Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

GEORGE JOHNSON'S (GEO) PROPOSED CONCLUSIONS OF LAW AND FINDINGS OF FACT

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Dated: Friday, May 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES
George Johnson (GEO)

Cases **Page**

*Authorities upon which we chiefly rely are marked with asterisks.

CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, § 8, cl. 8

U.S. CONST., amend I

U.S. CONST., amend V

U.S. CONST., amend XIV

Dec. of Independence

STATUTES

17 U.S.C. § 106

17 U.S.C. § 114

17 U.S.C. § 115

17 U.S.C. § 114(f)(2)(B)

17 U.S.C. § 801

Fed. R. Evid. 702

INTRODUCTION

George Johnson, (hereinafter "GEO") is an individual author, copyright creator, singer, songwriter, and publisher, *pro se*, who respectfully submits his Proposed Conclusions of Law and Findings of Fact in support of his proposal for rates and terms for underlying works under Section §115 of the Copyright Act. GEO is also considered an expert witness in songwriting, sound recording creation, and the music business.

A. CONCLUSIONS OF LAW

I. COPYRIGHT LAW PRINCIPLES APPLICABLE TO THIS PROCEEDING

The following (opinions) are taken from Supreme Court cases (decisions), in which the Court has suggested (ruled or decided) that copyright is intended to reward the creator (first and foremost):

1. The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. *Mazer v. Stein*, 437 U.S. 201, 219 (1954) (internal citations omitted) (holding that the original expression embodied within a statue intended to be used as a base for table lamps was entitled to copyright protection).

2. "This limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) (internal citations omitted) (finding that the use of an unpublished manuscript in a political commentary magazine was not fair use).

    "We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave

insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Id.* at 545-46.

> "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* at 558.

2. "The 'constitutional command,' we have recognized is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.' We have also stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (internal citations omitted) (rejecting Petitioner's constitutional argument that the CTEA's extension of existing copyrights does not "promote the Progress of Science" as contemplated by the preambular language of the Copyright Clause).

> JUSTICE STEVENS' characterization of reward to the author as "a secondary consideration" of copyright law, *post*, at 227, n. 4 (internal quotation marks omitted), understates the relationship between such rewards and the "Progress of Science." As we have explained, "[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954). Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science." *American Geophysical Union* v. *Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), aff'd, 60 F.3d 913 (CA2 1994). Rewarding authors for their creative labor and "promot[ing] . . . Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides . . . with the claims of individuals." The Federalist No. 43, p. 272 (C. Rossiter ed. 1961). JUSTICE BREYER's assertion that "copyright statutes must serve public, not private, ends," *post*, at 247, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (U.S. 2003)

3. "Nothing in the text of the Copyright Clause confines the 'progress of Science' exclusively to 'incentives for creation.' Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science." *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (citations omitted).

4. "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." 'The sole interest of the United States and the primary object in conferring the monopoly" the his Court has said, "lie in the general benefits derived by the pubic from the labors of authors" *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

5. "[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." *Id.* at 156 n. 6 (quoting *Cary v. Longman*, 1 East *358, 362 n. (b), 102 Eng. Rep. 138, 140 n. (b) (1801). (quoting Lord Mansfield)

The following (opinions) are taken from Lower Circuit courts. Various other courts have elaborated on the idea that copyright's goals are achieved through rewarding the creator:

6. "Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work." *Klitzner Indus. v. HK James & Co.*, 535 F. Supp. 1249, 1259-60 (E.D. Pa. 1982). Cited in *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254-55 (3d Cir. 1983); *Concrete Machinery Co., Inc. v. Classic Law Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988); *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3 958, 968 (8th Cir. 2005).

7. "The object of copyright law is to promote the store of knowledge available to the public. But to the extent it accomplishes this end by providing individuals a financial incentive to contribute to the store of knowledge, the public's interest may well be already accounted for by the plaintiff's interest." *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

8. "The stated objective was 'to promote the progress of science [*i.e.,* knowledge]'; the means by which this was to be accomplished was the granting to authors of exclusive rights with respect to their writings. The theory espoused by this constitutional

provision is that the advancement of public good, through growth of knowledge and learning, is to be obtained by securing the private commercial interests of authors. If authors are guaranteed the opportunity to profit from their writings, they will have an incentive to create, and the public will ultimately reap the resulting expansion of human knowledge. In contrast, if no copyright protection were granted and others were permitted to copy freely works of authorship, authors would find it difficult to earn a living from their writings; their energies would be diverted to other pursuits by the need to feed their families; consequently, the public's right to appropriate the works of authors would make the public poorer through loss of the benefit of authors' endeavors. This led James Madison to observe, 'the utility of [the power conferred by the patent and copyright clause] will scarcely be questioned.... The public good fully coincides in both cases with the claims of individuals.'" *American Geophysical Union* v. *Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), aff'd, 60 F.3d 913 (CA2 1994).

Additional Citations

9. "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough." — Justice Holmes *Herbert v. Shanley Co.*, Decision 242 U.S. 591 (1917)

10. "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." (some citations omitted)). *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S.Ct. 546, 547, 76 L.Ed. 1010.

11. "The Judges [of the CRB] are required to determine royalty rates that 'most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.' 17 U.S.C. § 114(f)(2)(B).". *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 387 U.S. App. D.C. 387, 295-96, 574 F.3d 748, 75657 (D.C. Cir. 2009)

12. "[A]gencies . . . have 'an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress.'" *McBryde v. Comm. to Rev. Circuit Council Conduct,* 264 F.3d 52, 62 (D.C. Cir. 2001) (quoting *Graceba Total Comms., Inc. v. FCC,* 115 F.3d 1038, 1042 (D.C. Cir. 1997)); *see also Meredith Corp. v. FCC,* 809 F.2d 863, 874 (D.C. Cir. 1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. . . . [The FCC] must discharge its constitutional obligations by explicitly considering [the petitioner's] claim that the FCC's enforcement of the fairness doctrine against [the petitioner] deprives it of its constitutional rights. The [FCC's] failure to do so seems to us the very paradigm of arbitrary and capricious administrative action."). This rule "guard[s] against premature or unnecessary constitutional adjudication," and ensures that courts have the "benefit . . . [of] the [agency's] analysis." *Meredith Corp.,* 809 F.2d at 872. Moreover, even when an argument is non-constitutional, an agency must respond to it so long as it "do[es] not appear frivolous on [its] face and could affect the [agency's] ultimate disposition." *Frizelle v. Slater,* 111 F.3d 172, 177 (D.C. Cir. 1997).

13. *Care Net Pregnancy Ctr. of Windham County v. U.S. Dep't of Agric.*, 896 F. Supp. 2d 98, 116 (D.D.C. 2012); *accord McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 347 U.S. App. D.C. 302, 312, 264 F.3d 52, 62 (2001) ("[A]gencies do have 'an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress.' *Graceba Total Communications, Inc. v. F.C.C.,* 115 F.3d 1038, 1042 (D.C. Cir. 1997). *See also Meredith Corp. v. F.C.C.,* 809 F.2d 863, 872-74 (D.C. Cir. 1987). We can see neither any reason why Congress would have withdrawn that power and obligation from a reviewing 'agency' composed exclusively of Article III judges nor any indication that it has done so."); *Iowa v. FCC*, 342 U.S. App. D.C. 389, 392, 218 F.3d 756, 759 (2000) ("T]he Commission's failure to address Iowa's argument requires that we remand this matter for the Commission's further consideration. *See, e.g.*, *Frizelle v. Slater,* 111 F.3d 172, 177 (D.C. Cir.1997) (remanding where agency 'did not respond to two . . . arguments, which do not appear frivolous on their face and could affect the [agency's] ultimate disposition'); *AT&T Corp. v. FCC,* 86 F.3d 242, 247 (D.C. Cir.1996) (remanding where Commission 'completely failed to address' argument raised in *ex parte* letter).")

