Public

Before the
United States Copyright Royalty Judges
The Library of Congress
Washington, D.C.

In the Matter of: Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)	**Docket No. 16-CRB-0003-PR (2018-2022)**

Google's Proposed Findings of Fact and Conclusions of Law

Table of Contents

I. Introduction

GPFF1. Google's Amended Proposal would both protect the viability of the rich variety of music streaming services that serve the public and assure the Copyright Owners a fair income. In response to questions raised by the Panel, Google has refined its proposal to further simplify the existing rate structure, address revenue deferment or displacement issues, and ensure that the Copyright Owners can share in upside potential. Google's Amended Proposal is the only proposal that streamlines the existing Subparts B and C regulations without disrupting the growth and diversity in interactive streaming that has been fostered by the existing regulations. The Panel should adopt it.

GPFF2. The Panel should start from the modern reality that interactive streaming is a thriving form of music distribution that has paid enormous dividends to the Copyright Owners. Interactive streaming has made it easier to access music — and made more musical works available to the public — than ever before. JPFF11–24. And it has reversed decades of declining revenues in the music industry. JPFF50. But it has done so without profiting the services driving Copyright Owners' success. JPFF82.

GPFF3. The existing § 115 regulations have been critical sources of this growth, as they have channeled customers that may have once been reluctant to pay for music into licensed services. JPFF17, 30, 38–39, 333. The regulations were animated by a core insight: the license rate and structure should be flexible enough to safeguard the viability of diverse types of interactive services that reach a wide array of consumers who differ in their willingness to pay. JPFF30–39, 166–167. The regulations also contain mechanisms to protect the Copyright Owners' interests. Some, like the capped TCC prongs, address circumstances when service revenue is displaced or deferred under certain business models. At the same time, other provisions in the existing regulations, such as the mechanical-only floors, have proven to be inefficient and have inflated musical works royalties due to publishers' market power in the wake of recent upheaval and fragmentation of the public performance marketplace. GPFF53–54.

GPFF4. While this scheme generally has served all parties well, the existing regulations are not a Platonic ideal. The Services initially proposed improvements to the existing regulations to eliminate inefficiency. But the Panel expressed concerns during the hearing that the proposed rates and terms are complex and fragmented to the extent they are tied to the current regulations. GPFF57–58. Google took the Panel's concerns seriously and has revised its rate proposal to streamline the regulations in light of the evidence at the hearing and the § 801(b)(1) factors. *See* JPCL21–48. In broad strokes, Google's Amended Proposal is as follows:

- the greater of 10.5 percent of service revenue or 15 percent of the total amount expensed for the use of sound recording rights (referred to in the industry as "TCC")
- less payments made for the service's performance rights in musical works.

GPFF5. This proposal maintains the core economic terms of Google's initial proposal and is supported by the benchmark evidence presented at the hearing, while eliminating the numerous service categories in the current regulations. GPFF59–67.

GPFF6. Google's Amended Proposal preserves the efficiency and flexibility benefits of a percentage-of-revenue rate structure. To address the Panel's questions regarding revenue displacement and deferment, the proposal pairs the percentage-of-revenue rate in a greater-of rate structure with an uncapped TCC rate component. GPFF59–62. The uncapped TCC prong promotes flexibility by allowing for any service type licensed by the record labels under any rate structure to operate, without the need for multiple service categories designed to anticipate various business models that may develop during the next five years. GPFF58.

GPFF7. The TCC prong protects the interests of Copyright Owners and addresses problems associated with revenue attribution and deferment by linking the musical works rate to sound recording payments. The record labels wield significant bargaining power and operate in an unregulated market. They are thus free to negotiate any deal structure they wish and will always protect their own interests, thus protecting Copyright Owners' interests as well. JPFF154–158, 249-252. Unlike the one-size-fits-all proposal offered by Copyright Owners, Google's proposal reduces complexity in the current regulations without imposing a single rate structure and set of rates that would dramatically reduce the number and types of service offerings available to consumers. Indeed, the Copyright Owners' proposal could bring the entire interactive music streaming industry to its knees. *See* JPFF166–168.

GPFF8. If the Panel does not adopt Google's proposal, then it should adopt one of the proposals put forth by Spotify, Pandora, or Amazon. While these proposals keep the existing subpart B and C categories, they still adhere to the § 801(b) factors by setting sustainable, fair rates that would not disrupt the industry.

GPFF9. In contrast, Copyright Owners have proposed a sea change: the greater of a "mechanical only" per-play rate of 15 cents per 100 plays or $1.06 per user. JPFF163–165. That proposal is flawed at multiple levels. Most obviously, it would serve as an end-run around the § 801(b) factors, producing almost exactly the same rates that Copyright Owners have advocated imposing as part of a congressional repeal of § 801(b). JPCL21–48.

GPFF10. The per-play structure itself is unsupported, in fact undermined, by benchmarks. The prior *Phonorecords* settlements, as well as numerous direct licenses with publishers, evince a strong "revealed preference" for percentage of revenue, per-subscriber, and TCC royalty structures — not per-play. *See* JPFF126, 129, 175. Even the unregulated sound recording agreements endorsed by Copyright Owners overwhelmingly adopt the same percentage of revenue and per-subscriber format. JPFF175–176. That per-play rates have been generally shunned in this industry is not surprising. As numerous witnesses explained, per-play rates discourage user engagement, which is one of the primary drivers of subscriber retention and long-term revenue growth. JPFF172–176.

GPFF11. Even if a per-play rate were appropriate, Copyright Owners failed to support their proposed per-play rate of 15 cents per 100 plays. The purported support for this rate comes from benchmark analysis performed by

Copyright Owners' principal economist, Dr. Eisenach. *See generally* JPFF243–283. But Dr. Eisenach misapplied the § 801(b)(1) standard, used inapposite agreements as benchmarks, ignored superior benchmarks, and applied multiple, convoluted "conversion ratios" and adjustments to his benchmarks that were riddled with errors. *See generally* JPFF245–283.

GPFF12. Dr. Eisenach also erred by incorporating into his benchmarking analysis flawed "effective per-play rates" for sound recording payments by the services. *See* JPFF249–258. To start, the effective per-play rates are subject to significant shifts over time as usage levels change (e.g., the 2015 rates were significantly higher than if Eisenach had used 2016 rates), which highlights the absurdity of this approach. Moreover, Dr. Eisenach made numerous self-serving omissions when choosing which services to include in his analysis. JPFF255–258. These combined choices and errors (which all inured to Copyright Owners' benefit) significantly and conveniently biased rates upward.

GPFF13. Copyright Owners' proposed $1.06 per-user rate fares no better. Copyright Owners justify having a high "mechanical only" per-user rate on the basis that it compensates Copyright Owners for access, even if no songs are streamed. But "access" is a value provided by the digital services, not the Copyright Owners. JPFF18. Section 115 is not a blanket license. JPFF18. The services, not the Copyright Owners, incur the transaction costs (and significant infringement risks) associated with amassing and making available such large catalogs of works. Moreover, the Copyright Owners' "access" value theory cannot be squared with their proposal, under which payments would flow only to owners of compositions that were actually played. 3/29/17 Tr. 3784:2-3791:20 (Israelite).

GPFF14. Copyright Owners' proposed rates openly disregard the § 801(b) factors. Their own expert calculates that the Copyright Owners' proposal would [redacted] Google Play Music's effective mechanical rate. Trial Ex. 3032, Rysman WRT, Table 1. This is exactly the outcome Copyright Owners have sought in pursuing legislation to *replace* the 801(b)(1) factors with a "willing buyer, willing seller" standard. JPFF180. The rates also fail to maximize the availability of creative works because they hamper certain business models and discourage user engagement. *E.g.*, JPFF192, 213, The rates also deny services a "fair" return and do not reflect the relative roles of Copyright Owners and service operators because they drive services further into unprofitability while increasing the high profit margins captured by music publishers. And most strikingly, the proposed rates are "disruptive" because they will force important players out of the market, [redacted], and curtail new market entry.

GPFF15. That Copyright Owners' proposal does not reflect the § 801(b) factors is not surprising. Their representatives resent the very concept of compulsory licensing and the § 801(b) factors in particular. JPFF245–248; JPFF288–291; JPFF316–319; JPFF351–362. The primary person tasked with supporting Copyright Owners' proposal, Dr. Eisenach, in fact gave testimony to Congress in 2012 in opposition to the § 801(b) rates on the basis that they are "uneconomic" and would produce rates "below those that would emerge from a competitive market." JPFF245–248. Reversing course, he now claims that the first three 801(b) factors are a proxy for "fair market value" and that the Panel must look to unregulated market rates for guidance. JPFF245–248. Not only is this interpretation contrary to his congressional testimony, it is legally wrong. Just last month, the D.C. Circuit admonished in *SoundExchange v. Muzak* that while "willing-buyer and willing-seller" rates are intended to be "market" based, rates governed by § 801(b) factors are not based on a "hypothetically free market" and "some argued, favored the subscription services providers over the copyright holders." *SoundExchange, Inc. v. Muzak LLC*, No. 16-7041, 2017 WL 1458865, at 3–4 (D.C. Cir. Apr. 25, 2017) (dispute regarding Muzak's entitlement to § 801(b) based "preexisting subscription service" rates under § 114).

GPFF16. Finally, even if Copyright Owners' refusal to engage with the § 801(b) factors and questionable benchmark analysis were not enough to convince the Panel, the simple economics of the interactive streaming industry strongly caution against raising the existing rates. The record is replete with evidence that the digital services are losing money. JPFF82. Google in particular is losing [redacted] per year to operate Google Play Music. JPFF82. [redacted] JPFF82. Meanwhile, publishers' revenues are headed in the opposite direction. The publishers have experienced stable revenues, and even bragged that publishing is a "high margin" and "low risk" business. JPFF61. In fact, the evidence reveals that the major publishers each capture profit margins close to [redacted]. JPFF62. That is higher even than record labels, and certainly much higher than the services' negative profit margins. JPFF62. Though the Panel heard testimony from several songwriters discussing the financial difficulties of the profession, their frustration with digital services is misdirected. The source of their grievance is in fact the deals between the writers and publishers that afford publishers a big slice of the pie and allow them to capture admittedly "high" margins. *See* JPFF61–64. Raising the royalty rates on digital services would do nothing to change that and it would not satisfy the objectives of Section 801(b)(1).

