Before the UNITED STATES COPYRIGHT ROYALTY JUDGES The Library of Congress

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

WRITTEN REBUTTAL TESTIMONY OF WILL PAGE

(On behalf of Spotify USA Inc.)

Introduction

- 1. My name is Will Page. I am the Director of Economics at the Spotify group of companies ("Spotify"). I previously provided testimony during the direct phase of this proceeding.
- 2. I offer this rebuttal testimony to address several issues raised in the National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International (collectively, "Copyright Owners") Written Direct Statements ("WDT").
- 3. As I describe below, the Copyright Owners' testimony cherry-picks selective microeconomic case studies while ignoring the relevant macroeconomic trends, and by doing so misconstrues the issues. In particular, (a) the Copyright Owners' cannibalization argument obscures or outright ignores several critical facts, including the fact that streaming pays both mechanical *and* performance royalties and that the supply of musical works is increasing, not decreasing; (b) the Copyright Owners' focus on anecdotal examples of specific cherry-picked

"hits" receiving less in royalties in one calendar year fails to mention that overall revenue to both publishers and songwriters has increased with streaming; (c) the justifications Copyright Owners advance in support of their rate proposal are not only flimsy and conclusory but also will ultimately hurt publishers, songwriters, and the consuming public; and (d) the risk publishers take by issuing advances is more akin to high-interest loans than creative investment, and relative to other parts of the music ecosystem, publishing is generally a stable, low-risk industry.

4. As shown in my WDT and as I will further show in this Rebuttal, the new streaming/access paradigm *works*, and it works to the benefit of a greater number of songwriters and publishers than under the old ownership model. The global value of music copyright for labels and publishers grew by almost \$1 billion in 2015, and all indicators point towards an accelerating global recovery in 2016 – especially in the U.S. Below, I further expand on why Spotify has benefitted both the consumers and creators of copyright alike, and why the Copyright Owners' rate proposal will ultimately harm not just digital services, but the public, rightsholders, and the music industry landscape as a whole.

Copyright Owners' "Cannibalization" Argument Is Wrong: Ownership Was on the Decline Before Streaming, and Streaming's Ascent Has Boosted Publishing's Recovery

5. One of the Copyright Owners' pervasive themes is the alleged dwindling fortunes of songwriters due to falling mechanical royalties. Indeed, the Copyright Owners would have the Judges believe that the fate of the music publishing industry has never looked so dire.¹

¹ See, e.g., Witness Statement of Bart Herbison ("Herbison WDT") at ¶ 31 ("The combination of rapid technological changes, low rates for compulsory mechanical licenses and archaic consent decrees, are devastating the American songwriting industry. In Nashville and across the United States there are alarmingly fewer songwriters than there were just a few years ago."); Witness

6. In this version of the story, streaming services are the villain. *See*, *e.g.*, Witness Statement of Peter Brodsky ("Brodsky WDT") at ¶ 77 (describing how "[e]ven as recently as five years ago, a song as popular as 'Fight Song' would have earned significantly greater mechanical royalty revenues than those earned by 'Fight Song,' and I believe the reason is the lower royalties paid by interactive streaming services"). But the Copyright Owners' testimony does not tell the whole story. Notably, Copyright Owners wholly omit: (a) any discussion of *performance* royalties, which streaming services also pay—and half of which goes directly to songwriters; (b) data on whether fewer works are being created than before; and looking at publicly-available data shows an *increase* in works created; and (c) a discussion of *piracy*, which, along with the availability of other services like YouTube, actually created the shift from ownership to access.

A. Streaming Pays Both Performance and Mechanical Royalties

7. Notably, the Copyright Owners focus solely on decreasing mechanicals from CD/PDD sales as evidence of streaming's damage to songwriters. But this focus on streaming vs. CD/PDD mechanicals also fails to mention that the two are not an apples-to-apples comparison, since streaming currently pays *both* performance *and* mechanical royalties. In fact, performance royalties from streaming are actually worth *more* to songwriters than mechanicals from physical

Statement of David Israelite at ¶ 68 ("Nonetheless, mechanical royalties paid to music publishers have continued to decrease year after year in recent history, to a point where I have never seen mechanical royalties, as a percentage of revenues paid to the music publishing industry, lower than they are presently."); Witness Statement of Steve Bogard ("Bogard WDT") at ¶ 5 ("If the statutory mechanical rate structure for interactive streaming is not substantially increased to provide songwriters fair compensation for their contributions, successful professional songwriters who can no longer support themselves and their families will continue leaving the business at a faster rate.").

or PDD sales. That is, whereas mechanicals flow through publishers first before they are passed on to songwriters, songwriters receive their share of the performance royalties *directly* from the PROs.² *See* Witness Statement of David Kokakis ("Kokakis WDT") ¶ 21 ("[T]he writer's share of public performance royalties is almost always paid directly to the songwriter by the songwriter's performing rights organization…"). And, because publishers do not receive the 50% of performance income that is passed directly to songwriters, publishers are not booking that portion as revenue. Therefore, focusing solely on *publisher mechanical revenues* obscures the true amount of royalties that streaming provides to both publishers *and* songwriters.

revenues publishers receive is enough to replace declining mechanicals. Separate data from MiDiA Research shows that

.3 And of course, this data does not take into account the fact that *songwriters* are better off under the streaming structure because they are receiving more revenue directly from PROs—royalties that publishers cannot directly apply toward the recoupment of any advances.

In any event, independent evidence suggests that even the 50% of performance

9. Indeed, the Copyright Owners' argument that "the rate of recoupment has dropped significantly" also glosses over this important fact. Whereas mechanical rights management agencies pay mechanical royalties entirely to publishers, who may then hold on to

Witness Statement of Annette Yocum ("Yocum WDT") ¶ 22.