14. "As a preliminary matter, United Space is right to object to the administrative law judge's assertion that the administrative hearing over which he presided was not the proper forum in which to raise an equal protection argument, and that such a claim would be better raised in federal district court. "Although government agencies may not entertain a constitutional challenge to authorizing statutes they *must* decide constitutional challenges to their own policies whether embodied in generic rules or as applied in an individual case." *Lepre v. Dep't of Labor,* 275 F.3d 59, 75 (D.C. Cir. 2001) (citing *Meredith Corp. v. FCC,* 809 F.2d 863, 872 (D.C. Cir.1987)). "The

administrative law judge was plainly wrong to suggest otherwise." *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011)

15. *Covington & Lexington Turnpike Road Co. v. Sandford,* 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); *FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 585, 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); *FPC v. Texaco Inc.,* 417 U.S. 380, 391-392, 94 S.Ct. 2315, 2392, 41 L.Ed.2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments. As has been observed, however, "[h]ow such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question." *Smyth v. Ames,* 169 U.S. 466, 546, 18 S.Ct. 418, 433-434, 42 L.Ed. 819 (1898). See also *Permian Basin Area Rate Cases,* 390 U.S. 747, 790, 88 S.Ct. 1344, 1372, 20 L.Ed.2d 312 (1968) ("[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders"). *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 30708 (1989).

16. "By long standing usage in the field of rate regulation, the 'lowest reasonable rate" is one which is not confiscatory in the constitutional sense." *Ill. Bell Tel. Co. v. FCC*, 300 U.S. App. D.C. 296, 302, 988 F.2d 1254, 1260 (1993) quoting *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)

17. "The favored mechanism is by direct dealings in a competitive market with the owners of those rights, typically record companies." — Mr. Bruce Rich counsel for Pandora

    "The setting of rates through SoundExchange as an aggregator and the Copyright Royalty Board as a rate-making body is the alternative, second-best scenario described and authorized in Section 114 of the Copyright Act. Direct arm's-length transactions between interested parties in a free market is always preferable to the imperfect task of setting a regulatory rate."

    "Defendants and their unnamed co-conspirators have, quite simply, attempted to eliminate entirely the first and preferred method of sound recording performance rights licensing under Section 114."

"Lest Defendants and their co-conspirators continue to succeed in stifling price competition across the entire market for licensing performance and other copyright rights in sound recordings, whether pursuant to statutory licenses or otherwise. Defendants' unlawful conduct should be permanently enjoined with such other and further relief as is necessary to dissipate the effects of that conduct and restore free competition." *SiriusXM Radio, Inc. v. SoundExchange, Inc. and American Association of Independent Music*, 12 CV 2259 (SDNY 2012)

18. Three Register of Copyrights have quoted on how copyright and the author are first, the public second.

19. Mr. Ralph Oman…what is "...the true nature of copyright — as an exclusive private property right, or as a limited right to be doled out stingily, riddled with exceptions and limitations, to be given away free-of-charge"?

20. Marybeth Peters *"At the time it was drafting the 1976 Copyright Act, Congress realized that the mechanical license was flawed because a statutorily-set, never-changing royalty rate was inflexible and did not provide fair compensation."* - testimony to the Judiciary Committee in 2002.

21. Former Register Marybeth Peter's quote from the 1995 CARP rate proceeding where she said the Services stopped "*prematurely"* and "*without once considering the value of the individual performance"*[1] Here is a quote from the A2IM Brief, which quotes Register Peters in the 1995 DPRSR. Register Peters clearly makes her point on the importance of establishing the value of an individual performance of a sound recording: A2IM writes: "Indeed, in the first proceeding under the Digital Performance Right in Sound Recordings Act of 1995, under the predecessor to the current version of Section 114(f) for then extant digital services, the Copyright Register made a specific finding on this point:

"2. **Value of an individual performance of a sound recording**. T*he Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording.* Its entire inquiry focused on the value of the "blanket license" for the right to perform the sound recording, *without once considering the value of the individual performance-a value which must be established* in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, the Register has made a determination that each performance of each sound recording is of equal value and has included a term that incorporates this determination."

[1] Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) Page 18 http://www.copyright.gov/history/mls/ML-597.pdf

"To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. ***Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings***. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, ***each performance of each sound recording*** must be afforded equal value."[2]

22. Maria Pallante - Quotes relating to devotion of craft from "The Next Great Copyright Act"

"Copyright is for the author first and the nation second."

"I think the problem we have today in terms of imbalance that we might feel in the copyright statute is that we have gotten away from that equation that puts the authors as the primary beneficiaries, followed by the public good."

"Unfortunately, I start with enforcement because, if you don't have exclusive rights in the first place, you can't get to other questions."

"The issues of authors are *intertwined* with the interests of the public. As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation. In the words of the Supreme Court, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. *But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good*." (*emphasis added*)

"Congress has a duty to keep authors in its mind's eye, including songwriters, book authors, filmmakers, photographers and visual artists. Indeed, "[a] rich culture demands contributions from authors and *artists who devote thousands of hours to a work and a lifetime to their craft*." *A law that does not provide for*

[2] Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) GEO underlined relevant sections for Your Honors "without ***once*** considering the value of the individual performance" and "Neither the services nor RIAA *proposed any* methodology for assigning different values to different sound recordings." and "there was a single representative of all sound recording owners, in this case, the RIAA." Page 18 http://www.copyright.gov/history/mls/ML-597.pdf

> *authors would be illogical—hardly a copyright law at all. And it would not deserve the respect of the public*." (*emphasis added*)

23. Of course, pursuant to § 802(f)(1)(A) "the Copyright Royalty Judges shall have *full independence* in making determinations concerning *adjustments* and determinations of copyright royalty *rates and terms*, …"

More Conclusions of Law

24. George D. Johnson, is an individual *pro se* singer/songwriter and music publisher.

25. As will be demonstrated below and as shown in the accompanying Proposed Findings of Fact, GEO's proposed rates and terms were fully supported at the hearing by the testimony of fact and expert witnesses and documentary evidence of GEO and the Copyright Owners.

26. As GEO is a Copyright Owner (CO) as well, on the side of NSAI and NMPA, if allowed, *GEO would like to agree with, use and/or "join with" for a lack of a better term, all of NSAI and NMPA's primary economic evidence and economic arguments when applying GEO's amended stand alone Subpart B rates of $.0022 and $.0025 per-play for mechanicals* beginning in 2018.

27. Overall Music Revenues and sales of albums and singles by download have been "cannibalized" or "substituted for" by all interactive and non-interactive streaming performances the past 10 to 15 years.

28. Cannibalization or streams that "substitute for" sales and the shadow of the compulsory license are the two biggest problems the music industry and copyright owners face from the Services

29. Current Statutory Rates And Direct Deals Under The Compulsory Shadow Are Not Useful Benchmarks. The Statutory Rate Is a Ceiling For Agreements Made In Its Shadow.

