Before the
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Washington, D.C.

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

WRITTEN DIRECT STATEMENT OF COPYRIGHT OWNERS

PUBLIC VERSION

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INTRODUCTORY MEMORANDUM OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION AND NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners") respectfully submit this Introductory Memorandum in connection with the filing of their Written Direct Statement ("Copyright Owners' Statement") to provide the Copyright Royalty Judges ("CRJs") with a brief description of the Copyright Owners' Statement and a summary of the evidence in support of the Copyright Owners' proposed rates and terms for mechanical royalties under Section 115 of the Copyright Act, effective from January 1, 2018 through December 31, 2022.

INTRODUCTION

Songwriters are the engine that drives the music industry because, to quote NSAI's motto, "it all begins with a song." As songwriter witness Liz Rose explains, "[d]espite the misconceptions some people may have, writing songs that artists want to record and that people want to hear is incredibly labor-intensive. It's a full-time job." Songwriters like Liz write every single day, and spend countless hours in the studio. As Ms. Rose states, "[w]hile I enjoy the creative process of

songwriting, my end goal is to write songs that become hits so that I can continue to earn a living and take care of my family."

Music publishers are the songwriters' business and creative partners. As the Copyright Owners' witnesses will demonstrate, music publishers discover songwriting talent and provide songwriters with financial support in the form of advances so that songwriters can focus on writing while still paying their bills. Music publishers create opportunities for collaborations with other writers and artists; promote and license their writers' songs for exploitation; and administer and protect their songwriters' copyrights. Music publishers provide these services to their songwriters at considerable expense, and receive in exchange a share of the royalties generated from exploitation of their writers' songs. There is no guarantee that publishers will recoup their expenses from their writers' royalties. Songwriters and music publishers depend on each other for their respective success.

Since 1909, the compulsory mechanical license has denied songwriters and music publishers the right to negotiate their rates in a free market. Over a century of government rate-setting has severely depressed mechanical rates. This is evidenced by the wide disparity in the rates that record labels, operating in the free market, and publishers, constrained by the compulsory license, are able to obtain for licenses for the reproduction and distribution of their copyrighted material. As several of the Copyright Owners' witnesses will demonstrate, when labels and publishers negotiate in the free market, unconstrained by government price regulations, the licensees pay the labels and publishers at either the same rate, or at a rate far closer to parity.

The current compulsory mechanical rates and rate structure are unsustainable. Consumption of interactive streaming and limited download platforms are showing unprecedented growth, but the Copyright Owners are not benefitting from the record-high demand for their songs.

To the contrary, although mechanical income from interactive streaming has increased, under the existing mechanical rate structure, the Copyright Owners earn a fraction of what they earn from album sales and downloads. As career songwriter Steve Bogard states, he "has seen [his] mechanical royalties drop like a nickel rolling off a table."

A primary reason the Copyright Owners have not benefitted financially from the recent market shift is that the current compulsory mechanical royalty rate structure for interactive streams and limited downloads does not pay songwriters and publishers based on consumption of their songs. Rather, the current structure predicates payment primarily on the revenues earned by the digital service licensees ("Digital Services"). As numerous witnesses will testify, Digital Services have business interests that are in conflict with maximizing music streaming revenue. The Digital Services – comprised of some of the wealthiest corporations in the world – seek to garner company value through market share (at the expenses of revenues) and the use of music streaming to acquire and lock consumers into their "ecosystems" to sell other products and services.

- Amazon, for example, leverages its streaming service to sell its Amazon Prime delivery service. Amazon also just launched a music subscription service priced at $3.99 a month for users of Amazon's proprietary voice-activated Echo devices.
- Similarly, Apple Music operates as a gateway into the Apple ecosystem, which Apple uses to sell iPhones, iPads, laptops, desktops, apps, and other products.
- Google likewise "monetizes" its users, including its music streaming service users, in many different ways in maintaining its ubiquitous presence on the Internet.
- Spotify has not merely kept subscription fees low, but provides a free on-demand music streaming service with no expiration or time limitation. Even further, Spotify makes no effort to maximize its advertising revenues, but operates with the primary

> goal of growing its user base and further increasing its $8.5 billion enterprise value, which will inure to the benefit of Spotify and its owners and investors when it completes its expected upcoming initial public offering or is sold. As Universal Music Publishing Group's David Kokakis states: "[w]hile Spotify's IPO will likely make its owners very wealthy, the songwriters and publishers who have fueled Spotify's rise will not receive any payment from the IPO."