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² A true and correct copy of Kristin Thomson, *Music and How the Money Flows*, FUTURE OF MUSIC COALITION (Mar. 10, 2015), http://futureofmusic.org/article/article/music-and-how-money-flows, is attached hereto as Spotify Exhibit 2.

them to recoup advances, the PROs pay a portion of performance royalties directly to songwriters. See Kokakis WDT \P 21 ("[T]he writer's share of public performance royalties...is not in any instance used to recoup the advance.") (emphasis added).

- 10. Thus, when comparing mechanical and performance royalties, the "pure mechanicals" model of physical sales stands to benefit publishers more on a dollar-to-dollar basis than performance compensation to songwriters. To the extent publishers may be slower in recouping advances under the streaming model, this is because streaming has shifted the songwriter compensation structure from a pay-publishers-only-mechanical model to, in part, a pay-songwriters-directly (and pay publishers separately) performance-plus-mechanical royalty model.
- 11. As such, the Copyright Owners' story about falling mechanical revenue is a straw man that focuses only on half of the equation—for publishers only. If what Copyright Owners are seeking is for Digital Services to make up for lost revenue due to declining physical/PDD sales (a proposition that in itself is absurd, as I explain below), then they must first acknowledge that a pure mechanical-mechanical comparison between CD/PDD and interactive streaming is inappropriate. By ignoring the amount of performance royalties generated by streaming, and the fundamentally different payment structure that entails, the Copyright Owners paint an incomplete and wholly inaccurate picture of the health of the publishing industry in their WDT.

B. The NMPA Hasn't Provided Actual Evidence That the Supply Side is Drying Up

12. Likewise, the Copyright Owners' anecdotal testimony as to how more songwriters are fleeing the profession due to poor returns is not consistent with the actual data, nor does it

provide any insight into actual trends.⁵ On the contrary, The New York Times reported that Office of Employment Statistics ("OES") data show that songwriters "saw their average income rise by nearly 60 percent since 1999"—the year Napster was introduced.⁶ According to OES statistics, "in 1999 there were nearly 53,000 Americans who considered their primary occupation to be that of a musician, a music director or a composer; [while] in 2014, more than 60,000 people were employed writing, singing or playing music. That's a rise of 15 percent, *compared with overall job-market growth during that period of about 6* percent." That is, "[s]omehow the turbulence of the last 15 years seems to have created an economy *in which more people than ever are writing and performing songs for a living.*" Notably, The New York Times points out that job market growth overall has been slow because of the recession. Therefore, to the extent *some* songwriters are suffering, the Copyright Owners haven't shown causation, and the songwriters' anecdotal circumstances could be for any number of reasons, including the overall recession.

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⁵ See, e.g., Herbison WDT ¶ 31 ("By NSAI's approximation, roughly 80% to 90% of songwriters in Nashville who earned a full-time living from royalty payments on songs released by recording artists are no longer signed to a publishing deal, no longer writing songs as a profession and no longer receiving royalties from new titles. The decline in Nashville is consistent with trends in the songwriting industry nationwide."); Bogard WDT ¶ 5 ("If the statutory mechanical rate structure for interactive streaming is not substantially increased to provide songwriters fair compensation for their contributions, successful professional songwriters who can no longer support themselves and their families will continue leaving the business at a faster rate. Talented young songwriters will not choose the songwriting profession if they can't earn enough to support themselves and their families.").

⁶ A true and correct copy of Steven Johnson, *The Creative Apocalypse That Wasn't*, N.Y. TIMES (Aug. 19, 2015), http://www.nytimes.com/2015/08/23/magazine/the-creative-apocalypse-thatwasnt.html? r=0, is attached hereto as Spotify Exhibit 4.

⁷ *Id.* (emphasis added).

⁸ *Id.* (emphasis added).

⁹ *Id*.

- 13. The Copyright Owners' drastic proclamations regarding the dire straits of the songwriting industry are also contradicted by PRO data showing that more songwriters are joining year after year. Indeed, a recent ASCAP annual report stated that "[m]ore than 40,000 music creators joined ASCAP in 2014." Likewise, a recent BMI annual review also reported "56,000 new songwriters, composers and publishers" joining BMI in 2015. The statistics simply don't bear out Copyright Owners' claims that the supply side is drying up.
- 14. Works in the ASCAP/BMI repertory are also increasing. A review of relevant BMI court filings from 2009 to 2017 shows this supply-side increase:
 - **2009**: 400,000 Affiliated Songwriters and 6.5 million works¹²
 - **2014:** 7.5 million works¹³
 - **2016**: 700,000 Affiliated Songwriters and 10.5 million works¹⁴
 - **2017**: 750,000 Affiliated Songwriters and 12 million works¹⁵

¹⁰ A true and correct copy of the ASCAP 2014 Annual Report (at 9), https://www.ascap.com/~/media/files/pdf/about/annual-reports/ascap_annual_report_2014.pdf, is attached hereto as Spotify Exhibit 5.

¹¹ A true and correct copy of the BMI 2014-2015 Annual Review (at 15), https://www.bmi.com/pdfs/publications/2015/BMI_Annual_Review_2015.pdf, is attached hereto as Spotify Exhibit 6.

¹² A true and correct copy of the Response of Broadcast Music, Inc. to the Petition of WPIX, Inc., et al. (at 3) in *WPIX*, *Inc.*, et al. v. *Broadcast Music*, *Inc.*, C.A. No. 09-cv-10366, is attached hereto as Spotify Exhibit 7.

