).

COL-271. An appropriate Shapley Analysis does not attempt to alter the legitimate market power that parties enjoy in the real world from the necessity of their products or services. As Dr. Watt explains, Spotify's expert Dr. Marx "cut[s] the heart and soul out of the model" in her Shapley Analysis when she removes the market power that SR and MW rights holders have by virtue of their being essential inputs to coalitions:

> Q. . . . If you were to, say, use the word "correct" or "modify" a Shapley analysis to adjust the market power of the participants, would you still call it a Shapley analysis?
>
> A. If you do that, you're cutting the heart and soul out of the model. And, you know, Professor Shapley would cringe in his grave and clutch his Nobel medal

> closer to his chest. It would no longer be validly a Shapley model per se because the Shapley model, as we have, you know, on several occasions tried to, you know, make it clear, it's there and it's in place to measure the necessity and the market power.
>
> Indeed, if you look at -- you know, maybe I don't know if it's -- how relevant it is, but the Shapley model is used in a companion paper to the original one to measure market power in voting markets, but it's there to say, well, how much market power do you have? Well, run a Shapley on it and see how much market power each individual has.
>
> The Shapley is measuring that. It's there for that purpose.

(COF-216; Tr. 3073:4-3074:4 (Watt))

COL-272. In contrast to this principle, Dr. Marx improperly adjusts her Shapley Analysis to modify the actual necessity and market power of the participants, modeling only a single interactive streaming service player, when the evidence in the record is overwhelming that the Services compete against each other and have a very high level of substitutability. (HX-755; COF-755, COF-757)

COL-273. As Dr. Watt's testimony explains, it was utterly improper for Dr. Marx to model the interactive services as having more essentiality than they actually do. This is not a minor tweak, but removes the heart of Lloyd Shapley's analysis. The entire point of the Shapley Analysis – *the reason it works to capture fairness* – is that it assesses a party's *contribution* as its necessity. Any other method of assessing "contribution" would be hopelessly subjective, and Shapley is able to create a model that works to avoid subjectivity by evaluating contribution as how *necessary* a player is (controlling for abuse of position). Consistent with this, Dr. Gans opined that, "Shapley values are meant to incorporate market power asymmetries, and the allocations that result from those asymmetries are one of the central ingredients in the fair result according to Shapley." (Gans WRT at ¶ 31 (HX-3035)

COL-274. Dr. Marx was questioned about her modification of the model, and she confirmed that it would be improper to adjust the model to eliminate the types of efficiencies that come from aggregation of interests, as with the label or publisher entities. However, she inexplicably allowed for an adjustment to her model to grant each service an entirely false necessity. [redacted] (Tr. 1864:2-5 (Marx)). But Dr. Marx's adjustment was to make each service *more essential than they are in reality* to each coalition – to give each service a necessity to each coalition that simply does not exist. She does this by modeling only a single interactive service, thereby removing the near-complete substitutability of interactive services. She is thus saying that a party who is more essential than another has "asymmetric market power." *But if you remove this, then there is no Shapley Analysis to undertake*. Every entity would have the precise same Shapley Value. Shapley Analysis is based on "abstract games" which are "played by roles - such as 'dealer,' or 'visiting team' – rather than by players external to the game." (HX-1598 at 9 (which reflects the page number 32 from the original printing)) If the "asymmetries" of the roles are removed, then everyone has basically the same role, and the model informs nothing. The first axiom of the Shapley Analysis is the "symmetry" axiom. To be clear, the symmetry axiom does *not* imply that all players have symmetric necessity, but rather that a player's Shapley value will flow from their role in the abstract game – in other words, *from their necessity*. (*Id.* at 10) Dr. Marx's "market power" modifications are not consistent with the Shapley Analysis, including such analysis's determination of fair outcomes.

COL-275. To be clear, Dr. Marx *admits* that she is modifying the necessity of the players, but tries to turn the bug into a feature by incorrectly stating that this is somehow consistent with Shapley Analysis:

(Tr. 1866:21-1867:21 (Marx))

COL-276. As Dr. Watt's quote above explains, a Shapley Analysis cannot "[redacted] the necessity of the players. In the Shapley Analysis, relative contribution is reflected in necessity which is reflected in market power, and fairness is reflected in the allocation of surplus that respects this market power.

4. <u>Shapley Analyses By Dr. Watt And Dr. Gans Further Show How The Current Mechanical Rate Is Undervalued By Comparison To Estimated Fair Compensation</u>

COL-277. As noted above, Dr. Gans' top-down Shapley Analysis indicates fair mechanical royalty rates of [redacted] per-play and [redacted] per user – well above the COR. Drs. Gans and Watt also evaluate the methodological problems with Dr. Marx's analysis, which confirmed the relative value of SR and MW rights, but also offered a counterintuitive estimate of

total content royalties (▇▇▇) that is well below what the Labels alone bargain for from the Services in the free market. Dr. Marx's Shapley Analysis suffers from a number of methodological flaws, such as the use of outdated and thus non-representative financial data, failure to use revenue and cost projections, and the assumption of a single representative streaming service, thereby artificially increasing the necessity (and thus the allocated surplus) of the services. These flaws bias her results in favor of the Services and are discussed at length in the testimony of Drs. Watt and Gans. (*See* COF 742-44, 745-747, 749-755, 757, 758)

COL-278. The independently corrected models by Drs. Watt and Gans indicate fair MW royalties that are *multiples* of the current rates. Dr. Watt (using Dr. Marx's share-of revenue metric for purposes of comparison with her conclusions) arrives at MW royalties equivalent to 29.1% of service revenues.[43] Dr. Gans independently arrives at an estimate of MW royalties equivalent to ▇▇▇▇ of service revenues, which he translates using actual SR royalty data into a mechanical royalty rate that is equivalent to ▇▇▇▇▇▇▇▇▇▇▇▇▇ (Gans WRT Table 4 (HX-3035))

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[43] Furthermore, the sharable revenues that would be divided up in these Shapley Analyses should not be confused with the definitions of "service revenue" in the current rate terms and also in the Services' proposed rates and terms, or for accounting metrics which may not capture all capture all of the value attributable to the interactive streaming activities. As Dr. Watt explained: "When revenue is displaced from one business activity, for example interactive streaming, to another, for example hardware sales, or when revenue is deferred from the present to the future by means of perhaps undercharging current customers in order to lock them into higher fees in the future or to increase the market valuation of the company, then the revenue that is ascribed to interactive streaming and therefore used to populate the model, is an incorrect measure of value. The Shapley model requires that all profits be accounted for, no matter what accounting treatment they are given – the Shapley pool of revenue must take into account all revenues, even those diverted away from the streaming plan. In situations in which revenues and profits are deferred or displaced, a Shapley analysis breaks down, and will not deliver a fair and reasonable sharing rule. Dr. Marx has not taken this very important issue into account at all in the model in her report, in spite of the fact that it is clearly occurring in the interactive streaming market." (Watt WRT ¶ 54 (HX-3034))

COL-279. Notably, the total content royalties output by Drs. Watt and Gans' models are consistent with the actual total royalties that are paid in the market (as discussed below, the difference between their models and the actual *relative* royalties for SR and MW is explained by the effect of the underpriced statutory rate). Dr. Marx's model is far from consistent with actual results, and she was entirely unable to explain why her results were so inconsistent with reality (and her vague and unsupported statements about "market power" do not amount to any explanation). Rather, she tried to argue that Shapley Analysis results should *not* be consistent with market results. But this is not an accurate reflection of Shapley Analysis principles. As Dr. Watt explained:

> Dr. Marx declines to address the glaring inconsistency of her model with real world results. The Shapley model is a game theory model that is ultimately designed to model the outcome in a hypothetical "fair" market environment. It is closely aligned to bargaining models, when all bargainers are on an equal footing in the process. A Shapley result that is far out of alignment with market benchmarks requires explanation.

(Watt WRT ¶ 23 (HX-3034); also Gans WRT ¶ 28 (HX-3035))

COL-280. The likely reason that Dr. Marx's model diverges from market results is found in the modelling problems that are evaluated by both Drs. Gans and Watt. These departures from proper Shapley Analysis systematically bias her results in favor of the Services to a dramatic degree. And again, Dr. Marx admits that she modifies the Shapley model to suit her purposes, but offers no economic literature or precedent for abandoning the traditional Shapley Analysis derived by the Nobel Laureate to use her own, new cooperative game theory model in which the actual market contributions of players are ignored in service of an undefined and uneconomic concept of "fairness" that is not connected to a "fair market." (Tr. 1866:21-1867:21 (Marx))

5. Analyzing the Interplay of Regulations and Royalties For SRs and MWs Shows That The Current Mechanical Rate Is Undervalued, And A Rise In Mechanical Royalties From Current Rates To Fair Rates May Normalize And Lower The SR:MW Ratio

COL-281. Dr. Gans and Dr. Watt both observe that the results of their Shapley Analyses suggest that [redacted]. Dr. Gans compares historical rates of Label and publisher royalties paid by interactive services and finds that the ratio [redacted], which, he explains, provides evidence that [redacted]. COF-231)

COL-282. Dr. Watt reaches a similar conclusion to Dr. Gans. Recognizing that his Shapley Analysis predicts a lower fraction of revenues for SR royalties than what occurs in the market, he explores bargaining theory, and explains that "the answer is simple": statutory rates for mechanical royalties are significantly below the fair rate that his Shapley Analysis predicts, and SR owners, who (unlike MW owners) are able to set their royalty rates through bargaining with streaming service and who are the only remaining essential input, should be expected to obtain most of the available surplus. (COF-235)

COL-283. Dr. Eisenach's analysis of SR and MW royalties under different regulatory schemes provides additional evidence of the undervaluing of the MW royalties in the current statutory rate. As discussed above, [redacted]

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COL-284. Moreover, the COs' experts have shown that SR owners capture much of the surplus that would otherwise be available to MW owners but for the below-market statutory rate for mechanical royalties. Using a bargaining model, Dr. Watt shows (COF-235; Watt WRT Appendix 3 at 12 (HX-2619)) Importantly, as Dr. Gans demonstrates, this see-saw effect – one royalty rate increasing as another decreases – can move in both directions. Dr. Gans shows that when Dr. Marx's Shapley analysis is corrected for her many methodological errors, the removal of the compulsory license can be expected to result in an increase in MW royalties and a decrease in SR royalties. (COF-763)

The Services' experts also recognize the see-saw effect between MW and SR royalty rates and acknowledge that if MW rates were to increase, SR would likely fall. Dr. Katz

(COF-237; Tr. 4941:7-21 (Katz)) Dr. Ghose likewise testified that an increase in publisher profits from interactive streaming would be expected to correspond with a decrease in Label profits, explaining,

[redacted]

(COF-237; Tr. 025704:13-5705:12 (Ghose))

COL-286. Importantly, this interplay does not in any way counsel for lower mechanical royalty rates than indicated by direct benchmarking from the current SR rates. Dr. Gans shows in detail how the interplay works, and the resulting royalty rates from removing the depression of the musical works rate. (Gans WRT ¶ ¶ 75-84 (HX-3035)) Indeed, Dr. Gans' initial top-down Shapley Analysis used the current SR rate as a benchmark and calculated the MW rate using Shapley principles, while his second, bottom-up Shapley Analysis put both rights into the model and allowed them both to be adjusted – and the second Shapley Analysis outputted a *lower* fair SR royalty rate but a *higher* fair mechanical royalty rate. This is to be expected. The interplay being observed is that, when MW royalties are held below fair market value, SR royalties will rise. The effect is of a *see-saw*, and the interplay does not tolerate modeling that brings *both* royalties down together. The reason the SR rate would be higher under this dynamic is *at the expense* of an underpriced MW rate. So if one were to "readjust" the SR rate downwards, to "remove" any capture of royalties due to an underpriced MW rate, then the model must *add* what was captured back to the MW rate. Anything else would amount to simply confiscating more fair market royalties from both sets of copyright owners and giving them to services.

G. **There Are No Grounds for a Downwards Adjustment Of The COR Under The Fourth Factor, Which Addresses the Viability Of The Industry, Does Not Ensure Profits, And Does Not Insure the Survival Of Any Particular Service Or Offering**

1. Precedent Makes Clear That The Fourth Factor Is Not A Tool To Be Used To Decouple Royalties From Usage Or To Subsidize Services That Cannot Afford The Same Royalties As Others

COL-287. As the Librarian of Congress has held, "[t]he law requires the Panel, and ultimately the Librarian, to set a reasonable rate that minimizes the disruptive impact on the industry. It does not require that the rate insure the survival of every company." *CARP PSS 1998 Proceedings*, 63 FR at 25408 (citation omitted). The Copyright Royalty Tribunal likewise stated:

> We conclude that while the Tribunal must seek to minimize disruptive impacts, **in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever**. The fact that an increase in the rate will increase costs is not per se an argument against raising the rate. There have been benefits to others from cost and price increases in the past without any benefit to the copyright owner.

1981 Phonorecords, 46 FR at 10486 (emphasis added). This sentiment was stated emphatically by the Judges in *Web II*:

> It must be emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, **the normal free market processes typically weed out those entities that have poor business models or are inefficient. To allow inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners**.

Web II, 72 FR at 24088 n.8 (emphasis added).

COL-288. Moreover, the Judges have made clear that "disruption" under the Fourth factor does not encompass anything that one might use the plain English word to mean, but rather:

> [a]s the Judges indicated in the SDARS proceeding, ''disruption'' typically refers to an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the industry participants to adequately adapt to the changed circumstances and, as a consequence, such adverse impacts threaten the viability of the music delivery currently offered under the license in question.

Phonorecords I, 74 FR at 4516.

COL-289. The Judges and their predecessors have consistently found that a mere increase in costs to services (whether passed on to their end users or not), without more, is not disruption. In the *1981 Phonorecords* proceeding, the Tribunal found that a benchmarked rate that was more than 45% higher than the then-current statutory rate would not be disruptive to the record industry because, at that time, the record industry's profits were higher than they had been in years past and the Tribunal expected the record industry could either absorb the cost increase or pass on the costs. *Id.*, 46 FR at 10481. In *Phonorecords I*, the Judges declined to decrease rates, rejecting the RIAA's "list of horribles allegedly attributable to the current mechanical rates" on the grounds that the RIAA had not demonstrated that the existing rates caused those "horribles" or that lowering the rates would "alleviate all the claimed record industry adversity in any substantial way . . ." *Phonorecords I*, 74 FR at 4525.

COL-290. Although in *SDARS I*, the Judges concluded that the fourth factor weighed in favor of a downward adjustment from the "upper boundary most strongly indicated by marketplace data" based on evidence that the industry was still in its infancy, they stated that "over the passage of time the potential for disruption . . . gradually diminishes as indicated by various forecasts showing consistent subscriber and revenue growth." *SDARS I*, 73 FR at 4097-98 (internal citation omitted). By the time of the *SDARS II* proceeding, SiriusXM had become profitable and its subscriber base had increased, and so, in the *SDARS II* decision, the Judges determined that application of the fourth factor did not merit a decrease in rates. *SDARS II*, 78 FR at 23070-71.

COL-291. The standard considers disruption to copyright *owners* as well as copyright users, and in a number of proceedings, the Judges have considered whether a downward adjustment might have a disruptive effect on copyright owners, in addition to considering whether an upward adjustment would be disruptive to copyright users. *See Phonorecords I*, 74 FR at 4525; *SDARS II*, 78 FR at 23060-61.

COL-292. The question of the disruptive effect was also addressed by the Judges in Phonorecords I:

> Furthermore, we find that the RIAA's contentions with respect to the disruptive impact of the current rates have little merit. RIAA's list of horribles allegedly attributable to the current mechanical rates is not supported by any substantial evidence of cause-and-effect. Even the RIAA admits that "high mechanical royalty rates did not cause all of these problems." [citation omitted] Further, the RIAA's proffered evidence fails to persuade us that reducing this one particular cost will alleviate all the claimed record industry adversity in any substantial way and fails to adequately weigh other cost-based or demand-based alternative explanations for the alleged adversity. Similarly, DiMA's claims related to lowering the bar for new market entrants are not adequately supported by evidence to indicate the degree to which the overall cost structure and pricing capabilities of such new entrants differ from existing market participants such as Apple iTunes. Thus, we find that RIAA and DiMA have failed to show that the current mechanical rates have caused and are anticipated to continue to cause an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the parties impacted by the rate to adequately adapt to the changed circumstances produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music currently offered to consumers under this license.

Phonorecords I, 74 FR at 4525 (emphasis added). Given the disparity between the mechanical rate, both as it exists and as sought by the Copyright Owners, and [redacted], any claim by the Services that *"high mechanical royalty rates"* would or could cause any of the *"problems"* hypothesized by the Services is not credible.

2. The Obligation To Prove Disruption To Their Industry Lies With The Services, An Obligation That They Have Entirely Failed To Meet

COL-293. As the above quote from Phonorecords I indicates, while there are no regulations setting out burdens of proof in this rate proceeding, precedent makes clear that the Judges look to participants to provide evidence supporting positions both affirmatively and defensively with respect to proposed rates and terms. Participants are expected to put forth evidence that supports the rates and terms that they have proposed. Likewise, with respect to the Fourth Factor, participants that seek to have marketplace rates adjusted downwards by claiming potential disruption to their industry (that outweighs the other Factors and the reasonableness of marketplace benchmarks that underlie the proposed rate at issue) are expected to provide evidence proving such disruptive impact. *See, e.g., id.* ("we find that RIAA and DiMA have failed to show [disruption to their industries]"); *1980 Jukeboxes*, 46 FR at 889 ("We cannot on the basis of the evidence presented by the jukebox industry find that our schedule will have a disruptive impact on the structure of the jukebox industry or disturb generally prevailing industry practices.") (emphasis added).

COL-294. The burden is thus effectively on the party claiming disruption to its industry to prove such disruption in order to obtain an adjustment to market rates or terms. The Services have entirely failed to meet such burden in this proceeding.

3. The COR Is Consistent With Historical Rates And Would Result In Minimal Changes For Some Services, And Larger Percentage Changes For Some Services Only Highlights The Inequity In The Current Rate Structure And The Decoupled Rates That Have Arisen Thereunder

COL-295. As Dr. Rysman demonstrated, the Copyright Owners' proposed rate is consistent with historical rates. [redacted]. (COF-

764; COF-765; COF-766; Rysman WDT ¶¶ 62-65 & Fig. 7 & Table 1 (HX-3026)) Over the same period of time, the market grew substantially in the number of subscribers and streaming services, demonstrating that the interactive streaming market can function well at the Copyright Owners' proposed rate. (COF-341; COF-323)[44] The Copyright Owners' proposed per-user rate of $1.06 is also consistent with [redacted]. (COF-767; Rysman WDT ¶ 66 (HX-3026)) [redacted]. (*Id.*) [redacted]. (*Id.*) Dr. Hubbard confirmed that there has been explosive growth in streaming activity since 2015 and that, given the pattern he has observed, he expects that the number of streams or the average number of streams to continue to increase in over the next years. (Tr.5992:18-5993:15 (Hubbard)) (COF-768)

COL-296. Dr. Marx's own calculations support Dr. Rysman's conclusions. [redacted] (*See* Marx WRT ¶¶ 119-123, Figs. 15 & 16 (HX-1069)) [redacted]

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[44] The Copyright Owners' proposed $0.0015 per play rate is also consistent with [redacted] (Kokakis WRT ¶¶ 4-13 (HX-3031); HX-1074; HX-1075; HX-1076).