II. Google's Amended Proposal preserves the best parts of the previous structure while also improving it.

GPFF17. Google's Amended Proposal maintains the best elements of the royalty structure that has served both the Copyright Owners and music services well for years. Google's Amended Proposal also simplifies and is more flexible than the regulations' multitude of categories, and includes a rate structure that protects Copyright Owners' interest while allowing Copyright Owners to share in the services' upside potential. *See* Google Inc.'s Amended Proposed Rates and Terms, Docket No. 16-CRB-0003-PR (2018-2022) (May 11, 2017).

GPFF18. Google's Amended Proposal eliminates the numerous service categories in subpart B and C and instead provides for a single, adaptive rate structure for all subpart B and C services. *Id.*

GPFF19. Under Google's proposal, licensees would pay for musical works rights the greater of 10.5 percent of service revenue or 15 percent of the payments to record labels for sound recording rights required for the licensed service (referred to in the industry as "TCC" or "total content costs"). *Id.*

GPFF20. Google's proposal would continue the existing practice of allowing licensees to deduct the payments made for the performance right in musical works before making payments for mechanical rights under the percent-of-revenue or TCC prongs. *Id.*

GPFF21. Google proposes removing the existing per-subscriber caps on TCC provided in Subparts B and C (e.g., the 80 cent cap on TCC for portable subscription services) to allow for seamless adjustment based on revenues and a range of rate structures reached with the record labels. *Id.* As discussed below, with the removal of the protection that the existing TCC caps provide the services, it is imperative that the TCC figure is calibrated to reflect the ratio of publisher-to-label compensation under Subpart A of § 115. The removal of a cap on TCC responds to one of the Copyright Owners' major criticisms of the existing structure.

GPFF22. Google's proposal permits services to deduct costs associated with credit card fees, carrier billing, and app store fees up to a limit of 15 percent of revenue. *See id.*

GPFF23. The Amended Proposal eliminates the mechanical-only floor that exists in the current regulations. *Id.*

III. Benchmark agreements support Google's Amended Proposal.

GPFF24. The recent Subpart A settlement, the *Phonorecords I* and *II* settlements, and direct licenses provide a firm foundation for Google's Amended Proposal. 3/15/17 Tr. 1077:6–1078:14, 1080:12–20 (Leonard); Trial Ex. 695, Leonard AWDT ¶ 13. *Phonorecords I*, Final Rule, Docket No. 2005-3 DPA, 74 Fed. Reg. 4510, 4515 (Jan. 26, 2009); *Phonorecords II*, Final Rule, Docket No. 2011-3 DPA, 78 Fed. Reg. 67938 (Nov. 13, 2013).

GPFF25. Whether a potential benchmark is appropriate depends on whether similar rights and uses are involved, whether the same or similar parties were involved, when the benchmark was agreed upon, and whether the benchmark arose from similar economic conditions. 3/15/17 Tr. 1082:11–1083:16 (Leonard).

GPFF26. Google's expert, Dr. Greg Leonard, testified that the best available benchmark for this proceeding is the 2016 settlement of Subpart A rates applicable to sales of permanent digital downloads (PDDs). 3/15/17 Tr. 1080:16–20, 1098:11–1100:7 (Leonard); Trial Ex. 698, Leonard WRT ¶ 6. Dr. Leonard reasoned that Subpart A "is the best benchmark because (1) it was agreed to in a settlement involving the same parties[, the Copyright Owners], (2) it incorporates the 801(b)(1) factors, and (3) there are economic similarities between streaming and digital downloads." Trial Ex. 698, Leonard WRT ¶ 27; 3/15/17 Tr. 1098:11–1100:7 (Leonard).

GPFF27. The Subpart A benchmark is appropriate because it is recent and covers the same term as the license under consideration here (2018–2022). Indeed, Copyright Owners voluntarily accepted the existing Subpart A mechanical royalty rates through the end of 2022. *See* 82 Fed. Reg. 15297 (Mar. 28, 2017); *see also* JPFF146–152. The settlement also reflects Copyright Owners' relative contributions to the distribution of sound recordings. Trial Ex. 695, Leonard AWDT ¶ 42; Trial Ex. 3014, Israelite WDT ¶¶ 20–26.

GPFF28. Moreover, the major record labels and Copyright Owners negotiated the agreement under the same § 801(b)(1) factors that guide this proceeding; the negotiating parties knew that if they could not agree they would be subject to a rate setting proceeding governed by those factors. Trial Ex. 698, Leonard WRT ¶¶ 6, 27. That the Subpart A settlement was negotiated against the backdrop of § 801(b)(1) is a benefit, not a shortcoming as Dr. Eisenach claims, because that is the same standard that applies to this proceeding. *See* JPFF262. The Subpart A settlement is particularly helpful in that it applies the 801(b)(1) factors to Copyright Owners *and* sound recording companies. Just as the 801(b)(1) factors dictate an outcome that is fair to the parties here, recognizes their relative contributions to interactive streaming services, and is not tainted by the effects of market power, the Subpart A settlement resolved a proceeding that would have applied the same factors to ensure a fair return to Copyright Owners notwithstanding the market power of the record labels.

GPFF29. Like Google's proposal, the Subpart A license grants all of the rights necessary to allow the use of the Copyright Owners' works, on a work-by-work basis. Dr. Leonard and Dr. Katz explained that both Subpart A and Subpart B, which includes a deduction for performance fees, are "all-in" and involve all necessary rights for using the composition. 3/15/17 Tr. 1106:9–1107:1 (Leonard); 3/13/2017 Tr. 587:8–588:9 (Katz); Trial Ex. 695, Leonard AWDT ¶ 76. As Dr. Leonard testified, "in the context of streaming, there is no apparent economic reason why a service would seek a license to either the mechanical right, but not the performance right, or vice-versa. A service is only concerned with securing whatever rights in musical works are necessary for streaming." Trial Ex. 695, Leonard AWDT ¶ 76.

GPFF30. Copyright Owners challenge application of Subpart A as a benchmark because PDD sales grant "ownership" rights over songs, while this proceeding will grant only "access" rights. *See* Trial Ex. 3033, Eisenach WRT ¶¶ 48–52. That makes no difference. As Dr. Leonard explained, when a user purchases a digital download, the user pays a single fee and can then listen to the composition on-demand as often as the user wants. When a user subscribes to a streaming service, the result is the same: the user pays a single fee and gets to hear the song whenever he or she wants. 3/15/17 Tr. 1113:16–1114:13 (Leonard); Trial Ex. 698, Leonard WRT ¶ 6 ("With a PDD, a user pays a price for access to a track (by purchasing the PDD), and then can listen to the track as often as desired over an unlimited time," while "[w]ith [a] subscription streaming service, a user pays a price for access to a library for a given time period (by purchasing a subscription), and then can listen to any track in the service's library as often as desired within that time period."). Copyright Owners have also claimed that the settlement of Subpart A was due to the lack of financial importance of Subpart A royalties and the high cost of litigation, but those arguments were disproven at the hearing. JPFF149.

GPFF31. The *Phonorecords I* and *II* settlements confirm that Google's proposed structure is reasonable. Those settlements established the mechanical royalty rates that have applied for the last decade. They involve similar (and in many cases the same) parties, identical uses of music, and the same rights at issue here. 3/15/17 Tr. 1093:7–24 (Leonard); *see* Trial Ex. 6013, *Phonorecords I* Wrapper Agreement; *see also* Trial Ex. 6014, *Phonorecords II* Wrapper Agreement. Like Subpart A, the prior settlements were also negotiated under the umbrella of the 801(b) factors. Trial Ex. 885, Katz WDT ¶¶ 71–72.

GPFF32. Direct deals between services and publishers further buttress Google's Amended Proposal. Each of the services participating in this proceeding has entered into direct licenses with publishers, and some of the participants have licensed over [redacted] of the works available on their interactive service through direct licenses. *See* Trial Ex. 695, Leonard AWDT ¶¶ 53, 63–72 (describing services' direct licenses); Trial Ex. 693, Joyce WDT ¶ 22. As explained by Dr. Leonard, these licenses are also informative because they involve the same parties, rights, uses, and economic conditions as the statutory rate under consideration. 3/15/17 Tr. 1084:2–1085:13, 1092:23–1093:6 (Leonard).

A. These benchmarks support Google's proposed use of a percentage-of-revenue and TCC-based royalty structure.

GPFF33. The overwhelming trend in the industry is towards a percentage-of-revenue structure. The parties have demonstrated a "revealed preference" for the percentage-of-revenue structure in the *Phonorecords I* settlement, the *Phonorecords II* settlement, numerous direct licenses between services and publishers, and licenses involving PROs for public performance rights. Trial Ex. 695, Leonard AWDT ¶ 74.

GPFF34. Even services' licenses with record labels, which are wholly unregulated, demonstrate the same preference for including a percentage-of-revenue based royalty prong. *See, e.g.*, Trial Ex. 388 ([redacted]), Trial Ex. 2760 ([redacted]), Trial Ex. 2761 ([redacted]), Trial Ex. 2765 ([redacted]), Trial Ex. 2766 [redacted]).

GPFF35. The industry's preference for revenue-based licenses over per-play rates should not be surprising. If a music service must pay based on usage, it will incentivize the service to restrict the number of times a consumer may listen to a song. Trial Ex. 692, Levine WDT ¶ 20; JPFF173. But where usage is unlimited and untethered from royalties, the marginal cost of additional usage is zero, and allowing unlimited usage creates a service that is more attractive to consumers. 3/15/17 Tr. 1123:17–1124:15, 1142:21–1143:4 (Leonard). A percentage-of-revenue structure thus enhances economic efficiency.