30. The royalty rate contained in virtually any agreement made by a music publisher or songwriter with a license for rights subject to the compulsory license will be depressed by the availability of the compulsory license. (Israelite WDT 1 60, 61 (HX-3014); Israelite WRT 1 53, 54 (HX-3030); Eisenach WDT 1 29 (HX-3027), FN 21 (HX-280))

31. In its 2015 Music Marketplace Report, the U.S. Copyright Office acknowledged that royalty rates for musical works have been historically depressed by compulsory licensing. (Gans WDT 1 10 (HX-3028); HX-920 at 159)

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

33. The Current Revenue-Based Royalty Structure Has Not Resulted In Fair Returns to Songwriters and Publishers. The record is replete with evidence that the current revenue-based structure has resulted in inadequate payments to songwriters and music publishers, and that these low payments threaten the very viability of the American songwriting industry. (COF-443) As Apple's Dr, Ramprasad testified, "as the use of interactive streaming increases, songwriters are increasingly disenchanted with their royalty payments," and this, coupled with the increase in recent years in the "number of streaming services, the volume of music available for interactive streaming, interactive streaming services' revenues, and the number of paid subscribers," "necessitate[s] a reassessment of how royalties for publishers/ songwriters are determined." (COF-442; Ramaprasad WDT 1 47 (HX-1615))

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

35. As the statements and financial data from the NMPA and the music publishers show: Total interactive streaming (by number of streams) increased by 54% from 2013 to 2014, and by an additional 92.8% from 2014 to 2015. (COF-190) The sale of digital albums and digital tracks decreased by 9.4% and 12.5%, respectively from 2013 to 2014, and by an additional 2.9% and 12.5%, respectively, from 2014 to 2015. (COF-584)

36. Total U.S. mechanical revenues for the songwriting and publishing industry decreased by 11.6% from 2013 to 2014, and by another 2.6% from 2014 to 2015. (COF-585) Mechanical revenue, as a percentage of total publishing industry revenue, also declined. (COF-586)

37. The Services —which include three of the largest companies in the world, and two other Services with enormous market valuations —claim that they cannot afford to pay mechanical royalties at a higher rate because they are losing money on a GAAP basis. But while GAAP-based financial statements may be a starting point for an analysis to determine 202 profitability, financial position and cash flows, they are not sufficient to make such a determinations. (COF-532) The valuation of the Services are based on future expectations (COF-535), and for high-growth businesses —like Spotify and Pandora —focusing on GAAP financials provides a misleading and incomplete picture of financial performance (COF-533)

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

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

40. Pandora, which reports its financial condition to its investors on non- GAAP bases, including non-GAAP net income and Adjusted EBITDA, shows profitability rather than losses. (COF-534)

41. According to the Copyright Owners' expert Dr. Gans, the compulsory rate for mechanical royalties acts as a ceiling for negotiated deals, and in so doing has negatively influenced perceptions regarding the market value of composition rights, creating an "unvirtuous cycle" that depresses royalty rates for musical works. (Gans WDT 1 10 (HX-3028))

42. Dr. Hubbard agrees that a statutory rate acts as a ceiling in private negotiations and that it would be hard to imagine a party voluntarily paying more than the statutory rate. (Tr. 2205:19-24, 5949:13-5950:16 (Hubbard))

43. Dr. Marx testified that there is no reason to believe that the current statutory rates reflect marketplace benchmarks. (Tr. 1912:10-18 (Marx): Eisenach WRT 9t9t 26- 31 (HX-3033))

44. However, Dr. Marx also claimed that the statutory rate, which was the product of a settlement, was agreed to in the shadow of the compulsory license and that she actively sought it out as a benchmark for that reason. (Tr. 1844:14-25 (Marx))

45. Dr. Leonard admits that the shadow of the compulsory license can affect directly negotiated agreements, including Google's direct deals with publishers. As he admitted in a footnote to his WDT, "there would be no economic incentive" for a service to pay a royalty greater than the statutory rate unless it was receiving something more than a license for the rights subject to the compulsory license. (Leonard WDT 1 71, FN132 (HX-695); (Tr. 1243:5-1245:16))

46. Dr. Watt testified: I am aware that publishers in fact routinely bargain with services and license their repertoires directly, despite the existence of a statutory rate. This should come as no surprise — market participants will often find win-win situations that can marginally improve upon statutory rates for both sides or provide non-rate benefits for both. But it must be emphasized that this is nothing resembling a free market bargain. *Licensors subject to a statutory rate have no ability to obtain materially higher rates than the statutory rates. Licensors can only bargain around the margins of the statutory rate,* identifying regulatory terms that may have more value to licensees, and which may thus be bargained away for alternative value. One example of this might be a bargain to eliminate a burdensome paperwork requirement associated with statutory rates. Such a term may be a substantial burden for the licensee, but provide little financial benefit to the licensor. There is thus a potential bargain to be had where the licensor waives the need for the paperwork in return for a transfer of surplus larger than its minimal paperwork value but less than the licensee's substantial paperwork value. But these are bargains around the margins of the statutory rate, and should not be confused with actual bargaining for higher royalty rates. *Direct agreements at or near statutory rates simply measure the statutory rate and are wholly unhelpful as a measure of fair rates.* Watt WRT 1 36 n. 22 (emphasis added) (HX-3034); *See also* Eisenach WRT 9t9t 26-31 (HX- 3033)

47. The 2008 and 2012 Settlements and the Section 115 Direct Agreements were negotiated under the shadow of a compulsory license. The 2012 marketplace bears little resemblance to the contemporary marketplace. In 2012 the market was dominated by iTunes and Pandora's non-interactive streaming service, and the interactive streaming services had a much presence than they have today. (Eisenach WRT 9t9t 20, 22-37 (HX-3033); HX-302; HX- 2728; HX-2729; HX-2730; HX-2699; HX-2698; Ramaprasad WDT 1 47 (HX-1615))

48. GEO argues that if three individual representatives[3] of the Digital Music Association ("DiMA"), the Recording Industry Association of America ("RIAA"), and the

[3] Mr. Lee Knife from DiMA, Mr. Steve Marks from RIAA and Mr. David Israelite from NMPA

National Music Publishers Association ("NMPA") can create[4] entirely new rates, new terms, new licensing categories, new code sections and two completely new Subparts in 37 C.F.R §385[5] out of thin air, so can GEO or any other rate participant.

49. Furthermore, if DiMA, RIAA, and NMPA can create new rates, terms, new licensing categories, new code sections and entirely new Subparts in 37 C.F.R §385 *for §114 sound recordings, while being in a §115 mechanical hearing* for Phonorecords I and II, so can GEO or any other rate participant. Somehow, the segmentation or fragmentation of music copyrights was not an obstacle to them, apparently since they were creating new code sections and Subparts from scratch.

50. GEO proposes a BUY Button or Paid Permanent Digital Song Sale ("PPDSS") under a newly created Subpart C 37 C.F.R.§ 385.27 or a newly created Subpart D starting at 37 C.F.R.§ 385.30 for General, 37 C.F.R.§ 385.31 for Definitions, and 37 C.F.R.§ 385.32 for Calculation of Royalty Payments in General.

51. In addition to GEO's evidence provided by the RIAA, NSAI, NMPA with their economists and evidence, all of it clearly proves the drastic loss in music copyright sales the past 20 years, as non-interactive and interactive streams have "substituted for" or "cannibalized" Subpart A sales during this time. Historically, music sales dating back to 1889 through the year 2000, prove that songs and music copyrights have *real intrinsic value in dollars*, not $.00 cents per musical work, especially when they are now being given away for literally free by compulsory license. This is why GEO proposes a completely new Subpart C or Subpart D BUY button as a Paid Permanent Digital Song Sale ("PPDSS") which would also eliminate the unpaid *limited download* in 37 C.F.R. 385, Subparts B and C — as GEO proposes in his offered regulations. Most importantly, the Subpart D "BUY button" is completely separate from any current "download" definitions in §385 Subpart A, B, or C and any Subpart A mechanical rates and terms.

52. **Proposal B** (See GEO Ex. 4089) for 37 C.F.R. §385.27 or Subpart D section will read "On a per-dollar basis royalties shall be divided $.20 for record labels, $.18 for the featured artist, $.01 for AFM studio players, $.01 for AFTRA background singers, $.20 for songwriters, $.20 for publishers, and $.20 for the Services or Licensees at a 80/20% split between copyright owners and the services".

53. Alternative **Proposal A** (GEO Ex. 4088): "On a per-dollar basis royalties shall be divided $.21 for record labels, $.19 for the featured artist, $.01 for AFM studio players, $.01 for AFTRA background singers, $.21 for songwriters, $.21 for

[4] Phonorecords I and II in 2008 and 2012

[5] As confirmed in hearing testimony from 3 separate witnesses on March 8th and 9th, 2017 in this proceeding.

publishers, and $.16 for the Services or Licensees at a 84/16% split between copyright owners and the services."

