

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In the Matter of

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16–CRB–0003–PR (2018–2022)

TESTIMONY OF DAVID DORN

1. My name is David Dorn. I am the Senior Director of Apple Music at Apple Inc. (“Apple”).

2. I have been employed at Apple since July 2012. In my role as Senior Director, I oversee the day-to-day music operations at Apple. My responsibilities include, among other things, programming, editorial decisions, coordination with our artist and label partners, contextualizing music for our listeners, and product development. In addition, I am familiar with Apple’s deals with music labels and publishers. Prior to being promoted to Senior Director of Apple Music, I was the Director of the iTunes Music Store, a position I held from August 2014 until my recent promotion.

3. Prior to joining Apple, I was Senior Vice President of Global Product Innovation at Warner Music Group (“WMG”) for 14 months. Prior to that, I was Senior Vice President of Global Sales & Digital Strategy at Rhino Entertainment (“Rhino”), a division of WMG, where I worked for 19 years. During my time at WMG and Rhino, I was responsible for, among other things, sales, product development, product innovation, and public relations.

4. I submit this testimony in support of Apple’s direct case in the above-captioned proceeding.

I. SUMMARY OF TESTIMONY

5. Apple understands that music has an inherent value and that music services should not be allowed to prosper at the expense of content creators. That is why, in 2003, when music piracy threatened the music industry, Apple launched iTunes Music Store (the “iTunes Store”), a digital music store where consumers could lawfully license and *pay* for digital music. Consistent with this, 12 years later, when Apple launched its interactive streaming service, Apple Music, it offered a *paid* subscription service, rather than a free service. RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords), with nearly RESTRICTED — Subject to subscribers in the United States joining Apple Music in its first year, proving once again that if a service offers consumers an elegant, easy-to-use music platform, consumers will pay for the right to access music.

6. Consistent with this philosophy, Apple is proposing an all-in interactive streaming rate of \$0.00091 per play for all non-fraudulent streams of 30 seconds or longer for all interactive streaming services. The mechanical royalty rate would be equal to this all-in rate less the amount paid in public performance royalties for the musical work.

7. Under this proposal, songwriters and publishers would benefit as they would be paid a consistent amount every time one of their songs is played via interactive streaming, thus ensuring a constant return to copyright owners, regardless of whether a service is new, old, successful, unsuccessful, or intentionally keeps revenue low. Moreover, songwriters who write the most popular songs would receive greater compensation than those who write less popular songs because the total royalty paid is proportionate with demand. The proposal also would

benefit interactive streaming services because they would not have to share a percentage of their revenue or subscription income with copyright owners the way they do under a “percentage of revenue” structure or a rate structure with a per-subscriber minimum. If a company earns revenue or attracts subscribers for innovative reasons, it should be able to reap the resulting benefits. Likewise, if a company earns little revenue, copyright owners should not receive less money per-play than they do from companies that generate high revenues when both companies are licensing the same music. With a per-play rate, each party is compensated for what it contributes. Songwriters and publishers receive payments when their songs are played and services keep any revenue they are able to generate in excess of these payments to copyright owners.

8. In addition, Apple’s proposal adds much-needed simplicity and transparency to royalty payments for interactive streaming. Having worked in the music industry for over 25 years, I understand that there is considerable confusion among publishers and songwriters regarding royalty payments from interactive streaming services. It is difficult for them to understand how the number of times a song is streamed translates into royalty payments to the people who create those songs. Apple’s proposal eliminates any such confusion by setting a fixed amount that publishers will be paid every time one of their songs is played.

9. In this affidavit, I will discuss Apple Music’s growth, functionality, technological and creative contributions to the interactive streaming industry, and the risks associated with entering this industry. I also will explain why this information supports Apple’s rate proposal. A brief summary of the points I will discuss is below.

10. First, to illustrate how the market for interactive streaming has matured, I will discuss Apple Music's **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

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RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

Indeed, based on my experience I believe Apple Music has played a key role in driving consumer acceptance of the proposition that consumers should pay for music that is consumed via streaming. **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

It is no longer a fringe platform. Rather, it is a core part of the digital music landscape. Royalty rates should reflect this change in interactive streaming's role in the digital music market.