GPFF36. The *Phonorecords I* settlement, the *Phonorecords II* settlement, and direct licenses between publishers and services also support inclusion of a TCC prong in Google's Amended Proposal. Trial Ex. 695, Leonard AWDT ¶ 13 ("The overall rate structure proposed by Google is also supported by Google's voluntary agreements with music publishers for its Google Play Music Subscription Service, other services' voluntary agreements with music publishers for interactive streaming and limited downloads services, and the prior settlements in Phonorecords I and II."). The TCC structure in the *Phonorecords I* settlement was originally adopted as a means of protecting against downside risks associated with revenue attribution and displacement issues. 3/8/17 Tr. 245:5–9 (Levine) (explaining that the TCC "inures to the benefit of the publisher community"). The current regulations established by the *Phonorecords II* settlement also incorporate the TCC prong, which was updated to reflect further negotiations between the parties. GPFF74.

GPFF37. The direct licenses that incorporate aspects of the *Phonorecords I* and *II* structure are Dr. Leonard's primary benchmarks for determining royalty structure (as opposed to rates), and demonstrate a revealed preference for percentage of revenue and TCC rates. Trial Ex. 695, Leonard AWDT ¶¶ 74, 82; *see also* 3/15/17 Tr. 1077:3-20 (Leonard). Copyright Owners say that they could not have foreseen the circumstances present today when agreeing to the *Phonorecords I* and *II* settlements. *See, e.g.*, Trial Ex. 3016, Brodsky WDT ¶ 59; Trial Ex. 3014, Israelite WDT ¶ 81; Trial Ex. 3018, Kokakis WDT ¶ 58. But Copyright Owners made the same arguments regarding revenue attribution, deferment, and displacement during the *Phonorecords I* trial. *See* JPFF133–139. Not only that, but major aspects of Google's proposal, including the "greater of" structure and a "TCC" prong, were demanded by Copyright Owners to address the concerns Copyright Owners raised in *Phonorecords I* and then reiterated a decade later in this proceeding. JPFF122–131.

B. The benchmarks support a 10.5 percent of revenue rate.

GPFF38. A headline rate of 10.5 percent of revenue, as proposed by Google, is reasonable and consistent with the best available benchmark.

GPFF39. The Subpart A settlement is the best benchmark to determine a proper percentage-of-revenue rate. That agreement illustrates the rates Copyright Owners are willing to accept for musical works rights over the exact same time period for PDD sales. Trial Ex. 698, Leonard WRT ¶¶ 27–29. Copyright Owners themselves have claimed that PDDs and interactive streaming are substitutes for one another and similar uses of music. *E.g.*, Trial Ex. 3015, Herbison WDT ¶ 6 ("[I]nteractive streaming is cannibalizing physical sales and downloads."); Trial Ex. 3016, Brodsky WDT ¶ 80 (discussing the "negative effect that interactive streaming services have had on the sale of physical product and digital downloads"); *see also* Trial Ex. 695, Leonard AWDT ¶ 45, n.85 (discussing the industry's' longstanding contention PDDs and interactive streaming are substitutes).

GPFF40. Expressed as a percentage of revenue, the Subpart A settlement reflects an all-in payment to Copyright Owners of 9.6 percent of revenue for the average PDD sale based on the average retail price of digital downloads when the rate was established in 2006, which was $0.99. Trial Ex. 695, Leonard AWDT ¶ 42. It reflects an all-in payment to Copyright Owners of 8.7 percent of revenue when compared to the average retail price of PDDs in 2015, which rose to $1.10. *Id.* As applied to services that do not avail themselves of the 15 percent deduction described below, the revenue prong of 10.5 percent in Google's revised proposal is conservative when compared against what Copyright Owners voluntarily accepted for Subpart A uses.

GPFF41. Google's proposal also includes a deduction from the revenue base of up to 15 percent for costs of revenue. The deduction is to account for expenses to obtain revenue (including credit card fees) and brings all categories of services licensed under § 115 in line with ad-supported models, which have traditionally received this type of deduction in the current regulations, in contracts with PROs, and in at least one service's direct licenses considered by Dr. Leonard. Trial Ex. 695, Leonard AWDT ¶ 77; *see also* 37 C.F.R. § 385.11; Trial Ex. 2614 ([redacted]).

GPFF42. Because the proposed deduction would impact the size of the revenue base for royalty calculation purposes, Dr. Leonard noted that the percentage-of-revenue rates calculated on the basis of the Subpart A benchmark would also need to be adjusted accordingly. 3/15/17 Tr. 1109:6–22 (Leonard); Trial Ex. 695, Leonard AWDT ¶ 73 (topline royalty rate would need to be "adjusted to reflect . . . deductions of up to 15% of revenue"). Importantly, Dr. Leonard demonstrates that, even assuming a service was able to take the maximum deduction, the Subpart A benchmark would still suggest a percentage-of-revenue rate for Subpart B ranging from 11.3 percent in 2006 to 10.2 percent in 2015. 3/15/17 Tr. 1109:6–22 (Leonard); Trial Ex. 695, Leonard AWDT ¶ 73. Thus, even making conservative assumptions and adjustments, Google's proposed revenue rate is within the declining range suggested by the Subpart A benchmark. *See, e.g.*, 3/15/17 Tr. 1109:23–1110:8 (Leonard) (noting that Google likely would not be able to take the full 15 percent deduction); Trial Ex. 695, Leonard AWDT ¶ 73 (observing that the "relative contribution" of services is greater in the Subpart B than for Subpart A).

C. The benchmarks support a 15 percent TCC rate.

GPFF43. Google's proposed TCC rate of 15 percent is also fully in line with the benchmarks described above.

GPFF44. The Subpart A settlement is the best benchmark for evaluating the TCC rate because it reveals the amount Copyright Owners are willing to accept from record labels for PDD sales, which can be easily compared against the revenues the labels keep for themselves from those same sales. 3/15/17 Tr. 1080:12–20, 1114:14–1116:9 (Leonard). The Subpart A settlement provides information from a voluntary negotiation between Copyright Owners and record labels concerning the relative value that each provides to the sale of a PDD. *See id*. As a matter of principle, Copyright Owners should not be able to price at one rate to labels (thus reflecting an understanding of the parties' relative contributions) and then insist on a completely incongruent deal from other licensees that reflects a much higher contribution from Copyright Owners. 3/8/17 Tr. 234:3–235:6 (Levine) (explaining even though Google is unlikely to pay under TCC, setting the TCC rate to be consistent with Subpart A is a matter of "principle" because publishers should not be allowed to price at disparate rates to different services and labels). There is no reason to believe that Copyright Owners contribute more *relative to the record labels* when a song is downloaded rather than streamed on-demand.

GPFF45. The Subpart A settlement suggests a range of TCC ratios from 14.2 to 15.8 percent, a range that is declining as PDD prices continue to rise. 3/15/17 Tr. 1115:13–1116:1 (Leonard) (explaining the decrease in percentages from 2006 to 2015 in light of the increase in PDD prices during this time). Typically, in the sale of a PDD, the record label will receive 70 percent of the retail sale price and Copyright Owners will receive an average of $0.095 due to songs longer than five minutes receiving more than $0.091 under the current regulations. Trial Ex. 695, Leonard AWDT ¶¶ 44, 76. Based on these averages and the prevailing average PDD retail sales price of $0.99 in 2006, the Subpart A settlement would generate a payment to Copyright Owners equal to 15.8 percent of the all-in sound recording royalties received by record labels. *See* 3/15/17 Tr. 1114:24–1115:16 (Leonard); *see also* Trial Ex. 695, Leonard AWDT ¶ 44. In 2015 when average PDD retail prices had climbed to $1.10, that percentage dropped to 14.2 percent. Trial Ex. 695, Leonard AWDT ¶ 46.

GPFF46. Google's proposal of 15 percent is within the range of reasonable TCC percentages calculated by Dr. Leonard. Moreover, the 15 percent TCC is actually conservative because the effective TCC percentage has declined over time as PDD prices increase and Copyright Owners have voluntarily agreed to a flat, per-download rate through the end of 2022. 3/15/17 Tr. 1115:13–1116:4 (Leonard); *id*. at 1103:24–1104:12.

GPFF47. An uncapped TCC rate above 15 percent would be completely inconsistent with the weight of the benchmarks presented at the hearing, including the Subpart A benchmark, the *Phonorecords I* and *II* settlements, and direct licenses between the services' and the publishers. Though the *Phonorecords I* and *II* settlements contain different TCC rates ranging from 17.11–22 percent, those rates rarely come into play either because the percentage-of-revenue prong dominates or because (for most service categories) they are capped by a per-subscriber fee as part of a "lesser of" structure. *Phonorecords I*, 74 Fed. Reg. at 4515; *Phonorecords II*, 78 Fed. Reg. at 67938. Indeed, most interactive services rarely (or in many cases never) pay under the TCC prong. *See* 4/5/17 Tr. 5170:4–12 (Leonard). And for the few that do pay under the existing TCC prong, the weight of the benchmark evidence suggests they have been overpaying since there is no evidence that the relative contribution of a musical work to a sound recording is greater for those services than it is in the context of a digital download service selling PDDs.

GPFF48. Though the TCC prong was often described during the hearing as a "minimum," that discussion included the concept of a per-subscriber cap on TCC under the current regulations. Setting the TCC percentage too high without the protection offered by a per-subscriber cap would swallow the percentage-of-revenue prong and have the result of increasing rates to an unacceptable level. *See* 4/6/17 Tr. 5209:15–5210:17, 5253:17–5254:15 (Leonard). For instance, if an uncapped TCC rate were set at 21 percent and a service were paying record labels [redacted] per subscriber, as is the case in some existing label contracts, the TCC prong would generate an effective royalty to Copyright Owners of [redacted] per subscriber. *See, e.g.*, Trial Ex. 648, GOOG-PHONOIII-00004658 at Ex. H ([redacted]). Even for the best monetizing services charging $9.99 per month for subscriptions, [redacted] per subscriber would represent a net effective rate of [redacted] of revenue. In fact, any TCC rate above [redacted] could generate payments that eclipse the 10.5 percent of revenue prong for a $9.99 a month service based on the prevailing [redacted] of revenue agreements between services and record labels [redacted]). Notably, the 15% TCC rate proposed by Google corresponds more closely to the existing maximum TCC cap of $0.80 using the [redacted] in many sound recording agreements [redacted]

D. The benchmarks and sound economic principles support an all-in rate structure.

GPFF49. Google's proposal is for an all-in rate structure that allows for the deduction of public performance expenses.