In sum, the songwriters and publishers, because they are constrained by the compulsory license, have been subsidizing these tech giants' other business strategies.

Numerous witnesses will testify that the effect of the shift to interactive streaming on songwriters and publishers has been profound. The middle class of songwriters now struggles to earn a decent living. Successful songwriters are leaving the business because they cannot support their families on the dramatically reduced mechanical income they earn from interactive streaming. The few superstar songwriters (largely recording artist-songwriters) who are still earning substantial mechanical income from interactive streaming based on hundreds of millions of streams also are earning significantly less than they were earning from album sales and downloads.

Music publishers' mechanical income, too, has fallen. Soon, interactive streaming will be the primary source of mechanical income. The result will be that music publishers will no longer be able to make the early-stage investments in songwriters that are necessary to develop the next generation of great songwriters to add to the American songbook. As Sony/ATV's Tom Kelly states: "[w]ithout healthy and thriving music publishers who effectively finance the creative base on which the entire music industry is built – the songs – the public will be deprived of at least some of the great music of the future which may never be written. In my view, this is precisely the disruption that the Copyright Act seeks to avoid in the setting of mechanical rates." In other words,

the next "Blowin' In The Wind," "Born To Run," or "Good Vibrations" may never be created because of a price fixing regime that subsidizes startup companies vying with each other over who can get the most "clicks."

Since the Copyright Act prevents songwriters and their publishers from negotiating their mechanical income in the marketplace, they must rely on the CRJs to set rates that fairly compensate them for their contributions to the music industry, the American songbook, and the melodies and lyrics that enrich our everyday lives. As explained in detail in the testimony of both the Copyright Owners' fact witnesses and the four expert witnesses herein, the current rates and terms are neither fair nor economically justified. The current rate structure is not aligned with the economic values at issue, leading to a variety of inefficiencies and unfairness. This fact should be unsurprising, as the current rate structure for interactive streaming and limited downloads was largely agreed to ten years ago in the *Phonorecords I* proceedings in order to explore an industry that barely existed at the time and has since exploded in growth. Anticipating the potential for change, the parties expressly stated these trial rates and terms would be non-precedential, with the regulations directing a *de novo* determination.

The Copyright Owners' proposed rates and terms, based on per-play and per-user rate tests, properly align royalties with economic value and consumption and balance the interests of licensors and licensees in achievement of the policy objectives at Section 801(b) of the Copyright Act. In fact, as demonstrated by the Copyright Owners' economic witnesses, the proposed rates are not merely reasonable, but are well below the expected rates that would be obtained in an unconstrained market, by reference to the most comparable benchmarks available. The evidence from market benchmarks and from custom and trade in the industry is further confirmed by economic modeling using the Shapley value approach. The Copyright Owner's proposal meets the

spirit and letter of the Section 801(b) policy objectives guiding this proceeding, and sets forth an economically sound rate structure that does much to remedy a current unfairness and advance the many interests represented in a burgeoning marketplace.

This is no easy task. As the Copyright Office has reported:

> Viewed in the abstract, it is almost hard to believe that the U.S. government sets prices for music. In today's world, there is virtually no equivalent for this type of federal intervention – at least outside of the copyright arena . . . Compulsory licensing removes choice and control from copyright owners who seek to protect and maximize the value of their assets.[1]

Nonetheless, as shown throughout the Copyright Owners' Statement, in the testimony of the twelve industry fact witnesses and four expert witnesses, the Copyright Owners' proposed rates and terms fulfill the statutory policy objectives, are demonstrably reasonable, and protect the one group that is otherwise left economically defenseless by compulsory royalty rates – the songwriters and their music publishers.