11. Second, as an example of the contributions that services have made to the development of a successful marketplace for interactive streaming, I will describe the many creative and technological Apple Music features that benefit both music consumers and the songwriters and publishers that create music. Among these features are the following:

- (i) Apple Music unifies disparate music consumption options in a single platform, including allowing subscribers to listen to both their permanent digital music collection and the Apple Music catalog,
- (ii) Apple Music has several tools that enhance music discovery, including recommendations by music editors and playlists compiled by music experts, and

- (iii) Apple Music creates a community where songwriters, music experts, and music fans can connect with one another and have a deeper, more fulfilling music experience.

These features help emerging songwriters find an audience and serve as valuable marketing tools for the music industry, similar to the role radio once served. I believe the per-play rate Apple is proposing will incentivize services to continue developing these types of features because with a per-play rate, if a service develops features that allow it to increase its revenue, such as by implementing attractive elements that draw consumers and drive up advertising prices, it can keep this revenue and, thus, capture the benefit of this innovation.

12. Third, as an illustration of the costs and risks that services take in building out their platforms, **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

I believe that the interactive streaming services should have to shoulder these risks, just as would happen in other industries. With a per-play rate, that is exactly what happens: the services pay the songwriters and publishers a fixed amount every time one of their songs is used, so the services, and not the songwriters and publishers, bear the downside risk (*i.e.* if a service earns no revenue, the service loses money, not the publishers and songwriters; they are paid for their songs either way). On the other hand, the fact that there are costs and risks associated with entering the interactive streaming industry cautions against setting the per-play royalty rate too high. Based on my experience with Apple Music, I believe an all-in royalty rate of \$0.00091 is low enough that services still could succeed economically while paying this rate.

13. Fourth, I will explain that a per-play rate for non-interactive streaming is a reasonable rate structure because it is consistent with the rate structure used for other music

distribution platforms. For example, the statutory rate for non-interactive streaming services for the performance of sound recordings is a per-play rate and the statutory rate for the mechanical license for digital downloads is a per-unit rate.

14. Fifth, I will explain that the all-in rate of \$0.00091 per play of 30 seconds or longer is appropriate because it is consistent with the The Official UK Charts Company's 100:1 ratio for converting streams to downloads and more favorable to copyright owners than the 150:1 ratio that Billboard Music uses in the United States. Moreover, based on Apple Music's growth, I believe an all-in rate of \$0.00091 would be sustainable for services and allow them the opportunity to profit while still compensating publishers and songwriters a consistent amount every time one of their songs is played.

15. Finally, I will explain that Apple's proposed rate for music lockers also is fair and reasonable.

II. APPLE MUSIC BACKGROUND

16. Apple has played a significant role in the digital music market since at least April 2003 when it launched the iTunes Store, an online store that makes lawfully licensed music available to consumers.

17. Since then, Apple has been at the forefront of the digital music market. It transformed the iTunes Store from a program on a computer desktop to a mobile application for smartphones and tablets. Apple subsequently created iTunes Match, a music locker service that allows subscribers to store their music in iCloud, Apple's cloud storage service, and access it from multiple devices and computers. It also introduced a streaming radio service in 2013 called iTunes Radio that allowed users to listen to editorially-curated and genre-specific radio stations.

18. Apple's most recent innovation is Apple Music, a revolutionary on-demand streaming service that gives subscribers unlimited access to over 30 million songs in the Apple Music catalog. Apple Music subscribers can access this music from a variety of devices, including devices using the Android operating system, Apple Watch, iPhone, PC's, and the Sonos sound system, as long as they have an active Internet or mobile connection. In addition, subscribers can download songs to their devices for offline listening throughout the duration of their membership. A true and correct copy of the press release for Apple Music is attached hereto as **APL-001**.

19. Apple Music offers three different membership options: (a) Individual Membership, which costs \$9.99 per month and allows one individual to use Apple Music, (b) Family Membership, which costs \$14.99 per month and provides service for up to six family members, and (c) Student Membership, which Apple began offering in May 2016 and allows students at qualifying schools to join Apple Music for \$4.99 per month for up to 4 years. All subscribers receive a free three-month introductory trial period. A true and correct copy of the membership page for Apple Music dated October 26, 2016 is attached hereto as **APL-011**.

20. Before launching Apple Music, **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

attached hereto as **APL-003, APL-005, and APL-**
RESTRICTED — Subject to Protective Order in Docket No. 16-

006. In addition, during an Apple Music subscriber's free three-month trial **RESTRICTED — Subject to Protective**
. A true and correct

copy of RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022)
(Phonorecords III)

as **APL-004**.