(*Id.* at Figure 16 (HX-1069))

(*Id.*)

. (Tr. 5972:11-5973:21 (Hubbard)) (COF-28)

COL-297. Dr. Marx's calculations in her rebuttal report also underscore the inequities of the current statutory rate structure,

(*See* Marx WRT Fig. 4 (HX-1069))

(*See* Marx WRT Fig. 3 (HX-1069))

(*See* Marx WRT Figure 4, ¶ 40 (HX-1069))

4. The Interactive Streaming Market is Thriving, and Competition, Not Mechanical Royalty Rates, Will Determine Service Viability

COL-298. The interactive streaming market is thriving. The number of streaming music subscribers worldwide recently passed the 100 million mark. (COF-323) Within the United States, the number of paying subscribers more than doubled between the first half of 2014 and the first half of 2016. (*Id.*) Many companies have entered the market and many new services have been launched in the past five years, including Google Play's interactive streaming

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[45] (Tr. 4303:4-23 (Rysman); Tr. 5638:18-5639:23 (Marx)). (*See e.g.*, Marx WRT ¶ 22 (HX-1069)). (COF-371).

service, Amazon's interactive streaming service for its Prime program, Tidal, Apple Music, Soundcloud (Go), Deezer, and Amazon (Unlimited). (COF-341) Major telecommunication companies, including AT&T, Verizon, Sprint, Orange, and Cricket have also gotten involved in the market. (Timmins WRT ¶ 24 (HX-3036)) Substantial financial investments in the industry also signal its robustness. In recent years, publicly available information alone shows that more than $2 billion has been invested in the most visible companies in this industry. Such investments include Deezer's $200 million equity offering, Twitter's $70 million investment in SoundCloud in June 2016, and Spotify's EUR 1.7 billion offering. (COF-324)

COL-299. The impact of this influx of capital and companies – some of which constitute the largest and most-well funded companies in the world – dwarfs any effects of an increased mechanical royalty rate. Diversified industry giants Amazon, Apple, and Google that have massive war chests and many alternative revenue sources have shown a willingness to use interactive streaming as a loss leader for their broader business goals – [redacted]. (COF-317)[46] Two music streaming platforms that have over 150 million subscribers combined – Pandora and iHeart Radio – have also just entered the market. (COF-342)

COL-300. Some of the companies in the interactive streaming market are striving for near total dominance. Spotify, with 50 million subscribers worldwide, already has the largest

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[46] [redacted] As the COs' expert Jim Timmins notes, Google has been developing self-driving cars since 2009 without having received any material revenue from that project to date; it likewise paid $1.65 billion more than ten years ago to acquire YouTube, a company that, according to YouTube's CEO, is "still in investment mode." (COF-326).

user base (at least within the U.S.) of any interactive streaming service. [redacted] (COF-383) [redacted] (*Id.*) [redacted]

COL-301. To assist in this fight against competitors for market share, several of the Services have already slashed prices and offered discounts that have a far greater impact on the Services revenues than the mechanical rate increase that the Copyright Owners seek in this Proceeding. For example, [redacted] It offers a discount equivalent to $3.42 per user per month on its portable service (without factoring in family plan and student discounts). [redacted]. (COF-377) Amazon also [redacted]. (COF-477) Of course, Amazon also gives away Prime Music for free to Amazon Prime users – a discount of 100%.

COL-302. Amazon and other Services also offer "student plan" discounts of 50% ($5 per user per month off of the "industry-standard" price) as well as deeply discounted "family plans." (*E.g.*, COF-380; COF-525; COF-638) These discounts are also a product of competition among the Services. [redacted] (Tr. 2068:5-10 (McCarthy)) The impact of the 50% student discount is [redacted] greater than the estimated average increase in the per-user per-month mechanical royalty increase.[47] And these discounts do not include other discounts proposed by Amazon (*e.g.*, an annual plan discount of 16 2/3%). (HX-638; Tr. 1320:9-22, 1321:5-1326:1, 1448:9-1448:22, 1452:1-7 (Mirchandani))

COL-303. Not all companies will survive in this competitive environment. Some will inevitably fail. According to the Copyright Owners' expert Jim Timmins [redacted], the market will see some consolidation. (HX-564; HX-799 at SPOTCRB0001534, 0001540; Timmins WRT ¶¶ 82-83 (HX-3036)) But the failure of some companies will not be the result of increased mechanical royalty rates, which represent only one cost input for interactive streaming services and are of relatively minimal importance for such services compared to the impact of competition. And as previously noted by the Librarian:

> The law requires the Panel, and ultimately the Librarian, to set a reasonable rate that minimizes the disruptive impact on the industry. *It does not require that the rate insure the survival of every company*.

CARP PSS 1998, 63 FR at 25408 (emphasis added; citation omitted).

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[47] [redacted] (COF-493). As with student discounts of 50%, the impact of the [redacted] discount is [redacted] greater than the estimated average increase from the COR (based on the industry-standard $9.99 price point).

5. Service Viability Is Not Driven By Mechanical Royalty Rates, And There Is No Evidence That Any Individual Service Will Become Unviable Due To The COR, Let Alone The Entire, Thriving Industry

COL-304. There is no evidence in the record that the mechanical royalty rate has ever been – or that the COR will be – a material factor in industry viability, or even the viability of any individual service. The Services have not produced or offered into evidence a single business analysis of the impact of mechanical royalties on service viability (including any analysis of a "break point" or "shut down" point), even though such analyses were requested in discovery. In fact, [redacted] (Tr. 221:24-223:21 (Levine); Tr. 1792:8-12 (Page)) As Spotify's CFO testified:

[redacted]

(Tr. 2153:12-22 (McCarthy))

COL-305. There is no evidence in the record that the mechanical royalty rate has ever been – or that the COR will be – a material factor in industry viability, or even the viability of any individual service. The Services have not produced or offered into evidence a single business analysis of the impact of mechanical royalties on service viability (including any analysis of a "break point" or "shut down" point), even though such analyses were requested in discovery. In fact, [redacted]

(Tr. 221:24-223:21 (Levine); Tr. 1792:8-12 (Page))

COL-306. The fact that none of these resource and data rich companies have done any such analysis of the impact of an increase in mechanical royalties or of any "shut down" point demonstrates the lack of significance that mechanical royalties rates have for the Services' business decisions. . (*See* Tr. 222:22-223:5 (Levine))[48]

COL-307. Nor is there any evidence that the mechanical royalty rate has ever been – or that the Copyright Owners' proposed rate, if adopted, will be – a material factor on service pricing. The Services have not produced or offered into evidence a single business analysis of the impact of mechanical royalties on service pricing. Indeed, (COF-111)

[48] The closest that any Service comes to such an "analysis" is that utterly disproves the Services' disruption argument. It states that (CO317; HX-3212 at GOOG-PHONOIII-00005592-00005593).

(COF-382; Tr. 224:1-225:15 (Levine))

(COF-110)

COL-308. The standard for showing disruption requires proving an impact that threatens the viability of the industry because the impact is "substantial, immediate and irreversible in the short-run" because there is "insufficient time for the parties impacted by the rate to adequately adapt to the changed circumstances." The Services have failed to present <u>any analysis at all concerning their available responses</u> to the adoption of the Copyright Owners' rate proposal, or to any other increase in the statutory mechanical rate, although numerous responses are available. Rather, the evidence from the Services' own experts is that they have at their disposal sophisticated business techniques for determining appropriate pricing to deal with changes in costs. As Dr. Ghose testified, streaming service providers can use pricing innovations based on tiered pricing, menu-based contracts, and quantity discounts, where they can offer multiple levels of pricing consistent with usage. (Tr. 2865:25-2867:10 (Ghose)) A fixed per-play rate, coupled with the fact that these data-driven companies know the frequency of plays on their services and can predict demand, also gives subscription services the ability to price properly, and ad-supported services the ability to insert (and price) ads at the appropriate frequency. (Tr. 2877:8-2879:20; 2881:23-2882:7 (Ghose)) That said, while changing the price

to consumers is one way in which a service might respond to a rate increase, there is no evidence, as discussed above, that the mechanical royalty rate has ever been – or that the Copyright Owners' proposed rate, if adopted, will be – a material factor on service pricing, and the Services have not produced or offered into evidence a single business analysis of the impact of mechanical royalties on service pricing that shows any impact from a mechanical rate like the COR.

6. Services Have Many Effective Options For Responding To Any Increase In Mechanical Royalty Rates From The COR

COL-309. The Services have many options at their disposal for responding to an increase mechanical royalty rate. For one, they can always raise their prices. As Dr. Rysman showed, standard subscription services need only increase their pricing by [redacted] per user on average from the current $9.99 in order to absorb the mechanical royalty increase proposed by the Copyright Owners. (COF-358) Such an increase would hardly cause any disruption. Spotify has already marked up the price of its subscription service by $3.00 to users who purchase the app through Apple's iTunes store, and by over $1.00 in New Zealand to cover a new government tax. (Marx WDT ¶ 78 n.99 (HX-1065); Gans WRT ¶ 73 n.68 (HX-3035); HX-2666) Services could also of course cut their other costs by [redacted] per user on average; such cost cuts could come from SR royalties, which represent [redacted] of music royalties paid by the services, are freely negotiated, and, as discussed above, can be expected to decrease in response to a MW royalty increase.

COL-310. Interactive services like Spotify and Pandora that, compared to their more diversified competitors, focus more substantially on their music streaming businesses and so pay relatively higher royalties as a percentage of overall revenue, are already pursuing strategies that mitigate the impact of any royalty rate increases. One such strategy is, unsurprisingly, to

diversify their revenue streams. Both Spotify and Pandora earn revenue from ticket sales. (COF-506; COF-531; COF-391) Pandora leverages the user data that it collects on its streaming platforms in aid of its ticket sales business, and Spotify may well be doing the same. (*See* COF-391) [redacted] (COF-516; COF-519) Many internal Spotify documents also reveal that [redacted]. (COF-510, COF-511, COF-512, COF-515, COF-513, COF-357) [redacted], having recently unveiled a bundle with the New York Times digital newspaper. (COF-509) Dr. Eisenach discusses at length the opportunities that services have to grow and increase profitability of their actual streaming services lines (if they wanted to), including the massive opportunities from the collection of user data and programmatic advertising. (Eisenach WRT ¶¶ 91-97 (HX-3033))

COL-311. Spotify also [redacted]. On its Ad Tier, [redacted] (COF-392) [redacted] (COF-329)

COL-312. Spotify is also pursuing lower margins through [redacted]

[redacted]:

[redacted]

[redacted]

[redacted]

(COF-396; Tr. 2095:1-15 (McCarthy))[49]

COL-313. Amazon, Apple, and Google already have diversified revenue streams that not only enable them to offset the cost increase from the COR, but which also benefit indirectly from those companies' continued involvement in the interactive streaming space. Moreover, as three of the largest companies in the world, those Services are particularly able (and often quite willing) to absorb costs should they choose not to innovate on prices or make any other adjustments. As the COs' expert Jim Timmins shows, Amazon, Apple, and Google each earn revenues of tens or hundreds of billions of dollars annually and have tens of billions of dollars in cash on hand. (COF-340) For each company, all-in MW royalty payments in recent years have been equivalent to just 0.03% or less of annual company revenues and less than 0.1% of cash on hand. (*Id.*) Measured against the total revenues and balance sheet of these conglomerates, total

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[49] [redacted]

musical royalty payments – to say nothing of the marginal increase in mechanical royalties from the COR – are immaterial.

IV. THE SERVICES' PROPOSED RATE STRUCTURES AND TERMS ARE UNREASONABLE AND WITHOUT EVIDENTIARY SUPPORT

A. Every Service Proposal Involves An "All-In" Rate Structure, Which Is Unreasonable And Seeks Rates Beyond The Scope Of This Proceeding

COL-314. Each of the Services proposes an "all-in" rate structure, *i.e.*, one that seeks to establish a combined rate for ***both*** the mechanical and performance rights implicated in interactive streaming and limited downloading. But this is a proceeding to set reasonable rates and terms for the Section 115 compulsory ***mechanical*** license to make and distribute phonorecords, ***not*** to ***perform*** works. 17 U.S.C. §§ 115; 801(b)(1). The Section 115 compulsory license explicitly applies solely to "the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of [nondramatic musical] works," not to the exclusive right provided by clause (4) to perform the work publicly. 17 U.S.C. §§ 106, 115. The public performance right provided by 17 U.S.C. § 106(4) is an entirely separate and divisible right from the mechanical right at issue in this proceeding and is not subject to the Section 115 license. 17 U.S.C. §§ 106; 115, 201(d); HX-920 at 16; 2 *Nimmer on Copyright* § 8.04[B] ("[T]he compulsory license does not convey the right to publicly perform the nondramatic musical work contained in the phonorecords made under that license. Similarly, a grant of performing rights does not, in itself, confer the right to make phonorecords of the work."). (COF-597)

COL-315. Pursuant to Section 115, the CRB is vested with the authority to determine rates and terms "for the activities specified by this section," which is solely to determine the rates

and terms for mechanical royalties. The CRB has not been vested with the authority to set rates for performance rights because they are not covered by Section 115.

COL-316. Performance rights royalty rates for interactive streaming, among other uses, are licensed (over 90 percent of the time) by the performance rights organizations ("PROs"), such as ASCAP and BMI. ASCAP and BMI are subject to federal courts sitting in the Southern District of New York, at least where consensual agreements between the PROs and licensees have not been obtained. (*See, e.g.*, COF-594; HX-920 at 20, 34, 37, 41)

COL-317. This fact was echoed by the Board less than a month ago in its decision adopting the Subpart A settlement, where the Board noted that performing rights are "governed by separate Consent Decrees that were first entered in 1941 and have been amended periodically." The New York District Court which administers the Consent Decree is commonly known as the Rate Court. Final Rule, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); Subpart A Configurations of the Mechanical License*, Docket No. 16-CRB-0003-PR, 82 FR 15297, 15298 n. 15 (March 28, 2017). "[M]usic licensing is fragmented, both by reason of the Consent Decree and the fragmentation of the statutory licensing schemes in the Act. These issues are beyond the scope of authority of the Judges; they can only be addressed by Congress." *Id.*

COL-318. This statement echoed the observation made by Chief Judge Sledge during the *Phonorecords I* hearing. While questioning one of the digital services' witness regarding a paragraph in his WRT arguing that Copyright Owners should not be paid mechanical royalties for interactive streaming because they receive public performance royalties for that activity (COF-597), Judge Sledge made clear that the CRB does not have the authority to consider what the services pay for performance (or any other) rights when determining a reasonable mechanical

royalty rate because "Congress has already created those two separate rights." (COF-597; HX-322 at 6235:21-6237:5) Judge Sledge referred to complaints by services that they need to pay both performance and mechanical rights as a "waste of time." (COF-597; HX-322 at 6237:22-6238:9; *see also id.* at 6239:13-6240:12 (criticizing service's witness for complaining about having to pay mechanical royalties, which requirement has been part of U.S. law "for a century," and reminding him that "We're not setting public performance fees" in a CRB proceeding))

COL-319. Equally important, the CRB has not been provided with the evidence necessary to make such a determination, which would, among other things, require the consideration of evidence showing the rates and terms in existing performance licenses; the duration of such licenses; benchmarks for performance rights licenses; and the impact of interactive streaming on other sources of performance income, including non-interactive streaming, terrestrial radio and satellite radio income.[50] Further, the necessary parties for any such determination are not before the CRB (the PROs and/or all music publishers).

COL-320. Engaging in sophistry, the Services argue that they are not asking the Board to set performance rates but only to "set" a "mechanical" rate that permits them to deduct what they pay for performance. The assertion is transparent: in asking the CRB to fix a

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[50] That there ***is*** such an impact (albeit of unknown extent) is beyond dispute. [redacted] (Tr. 1021:4-13 (Herring)), [redacted] (COF-600; Tr. 1021:14-17 (Herring)) Mr. Herring further testified that Pandora has activated over 25 million automobile dashboard integrations in the United States, and over half of all car models sold in the U.S. in 2017 will have Pandora integrated into the dash. (COF-601; Tr. 861:21-862:3 (Herring)) [redacted] (COF-601; Tr. 1022:21-1023:12 (Herring)) [redacted] (COF-606; Zmijewski WRT, Appendix C (HX-1070); Tr. 5836:24-5837:16; 5838:13-5839:20; 5839:21-5840:20 (Zmijewski))

combined rate covering both mechanical and performance rights, the Services are effectively asking the CRB to decide nothing. If the mechanical royalty rate is some unknown penny rate (in the case of Apple) or percentage of service revenue (in the case of the other Services) that is whatever is "left over" after performance royalties deducted – the rate for which will be set by a different rate court, based on different evidence – there is no mechanical rate. None of the CRB, the Copyright Owners or the Services will have any idea what the mechanical rate actually is because it will be totally dictated by the performance rate.

COL-321. Indeed, under the Services' improper proposal, the mechanical rate could be zero (if performance royalties are agreed to or set by the Rate Courts at a rate that is greater than or equal to the "all-in" rate proposed by the Services here). A mechanical royalty rate of zero is anything but reasonable under the Section 801(b) standards. (COF-616; COF-615)

COL-322. According to the Services, it does not matter whether the mechanical royalties payable to songwriters and publishers are zero, because those rights owners are also receiving performance royalties. (*See, e.g.,* COF-593) The Services' argument is, essentially, "royalties are royalties." But this argument is precisely the argument that Judge Sledge rejected in *Phonorecords I*. It ignores that the Copyright Act creates mechanical (reproduction) and performance rights as separate rights and made only the former subject to compulsory licensing under Section 115. It ignores that the rates for the use of those two rights, to the extent not agreed, are set by different rate courts. And it ignores the disruption that would be caused by eliminating mechanical royalties – which would be the effective result if an "all-in" rate were adopted.

COL-323. The undisputed evidence establishes that mechanical royalties are the most significant source of recoupment of advances to songwriters, and songwriters receive a greater

share of mechanical royalties than they do of performance royalties (both because of the standard splits in songwriter agreements and the fact that performance income, unlike mechanical income, is diminished by PRO commissions). (COF-640) Making mechanical royalties and performance income a single all-in payment will therefore diminish payments to songwriters, and will negatively impact the publishers' ability to recoup advances, which will, in turn, negatively impact the size and number of future advances. (COF-185; COF-186; COF-187; COF-188; Kelly WDT ¶ 66 (HX-3017); Sammis WDT ¶ 27 (HX-3019); Yokum WDT ¶ 23 (HX-3021); Israelite WDT ¶ 71 (HX-3014)) This is precisely the reason why the Copyright Owners negotiated mechanical-only minima in the *Phonorecords I* settlement, which minima several of the Services now propose to eliminate even as they pretend they are simply "rolling forward" the existing rates. (COF-428)

COL-324. For these reasons, the Services' arguments concerning alleged "fragmentation" in the public performance marketplace (COF-587) are entirely irrelevant, as they do not and cannot bring performance royalties under the jurisdiction of this proceeding. The Services raise the fabricated spectre of unrestrained increases in performance rates that will theoretically occur if publishers fully withdraw from PROs, or because PROs are issuing "fractional licenses." (COF-588) But not only are such issues completely outside the purview of the CRB, the fact is that the Services invoke these issues precisely because they are outside the purview of the CRB and their falsity can therefore be obscured. (COF-597)

COL-325. Thus, the reason the services have proffered no evidence that any music publisher has withdrawn from a PRO or intends to withdraw from a PRO during the period covered by this Proceeding is because there is none. The PRO rate courts, the Second Circuit, and the Department of Justice have determined that partial withdrawals are not permitted. (COF-

589) Moreover, the publishers testified that they have no intention of fully withdrawing from the PROs and both publisher and service witnesses noted the logistical difficulties in fully withdrawing. (COF-590)

COL-326. As to the supposed new "evil" of fractional licensing, in fact, the record is replete with evidence that PROs have always licensed rights on a fractional share basis. (*See, e.g.,* COF-596; HX-327, HX-920 at 2-3 (U.S. Copyright Office referring to fractional licensing as "a longstanding practice of the music industry)) Thus, the supposed "change" that the Services point to is not a change at all.