¹³ A true and correct copy of the Verified Complaint (at 2) in *Broadcast Music, Inc., et al. v. Flatiron Room Operations LLC, et al.*, C.A. No. 14-cv-1970, is attached hereto as Spotify Exhibit 8.

¹⁴ A true and correct copy of the Response of Broadcast Music, Inc. to the Petition of ESPN, Inc. for the Determination of Reasonable Final License Fees (at 4) in *ESPN*, *Inc.* v. *Broadcast Music*, *Inc.*, C.A. No. 16-cv-1067, is attached hereto as Spotify Exhibit 9.

¹⁵ A true and correct copy of the Petition of Broadcast Music, Inc. for the Determination of Reasonable Interim License Fees (at 3) in *Broadcast Music, Inc.v. Radio Music License*

- 15. As evidenced by the above numbers, between March 2016 and January 2017, according to the documents BMI itself filed in federal district court, the number of works in BMI's repertoire grew by 1.5 million, or about 167,000 works each month. Furthermore, it looks like the rate of production of new works is dramatically increasing as well: compare a 1 million increase in works from 2009 - 2014, followed by 4.5 million in 2014 - 2017.
- Overall, the evidence suggests that the number of songwriters and musical works 16. are growing or, at the very least, not diminishing at a rapid pace.

C. The Shift From Ownership to Access Happened Well Before Streaming, and Streaming Is Helping with the *Recovery*

| | 17. | If anything, streaming | ng has been the | reason for U.S | . publish | ning's <i>rebout</i> | nd in the |
|--------|----------|--------------------------|------------------|-----------------|------------|------------------------|-----------|
| past s | several | years. As the attach | ed International | Federation of | f the Pl | nonographic | Industry |
| ("IFPI | I") data | (which measures lab | el revenue) shov | v, | | | |
| | | | | | | ¹⁷ This was | 11 years |
| before | Spotif | , the largest interactiv | ve streaming com | pany, launched | l in the U | J.S. | |
| | 18. | Nor did the launch | of iTunes in 200 | 3 stem this fre | e-fall. A | s also show | n in IFPI |
| data, | | | | . It | n fact, if | iTunes can b | e said to |
| have o | changed | the industry landsca | pe in any way, | | | | |
| | | | | | | | |

Committee, Inc., C.A. No. 17-cv-00004, is attached hereto as Spotify Exhibit 10.

¹⁶ ASCAP/BMI numbers are a far more reliable indicator of the health of American songwriting versus any testimony specific to, say, NSAI, or to a specific publisher. This is because ASCAP/BMI are open to all comers, and therefore not susceptible to the whimsies or other operating limitations of a specific publisher or a specific group of songwriters (like NSAI).

PDDs were not the savior of the music industry—if anything, the introduction of PDDs likely contributed to decreasing revenues by allowing consumers to spend only \$0.99 on the song they actually want to listen to, rather than \$11.99 on an album just for one song they want to listen to and 11 other songs they did not want.¹⁸

19. Indeed, at times, it is unclear if the Copyright Owners themselves know what caused the changing state of the industry, as they cite to the "sales of digital media (sold increasingly as unbundled tracks)" as one of the "changes [that] have profoundly affected the ways in which music is distributed and consumed, disrupted traditional business models, and reduced overall revenues." Yet in other places, the Copyright Owners insist that "interactive streaming is cannibalizing physical sales and downloads" and hold up the 9.1 cents per download as a hero number versus "micro-pennies per stream." Herbison WDT ¶ 6. The Copyright Owners have their story wrong. PDDs are not the hero, streaming services are not the villain, and CDs are not the eternal return. Access is the future, and Spotify is providing fair and growing returns to artists and songwriters for that service. Given their proposed rate for mechanical royalties, it appears that Copyright Owners are unwilling to adapt to the new digital model and instead are either hoping for a statutorily-imposed subsidy from the Digital Services to compensate for

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¹⁸ A true and correct copy of Glenn Peoples, *Recording Industry 2015: More Music Consumption and Less Money, That's Digital Deflation*, BILLBOARD (Jan. 7, 2016), http://www.billboard.com/articles/business/6835350/recorded-industry-2015-consumption-grew-revenues-digital-deflation, is attached hereto as Spotify Exhibit 12 [hereinafter RECORDING INDUSTRY 2015] ("Money spent on physical purchases were only partially replaced by money spent on downloads. Consumers were able to spend less when previously bundled tracks became unbundled and a la carte shopping was made possible. Many people opted to buy a few tracks (or obtain illegally, although piracy is a separate issue) rather than the entire digital album. Physical formats didn't offer that choice.").

 $^{^{19}}$ Expert Report of Jeffrey A. Eisenach ("Eisenach WDT") \P 41.

changing consumer behavior or, if streaming were decimated, to force consumers to return to CD and/or PDD purchases.

- 20. But fighting against consumer behavior is pure wishful thinking. As described in my prior testimony, *streaming services* did not cause the decline in ownership. *See* Page WDT ¶ 30 (showing Canadian data that digital album sales began falling before streaming was even introduced in that country). Nor did interactive streaming cause the shift from ownership to access: YouTube and piracy—both "access" services—were available and popular before interactive streaming.

The Copyright Owners' Focus on the Microeconomics of the "Effective" Per-Play Rate Again Conveniently Ignores the Macroeconomics of An Increasing Pie

22. The Copyright Owners' justifications for a per-play rate, just like its mechanicalsmechanicals comparison, conveniently ignore that overall publishing industry revenue is *up*.