III. RESTRICTED — Subject to Protective Order in Docket No. 16 CRB 0001 PR

21. Apple Music launched on June 30, 2015. As described below, RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022)

A. RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

22. RESTRICTED — Subject to Protective Order in Docket No. 16 CRB 0001 PR (2018 2022) (Phonorecords III)

23. From approximately the last six months of 2015 to the first six months of 2016,

Apple Music's gross revenue in the United States RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III) **APL-007**.

24. RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

. A true and correct copy of a spreadsheet showing RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR

attached hereto as **APL-015**.

25. RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

. Table 1 below summarizes the RESTRICTED — Subject to Protective Order in Docket No

RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III). A true and correct copy of a spreadsheet setting forth

RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

is attached hereto as **APL-008**.

RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

B. **Apple Music** RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

26. Apple Music also RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

27. For example, according to Apple's research, RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III), as shown in Apple's

RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III), a true and correct copy of which is attached hereto as **APL-002**.

28. This shows that RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

C. **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

29. Streaming services have argued that they cannot afford to pay copyright owners a per-play rate because interactive streaming services must be free or almost free in order to compete with free music platforms and pirated music.

RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

30. When interactive streaming services first launched, they had a lot of potential to draw consumers away from pirated music as well as from free music sources that hosted third party content for users and thus could pay publishers and songwriters little to nothing. Because the long-term prospects for the interactive streaming market were uncertain, however, in 2008 the interactive streaming services and copyright owners struck a deal whereby interactive streaming services paid copyright owners a percentage of their revenue, rather than a fixed per-play amount. The interactive streaming services thus avoided the burden of a fixed cost at a time when the market was still developing, while copyright owners gained access to new music platforms that could compete with pirated music and online music sources that hosted third party content.

31. **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

. Industry reports also demonstrate the important role that interactive streaming services play in the current digital music market. For example, RIAA reported in its *News and Notes on 2016 Mid-Year RIAA Music Shipment and Revenue Statistics*, a true and correct copy of which is attached hereto as **APL-010**, that digital

music revenue in the United States grew by about \$370 million from the first half of 2015 to the first half of 2016, fueled largely by a growth in paid subscriptions to music streaming services.

32. Given this shift in the interactive streaming industry from an unproven market to a popular industry, a royalty structure that protects services by allowing them to enter the interactive streaming industry without paying for the music being streamed (unless they have subscribers or earn revenue in other ways) no longer is appropriate. Given the maturation of the interactive streaming market, it now is possible to set royalties in a manner that protects the value of a musical work without compromising consumer access to digital music or the future of the interactive streaming industry. Apple's proposal does just that. It pays music publishers and songwriters a fixed amount every time one of their songs is played on an interactive streaming service, thus protecting the value of their songs.

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33. Apple's proposal also solves another problem that comes with percentage of revenue royalty payments and per-subscriber royalty payments for interactive streams. Under those approaches, all-in royalties to publishers and songwriters per song can vary from month-to-month and service-to-service and can even fall over time as consumers use interactive streaming services more frequently. This is a problem for several reasons. First, it is confusing and unfair to have the value of a musical work constantly changing. Second, it is unfair that different services are paying a different total amount in royalties to publishers and songwriters per work, even though every service is licensing the same music. Third, I believe that a rate structure under which a musical work has no recognized value and compensation for the use of that work

can drop over time is detrimental to the music industry because it undercuts incentives for creating music. Moreover, it ignores a basic tenet of the music industry, namely, that music compositions have inherent worth. Apple's per-play rate addresses this problem by guaranteeing that songwriters and publishers are compensated a consistent amount every time one of their songs is played and that compensation for the use of their musical works increases in direct proportion to that use. Under Apple's proposal, the value of a musical work would no longer fluctuate.

IV. APPLE'S CONTRIBUTIONS TO THE MUSIC INDUSTRY THROUGH APPLE MUSIC

34. **RESTRICTED — Subject to Protective Order in Docket No 16 CRB 0001 PR (2018 2022)** Apple's creativity, innovation, and technological accomplishments in creating Apple Music.

35. Prior to launching Apple Music, Apple invested **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

36. This investment in Apple Music continues. Indeed, in September 2016 Apple launched a new, easier-to-use graphic interface for Apple Music to further improve consumer experience.