COL-327. The Services also theorize that the creation of GMR, as a fourth PRO (in addition to SESAC) that is not subject to a consent decree, might result in higher performance royalty rates. Yet they admit that GMR represents fewer than 100 songwriters and has a market share of roughly 3% of the performance market. (COF-591) Further, they have presented no evidence of any increase in performance rates in licenses issued by GMR. In fact, [redacted] (COF-592)

B. Apple's Proposed Per-Play Rate Structure Is Unreasonable And Fails To Include A Royalty Prong That Aligns With The Access Value On Which The Interactive Streaming Models Are Based

COL-328. Apple's proposed per-stream rate structure does not serve the Factors for three reasons. *First*, as discussed above, Apple's proposal improperly seeks an "all-in" rate that includes performance royalties. As noted, the CRB has neither the jurisdiction nor the evidence to determine performance royalty rates. Any all-in proposal, including Apple's, would not establish a mechanical royalty rate but would instead set a floating mechanical rate that would be determined solely by whatever performance rate is set either by agreement or by the Rate Courts.

COL-329. *Second*, the all-in rate structure combined with Apple's unreasonably low $.00091 "all-in" rate (which does not even include a mechanical minimum or floor), could result in a service paying ***zero*** mechanical royalties for billions of plays. In fact, based on historical data, for a number of service months, Apple's rate and rate structure would have resulted in certain services paying ***absolutely nothing*** in mechanical royalties. (COF-616) Apple was careful not to mention this but a mechanical royalty rate of zero cannot be considered a "reasonable" rate under either Section 115 or Section 801(b). In fact, Dr. Ramaprasad, in her rebuttal statement, stated that a method of calculating mechanical royalties is "absurd' if it can yield a mechanical per-play royalty of zero. (COF-615; Ramaprasad WRT ¶ 52 (HX-1616)) The Copyright Owners agree.

COL-330. *Third*, while Apple proposes a per-user rate for locker services, it does not include a per-user rate for other types of interactive streaming services. There is no basis for the distinction. Apple's own witnesses admit that interactive streaming services provide value beyond the value of usage; there is economic value in having access to vast libraries of musical works. Dr. Ghose testified to the value of having "access to a large catalog of songs" to listen to without having to purchase them. (COF-621) Dr. Ramaprasad testified to the value of having access to a vast library that no single person could ever individually purchase or store on a mobile device, as well as the value of diversity in listening that is provided by the access model. (COF-53; COF-77; COF-622; Ramaprasad WRT ¶ 72 (HX-1615)) Other Services' experts and Copyright Owner witnesses agree that there is great value in access, as discussed above, and this is reflected in agreements negotiated in the free market as per-user rates are prevalent in direct deals outside of the statutory context. *Id.* Songwriters and publishers should be compensated for their contributions to creating that value through a per-user royalty.

C. The Proposed Revenue-Based Rates And Terms Are Unreasonable, Without Sound Economic Basis, And Do Not Serve The Policy Factors

1. The Current Rates and Terms Cannot Merely Be Rolled Forward

a. Rates and Terms Must Be Established *De Novo*

COL-331. The Revenue Models proposed by the Four Services (other than Apple) largely consist of asking that the current rates and terms be "rolled over" (with material reductions), on the circular logic that the current rates and terms are a "benchmark" for themselves. [redacted]. (*See* COF-637; Tr. 235:7-21 (Levine) ([redacted]); Rysman WRT ¶ 83 & Tables 1 and 2 (HX-3032))

COL-332. The current rates and terms were established by settlement agreements among the participants to the prior *Phonorecords* proceedings that were intended to be experimental. (COF-421; COF-424; COF-428) Those participants could not have been clearer that the rates contained in the 2008 and 2012 settlements of the *Phonorecords I* and *II* proceedings were not meant to be "rolled over" in a subsequent contested proceeding.

COL-333. [redacted] (COF-431; HX-6013, at Ex. B p. 16 (emphasis added)) [redacted] the CRB did adopt and include in the current regulations (under the

heading "Effect of rates") the requirement that in proceedings such as this, "the royalty rates payable for a compulsory license shall be established de novo." (COF-432; 37 C.F.R. § 385.17)

COL-334. This "de novo" provision "has an accepted meaning in the law. It means an independent determination of a controversy that accords ***no deference*** to any prior resolution of the same controversy." *United States v. Raddatz*, 447 U.S. 667, 690 (1980) (emphasis added). Indeed, "no form of . . . deference is acceptable." *Salve Regina Coll v. Russell*, 499 U.S. 225, 238 (1991). "*De novo* review . . . is independent and plenary; as the Latin term suggests, we look at the matter anew, as though the matter had come to the courts for the first time." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) (citation omitted); *see also Doe v. United States*, 821 F.2d 694, 698 (D.C. Cir. 1987) (Ginsburg, J.) ("De novo means here, as it ordinarily does, a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion. . . . Essentially then, the district court's charge was to put itself in the agency's place, to make anew the same judgment earlier made by the agency.").

COL-335. Rolling over the current rates and terms, with no evidentiary support them other than their existence in the face of the requirement that rates and terms must be determined *de novo* is not only contrary to the parties' agreement and the regulations but would chill any future settlements. As David Israelite testified, there is a strong public policy interest in encouraging settlements, and the Copyright Act itself encourages those settlements. If settlements are used in rate setting proceedings as benchmarks to perpetuate rates into the future despite express agreement that they are not to be so used, it will discourage settlements. (COF-433)

COL-336. But even assuming, for the sake of argument, that any consideration of the past settlements were appropriate, the Judges would have to be provided with evidence demonstrating how, as a matter of give and take, it was negotiated. The Judges would need to be presented with evidence regarding each and every rate and term that a proponent sought to carry forward (as well as those rates and terms the proponent sought to jettison) so that the Judges could make an independent determination as to the reasonableness of each such rate and term under Section 801(b). There is no way that some of the rates and terms can be plucked from the settlement that produced them without reference to the remaining rates and terms.

COL-337. As Chief Judge Barnett warned at the outset of the hearing in this matter:

> A word about evidence required in proceedings to set royalty rates and terms. Please be reminded that the judges have an obligation to set both rates and terms. In any proceeding, just because a regulation is in the current Code of Federal Regulations does not mean that the judges are adopting that term for the coming rate period. The judges cannot determine rates or terms without an evidentiary record. As you are all aware, rates and terms for the Section 115 phonorecords licenses were the product of settlements in the two prior phonorecords proceedings. Those rates and terms expire at the end of this calendar year. The judges cannot adopt any terms of royalty administration, unless the parties present evidence to support their proposed terms.

(Tr. 15:4-21)

COL-338. Despite the existence of the *de novo* language in both the *Phonorecords* settlements themselves and in the current regulations, despite Judge Barnett's warnings, and consistent with the Copyright Owners' predictions during opening argument, Tr. 93:17-94:3 (Copyright Owners' Opening), the Services completely failed to present ***any*** evidence as to the basis or rationale for ***any*** of the rates or terms in the current regulations. Solely by way of example, they did not offer any evidence to show how or why 10.5% of revenue became the headline rate for certain Subpart B business models, while 12% became the headline rate for other business models, and 11.35% became the headline rate for still other business models – or

why any of those percentages is a reasonable and appropriate rate for that business model. They presented no evidence as to how or why 50 cents became the mechanical-only minimum for standalone portable subscription services, while 25 cents became the mechanical-only minimum for bundled offerings, or why there should even be a difference. [redacted]. (Tr. 228:4-231:2 (Levine); Tr. 231:24-233:21 (Levine); HX-3272 (Response to Interrogatory No. 16); Tr. 5168:12-5169:18 (Leonard); 5221:6-5222:11 (Leonard, on questioning from Judge Feder[redacted]. (COF-439; Tr. 5977:5-5989:9 (Hubbard)) In fact, they failed in their testimony to even mention half of the ten different service offerings identified in the current regulations.

b. <u>The Tectonic Shift In The Streaming Market Since 2012 Confirms That The Phonorecords Settlements Cannot Be Informative As Benchmarks</u>

COL-339. A further reason why the 2008 and 2012 settlements cannot simply be rolled forward (with or without the material reductions sought by the Four Services) is that the Judges would have to consider the changes to the marketplace since the time those rates were settled. In fact, one of the reasons the rates are re-established *de novo* every five years – which represents a reduction from the prior 10-year period – is because of the concern that the digital music industry is a rapidly-changing market. (COF-630)

COL-340. While the Services have sought to pretend that nothing much has happened in the 10 years since the 2008 settlement and the 5 years since the 2012 settlement, the

reality is that there have been dramatic changes, as acknowledged at least by Amazon's expert, Dr. Hubbard. Dr. Hubbard admitted that the streaming industry has materially changed since 2008 in terms of the number of consumers, number of streams, entry by new entities, revenue growth, subscriber growth, number of companies and the identity of the companies. (COF-634; Tr. 2198:4-20 (Hubbard))

COL-341. The current statutory rate and rate structure were negotiated when the business models for delivering interactive streams and limited downloads were experimental and no one knew how they might develop. (COF-421) None of the market intelligence, information and data about the functionality of the interactive streaming market or the business models of streaming services currently available to the participants in this Proceeding was available to the parties in *Phonorecords I*. (COF-424)

COL-342. At the time of the *Phonorecords I* proceeding, downloads predominated the market, and the NMPA chose to focus its efforts on Subpart A rates for downloads without the distraction of litigating with DiMA over streaming, which was experimental. NMPA did not know who would be operating streaming services or what their business model would be. Streaming was of no economic significance. It had not been widely adopted by consumers are the preferred means of accessing music. And, NMPA lacked any data to evaluate the business or its prospects. (COF-426)[51]

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[51] Conversely, early in this Proceeding, the NMPA settled Subpart A rates because physical sales and digital downloads have been declining, while interactive streaming has become the most popular form of music consumption and by all accounts, it is expected to continue to grow. (COF-736) For this reason, among others, the Services' experts' reliance on the Subpart A settlement as a "benchmark" is misplaced, as discussed below.

COL-343. At the time of the 2008 Settlement, revenues for interactive streaming services were inconsequential. Interactive and non-interactive streaming ***together*** accounted for less than four percent of RIAA revenues. (COF-426)

COL-344. At the time of *Phonorecords II*, the parties still had little data to rely on regarding the market for interactive streaming. (COF-426) The focus of the discussions during *Phonorecords II* was what ultimately became Subpart C. NMPA and DiMA had little discussion about the Subpart B rates and terms settled during *Phonorecords I*, and the discussion they did have revolved around tightening the TCC prong. (COF-434) The Subpart B rates agreed in 2008 were rolled forward in the *Phonorecords II* settlement because the uncertainties present in 2008 about how the interactive streaming industry would develop, and what business models would be used, were still present in 2012. (*Id.*)

COL-345. The 2012 *Phonorecords II* settlement (like the 2008 *Phonorecords I* settlement) was negotiated under circumstances that bear little resemblance to the contemporary marketplace – that is, in a streaming market that was still dominated by iTunes and Pandora's non-interactive streaming service, and in which interactive streaming services had a much smaller presence than they do today. (COF-729) At the time of the 2012 Settlement, streaming in general – while relatively new – had seen growth, but interactive streaming had not yet taken off. (COF-731)

COL-346. Since the *Phonorecords II* settlement, the interactive market has experienced rapid entry, including by such major and multi-dimensional businesses as Amazon, Apple, Google and iHeartMedia. (COF-422) All of the Services participating in this proceeding except Spotify entered the interactive streaming market after the *Phonorecords II* settlement. Prior to 2012, there were very few services. Rhapsody had been in the streaming market for a

few years, and Spotify launched its streaming service in the US in mid-2011, starting with a six month free trial. (COF-427) It was only after 2012 that Google, Apple, Tidal, Amazon and Pandora entered the market. (*Id.*) Even then, interactive streaming did not explode until later. (*Id.*)

COL-347. In fact, the Judges held in *SDARS II* that the interactive streaming market in 2011-2012 would not make a good benchmark in a subsequent proceeding, noting that the market was "in a constant state of flux" and that details about the changing market "underscore the fluid nature of the subscription streaming market." A look at the Judges' discussion of the interactive streaming market – drafted by the Judges in 2013 – shows how wildly different it was from today. Not a single current Service Participant is mentioned, and those services that are mentioned are no longer of consequence:

> Dr. Ordover characterizes the streaming services as ''well-established services like Microsoft Zune, Napster, and Rhapsody, and newer market entrants like Rdio and MOG.'' *Id.* Dr. Ordover concedes, however, that in October 2011, Rhapsody announced that it was acquiring Napster. *Id.* at 19, n.16. Notably, in 2012 Microsoft ceased offering Zune as a stand-alone service and rolled it into its XBOX service suite. See http://www.xbox.com/en-S/Live/ Partners/Zune. In addition, one of the services upon which Dr. Ordover based his proposed benchmark, Slacker Premium, was not introduced until May 2011, so not even a full year's payment data was available for that service. The royalty implications of these details are uncertain, but these details about the proposed benchmark market underscore the fluid nature of the subscription streaming market and the difficulty of generalizing the royalty obligations of a market based on a few quarters worth of payment data for a handful of services. In short, the interactive subscription service market upon which Dr. Ordover relied is in a constant state of flux.

Final Rule and Order, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2011-1 CRB PSS/Satellite II, 78 FR 23054-01, 23065 (Apr. 17, 2013) ("*SDARS II*").

c. The Services' "Reliance" Argument Is Meritless

COL-348. A few of the Services (Pandora, Google and Amazon) pretend that they relied upon the current rates in deciding to enter the interactive streaming marketplace or to offer certain products – an argument that is not only untrue but is also inconsistent with their contrary attempts to pretend that they were involved in *Phonorecords II* as streaming services – and for that reason, the current rates and rate structure should not be changed. (COF-631; Herring WDT ¶ 55 (HX-885) ("Pandora's analyses and its decision to enter the market for on-demand streaming assumed no increase in the current statutory rates for the license at issue in this proceeding") (HX-880); Herring WRT ¶ 3 (HX-888) ("As discussed in my written direct testimony, Pandora made the decision to develop interactive product offerings on the assumption that there would be no increase from the current statutory rates for the license at issue in this proceeding") (HX-888); Mirchandani WDT ¶¶ 69-73 (HX-1) (alleging that Amazon and other unnamed services "built their businesses in reliance on the rates embodied in the current regulatory scheme"), ¶¶ 40-41 (alleging that Amazon would be forced to stop providing Unlimited for Echo and Prime Music if Copyright Owners' rates are adopted) (HX-1); Leonard WDT ¶ 128 (HX-695) (claiming that unnamed services had a "reasonable expectation that the regulatory 'rules of the game' (i.e., the form and level of the royalty rates for the compulsory license) would not change substantially over time").

COL-349. But the Services have not presented a single analysis or business plan – or indeed any document at all – to support any of the foregoing claims and statements. In fact, the evidence that has been adduced is to the contrary. [redacted] (COF-632; Tr. 943:8-20 (Herring)) The fact that Pandora chose to move forward with developing its interactive

music service demonstrates that the expected returns of doing so exceed Pandora's internal "hurdle rate" for capital allocation, and that it was prepared to tolerate the risk that this proceeding would result in higher rates. (COF-635) Pandora does not consider musical works royalties – either currently or as might reasonably be expected to emerge from this proceeding – to be a significant impediment to enter the market for interactive streaming services. (COF-636)

COL-350. But more fundamentally, such a purported "reliance" claim is inherently unreasonable, even were the entities making it not sophisticated businesses like Pandora, Google or Amazon. There is no rational basis on which one can assume that any of them made a business entry decision based on an assumption that rates which by statute are to be determined by an independent rate court every five years will remain static.[52] The argument is simply not credible and the absence of a single document to support it confirms its patent lack of credibility.

2. Revenue-Based Royalty Structures Permit Revenue Displacement

COL-351. The current rate structure, with its primary headline rate based on a percentage of a constricted definition of "service revenue," has, in the hands of the multi-faceted businesses that have entered the streaming business subsequent to the 2012 settlement of *Phonorecords II*, turned the percent of revenue structure into an illusion. Rather than maximizing service revenue – and thereby the payment of mechanical royalties to rights owners under a revenue-based royalty structure – interactive services displace revenue to other parts of their ecosystems, and also define revenue in opportunistic ways.

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[52] The Services' claimed reliance on the current rates remaining in place despite statutory and contractual language to the contrary is analogous to other situations in which courts generally reject claims of reliance, such as where a party in an action for fraud attempts to claim reasonable reliance "where such reliance contradicts the express terms of the contract." *Grubb & Ellis Co. v. Potomac Med. Bldg., LLC*, No. 1:08CV971 (GBL), 2009 U.S. Dist. LEXIS 93471, at *40 (E.D. Va. Sept. 29, 2009), *citing Foremost Guar. Corp. v. Meritor Sav. Bank*, 910 F.2d 118, 126 (4th Cir. 1990).

COL-352. The Services' own witnesses admit that the Services engage in these revenue displacement strategies, which are made possible by the current revenue model.

COL-353. David Pakman, an expert for all of the Services except Apple, testified that [redacted] (COF-542; Pakman WDT ¶ 29 & n. 17 (HX-696); *see also* COF-546; Ghose WDT ¶ 66 (a "loss leader strategy is one in which a multiproduct firm sells one or more products below cost to attract customers that would then buy other more profitable products") (HX-1617))[53]

COL-354. [redacted] (COF-544; McCarthy WDT ¶¶ 50-51 (HX-1060))

COL-355. [redacted] (COF-541; Page WDT ¶ 58 ([redacted]), *id.* ¶ 60 ([redacted]) (HX-1061))

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[53] Because of the revenue deferment and displacement activities of these companies, labeling the music streaming services "loss leaders" is questionable. Were revenue properly attributed to the services, they may instead be defraying the costs of and supplying revenues to other parts of the ecosystem.

COL-356. Apple's expert Dr. Ghose testified that a revenue-sharing rate structure creates a "perverse incentive for the downstream firm (which may have other, complementary business lines that do not rely on the upstream firm) to employ a 'loss leader' strategy that hurts the upstream firm in an effort to drive demand for the complementary products." (COF-545; Ghose WDT ¶ 66 (HX-1617)) Dr. Ghose equates the upstream entity in this case to the songwriter and the downstream entity to the streaming service, and points to Spotify as an example of a service that employs a loss-leader strategy in its "freemium" offering, which may be highly beneficial to Spotify but results in lower compensation to songwriters. (COF-547; Ghose WDT ¶ 67 (HX-1617); *see also id.* ¶ 91 (pointing to Google's free locker service as another example of a loss-leader strategy) (HX-1617)) Dr. Ghose further opined that a percent of revenue rate structure unfairly subjects the Copyright Owners to the particular business model and strategic decisions of the service provider. (COF-548; Ghose WDT ¶¶ 80, 81 (HX-1617)) As a result, like the Copyright Owners and contrary to the Four Services and their experts, Dr. Ghose and Apple endorsed a rate structure that would tie the mechanical royalty to the number of times that a song is streamed (a per-play rate structure).[54]

COL-357. Apart from these admissions, as further discussed below, a wealth of evidence was adduced during this proceeding regarding the revenue displacement strategies of each of the specific Service participants, all of which demonstrate the problems with the Services' revenue-based rate proposals.