THE COPYRIGHT OWNERS' RATE PROPOSAL

For the above reasons and other reasons more fully described in the Copyright Owners' Statement, the Copyright Owners are proposing to modify the compulsory mechanical rates and to simplify the rate structure.

The Copyright Owners' proposed mechanical rate structure is straightforward: it is the greater of (a) $0.0015 per-play of an interactive stream or limited download, and (b) a per-user royalty of $1.06.

A per-play royalty reflects that each play of an interactive stream or limited download has an inherent value that has nothing to do with how a Digital Service chooses to offer it. A per-user royalty reflects the significant value of the access to all of the music the Digital Services offer. The

[1] U.S. Copyright Office, Copyright and the Music Marketplace, at 145, 148 (Feb. 2015).

value to the consumer of a play of a song, or of access to tens of millions of songs, is the same regardless of the business model by which the Digital Service makes its offering. The same rate should therefore apply regardless of whether the service offers interactive streams and limited downloads on a subscription basis, an ad-supported or other free to the user basis, or on a "promotional" or any other basis. Similarly, the same rate should apply regardless of whether streams or limited downloads are offered on a portable, non-portable or mixed use basis, through a "cloud" or "locker" service, or bundled with a different music or non-music product or service.

A per-user royalty captures the access value of the Copyright Owners' musical works. As described in the witness statement of Peter Brodsky, "[t]he ability to play virtually any song at any time in any location is of great value to consumers. Such value is vigorously promoted to consumers by Digital Services, and consumers have paid and are willing to pay for that value. Similarly, advertisers have paid and are willing to pay for the privilege of pitching their wares to consumers using these services." The Digital Services claim they need the publishers' entire catalogs of music because the more songs they have the more users they attract, regardless of how many songs a particular user streams during a given accounting period. Access provides significant value to the services and their end users, regardless of whether those users pay for a subscription or are offered access to the music at no charge. It is only fair that the Copyright Owners share in the value the services derive from providing access to their songs.

The Copyright Owners' streamlined proposal will simplify the Digital Services' royalty statements and make their accounting more transparent. The current compulsory mechanical rate for interactive streaming and limited downloads is based on a complicated calculation featuring multiple prongs, including a percentage of service revenue, a percentage of total content costs, and minimum subscriber-based royalty floors. Much of this information is not easily verifiable by the

songwriters and publishers. If the Copyright Owners' proposal is adopted, the only information needed to be verified is the number of times each song was played and the number of users of the service in a given accounting period.

The Copyright Owners' witnesses will demonstrate that the Copyright Owners' proposed rates achieve all of the objectives described in Section 801(b) of the Copyright Act. Songwriters will not create new works, and cannot be expected to do so, without fair compensation. Several songwriter witnesses will testify that many songwriters have already been forced to leave the business, and that if the rates do not improve others will follow because they simply cannot work full-time at writing songs unless they are afforded a fair return for their creative work. Several music publisher witnesses will testify that the current rates are resulting in advances being recouped at a much slower rate (if at all), and that, if the rates are not changed, fewer and smaller advance payments will be made in the future, which will force many songwriters to cease writing, at least on a full-time basis. *See* 17 U.S.C. § 801(b)(1)(A), (B).

Several songwriter and publisher witnesses will testify regarding the substantial time and expense they incur in creating and promoting the songs that are the lifeblood of the Digital Services. The Digital Services, most of which are flourishing (despite their decisions to focus on customer acquisition, selling other products or services, attracting new investments, or exit strategy, as opposed to generating revenue for their music offerings), would not exist but for the contributions of songwriters. *Id.* § 801(b)(1)(C).

The Digital Services will not be disrupted by paying the Copyright Owners' proposed rates. *Id.* § 801(b)(1)(D). There have been seven new entrants in the interactive streaming industry since 2012, six of which entered the market between mid-2015 and last month. Among these new entrants are some of the largest companies in the world. Meanwhile, successful songwriters have

been leaving the professional songwriting industry because they can no longer earn enough income to support themselves and their families, and music publishers are unable to sign as many songwriters or pay advances as before. The business strategies of the Digital Services have in fact disrupted the established practices and structure of the U.S. songwriting industry.