37. Apple Music is an innovative music application for many reasons, several of which are described in Apple's press release for Apple Music and on various pages of Apple's

website, true and correct copies of which are attached hereto as **APL-001, APL-011, APL-012, and APL-027**. The most significant innovations reflected in Apple Music are the following:

- Through sophisticated technology and creative thinking, Apple Music unifies many disparate music listening experiences under one umbrella;
- Through personalized recommendations and playlists created by music experts, Apple Music provides consumers with a variety of tools for discovering new music; and
- By incorporating many social networking features into Apple Music, Apple Music helps strengthen the connection between songwriters, music experts, and music fans.

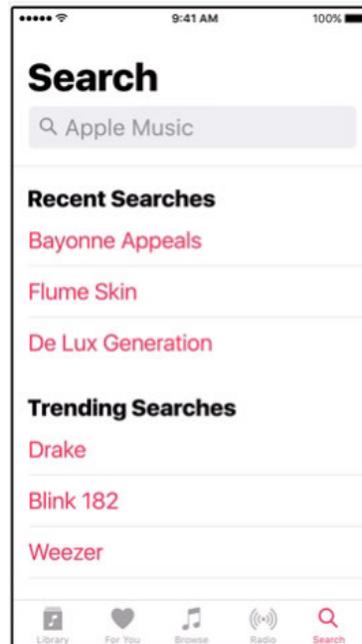
A. Apple Music Is An Ecosystem that Unifies Disparate Music Listening Experiences In A Single Platform.

38. Although advances in mobile technology and wireless connectivity have led to considerable innovation in music listening, they also have led to a fragmented music consumption experience. Consumers stream music from one application, listen to purchased content in a different application, find music lyrics through websites, and connect with their favorite artists through social media websites. Apple Music changed this fragmented user experience by creating a single music application that offers all of these options via one platform.

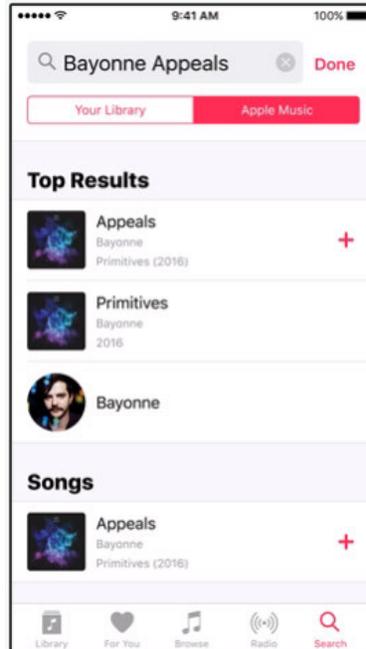
1. Access to Personal Music Libraries and the Apple Music Catalog

39. One of Apple Music's most revolutionary innovations is that it affords subscribers seamless access to both their personal music catalogs and the Apple Music catalog through a single application. As the Apple Music press release explains, when a subscriber joins Apple Music, every song the user has downloaded from a digital music store or ripped from a CD that he/she owns automatically is added to that user's cloud storage space (to the extent the songs are not already in the Apple Music catalog).

40. A user can then listen to any song in either his/her personal music catalog or the Apple Music catalog by conducting a search on Apple Music’s “search” page. A screenshot of a representative search page is shown below:



41. In the alternative, if the subscriber knows where to find the song he or she wants to hear, the subscriber can easily toggle between searching for songs in his or her personal music library and searching for songs in the vast Apple Music catalog, thus making it easier for the consumer to find the exact song(s) he or she wants. A screenshot of a representative search using this toggle feature is shown below:



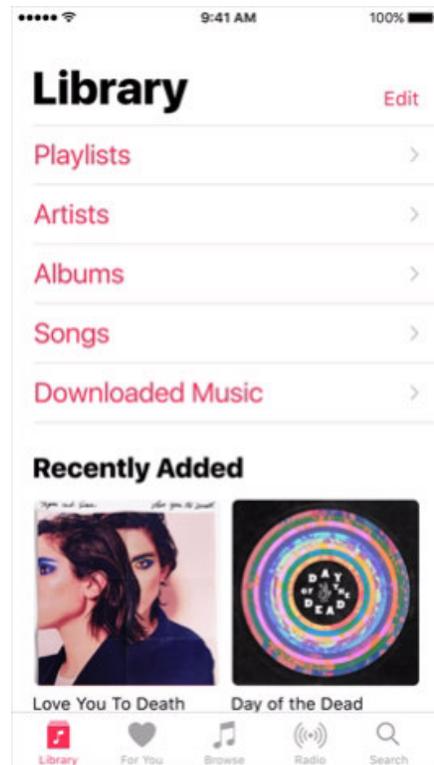
42. Subscribers also can add songs from both their personal libraries and the Apple Music catalog to a single playlist.