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[54] As shown above and below, Apple's per-play mechanical royalty rate is unfairly low, fails to account for the value of access, and is an "all-in" rate which improperly includes a public performance component, the rate for which is not before the CRB.

a. Amazon's Revenue Displacement Strategies

COL-358. Amazon is the poster child for a service engaging in revenue displacement. Amazon engages in multiple revenue displacement strategies, including by "bundling" its Prime Music service with Amazon Prime subscriptions, [redacted]

COL-359. While bundled services were contemplated at the time of the 2008 settlement, which was largely carried forward into the 2012 settlement to produce the current Subpart B structure, as reflected in the 2008 written rebuttal statement of Dan Sheeran of RealNetworks (HX-322 ¶17), the type of bundled services then being contemplated was where a music service was bundled into the price of a cell phone subscription or a music player. (COF-463)

COL-360. There is no evidence anywhere in the record that even remotely suggests that anyone in 2008 or 2012 contemplated that the rate structure, with a prong created for bundled services, would, in the hands of companies like Amazon, with Amazon Prime Music, turn bundling into a financial engineering art-form. [redacted] (COF-553; Tr. 1481:24-1484:15 (Mirchandani))

COL-361. Amazon's expert, Dr. Hubbard, asserted in his written rebuttal testimony:

> A revenue-based mechanical royalty rate structure ***can provide*** appropriate value to rights holders ***as long as that structure*** includes alternative minimum royalty calculations when revenue is low ***or impractical to calculate."***

(COF-441; Hubbard WRT ¶ 1.3 (HX-132) (emphasis supplied))

COL-362. [redacted] (COF-440; Tr. 5957:12-5958:26 (Hubbard)) [redacted]

COL-363. [redacted] (COF-441; COF-464; Tr. 5955:8-5956:23 (Hubbard)) [redacted]

COL-364. Contrary to Dr. Hubbard's notion that the minima in the current rate structure provide the Copyright Owners with a "fair return," because the narrowly defined "service revenue" for a bundled service like Amazon Prime Music [redacted]

(COF-200; COF-465)

Instead, the current rate structure [55]

COL-365. (COF-327; COF-549; HX-1373, at AMZN 00076220, line 17), (COF-327; COF-549; HX-1373 at AMZN00076220, line 27) (COF-327; COF-549; HX-129)

COL-366. thus provide concrete confirmation of both David Israelite's testimony (*see* Israelite WDT ¶ 39 (HX-3014)) and Dr. Ghose's testimony quoted above.

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[55] As to the 25 cents per user per month minimum, there is no evidence anywhere in the record that even begins to explain where it came from in the 2008 Settlement; whether or how it was employed ; or, why a lesser minimum was provided for a bundled service than for a portable non-bundled service in Subpart B. Neither Amazon nor any of the other Services has offered any evidence to support the bundled service rate or rate structure. (COF-439; Tr. 5990:23-5991:24 (Hubbard))

– publishers and songwriters end up being paid less and less on an effective per-play basis as consumption increases because the royalty payment is decoupled from revenue and defaults to the minimum.

COL-367. Dr. Hubbard's own Written Rebuttal Statement and trial testimony (COF-200; COF-465; Hubbard WRT ¶ 2.22 (HX-132)) As reflected on Exhibit 1 to Dr. Hubbard's WRT (HX-133), (COF-200; COF-465; HX-129)

COL-368. (COF-27; COF-201; COF-466) (COF-28; COF-202; COF-467; Tr. 5972:11-5973:21 (Hubbard))[56]

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[56]

COL-369. [redacted]

COL-370. As Mr. Mirchandani admitted, [redacted] Amazon believed that providing Prime Music as a "free benefit" of Prime membership was helping it to convert and retain Prime members – meaning converting Amazon customers from free trials to paying subscribers and retaining them as members. (COF-550; Tr. 1465:10-1467:3 (Mirchandani)) He admitted that Amazon closely tracks the acquisition and retention of Prime members and assesses what causes them to convert to paying subscribers and to remain as Prime members. (COF-550; Tr. 1465:10-1467:3 (Mirchandani))

[redacted] (COF-98) [redacted]

(COF-117; Tr. 1570:14-1571:16 (Mirchandani))

COL-371. [redacted] (COF-327; COF-549; HX-1373, AMZN00076220, lines 5, 8 and 13)

COL-372. [redacted] (HX-3056), [redacted] (COF-350) [redacted] (*Id.*) [redacted] (*Id.*) [redacted] (*Id.*)

COL-373. [redacted]

(COF-552)

COL-374. (COF-555; HX-3051 at AMZN00004166) (COF-556; HX-3054 at AMZN00004212)

COL-375. In an article noted in footnote 32 of Dr. Rysman's Written Direct Testimony submitted on behalf of the Copyright Owners (HX-3026), Amazon's CEO, Jeff Bezos, was quoted :

> We get to monetize [our subscription video] in a very unusual way,' Amazon CEO Jeff Bezos said this summer. 'When we win a Golden Globe, it helps us sell more shoes. And ***it does that in a very direct way. Because if you look at Prime members, <u>they buy more on Amazon than non-Prime members</u>, and one of the reasons they do that is once they pay their annual fee, they're looking around to see, 'How can I get more value out of the program?' And so they look across more categories – they shop more.*** A lot of their behaviors change in ways that are attractive to us as a business. And the customers utilize more of our services.'.

(COF-557 (emphasis supplied))

COL-376. [redacted] (COF-554)

COL-377. As Amazon itself has admitted, [redacted] (COF-558)[57] Thus, by Amazon's own admission, [redacted] (*Id.*)

COL-378. [redacted]

[57] As noted above, [redacted]

(COF-559; Tr. 1474:13-1475:10 (Mirchandani))

COL-379. (Tr. 1474:3-12 (Mirchandani)), He has stated that the relationship between the benefits Amazon provides to its Prime members and their spending on Amazon is "direct." As Mr. Bezos said, Prime members shop more and buy more on Amazon than non-Prime customers. (COF-554; COF-555; COF-557)

COL-380.

COL-381. (COF-554; Tr. 1474:3-24 (Mirchandani))

COL-382.

COL-383. But Mr. Mirchandani is correct in one thing:

COL-384.

COL-385.

(Tr. 5992:18-5993:15 (Hubbard)) –

COL-386.

(HX-113 at 2)

(COF-468; HX-113 at 2)

COL-387.

(which Amazon purports to want to roll forward, albeit, with substantial reductions).[58]

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[58] As Mr. Mirchandani described Amazon's rate proposal, it was a roll forward with "four ***minor*** modifications." (COF-638; Tr. 1320:9-22 (Mirchandani) (emphasis added)) The four supposedly "minor" modifications, however,

COL-388. (COF-475; HX-3225) (HX-3225 at 1);[59] (HX-3225 at 2); and, (HX-3225, at 2) (COF-475)

COL-389. (HX-3225, at 3)

(*Id.*; Tr. 1448:9-1448:22 (Mirchandani)) Without even including the discount for family plans and student plans, the "minor" modifications to the current rate structure proposed by Amazon would reduce "service revenue" and hence mechanical royalties based on a percent of revenue by nearly . (*Id.*; Tr. 1321:5-1326:1 (Mirchandani)) In fact, (*Id.*; Tr. 1452:1-7 (Mirchandani))

[59] (COF-475)

(COF-475)

COL-390. (COF-478; HX-118 at 4)[60] Amazon heavily promoted the sale of Echo devices by reference to its use for streaming music. (COF-480; HX-2644; HX-3383) (COF-480; Tr. 1418:10-1419:3 (Mirchandani)) (COF-562),

b. Google's Revenue Displacement Strategies

COL-391. Google also leverages its music business to drive revenues elsewhere within its enterprise.

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[60] (COF-379; COF-479; Tr. 1606:24-1609:23 (Mirchandani))

(COF-482; HX-546 at 6) Android is Google's mobile operating system, which runs on both third-party manufactured mobile devices and Google own Nexus phone. (COF-482; Tr. 185:14-20 (Levine))

COL-392. (COF-484; HX-3209 at 18, 20, 22 ("Music is a key Hero use case across many other Google products, most recently with Google Home"))

COL-393. (COF-489; Tr. 194:13-20; Tr. 187:9-25 (Levine)) (COF-489; Tr. 195:1-12 (Levine))

COL-394. or "GMSs." (COF-490; Tr. 195:22-197:5 (Levine)) (COF-490; Tr. 197:6-14 (Levine)) (COF-490; Tr. 198:4-9 (Levine))

COL-395. [redacted] (COF-491; Tr. 196:18-20 (Levine) ("[redacted]), 197:15-25 (Levine) ([redacted])) [redacted] (COF-491; Rysman WDT ¶ 29 (HX-3026) (Google realizes the benefits of customer acquisition through related services that are marketed with Google Play Music.))

COL-396. For this reason, Google routinely offers three, and sometimes even six, months of Google Play Music for free in connection with carrier and original equipment manufacturer promotions. (COF-492)

COL-397. [redacted] (COF-493) [redacted] (*Id.*)

COL-398. Google Play's product manager Paul Joyce also testified that, while the Google Play store sells digital content (including music), Google Play is very well-known for apps and games for the Android. (COF-494; Tr. 772:19-773:11 (Joyce)) [redacted] (COF-494; HX-3209 at 9) [redacted]

(COF-494; Tr. 806:1-16 (Joyce))

COL-399. (COF-483)

COL-400. Google also bundles Google Play Music with its separate YouTube Red offering. A subscriber to either offering will get the other product for free. (COF-387; COF-495; Joyce WDT ¶ 13 (HX-693)) (COF-387; COF-495; HX-3209 at 10; HX-3212 at 5581 ( ))[61]

COL-401. The decision to continue to bundle Google Play Music with YouTube Red

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[61] (COF-266; Tr. 200:14-201:4 (Levine)) (COF-266; Tr. 201:31-202:12 (Levine)).

(COF-496)

COL-402. (COF-497; HX-3209 at 7; *see also* HX-3212 at 5576) (COF-497; HX-3209 at 7) (COF-497; HX-3212 at 5576, 5592-93)

c. Apple's Revenue Displacement Strategies

COL-403. As noted above, Apple's own experts agree that services that have complementary business lines are incentivized by a revenue-based structure to engage in loss-leader and other revenue displacement strategies. The observation applies no less to Apple even though it is critical of and is not proposing a revenue-based rate. If a revenue-based rate were to be adopted, it would apply to Apple, which is undoubtedly a company with complementary hardware and software business lines and an established "ecosystem."

COL-404. Indeed, industry analysts have referred to the use of revenue displacement strategies, such as a company using music streaming as a loss-leader to make its hardware more attractive, as "pulling an Apple." (COF-523) [redacted] (COF-524; HX-2704, at 70887 ([redacted])) Spotify's expert, Dr. Marx, represented Pandora in a prior rate court proceeding against ASCAP, [redacted] (COF-500; Tr. at 1963:25-1964:24 (Marx))

d. Revenue Displacement By The So-Called "Pure Plays" - Spotify and Pandora

COL-405. Amazon's success in using music to drive revenue elsewhere in its ecosystem – just as it is continuing to do with its new Unlimited service – has not been lost on its competitors. Even now, an ostensible "pure play" like Spotify is already creating "bundles" which will enable it to emulate Amazon were the current rate structure or anything like it to be perpetuated. [redacted] (COF-508)

COL-406. For example, Spotify recently announced a bundle that includes subscription to both its Premium service and the New York Times digital newspaper edition with a one-year commitment that appears to cost $260/year, a price that rises to $325/year after one year. It also provides "two complimentary" New York Times All Access subscriptions that can be given as gifts, and which are described as a $50/month value. Using such valuations would produce a zero valuation for Spotify's revenue from its music streaming service. (COF-509)

COL-407. [redacted] (COF-510)

COL-408. [redacted] (COF-511) [redacted] (COF-512)

COL-409. [redacted] (COF-513) [redacted]

(COF-514)

COL-410. (COF-515)

(COF-518)

COL-411. (COF-516; COF-519)

(COF-517)

COL-412. Spotify also sells tickets through its music streaming service. (COF-506)

(COF-504)

COL-413. Indeed, Spotify's own proposed rates and terms include a definition of "service revenue" that is deeply unfair and glaringly at odds with Dr. Marx's own economic understanding of what is appropriate. This is perhaps why Dr. Marx – citing things that she "didn't analyze" in Spotify's proposal such as "the definition of revenue" – refused to opine that her own client Spotify's rate proposal was "fair." (Tr. 5602:20-5605:1 (Marx))

COL-414. While Pandora is new to the interactive streaming space, [redacted] Pandora acquired Ticketfly, a company with fan-to-fan ticket exchange which may, in the future, enable it to generate revenue derived from its music streaming business but not included as "service revenue" in a revenue based rate structure. (COF-531)

3. Revenue-Based Royalty Structures Result In Revenue Gaming

COL-415. [redacted], discussed above, highlights a problem with a revenue-based royalty structure that is related to bundling and other revenue displacement strategies, *i.e.*, the problem of allocation and the lack of transparency. Several interactive streaming music services realize significant cross-selling benefits to their other business lines ("Indirect Revenues") which are excluded from the current definition of "Service Revenue" under Section 115. (COF-566) Quantifying Indirect Revenues is very subjective and accounting principles do not provide methodologies to quantify Indirect Revenues. (COF-569)

COL-416. Pandora's Dr. Katz agrees, testifying that "[a]ccounting difficulties also arise when a streaming service is sold as a part of a larger bundle of services, or when the service is advertising supported and the advertising is sold in bundles that include other outlets. Under these circumstances, any proposed allocation of revenues across services and goods is likely to

be contentious." (COF-567; Katz WDT ¶ 82 (HX-885)) Google's Dr. Leonard agreed that a service could game the system with respect to the deduction of up to 15% of a service's costs from its revenues. (COF-571)[62] Dr. Ghose also testified that a percent of revenue rate structure makes the calculation of mechanical royalties complicated, and renders service revenue "opaque" to songwriters and "inherently idiosyncratic." (COF-568; Ghose WDT ¶¶ 80, 81 (HX-1618)) He further testified that, under the current statutory rates, the service revenue for bundles "is subjective and can be interpreted differently by different service providers." (COF-568; Ghose ¶ 78)

COL-417. The lack of any clear principle by which to account for Indirect Revenues is a significant problem in a rate structure in which mechanical royalties are paid based on a percentage of Service Revenue (COF-570), a problem highlighted by the Judges in their recent determination in the Web IV proceeding:

> SoundExchange makes this point well by analogizing to a "buy one, get one free" offer. If a vendor offered an ice cream cone (to adopt SoundExchange's demonstrative example at the hearing) for $1.00, but offered two ice cream cones for $1.06, it would be absurd to conclude that the true market price of an ice cream cone is the incremental six cents. Rather, this offer indicates a market price of $0.53, the average price for the two ice cream cones. Or, to take a common example, tire sellers will often advertise a special offer: A buyer can pay for three tires and get the fourth tire free. This is economically (and mathematically) equivalent to a 25% reduction in the price of four tires. No one could go to the automotive store and receive only the "free" fourth tire!

Final Rule and Order, *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, Docket No. 14-CRB-0001-WR (2016-2020), 81 FR 26316, 26382 (May 2, 2016) ("Web IV").

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[62] A similar gaming and transparency problem exists with respect to the calculation of the TCC prong. (CO-435; CO-436; CO-437).

4. Revenue-Based Royalty Structures Result In Revenue Deferral

COL-418. A revenue-based structure enables – indeed encourages – streaming music services to defer profits. As Dr. Rysman testified, there are numerous reasons why a firm may conclude that it is rational to charge prices that do not maximize current direct profits, but instead charge lower prices today in order to build a customer base that leads to greater long-run profitability (or greater long-run value) in the music service itself, or greater profitability from selling other products or services to its customers. These features are: (a) network effects, (b) economies of scale, (c) learning about consumers, and (d) switching costs. (COF-445; Rysman WDT ¶¶ 13-24 (HX-3026)) The four network industry features create a benefit to gaining additional customers that is not tied to current revenue, and explains why services may find it attractive to forgo current revenue and profits in order to grow users and market share faster than they otherwise would. (COF-446; Rysman WDT ¶¶ 28-29 (HX-3026)) When these features are present, rational firms will choose to set artificially low prices now in the hopes of being able to realize higher returns at some point in the future, either on the service or on related products. (COF-447; Rysman WDT ¶¶ 28- 29 (HX-3026))

COL-419. [redacted] (COF-450) [redacted] (*Id.*) [redacted] (*Id.*) [redacted] (*Id.*) [redacted] (COF-537)[63]

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[63] [redacted]

COL-420. [redacted] (COF-451) [redacted]. (COF-448) [redacted] (COF-449) [redacted] (*Id.*)

COL-421. Because it is focused on user growth, Spotify has not sought to maximize its present advertising revenue. While broadcast radio typically plays approximately 25 advertisements per hour, Spotify plays only 4 ads per hour. (COF-501) [redacted] (COF-503)

COL-422. A music streaming service's decision to focus on user growth as opposed to current revenues diminishes current mechanical royalties in a revenue-based model in which songwriters and publishers are hostage to the independent business decisions of the service. (COF-455) [redacted]. (COF-502)

COL-423. Even if a service engaging in this strategy does realize increased revenue in the future, today's songwriters are unlikely to be the same songwriters in the future, and there will be a disconnect between the songwriters who suffered from the short run revenue

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[redacted] (CO-456; HX-3212, at 5592)

suppression and the songwriters who will supposedly benefit in the future if the revenue deferment today results in revenue growth tomorrow. (COF-458; COF-639; Rysman WDT ¶¶ 50 & Fig. 3 (discussing the artist Goyte) (HX-3026))

5. Revenue Displacement and Deferral Starkly Demonstrate The Need For A Royalty Structure Aligned With Usage Of The Economic Values In The Good: Access And Plays

COL-424. The Services' admissions that in many contexts of their own making the identification of revenue is "impractical" – which is simply a euphemism for making any rate structure that is based on a percent of revenue illusory and unfair to Copyright Owners – starkly demonstrate the problems with a revenue-based metric, and the need for a royalty model based instead on consumption, consistent with CRB precedent. *See* Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 72 FR 24084, 24089 (May 1, 2007) ("*Web II*") ("Revenue merely serves as 'a proxy' for what '***we really should be valuing***, which is performances' . . . By contrast, a per-performance metric 'is directly tied to the nature of the right being licensed, unlike other bases such as revenue . . . of the licensee.") (emphasis added; citation omitted); Final Rule, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, Docket No. 2006–3 CRB DPRA, 74 FR 4510, 4517 (Jan. 26, 2009) ("*Phonorecords I*") (noting that a revenue percentage model "***raises serious questions of fairness*** precisely because the percentage of revenue metric may be a less than fully satisfactory proxy for measuring more usage or the actual intensity of the usage of the rights in question") (emphases added).

COL-425. Music streaming services that are part of large corporate ecosystems help generate revenues in a multitude of ways that such entities can readily decouple from the revenue on which mechanical royalties are calculated. Such entities can and do pursue business strategies that have nothing to do with maximizing revenues for the music streaming business but

instead use their music services to enhance other revenue streams or accomplish other corporate goals.

COL-426. In a streaming industry that, over the next five years, is likely to be dominated by multi-faceted businesses like Amazon, Apple and Google which have diverse ecosystems and, as "pure plays" such as Spotify and Pandora themselves build their ecosystems and engage in bundling (as Spotify is already doing), there is no possibility that a percentage of revenue model can possibly provide songwriters and publishers with a fair return precisely because, in Dr. Hubbard's words, it is "impractical" to attribute the revenue to the music services. A rate structure that defaults to minima – especially minima that have not been supported with any economic or other evidence – is no solution because, as evidenced by how it has operated for services like [redacted], it decouples the value produced by musical works from the value derived by the services, driving per user and per stream rates down even as the number of users and the number of streams massively increase. Further, given that some of the Services seek to eliminate the minima that have frequently bound, it is even less of a solution.