 $^{^{20}}$ *E.g.*, Page WDT ¶¶ 56 & 57.

 $^{^{21}}$ ¶ 48.

Below, I first discuss why the Copyright Owners' focus on the "inherent" value of a play is unprecedented in a publishing industry that operates almost exclusively on a percentage-of-revenue basis. Next, I focus on why discussions of a "per-play" rate obscures the more important point that overall publishing revenue is *up* under streaming. Likewise, the Copyright Owners' focus on revenue generated by individual "hits" also misses this point—and misses the greater point that streaming enables distribution to a *wider variety* of artists, not just the "top 40" radio stars.

A. The Copyright Owners Cannot Name One Scenario in Which Musical Works Are Licensed on a Per-Play Rate

- 23. The Copyright Owners' argument for why their rate proposal—which incorporates a per-stream component for the total amount paid by Digital Services—is appropriate rests on the argument that a "percentage of revenue prong is problematic precisely because it is not tied to a fixed per play rate. Musical works have inherent value and the Digital Services should pay more when their users stream or play more music." Brodsky WDT ¶ 68.
- 24. This argument ignores the realities of music promotion and consumption. Terrestrial radio—which the Copyright Owners cite to again and again as a positive counterexample in contrast to the Digital Services²²—like interactive streaming pays on a percentage-of-revenue basis.²³ Nor does this argument apply to consumption such as CD and PDD sales, the other example Copyright Owners routinely hold up. Once a consumer purchases a

²² See Witness Statement of David M. Israelite ("Israelite WDT") at \P 66; Witness Statement of Lee Thomas Miller at \P 7 ("Today the one thing keeping us working is the performance royalty from terrestrial radio.").

²³ See Page WDT ¶ 26 & n. 27.

CD or PDD, they can access the music—by playing a song—as often or as little as they would like. There is no "per-play" charge in either, contrary to the Copyright Owners' argument that "users' consumption" forms "the basis of most statutory rates, including the rates for Subpart A products such as downloads." Israelite WDT ¶ 39. There is simply no precedent in the musical works context as a whole (including in the CD/PDD context), for the Copyright Owners' argument that "Digital Services should pay more when their users stream or play more music" (Brodsky WDT ¶ 68) for interactive consumption.

B. Copyright Owners Fail to Mention That Overall Publishing Revenue is Increasing

- 25. Next, the Copyright Owners argue that a per-play rate would eliminate "some cases [where] the number of streams per month is growing at a more rapid rate than the revenue," resulting in cases where "a songwriter can have more streams than in a prior month and actually make less money." Israelite WDT ¶ 39.
- 26. The Copyright Owners' argument that in *some* cases number of streams per month grows at a more rapid rate than revenue paints an inaccurate picture, and this unerring focus on per-stream microeconomics overlooks the greater macroeconomic picture. Spotify has demonstrated that stable microeconomics (a steady royalty stream) has resulted in scalable macroeconomics (a thriving industry), essentially optimizing the trade-off for both parties while (a) simultaneously competing with lower-royalty services like non-interactive streaming or zero-royalty services like piracy and, in turn (b) driving the recovery.

- 27. Indeed, *overall publishing revenue is up*, as I showed in my WDT. *See* Page WDT ¶¶ 36-37. In 2015, publishing generated \$10.4 billion in revenue to labels' \$13.98 billion,²⁴ debunking the "David and Goliath" argument that the Copyright Owners consistently present in this rate proceeding about the dwindling fortunes of publishers.²⁵ That is, *publishing brought in* 42.7% of the total music copyright global revenue in 2015—just a bit less than labels. The 2015 data also shows that performance right collections constituted 28% of the *total overall global revenue for music copyrights, and mechanicals brought in an additional* 6.5%.²⁶ This data on the global value of musical works copyright produces two valuable insights. First, the growth in CISAC (the International Confederation of Societies of Authors and Composers) -sourced mechanicals (+\$73 million) actually *off set* the decline in non-CISAC-sourced mechanicals (-\$70 million).²⁷ Second, the global value of musical works was \$10.397 billion globally in 2015—only a few billion less than labels, which brought in \$13.975 billion globally in 2015. These figures illustrate actual parity between the Copyright Owners and record labels.
- 28. Moreover, interactive streaming services like Spotify pay out *more* Average Revenue per User (ARPU) to rights holders than either CD/PDDs or terrestrial radio, contrary to

²⁴ A true and correct copy of Tim Ingham, *The Global Music Copyright Business is Worth More Than You Think—And Grew By Nearly \$1Bn Last* Year, MUSIC BUSINESS WORLDWIDE (Dec. 13, 2016), http://www.musicbusinessworldwide.com/the-global-music-copyright-business-is-worth-more-grew-nearly-1bn-last-year/, is attached hereto as Spotify Exhibit 13 [*hereinafter* 2016 MBW].

²⁵ See, e.g., Kokakis WDT ¶ 73 ("[T]he current rate structure has also resulted in strikingly low payments to songwriters for even the biggest of hits. Those songwriters and their publishers have suffered economically…").

²⁶ Spotify Exhibit 13, 2016 MBW.

²⁷ CISAC is the "umbrella" organization for many of the world's collecting societies.

the Copyright Owners' testimony. 28 As I testified to in my WDT, the average Spotify user pays more in royalties to publishers and songwriters each year than the average CD/PDD buyer. See Page WDT ¶¶ 27-28 (the average CD/PDD buyer paid only \$ per year in musical works royalties, compared with \$ for the average Spotify paid user and \$ for the average Spotify user generally, including ad-supported). It is my understanding that Dr. Leslie Marx's testimony will also show that Spotify's ad-supported service alone pays out more royalties per listening hour than terrestrial radio, a crucial comparison at the unit level.