43. Thus, through searches and playlists, an Apple Music subscriber easily can stream a song in the Apple Music catalog back-to-back with a song that the subscriber purchased on CD 25 years ago from a little-known, self-produced band. It all can be accessed from one location.

2. The Library Feature

44. Apple Music also includes a “Library” section that helps users organize the songs in their personal music libraries and the Apple Music catalog.

45. When a user subscribes to Apple Music, the user’s “Library” page automatically lists every song in the subscriber’s personal music library and all playlists created by that user.

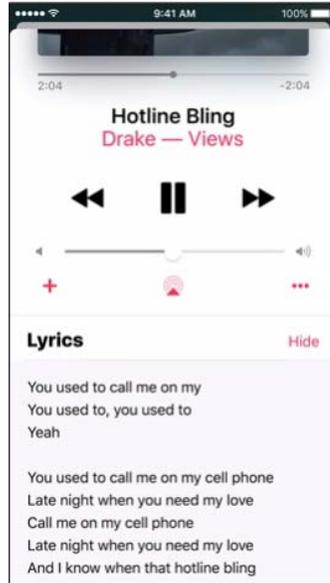


46. Further, by simply clicking the “+” icon next to a particular song, subscribers can add any song in the Apple Music catalog to the “Library” page for easy access in the future.

47. Thus, not only can songs in the subscriber’s personal library and those in the Apple Music catalog be played back-to-back, they can appear visually in the same location.

3. Song Lyrics

48. Apple also included a catalog of song lyrics in the Apple Music platform, which subscribers can view while a song plays. A screenshot of a representative lyric page is shown below:

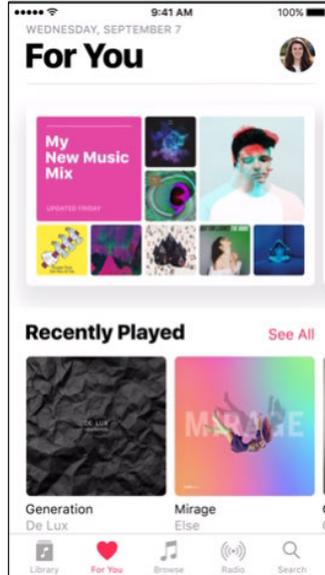


B. Apple Music Enhances Music Discovery.

49. Apple also has made substantial creative and technological contributions in the area of music discovery.

1. The “For You” Page

50. One of Apple Music’s main features is the “For You” page, where subscribers can find album and playlist recommendations tailored to the individual subscriber’s music preferences.



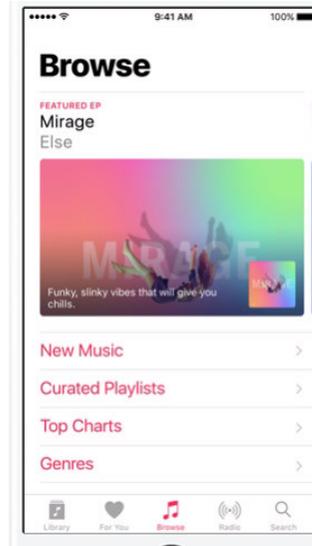
51. The “For You” recommendations are updated daily so subscribers always can find a new artist to add to their collections. In addition, every week Apple Music creates a personalized playlist for each subscriber and adds it automatically to the subscriber’s “For You” page.

52. To create these recommendations and individualized playlists, Apple employs RESTRICTED of experienced music experts from around the world. These experts are passionate about music and have a pulse on trending songs, emerging artists, and unknown songwriters.

—these experts bring their broad knowledge base and experience to Apple Music to create some of the most on-point music recommendations in the industry.