54. All Royalties will be collected either by direct deal *or* Harry Fox, ASCAP, BMI, SESAC and Global Rights will collect §115 royalties while SoundExchange would be designated the "Collective" for all §114 royalties related to Paid Permanent Digital Song Sales ("PPDSS") under the newly created 37 C.F.R. §385.27 in Subpart C or defined under the newly created 37 C.F.R. §385.30 to .32 in Subpart D.

55. The streamers' economic model leaves out one crucial element - *the customer*, and why a a new Paid Permanent Digital Song Sale ("PPDSS") under a newly created Subpart C 37 C.F.R.§ 385.27 or a newly created Subpart D starting at 37 C.F.R.§ 385.30 is the only reasonable proposal that captures the *true value* of a music copyright today and historically. It is only reasonable from the perspective of the copyright owners that the customer must pay for the song on a per-song basis, including the cost of copyright creation, and at a profit, like any other product.

56. As Eagle's manager Irving Azoff recently said, "The industry can't be *pacified by lip service* about efforts to create paid subscription services."

57. The Judges warned that: [A revenue metric] could result in a situation in which copyright owners are forced to allow extensive use of their property without being adequately compensated due to factors unrelated to music use such as a dearth of managerial acumen at one or more Services. The similar potentiality that webcasters might generate little revenue and, under a revenue-based metric, produce a situation where copyright owners receive little compensation for the extensive use of their property was a concern that animated the Librarian to approve a per performance metric rather than providing for a revenue-based payment option in Webcaster I. *Web II,* 72 FR at 24090

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

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

60. One of the greatest values to the consumer of interactive streaming services is that the consumer has access to all of the music, everywhere and anytime. (COF-50) Songwriters and publishers, through their hard work and investment, create and provide the massive catalogs of songs that make it possible for streaming services like Apple, Spotify, Google Play and Tidal to offer access to catalogs of over 30 million songs.

61. The Copyright Office itself concluded in 2015 that: There is substantial evidence to support the view that government-regulated licensing processes imposed on publishers and songwriters have resulted in depressed rates, at least in comparison to noncompulsory rates for the same uses on the sound recording side. U.S. Copyright Office, Copyright and the Music Marketplace, at 159 (Feb. 2015).

62. The Copyright Royalty Tribunal likewise stated: "We conclude that while the Tribunal must seek to minimize disruptive impacts, in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever. The fact that an increase in the rate will increase costs is not per se an argument against raising the rate. There have been benefits to others from cost and price increases in the past without any benefit to the copyright owner." *1981 Phonorecords,* 46 FR at 10486 (emphasis added).

63. This sentiment was stated emphatically by the Judges in *Web II: "*It must be emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, the normal free market processes typically weed out those entities that have poor business models or are inefficient. To allow inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners." *Web II,* 72 FR at 24088 n.8 (emphasis added).

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

> "Furthermore, we find that the RIAA's contentions with respect to the disruptive impact of the current rates have little merit. RIAA's list of horribles allegedly attributable to the current mechanical rates is not supported by any substantial evidence of cause-and-effect. Even the RIAA admits that "high mechanical royalty rates did not cause all of these problems." [citation omitted] Further, the RIAA's proffered evidence fails to persuade us that reducing this one particular cost will alleviate all the claimed record industry adversity in any substantial way and fails to adequately weigh other cost-based or demand-based alternative explanations

> for the alleged adversity. Similarly, DiMA's claims related to lowering the bar for new market entrants are not adequately supported by evidence to indicate the degree to which the overall cost structure and pricing capabilities of such new entrants differ from existing market participants such as Apple iTunes. Thus, we find that RIAA and DiMA have failed to show that the current mechanical rates have caused and are anticipated to continue to cause an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the parties impacted by the rate to adequately adapt to the changed circumstances produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music currently offered to consumers under this license."

65. One rate structure proposed by GEO in the BUY button is a simple and transparent structure that directly links payment with use and access to the songs. GEO's proposed rates are supportable and fully supported, providing the Copyright Owners and GEO with a fair return.

66. The Services came into this Proceeding proclaiming that they wanted to preserve the status quo by rolling the rates and terms set by settlements in 2008 and 2012 forward. However, their notion of the status quo was, as the Judges' quickly perceived, "not the status quo," since their proposals (which differ to some extent one from the other), on their face, seek material reductions in the existing rates and terms. Moreover, the Services failed to provide any evidence supporting their starting place: the existing rates and terms. Instead, they simply presumed that the existing rates and terms needed no evidence to support their continuation into the future, a form of stasis. In short, the Services chose to ignore the fundamental requirement of the very rates and terms that they seek to roll forward: the requirement that the rates and terms be established *de novo.* As is unambiguously required under the current regulations (under the heading "Effect of rates"), in this proceeding, "the royalty rates payable for a compulsory license shall be established de novo." 37 C.F.R. § 385.17. This "de novo" provision "has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy." *United States v. Raddatz,* 447 U.S. 667, 690 (1980) (emphasis added). Indeed, "no form of . . . deference is acceptable." *Salve Regina Coll. v. Russell,* 499 U.S. 225, 238 (1991).

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

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

69. This compulsory license —commonly referred to as a "mechanical" license —was first included in the Copyright Law in a 1909 amendment, following a Supreme Court decision determining that a composer could not copyright a perforated piano roll of his musical work. *See Jondora Music Publ'g Co. v. Melody Recordings, Inc.,* 506 F.2d 392, 393 (3d Cir. 1974) (discussing *White-Smith Music Publ'g Co. v. Apollo Co.,* 209 U.S. 1 (1908)); Final Rule, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding,* Docket No. 2006-3 CRB DPRA, 74 FR 4510, 4512 (Jan. 26, 2009) *("Phonorecords I").* To provide protection to authors from unauthorized recording of their songs, while also preventing a feared monopolization by a particular piano roll company at the time, Congress granted protection from unauthorized recordings of unreleased musical works, but instituted a compulsory license so that, once "the composer chose to license one manufacturer to make mechanical reproductions, others would be allowed to record the composition upon payment of a specified royalty." *Jondora,* 506 F.2d at 393.

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

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

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

71. The compulsory license under Section 115 was thus created to protect copyright owners and prevent monopolization by copyright users, not vice versa. The goal of promoting "the Progress of Science and useful Arts" is achieved by granting limited monopoly power to the copyright owner, which is "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Harper & Row, Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 546 (1985) (noting "monopoly granted by copyright" has an "intended purpose of inducing the creation of new material of potential historical value.") (citations & quotations omitted).

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

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

market forces, while affording individual copyright owners a reasonable rate of return for their creative works.

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

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

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

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

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

76. -The all-in rate structure combined with Apple's unreasonably low $.00091 "all-in" rate (which does not even include a mechanical minimum or floor), could result in a service paying *zero* mechanical royalties for billions of plays. In fact, based on historical data, for a number of service months, Apple's rate and rate structure would have resulted in certain services paying *absolutely nothing* in mechanical royalties. (COF-616) Apple was careful not to mention this but a mechanical royalty rate of zero cannot be considered a "reasonable" rate under either Section 115 or Section 801(b). In fact, Dr. Ramaprasad, in her rebuttal statement, stated that a method of calculating mechanical royalties is "absurd' if it can yield a mechanical per-play royalty of zero. (COF-615; Ramaprasad WRT 1 52 (HX-1616)) The Copyright Owners agree.

77. THE SERVICES' PROPOSED RATES ARE UNREASONABLE AND WITHOUT ANY EVIDENTIARY SUPPORT OR SOUND ECONOMIC JUSTIFICATION. Apple's Proposed Per-Play Rate Is Unreasonable And Not Consistent With The Policy Factors. There Is No Economic Support For Apple's "Conversion" Ratio Pseudo-Benchmarks.