COL-427. The experimental rate structures that were embodied in Subpart B in 2008 and in Subpart C in 2012 have been successfully gamed by services that have either (or both) deferred revenue or displaced revenue. To provide the Copyright Owners with a fair return and assure the continued availability of music, mechanical royalties should be linked, as they have been with physical and digital recordings since 1909, to actual consumption on a per unit basis (for streaming, on a per-play basis). A royalty structure that is based on plays and access will recouple the royalties payable to writers and publishers with the consumption of music and the value of unlimited, anytime, anywhere access to music.

6. The Current Revenue-Based Royalty Structure Has Not Resulted In Fair Returns to Songwriters and Publishers

COL-428. The record is replete with evidence that the current revenue-based structure has resulted in inadequate payments to songwriters and music publishers, and that these low payments threaten the very viability of the American songwriting industry. (COF-443) As Apple's Dr, Ramprasad testified, "as the use of interactive streaming increases, songwriters are increasingly disenchanted with their royalty payments," and this, coupled with the increase in recent years in the "number of streaming services, the volume of music available for interactive streaming, interactive streaming services' revenues, and the number of paid subscribers," "necessitate[s] a reassessment of how royalties for publishers/songwriters are determined." (COF-442; Ramaprasad WDT ¶ 47 (HX-1615))

COL-429. Moreover, neither the Services nor their experts appear to dispute that interactive streaming serves as a substitute for digital downloads and physical products, and that the former has caused the decline in sales of the latter. (COF-583; Tr. 1458:5-1461:4 (Mirchandani testifying that Amazon customers were migrating in droves from purchasing downloads to streaming); *see also* HX-215 (analysis commissioned by Spotify opining that percentage of drop in purchasing directly due to streaming) at 70, 78-86) [redacted] (COF-583) As the statements and financial data from the NMPA and the music publishers show, [redacted]

COL-430. Total interactive streaming (by number of streams) increased by 54% from 2013 to 2014, and by an additional 92.8% from 2014 to 2015. (COF-190) The sale of digital

albums and digital tracks decreased by 9.4% and 12.5%, respectively from 2013 to 2014, and by an additional 2.9% and 12.5%, respectively, from 2014 to 2015. (COF-584)

COL-431. Total U.S. mechanical revenues for the songwriting and publishing industry decreased by 11.6% from 2013 to 2014, and by another 2.6% from 2014 to 2015. (COF-585) Mechanical revenue, as a percentage of total publishing industry revenue, also declined. (COF-586) In 2013, mechanical revenue accounted for [redacted] of music publisher income; in 2014 it [redacted]; and in 2015 [redacted] of music publisher revenue. (COF-189)

COL-432. [redacted] (COF-196) [redacted] (*Id.*)

COL-433. [redacted]

(COF-197)

(COF-198)

COL-434. Professor Zmijewski, an accounting expert retained by Amazon, Google, Spotify and Pandora, (COF-602; Zmijewski WRT ¶ 14 (HX-1070)) (COF-603; Tr. 5811:6-22 (Zmijewski))[64]

COL-435. (COF-604; HX-1070, ¶¶ 14, 42, 60, 73 and 86) Again, the CRB has noted that it does not have the authority to consider what the services pay for performance rights when determining a reasonable mechanical royalty rate. (COF-597; HX-322 at 6235:21-6237:5) Moreover, Professor Zmijewski admitted that he simply assumed that all of this streaming performance income (which is reported by the PROs,

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[64]

see HX-1048 at 2), is attributable to ***interactive*** streaming when in fact, it is not. (COF-605; Tr. 5796:8-5797:4 (Zmijewski)) He admitted that he did not ask his own client, Pandora, by far the largest player in the ***non-interactive*** streaming business, about its streaming performance income payments. (COF-605; Tr. 5803:12-5804:25 (Zmijewski)) [redacted] (COF-606; Tr. 5836:24-5837:16; 5838:13-5839:20; 5839:21-5840:20 (Zmijewski))

COL-436. [redacted] (COF-607; Tr. 5842:2-24 (Zmijewski))

COL-437. However, Professor Zmijewski did have information available to him regarding the growth in catalogues or market share of the publishers that he failed to consider. For example, in his WRT, he quoted the CFO of Warner Music Group, Eric Joshua Levin as stating that "our market share growth in publishing has been tremendous." (COF-608; Zmijewski WRT ¶ 97 (HX-1070)) Professor admitted that [redacted] (COF-608; Tr. 5848:9-5850:8 (Zmijewski)) Yet he ignored this information in simply reporting numbers.

COL-438. Professor Zmijewski admitted [redacted] (COF-609; Tr. 5820:14-5822:18 (Zmijewski); Tr. 4558:8-21 (Barron)) He was also [redacted] (COF-609; Tr. 5822:19-5823:3 (Zmijewski); Tr. 3957:21-3959:3 (Kalifowitz))

COL-439. In the end, [redacted] (COF-610; Tr. 5848:9-5850:8 (Zmijewski)) In short, [redacted] mechanical income from physical recordings and downloads are declining as the ownership model that has existed for over one-hundred years is replaced by the access model represented by interactive streaming, and that this further demonstrates that the current mechanical royalty rate structure is not adequately compensating songwriters and music publishers. (COF-611)

D. <u>The Services' Attempts To Focus This Proceeding On Their Financial Performance Under GAAP Provides An Incomplete And Inaccurate Picture Of Their Financial Performance</u>

COL-440. The Services – which include three of the largest companies in the world, and two other Services with enormous market valuations – claim that they cannot afford to pay mechanical royalties at a higher rate because they are losing money on a GAAP basis. But while GAAP-based financial statements may be a starting point for an analysis to determine

profitability, financial position and cash flows, they are not sufficient to make such a determinations. (COF-532) The valuation of the Services are based on future expectations (COF-535), and for high-growth businesses – like Spotify and Pandora – focusing on GAAP financials provides a misleading and incomplete picture of financial performance. (COF-533)

COL-441. Amazon spent nine years focusing on growth and building its network, instead of seeking short run profits. It sustained billions of dollars in losses to build its network. The company sustained short term losses as an investment in building customer loyalty, collecting customer information, and building its base to enjoy future network effects and economies of scale. Amazon now has a market cap of $360 billion and is the largest online retail company in the United States. (COF-536)

COL-442. [redacted]

COL-443. [redacted] (COF-540) If Spotify is sold to a large firm or if it goes public, its investors will realize the entire benefit from its revenue deferral strategy to build market share. There will not be a future increased revenue-based royalty payoff for songwriters and publishers who have been forced to subsidize Spotify's revenue deferral business model which has suppressed mechanical royalties for current songwriters and publishers. (COF-538)

COL-444. Pandora, which reports its financial condition to its investors on non-GAAP bases, including non-GAAP net income and Adjusted EBITDA, shows profitability rather

than losses. (COF-534) [redacted]

[redacted] (COF-539)

V. THE SERVICES' PROPOSED RATES ARE UNREASONABLE AND WITHOUT ANY EVIDENTIARY SUPPORT OR SOUND ECONOMIC JUSTIFICATION

A. Apple's Proposed Per-Play Rate Is Unreasonable And Not Consistent With The Policy Factors

1. There Is No Economic Support For Apple's "Conversion" Ratio Pseudo-Benchmarks

COL-445. Apple's rate proposal is based ***entirely*** on the premise that the Board should simply "convert" the Subpart A mechanical license rate of $0.091 per track sale to a Subpart B equivalent for interactive streaming using a nice, round "conversion ratio" of 100 streams to one download. Apple offers no economic support for the flawed premise that the rate for interactive streaming – an access model – can be derived by "converting" the rate for permanent downloads – an ownership model.

COL-446. The opinions of the Apple witness who testified in support of the approach – Dr. Ramaprasad – do not merit any weight in the economic evaluation of rates for a number of reasons. First, she did not perform any independent analysis of any conversion ratio. Second, she did not bother to address the question of what is being "converted," nor undertake any economic or econometric analysis in support of the theory, let alone identify reliable data on which to base such a rate. (COF-645) It would be inappropriate for a five-year statutory mechanical royalty rate to be based upon a source so devoid of scientific method. (COF-648)

COL-447. Nor did Apple offer any economic support for the 100:1 "conversion ratio" number. Apple's expert, Dr. Ramaprasad, advocates for the 100:1 ratio because it is a

"simple" way to calculate a rate, but simplicity or round numbers does not constitute an economic reason to adopt a conversion ratio. (COF-690; Tr. 2624:9-2625:8 (Ramaprasad))

COL-448. To be clear, Dr. Ramaprasad did not herself calculate this "conversion ratio."[65] Nor did she request from Apple any of Apple's own data, or any data produced by other Services in this Proceeding to perform her own analysis. (COF-689; Tr. 2794:16-2795:1 (Ramaprasad)) Rather, without any independent analysis, she borrowed ratios (which she mislabeled "benchmarks") from third-party sources: Billboard magazine, the RIAA. a UK Charting company, and an academic working paper. But Dr. Ramaprasad could not testify at all as to how the first three "benchmarks" were calculated and, at trial, she demonstrated the most superficial understanding of the purpose of the Aguiar and Waldfogel working paper, its methodologies, and its conclusions.

a. The "Billboard Benchmark"

COL-449. Dr. Ramaprasad observed a "conversion" ratio of 150:1 from Billboard magazine, Ramaprasad WDT ¶¶ 84-85 (HX-1615 (referring to ratio as the "Billboard Benchmark")), with no discussion of Billboard's purpose or basis for calculating this ratio. *See id.;* COF-668. In fact, Dr. Ramaprasad candidly admitted at trial that "***it is not clear what [Billboard is] doing***" in calculating this ratio. (COF-671; Tr. 2828:13-2829:5 (Ramaprasad)) (emphasis added)

COL-450. Dr. Ramaprasad also admitted at trial that she does not know how the Billboard ratio was calculated, COF-677; Tr. 2759:10-2761:5; 2629:14- 2630:2, and that there is

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[65] Nor did Dr. Ramaprasad herself calculate or derive a rate or a range of rates that she believed would meet the statutory objectives; rather, she merely opined on the reasonableness of the .00091 rate that was presented to her, Ramaprasad WDT ¶ 1 (HX-1615); Tr. 2739:16-2740:25 (Ramaprasad), and concluded it was reasonable because it was consistent with one of the very "benchmarks" upon which the rate was calculated.

"not a lot of insight" into how that ratio was calculated. (COF-670; Tr. 2760:10-18 (Ramaprasad)) Dr. Ramaprasad did not contact anyone at Billboard to determine how it derived its ratio(s) or what they even meant. (COF-681; Tr. 2773:4-2768:7 (Ramaprasad))

COL-451. Dr. Ramaprasad's entire "analysis" of the Billboard ratio is set forth in paragraphs 84 and 85 of her WDT (HX-1615), where she cites four articles (two from Billboard and two from internet blogs), only one of which (HX-1497, a Billboard article by Ed Christman) contains ***any*** description at all of the method by which the Billboard ratio was derived. (COF-669) But even that article states only that the ratio is a comparison of the 2014 average blended per-stream royalty payout (of $0.005) to labels for audio and music videos with the labels' average blended wholesale revenue from an album sale (of $7.50), applying a conversion ratio of 10 track sales per album unit. (COF-672; HX-1497 at 1-2)[66] The article provides no information as to how these blended per-stream royalty payouts and blended wholesale album sale revenue figures were derived, *e.g.*, which labels' data were used and for what time period; what weights, if any, were assigned in calculating the "blended" rate between audio and video streams; and so forth, *see* HX-1497, and Dr. Ramaprasad admitted that she does not know how the average blended per-stream rate of 0.005 for audio and music video streams was calculated, or which audio and video services were examined. (COF-672; Tr. 2760:19-2761:5 (Ramaprasad))

COL-452. Dr. Ramaprasad herself identifies another facially obvious failing of the Billboard ratio when she acknowledges that Billboard combines video streaming royalty data with audio streaming royalty data to come up with a "blended" per-stream royalty rate. Dr.

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[66] Dr, Ramaprasad inconsistently criticized Dr. Eisenach for using royalties paid to record labels for sound recording rights as a benchmark, Ramaprasad WRT ¶ 5 (HX-1616), ignoring that, while we do not know very much about how her "Billboard benchmark" was calculated, we do know from this article (and Dr. Ramaprasad admits) that the calculation is based to some degree on payments to record labels for sound recording rights. (COF-691; Tr. 2797:17-2799:4 (Ramaprasad))

Ramaprasad admits that, in doing so, Billboard overestimates the ratio of streams to track sales relative to an audio-stream-only analysis. This is because on an effective per-stream basis, video streaming royalties tend to be lower than audio streaming royalties, Ramaprasad WDT ¶ 80 (HX-1615), which results from the video services' reliance on the Digital Millennium Copyright Act. (COF-687) Dr. Ramaprasad does not indicate how many fewer streams would be equivalent to one track sale using audio-stream-only data calculation – nor can she, because she does not possess the data that was used to calculate the blended ratio.

COL-453. Thus, while we know virtually nothing about the Billboard ratio, what we do know is that it is calculated using the effective per-play royalty paid by digital services (as of the particular point in time that the ratio is calculated) for various types of streams (and the same is likely true for the RIAA and U.K. Charts ratios discussed below). To the extent that effective per-play royalties fluctuate – and it is clear that they fluctuate from month to month and vary from service to service, *see, e.g.,* Ghose WDT ¶¶ 63-65 (HX-1617); Ramaprasad WDT ¶¶ 42-43 (HX-1615) – then such fluctuation would require constantly changing the ratio. (COF-685; Tr. 2764:1-20 (Ramaprasad))

COL-454. As Judge Strickler noted in questioning Dr. Ramaprasad, and as Dr. Ramaprasad admitted, there is a circularity to using a "conversion" ratio like the Billboard ratio to set a rate in this Proceeding. Because the ratio uses the effective per-play royalty paid by digital services for various types of streams, to the extent that such royalty calculation includes the mechanical royalty, using such a ratio to set the rate in this Proceeding is circular because the ratio depends in part upon the rate that is set in this Proceeding. Thus, the CRB could actually change the ratio depending on the rate that it sets in this Proceeding to the extent that the

mechanical rate is part of the effective per-play royalty used in calculating the ratio. (COF-688; Tr. 2766:10-2768:7 (Ramaprasad))

COL-455. In the end, the Billboard ratio is unreliable. Beyond being a round number, it has not been updated since mid-2014, when it was calculated using data from the preceding months in 2014. The failure to update the ratio exists despite the fact that between 2013 and mid-2014, the ratio shifted to 150:1 from an equally round number of 200:1. (COF-676; Ramaprasad WDT ¶ 85 (HX-1615) ("Billboard used the equivalence of 1 track and 200 streams because the average per stream rate for audio and music video streams was $0.00375.")) Oddly, while the Billboard ratio ***decreased*** from 200:1 to 150:1, both the RIAA and U.K. Charts company ratios (discussed below) ***increased*** from 100:1 to 150:1. (COF-676)

COL-456. To conclude this point, also unexplained by Dr. Ramaprasad (or any of the other Service experts) is the incongruity of the ratio increasing from 100:1 to 150:1 (as it did in the case of the RIAA and U.K. Charts ratios) at the same time that the demand for streaming increased, and why the RIAA and the U.K. Charts Company would choose to devalue streams *vis-à-vis* downloads (for Gold and Platinum record certification purposes, and chart position purposes, respectively) when downloads were diminishing. One would think that as more people stream music, streams would become more valuable and not less valuable – an issue that the Services' experts completely failed to address or even consider. (COF-675; *See* Tr. 1944:5-1945:7 (Judge Strickler questioning Dr. Marx: "Wouldn't the ratio go in the other direction if there is a growth of streaming consumption on the basic economic analysis?"))

b. <u>The RIAA Ratio</u>

COL-457. While Dr. Ramaprasad testified at trial that she also relied on a ratio from RIAA, COF-650; Tr. 2756:15-22 (Ramaprasad), her report merely states (in one sentence) that RIAA "uses the same benchmark [as Billboard] to account for music interactive streaming in its

calculation of 'gold' and 'platinum; awards given to albums." (COF-650; Ramaprasad WDT ¶ 85 (HX-1615), citing HX-1469 (an article from the blog "Complete Music Update")) That is the entirety of Dr. Ramaprasad's "analysis" of the RIAA ratio (and it is already clear that she had no more understanding of the Billboard ratio than she did of the RIAA ratio). Dr. Ramaprasad admitted at trial that she does not have any knowledge of how the RIAA ratio was calculated other than what is in the blog article she cited, COF-649; Tr. 2769:1-2770:16 (Ramaprasad), which blog article contains no discussion of how the ratio was calculated. (*See* HX-1469)

COL-458. Three of the other Services' experts – Drs. Marx, Katz and Leonard – also incorporate the RIAA ratio into their analyses (albeit, they understandably do not place much reliance on it). (COF-650; Marx WDT ¶¶ 107-110 (HX-1065); Katz WDT ¶ 110 (HX-885); Leonard WDT Ex. 7 (HX-695)) Those experts do not cite the blog article cited by Dr. Ramaprasad; instead, they cite only an RIAA press release. (COF-651; HX-903) In that press release, the RIAA stated that it derived the 150:1 ratio as well as a 10 track sales to 1 album sale equivalence using "a comprehensive analysis of a variety of factors – including streaming and download consumption patterns and historical impact on the program – and also consultation with a myriad of industry colleagues." (COF-651) It noted also that its "determination of a formula is based on comparative consumption patterns, not marketplace value." (*Id.*)

COL-459. The press release does not purport to list all of the "factors" the RIAA used when it came up with its ratio, instead noting only that such factors "includ[ed]" streaming and download consumption patterns as well as impact on the Gold & Platinum Program. (COF-651) The press release provides no further detail on those streaming and download consumption patterns (or even what streaming and download services were considered and during what period of time). (COF-651) No data is provided; nor are the RIAA's techniques for collecting and

analyzing such data disclosed. The RIAA does not say how the "historical impact" on the Gold & Platinum Program affected its calculations – it does not even state in which direction, upward or downward, such "historical impact" moved the ratio – only that such impact was part of its analysis. (*See id.*)

COL-460. The press release also notes that the RIAA derived its ratio after "consultation with a myriad of industry colleagues." (COF-651) It does not identify such persons by name. It gives no indication as to how many industry colleagues were consulted, nor the organizations or even *types* of organizations with which those industry colleagues were affiliated. Nor does it shed any light on how such "consultation[s]" influenced the ultimate 150:1 calculation. (*Id.*)

COL-461. The other Services admitted that they too have no insight into the RIAA's calculation of its ratio beyond what the RIAA put into the press release. For example, Dr. Marx testified that she didn't have any "visibility" into how the RIAA constructed the 150:1 ratio other than what was stated in the press release, and she did not seek further information from the RIAA. (COF-695; Tr. 1849:8-1850:15 (Marx); Tr. 1927:3-20 (Marx); HX-903) She had no knowledge or understanding of whether video streams were used in the calculation, or how video streams were weighted. (*Id.*; Tr. 1934:6-1935:5 (Marx)) And she further admitted that she is unaware of any incentive the RIAA may have to increase the number of streams used in its ratio based on additional compensation that may be due to artists based on their reaching gold and platinum status. (*Id.*; Tr. 1939:8-1942:1 (Marx))

c. <u>The U.K. Charts Company Ratio</u>

COL-462. Dr. Ramaprasad also cites to a 100:1 ratio (formerly) used by the U.K. Charts Company in creating its charts. (COF-678) As with her "analysis" of the Billboard ratio, Dr. Ramaprasad's entire "analysis" of the U.K. Charts ratio is set forth in a single paragraph