2. The “Browse” Page

53. In addition to these personalized recommendations, Apple Music helps consumers discover new music through its “Browse” feature. A screenshot depicting a typical “Browse” page is shown below:



54. On the Browse page, subscribers can easily find new releases, chart toppers, and featured content. Curated playlists also are available on this page and are one of the highlights of Apple Music.

3. Curated Music

55. There is little doubt that in the modern music industry, playlists drive music discovery. They also are a way for services to attract customers. Apple offers a wide variety of playlists on Apple Music including playlists from its music editors, playlists organized by genre, playlists centered around a particular mood or theme, and playlists curated by some of the leading tastemakers in the music industry, including editors from top music magazines such as Pitchfork and Rolling Stone. And, if a subscriber likes a particular playlist he or she can add it to his or her Library for future access just by clicking the + icon. The link between discovering and collecting music is seamless.

56. These playlists also provide ways for passive music listeners to enjoy Apple Music. They can lean back and listen to music for hours just by clicking the play button on one playlist.

57. As a result of the curatorial services that Apple provides from real music experts, consumers are discovering new music, and artists who would not have gotten shelf space at record stores 20 years ago are finding an audience. These services also add value for consumers who have Apple and its editors as their guides, helping them navigate the potentially overwhelming music catalog available from interactive streaming services.

C. Apple Music Is A Music Community.

58. Apple Music is not just an interactive streaming application. It also is a social platform where artists can connect with fans and fans can connect with one another.

59. Apple Music provides artists with a new venue for creative expression. They can post pictures, messages, and videos to Apple Music that subscribers can then view on their “For You” pages. Subscribers in turn can comment on these messages or share them with their friends. Subscribers similarly can follow their favorite music curators, thus connecting music fans with music experts. And, music labels can create their own playlist to promote their songs and artists.

60. In addition, Apple Music offers a tool that enables subscribers to share songs, albums, and playlists, including playlists they personally have curated, effortlessly with other subscribers simply by clicking the share button, shown here: .

61. I believe the net effect of these features is that subscribers using Apple Music have a deeper experience and stronger connections to the songwriters they like, and songwriters have a new tool for communicating with their fans. This can be particularly fulfilling for new artists who are trying to cultivate an audience.

62. In addition, **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

D. Apple’s Per-Play Rate Properly Rewards Streaming Services for Their Technical and Creative Contributions.

63. There are many interactive streaming services in the market, all of which offer more or less the same music. What distinguishes the various services from each other are the features they offer in addition to the ability to stream music.

64. Apple’s per-play rate proposal rewards services for creating such additional features, and incentivizes them to create more in the future. Under Apple’s proposal, when a service increases its revenue by, for example, developing attractive features that allow it to charge higher advertising prices than its competitors or creating perks in addition to the opportunity to stream music that then draw subscribers to the service, it is rewarded because it can keep these gains. That is because, unlike many other rate structures, including the current structure, under Apple’s proposal songwriters and publishers are not compensated based on a service’s revenue or the number of subscribers a service has. Rather, their compensation increases only when demand for their songs increases. Thus, Apple’s proposed rate structure rewards songwriters and publishers when consumers use their products by listening to their creative works and rewards services when they increase revenue through their own innovation and creativity.

65. The features that Apple already has created also highlight why interactive streaming services are important to the music industry. They expose consumers to new music

and allow more songwriters and artists who may not have been able to find an audience in the past to connect with and develop fans. The interactive streaming royalty rate must be calibrated to both incentivize music creators to create songs and incentivize music streaming services to continue attracting consumers and developing music fans. As described in more detail below, Apple's proposed rate achieves this goal.

V. THE RISKS ASSOCIATED WITH APPLE MUSIC

66. **RESTRICTED** — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018 2022) (Phonorecords III)

operating an interactive streaming service is not a risk-free endeavor. Services should be compensated for bearing those risks.

A. There Are Many Risks Associated with Interactive Streaming.

67. Apple **RESTRICTED** — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

68. **RESTRICTED** — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)

B. These Risks Caution Against Setting a Per-Play Rate that is Too High.

69. Apple understands that because interactive streaming is a business like any other, there are costs and risks to entering the market. As with any business, a new interactive streaming service must be prepared to shoulder these risks and take on these expenses. It is the cost of doing business.