29. Synch Licenses Are Inappropriate Comparisons. As I discussed above, publishers' diverse income streams (many of them more lucrative than labels) place them almost at parity with labels, unlike the David-and-Goliath tale Copyright Owners paint in their WDT. Yet the Copyright Owners' attempt to argue for parity with labels in mechanical rights by using the synch license as a benchmark ignores crucial dynamics of the industry. Dr. Eisenach opines that synchronization licenses show a 1:1 ratio of rates paid for sound recordings relative to musical works, and therefore serve as an appropriate comparison to the rights at issue in this proceeding. However, Dr. Eisenach's testimony ignores the differences between the consumption patterns and demand dynamics between music played on movies and television shows—for which synchronization licenses are needed—and music played on a Digital Service—for which mechanicals are needed. Music in films and TV shows are chosen for a variety reasons, including for the fit of the underlying composition to the movie or show—the musical notes and lyrics of the songs. The artist who performs the recording is, in likely many

²⁸ Eisenach WDT ¶ 69.

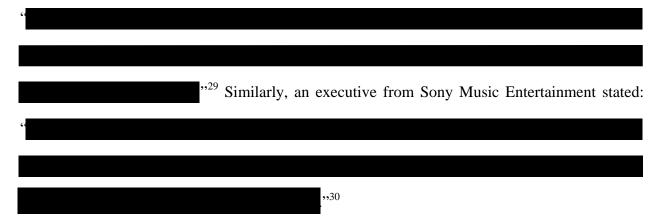
respects, a secondary consideration. By contrast, the performing musician will have a greater impact on a consumer's choice to listen to a song on a streaming service. Thus, while a film or TV show can pick a cover band for a song, an Adele cover is generally not as popular as the original song. This dynamic makes the rights for the underlying composition more valuable in synchronization licenses than in mechanical licenses.

- C. That Cherry-Picked Individual Songs May Bring in Less Royalties Tells Us Nothing About the Overall Impact of Streaming for All Songwriters.
- 30. Copyright Owners' anecdotes regarding specific "hits" likewise tell us less than figures showing overall industry revenue. *See, e.g.*, Kokakis WDT at ¶ 50-54 (comparing a hit in 2011 by Adele to a hit in 2015 by Imagine Dragons, or, a hit in 2015 by Nick Jonas to a hit in 2010 by Justin Bieber). Rather than focus on overall revenue, which, again, has either remained flat when streaming was introduced or, as streaming has ascended in the past three years, increased, Copyright Owners choose to present stories from isolated "hits," which are disparate comparisons. For example, it is unclear why Copyright Owners compare a 2010 song by one of the world's most well-known artists, Adele, which peaked at *Number 1* on the Billboard *Hot 100* chart, to a 2015 song by a lesser-known rock group, Imagine Dragons, which merely peaked at Number 3 on a completely different chart—the Billboard *Hot Rock* chart. Further, it is unclear why Copyright Owners present *2015* sales figures for Nick Jonas' track "Jealous" when the single was released in the U.S. and Canada in 2014, as compared to 2010 figures for Justin Bieber's "Baby", as that track was, appropriately, released that same year. Regardless, the import of the Copyright Owners' decision to focus on hits is clear: Copyright Owners' case is focused

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on a radio-centric, "top 40s" paradigm, where a few songs are expected to bring in all the revenue.

31. But streaming has the ability to shift this paradigm for the benefit of all songwriters. Spotify has increased revenue going to "long tail" artists and songwriters by increasing listening diversity, as discussed in my WDT (*see* pp. 28-40) and as has been widely reported in the industry. IFPI's annual report quotes top label executive Per Sundin as stating:



32. Therefore, streaming's access model helps level the playing field, whereby consumers are able to access more music and exercise more choice, and publishers and songwriters both large *and* small are able to exploit more opportunities. In addition to the industry's acknowledgment of this fact, data shows the same: The attached MiDiA Research Music Publishing Model shows that

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- 33. Further, comparing revenue generated by streaming and revenue generated by physical sales in 2015 overlooks how sales are front loaded and streaming is back-ended. This means that the nature of physical sales are better designed to produce more money upfront (in the same year the song is "hot"). As has been widely reported by Billboard, "[w]hat was roughly a 50/50 split between current and catalog music [under physical sales] is now a 30/70 split [under streaming]. Put another way, as purchases fall and streaming activity increases, current music is losing market share to catalog music. Using Nielsen's numbers, it's clear catalog music is getting twice the streaming gains as current music."³²
- 34. Therefore, streaming generates more revenue for repertoire over a longer period of time (in turn generating more revenue for artists)—a fact widely-known in the industry, and which Copyright Owners omit or otherwise contradict in their testimony.³³ Again, this just shows that Copyright Owners' comparison of revenue generated by specific "hits" in one calendar year is not an apples-to-apples comparison.
- 35. In any event, these individual specific stories do not tell us the whole story about the overall welfare of songwriters as a whole. For every song by Nick Jonas or Imagine Dragons that did not bring in as much revenue as an Adele or Justin Bieber, there are other songs released in recent years—by Drake or Rihanna—that probably did just as well. With the data provided,

³³ Cf. Spotify Exhibit 14 at 34,

; Written Statement of Michael Sammis ("Sammis WDT") at ¶ 2 (stating, without support, that "income being generated by existing catalogues [is] diminish[ing]")

³² Spotify Exhibit 12, RECORDING INDUSTRY 2015.

we simply don't know whether other hits in 2015 did equally as well as hits in 2011—and indeed, overall industry numbers I've provided above would strongly imply that is the case.