(¶ 91) of her WDT (HX-1615), where she cites two exhibits, each of which consists of web pages from the U.K. Charts Company's website. (COF-678; Ramaprasad WDT ¶ 87 n.173-174 (HX-1615), *citing* HX-1442 and HX-1489)

COL-463. Dr. Ramaprasad offered no evidence concerning the U.K. Charts Company ratio other than those web pages, *Id.*; Tr. 2771:5-25 (Ramaprasad), only one of which (HX-1489), contains any description at all of the method by which the ratio was derived. (*See* HX-1489 and HX-1442) That exhibit, HX-1489, states only that the U.K. Charts Company "used value (in terms of royalties paid to the rights owners) to calculate this average rate," conducted "extensive investigation of royalty rates paid," and "sense-checked in consultation with independent and major labels, digital retailers and streaming services." It does not state, among other things, which "rights owners" were examined, what data was collected and how it was collected, what types of royalties were considered, which labels, digital retailers, and streaming services were consulted, or how such entities were chosen. (COF-679) Moreover, the U.K. Charts Company *admits* in HX-1489 that its ratio is unscientific – or not "slavishly pure," in the company's own words. (COF-680) As with the Billboard ratio, Dr. Ramaprasad did not contact anyone at the Official Charts Company to determine how it derived its ratio(s). (COF-681; Tr. 2773:4-2774:7 (Ramaprasad))[67] As noted above, the U.K. Charts Company has inexplicably increased its ratio from 100:1 to 150:1, Leonard WRT ¶ 117 (HX-698), thereby devaluing streams as compared to downloads, even though more people are streaming music than ever before. (COF-683)

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[67] Dr. Leonard criticizes Dr. Ramaprasad for using the 100:1 U.K. Official Charts Company ratio and claims that the ratio was recently changed to 150:1. (COF-682; Leonard WRT ¶ 178 (HX-698)) The document he cites in support of his claim that the ratio was changed is a BBC News article which also provides no information regarding how the 150:1 ratio was derived.

d. The Aguiar/Waldfogel Working Paper

COL-464. Dr. Ramaprasad testified that "academic research" is "consistent with the benchmarks discussed above," citing one working paper by Luis Aguiar and Joel Waldfogel that was not published in a peer-reviewed journal. (COF-652; Ramaprasad WDT ¶ 89 (HX-1615); Tr. 1945:21-24 (Ramaprasad))[68] Dr. Ramaprasad's entire discussion of this paper consists of the following two sentences: "Specifically, academic research has investigated how the sales of singles or CDs change with an increase in interactive streaming, i.e., whether and to what extent consumers consider interactive steaming and singles/CDs as substitutes. Using data from the top 50 streams available on Spotify and Nielson data for music sales for the period of 2013-2015, this research has found that for every increase of 137 streams, there is a decrease of 1 song purchased, i.e., 137 streams are equivalent to one single." (COF-655) This is not only decidedly not an analysis, it is a mischaracterization of the paper, the issue it was examining, and its conclusions.

COL-465. The stated goal of the Aguiar/ Waldfogel paper "is to analyze data on streaming, sales and unpaid consumption to determine how streaming is affecting the ***recorded music industry***." (COF-657; HX-909 at 3 (emphasis added); Rysman WRT ¶ 97 (HX-3032)) Aguiar and Waldfogel do not attempt to ask what happens to the download behavior of an individual who adopts streaming, nor how consumption of a particular song changes when it is available to stream. (COF-659) They do not investigate "whether and to what extent consumers consider interactive steaming and singles/CDs as substitutes," or reach any conclusions regarding

[68] Drs. Marx and Katz also make passing reference to the Aguiar and Waldfogel paper as corroborative of the RIAA "benchmark," but do not provide any additional analysis or discussion of the paper. (COF-653; Marx WDT ¶ 108 (HX-1065); Katz WDT ¶ 110 (HX-885))

the sales of CDs, as their data was limited to digital sales. (COF-657; COF-659; HX-909 at 13-15) Nor do they study or reach any conclusions regarding the effect of streaming on the music publishing or songwriting industries. (*See* COF-657; COF-659; HX-909)

COL-466. There are also several methodological problems with, and limitations on, the study that render it inappropriate for use in setting industry-wide rates. *First*, the authors' use the top 50 songs on Spotify as an "index of total streaming." (COF-660; HX-909 at 14) But the effect of streaming on the consumption of individual songs could reasonably be expected to be very different for songs outside of the top 50, which represent about 90 percent of total streaming volume. (*Id.*) For example, the top 50 tracks streamed on Spotify might be a much smaller proportion of total track streams on Spotify than the top tracks downloaded might be as a proportion of total download sales. If the top 50 songs accounted for a greater percentage of overall download sales than they did for total track streams, then displacement of the top 50 tracks might be greater in the download market than in the streaming market, a fact that the authors did not consider. (*Id.*)

COL-467. *Second*, the authors looked only at Spotify data (and for a limited period). (COF-658; HX-909 at 13-15) Their analysis did not at all consider the effects that streaming services other than Spotify might have on download sales, and it did not consider the effects of streaming on the sales of physical products such as CDs and vinyl records. (COF-662; *See* HX-909)

COL-468. *Third*, Aguiar and Waldfogel expressly admit that the 137:1 ratio was a "best estimate" and one based on limited data that "fall short of the ideal" because, among other things, they did not have access to sufficient streaming data from Spotify. (COF-661; HX-909 at 12, 20) Aguiar and Waldfogel therefore view their paper as very limited, stating that

"[a]dditional work would be helpful to provide more confidence in [t]heir answer." (COF-662; HX-909 at 26)

COL-469. The Services' experts did not verify that the input data that Aguiar and Waldfogel used was accurate, sufficient, or appropriate for the analysis they purported to undertake. (COF-654; Tr. 1945:25-1946:10 (Marx)) In fact, Aguiar and Waldfogel state that "it would be desirable to conduct experimental studies at the song level for interactive streaming services to see whether they stimulate or depress track sales." (COF-662; HX-909 at 36) Yet not only did the Services' experts fail to identify any such further studies or additional work performed by Aguiar and Waldfogel, they themselves failed to do any of that work, or to engage in any independent analysis of streams and permanent digital downloads (let alone physical sales). Indeed, while Aguiar and Waldfogel lacked "confidence in [their] answer" in part because they had limited Spotify data to examine, Dr. Marx, who is Spotify's expert witness [redacted]. (COF-666; Tr. 1946:14-1947:5 (Marx)) Dr. Ramaprasad did not [redacted]. (COF-689; Tr. 2794:16-2795:2 (Ramaprasad)) [redacted], they instead simply invoked one of the ratios contained in a working paper without any analysis or verification. (COF-654; Tr. 1946:11-13 (Marx); 2789:19-2790:1 (Ramaprasad))

COL-470. Moreover, Drs. Ramaprasad and Marx conveniently ignore that Aguiar and Waldfogel conducted ***two*** analyses. (COF-663; Tr. 1947:10-13 (Marx)) In the analysis that they cite, the authors compared data from Spotify relating to streams of the top 50 songs during the period April to December 2013 with data from Billboard relating to download sales during a different time period (from 2013 through 2015). (*Id.*) The Billboard data was aggregated data

that was not tied or matched to the exact same 50 songs in the Spotify data. (*Id.*) Using a regression analysis, the authors reached the 137:1 result. (*Id.*; HX-909 at 20-22)

COL-471. But in the second analysis, which Drs. Ramaprasad and Marx studiously ignore, the authors compared the weekly data from Spotify for the period April to December 2013 with weekly data from Nielson on digital download sales for the same exact songs during the same overlapping time period. That analysis, which the authors called their "matched aggregate sales" analysis, yielded a ratio of 43 to 1. (COF-664; HX-909 at 15, 21)[69] This "matched aggregate sales" analysis is not only more precise – because it was based on a song to song comparison – it was also more robust, as it looked at over 700 tracks on Spotify, while the analysis that yielded the 137:1 ratio looked only at 86 tracks. (COF-664; HX-909, Tables 5 and 7)[70]

COL-472. In sum, Drs. Ramaprasad and Marx have failed to demonstrate that this third-party study of track purchasing displacement (permanent download only) caused by streaming activity on just one of the services (Spotify) during a period that ended nearly two

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[69] Dr. Katz acknowledges the 43:1 ratio, citing it in a different section of his WDT for the proposition that streaming has reduced piracy, stating that "a recent academic study finds that every 47 streams displaces one illegal download." (COF-665; Katz WDT ¶ 55 & n.70 (HX-885)) It is curious that Dr. Katz would adopt the 47:1 ratio for the proposition that streaming replaces illegal downloads while adopting the 137:1 ratio for his "conversion" analysis, as the paper did not confine one study to illegal downloads and the other study to legal downloads.

[70] Dr. Ramaprasad cites in her WDT a more recent paper by Datta, Knox and Bronnenberg ("DKB"), WDT n. 150, at 41 (HX-1615), HX-201, which uses individual level data to measure the long-term effect on overall music listening of an individual user of a download service (mostly iTunes) who adopts Spotify. (COF-667; HX-201 at 2-3) Using consumption data from users pulled from Last.fm, DKB 's analysis shows that when individuals begin to use Spotify, while their overall listening to both downloads and streams combined increased by a certain percentage their download listening decreased by a different percentage. (HX-201 at 20) Assuming that using an analysis that attempts to "equate" the consumption of streams to the consumption of downloads were an appropriate way to set a rate in this proceeding, the DKB paper could be used to imply a very different conversion ratio of closer to 2:1. While Dr. Ramaprasad cites and relies on the DKB paper for a different point, she completely fails to consider the implications of DKB's conclusions in adopting a 100:1 "conversion ratio." (COF-667)

years ago is a relevant or appropriate basis for deriving an industry-wide mechanical royalty rate for interactive streaming for the next five years, particularly when they have performed no independent investigation or analysis of the underlying data or methodology behind the study or considered the limitations of the study, including those pointed out by its authors. Indeed, with respect to a per-play rate, a more relevant inquiry is not aggregate unmatched displacement but the matched (song to song) displacement and that was 43 to 1. Thus, invoking the 137 to 1 ratio is even more questionable when the very same paper references a study that compares significantly more data concerning the same songs for the same time period and yields a very different result than the one posited by the Services.

2. The Use Of These "Conversion" Ratios Ignores That Downloads and Streams Are Not Equivalents

COL-473. Deriving a statutory compulsory rate for interactive streaming services by trying to "convert" or "equate" streams to downloads is a fundamentally flawed exercise in the first place, because streams and downloads are not equivalents.

COL-474. The fallacy of the argument that streams are equivalent to downloads was laid bare by Dr. Ramaprasad herself, who testified at trial that downloads and streams are similar because "for both, we can listen to whatever song we like at whatever time we would like to." (COF-698; Tr. 2796:14- 2797:11; 2604:21-2605:13 (Ramaprasad)) But, of course, that is not true. A user who wishes to listen to downloads can only listen to the particular downloads that he or she purchased. A user of an interactive streaming service has on-demand access to tens of millions of songs. A "conversion" analysis ignores that playing the same song 150 times is not the same as playing 150 different songs one time each.

COL-475. There is great value in the diversity of music that is provided by interactive streaming. This is one reason why, in the case of music files, access is a far more

valuable model than ownership. (COF-53; COF-77; COF-622; Marx WDT ¶ 38 (HX-1065) ("For consumers, interactive streaming provides immediate access to an extensive catalog of songs beyond what most individual owners could accumulate, allowing free sampling and experimentation with new music.")); Ramaprasad WDT ¶ 68 (HX-1615) ("interactive streaming services have increased consumer access to a larger catalogue and, therefore, a greater variety of music"); Hubbard WDT ¶ 2.8 (HX-22) (interactive streaming services "appeal to consumers by moving away from a model of 'ownership' towards a model of 'access.'"); Ghose WDT ¶ 50 (HX-1617) ("interactive streaming services provide consumers access to a large catalog of songs that they can listen to 'on-demand' without owning the songs (and paying for that ownership);" Eisenach WRT ¶ 51 (HX-3033) (access to music on-demand is a substantial value, separate and apart from the value obtained from listening to music))

COL-476. As Copyright Owners' expert Dr. Eisenach stated, "'converting' the penny rate for ownership rights in a single song into a rate reflecting the value of unlimited, on-demand usage of a music library" is "akin to trying to derive the value of a gym membership by asking the question: 'How many visits to the gym equals one barbell?'" (COF-739; *see also* Rysman WDT ¶¶ 91-93 (HX-3026) ("How do we equate the everlasting option of listening to a downloaded song to the time-limited option of listening to a large catalog of songs?')) Spotify's Will Page also noted the absurdity of the approach when he said that comparing streams to downloads to derive "stream equivalent albums" is akin to asking how many e-mails equals one fax, or creating a ratio of "fax equivalent e-mails." (COF-700; COF-712)

COL-477. Streaming also creates value that downloads do not create, in that when a service sells a download, the consumer transaction is complete upon the sale. Streaming services, on the other hand, maintain a continuing and continuous relationship with their

subscribers or users. The service can harvest valuable data from its users as a result, including, for example, what types of music a particular user listens to, where he or she listens to that music, and when he or she listens. (COF-460) This is of great assistance and value in, *inter alia,* serving targeted advertisements to those users (results in premium prices charged to advertisers).

3. Apple's Proposed Rate Is Unreasonably Low, Would Drastically Reduce Royalty Payments As Usage Is Expanding, And Would Lead To "Zero Rates" For Mechanical Royalties

COL-478. Apple's proposed an "all-in" royalty rate of $0.00091 per play would drastically reduce the royalties paid by the Services, and in particular Apple. [redacted]. (COF-770; Rysman WRT ¶ 84 & Table 1 (at p. 51) (HX-3032))

COL-479. While Apple's expert, Dr. Ramaprasad, opined that Apple's proposed rate was "reasonable" solely because it is "consistent with" the "conversion ratios" that she cites to (which is both tautological, because Apple's rate was calculated using one of those "conversion ratios" and vacuous, because, as discussed above, Dr. Ramaprasad has no knowledge about the conversion ratios), [redacted]. (COF-702; Tr. 2752:11-17 (Ramaprasad)) [redacted]. (COF-703; Tr. 2752:18-22 (Ramprasand)) [redacted]. (COF-704; Tr. 2752:23-2753:6 (Ramaprasad))

COL-480. Moreover, as noted above, Apple does not actually propose a fixed mechanical royalty rate, but rather, an "all in" rate that will float (or sink) potentially to zero after deducting performance royalties paid by the service from a $.00091 "all-in" rate without a mechanical only floor. [redacted], Rysman WRT ¶ 85 (HX-3032), [redacted]. (COF-616)

B. The Proposed Revenue-Based Royalty Structures Are Unreasonable And Not Consistent With The 801(b) Factors

1. Benchmarks That Reflect Prevailing Statutory Rates Are Not Marketplace Benchmarks

COL-481. As discussed above, prevailing statutory rates are not market benchmarks, nor are deals under a statutory regime that are at or near the statutory terms. The CRB could not have been much clearer in *SDARS II*, in a Section entitled "The Prevailing Statutory Rate," holding that ***the statutory rate "is a rate that was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate . . . ."*** 78 FR at 23058 (citation omitted).

COL-482. Nor is this surprising. ***Of course*** statutory rates are not market benchmarks. Ignoring the overwhelming shadow of statutory rates denies their very purpose. Statutory rates are ***compulsory*** rates – which are fixed and which exist at a point in time based on the facts existing at that point in time. A statutory rate ***could*** mirror a marketplace rate – but that would be ***despite*** it being a statutory rate, not ***because*** of it. One would have to ***prove*** through extrinsic evidence why a particular statutory rate reflected a marketplace, because no economic principles provide that statutory rates bake in understanding of the marketplace.

COL-483. One could theorize the existence of evidence that would prove that not only was a statutory rate a marketplace benchmark but that there had been no changes in facts and circumstances that warranted changes in such rates and terms (or evidence could be presented that enabled Judges to adjust such rates and terms based on the changes in facts and circumstances). But such evidence would have to be presented, not assumed, both as to the underlying evidentiary basis for either the prior rates and terms or for a settlement creating those terms and any changes that have occurred. Here, the Services have presented not a shred of underlying evidence to support the use of the rates and terms from the 2008 and 2012 settlements, even as they have ignored the manifest changes in the industry that have occurred since those settlements were entered into.

COL-484. The purpose of economic benchmarking is to use marketplace rates that ***by their very nature as free market deals*** bake in elements that we expect from the market. Longstanding economic principles concerning free market transactions support this use of marketplace deals precisely because of the dynamics of sophisticated entities in the marketplace. Statutory rates and the direct deals under them do not do this.

COL-485. The Judges recognized in *Web IV* that direct deals reflecting statutory terms are of course not benchmarks either, noting that deal terms that mirror statutory rates "reveal[] nothing about whether the parties in the marketplace would agree to include such a prong in an agreement." (*Web IV*, 81 FR at 26325-26)

COL-486. The Judges in *Phonorecords I* explicitly remarked on the "considerable impact" of the shadow of the statutory rates on all private agreements thereunder:

> The complexity of compliance, and the associated transactions costs, create a curious anomaly: virtually no one uses section 115 to license reproductions of musical works, yet the parties in this proceeding are willing to expend considerable time and expense to litigate its royalty rates and terms. The Judges are, therefore,

> seemingly tasked with setting rates and terms for a useless license. The testimony in this proceeding makes clear, however, that despite its disuse, the section 115 license exerts a ghost-in-the-attic like effect on all those who live below it. [citation omitted] Thus, the rates and terms that we set today will have considerable impact on the private agreements that enable copyright users to clear the rights for reproduction and distribution of musical works.

Phonorecords I, 74 FR at 4513.

COL-487. Experts for both sides in this proceeding agree that the statutory rates have such "considerable impact [redacted]. (COF-716) [redacted]. (COF-716; Leonard WDT ¶ 71 n.129 (HX-3027 [redacted]. (COF-717; Tr. 5949:13-5950:16 (Hubbard))

COL-488. As Dr. Watt stated:

> I am aware that publishers in fact routinely bargain with services and license their repertoires directly, despite the existence of a statutory rate. This should come as no surprise — market participants will often find win-win situations that can marginally improve upon statutory rates for both sides or provide non-rate benefits for both. But it must be emphasized that this is nothing resembling a free market bargain. ***Licensors subject to a statutory rate have no ability to obtain materially higher rates than the statutory rates. Licensors can only bargain around the margins of the statutory rate***, identifying regulatory terms that may have more value to licensees, and which may thus be bargained away for alternative value. One example of this might be a bargain to eliminate a burdensome paperwork requirement associated with statutory rates. Such a term may be a substantial burden for the licensee, but provide little financial benefit to the licensor. There is thus a potential bargain to be had where the licensor waives the need for the paperwork in return for a transfer of surplus larger than its minimal paperwork value but less than the licensee's substantial paperwork value. But these are bargains around the margins of the statutory rate, and should not be confused with

> actual bargaining for higher royalty rates. ***Direct agreements at or near statutory rates simply measure the statutory rate and are wholly unhelpful as a measure of fair rates.***

(Watt WRT ¶ 36 n.22 (HX-3034) (emphasis added); *See also* Eisenach WRT ¶¶ 26-31 (HX-3033)) *Web IV* is in accord. *See Web IV*, 81 FR at 26352 ("Economists for both licensors and licensees agreed that the statutory rate effectively sets a ceiling on rates for statutory services, since a service can always fall back on the statutory rate if it is unable to negotiate an equal or lower rate with the copyright owner.") (citation omitted).