THE COPYRIGHT OWNERS' LATE FEE TERM PROPOSAL

Timely payment of mechanical license fees continues to be a persistent problem. Although the current statute sets out a timeframe for payment of royalties, many licensees do not pay on time and, in fact, mechanical royalty payments by the digital services are chronically late. As several Copyright Owner witnesses will testify, because Digital Services have difficulty in matching their streaming data to a particular recording and hence to a particular song, payments to writers and publishers are often significantly delayed and, in some cases, are not made at all. Songwriters should not have to act as financiers for Apple, Amazon, and Google.

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

The Copyright Owners proposed the late fee apply to all licensees. The CRJs placed the late fee provision in Subpart A of the regulations (at 37 C.F.R. § 385.4) after a litigated proceeding. Because the participants reached a settlement with respect to rates and terms that would come to be embodied in Subpart B of the regulations, the Subpart A provisions were derived separately. The Copyright Owners do not believe it was the CRJs' intent to limit the provision to only Subpart A licensees, but rather, intended it to apply to all Section 115 licensees.

Regardless of the CRJs' intent at the time, there is no reason why one group of licensees who frequently make late payments (the record labels) should be subject to a late fee provision while another group of licensees who frequently make late payments (the Digital Services) should not be subject to such a provision. As the CRJs determined in *Phonorecords I*, a late fee is appropriate to "provid[e] an effective incentive to the licensee to make payments timely," and that a fee of 1.5% per month "is not "so high that it is punitive" and achieves the correct balance.[2]

TESTIMONY OF COPYRIGHT OWNERS' FACT AND EXPERT WITNESSES

The fact and expert witnesses who have submitted statements in support of the Copyright Owners' proposal will address the above-described points, and others. We summarize their testimony below:

Industry Witnesses

- **David M. Israelite**, President and Chief Executive Officer of NMPA, will explain why the current statutory mechanical rates and terms for Subpart B & C Configurations[3] should be modified as the Copyright Owners propose, and why doing so would further the objectives set forth in Section 801(b) of the Copyright Act. Specifically, Mr. Israelite will discuss the tremendous change in the music industry brought about by the growth of interactive streaming and limited download services, and the resulting challenges to obtain a fair share for music publishers and

[2] Final Rule, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Docket No. 2005-3 CRB DPRA, 74 Fed. Reg. 4510, 4510 (Jan. 28, 2009) (quoting Final Rule, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA, 73 Fed. Reg. 4080, 4099 (Jan. 24, 2008)).

[3] Music products and configurations currently described and defined in 37 C.F.R. § 385 Subparts B and C are described herein as "Subpart B & C Configurations."

songwriters of the enormous value they contribute to those services. Mr. Israelite will also discuss how the history of government price controls on licenses for musical works has historically served to, and continues to, suppress the rates songwriters and publishers are paid for the use of their property. Mr. Israelite will also discuss the context in which the current rates for Subpart B & C Configurations were negotiated.

- **Bart Herbison**, Executive Director of the NSAI, will provide a window into American songwriting, and explain the negative effects on the songwriting profession brought about by the combination of recent technological changes, a below-market compulsory license, and the PRO consent decrees. He will explain why higher rates and an improved rate structure for the Section 115 compulsory license are needed to make careers in songwriting once again sustainable.

Music Publisher Witnesses

Four music publisher executives will testify about the pivotal, yet often underappreciated role played by music publishers in assuring generations of Americans the continuing availability of great music – without which the Digital Services have nothing to offer. These witnesses will also testify to the deleterious effect that interactive streaming and limited downloading has had on mechanical royalties paid to publishers and songwriters at the current statutory rate. They will discuss weaknesses in the current Subpart B and C rate structure and will demonstrate how the Digital Services have benefitted from those weaknesses, including by using Copyright Owners' music to subsidize their consumer acquisition strategies and to sell other products and services. They will further discuss the lack of transparency in the royalty accounting statements provided by the Digital Services. Finally, they will discuss and summarize rates and terms obtained in direct

licenses that they have entered into both with Digital Services that are subject to the compulsory license, and digital music services that are not subject to the compulsory license and were therefore negotiated in the free market, as well as effective per play rates that have resulted from statutory and non-statutory interactive streaming and limited download licenses. The publisher witnesses will demonstrate that the rates proposed by the Copyright Owners are reasonable, not disruptive, and reflect the relative roles of Copyright Owners and licensees in furtherance of the Section 801(b) statuary objectives. Specifically, these witnesses are:

- **Peter S. Brodsky**, Executive Vice President, Business and Legal Affairs. Sony/ATV Music Publishing ("SATV"). Mr. Brodsky's testimony will discuss, among the other issues identified above, the essential value publishers and songwriters provide to Digital Services and their users, including the value of access to virtually every song ever recorded. Access to the publishers' massive catalogs of musical works is facilitated by publishers' direct blanket licenses with the Digital Services, and Mr. Brodsky will testify about the benefits of such licenses. Mr. Brodsky will also discuss direct deals made outside of the compulsory license that demonstrate that the free market recognizes musical works have a greater value than contemplated by the existing compulsory license rates.
- **David Kokakis**, Executive Vice President/Head of Business & Legal Affairs, Business Development and Digital, Universal Music Publishing Group ("UMPG"). Among the other issues identified above, Mr. Kokakis will testify regarding the Digital Services' failure to timely and accurately account and pay royalties and some of the reasons therefore, as well as UMPG's rationale for modifying the statutory rate in deals with certain Digital Services, particularly bundled offerings.

- **Gregg Barron**, Senior Director of Licensing, BMG Rights Management (US) LLC ("BMG"). Mr. Barron's testimony will include, among the other issues identified above, BMG's particular experience in discovering, developing and supporting songwriters, and in entering into licenses with Digital Services.
- **Justin Kalifowitz**, Founder and President, Downtown Music Publishing ("Downtown"). Mr. Kalifowitz will discuss several of the issues identified above from the perspective of an independent music publisher. Mr. Kalifowitz will also testify that songwriters, including singer-songwriters, are increasingly looking to music publishers, and particularly independent music publishers, for the financial support that record labels used to provide.

Music Publisher (Finance) Witnesses

Three additional music publisher witnesses will testify about the financial investments made and risks assumed by music publishers in identifying, signing, and funding the careers of currently unknown songwriters, some of whom will create the songs the public will listen to in the future. These witnesses will also testify about the costs incurred and risks assumed by music publishers to retain the rights to the existing songs that generate the revenue necessary to support the continued creation of new music. They will also identify the economic costs borne by music publishers in centralizing the licensing of music, in collecting and distributing royalty income for their songwriters, and enforcing and protecting the copyrights in songs created by songwriters (expenses which cannot be sustained by even the most successful songwriters). These music publishing financial witnesses will also testify about how the changes in the music industry, from an ownership model to a music anywhere, on-demand model, have impacted both the quantum and predictability of income. They will explain the direct connection between the reduction in

mechanical income and the delays in the timing of its receipt and the ability of music publishers to continue to fund the search for and signing of the songwriters of the future and the funding of the continuing efforts of established songwriters to produce new songs. Specifically, these witnesses are:

- **Thomas Kelly**, Executive Vice President, Finance and Administration, at SATV. Mr. Kelly's testimony will include, among the other issues identified above, how changes in the music industry, moving from an ownership model to a streaming model, have affected the mechanical royalty revenues to music publishers and their writers and how such changes may affect the financial risks and investments that music publishers will be able and willing to make in the future. Mr. Kelly's testimony also discusses the effect that delays in reporting and payment of royalties by the streaming services have had on the music publishers and their songwriters and the ability of music publishers to continue to play their role in assuring that the music of the future will continue to be as rich and broad as it has been for decades.
- **Michael J. Sammis**, Executive Vice President – Operations and Chief Financial Officer, UMPG. Mr. Sammis's testimony concerns, among other issues, the financial investment that music publishers make in acquiring and maintaining existing song catalogs and supporting established songwriters. Mr. Sammis further discusses how exploitation of such existing song catalogs leads to revenues that are used, *inter alia*, to make riskier investments in unknown songwriters who may create new music for future generations as well as continuing to support those successful songwriters whose current songs provide the financial base for locating, supporting and promoting the great songwriters of the future.