The Copyright Owners' Rate Proposal Hurts the Public and Publishers Alike

36. The Copyright Owners advance several ad-hoc arguments in support of their rate proposal, which would apply to Spotify's ad-supported and paid tiers alike. The first is that a peruser rate is necessary because the ability to "access" a service has some inherent value that must be compensated. The second is that a per-user and/or per-stream rate on ad-supported is necessary because services like Spotify are insufficiently monetizing their service. Lastly, the Copyright Owners point to the existence of so-called "streamripping" apps to justify why a per-user rate is necessary. As I discuss immediately below, these arguments are flimsy and conclusory.

A. "Mere Access is of Value" Argument is Unprecedented in the Industry

- 37. The Copyright Owners' justifications for a "greater of" rate structure that consists of a per-user rate for both ad-supported and paid tiers also fall apart upon closer examination. For example, the main argument the Copyright Owners advance appears to be that the mere ability of a user to access Spotify, in and of itself, has an inherent value that demands a separate "per-user" prong. *See, e.g.*, Israelite WDT ¶ 42 ("Each end user account has an inherent value. The user is secure in knowing that all the songs offered by the Digital Service can be accessed at any time or place.").
- 38. Again, analogizing to the Copyright Owners' seemingly favored mode of distribution—CDs and PDDs—this argument makes little sense. Publishers don't get a cut any

time a CD is made available for purchase in a record store. Nor do they impose a toll on a customer who wishes to enter the store. Under the ownership model, the *sale* of the CD (or PDD) is what triggers the royalty, not mere *availability* of a CD at a consumer's nearest record store.

- B. Copyright Owners Offer No Actual Evidence that Spotify is Insufficiently Monetizing Its Service
- 39. Second, to the extent the Copyright Owners are arguing that a per-user or perstream rate is superior to a percentage-of-revenue structure because the services are *insufficiently* monetizing their offerings (see Brodsky WDT \P 66³⁴), this argument is flawed as well.
- 40. Copyright Owners Provide No Basis for the Argument That Spotify Could Increase Conversion By Introducing More Limitations On Its Ad-Supported Tier. The Copyright Owners suggestions, made under the assumption that they can run Spotify's business better than Spotify, do not work in the real world. Brodsky tells Spotify that it would do well to "limit the catalog on its free tier, thereby enticing users who want access to 'all of the music' to subscribe [to Spotify's Premium tier]," or else implement functional limitations or increase the number of ads it serves consumers. *Id.* But as my colleague Paul Vogel explains, Spotify could under the Copyright Owners' rate proposal.

³⁴ For example, Brodsky implies that Spotify is more concerned with increasing user base via its ad-supported tier than it is with converting that user base to paid subscribers. Brodsky WDT ¶ 66 ("But if Spotify was truly focused on converting free users to paid subscribers, it would differentiate its free tier from its premium tier in a more meaningful way in order to entice consumers to upgrade to a subscription.").

³⁵ Brodsky WDT ¶ 66.

| 41. | In terms of increasing conversions to Premium, |
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Spotify Exhibit 16.

| | 42. | As shown in the above graphic, |
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| | 43. | Therefore, not only will |
| | | |
| The C | Copyrigl | ht Owners' per-stream proposal thus stands to harm the overall music landscape |
| more | than it b | penefits it. |
| | 44. | The survey study also found that, |
| | | |
| | | |
| | 45. | The below chart |
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That is, the Copyright Owners seem to be operating under the assumption that users only know how to use one service: thus, if Spotify limits functionality in the ad-supported tier, ad-supported users would have no choice but to subscribe to Spotify Premium. But that is not the reality of the competitive landscape.

| 47. Therefore, the suggestion that Spotify is not "truly focused" on conversion |
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| (Brodsky WDT \P 66) simply because the service have not adopted some wildly-speculative |
| product suggestions obscures the complicated nature of digital streaming. |
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| |
| 48. The Copyright Owners' Per-User Proposal Harms Spotify's Ad-Supporte |
| Tier, Removing a Valuable Freemium Funnel. As Barry McCarthy testifies, the effect of the |
| Copyright Owners' per-user rate would be to |
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| The O&O study shows that |
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49. **Spotify** Likewise, the

Copyright Owners speculate (again with little to no support) that the Digital Services "could charge higher subscription fees...without a loss of net revenue." Kokakis WDT ¶ 62.³⁷ A critical

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³⁷ Kokakis also states that "Pandora executives have stated that consumers can and would pay more than \$9.99 per month, the current subscription fee for Spotify and Google Play Music, for a music streaming service." But the article Kokakis cites to (John Paul Titlow, *Inside Pandora's Plan to Reinvent Itself – And Beat Back Apple and Spotify*, Fast Company (Apr. 26, 2016), available at https://www.fastcompany.com/3058719/most-innovativecompanies/inside-pandoras-plan-to-reinvent-itself-and-beat-back-apple-and-sp) says no such thing. Rather, it simply states that Pandora will have "multiple price tiers that cater to fans of varying levels of intensity," and analogize to the "gaming industry," where "people are willing to spend thousands if they're a superfan." There's nothing controversial in this testimony—in the music industry, fans spend thousands a year if they're a music superfan, on vinyl or concert tickets. Indeed, concert tickets were cited by the Pandora executive as something fans may pay a "premium" for. *Id.* But

| examination of the interactive streaming competitive landscape shows that |
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| Again, the culprit is cross-usage: if |
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| All three of these competitors, by the Copyright Owners' own logic, can afford to |
| subsidize its music offering with higher-margin business lines and will not feel the same pressure |
| to recover revenue loss from higher rates through higher prices. ³⁸ Therefore, short of all the |
| Digital Services colluding to raise prices simultaneously, |
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| 50. Secondly, actual studies on the price elasticity concluded that |
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| The below O&O graph ³⁹ presents these |
| findings. The ultimate conclusion is that |
| |

spending by both videogame and music superfans are for many different products and experiences. This example has no bearing on whether services can *raise prices on current offerings* without losing users and net revenue.