COL-489. This "considerable impact" just reinforces that, whatever statutory rates and the direct deals thereunder may be, they cannot be considered marketplace benchmarks and it would be hopelessly circular for rate-setting bodies to use the results of their own proceedings as benchmarks. Doing so would be akin to benchmarking the performance of your computer by comparing it to itself – there is nothing informative in such an exercise.

2. Subpart A Does Not Provide A Legitimate Benchmark

COL-490. There are two ways that the Services seek to use Subpart A rates as a "benchmark."

COL-491. Before getting to the detailed problems with each approach, as discussed above, Subpart A is a statutory rate and thus is not a marketplace benchmark, regardless of whether it was part of a settlement in the shadow of the rate proceeding. As also discussed above, Dr. Marx herself admitted that to determine fair market rates, one would look to "market-determined" or "competitive" benchmarks, not benchmarks under the influence of rate-setting bodies. And as noted multiple times during the hearing, the most that might be presumed from settling parties is that they are playing a game of anticipating what they think the Judges might rule – a game that can be far removed from reality. (COF-724; Tr. 573:4-580:1 (Katz); Tr. 1845:4-9 (Marx)) As discussed above, not only is there no teaching or experience or evidence

whatsoever that a rate proceeding settlement represents a marketplace benchmark, the CRB has specifically held that it does not.

COL-492. The first method by which a Service seeks to use Subpart A rates as a "benchmark" is Drs. Ramaprasad's and Marx's reliance upon the "conversion ratio" approach, which, as set forth above is utterly devoid of any economic or other analytical support or basis. (COF-648)

COL-493. The second approach is advanced by Drs. Leonard and Marx. This approach looks to compare how much record labels might obtain in the free market from selling physical product or digital downloads to how much musical works owners obtain from the statutory Subpart A license, an approach that conflates upstream and downstream markets. (COF-725; Leonard WDT ¶¶ 42-44 (HX-695); Marx WDT ¶¶ 113-115 (HX-1065))

COL-494. This type of comparison has already been rejected by the Register in a prior rate proceeding. In the 1998 *PSS* Proceeding, the RIAA sought to advance a near-identical argument comparing what percentage of the wholesale price of records goes to labels versus how much is paid to the musical works owners under Subpart A, to try to show how much more the sound recording was worth. The Register properly held that this argument "fails" because:

> [The RIAA's argument] does not discuss the constraining effect the mechanical license has on the copyright owners in setting a value on their reproduction and distribution right. Record companies pay the copyright owners of the musical compositions no more than the statutory rate for the right to reproduce and distribute the musical composition in a phonorecord. The record company then, in turn, sells the phonorecord at a fair market price. Because both groups do not share equal power to set rates in an unfettered marketplace, it is unreasonable to compare the value of the reproduction and distribution right of musical compositions - a rate set by the government at a level to achieve certain statutory goals - with the revenues flowing to record companies from a price set in the marketplace according to the laws of supply and demand, and then to declare that the marketplace values of the sound recording more than the underlying musical composition.

Final Rule and Order, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 FR 25394, 25404 (May 8, 1998) ("*CARP PSS 1998*").

COL-495. This holding captures one of the many problems with this "benchmark." The labels are ***the downstream licensees*** in this situation. The labels obtain a license to record a musical work, ***and pay a fixed fee per unit,*** and then not only create the sound recording, but also go out and manufacture and distribute the physical copies and arrange for distribution of digital copies. If those physical copies have to be deeply discounted in order to sell them, the musical works royalty does not diminish. (COF-727)[71] If the label has a hit sound recording and can price that unit higher and make more money off of the sales, they have that ability and surely use it.[72] The Services' experts took none of this into account.[73]

COL-496. Moreover, although the record label is the licensee of the musical work under Subpart A, Dr. Marx's analysis of musical works royalties as a percentage of revenue under Subpart A licensing looked to the retail price of a track to determine revenue rather than the revenue actually received by the label, which may be lower on a per-track basis than the

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[71] As discussed above, there is also significant evidence in the record that sales of physical copies and PDDs are in fact declining precipitously every year. The Services claim that the benchmark they are using is the recently negotiated settlement from 2016. However that settlement is for future rates, and one cannot compare "recommended or estimated retail prices" of physical/PDD products from past years in order to gauge what label revenues or profits will be from such sales during the next rate period starting in 2018. Moreover, the precipitous decline in sales of PDDs was a significant factor in the NMPA choosing to settle the Subpart A PDD rates in 2016, rather than engage in costly litigation with the labels over such rates. (COF-736)

[72] There is a range of price points for individual tracks in the market. (COF-727)

[73] The services also ignore that the Subpart A rate is a per-unit consumption-based rate. They ignore all of the benefits of access provided by streaming which are not available in the case of a download, as discussed above. And they do not factor the economic value of the data that streaming services receive by virtue of their continuing relationship with users. (COF-460)

retail price. (COF-728) In fact, some labels are now selling downloads at a wholesale price of 49 cents. (COF-727)

COL-497. The relative valuation benchmarking exercise that Dr. Eisenach uses is entirely different. There he is looking at two licensors with perfectly complementary inputs who are licensing to a third party, not one to the other. This analysis truly informs as to relative valuation.

COL-498. Likewise, the Shapley analysis provides a proper way of evaluating the relative values of the sound recordings and musical works. [redacted]. (COF-738)

CONCLUSION

For the foregoing reasons, and those set forth in the Proposed Findings of Fact, the Copyright Owners respectfully request that the Copyright Royalty Judges adopt the proposals set forth in the Amended Proposed Rates and Terms of the National Music Publishers' Association, Inc., and the Nashville Songwriters Association International, dated May 11, 2017.

Dated: May 11, 2017

Respectfully submitted,

PRYOR CASHMAN LLP

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Attorneys for the Copyright Owners

CERTIFICATE OF SERVICE

I hereby certify that, on May 12, 2017, I caused a true and correct copy of the PUBLIC versions of **Proposed Findings of Fact of Copyright Owners; Proposed Conclusions of Law of Copyright Owners; and Amended Proposed Rates and Terms of the National Music Publishers' Association, Inc. and Nashville Songwriters Association International** to be served on the individuals and entities identified in the below-attached Service List solely by e-mail, with no hard copy to follow, as expressly requested by all participants.

By: Marion R. Harris

Marion R. Harris

Service List

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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)

DECLARATION OF BENJAMIN K. SEMEL
REGARDING RESTRICTED INFORMATION

1. I am a partner at Pryor Cashman LLP, counsel for the National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI" and, together with the NMPA, the "Copyright Owners") in the above-captioned proceeding (the "Proceeding").

2. Pursuant to Section IV.A of the Protective Order issued in the above-captioned Proceeding on July 28, 2016 (the "Protective Order"), I submit this declaration in connection with the Proposed Findings of Fact of Copyright Owners and Proposed Conclusions of Law of Copyright Owners (the "Proposed Findings and Conclusions").

3. I am familiar with the definitions and terms set forth in the Protective Order. Together with attorneys working under my supervision, I am also familiar with the Proposed Findings and Conclusions and the Redaction Logs appended hereto as Attachment A and Attachment B. After consulting with Copyright Owners and entities whose interests Copyright Owners represent in this Proceeding and who have provided confidential information for the preparation of this case, attorneys working under my direction and I have determined in good faith that portions of the Copyright Owners' Proposed Findings and Conclusions contains "Confidential

Information" as defined in and protected under Section III of the Protective Order. Pursuant to the Protective Order's terms, such confidential information has been designated and marked as "Restricted."

4. The Restricted information that Copyright Owners are submitting includes, among other things, (a) materials or testimony relating to or constituting contracts, contract terms or data that are proprietary, not publicly available, commercially sensitive or subject to express confidentiality obligations in agreements with third parties; (b) materials or testimony relating to or constituting internal business information, negotiating positions, negotiation strategy, financial data and projections, and competitive strategy that are proprietary, not publicly available or commercially sensitive; and (c) third-party information provided in confidence, not publicly available or subject to express confidentiality obligations.

5. In addition, attorneys working under my direction and I have determined that portions of the Copyright Owners' Proposed Findings and Conclusions contain information previously designated "Restricted" by a participant or producer in this Proceeding pursuant to the terms of the Protective Order.

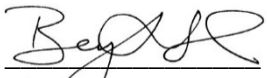
6. The Restricted materials contain information that, if disclosed, would either competitively disadvantage Copyright Owners, the entities whose interests they represent and their business partners, and other entities; provide a competitive advantage to another entity or participant in the above-captioned proceeding; or interfere with the ability to obtain like information in the future by Copyright Owners, the entities whose interests they represent and their business partners, and other entities.

7. Pursuant to the Protective Order, Copyright Owner is submitting all confidential information designated as "Restricted" under seal and is redacting such information from the

Public version of its Proposed Findings and Conclusions submission. Attachment A and Attachment B are Redaction Logs that identify the Restricted information in the Copyright Owners' Proposed Findings of Fact and Proposed Conclusions of Law, respectively, and set forth the basis for each redaction.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: May 12, 2017
New York, New York



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Counsel for Copyright Owners

ATTACHMENT A

REDACTION LOG
PROPOSED FINDINGS OF FACT OF COPYRIGHT OWNERS

Paragraph	Description and Basis	Producing Participant/ Producer
COF-26 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COF-27	Designated restricted by Producing Participant/Producer.	Amazon
COF-28	Restricted information discussed by witness during confidential hearing session	Amazon
COF-57	Restricted information discussed by witness during confidential hearing session	Google
COF-59	Designated restricted by Producing Participant/Producer.	Amazon
COF-62	Designated restricted by Producing Participant/Producer.	Amazon
COF-65	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV
COF-67	Designated restricted by Producing Participant/Producer.	Amazon
COF-69	Restricted information discussed by witness during confidential hearing session	Pandora
COF-70	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Pandora
COF-72 (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Amazon; Pandora; Google
COF-73	Restricted information discussed by witness during confidential hearing session	Spotify
COF-90	Designated restricted by Producing Participant/Producer.	Apple

Paragraph	Description and Basis	Producing Participant/ Producer
COF-91	Restricted information discussed by witness during confidential hearing session	Google
COF-92	Restricted information discussed by witness during confidential hearing session	Google
COF-93	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-95	Designated restricted by Producing Participant/Producer.	Amazon
COF-98 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COF-102A	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-108	Restricted information discussed by witness during confidential hearing session	Spotify
COF-109	Restricted information discussed by witness during confidential hearing session	Google
COF-110	Restricted information discussed by witness during confidential hearing session	Spotify
COF-111	Restricted information discussed by witness during confidential hearing session	Spotify
COF-116	Designated restricted by Producing Participant/Producer.	Amazon
COF-117	Restricted information discussed by witness during confidential hearing session	Amazon
COF-120	Designated restricted by Producing Participant/Producer.	Google
COF-121	Designated restricted by Producing Participant/Producer.	Google
COF-122	Designated restricted by Producing Participant/Producer.	Amazon
COF-125	Restricted information discussed by witness during confidential hearing session	Google
COF-126	Restricted information discussed by witness during confidential hearing session	Google

Paragraph	Description and Basis	Producing Participant/ Producer
COF-132	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; Downtown; BMG; W/C
COF-134	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Downtown
COF-140 (3 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-141	Designated restricted by Producing Participant/Producer.	Google
COF-142	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG
COF-144	Restricted information discussed by witness during confidential hearing session	UMPG
COF-146 (13 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG; SATV; DR; W/C
	Designated restricted by Producing Participant/Producer.	Pandora

Paragraph	Description and Basis	Producing Participant/ Producer
COF-150 (4 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPC; W/C;
COF-152 (10 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; W/C;
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; W/C
COF-153 (11 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C

Paragraph	Description and Basis	Producing Participant/ Producer
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C
COF-154 (4 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; W/C
COF-155 (5 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C
COF-156 (2 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG

Paragraph	Description and Basis	Producing Participant/ Producer
	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-163	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C
COF-166 (11 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C

Paragraph	Description and Basis	Producing Participant/ Producer
COF-167	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C
COF-168 (9 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG
COF-170 (5 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C

Paragraph	Description and Basis	Producing Participant/ Producer
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COF-171	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-173 (6 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG

Paragraph	Description and Basis	Producing Participant/ Producer
COF-178	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; W/C
COF-179 (7 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; BMG; Downtown
COF-180 (3 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV
COF-181 (5 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; Downtown; SATV; W/C

Paragraph	Description and Basis	Producing Participant/ Producer
COF-182 (3 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C
COF-187 (4 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; W/C; UMPG
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; W/C
COF-188	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; UMPG; W/C

Paragraph	Description and Basis	Producing Participant/ Producer
COF-190	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-193	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-194	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-195	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA

Paragraph	Description and Basis	Producing Participant/ Producer
COF-196	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV
COF-197	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-198	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Downtown
COF-199 (5 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV

Paragraph	Description and Basis	Producing Participant/ Producer
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV
COF-200	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Amazon
COF-201	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Amazon
	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-202	Restricted information discussed by witness during confidential hearing session.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COF-203	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-204	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Google
COF-206	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Google
COF-209	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Apple

Paragraph	Description and Basis	Producing Participant/ Producer
COF-210 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Amazon
COF-229	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-230 (4 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-231	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA

Paragraph	Description and Basis	Producing Participant/ Producer
COF-232 (3 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-233 (3 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Spotify
COF-235	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-237 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Pandora; Apple
COF-238	Restricted information discussed by witness during confidential hearing session.	Google
COF-241 (3 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Google; Pandora; UMPG; BMG; SATV; Downtown

Paragraph	Description and Basis	Producing Participant/ Producer
COF-242	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-244	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; BMG; Downtown
COF-245 (4 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-246 (7 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; Downtown; SATV
COF-247 (6 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV

Paragraph	Description and Basis	Producing Participant/ Producer
COF-250 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-251	Designated restricted by Producing Participant/Producer.	Google
COF-252	Designated restricted by Producing Participant/Producer.	Google
COF-253	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-255	Designated restricted by Producing Participant/Producer.	Google
COF-256 (7 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; Downtown; Kobalt; UMPG; NMPA
	Designated restricted by Producing Participant/Producer.	Google
COF-257 (6 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-258	Designated restricted by Producing Participant/Producer.	Google
COF-259 (3 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-260	Designated restricted by Producing Participant/Producer.	Google
COF-261	Designated restricted by Producing Participant/Producer.	Google
COF-262	Designated restricted by Producing Participant/Producer.	Google
COF-263	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COF-264	Designated restricted by Producing Participant/Producer.	Spotify
COF-265		
COF-266	Designated restricted by Producing Participant/Producer.	Google
COF-268 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; NMPA
COF-269 (2 redactions)	Designated restricted by Producing Participant/Producer.	Pandora
COF-270	Designated restricted by Producing Participant/Producer.	Pandora
COF-271	Designated restricted by Producing Participant/Producer.	Pandora
COF-272	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-273 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA

Paragraph	Description and Basis	Producing Participant/ Producer
COF-274 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-275 (5 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-276	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-277 (3 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA

Paragraph	Description and Basis	Producing Participant/ Producer
COF-278 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-279 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-280	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-281 (3 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA

Paragraph	Description and Basis	Producing Participant/ Producer
COF-282 (3 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-285 (25 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora; Spotify
COF-286	Designated restricted by Producing Participant/Producer.	Google; Amazon; Apple; Pandora; Spotify
COF-289	Designated restricted by Producing Participant/Producer.	Spotify
COF-290	Designated restricted by Producing Participant/Producer.	Spotify
COF-291	Designated restricted by Producing Participant/Producer.	Spotify
COF-292	Designated restricted by Producing Participant/Producer.	Spotify
COF-293		
COF-294	Designated restricted by Producing Participant/Producer.	Spotify
COF-295	Designated restricted by Producing Participant/Producer.	Spotify
COF-297	Designated restricted by Producing Participant/Producer.	Spotify
COF-298	Designated restricted by Producing Participant/Producer.	Spotify
COF-299	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COF-300	Designated restricted by Producing Participant/Producer.	Spotify
COF-301	Designated restricted by Producing Participant/Producer.	Google
COF-302	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COF-303	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV
COF-304	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA

Paragraph	Description and Basis	Producing Participant/ Producer
COF-305 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-306	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-315	Designated restricted by Producing Participant/Producer.	Google
COF-316 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-317	Designated restricted by Producing Participant/Producer.	Google
COF-318	Restricted information discussed by witness during confidential hearing session.	Google
COF-327	Designated restricted by Producing Participant/Producer.	Amazon
COF-329	Designated restricted by Producing Participant/Producer.	Spotify
COF-335	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-336	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-337	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-340 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA

Paragraph	Description and Basis	Producing Participant/ Producer
COF-343	Designated restricted by Producing Participant/Producer.	Apple
COF-347	Designated restricted by Producing Participant/Producer.	Pandora
COF-348 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COF-350	Designated restricted by Producing Participant/Producer.	Amazon
COF-351	Designated restricted by Producing Participant/Producer.	Amazon
COF-353	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-354	Designated restricted by Producing Participant/Producer.	Spotify
COF-355	Designated restricted by Producing Participant/Producer.	Spotify
COF-356	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-357	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-358	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-359	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-364	Designated restricted by Producing Participant/Producer.	Spotify
COF-365	Restricted information discussed by witness during confidential hearing session.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COF-366	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-367	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-368	Designated restricted by Producing Participant/Producer.	Spotify
COF-369	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-370	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-371	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-372	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-374	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-375 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COF-377 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COF-378	Designated restricted by Producing Participant/Producer.	Amazon
COF-379	Designated restricted by Producing Participant/Producer.	Amazon
COF-380		
COF-381	Designated restricted by Producing Participant/Producer.	Amazon
COF-382	Restricted information discussed by witness during confidential hearing session.	Google
COF-383	Restricted information discussed by witness during confidential hearing session.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COF-384	Restricted information discussed by witness during confidential hearing session.	Google
COF-385	Restricted information discussed by witness during confidential hearing session.	Google
COF-386	Restricted information discussed by witness during confidential hearing session.	Google
COF-387 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-388	Designated restricted by Producing Participant/Producer.	Google
COF-389	Designated restricted by Producing Participant/Producer.	Google
COF-390	Restricted information discussed by witness during confidential hearing session.	Google
COF-392	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-394	Designated restricted by Producing Participant/Producer.	Spotify
COF-396	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-399	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-403	Designated restricted by Producing Participant/Producer.	Spotify
COF-404	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COF-408 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COF-409	Designated restricted by Producing Participant/Producer.	Amazon
COF-411	Designated restricted by Producing Participant/Producer.	Pandora
COF-412	Designated restricted by Producing Participant/Producer.	Spotify
COF-413	Designated restricted by Producing Participant/Producer.	Spotify
COF-418 (8 redactions)	Restricted information discussed by witness during confidential hearing session.	Google
COF-418	Designated restricted by Producing Participant/Producer.	Google
COF-419 (7 redactions)	Designated restricted by Producing Participant/Producer.	Pandora
COF-437	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-449	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-450	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-451	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-452	Restricted information discussed by witness during confidential hearing session.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COF-456	Designated restricted by Producing Participant/Producer.	Google
COF-465	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-466	Designated restricted by Producing Participant/Producer.	Amazon
COF-467	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-469 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COF-470	Designated restricted by Producing Participant/Producer.	Amazon
COF-471	Designated restricted by Producing Participant/Producer.	Amazon
COF-472	Designated restricted by Producing Participant/Producer.	Amazon
COF-473	Designated restricted by Producing Participant/Producer.	Amazon
COF-474	Designated restricted by Producing Participant/Producer.	Amazon
COF-475	Designated restricted by Producing Participant/Producer.	Amazon
COF-476	Designated restricted by Producing Participant/Producer.	Amazon
COF-478	Designated restricted by Producing Participant/Producer.	Amazon
COF-479	Designated restricted by Producing Participant/Producer.	Amazon
COF-480	Designated restricted by Producing Participant/Producer.	Amazon
COF-481	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-482 (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Google
	Designated restricted by Producing Participant/Producer.	Google
COF-483	Designated restricted by Producing Participant/Producer.	Pandora