70. A rate system without a per-play minimum shifts some of this risk to the songwriters and publishers whose music is being used because it allows services to use the songwriters' and publishers' songs while paying them a very low rate (or, in some circumstances, if there is no minimum in place, without paying them at all). By contrast, under Apple's proposal the companies choosing to enter the interactive streaming market would bear the the risks of doing so. **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

, I believe it makes sense to treat the interactive streaming industry like all other industries, such that service providers must pay a fixed amount for songs (which are the inputs on which their services are based) regardless of their revenue.

71. At the same time, these costs and risks caution against setting the all-in per-play rate so high that service providers are deterred from entering the market. Indeed, given the important role interactive streaming services play in, among other things, increasing consumer access to music and exposing consumers to new songs, it would not be a good result for songwriters, publishers, or interactive streaming services if the all-in per-play rate were set too high.

VI. A PER-PLAY RATE FOR INTERACTIVE STREAMING IS CONSISTENT WITH THE RATES FOR OTHER TYPES OF SERVICES

72. Not only is a per-play rate fair to both copyright owners and copyright users, it also is consistent with the rate structure used for some of the most common forms of music consumption.

73. For example, in December 2015, in the proceeding titled “Web IV,” Docket No. 14-CRB-0001-WR (2016-2020), the CRB adopted a per-performance rate for the digital performance of sound recordings over the Internet by nonexempt, non-interactive streaming services and the making of ephemeral recordings to facilitate those performances, despite the fact that, according to the final determination in that proceeding, at least two participants proposed a “greater of” structure under which copyright users would have to pay the greater of a per-performance minimum or a percentage of revenue.

74. Copyright owners also are paid a per-unit rate for digital music sales pursuant to the Section 115 license.

75. In addition, copyright owners are paid a per-unit rate for CD sales.

76. Adopting a per-unit or “per-play” rate for interactive streaming would be consistent with royalties for these other forms of music distribution.

VII. \$0.00091 IS THE APPROPRIATE RATE FOR SERVICES TO PAY

77. Apple is proposing an all-in per-play rate of \$0.00091 per stream for non-fraudulent streams of 30 seconds or longer for all interactive streaming services.

78. This rate is based on the royalty rate that songwriters and publishers currently are paid for downloads (9.1 cents per download) and converting it to a royalty rate for interactive streaming using a 100:1 ratio.

79. There are a variety of sources that could be used to determine the correct ratio for converting streams to downloads. One of these sources is Billboard Music, which is the premier music charting company in the United States. Songwriters, publishers, music labels, and music services all rely on Billboard's music charts to determine what the most popular songs, artists, and albums are across a variety of genres. In 2014, Billboard incorporated streaming into its Billboard 200 chart, which ranks the 200 most popular albums each week. To equate songs streamed with album sales, Billboard relied on "accepted industry benchmarks for digital and streaming data," which equate 10 digital track sales from an album to one album sale and 1,500 song streams from an album to one album, thus equating 150 streams to one digital download. To create its charts, Billboard relies on data from audio on-demand streaming services. A true and correct copy of Billboard's announcement concerning the incorporation of streams into the Billboard 200 chart is attached hereto as **APL-013**.

80. The Official UK Charts Company serves a similar function in the United Kingdom. In 2014 it began incorporating streams into its singles chart, which ranks the most popular singles each week. According to an article on The Official UK Charts Company's website, it adopted a conversion rate of 100 streams equals one download to create its singles chart and relies on data from on-demand streaming services to determine how many times songs are streamed in the UK. A true and correct copy of The Official UK Charts Company's announcement concerning the addition of streaming to its singles chart is attached hereto as **APL-014**.

81. Between these two sources, Apple adopted the conversion rate that is most favorable to copyright owners. Applying the 100:1 rate to the current amount songwriters and publishers receive for music downloads (9.1 cents per download), appropriate compensation for music publishers and songwriters for the use of their musical works on interactive streaming is \$0.00091 total per stream.

82. In addition to matching industry benchmarks, I also believe the proposed all-in rate of \$0.00091 per stream is appropriate because it strikes a middle ground between what I understand the various interactive streaming services currently pay.

83. My understanding from public sources and my experience in the industry is that the per-play rate that interactive streaming services pay varies widely from service to service and that ad-supported services in particular tend to pay music publishers and songwriters significantly less per play than Apple's proposed all-in per-play rate of \$0.00091 for the use of their musical works.