GPFF50. Everyone involved in *Phonorecords I* expected that the floor fees would be largely academic. Zahavah Levine and Adam Parness testified that when "floor fees" were agreed upon in *Phonorecords I*, the parties expected that the fees would rarely, if ever, come into play under the prevailing public performance rates. Trial Ex. 875, Parness WDT ¶¶ 9, 21; 3/8/17 Tr. 309:12–15 (Parness); Trial Ex. 692, Levine WDT ¶ 35; 3/8/17 Tr. 254:24–256:8 (Levine). Instead, they understood the purpose of the floor fees was to deter services from channeling all of their licensing royalties through PROs. 3/8/17 Tr. 261:4–10 (Levine) (testifying that the publishers insisted on a mechanical-only floor because "they wanted to prevent voluntary agreements that were at a higher rate because from the service perspective, if it was capped at 10 and a half percent, we could just say: Here, PRO, here is a check for 10 and a half percent and we will -- we don't have to deal with administering the whole mechanical licensing, which is a huge hassle"). The record demonstrates that Copyright Owners' concern was unfounded. Due to the work-by-work nature of the statutory license, services rely on blanket direct agreements with music publishers for mechanical licenses. JPFF143; Trial Ex. 3016, Brodsky WDT ¶ 83; Trial Ex. 693, Joyce WDT ¶ 21. Unless services resort to securing and administering tens of millions of individual work statutory licenses, the music publishers will always have some influence over how interactive streaming services direct their royalty payments.

GPFF51. Direct licenses between services and publishers confirm that the floor fees were not supposed to function as a mechanism to plus-up rates. Many of the direct licenses between services and publishers — [redacted] — [redacted]. *See, e.g.*, Trial Exs. 380, 390, 496.

GPFF52. Floor fees also create economic inefficiencies, including the "Cournot complements" or "royalty stacking" problem identified by Dr. Leonard and Dr. Katz. *See* 3/15/17 Tr. 1089:10–1090:25 (Leonard); *see also* 3/13/17 Tr. 602:1–605:16 (Katz). The Cournot complements problem arises because mechanical rights and public performance rights are perfect complements in the context of interactive streaming. Trial Ex. 695, Leonard AWDT ¶ 56. Neither has any value without the other. *Id.* Where both rights are licensed separately, "independent sellers of complementary products may each price inefficiently high because each does not take into account the negative externality on the other of increasing its price." *Id.* The solution is to jointly price the two rights. "Joint selling of a package consisting of the complementary products leads to a lower overall price, greater output, and increased economic efficiency." *Id.*

GPFF53. The Cournot complements problem is especially troubling when paired with shifts in the publishing market that may drive up public performance rates through the exercise of market power. These developments include the rise of a new, unregulated PRO and the phenomenon of publisher "withdrawals" from PROs. These shifts increase the probability that floor fees will be triggered and thus cause overall publishing rates to increase due to "the exercise of market power, not because music is making a bigger contribution." 3/13/17 Tr. 602:1–605:16 (Katz). The presence of the new PRO, GMR, [redacted], and several publishers have wholly withdrawn from PROs and threatened to do so again. 3/28/17 Tr. 3312:18–3314:20 (Kokakis); 3/9/17 Tr. 364:7–11, 376:15–380:10 (Parness); *see also* Trial Ex. 875, Parness WDT ¶ 17; Trial Ex. 885, Katz WDT ¶ 91.

GPFF54. Copyright Owners recognize this instability in the market for public performance rights, which is undoubtedly one of the reasons they have proposed an opportunistic uncoupling of mechanical and performance rights. By insisting on a "floor fee," Copyright Owners can extract supracompetitive rates in the public performance market through the exercise of market power and magnify their mechanical royalties at the same time. 3/8/17 Tr. 256:14–257:18 (Levine).

GPFF55. The Copyright Owners argued that instability in the public performance market was overstated and that publisher withdrawals were a thing of the past. Testimony at the hearing disproved that hypothesis. [redacted] *See* 3/9/17 Tr. 376:15–380:10 (Parness). Mr. Kokakis testified that he had never "told any of the representatives of any of the Services in this proceeding that Universal intends to fully withdraw from a PRO." 3/27/17 Tr. 3206:15–23 (Kokakis). Mr. Kokakis explained UMPG's hesitancy to withdraw relates to difficulties encountered when UMPG was briefly withdrawn from BMI in January 2014, and that UMPG learned that it could not withdraw without incurring tens of millions of dollars in expenses to build its infrastructure. *Id.* at 3205:8–3206:14. Mr. Kokakis then doubled-down by telling Judge Strickler that he would not "bluff" or threaten withdrawal as a negotiating tactic. *Id.* at 3208:2–11. Yet Mr. Kokakis later admitted that, even after the brief one-month period that UMPG was withdrawn from BMI and supposedly learned its lesson, he continued to make public statements, including during Copyright Office roundtables, that UMPG could easily execute a full PRO withdrawal, that it would be "seamless," and that UMPG was prepared to do so in order to "get out from under the thumb of the oppressive consent decrees." *Id.* at 3312:6–3314:16.

IV. Google's Amended Proposal addresses questions about the regulations' complexity, as well as possible revenue deferment and revenue attribution issues.

GPFF56. During the hearing, the Panel voiced concerns over the breadth and complexity of the existing § 115 rates and terms. 4/5/17 Tr. 5198:10–16; 4/6/17 Tr. 5223:25–5224:18. The Copyright Owners also raised concerns regarding revenue deferment and revenue attribution issues. *See, e.g.*, 4/3/17 Tr. 4334:15–24 (Rysman); *see also* Trial Ex. 3026, Rysman WDT ¶ 11. The Panel invited the participants to submit revised rate proposals. 4/13/17 Tr. 6019:10–21.

GPFF57. The amendments to Google's proposal address these questions. Google's Amended Proposal streamlines the applicable regulations and still protects Copyright Owners' interest through an uncapped TCC prong. And unlike Copyright Owners' proposal, Google's proposal is flexible enough to maintain different business models and will not disrupt the interactive streaming industry.

A. Google's Amended Proposal simplifies the existing regulations.

GPFF58. Google's proposal eliminates the five Subpart B service categories listed in 37 C.F.R. § 385.13 and the five Subpart C categories listed in 37 C.F.R. § 385.23. These fragmented service categories are unnecessary under Google's proposal, which replaces the static, per-subscriber based payment prongs found in the old regulations with self-adjusting prongs: the greater of (1) 10.5 percent of revenue and (2) 15 percent of TCC.

GPFF59. First, the percentage-of-revenue prong self-adjusts to the different service types because it tracks consumer willingness to pay. *See* 3/15/17 Tr. 1117:23–1118:25 (Leonard). Services can cater to consumers along the demand curve with differentiated service offerings at various price points, and in each instance will pay 10.5 percent of revenue for musical works rights. 3/14/17 Tr. 885:12–16 (Herring); 03/21/17 Tr. 2053:22–2054:4 (McCarthy); *see also* Trial Ex. 1062, Vogel WDT ¶¶ 4–11, 32.

GPFF60. The percentage-of-revenue rate also provides upside protection to Copyright Owners if a service generates significant revenue. 3/21/17 Tr. 2189:7–14 (Hubbard) (explaining how offering services at different price points increases the total revenue pool for Copyright Owners); *see also* 3/15/17 Tr. 1224:7–1225:2 (Leonard). And, percentage-of-revenue rates work well for services from a business planning perspective. As Google witnesses Zahavah Levine and Paul Joyce explained, it is "dangerous and difficult to run a business, if you can't predict the costs." 3/8/17 Tr. 174:23–24 (Levine). Percentage-of-revenue rates address that concern because they are predictable, unlike the unpredictable spikes in royalties that could occur with other royalty structures, including per-play rates. 3/8/17 Tr. 171:1–5 (Levine); Trial Ex. 693, Joyce WDT ¶¶ 3, 20, 24.

GPFF61. Second, the TCC prong self-adjusts because it tracks licensing payments for sound recording rights, which vary depending on service type and features. Unlike Copyright Owners, record labels are not subject to a compulsory license for interactive streaming. *See, e.g.*, 4/3/17 Tr. 4496:19–22 (Brodsky). Labels are thus free to decide whether to license a specific service and on what terms.

3/20/17 Tr. 1876:1–13, 1899:18–1900:7 (Marx). For example, licenses between interactive streaming services typically include percentage of revenue and per-user minima. 4/4/17 Tr. 4739:9:4753:7 (Eisenach); *see also, e.g.*, Trial Ex. 2760 ([redacted]); Trial Ex. 2765 ([redacted]).

GPFF62. The per-play rate proposed by Copyright Owners offers none of this flexibility. It would charge all service types equally, without regard for the value that each provides or the consumer willingness to pay for that service type. Trial Ex. 1065, Marx WDT ¶¶ 14, 56; *see also* Trial Ex. 1062, Vogel WDT ¶¶ 28–32.

GPFF63. Some services provide different value to consumers and are thus priced accordingly, such as Amazon's services that allow access to only a limited catalog of works or are tethered to a specific hardware device, as well as Pandora and Spotify's services that limit listener interactivity. 3/21/17 Tr. 2176:1–16 (Hubbard); 3/14/17 Tr. 892:14–894:8 (Herring); 3/21/17 Tr. 2020:11–16 (Marx). These differentiated services grow the interactive streaming industry by appealing to a broader audience and drawing in new customers with a lower willingness to pay for a fully interactive all-you-can-eat subscription service. *See* 3/15/17 Tr. 1125:2–1126:3 (Leonard); *see also* 4/3/17 Tr. 4406:13–4407:2 (Rysman) (acknowledging that differentiated services can attract new users to interactive streaming services).