Paragraph	Description and Basis	Producing Participant/ Producer
COF-484 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-485	Designated restricted by Producing Participant/Producer.	Google
COF-488	Designated restricted by Producing Participant/Producer.	Google
COF-489	Restricted information discussed by witness during confidential hearing session.	Google
COF-490	Restricted information discussed by witness during confidential hearing session.	Google
COF-491 (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Google
COF-492	Designated restricted by Producing Participant/Producer.	Google
COF-493	Designated restricted by Producing Participant/Producer.	Google
COF-494	Designated restricted by Producing Participant/Producer.	Google
COF-495 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COF-496	Designated restricted by Producing Participant/Producer.	Google
COF-497	Designated restricted by Producing Participant/Producer.	Google
COF-500	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-503	Designated restricted by Producing Participant/Producer.	Spotify
COF-506	Designated restricted by Producing Participant/Producer.	Spotify
COF-508	Designated restricted by Producing Participant/Producer.	Spotify
COF-509	Designated restricted by Producing Participant/Producer.	Amazon
COF-510	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COF-511	Designated restricted by Producing Participant/Producer.	Spotify
COF-512	Designated restricted by Producing Participant/Producer.	Spotify
COF-513	Designated restricted by Producing Participant/Producer.	Spotify
COF-514	Designated restricted by Producing Participant/Producer.	Spotify
COF-515	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-516	Designated restricted by Producing Participant/Producer.	Spotify
COF-517	Restricted information discussed by witness during confidential hearing session.	Spotify
COF-518	Designated restricted by Producing Participant/Producer.	Spotify
COF-519	Designated restricted by Producing Participant/Producer.	Spotify
COF-524	Designated restricted by Producing Participant/Producer.	Pandora
COF-529	Designated restricted by Producing Participant/Producer.	Spotify
COF-537	Designated restricted by Producing Participant/Producer.	Spotify
COF-539	Designated restricted by Producing Participant/Producer.	Pandora
COF-540	Designated restricted by Producing Participant/Producer.	Spotify
COF-543	Designated restricted by Producing Participant/Producer.	Amazon
COF-549	Designated restricted by Producing Participant/Producer.	Amazon
COF-550	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-551	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-552	Designated restricted by Producing Participant/Producer.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COF-553	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-554	Designated restricted by Producing Participant/Producer.	Amazon
COF-555	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-556	Designated restricted by Producing Participant/Producer.	Amazon
COF-558	Designated restricted by Producing Participant/Producer.	Amazon
COF-559	Designated restricted by Producing Participant/Producer.	Amazon
COF-560	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-561	Designated restricted by Producing Participant/Producer.	Amazon
COF-562	Designated restricted by Producing Participant/Producer.	Amazon
COF-564	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-565	Designated restricted by Producing Participant/Producer.	Amazon
COF-572	Designated restricted by Producing Participant/Producer.	Spotify
COF-573	Designated restricted by Producing Participant/Producer.	Spotify
COF-575	Designated restricted by Producing Participant/Producer.	Spotify
COF-576	Designated restricted by Producing Participant/Producer.	Spotify
COF-577	Designated restricted by Producing Participant/Producer.	Spotify
COF-578	Designated restricted by Producing Participant/Producer.	Spotify
COF-583	Restricted information discussed by witness during confidential hearing session.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COF-590 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	UMPG; SATV; Pandora
COF-599	Designated restricted by Producing Participant/Producer.	Amazon; Spotify; Google; Pandora
COF-602	Designated restricted by Producing Participant/Producer.	Amazon; Google; Spotify ; Pandora
COF-603	Restricted information discussed by witness during confidential hearing session.	Amazon; Google; Spotify ; Pandora
COF-606	Designated restricted by Producing Participant/Producer.	Amazon; Google; Spotify ; Pandora
COF-607	Restricted information discussed by witness during confidential hearing session.	Amazon; Google; Spotify ; Pandora
COF-610	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG

Paragraph	Description and Basis	Producing Participant/ Producer
COF-611	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	ABKCO SONGS Reservoir Kobalt
COF-614	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-618	Designated restricted by Producing Participant/Producer.	Spotify
COF-626	Designated restricted by Producing Participant/Producer.	Amazon
COF-629	Designated restricted by Producing Participant/Producer.	Amazon
COF-632	Restricted information discussed by witness during confidential hearing session.	Pandora
COF-635	Designated restricted by Producing Participant/Producer.	Pandora
COF-638	Restricted information discussed by witness during confidential hearing session.	Amazon
COF-641	Designated restricted by Producing Participant/Producer.	Apple Amazon Google Pandora Spotify
COF-707	Designated restricted by Producing Participant/Producer.	Spotify
COF-718	Restricted information discussed by witness during confidential hearing session.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COF-719	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV
	Restricted information discussed by witness during confidential hearing session.	SATV
COF-720	Restricted information discussed by witness during confidential hearing session.	Apple
COF-721	Restricted information discussed by witness during confidential hearing session.	Apple
COF-738 (4 redactions)	Designated restricted by Producing Participant/Producer.	All services
COF-741(2 redactions)	Designated restricted by Producing Participant/Producer.	All services
COF-744	Designated restricted by Producing Participant/Producer.	All services
COF-746	Designated restricted by Producing Participant/Producer.	All services
COF-747	Designated restricted by Producing Participant/Producer.	All services
COF-748	Designated restricted by Producing Participant/Producer.	All services
COF-750	Designated restricted by Producing Participant/Producer.	Spotify
COF- 751 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; All services
COF-752	Designated restricted by Producing Participant/Producer.	Amazon
COF-753	Designated restricted by Producing Participant/Producer.	Amazon
COF-757	Designated restricted by Producing Participant/Producer.	All services

Paragraph	Description and Basis	Producing Participant/ Producer
COF-761	Designated restricted by Producing Participant/Producer.	All services
COF-762	Designated restricted by Producing Participant/Producer.	All services
COF-763	Designated restricted by Producing Participant/Producer.	All services
COF-765	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV HFA Kobalt Audium
COF-766	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV HFA Kobalt Audium
COF-767	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV HFA Kobalt Audium
COF-769	Designated restricted by Producing Participant/Producer.	All services
COF-770	Designated restricted by Producing Participant/Producer.	Apple
COF-773	Designated restricted by Producing Participant/Producer.	Spotify

ATTACHMENT B

REDACTION LOG FOR
PROPOSED CONCLUSIONS OF LAW OF COPYRIGHT OWNERS

Paragraph	Description and Basis	Producing Participant/ Producer
COL-44	Designated restricted by Producing Participant/Producer.	Spotify
COL-47 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Amazon
COL-47	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-49	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-49 FN	Designated restricted by Producing Participant/Producer.	Amazon
COL-51 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV
COL-57 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COL-59	Designated restricted by Producing Participant/Producer.	Amazon; Google; Spotify; Pandora
	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; Downtown; BMG; W/C
Heading "C(1)(d)"	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Spotify; Pandora
COL-60	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Spotify; Pandora
COL-61	Designated restricted by Producing Participant/Producer.	Apple
COL-62	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COL-64 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora
	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-68	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COL-72 (6 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Spotify
	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COL-74	Designated restricted by Producing Participant/Producer.	Amazon; Spotify
COL-77	Designated restricted by Producing Participant/Producer.	Spotify
COL-78	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-79	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-80	Restricted information discussed by witness during confidential hearing session.	NMPA
COL-82 (2 redactions)	Designated restricted by Producing Participant/Producer.	Apple; Google; Amazon Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-82 FN (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Apple; Pandora; Google; Amazon
COL-83	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-85	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-90	Restricted information discussed by witness during confidential hearing session.	Pandora
COL-104	Designated restricted by Producing Participant/Producer.	Google
COL-105	Designated restricted by Producing Participant/Producer.	Pandora
COL-106	Designated restricted by Producing Participant/Producer.	Spotify; Apple; Amazon
COL-107	Designated restricted by Producing Participant/Producer.	Spotify
COL-111 (2 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Downtown; W/C; BMG; SATV
	Designated restricted by Producing Participant/Producer.	Pandora
COL-112	Designated restricted by Producing Participant/Producer.	Spotify; Apple; Pandora; Google; Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COL-114 (3 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV
COL-116 (2 redactions)	Designated restricted by Producing Participant/Producer.	Apple; Amazon
COL-117	Designated restricted by Producing Participant/Producer.	Apple; Amazon; Google; Pandora; Spotify
COL-119 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-121 (2 redactions)	Designated restricted by Producing Participant/Producer.	Apple
COL-124 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-125	Designated restricted by Producing Participant/Producer.	Spotify
COL-153	Restricted information discussed by witness during confidential hearing session.	Spotify; Amazon
COL-154	Designated restricted by Producing Participant/Producer.	Apple; Google; Amazon; Spotify; Pandora
COL-156 FN (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Pandora; Google; Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-167	Designated restricted by Producing Participant/Producer.	Spotify; Google; Apple; Amazon
COL-168	Designated restricted by Producing Participant/Producer.	Spotify; Amazon; Apple; Google; Pandora
COL-170	Designated restricted by Producing Participant/Producer.	Spotify; Amazon; Apple; Google; Pandora
COL-171 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Spotify; Pandora
COL-174 (2 redactions)	Designated restricted by Producing Participant/Producer.	Pandora
COL-178	Designated restricted by Producing Participant/Producer.	Spotify; Pandora; Google
COL-179 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-181 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-184	Designated restricted by Producing Participant/Producer.	Google
COL-185	Designated restricted by Producing Participant/Producer.	Google
COL-186	Designated restricted by Producing Participant/Producer.	Google

Paragraph	Description and Basis	Producing Participant/ Producer
COL-187	Designated restricted by Producing Participant/Producer.	Google
COL-187 FN (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-188	Designated restricted by Producing Participant/Producer.	Google
COL-189 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-197 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Pandora; Apple; Google
COL-198 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Pandora; Apple; Google
COL-199 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Spotify; Pandora
COL-201 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-202 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-203 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-204	Designated restricted by Producing Participant/Producer.	Spotify
COL-205 (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-206 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-206 FN	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-207 (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-208	Designated restricted by Producing Participant/Producer.	Spotify
COL-209 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-210 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-211 (2 redactions)	Designated restricted by Producing Participant/Producer.	Pandora
COL-212 (4 redactions)	Designated restricted by Producing Participant/Producer.	Pandora
COL-214 (7 redactions)	Designated restricted by Producing Participant/Producer.	Pandora; Google; Spotify
COL-215 (7 redactions)	Designated restricted by Producing Participant/Producer.	Pandora; Google; Spotify
COL-216	Designated restricted by Producing Participant/Producer.	Spotify
COL-217	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-218 (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-219	Restricted information discussed by witness during confidential hearing session.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-220	Designated restricted by Producing Participant/Producer.	Spotify
Heading III.D.2	Designated restricted by Producing Participant/Producer.	Spotify
COL-221 (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-222	Designated restricted by Producing Participant/Producer.	Spotify
COL-223 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-225 (4 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-226 (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-227 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-227 FN	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-228 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-228 FN (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-229	Designated restricted by Producing Participant/Producer.	Spotify
COL-229 FN (4 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Pandora; Google
COL-230	Designated restricted by Producing Participant/Producer.	Spotify
COL-231 (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-231 FN (13 redactions)	Designated restricted by Producing Participant/Producer.	Pandora; Spotify
COL-232 (5 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Google; Pandora; Amazon; Apple
COL-233 (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-234	Designated restricted by Producing Participant/Producer.	Spotify
COL-235	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-236 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
Heading III.D.5	Designated restricted by Producing Participant/Producer.	Spotify
COL-238 (4 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-238 FN (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-239 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Google
COL-240 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Google
COL-240 FN	Designated restricted by Producing Participant/Producer.	Spotify; Google
COL-241 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-241 FN	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-242 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-244	Designated restricted by Producing Participant/Producer.	Pandora; Amazon; Apple; Spotify; Google
COL-248	Restricted information discussed by witness during confidential hearing session.	Google
COL-250 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-251 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora; Spotify
COL-252 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Google
COL-253	Designated restricted by Producing Participant/Producer.	Pandora
COL-254	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora; Spotify
COL-260	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora; Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-262 (5 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora; Spotify
COL-264 (5 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Pandora; Spotify; Google
COL-265 (4 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-265 FN (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-267	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora; Spotify
COL-268 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Spotify; Pandora
COL-274	Designated restricted by Producing Participant/Producer.	Spotify
COL-275	Restricted information discussed by witness during confidential hearing session.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-276	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COL-277 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Spotify; Google; Pandora
COL-278 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Pandora Amazon; Apple; Google
COL-281 (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Amazon; Apple; Google; Pandora
COL-283	Designated restricted by Producing Participant/Producer.	Google
COL-284	Restricted information discussed by witness during confidential hearing session.	Amazon; Apple; Google; Spotify; Pandora
COL-285 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Apple; Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-292	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Pandora; Google; Spotify
COL-295 (4 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Pandora; Google; Spotify
COL-295 FN	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG
COL-296 (4 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Spotify
COL-297 (4 redactions)	Designated restricted by Producing Participant/Producer.	Spotify; Google; Amazon
COL-297 FN (4 redactions)	Designated restricted by Producing Participant/Producer.	Apple; Spotify; Amazon
COL-299	Designated restricted by Producing Participant/Producer.	Google
COL-299 FN	Designated restricted by Producing Participant/Producer.	Google
COL-300	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-301 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COL-302 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-302 FN (3 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-303	Designated restricted by Producing Participant/Producer.	Spotify
COL-304 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Google; Spotify
COL-305 (5 redactions)	Restricted information discussed by witness during confidential hearing session.	Google; Spotify
COL-306	Designated restricted by Producing Participant/Producer.	Google
COL-306 FN (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Google
COL-307 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify; Google; Amazon; Pandora; Apple
COL-309 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Spotify; Google; Pandora
COL-310 (3 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-311 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-312	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-312 FN	Restricted information discussed by witness during confidential hearing session.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-319 FN (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Pandora
	Designated restricted by Producing Participant/Producer.	Spotify
COL-327	Restricted information discussed by witness during confidential hearing session.	Google
COL-331	Designated restricted by Producing Participant/Producer.	Amazon; Google; Pandora; Spotify
COL-338 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Google; Amazon
COL-349	Restricted information discussed by witness during confidential hearing session.	Pandora
COL-353	Designated restricted by Producing Participant/Producer.	Google; Amazon; Spotify; Pandora
COL-354	Designated restricted by Producing Participant/Producer.	Spotify
COL-355	Designated restricted by Producing Participant/Producer.	Apple; Amazon
COL-358	Designated restricted by Producing Participant/Producer.	Amazon
COL-360	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-362 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-363 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-364 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COL-364 FN (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-365 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-366 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-367 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-368 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-368 FN (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-369	Designated restricted by Producing Participant/Producer.	Amazon
COL-370	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-371	Designated restricted by Producing Participant/Producer.	Amazon
COL-372 (3 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-373	Designated restricted by Producing Participant/Producer.	Amazon
COL-374 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COL-375	Designated restricted by Producing Participant/Producer.	Amazon
COL-376	Designated restricted by Producing Participant/Producer.	Amazon
COL-377 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-377 FN	Designated restricted by Producing Participant/Producer.	Amazon
COL-378	Designated restricted by Producing Participant/Producer.	Amazon
COL-379	Designated restricted by Producing Participant/Producer.	Amazon
COL-380	Designated restricted by Producing Participant/Producer.	Amazon
COL-381 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-382	Designated restricted by Producing Participant/Producer.	Amazon
COL-383	Designated restricted by Producing Participant/Producer.	Amazon
COL-384	Designated restricted by Producing Participant/Producer.	Amazon
COL-385 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-386 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-387	Designated restricted by Producing Participant/Producer.	Amazon
COL-387 FN	Restricted information discussed by witness during confidential hearing session.	Amazon
COL-388 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-388 FN	Designated restricted by Producing Participant/Producer.	Amazon
COL-389	Designated restricted by Producing Participant/Producer.	Amazon

Paragraph	Description and Basis	Producing Participant/ Producer
COL-390 (4 redactions)	Designated restricted by Producing Participant/Producer.	Amazon
COL-390 FN	Designated restricted by Producing Participant/Producer.	Amazon
COL-391	Designated restricted by Producing Participant/Producer.	Google
COL-392	Designated restricted by Producing Participant/Producer.	Google
COL-393 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-394 (3 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-395 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-397 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-398 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-399	Designated restricted by Producing Participant/Producer.	Pandora; Google
COL-400 (2 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-400 FN	Restricted information discussed by witness during confidential hearing session.	Google
COL-401	Designated restricted by Producing Participant/Producer.	Google
COL-402 (3 redactions)	Designated restricted by Producing Participant/Producer.	Google
COL-404 (2 redactions)	Designated restricted by Producing Participant/Producer.	Pandora; Apple
COL-405	Designated restricted by Producing Participant/Producer.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-407	Designated restricted by Producing Participant/Producer.	Spotify
COL-408 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-409 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-410 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-411 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-412 (2 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-414	Designated restricted by Producing Participant/Producer.	Pandora
COL-415	Designated restricted by Producing Participant/Producer.	Amazon
COL-419 (4 redactions)	Designated restricted by Producing Participant/Producer.	Spotify
COL-419 FN	Designated restricted by Producing Participant/Producer.	Google; Spotify
COL-420	Designated restricted by Producing Participant/Producer.	Spotify
COL-421	Designated restricted by Producing Participant/Producer.	Spotify
COL-422	Designated restricted by Producing Participant/Producer.	Spotify
COL-426	Designated restricted by Producing Participant/Producer.	Amazon
COL-429 (2 redactions)	Designated restricted by Producing Participant/Producer.	Pandora; Amazon; Apple; Spotify; Google

Paragraph	Description and Basis	Producing Participant/ Producer
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA; UMPG; SATV; W/C; Downtown; BMG
COL-431	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
COL-432	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV
COL-433	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG

Paragraph	Description and Basis	Producing Participant/ Producer
COL-434 (2 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; W/C; BMG Downtown
COL-434 FN	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; W/C; BMG Downtown
COL-435 (2 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	UMPG; SATV; W/C; BMG Downtown
COL-436	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	SATV; BMG; Downtown
COL-437	Restricted information discussed by witness during confidential hearing session.	Spotify

Paragraph	Description and Basis	Producing Participant/ Producer
COL-438 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG; Downtown
COL-439 (2 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify
	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	ABKO; Songs; Reservoir; Kobalt
COL-442	Designated restricted by Producing Participant/Producer.	Spotify
COL-443	Designated restricted by Producing Participant/Producer.	Spotify
COL-444	Designated restricted by Producing Participant/Producer.	Pandora
COL-449	Restricted information discussed by witness during confidential hearing session.	Apple
COL-461	Restricted information discussed by witness during confidential hearing session.	Spotify
COL-469 (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Spotify; Apple
COL-478	Designated restricted by Producing Participant/Producer.	Apple
COL-479 (3 redactions)	Restricted information discussed by witness during confidential hearing session.	Apple

Paragraph	Description and Basis	Producing Participant/ Producer
COL-480 (2 redactions)	Designated restricted by Producing Participant/Producer.	Apple
COL-487 (2 redactions)	Designated restricted by Producing Participant/Producer.	Amazon; Google
COL-498	Designated restricted by Producing Participant/Producer.	Amazon; Apple; Google; Pandora; Spotify