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

79. Apple's Proposed Rate Is Unreasonably Low, Would Drastically Reduce Royalty Payments As Usage Is Expanding, And Would Lead To "Zero Rates" For Mechanical Royalties.

80. Apple's proposed an "all-in" royalty rate of $0.00091 per play would drastically reduce the royalties paid by the Services, and in particular Apple. The Proposed Revenue-Based Royalty Structures Are Unreasonable And Not Consistent With The 801(b) Factors. Benchmarks That Reflect Prevailing Statutory Rates Are Not Marketplace Benchmarks

81. As discussed above, prevailing statutory rates are not market benchmarks, nor are deals under a statutory regime that are at or near the statutory terms. The CRB could not have been much clearer in *SDARS II,* in a Section entitled "The Prevailing Statutory Rate," holding that *the statutory rate "is a rate that was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate . . .."* 78 FR at 23058 (citation omitted).

82. Nor is this surprising. *Of course* statutory rates are not market benchmarks. Ignoring the overwhelming shadow of statutory rates denies their very purpose. Statutory rates are *compulsory* rates —which are fixed and which exist at a point in time based on the facts existing at that point in time. A statutory rate *could* mirror a marketplace rate —but that would be *despite* it being a statutory rate, not *because* of it. One would have to *prove* through extrinsic evidence why a particular statutory rate reflected a marketplace, because no economic principles provide that statutory rates bake in understanding of the marketplace.

83. One could theorize the existence of evidence that would prove that not only was a statutory rate a marketplace benchmark but that there had been no changes in facts and circumstances that warranted changes in such rates and terms (or evidence could be presented that enabled Judges to adjust such rates and terms based on the changes in facts and circumstances). But such evidence would have to be presented, not assumed, both as to the underlying evidentiary basis for either the prior rates and terms or for a settlement creating those terms and any changes that have occurred. Here, the Services have presented not a shred of underlying evidence to support the use of the rates and terms from the 2008 and 2012 settlements, even as they have ignored the manifest changes in the industry that have occurred since those settlements were entered into.

84. The purpose of economic benchmarking is to use marketplace rates that *by their very nature as free market deals* bake in elements that we expect from the market. Longstanding economic principles concerning free market transactions support this use of marketplace deals precisely because of the dynamics of sophisticated entities in the marketplace. Statutory rates and the direct deals under them do not do this.

85. The Judges recognized in *Web IV* that direct deals reflecting statutory terms are of course not benchmarks either, noting that deal terms that mirror statutory rates "reveal[] nothing about whether the parties in the marketplace would agree to include such a prong in an agreement." *(Web IV,* 81 FR at 26325-26) T

86. he Judges in *Phonorecords I* explicitly remarked on the "considerable impact" of the shadow of the statutory rates on all private agreements thereunder:

> The complexity of compliance, and the associated transactions costs, create a curious anomaly: virtually no one uses section 115 to license reproductions of musical works, yet the parties in this proceeding are willing to expend considerable time and expense to litigate its royalty rates and terms. The Judges are, therefore, seemingly tasked with setting rates and terms for a useless license. The testimony in this proceeding makes clear, however, that despite its disuse, the section 115 license exerts a ghost-in-the-attic like effect on all those who live below it. [citation omitted] Thus, the rates and terms that we set today will have considerable impact on the

private agreements that enable copyright users to clear the rights for reproduction and distribution of musical works. Phonorecords 1, 74 FR at 4513.

87. The current rates and terms were established by settlement agreements among the participants to the prior *Phonorecords* proceedings that were intended to be experimental. (COF-421)

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

89. Despite the existence of the *de novo* language in both the *Phonorecords* settlements themselves and in the current regulations, despite Judge Barnett's warnings, and consistent with the Copyright Owners' predictions during opening argument, Tr. 93:17-94:3 (Copyright Owners' Opening), the Services completely failed to present *any* evidence as to the basis or rationale for *any* of the rates or terms in the current regulations. Solely by way of example, they did not offer any evidence to show how or why 10.5% of revenue became the headline rate for certain Subpart B business models, while 12% became the headline rate for other business models, and 11.35% became the headline rate for still other business models — or demonstrate why any of those percentages is a reasonable and appropriate rate for that business model. They presented no evidence as to how or why 50 cents became the mechanical-only minimum for standalone portable subscription services, while 25 cents became the mechanical-only minimum for bundled offerings, or why there should even be a difference.

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

models, while 12% became the headline rate for other business models, and 11.35% became the headline rate for still other business models —or why any of those percentages is a reasonable and appropriate rate for that business model. They presented no evidence as to how or why 50 cents became the mechanical-only minimum for standalone portable subscription services, while 25 cents became the mechanical-only minimum for bundled offerings, or why there should even be a difference.

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

92. While the Services have sought to pretend that nothing much has happened in the 10 years since the 2008 settlement and the 5 years since the 2012 settlement, the reality is that there have been dramatic changes, as acknowledged at least by Amazon's expert, Dr. Hubbard. Dr. Hubbard admitted that the streaming industry has materially changed since 2008 in terms of the number of consumers, number of streams, entry by new entities, revenue growth, subscriber growth, number of companies and the identity of the companies. (COF-634; Tr. 2198:4-20 (Hubbard))

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

94. At the time of the *Phonorecords I* proceeding, downloads predominated the market, and the NMPA chose to focus its efforts on Subpart A rates for downloads without the distraction of litigating with DiMA over streaming, which was experimental. NMPA did not know who would be operating streaming services or what their business model would be. Streaming was of no economic significance. It had not been widely adopted by consumers are the preferred means of accessing music. And, NMPA lacked any data to evaluate the business or its prospects. (C0E-426)51

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

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

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

98. Since the *Phonorecords II* settlement, the interactive market has experienced rapid entry, including by such major and multi-dimensional businesses as Amazon, Apple, Google and iHeartMedia. (COF-422) All of the Services participating in this proceeding except Spotify entered the interactive streaming market after the *Phonorecords II* settlement. Prior to 2012, there were very few services. Rhapsody had been in the streaming market for a few years, and Spotify launched its streaming service in the US in mid-2011, starting with a six month free trial. (COF-427) It was only after 2012 that Google, Apple, Tidal, Amazon and Pandora entered the market. *(Id.)* Even then, interactive streaming did not explode until later. *(Id.)*

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

100. Apple's expert Dr. Ghose testified that a revenue-sharing rate structure creates a "perverse incentive for the downstream firm (which may have other, complementary business lines that do not rely on the upstream firm) to employ a 'loss leader' strategy that hurts the upstream firm in an effort to drive demand for the complementary products." (COF-545; Ghose WDT 1 66 (HX-1617)) Dr. Ghose equates the upstream

entity in this case to the songwriter and the downstream entity to the streaming service, and points to Spotify as an example of a service that employs a loss-leader strategy in its "freemium" offering, which may be highly beneficial to Spotify but results in lower compensation to songwriters. (COF-547; GhoseWDT167(HX-1617)

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

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

103. Amazon is the poster child for a service engaging in revenue displacement. Amazon engages in multiple revenue displacement strategies, including by "bundling" its Prime Music service with Amazon Prime subscriptions.

104. While bundled services were contemplated at the time of the 2008 settlement, which was largely carried forward into the 2012 settlement to produce the current Subpart B structure, as reflected in the 2008 written rebuttal statement of Dan Sheeran of RealNetworks (HX-322117), the type of bundled services then being contemplated was where a music service was bundled into the price of a cell phone subscription or a music player. (COF- 463)

105. There is no evidence anywhere in the record that even remotely suggests that anyone in 2008 or 2012 contemplated that the rate structure, with a prong created for bundled services, would, in the hands of companies like Amazon, with Amazon Prime Music, turn bundling into a financial engineering art-form.