GPFF64. Even though Copyright Owners' own witnesses acknowledge that not all plays provide the same value to listeners, Copyright Owners' proposal, like Apple's, saddles each service type with the same per-play rate. *See, e.g.*, 3/29/17 Tr. 3707:4–3710:23 (Israelite).

GPFF65. This approach (along with Copyright Owners' proposed flat per-user rate) would disproportionately burden certain service types and cripple services aimed at consumers with low willingness to pay. *See* 3/20/17 Tr. 1713:11–1714:11 (Page). There is no reason to endorse that result, particularly when Google's proposal avoids these disruptive consequences. While labels may charge supracompetitive prices, they have a vested interest in services' survival and have the ability to adjust rates to prevent the collapse of service types that benefit both services and rights holders. Trial Ex. 3027, Eisenach WDT ¶ 148, Table 11; *see also* 4/4/17 Tr. 4774:8–4775:7, 4782:1–4787:1 (Eisenach). An uncapped TCC prong protects Copyright Owners, as it is beyond doubt that the labels will not price their product below what they believe to be reasonable given the nature of a service's product offering, but they will also not price so high as to disrupt the industry.

GPFF66. Copyright Owners' per-play proposal is also inflexible in that it would favor services with low user engagement. Copyright Owners have put forth no evidence that the number of plays is similar across services. To the contrary, the services have established that user engagement varies widely service-to-service. 3/8/17 Tr. 174:11–175:15 (Levine); *see also* 3/21/17 Tr. 2064:17–2065:7 (McCarthy). Favoring services with low user engagement would skew the services' incentives by encouraging them to find ways to limit access. As multiple witnesses explained, user engagement is a key indicator of success in the interactive streaming market since engaged users are less likely to churn. 3/8/17 Tr. 175:6–10 (Levine); 3/14/17 Tr. 895:2–897:3 (Herring); *see id.* at 917:16–17 (" . . . we're all in the same boat from a churn perspective.").

B. Google's Amended Proposal addresses concerns of revenue deferment or displacement associated with business models that developed under the existing regulations.

GPFF67. The uncapped TCC prong is a unique feature of Google's Amended Proposal that will ensure that Copyright Owners always will receive a portion of overall royalties commensurate with their contributions, regardless of how a licensee structures its business. The prong tethers the musical works rate to the all-in sound-recording rate. Because record labels will always protect their own interest, this prong ensures that, through that process, they also protect the interest of Copyright Owners. As the testimony in this case and the findings of this Panel in *Web IV* reflect, record labels have immense bargaining power, which the labels exercise by insisting on whatever license structure best protects them from downside risks. Trial Ex. 1460, *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV*), 81 Fed. Reg. 26316, (May 2, 2016) ("Web IV Final Determination"), at 36368, 26374.

GPFF68. As explained in the hearing, the labels know how to take care of themselves. *Cf.* 4/7/17 Tr. 5518:11–12 (Marx) ("The publishers and record labels are making money. The streaming services . . . are losing money."). Indeed, "the labels . . . do a pretty good job of protecting themselves and because you have a TCC, that inures to the benefit of the publishing community." 3/8/17 Tr. 245:5–9 (Levine); *see also* 4/6/17 Tr. 5218:23–5219:1 (Leonard) ("[I]f you believe the labels . . . take care of themselves, using a percent of TCC for the musical works makes a lot of sense.").

GPFF69. This likely explains why the § 115 TCC structure originated at Copyright Owners' insistence. Trial Ex. 875, Parness WDT ¶ 8; JPFF126.

GPFF70. The existing Subpart B rates originated in the *Phonorecords I* settlement and were adopted again by the parties in the *Phonorecords II* settlement. Trial Ex. 692, Levine WDT ¶ 35; Trial Ex. 875, Parness WDT ¶¶ 10–13; Trial Ex. 3030, Israelite WRT ¶ 4; *see also* JPFF122–131. The regulations contemplate the existence of a variety of service models, including advertising-supported services and bundled services. And, as early as *Phonorecords I*, Copyright Owners were aware of possible revenue recognition issues associated with interactive services, including revenue allocation problems, temporal displacement problems, and revenue issues associated with large, diverse businesses. JPFF134–135 (explaining how Copyright Owners advanced the same arguments regarding diversified technology companies, ad-supported services, and bundled services). To guard against those issues, Copyright Owners insisted on inserting the TCC prong into the regulations. *See* 3/8/17 Tr. 161:2–164:11 (Levine); 3/29/17 Tr. 3656:15–3657:14 (Israelite).

GPFF71. As part of that bargain, services accepted a TCC prong but insisted on a cap (or ceiling) for TCC rates. JPFF126–131 (discussing the concessions made by services and ultimate agreement on a headline TCC rate).

GPFF72. Today, Copyright Owners still recognize the virtue of the TCC structure in protecting their interest, but their witnesses complained that it is too often capped by a per-subscriber rate the Copyright Owners feel is too low. 3/27/17 Tr. 3202:13–14 (Kokakis) (explaining that the "TCC prong also has a ceiling of 80 cents generally that we would often bump up against"); Trial Ex. 3016, Brodsky WDT ¶ 70 (claiming that because of the cap, "the TCC prong does not actually fix payments for musical works rights to a percentage of payments to labels for sound recording rights").

GPFF73. In Google's proposal, the caps are removed. While having no cap on TCC does leave the services exposed to the labels' market power, and would warrant close watching if adopted, removing the caps allows the TCC prong to flexibly protect against downside risks associated with revenue deferment, displacement, or attribution issues.

GPFF74. The TCC provisions in 37 C.F.R. 385 also address concerns about transparency of the payments to the labels. During Phonorecords II, the publishers negotiated and obtained "total content cost integrity." 3/8/17 Tr. 161:6–14 (Levine) ("[O]ne of the prongs of the royalty is -- of the royalty rate that Services pay, is a percentage of what the Services pay the labels. And the publishers were looking for some, what they called integrity, to make sure that the payments to the publisher -- that as we -- that we included everything and that there was more transparency in terms of what our payments to the labels were."). Total content cost integrity includes "anything of value given . . . including, without limitation, ownership equity, monetary advances . . . .” 37 C.F.R. § 385.11 (defining applicable consideration).

GPFF75. The Copyright Owners’ concerns about label equity are without merit. To the extent that any labels own equity in a service, no rational or ethical label would give up royalty payments in the present in exchange for a larger share of the company. 3/21/17 Tr. 2121:13–20 (McCarthy) (“[redacted].”); *id*. at 2124:1–2 (noting that “[redacted]”). 3/23/17 Tr. 2680:12–17 (Ramaprasad) (testifying that labels would not “give up known income now to uncertain income in the future”).

V. Google’s Amended Proposal Satisfies the 801(b)(1) Factors.

GPCL1. Of all the proposals presented in this proceeding, Google’s Amended Proposal best satisfies the policy objectives encompassed by the § 801(b)(1) factors. By preserving key elements of the existing royalty structure, applying the most comparable benchmarks, and improving on the existing structure’s ability to adapt efficiently to a range of business models, Google’s proposal (a) maximizes the availability of creative works to the public, (b) affords the copyright owners and copyright users a fair income under existing economic conditions, (c) reflects the relative contributions of the copyright owners and copyright users, and (d) minimizes the disruptive impact on the structure of the industries involved and generally prevailing industry practices.

A. Google's Amended Proposal maximizes the availability of creative works to the public.

GPCL2. Google's proposal maximizes the availability of creative works to the public by both "encourag[ing] the creation and dissemination of musical compositions" and "generat[ing] audiences for emerging artists." Mechanical Royalty Determination, 46 Fed. Reg. 10466 at 10479; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, n.8 (2005) (citing *Eldred v. Ashcroft*, 537 U.S. 186, 223–26) (2003) (Stevens, J., dissenting)).

GPCL3. Consumers vary in both their preferences for musical works and in the methods by which they gain access to those works. Trial Ex. 695, Leonard AWDT ¶ 85. In particular, consumers differ in how much music they listen to, how they listen to it, and how much they are willing to pay. *Id.* ¶¶ 85, 89. As a result, a rate satisfying the first § 801(b)(1) objective will allow for a range of services to make musical works available to the broadest set of consumers. *Id.* ¶ 84; Trial Ex. 1065, Marx WDT ¶ 14; *see also* JPCL53–58.

GPCL4. The wide range of music streaming services offered by the participants in this proceeding are the best proof of this commonsense reality. Some consumers — such as subscribers to Google Play Music's subscription service — desire all-you-can-eat on-demand streaming plans that are available on any device and will pay $9.99 per month for such a service. Trial Ex. 695, Leonard AWDT ¶ 32; 3/15/17 Tr. 1121:11-18 (Leonard) (discussing all-you-can-eat plans). Other users will pay a lower monthly price for services that come with more limited catalog or may only be used with a particular device. Trial Ex. 695, Leonard AWDT ¶ 33. And still other users are unwilling to pay anything for music but will access it through licensed sources that play ads. *Id.* ¶ 36 (discussing Spotify's ad-supported service); 3/15/17 Tr. 1121:11–18 (Leonard) (discussing ad-supported services).

GPCL5. Google's proposal maximizes the availability of musical works by allowing for a wider set of providers and services through which consumers with different preferences and willingness to pay can access musical works. Trial Ex. 695, Leonard AWDT ¶ 84; 3/15/17 Tr. 1125:18–21 (Leonard) ("[I]f you have a percentage-of-revenue-type royalty, you can offer a plan, for instance, at a lower price that's targeted at customers with lower willingness to pay.").