 $^{^{38}}$ See Kokakis WDT ¶ 60 ("Apple, Amazon, and Google do not raise the subscription fees for their respective music services because, rather than focus on driving revenue and profits from their music services higher, they appear to be more interested in growing their base of customers to whom they can then market their other products and services.").

³⁹ A true and correct copy of the Spotify – O&O Key Research Findings (final report) is attached hereto as Spotify Exhibit 17 (at 38).



- C. The Copyright Owners' "Streamripping" Argument is a Red Herring.
- 51. In an attempt to justify its exorbitant rates, the Copyright Owners argue that so-called "streamripping" software mandates a per-user fee, since such software enables users to "rip" songs for undocumented streaming. *See* Israelite WDT ¶ 43. This argument is a red herring. First, Spotify actively employs digital rights management measures to prevent such unauthorized piracy on its platform. Second, Spotify engages in active notice-and-takedown of streamripping apps. Moreover, in my time at Spotify and in my personal experience, other streaming services such as YouTube (which is the most common platform for streamripping)—are low.
- 52. In the limited number of instances of streamripping apps I have seen,

Notably, in my experience, not a single *publisher* has ever notified Spotify of a streamripping app—whereas labels have. Indeed, Israelite's own testimony would appear to acknowledge that

labels are much more active in policing such piracy. *See* Israelite WDT ¶ 43 ("In fact, just last month, a group of major independent record labels, backed by the Recording Industry Association of America, the British Recorded Music Industry and other industry lobbyists, sued YouTube-mp3.org...."). If streamripping were actually as important to Copyright Owners as they claim in their WDT, publishers would be a lot more active in policing. The fact that they haven't suggests that Copyright Owners are just raising the specter of streamripping as a post-hoc justification for the per-user rate.

53. Finally, the Copyright Owners' argument makes much of nothing, as streamripping apps are on the decline. For example, data from analytics firm App Annie shows that

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Publishing Is a Stable, Low-Risk Industry In Which Advances Can Act as High-Interest Loans

54. In what appears to be an attempt at diverting the Judges' attention away from the large amount of revenue publishers make every year, the Copyright Owners argue that publishing "is an expensive endeavor, and one which is fraught with risk." Brodsky WDT ¶ 110.⁴¹ The suggestion is that the Copyright Owners generally, and publishers specifically,

See also Witness Statement of Gregg Barron at ¶ 14 ("The payment of an advance is, of course, a risky endeavor. While BMG generally expects to recoup the advance from the royalties earned from licenses of the songwriter's works, frequently the royalties earned are less than the amount of the advance, so BMG is never repaid its investment in these...."); Sammis WDT ¶ 23

invest a lot of time and money into risky endeavors, and that this risk justifies a higher royalty rate.

- 55. But risk is relative, and it can be mitigated. The Copyright Owners take risks by giving songwriters advances and promoting their works, but they also profit when the risks succeed and the invested songwriters become successful. In these instances, the Copyright Owners recoup not just their initial advancement but also the rewards of royalties for years to come.
- 56. Moreover, publishers can actually profit off of advances as they act more like high-interest loans. Publishers are able to apply much of the royalties a song receives towards recoupment of advances. This operational model has led some songwriters to claim that "publishers are more like banks with a very high interest rate." ⁴² Publishers are also better situated vis-à-vis labels in that they have the unique opportunity to place songs with other artists should the initial "bet" (*i.e.*, a song is rejected by a recording artist or a recording session fails to monetize) not pay off. Labels simply do not have this option of "multiple placements" or a second bite of the cherry. As such, any risk that publishers take on are less than labels.

("Thus, the financial risks that must be assumed by UMPG to find and develop the writers of the 'hits' of the future, the income from which will, in turn, support the continued search for succeeding generations of new great writers, are therefore increasing.").

https://www.theguardian.com/music/musicblog/2008/oct/23/behind-the-music-publishing-deal, is attached hereto as Spotify Exhibit 19; a true and correct copy of Zack O'Malely Greenburg, *Golden Oldies: How To Become a Music Publishing Mogul*, FORBES (Feb. 12, 2014) http://www.forbes.com/sites/zackomalleygreenburg/2014/02/12/golden-oldies-how-to-become-a-music-publishing-mogul/#2f9e0eb2786a, is attached hereto as Spotify Exhibit 20.