- **Annette Yocum**, Vice President of Finance of Warner/Chappell Music, Inc. Ms. Yocum's testimony discusses, among other things, the financial costs to music publishers in developing and supporting new and existing songwriters. Ms. Yocum also discusses the financial risks that music publishers take when investing in unknown songwriters to create the music of the future, and the specific considerations that are considered when making such investments. Ms. Yocum further testifies to the acquisition and administration of United States extended renewal term rights, the revenues from which undergird the ability of music publishers to support songwriters' creation of new music for future generations.

Songwriters

Three professional songwriters will testify that songwriters are not being fairly compensated for their contributions to the music industry, the digital streaming industry, and American culture. These songwriters are:

- **Steve Bogard.** Mr. Bogard has been a successful professional songwriter for 47 years. He has written many number one hits for top-selling recording artists. Mr. Bogard will explain that interactive streaming has caused his mechanical royalties to drop precipitously and because he has no ability to withhold his songs from the services, he is forced to sit and watch as his work is devalued. Mr. Bogard will also explain that while the demand for music has never been higher, under the current mechanical rate structure for interactive streaming, the songwriters who create the music are struggling more than ever to earn a decent living. The result is that successful professional songwriters are leaving the business because they can no longer support themselves and their families, and talented young songwriters will

not choose the songwriting profession knowing they cannot earn enough to support themselves and their families.

- **Lee Thomas Miller.** Mr. Miller explains that a significant portion of the songs that are recorded are written by non-performing songwriters, without the help of the performing artist. Even songs on which the recording artist is also a writer are usually co-written with professional songwriters. Professional songwriting is a craft that requires not only talent but also time, sweat and perseverance. Mr. Miller will testify that even though more music is being consumed than ever before, the songwriting profession is being decimated. Many of the hit songwriters he has known over the last 20 years are no longer in the business.
- **Liz Rose.** Ms. Rose also has written many hit songs with top artists, including Taylor Swift. Ms. Rose will testify that, although her songs are streamed heavily, her mechanical revenue is not reflective of the massive consumption of her songs. Ms. Rose will testify that songwriters are not being fairly compensated for their contributions to the music industry, the digital streaming industry, and American culture. Ms. Rose will testify that while she enjoys the creative aspects of songwriting, she ultimately writes songs so that she can continue to earn a living and take care of her family.

Experts

Three expert economists and one music industry expert will testify in support of the Copyright Owners' proposal. These experts are:

- **Jeffrey A. Eisenach, PhD.** Dr. Eisenach is a Managing Director at NERA Economic Consulting and Co-Chair of NERA's Communications, Media and

Internet Practice. Dr. Eisenach surveys comparable benchmarks involving sound recording and musical works licenses, including an evaluation of market performance and relevant contextual information. He examines a variety of markets in which sound recording and musical works rights are both required in order to ascertain the relative value of the two rights as actually reflected in the marketplace. He establishes upper and lower bounds for this relative value, and also identifies specific compelling benchmarks within that range. Dr. Eisenach then applies these benchmark relative valuations to historical sound recording royalty data from the interactive streaming industry to assess reasonable per-play and per-user mechanical royalty rates. He further assesses his results for consistency against the rate terms implied from a variety of standard industry contracts and practices. Dr. Eisenach's opinion concludes that the Copyright Owners' proposed per-play and per-user rates are at the low end of the rates derived from the most compelling benchmarks.