GPCL6. The percentage-of-revenue prong of Google's Amended Proposal facilitates innovation by flexibly adapting to products offered at different prices. 3/15/17 Tr. 1121:12–18 (Leonard) (discussing how the rate structure allows for both "the all-you-can-eat plan, which is very attractive, which then gets people away from piracy" and for plans for "people who . . . weren't . . . willing to pay that money but [] are willing to endure some ads"). Services and Copyright Owners share in the upside of streaming services through percentage-of-revenue agreements, while Copyright Owners are insulated from the risks borne by the Services given the zero incremental cost of streaming an already written composition. *Id.* at 1122:18–1123:8; 3/20/17 Tr. 1891:17–23 (Marx).

GPCL7. The TCC prong of Google's Amended Proposal provides a flexible alternative rate in those circumstances when revenue is difficult to measure or otherwise does not adequately capture a service's value. It does so by importing whatever protections sound recording companies negotiate with services in their license agreements.

GPCL8. The record demonstrates that sound recording companies have a proportionally greater interest in streaming services than do Copyright Owners. *See* JPFF87 (noting that services' sound recording agreements are often [redacted]); Trial Ex. 648, GOOG-PHONOIII-00004658 at Ex. H ([redacted]). Complete with unconstrained market power, record labels "do a pretty good job of protecting themselves" in negotiations. 3/8/17 Tr. 245:6–7 (Levine). On the flip side, streaming services have played an important role in resuscitating record companies' revenues, so we can expect that record companies will continue to look for opportunities to grow the streaming marketplace while protecting their own, and their artists', financial interests. JPFF5. The TCC prong of Google's Amended Proposal — uncapped, but set at a 15 percent TCC rate to conform to the recent subpart A settlement — affords the record companies and the services maximum flexibility to innovate to everyone's benefit.

GPCL9. The "availability" of a product is greater when its price is lower, as more consumers will be willing to pay a lower price to obtain the product. Trial Ex. 695, Leonard AWDT ¶ 92; *cf.* 4/3/17 Tr. 4397:7–24 (Rysman). Because Google's Amended Proposal allows for a range of services offering access to as many as tens of millions of sound recordings at different price points, it maximizes the availability of creative works to the public while also maximizing surplus. Trial Ex.

695, Leonard AWDT ¶¶ 91–94. Google's proposal will foster continued growth by capturing consumers at several points on the demand curve. GPFF59.

GPCL10. Google's proposal also maximizes the availability of works because, unlike Copyright Owners' proposal, it does not discourage user engagement or "all you can eat" type plans. *See* Trial Ex. 695, Leonard AWDT ¶ 121; 3/15/17 Tr. 1119:16–24 (Leonard) ("I should also point out that the all-you-can-eat plans, I think, are a crucial element of this too because as we talked about having access to the library, it has value, it has the option values, encourage people to listen to songs they probably would never have listened to, you know, allows them to listen to more, from my perspective, again, from the point of view of an economist, availability.").

B. Google's Amended Proposal ensures that both services and copyright owners earn a fair income under existing economic conditions.

GPCL11. Google's Amended Proposal will "afford the copyright owner a fair return for his or her creative work, and the copyright user a fair income under existing economic conditions." 17 U.S.C. 801(b)(1)(B); *see also* JPCL28–41.

1. Google's proposal affords copyright owners a fair income under existing economic conditions.

GPCL12. Copyright Owners will continue to receive a fair income under Google's proposal, like they have under the existing regulations. JPFF42–81; *see also* 3/15/17 Tr. 1121:7–10 (Leonard) ("[S]treaming has benefited owners of . . . [copyrights] on the sound recording side and on the publishing side for the musical works side."). In fact, Copyright Owners revenues have generally stayed the same or grown, and Copyright Owners enjoy margins of close to 30 percent. JPFF61–64. That is significantly higher than the positive margins of the record labels or the negative margins of digital services. *Id.*

GPCL13. The publishers' financial data confirms that Google's proposal would afford them a fair income. Although piracy and the unbundling of the album decimated revenues in the music industry, revenues are recovering as interactive streaming becomes the dominant form of music consumption. JPFF1–15; 3/15/17 Tr. 1121:1–5 (Leonard) ("[B]efore streaming really became what it is today, you had PDDs and those revenues from that were declining and – and royalties from that were in decline. Streaming became more popular. That has turned around that trend.").

GPCL14. Under Google's proposal, Copyright Owners will continue to collect 10.5 percent of revenue all-in for fully interactive subscription services charging $9.99 per month. These revenues make up the majority of Copyright Owners' interactive streaming revenues. Trial Ex. 1065, Marx WRT ¶¶ 16 fig. 1, 23 fig. 4. Google's proposal also will permit continued expansion of the addressable market and resulting revenues by accommodating a wide range of business models designed to address different segments of the demand curve. GPFF59.

GPCL15. The Subpart A royalty rates Copyright Owners voluntarily agreed to accept through the end of 2022 for physical sales and permanent digital downloads demonstrate that both Google's proposed percentage-of-revenue rate and its TCC rate are fair—and, if anything, overly favorable—to the Copyright Owners when compared to what download services and record companies receive in connection with Subpart A activities. Trial Ex. 695, Leonard AWDT ¶ 97. *See also* GPFF40, 42.

GPCL16. Google's proposal also contains a mechanism to address any concerns regarding displaced or deferred revenue. 3/15/17 Tr. 1097:3–8 (Leonard) (discussing how the uncapped TCC component of Google's proposal "serves as a backstop"). Under Google's proposal, services will pay 15 percent of the costs paid to record labels. The definition of TCC in the existing regulations was refined between the *Phonorecords I* and *II* settlements to ensure that it reflects all consideration the labels receive in exchange for licensing sound recording rights. *See* GPFF74.

GPCL17. The TCC prong adequately protects the music publishers from any concerns about how services define revenue. 3/8/17 Tr. 245:2–9 (Levine) ("A. There [are] multiple sources of protection under our proposal. One is a percentage of revenue. It is the greater of, always. The other is that the labels do -- the other is TCC and the labels, as you have seen from our agreements, do a pretty good job of protecting themselves and because you have a TCC, that inures to the benefit of the publishing community."). As discussed above, the Copyright Owners have already recognized the TCC prong as a valuable protection. *See* GPFF33–37.

GPCL18. Google's Amended Proposal affords even greater TCC protection to Copyright Owners by removing the per-subscriber caps from the existing regulations and by setting the TCC percentage at 15 percent notwithstanding the declining trend in the ratio of Subpart A activity payments to Copyright Owners as compared to payments to sound recording owners observed by Dr. Leonard. *See* Trial Ex. 695, Leonard AWDT ¶ 46, n.88.

2. Google's proposal affords copyright users a fair income under existing economic conditions.

GPCL19. Google's proposed changes will improve copyright users' ability to earn a fair income under existing economic conditions.

GPCL20. While the Copyright Owners are profitable, Google Play Music has never achieved standalone profitability and other music services also operate at losses. Trial Ex. 695, Leonard AWDT ¶¶ 98–101; *see also* JPFF82–85. The lack of profitability among music service providers suggests that, if anything, the current statutory rates fail to ensure a fair income to licensees and that lower rates are necessary to achieve fairness. Trial Ex. 695, Leonard AWDT ¶ 101.

GPCL21. Google's proposal makes several changes to the existing regulations to improve the possibility that services will receive a fair income under existing economic conditions.

GPCL22. First, eliminating the mechanical-only floor will restore the payments made by the digital services to the expectations of the parties at the time of the *Phonorecords I* and *II* settlement. The parties to the *Phonorecords I* and *II* settlements did not intend for the mechanical floor to be triggered, but fluctuations in rates paid for performance rights — caused by copyright owners leveraging market power — have led to the floor being triggered in some circumstances. *See* JPFF160–162. By eliminating the mechanical-only floor, Google's proposal addresses some of the deficiencies under the existing regulations that have contributed to a lack of profitability for the services.

GPCL23. Google's direct deals confirm that the parties in *Phonorecords I* and *II* did not intend for rates to increase above 10.5 percent due to the mechanical-only floors. All of Google's Play Subscription and Locker Music Service licenses with music publishers [redacted]. Trial Ex. 695, Leonard AWDT ¶¶ 82–83.

GPCL24. Second, by revising the current definition of revenue to permit services to deduct expenses for credit card fees, app store fees, and carrier billing, Google's Amended Proposal brings the Subparts B and C rates into line with the Subpart A benchmark, which suggests a percentage-of-gross-revenue rate between 10.2 percent and 11.3 percent. The revised definition will encourage investments to grow the revenue base by permitting services to deduct expenses analogous to the advertising deduction already permitted under the existing regulations. Trial Ex. 695, Leonard AWDT ¶¶ 13, 77.

GPCL25. Third, Google has proposed to lower the TCC rate to 15 percent to bring it into line with the Subpart A benchmark and to account for the fact that Google's Amended Proposal removes the per-subscriber caps that led to a maximum TCC of $0.80 per subscriber per month under the existing regulations.

GPCL26. Dr. Leonard's analysis of the Subpart A benchmark suggests a TCC rate of between 14.2 percent and 15.8 percent, with the rate declining over time. A 15 percent TCC applied to the [redacted]

[redacted] Google's Amended Proposal to eliminate the TCC cap is inextricably tied to a lowering of the TCC rate. Leaving the TCC rate at current levels while removing the per subscriber caps would be inappropriate in light of the available benchmarks and would result in the TCC prong dominating the 10.5-percent-of-revenue prong for all-you-can-eat services charging $9.99 per month.

GPCL27. A reasonable TCC rate of 15 percent, consistent with the Subpart A benchmark, is efficient because it will afford services more latitude and flexibility to set prices and to experiment with different methods of distributing music. 3/8/17 Tr. 238:21–23 (Levine) ("The reason that it is helpful to have a lower TCC is because it affords more latitude, more flexibility in setting prices.").