106. Amazon's expert, Dr. Hubbard, asserted in his written rebuttal testimony: A revenue-based mechanical royalty rate structure *can provide* appropriate value to rights holders *as long as that structure* includes alternative minimum royalty calculations when revenue is low *or impractical to calculate."* (COF-441; Hubbard WRT 1 1.3 (HX-132)

107. In an article noted in footnote 32 of Dr. Rysman's Written Direct Testimony submitted on behalf of the Copyright Owners (HX-3026), Amazon's CEO, Jeff Bezos, was quoted “We get to monetize [our subscription video] in a very unusual way,' Amazon CEO Jeff Bezos said this summer 'When we win a Golden Globe, it helps us sell more shoes. And it does that in a very direct way. Because if you look at Prime members, they buy more on Amazon than non-Prime members, and one of the reasons they do that is once they pay their annual fee, they're looking around to see,

'How can I get more value out of the program?' And so they look across more categories —they shop more. A lot of their behaviors change in ways that are attractive to us as a business. And the customers utilize more of our services.'.

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

109. Pandora's Dr. Katz agrees, testifying that accounting difficulties also arise when a streaming service is sold as a part of a larger bundle of services, or when the service is advertising supported and the advertising is sold in bundles that include other outlets. Under these circumstances, any proposed allocation of revenues across services and goods is likely to be contentious." (CO COF-567; Katz WDT 1 82 (HX-885)) Google's Dr. Leonard agreed that a service could game the system with respect to the deduction of up to 15% of a service's costs from its revenues.(CO COF-571)

110. A rate structure that is transparent engenders trust and eliminates manipulation, which also serves to maximize availability. As the Services' own experts testified, the current rate structure is "complex" and "convoluted," (COF-18; Joyce WDT9[21 (HX-693)), and engenders confusion in songwriters and other payees who receive different per-stream rates across different services and in different months. (COF-20) Moreover, because the current rate structure is based on service revenue, it can also be (and has been) manipulated through bundling, discounting, accounting techniques and the pursuit of market share in lieu of profits, which further engenders confusion and distrust, as discussed below. *(See e.g.,* COF-13; COF- 377; COF-569; COF-543)

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

> SoundExchange makes this point well by analogizing to a "buy one, get one free" offer. If a vendor offered an ice cream cone (to adopt SoundExchange's demonstrative example at the hearing) for $1.00, but offered two ice cream cones for $1.06, it would be absurd to conclude that the true market price of an ice cream cone is the incremental six cents. Rather, this offer indicates a market price of $0.53, the average price for the two ice cream cones. Or, to

> take a common example, tire sellers will often advertise a special offer: A buyer can pay for three tires and get the fourth tire free. This is economically (and mathematically) equivalent to a 25% reduction in the price of four tires. No one could go to the automotive store and receive only the "free" fourth tire!

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

112. A revenue-based structure enables —indeed encourages —streaming music services to defer profits. As Dr. Rysman testified, there are numerous reasons why a firm may conclude that it is rational to charge prices that do not maximize current direct profits, but instead charge lower prices today in order to build a customer base that leads to greater long-run profitability (or greater long-run value) in the music service itself, or greater profitability from selling other products or services to its customers. These features are: (a) network effects, (b) economies of scale, (c) learning about consumers, and (d) switching costs. (COF-445; Rysman WDT Mt 13-24 (HX-3026)) The four network industry features create a benefit to gaining additional customers that is not tied to current revenue, and explains why services may find it attractive to forgo current revenue and profits in order to grow users and market share faster than they otherwise would. (COF-446; Rysman WDT 919t 28-29 (HX-3026)) When these features are present, rational firms will choose to set artificially low prices now in the hopes of being able to realize higher returns at some point in the future, either on the service or on related products. (COF-447; Rysman WDT 919t 28- 29 (HX-3026))

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

satisfactory proxy for measuring more usage or the actual intensity of the usage of the rights in question") (emphases added).

114. Those participants could not have been clearer that the rates contained in the 2008 and 2012 settlements of the *Phonorecords I* and *II* proceedings were not meant to be "rolled over" in a subsequent contested proceeding.

B. FINDINGS OF FACT

George Johnson, ("GEO") respectfully submits the following findings of fact:

1. Copyright is in the Creator's interest first and foremost, not the public or the licensees.

2. No licensee has the right to license anything without the Creator's expressed written permission.

3. There is no such thing as a "hypothetical marketplace".

4. There is no such thing as a "voluntary negotiation" inside a federal rate proceeding.

5. There is no such thing as a "fair" or "free" market inside a federal rate proceeding.

6. There is no such thing as an "effectively competitive" market inside a federal rate proceeding.

7. $.00 per song is confiscatory and unreasonable according to several Supreme Court decisions.

8. There is no such thing as a free market when forced by by the federal government to accept a compulsory license for your songs, and especially when the rate is set at $.00.

9. Counsel in this rate proceeding could never survive on $.00 per billable hour or on a $7.99 subscription model to provide unlimited legal services at $.00 per billable hour.

10. Unlike a percent of revenue based mechanical royalty rate structure, a per-play royalty rate structure provides transparency and simplicity in reporting to songwriters and publishers, requiring only the number of reported streams multiplied by the rate, making it much easier to calculate, report and understandable to songwriters. (Rysman WDT 1 56 (HX-3026); Wheeler WDT 1 19 (HX-1613); Ghose WDT 1 83 (HX-1617); Ramaprasad WDT 1 41 (HX- 1615); Tr. 2476:16-2478:2 (Dorn); Tr. 2855:22-2856:14 (Ghose))

11. A transparent metric tied to actual usage is superior to a metric based on service revenue which can be manipulated through bundling, discounting, accounting techniques and the pursuit of market share in lieu of profits. (RysmanWDT ¶¶ 43-45(HX-3026))

12. A per-play royalty rate structure requires only one metric for calculation besides the rate itself: the number of streams. (Brodsky WDT 1 76 (HX-3016); Ghose WDT 1 84 (HX-1617))

13. The current rate structure under the statute, by contrast, is complex and many of the required inputs are not easily verifiable by songwriters and publishers. (Brodsky WDT 1 76 (HX-3016); Ghose WDT 1 80, 81, 82 (HX-1617); Ramaprasad 1 4, 38, 42-44 (HX-1615); Rysman WDT 1 57 (HX-3026); Tr. 2865:15-24 (Ghose); Tr. 824:8-17 (Joyce); Tr. 2477:5-2478:2 (Dorn))

14. Per-play royalty rates compensate songwriters and publishers directly based on the actual usage of their songs. (Rysman WDT 1 56 (HX-3026); Tr. 2661:13-24 (Ramaprasad); 2851:8-13 (Ghose))

15. As David Israelite testified, "tying the statutory rate to a narrowly defined version of the Services' revenues (one that excludes sources of revenue such as the sale of other products linked to the sale of music) as opposed to users' consumption -- the basis of most statutory rates, including the rates for Subpart A products such as downloads and ringtones -- results in publishers and songwriters being paid less and less on an effective per-play basis as consumption increases . . . . It is counterintuitive for something that is so highly valued that it gets played more and more to earn less. (Israelite WDT 1 39 (HX-3014))

16. To incentivize songwriters to continue to create new songs, there must be sufficient and fair returns for the creative effort. The creation of additional works is an ongoing process, requiring the investment that is made by Publishers in discovering and developing new songwriters and providing advances to both new and existing songwriters to support and sustain their creation of new works. (Rysman WDT 1 69 (HX-3026); Kelly WDT ¶¶ 24-36 (HX-3017); Sammis WDT 9[9[10, 11, 18-35 (HX-3019); Yocum WDT n 10-15, 20-29 (HX-3021); Brodsky WDT ¶¶ 12-33 (HX 3016); Kokakis WDT ¶¶ 12-21, 39-44 (HX 3018); Tr. 2923:9-13 (Herbison))