- **Joshua S. Gans, PhD.** Dr. Gans is Professor of Strategic Management and holder of the Jeffrey S. Skoll Chair of Technical Innovation and Entrepreneurship at the Rotman School of Management, University of Toronto. Dr. Gans assesses how royalties for musical works have been historically depressed through compulsory licensing, and discusses how appropriate regulatory pricing can be accomplished through analysis of a hypothetical market without compulsory licensing to determine reasonable rates. Dr. Gans evaluates economic principles and regulatory pricing rules as guides for setting mechanical royalty rates, including a discussion of regulated prices for essential facilities and the efficient component pricing rule

(ECPR). Dr. Gans' testimony demonstrates how the per-play and per-user rate structure is consistent with the relevant economic principles, while a revenue-based pricing model is not. Finally, Dr. Gans evaluates the rates proposed by the Copyright Owners through a Shapley value approach (an analytical tool for evaluating the contribution of various participants in a bargaining situation) comparing roles of the different rightsholders. Dr. Gans concludes that the rates proposed by the Copyright Owners are reasonable and even below the estimates developed using the Shapley value approach.

- **Mark Rysman, PhD.** Dr. Rysman is a Professor of Economics at Boston University, where he teaches courses on industrial organization, econometrics, antitrust, and regulation. Dr. Rysman analyses the mechanical royalty rate structure in light of the four statutory policy objectives and the economic features of the interactive streaming and limited download market. He explains how numerous economic features of the music streaming market lead streaming services to defer and displace revenue and profits, why a rate structure based around a revenue test is deeply unsuited to ensuring a fair return to rightsholders or achieving the policy objectives, and why a rate structure based on per-play and per-user rate tests is reasonable and suited to the policy objectives. Dr. Rysman also surveys recent effective per-play rates (i.e., the effective amount of mechanical royalties received by musical works rightsholders for each play of their work) and discusses how, in a thriving market such as the current interactive streaming market, such rates should be viewed as a floor and support the reasonableness of the Copyright Owners' proposed rates.

- **Larry S. Miller**. Professor Miller is a music industry expert. He is a Clinical Associate Professor at New York University and Director of the undergraduate and graduate Music Business Programs. Professor Miller will discuss the history of how technology changed the music industry and the negative economic effects such change has had on songwriters and music publishers. Professor Miller will explain that the services have taken advantage of the current structure's focus on service revenue and total content costs by deliberately choosing not to maximize revenues in pursuit of higher market share, that some have used their music services primarily to sell other products and services to consumers, and that others have sought to parlay their market share to increase their enterprise value to position themselves for strategic transactions. The services' decisions not to maximize revenue has harmed songwriters and publishers. Professor Miller further testifies that accounting for royalties under a rate structure based on service revenue and total content costs lacks transparency because songwriters and publishers cannot verify the services' revenue or the amount they pay to record labels. The proposed rate structure is much more transparent because all one needs to know is the number of users a service has and how many times each song was played. Finally, Professor Miller observes that while there is no difference in the inherent value of a song versus a sound recording embodying the song, record labels historically have been paid higher royalty rates, claiming that their expenses are significantly higher than the expenses of music publishers. However, as Professor Miller will explain, the gap between the relative expenses borne by record labels and publishers has

significantly narrowed so that the disparity in royalty rates paid to record labels and publishers is not justified by the disparity in their expenses.

CONCLUSION

In sum, the Copyright Owners' direct case will demonstrate, and further discovery will confirm, that the Copyright Owners' proposed rates, embodied in a simplified structure, adequately compensate for the value of consumption and access to music enabled by Digital Services, and that such rates are warranted and, in fact, necessary for the survival of the songwriting and music publishing industries and to ensure the continued creation and availability of musical works.

Dated: November 1, 2016

Respectfully submitted,

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COPYRIGHT OWNERS' PROPOSED RATES AND TERMS

Pursuant to 37 C.F.R. § 351.4(b)(3), the National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners") propose the rates and terms set forth herein for making and distributing phonorecords under 17 U.S.C. § 115 during the period January 1, 2018 through December 31, 2022. Pursuant to 37 C.F.R. § 351.4(b)(3), the Copyright Owners reserve the right to revise their proposed rates and terms at any time during the proceeding up to, and including, the filing of their proposed findings of fact and conclusions of law.