GPCL28. A reasonable TCC rate also promotes efficiency and predictability because it normalizes a service's musical works payments to the varied accounting mechanisms required under a range of sound recording licenses. For example, a service paying per-subscriber fees to labels would pay a percentage of those fees to the owners of compositions. A service paying a percentage of revenues under a revenue definition specific to its sound recording agreements would pay 15 percent of that same revenue base to the owners of compositions. And a service that enters into experimental per-play agreements would pay a percentage of its sound recording per-play rate for the corresponding rights in musical works.

C. Google's Amended Proposal reflects the relative roles of Copyright Owners and the services in the product made available to the public, including their relative contributions to the opening of new markets for creative expression and media for their communication.

GPCL29. Google's Amended Proposal "reflect[s] 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).

1. A percentage-of-revenue rate best reflects the relative roles of Copyright Owners and the services.

GPCL30. A percentage-of-revenue rate structure is uniquely suited to reflect the relative roles of the Copyright Owners and services. That rate structure aligns the interests of the services with the Copyright Owners and allocates the business risks associated with providing interactive streaming services. 3/8/17 Tr. 237:19–24 (Levine) ("To get the most amount of revenue that the market can reasonably bear for -- or I should say the optimal, we have the aligned interest under a percentage of revenue structure to -- for us to get the optimal price. So the price it is going to get, you know, the most people at the maximum price.").

GPCL31. The prevalence of percentage-of-revenue agreements with record labels means that the TCC prong of Google's Amended Proposal indirectly incorporates the benefits of percentage-of-revenue rate structures in many cases. JPFF175. In any other instances, the TCC prong maintains the relative contributions of Copyright Owners and sound recording companies, and relies on the sound recording companies to ensure their interests are protected through whatever royalty mechanism is appropriate. As discussed above, record labels' market power and unregulated rates make them more than capable of fending for themselves and, by proxy, for the Copyright Owners.

GPCL32. There is no reason to believe that the relative contributions of Copyright Owners and the sound recording companies would vary across the services subject to the § 115 license. Trial Ex. 3027, Eisenach WDT ¶ 79 ("[I]t is sufficient simply to assume that the relative values of the two rights should be stable across similar or identical market contexts"). To the extent Google's Amended Proposal reduces certain services' royalty payments by lowering the TCC percentage to 15 percent, that result corrects an anomaly. It should not be the case that download services pay Copyright Owners 15 percent of what they pay to labels, while certain streaming services pay a higher percentage.

2. Google's rate proposal reflects the significant contributions made by the services in the interactive streaming product made available to the public.

GPCL33. Google's proposal appropriately calibrates the relative contributions made by the services and the Copyright Owners. The services provide technological contributions and capital investment, incur costs associated with securing sound recording rights, bear the business and legal risks associated with operating an interactive streaming service, and contribute the platforms that have allowed for the opening of new markets for the distribution of Copyright Owners' works. *See generally* JPFF89–108. Copyright Owners license services the right to reproduce and distribute their works, but incur zero incremental costs once a work is created and zero risk.

GPCL34. Google's proposal also takes into account the significant expenses Google has incurred to develop and operate Google Play Music. Google has also invested [redacted] of dollars to grow the Google Play Music subscription service and to differentiate it from other interactive streaming services. Trial Ex. 693, Joyce WDT ¶ 11; *see also* JPFF96–99.

GPCL35. To start, Google and other digital music services incur costs to provide access to and license a large catalog of works. These costs should be considered in assessing the relative contributions of the services. 3/13/17 Tr. 556:21–23 (Katz) ("[W]e should take sunk investments into account because that's a form of contribution.").

GPCL36. By subscribing to a streaming service, a consumer gains the ability to listen to music on-demand, as well as the convenience of the resulting features. Copyright Owners and their expert, Dr. Eisenach, attribute significant value to the ability to access a library of tens of millions of works. Trial Ex. 3033, Eisenach WRT ¶ 51; 4/4/17 Tr. 4853:19–4854:17 (Eisenach). This value is all provided by the service. It is the service—not the Copyright Owners—that must bear the cost of aggregating the required musical works and sound recording licenses into the product made available to the consumer. 3/29/17 Tr. 3798:22–3799:20 (Israelite).

GPCL37. The § 115 license is a work-by-work license, not a blanket license. JPCL18–20; 3/29/17 Tr. 3796:6–25 (Israelite). By definition, it cannot provide value beyond the access to a single work. Any value attributable to the availability of accessing a "library" or "catalog" of millions of works is not contributed by Copyright Owners through the § 115 license.

GPCL38. The Services also face the risk of statutory damages in the event that each and every work available on the service is not properly licensed. 3/29/17 Tr. 3800:1–4 (Israelite) ("If the Service offers access to a song for which it does not have an appropriate license, they are subject potentially to copyright infringement."); *see also* JPCL136.

GPCL39. In addition to the costs of licensing vast catalogs of sound recordings and musical works, Google has also invested in designing features for its service. For instance, Google has developed features to ensure its users remain engaged with the service, such as a proprietary "music quiz" used to make customized music recommendations and technology that evaluates a listener's location, time of day, activity, or even the listener's stated mood to customize music recommendations. JPFF97. Google has also invested heavily in human playlist curation. *Id*. And Google purchased Songza in 2014 for almost [redacted] to add to its personalization and curation capabilities. *Id.*

GPCL40. Around [redacted] Google engineers work on Google Play Music. JPFF99. Google has also worked continually to grow the catalog of songs available on the service, and Google has devoted significant advertising resources to promoting the service, including more than [redacted] in advertising inventory to promote Google Play Music. JPFF99.

GPCL41. Besides these costs to develop the service, Google must also pay variable costs such as credit card fees, carrier fees, and customer support efforts, payroll and marketing expenses, and content costs. In light of these expenses, Google has never operated at a profit and has generally had operating losses of approximately [redacted] to [redacted] per quarter. JPFF82.

D. Google's proposal minimizes the disruptive impact on the structure of the interactive streaming industry and the songwriting and music publishing industries and on prevailing industry practices.

1. Google's proposal maintains the essential features of the existing rate and rate structure

GPCL42. Google's initial proposal moved only incrementally from the existing § 115 compulsory license terms. *See* Trial Ex. 695, Leonard AWDT ¶ 123. Google's Amended Proposal improves on its prior proposal by increasing its flexibility and streamlining the rate structure to eliminate the need for multiple rate categories with different rate components and minima.

GPCL43. Google would pay the Copyright Owners exactly the same under its Amended Proposal that it paid the Copyright Owners under the regulations in place following *Phonorecords II.* Trial Ex. 698, Leonard WRT Ex. 1. While Google's Amended Proposal may have led to incrementally lower payments for certain services in the past, those reductions are warranted by the first three 801(b)(1) objectives, and the growth potential it affords the industry suggests that overall royalties attributable to interactive streaming will continue to rise.

GPCL44. Moreover, Google's proposal will not have a disruptive impact on the music publishing or songwriting industries under § 801(b)(1)(D). Unlike the importance of the Services' viability as businesses reflecting the vast majority of the interactive streaming industry, mechanical royalties represent just one component of Copyright Owners' revenues.

2. Google's Amended Proposal is consistent with the parties' expectations in settling *Phonorecords I* and *II*.

GPCL45. Google's proposal is consistent with the core elements of the *Phonorecords I* and *Phonorecords II* settlements. Both of those settlements provided that a service would generally pay under a percentage of revenue or TCC rate, albeit a capped TCC rate for the most prominent categories of services. *See generally* JPFF122–131.

GPCL46. From the services' perspective, a key driver of the settlements was that the new rates would be structured as a percentage of revenue and set at a level — 10.5 percent — that the services deemed acceptable for the combination of mechanical and performance rights. Trial Ex. 875, Parness WDT ¶ 7. From Copyright Owners' perspective, there were concerns that the rate structure needed to protect Copyright Owners against price declines or under-monetization of services, so certain minimum payment thresholds such as TCC minima were added to the royalty structure. *Id.* ¶ 8; Trial Ex. 3030, Israelite WRT ¶ 20. Google's proposal maintains these key features.

GPCL47. In addition, Google's Amended Proposal is consistent with the settling parties' understanding that the rates should permit different service types and that certain service offerings should command lower rates. While the *Phonorecords II* settlement accomplished this through numerous different service categories, *see* Trial Ex. 875, Parness WDT ¶ 8, Google's Amended Proposal collapses these categories into the greater of a single percentage-of-revenue rate and single TCC rate, both of which adjust based on the economics of the service's business.

3. Google's proposal is consistent with prevailing industry practice.

GPCL48. Google's proposal is consistent with prevailing industry practice of including percentage-of-revenue rates in musical work and sound recording licenses.

GPCL49. The current regulations include a percentage-of revenue rate. 37 C.F.R. 385.12. The rates established by the *Phonorecords I* settlement also included a percentage-of-revenue rate. *Phonorecords I*, 74 Fed. Reg. 4510 (Jan. 26, 2009).

GPCL50. The vast majority of direct agreements in the record for public performance, mechanical, and sound recording rights include percentage-of-revenue rate terms. *See* JPFF169, 174–175.

4. The changes that Google proposes to the existing rates would not be disruptive.

GPCL51. While Google has proposed several modest changes to the regulations, none of these changes would be disruptive.

GPCL52. First, removing the mechanical-only floors would not be disruptive. None of Google's direct deals contains mechanical-only floors, and the parties to the *Phonorecords I* and *II* settlements did not intend that a party would pay under the floor. *See* GPFF50–51. Rather than disrupt the streaming, music publishing, and songwriting industries, the expert testimony at the hearing demonstrated that removing the mechanical-only floors would improve efficiency and benefit everyone. Trial Ex. 695, Leonard AWDT ¶ 56.

GPCL53. Second, permitting a deduction for credit card costs, app store fees, and carrier billing is analogous to the deductions for advertising that is already permitted under the regulations. Amending the regulations to permit this deduction—up to 15 percent of revenue—would not be disruptive, and it would encourage expenditures to grow the revenue subject to fee. As Dr. Leonard testified, it would be economically irrational for services to incur costs of 15 percent of revenue simply for the purpose of maximizing this deduction of 15 percent of 10.5 percent, or 1.575 percent, of revenue. 3/15/17 Tr. 1276:25–1277:17 (Leonard).