17. The market exit of songwriters, which has been dramatic, with the number of songwriters in Nashville alone plummeting from over 4000 twenty years ago to only 400 to 500 today, due in part to the continuing drop in mechanical royalties and consequent inability of songwriters to earn a living and the corresponding drop in available publishing deals, will inevitably result in a decreased availability of new songs. (Rysman WDT 1 69 (HX-3026); Herbison WDT ¶¶ 7, 25, 31-36 (HX-3015); Bogard WDT ¶¶ 5, 40-49 (HX-3025); Rose WDT 1 33(HX-3024); BarronWDT160(HX-3020);KellyWDT12(HX-3017); Yocum WDT12 (HX-3021))

18. A royalty rate structure that assures that creators will be rewarded for their successful creation of new songs will enhance the availability of new songs and by increasing the body of available new songs, will increase the likelihood that among such songs will be the “standards"of the future.(Rysman WDT169(HX-3026);Yocum WDT162(HX-3021), Sammis WDT 1 55 (HX-3019), Kelly WDT 1 68 (HX-3017), Brodsky WDT 1 110 (HX-3016), Kalifowitz WDT 1 35, 39 (HX-3022))

19. Songwriters reasonably expect that the mechanical royalties they will receive will correspond to the demand for their songs as reflected in the number of streams. A rate structure that decouples royalties from usage reduces the economic incentive for a songwriter to create new songs. (Ghose WDT 1 53 (HX-1617); Brodsky WDT Mt 56, 57 (HX- 3016); Kokakis n 48-54 (HX-3018); Dorn WDT 1 7 (HX-1611))

20. The songwriters will be incentivized to create new works by fair compensation.(Tr. 2658:18-2659:2 (Ramaprasad); Yocum WDT162(HX-3021);Sammis WDT 1 55 (HX-3019); Kelly WDT 1 68 (HX-3017); Brodsky WDT 1 110 (HX-3016); Kalifowitz WDT Mt 35, 49 (HX-3022))

21. Interactive streaming is dramatically increasing, both in terms of users and numbers of streams, but because the current royalty structure decouples royalties from such growth in both exploitation and consumption, songwriters do not understand why their royalty payments do not reflect the popularity of their songs and the payments they receive make no sense to them. (Ramaprasad 1 47 (HX-1615), n.85; Ramaprasad WDT 1 65, 66 (HX 1615))

22. Music publishers provide financial support to both new and existing songwriters by paying advances against royalties that may or may not be earned in the future, advances that music publishers have been able to fund by virtue of the income generated by their existing catalogues. For more than a century, it has been the income generated by current songs that support the ability of music publishers to finance the investment in the songwriters of tomorrow and the creation of tomorrow's popular songs. Music publishers also bear the very significant costs to market, promote and arrange for the worldwide exploitation and licensing of the songs. They track the exploitation of the songs, collect and process all of the income received from thousands of users and issue royalty statements to the writers and composers. They protect the copyrights against unauthorized use, both through their in-house counsel and through outside litigation counsel. (KellyWDT ¶¶ 11,24-36(HX-3017);Sammis WDT ¶¶ 18-35(HX-3019); Yocum WDT ¶¶ 10-29(HX-3021))

23. In or around 2014, Amazon saw that its customers were migrating "in droves" from downloading to streaming and concluded that the sale of downloads was not going to be a long-term business. As streaming has replaced the sale of physical recordings and downloads, songwriters have experienced a decline in mechanical royalties. (Bogard WDT 9t9t 32, 33, 38, 43 (HX-3025); L.T. Miller WDT 1 7 (HX-3023); Rose WDT 1 29 (HX-3024); Herbison WDT 1 33 (HX-3015); Tr. 1458:5-1461:4, 1462:25-1464:16 (Mirchandani))

24. As Professor Zmijewski, an accounting expert for the Services (other than Apple), admitted in his written rebuttal report, the data obtained from both the NMPA and music

publishers confirms that mechanical royalties from physical records and digital downloads have dropped as interactive streaming has substituted for the purchases of physical records and digital downloads but the increased mechanical royalties from interactive streaming services have not been sufficient to replace the lost mechanical royalties from the sale of physical records and digital downloads. Professor Zmijewski admitted that, in those instances where music publishers have received increased mechanical income, he has not considered the fact that the growth has come from either increased market share or the growth in the publisher's catalogues, although he admitted that such growth would have an impact on revenues. (Zmijewski WRT ¶¶ 38,49-52, 69, 79-80, 91-92, 97, 104-106 (HX-1070); Tr. 5819:11-17, 5820:14-5823:3, 5823:8-5824:22, 5842:2-24-5844:3, 5848:9-5850:8 (Zmijewski))

25. Many songwriters have already left the profession and even today's successful songwriters will be forced to exit the profession if the compulsory mechanical rate structure does not change, as they are unable to make a living under the current structure as streaming becomes a primary method of music consumption. (Bogard WDT 1 5, 39, 46, 47, 49 (HX-3025); L.T. Miller WDT 1 11 (HX-3023); Rose WDT 1 2, 22, 33 (HX-3024); Brodsky WDT ¶¶ 77-81 (HX-3016); Ramaprasad 1 63 (HX-1615); Herbison WDT ¶¶ 22-24. 31-36 (HX- 3015))

26. Songwriting is a full-time job. There is no assurance that any song written will achieve any success or even be recorded and even if a successful song is written, it often is only after years of effort. Songwriters devote long hours and significant effort to creating songs. (Bogard WDT ¶¶ 20, 43 (HX-3025); L.T. Miller WDT 1 12 (HX-3023); Rose WDT 1 32 (HX- 3024); Ramaprasad WDT 1 63 (HX-1615))

27. For the songwriters "there is obviously some mental and physical cost, but there is also an opportunity cost." (Tr. 2847:25-2848:13 (Ghose))

28. Songwriters depend on advances from music publishers to sustain their lives while they devote themselves to writing. (RoseWDT122(HX-3024);Kelly ¶¶ 27-33 (HX-3017); Sammis ¶¶ 22-27 (HX-3019); Yocum n 18-23 (HX-3021); Brodsky n 29-33 (HX- 3016); Kokakis ¶¶ 20, 40-43 (HX-3018))

29. Spotify's expert Dr. Marx admitted that including a per-play rate in a royalty rate structure does not compel a licensee to charge a per-play fee to its users. She further admitted that she has no evidence that a per-play royalty structure would have a material effect on the pricing decisions of streaming services. (Tr. 2009:6-9, 2024:11-2025:2 (Marx))

30. Dr. Marx also admitted that Spotify's ad-supported service already exacts a user-facing per-play price from its users in the form of advertisements. (Tr. 2010:7-2011:18, 2014:13-24 (Marx))

31. Songs have value, representing the investments in time, effort and money by the music publishers and songwriters in their creation. (Israelite WRT 1 66 (HX-3030); Tr. 2851:18-24, 2852:11-2854:10, 2863:16-2864:11 (Ghose))

32. Songs are the foundation for the value of the music industry, without which there are no recordings and without which interactive music streaming services would have no content to offer their users. (Brodsky WDT 1 8 (HX-3016); Ghose WDT 1 51 (HX-1617))

33. Songwriters and publishers, through their hard work and investment, create and provide the massive catalogs of songs that make it possible for streaming services like Apple, Spotify, Google Play and Tidal to offer access to catalogues of over 30 million songs. (Kalifowitz WDT ¶¶ 32, 50 (HX-3022); Brodsky WDT ¶¶ 53-54, 111-121 (HX-3016); Ramaprasad WDT 1 68 (HX-1615))

34. A vast catalog of songs available from the services eliminates the need to purchase 30 million individual songs (or any songs, for that matter). (Hubbard WRT 1 2.8 (HX- 132); Ghose WDT ¶¶ 46, 50 (HX-1617))