⁴² A true and correct copy of Helienne Lindvall, *Behind the Music: Publishing Deals Explained*, THE GUARDIAN (Oct. 23, 2008),

- 57. Traditional publishers will also hold on to royalties and only account to a songwriter semi-annually, or quarterly.⁴³ This "pipeline income" has led one industry report to observe, "[a]s a result [of the semi-annual accounting], pipeline publishing income may not be immediately accessible to a songwriter in times of financial hardship, and he may require a supplemental advance."⁴⁴ Publishers are in turn sitting on "millions of dollars" that simply do not get paid out.⁴⁵
- 58. No wonder, then, that publisher "disruptors" like Kobalt Music Group are gaining ascendance. The same industry report observes that traditional publishers have "reporting and collection limitations" and highlights a well-known problem in the industry of poorly-kept records by publishers and collection societies. ⁴⁶ These limitations in turn affects the efficiency, frequency, and accuracy of payments to songwriters. For this reason, the article concludes, "Kobalt Music Group's rise to prominence as one of the most successful independent music publishers in the world" is due to its "technologically advanced collections system" and, "[g]iven the accuracy of its collections and reporting system, Kobalt is able to deliver royalty balances to its clients weekly." This is in sharp contrast to traditional publishers, like the ones testifying on behalf of Copyright Owners, who pass on to artists digital streaming revenues appearing "as a

⁴³ See, e.g., A true and correct copy of Alexander Scott Alberti, *Kobalt Music Group: Redefining Music Publishing*, Music Business Journal (Dec. 2011),

http://www.thembj.org/2011/12/kobalt-music-group-redefining-the-role-of-a-music-publisher/, is attached here to as Spotify Exhibit 21.

⁴⁴ *Id*.

⁴⁵ A true and correct copy of Kevin Gray, *Kobalt Changed the Rules of the Music Industry Using Data – and Saved It*, WIRED UK (May 1, 2015), http://www.wired.co.uk/article/kobalt-how-data-saved-music, is attached hereto as Spotify Exhibit 22.

⁴⁶ Spotify Exhibit 21.

⁴⁷ *Id*.

single revenue line," simply because they "don't possess the tools to track it and break the usage down"—resulting in money "fall[ing] through the gaps." If traditional publishers were truly focused on creative risk-taking, they would spend more investing in measures that actually benefit songwriters—the ones who create the works.

59. Publishers may argue that they are taking on risk because some of these advances go to relatively unknown songwriters. However, a risky songwriter is but one asset in a publisher's larger catalogue, and safer assets in that catalogue can balance the riskier assets. Consequently, the publishing business is generally seen as very stable, ⁴⁹ and publishers' revenue numbers support this assessment. As I testified to in my WDT,

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60. While the Copyright Owners suggest that they engage in more than just making advances to songwriters,⁵¹ I am not aware of any testimony that quantifies the level to which the Copyright Owners engage in such activities. To the extent that the Copyright Owners are now taking on "the financial support that labels used to provide," Kalifowitz WDT ¶ 17, this is evidence that publishers are thriving in the new streaming economy.

⁴⁸ Spotify Exhibit 22.

⁴⁹ See, e.g., id.

⁵⁰ Page WDT \P 37.

⁵¹ See, e.g., Witness Statement of Justin Kalifowitz ("Kalifowitz WDT") ¶ 17 (testifying that Downtown Publishing "not only furnish[es] advances to songwriters, but also often finance[s] the creation of recordings for our singer-songwriters prior to their obtaining a record deal").

- 61. Let me be clear: there are some publishers who do help songwriters in many ways. However, even if the Judges deem *some* publishing costs legitimate creative investment rather than pure bank lending, the marginal cost of the initial and ongoing administration of these investments will decline over time, yet many of the administrative costs placed on songwriters by publishers remain fixed. These costs and investments must be compared to Spotify's role in terms of creative and technological contribution, capital investment, cost, and risk. Not only has Spotify invested heavily in the dissemination of music content,⁵² but Spotify has also invested heavily in bringing the benefits of technological advances to the creators of that content.⁵³
- 62. In sum, risk is relative. Publishers may take on some risk, but relative to other parts of the music ecosystem they are exposed to less risk and have more ways to manage it. They don't take on more risk than Spotify, and certainly not more than that of the Services as a whole. Publishers are not innovators, and, as shown by their testimony, they do not want to be. They simply want higher rates to help support the same model they've always known—give advances that are essentially loans with high interest rates.

Conclusion

63.

Consumers have been going to the

⁵² See, e.g., Written Direct Testimony of Nicholas Harteau ¶ 18.

My colleague James Lucchese described Spotify's Creator department and all the innovative things that group has done to promote artists in his WDT, and my colleague Paul Vogel, in his Written Rebuttal Testimony, will testify to the on this investment.

Internet to consume music for over a decade and half, but it's only the most recent five years where we've collectively worked out how to monetize that act. By sticking to that principle, Spotify stands out as a unique innovator in the landscape of digital music services that have tried and often failed to solve the problem of monetizing consumption after Napster made it voluntary to pay.

- 64. We should all be wary of having short memories. No one should overlook the long list of failures that lie behind us. Music streaming is a difficult business. It takes a lot to get it right—and due to failure to scale, high and uneconomical content costs, difficulty in sustaining the growth and conversions to paid services, and low profit margins, many, many services have exited the market.⁵⁴
- 65. Copyright Owners may not be concerned—they may wish to convince themselves that there will always be *some* large technology company that are happy to serve music even as a loss leader. But this can't be the foundations of a healthy, thriving ecosystem, and a monotonous landscape dominated by one or two large industry players will not, in the long run, benefit songwriters or Copyright Owners. Only a thriving, competitive landscape with royalty rates that align incentives and allow fair compensation to performers, songwriters, and service providers alike can benefit the public and Copyright Owners. Spotify is dedicated to creating that thriving ecosystem—for publishers, artists, and the services that enable the public to enjoy the music they

of the presentation *Failed Music Services* is attached hereto as Spotify Exhibit 23. As I conclude in that study, while

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love. The Judges should set a rate that benefits all these parties that avoids disruption of the industry recovery we are all grateful for.

Before the UNITED STATES COPYRIGHT ROYALTY JUDGES The Library of Congress

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

DECLARATION OF WILL PAGE

I, Will Page, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief. Executed this <u>15</u> day of February 2017 in London, United Kingdom.

Will Page