GPCL54. Finally, lowering the TCC prong to 15 percent would not be disruptive. For a service that is $9.99 a month, such as Google Play Music, lowering the TCC is in practice not a change at all. Because this prong is part of a "greater of" structure, as before, Google and other $9.99 per month services will to continue to pay a percentage of their revenues.

GPCL55. Moreover, Google's proposed changes to the TCC prong brings the TCC percentage into equilibrium with the existing percentage-of-revenue prong, with the Subpart A settlement benchmark, and with the maximum per subscriber TCC cap from the existing regulations. *See* GPCL26; GPFF43–48.

5. Copyright Owners have failed to justify departing from an all-in rate structure given the fact that mechanical and public performance rights are perfect complements offered by the same licensors.

GPCL56. Copyright Owners have not offered any reason to depart from an all-in rate structure, which the Services' experts unequivocally endorsed as the most efficient means of compensating Copyright Owners for the complementary rights they control. Trial Ex. 886, Katz CWRT ¶ 3; 3/13/17 Tr. 561:21–562:9, 587:8–588:9 (Katz); 3/15/17 Tr. 1089:10–1090:25 (Leonard).

GPCL57. Google's policy when obtaining licenses from music publishers is to license on an all-in basis. Trial Ex. 692, Levine WDT ¶ 54 ("It is Google's policy, when obtaining licenses directly from music publishers for the US, to always license on an all-in basis at these rates.").

GPCL58. Similarly, many other services have entered into license agreements for musical works on an all-in basis. *See* JPFF143–145.

GPCL59. Sound recording agreements are also done on an all-in basis that does not distinguish between reproduction and performance rights. *See, e.g.*, Trial Ex. 388, GOOG-PHONOIII-00000346 at § 2(a) ([redacted]); Trial Ex. 2760, SPOTCRB0005221 at § 2 ([redacted]).

GPCL60. The *Phonorecords I* and *II* settlements both express their rate structures as all-in rates by including a deduction for performance fees. *Phonorecords I*, 74 Fed. Reg. 4510 (Jan. 26, 2009); *Phonorecords II*, 78 Fed. Reg. 67938 (Nov. 13, 2013). And in other contexts, this Panel has adopted a single all-in rate to address two complementary rights. *See* JPCL112–114 (noting that the Panel looked at the § 112 and § 114 rates holistically in *Web IV*).

GPCL61. These agreements reveal a preference for the all-in royalty rate structure. Trial Ex. 695, Leonard AWDT ¶ 12 ("The parties to these agreements have demonstrated a preference for a structure in which the licensee pays an all-in royalty rate for the package of rights. To be consistent with this structure, the § 115 statutory rate should continue to provide for deduction of a service's musical composition public performance royalty payments . . . ."); *see also* Trial Ex. 696, Pakman WDT ¶ 21 ("Similarly, from the perspective of the digital music service, the publishing royalty has always been viewed as a whole. The division of uses into the so-called mechanical royalty and public performance royalty buckets is an artificial distinction from a different era.").

GPCL62. The all-in rate also reflects that mechanical rights and public performance rights are perfect complements. As Dr. Katz explained, "from the perspective of interactive streaming services, a mechanical license and a public performance license to a given musical composition are perfect complements: neither one has any value to the streaming service without the other." Trial Ex. 885, Katz WDT ¶ 43.

GPCL63. The music publishers also view mechanical licenses and public performance rates as perfect complements. *See, e.g.*, Trial Ex. 695, Leonard AWDT ¶ 51 & n.90 (discussing testimony of then-UMPG Chairman/CEO Zach Horowitz that "It doesn't make any difference to me how Spotify's income to the publishers are designated. It doesn't matter to me if they're called digital royalties or performance royalties. It's a service that offers value to the consumers and a certain amount of money is paid to the publishers as a result. And so I looked at it in a holistic way in terms of the total amounts paid.”).

6. Copyright Owners have failed to demonstrate that any disruption to the songwriting or music publishing industries would occur.

GPCL64. Finally, Copyright Owners have offered no evidence that Google’s proposal — or the current regulations — would have a disruptive impact.

GPCL65. To the contrary, the evidence has shown that streaming has already reversed the long-term declines in music revenue caused by piracy and the unbundling of the album decimated streaming royalties. *See* JPFF11–15.

GPCL66. No evidence supports departing from the current percentage-of-revenue structure or dramatically increasing rates, as proposed by the Copyright Owners.

Dated: May 11, 2017

King & Spalding LLP

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

J. Blake Cunningham
401 Congress Avenue
Suite 3200
Austin, TX 78701
+1 512 457 2000
bcunningham@kslaw.com

David P. Mattern
1700 Pennsylvania Ave.
Suite 200
Washington, DC 20006
+1 202 737 0500
dmattern@kslaw.com

Counsel for Google Inc.

Public

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In the Matter of: **Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)**	**Docket No. 16-CRB-0003-PR (2018-2022)**

Certificate of Service

I, David P. Mattern, hereby certify that on May 12, 2017, a copy of the enclosed materials was served via electronic mail on the following parties:

George Johnson

Counsel for Apple, Inc.
Dale Cendali
Claudia Ray
Johanna Schmitt
Mary Mazzello
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
Fax: 212-446-4900
dale.cendali@kirkland.com
johanna.schmitt@kirkland.com
mary.mazzello@kirkland.com
claudia.ray@kirkland.com

Counsel for Amazon Digital Services LLC
Michael S. Elkin
Thomas Patrick Lane
Daniel N. Guisbond
Stacey F. Stark
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
melkin@winston.com
tlane@winston.com
dguisbond@winston.com
sfstark@winston.com

Counsel for Copyright Owners
(National Music Publishers Association and Nashville Songwriters Association)
Frank P. Scibilia
Pryor Cashman LLP
7 Times Square
New York, NY 10036
fscibilia@pryorcashm.com

Counsel for Pandora Media, Inc.
R. Bruce Rich
Todd Larson
Ben Marks
David Singh
Jennifer Ramos
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
r.bruce.rich@weil.com
todd.larson@weil.com
benjamin.marks@weil.com
David.Singh@weil.com
Jennifer.Ramos@weil.com

Gary Greenstein
Wilson Sonsini Goodrich & Rosati PC
1700 K Street, NW, Fifth Floor
Washington, DC 20006-3817
greenstein@wsgr.com

Counsel for Spotify USA, Inc.
John P. Mancini
Xiyin Tang
1221 Avenue of Americas
New York, NY 10020
jmancini@mayerbrown.com
xtang@mayerbrown.com

Richard M. Assmus
71 South Wacker Driver
Chicago, IL 60606
rassmus@mayerbrown.com

David Mattern

David P. Mattern

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In the Matter of: **Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)**	**Docket No. 16-CRB-0003-PR (2018-2022)**

Declaration and Certification of David P. Mattern

1. I am counsel for Google Inc. in the above-captioned case. I submit this declaration and certification pursuant to Rule 350.4(e)(1) of the Copyright Royalty Judges Rules and Procedures, and per the terms of the Protective Order issued July 28, 2016. I am authorized by Google to submit this Declaration.

2. I have reviewed Google's Proposed Findings of Fact and Conclusions of Law. I have also reviewed the definitions and terms provided in the Protective Order. After consultation with my client, I have determined that to the best of my knowledge, information, and belief, that portions of Google's Proposed Findings of Fact and Conclusions of Law contain information that is "Restricted" material as defined by the Protective Order.

3. The Restricted materials information related to (a) contracts, terms, and contract strategy that are proprietary, not available to the public, highly sensitive, and subject to confidential provisions with third parties; (b) confidential internal business information, financial data, and competitive strategy that are proprietary, not available to the public, and commercially sensitive.

4. If this contractual, strategic, and financial information were to become public, it would place Google at a commercial and competitive disadvantage, unfairly advantage other parties, and jeopardize Google's business interests. Information related to confidential contracts or relationships with third-party content providers could be used by Google competitors, or by other content providers, to formulate rival bids, bid up Google payments, or otherwise unfairly jeopardize Google commercial and competitive interests.

5. Under Rule 350.4(e)(1), I therefore declare that to the best of my knowledge, information, and belief, the materials described in this declaration that are marked with the "Restricted" label meet the definition in the Protective Order.

6. The information designated as "Restricted" must be treated as restricted "Protected Material" to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Google to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I declare under the penalty of perjury that, to the best of my knowledge, information, and belief, the foregoing is true and correct.

DATED: Washington, DC
May 12, 2017

Respectfully submitted,

KING & SPALDING LLP

____

David P. Mattern
1700 Pennsylvania Avenue
Suite 200
Washington, DC 20009
+1 202 626 2946
dmattern@kslaw.com
Counsel for Google Inc.

Before the
United States Copyright Royalty Judges
The Library of Congress
Washington, D.C.

In the Matter of: **Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)**	**Docket No. 16-CRB-0003-PR (2018-2022)**

Redaction Log for the Google Inc.'s Proposed Findings of Fact and Conclusions of Law

Google submits the following list of redactions from its Proposed Findings of Facts and Conclusions of Law filed on May 11, 2017. In compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration and Certification of David P. Mattern, the redacted materials listed below meet the definition of "Restricted" contained in the Protective Order.

Document	General Description
GPFF14	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF16	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF32	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF34	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.

Document	General Description
GPFF41	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF48	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF51	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF53	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF55	Contains Restricted information regarding Pandora and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF61	Contains Restricted information regarding Google and its competitors. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPFF75	Contains information designated as Restricted by other participants in this proceeding
GPCL8	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.

Document	General Description
GPCL23	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPCL26	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPCL34	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPCL39	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPCL40	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPCL41	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.
GPCL59	Contains Restricted information regarding Google. Such information is confidential, proprietary, and commercially sensitive. The disclosure of such information would provide a competitive advantage to another entity and/or competitively disadvantage Google.