84. **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

85. I believe Apple's proposal is fair and reasonable as it lies neither at the high-end nor the low-end of what I understand interactive streaming services pay per play for the use of musical compositions on their services. Rather, it would set a reasonable mid-point that likely would be supportable when viewed in the context of the industry as a whole.

86. Finally, I believe Apple's proposed all-in per-play rate is appropriate because it is low enough that services likely will continue to be incentivized to participate in the interactive

streaming industry. **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

. Moreover, **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

87. I also believe that it is fair and reasonable for copyright users to pay copyright owners only for non-fraudulent plays of 30 seconds or longer. The fundamental principle behind Apple’s proposal is that copyright owners should be paid royalties commensurate with demand, *i.e.*, if a user chooses to listen to a song, the copyright owner deserves to be paid for that song. When a song is streamed for less than 30 seconds, the consumer is not getting value from that song. Instead, he or she is choosing not to listen to that song. Because streaming a song for less than 30 seconds signals that a consumer does not want to hear that song, the copyright owner should not be paid a royalty for that song because there is no demand for the song. In addition,

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88. Similarly, copyright owners should not be compensated for “fraudulent” plays. A play is fraudulent if circumstances indicate that a human is not choosing to listen to a particular song. For example, if the same song is played more than 50 times in a row, it is reasonable to assume no human is choosing to listen to that song. Thus, as there is no consumer demand for a song when it is played fraudulently, there is no reason to compensate copyright owners for the play.

89. For the foregoing reasons, I believe the all-in royalty rate for musical compositions used on interactive streaming services should be \$0.00091 per play for all non-

fraudulent streams of 30 seconds or longer and that the mechanical royalty should be calculated by taking this all-in rate and subtracting any royalties paid for the public performance of the musical composition. This rate proposal recognizes the intrinsic value of a song and also provides simplicity and transparency to rate calculations. In addition, it is fair to both copyright owners and services because it takes their various contributions to the music industry into account as, under this structure, copyright owners are paid a fixed amount every time one of their songs is played and copyright users are able to keep any revenue they generate through their own hard work and innovation above the cost of the music being streamed. Further, I believe the particular all-in rate of \$0.00091 per stream is appropriate as it is consistent with industry benchmarks. **RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)**

. Because Apple's rate proposal balances the incentives and needs of both copyright owners and copyright users, I believe Apple's proposed rate is likely to maximize the creation of, and access to, music better than any other rate proposal I have seen. Thus, I believe Apple's proposed royalty rate for interactive streaming should be adopted.

VIII. APPLE'S PROPOSAL FOR MUSIC LOCKER ROYALTIES ALSO IS FAIR AND REASONABLE

90. Apple is proposing an all-in per-subscriber royalty rate of \$0.17 per subscriber for all rights held by publishers and songwriters for paid locker services and a mechanical royalty of this \$0.17 per-subscriber rate less any royalty payments for the public performance right in the musical compositions being played. Apple also proposes no mechanical royalty for purchased content locker services.

91. For many of the same reasons described above, this rate proposal also is fair and reasonable.

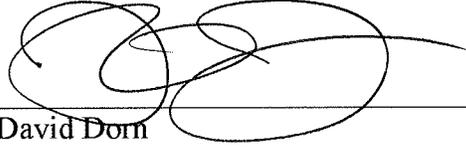
92. A per-subscriber rate is simple to implement and understand. Moreover, it creates the proper incentives for services as services that are able to increase their revenue above this fixed rate by, for example, developing an attractive user interfaces that allows one service to charge higher subscription prices than other services, keep all of the increased revenue. As all paid locker services are subscription-supported rather ad-supported, basing the music locker royalty rate on a per-subscriber number is more fair and workable than it is in the interactive streaming context, where some services earn revenue based on ads, others based on subscribers, and others based on a combination of the two.

93. The particular all-in rate of \$0.17 per subscriber also is reasonable as it is the current statutory minimum for paid locker services.

94. With respect to purchased content lockers, Apple's proposal that songwriters and publishers should not be paid for the storage of their music in purchased content lockers is reasonable because subscribers can only store songs they *already have purchased* in purchased content lockers. Songwriters and publishers are paid for these songs when they are purchased. Thus, they do not need to be paid again just because the purchaser chooses to store the song in a cloud storage space rather than on a hard drive.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 1, 2016



David Dom