35. The per-user prong of the Copyright Owners' proposal aligns the interests of the Copyright Owners with the interests of the interactive services. The services are paid subscription fees for the access they provide to the music created by the Copyright Owners regardless of actual usage. Copyright Owners too should be assured of payment for such access as both services and Copyright Owners will have an interest in maximizing the number of users. (Brodsky WDT 1 73 (HX-3016); Kokakis WDT 1 69 (HX-3018))

36. A percentage of revenue structure "basically decouples demand from actual payment." (Tr. 5712:6-23 (Ghose))

37. A rate structure that decouples compensation from demand will disincentivize songwriters and publishers to create and distribute new musical works. (Dorn WDT 1 33 HX-1611))

38. In the digital environment, interactive streaming services are the functional equivalent of the distributors and brick and mortar retailers that sold recordings (and before that, sheet music) under the historical business model. (Israelite WRT 1 45 (HX-3030); CO. Ex. R171 (HX-325))

39. A per-play rate structure properly allocates risk and reward; basically, each party gets what it contributes. The payment is commensurate with the actual contribution. For example, with a per-play rate, when a service increases its revenue by developing attractive features that allows it to charge higher advertising prices than its competitors, or by creating perks in addition to the opportunity to stream music that draws subscribers to the service, it is rewarded because it can keep these gains. A payment structure that balances risk and reward, and is commensurate with actual demand, encourages parties to innovate and maximize profits. (Tr. 2873:4-11 (Ghose); Dorn WDT 1 64 (HX-1611))

40. Costs do not change the Shapley values, which represent the fair share of profits that rightsholders and services should receive from the endeavor, but they affect the amount of royalties that would have to be paid to deliver these profits to publishers and labels. The profits equal to the Shapley values would be delivered to labels by paying royalties equal to the Shapley values plus their incremental costs. The Shapley value is an equitable distribution of surplus, not revenue—costs must be deducted from royalty revenue to yield profits. Any difference in incremental costs associated with cultivating and licensing their respective repertoires would lead to different royalty rates. Since the Shapley values for publishers and labels are equal, differences in costs would lead to less than proportional differences in royalties. (Gans WDT 1 73 (HX-3028))

41. Benchmarks delay deals in music licensing and at below market rates.

42. Foreign and domestic streaming corporations, foreign owned major record labels, past Congressional legislation, U.S. Justice Department consent decrees, DMCA "safe harbors", federal rate courts, statutory licenses, statutory rates, compulsory licenses, central economic planning, nationalized price-fixing of government royalties, music lobbyists, anti-copyright attorneys, and other outdated federal regulations have destroyed a significant segment of the songwriting, music publishing and sound recording industries — and the United States economy.

43. According to N.S.A.I, the Nashville Songwriters Association International, there has been an 80% to 90% decline in Nashville songwriters and music publishers since the year 2000. GEO has also personally witnessed this decline on Music Row as an expert witness in songwriting in Nashville for 20 years.

44. Supporting the copyright interests of all American singers, songwriters, music publishers, recording artists, independent record labels, producers, engineers, background singers, and studio musicians, as well as the creativity they inspire, is vital to the economic and cultural future of the United States.

45. Investment in the creation of great musical compositions and great recorded music should be nurtured and encouraged. It is the duty of the U.S. Congress, the U.S. Justice

Department and The Copyright Office to protect the personal private property of all American citizens and not to centrally plan the music royalty or music copyright economies by price-fixing individual property owner's rates at literally $.00 and $.00 cents per copyright, PA and SR.

46. After over 100 years of failed central economic planning and price-fixing of American songwriter's and publisher's music copyrights and personal private property, it is vital to individual American music copyright creators that the appropriate free-market economic incentives are present for musical creators and their investors to take the risks necessary to continue to create and innovate — this fact now applies to §114 digital sound recordings and streaming.

47. The United States should be a leader in promoting the creative industries including performing, songwriting, music publishing, and sound recording copyright production.

48. The genius of American songwriters, music publishers, performers, recording artists, and independent record labels has created a great cultural legacy and continues to create a critical source of income to the American economy.

49. The Natural Rights and Common Law background of the U.S. Constitution, the "Copyright Clause" in Article I, Section 8, Clause 8 of the U.S. Constitution, (and the Copyright Act of 1790 - repealed) specifically empower the The Copyright Office and Copyright Royalty Board Judges to encourage and protect individual artistic creations through federal copyright law.

50. It is well-established that President George Washington and James Madison based the federal copyright protections of The Copyright Act of 1790 on the English Statute of Anne. However, Article IV of the Statute of Anne, which called for an administrative board to set "reasonable" rates for copyrights similar to the current Copyright Royalty Board, was intentionally rejected by Washington and Madison to specifically create a prosperous free-market in American copyright creation. The Copyright Act of 1790 purposely contained no statutory license, no statutory rate and no compulsory license.

51. It is well-established by law and legal precedent that copyright is a private property right guaranteed by the 5th Amendment of the U.S. Constitution. It is also well established that property can only be taken for public use and that no person shall be deprived of life, liberty, or property without due process or just compensation by a jury of their peers.

52. It is well-established by law and legal precedent that contract rights are a form of private property rights that are guaranteed by the 5th Amendment of the U.S. Constitution and that no person shall be deprived of life, liberty, or property without due process or just compensation by a jury of their peers.

53. It is well established by law and legal precedent that copyright is a form of protected free speech and Congress shall make no law abridging freedom of speech guaranteed under the 1st Amendment of the U.S. Constitution.

54. It is well established by law and legal precedent that copyright contains a right to privacy which shall not be violated and is guaranteed to all U.S. citizens under the 4th Amendment of the U.S. Constitution.

55. The three "major American record labels", Warner Music, Universal Music, and Sony/ Columbia Music, are now all 100% foreign owned in Russia, France and Japan.

56. Using 2014 statistics, Pandora Media, Inc. executives and investors have extracted almost a-half-a-billion dollars in personal executive stock compensation for 4 years while "*losing money*" and lobbying Congress to lower statutory §115 royalty rates of American songwriters and music publishers from $.00 per-stream, that is split, to less than zero.

57. The Copyright Office has determined as policy in it's most recent copyright reform study that "*There is no policy justification for a standard that requires music creators to subsidize those who seek to profit from their works*".

58. Congressionally encouraged, private negotiations to compensate singers, songwriters, music publishers, recording artists, and independent record labels on streaming, webcasting, or internet radio services have failed to date.

59. Copyright law was purposely designed by Washington and Madison to serve both public and private interests and which can only be achieved when the individual rights and private property interests of copyright creators are recognized by the Copyright Office as paramount and which override any demands by the public interest or music licensees.

60. In the U.S. Supreme Court case, *Eldred v. Ashcroft*, the majority's firm response to Justice Breyer's dissent finds that "*Copyright law serves public ends by providing individuals with an incentive to pursue private ones*".

61. As James Madison is quoted, in referencing Adam Smith discussing the Copyright Clause of the U.S. Constitution, he affirms, "*The public good fully coincides…with the claims of individuals*."

62. The Copyright Royalty Board should provide meaningful copyright and royalty protection for musical artists and copyright creators.

63. The royalty rate standard for the public performance of sound recordings or musical compositions should be what a true free-market would bear, not a "hypothetical

marketplace", between real willing buyers and real willing sellers and without any government intervention or interference.

Respectfully submitted,

By: */s/ George D. Johnson*

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Dated: Friday, May 12, 2017

CERTIFICATION OF SERVICE

I, George D. Johnson, ("GEO") an individual *pro se* songwriter, music publisher and music copyright creator, hereby certifies that a copy of the foregoing GEORGE JOHNSON'S PROPOSED CONCLUSIONS OF LAW AND FINDINGS OF FACT has been served this 12th day of May, 2017 by electronic mail upon the following parties:

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