I. ROYALTY RATES FOR PHYSICAL PHONORECORDS, PERMANENT DIGITAL DOWNLOADS AND RINGTONES

A. Motion to Adopt Subpart A Settlement

On or about June 8, 2016, the Copyright Owners reached a settlement with major record labels Universal Music Group ("UMG") and Warner Music Group ("WMG") with respect to the rates and terms for those music products and configurations currently described and defined in 37 C.F.R. § 385, Subpart A., i.e., physical phonorecords, permanent digital downloads, and ringtones (such configurations, "Subpart A Configurations," and such settlement, the "Subpart A Settlement").

On or about June 15, 2016, the parties to the Subpart A Settlement moved the Copyright Royalty Judges ("CRJs") to adopt the rates and terms contained in the Subpart A Settlement as the rates and terms for all licensees of Subpart A Configurations (or at a minimum, for Subpart A Configurations made by UMG and WMG).

On July 25, 2016, the CRJs published the Subpart A Settlement in the Federal Register for comment. *See* 81 Fed. Reg. 48,371. The American Association of Independent Music ("A2IM"), representing a diverse group of independently-owned American record labels, submitted comments supporting the Subpart A Settlement. Major record label Sony Music Entertainment ("SME") also submitted comments expressing support for the rates contained in the Subpart A Settlement and raising an objection solely with respect to certain aspects of the late fee term at 37 C.F.R. § 385.4.[4]

SME has since settled with the Copyright Owners with respect to this issue, and now approves of the Subpart A Settlement in all respects. On October 28, 2016, SME and the Copyright Owners filed a motion by which SME withdrew its prior objection, and SME and the Copyright Owners requested that the CRJs adopt the Subpart A Settlement industry-wide as the statutory rates and terms for all Subpart A Configurations for the coming rate period.

Given that the Copyright Owners (representing the vast majority of licensors of mechanical rights for Subpart A Configurations) and SME, UMG, WMG and A2IM (representing the vast majority of licensees of those rights) have now all expressed support for adoption of the Subpart A Settlement as the rates and terms for all licensees of Subpart A Configurations under Section 115, and no other entity is opposed (other than GEO, who represents no interests beyond his own

[4] Mr. George D. Johnson ("GEO") has also voiced objection to the Subpart A Settlement, proposing instead a rate of at least 52¢ per copy, which, in the Copyright Owners' view, is not supportable at this time.

in this Proceeding), the Copyright Owners urge the Judges promptly to issue an order adopting the Settlement as to all licensees of Subpart A Configurations under Section 115.

The Copyright Owners therefore propose the rates and terms contained in the Subpart A Settlement as the rates and terms to be adopted by the CRJs in this Proceeding for all Subpart A Configurations made by all licensees.

II. ROYALTY RATES AND TERMS FOR INTERACTIVE STREAMS AND LIMITED DOWNLOADS

The Copyright Owners propose that the existing mechanical rates and rate structure for those music products and configurations currently described and defined in 37 C.F.R. § 385 Subparts B and C ("Subpart B & C Configurations") should be modified. The Subpart B & C Configurations are licensed by digital service providers ("Digital Services"), whose interests are represented in this proceeding by Amazon, Apple, Google, Pandora, and Spotify.

The Subpart B Configurations are merely different methods or business models for delivering or offering interactive streams and/or limited downloads (as each is defined below). The Subpart B Configurations, as currently defined, are: (a) "standalone non-portable [i.e., tethered to a computer] subscription – streaming only" services; (b) "standalone non-portable subscription – mixed" (i.e., both streaming and limited download) services; (c) "standalone portable" (i.e., accessible on mobile or other Internet-enabled devices) subscription streaming and limited download services; (d) "bundled subscription services" which are streaming and limited download services bundled with another product or service (such as a mobile phone); and (e) "free [to the end user] nonsubscription/ad-supported services." *See* 37 C.F.R. § 385.13.

All but one of the Subpart C Configurations similarly constitute different business models for delivering or offering interactive streams and/or limited downloads. These include: (a) "paid locker services," which permit users to stream from the Digital Service's server copy a sound

recording embodying a musical work that the user has demonstrated is present on the user's hard drive; (b) "purchased content locker services," which permit users to stream from the Digital Service's server copy a sound recording embodying a musical work that the user has demonstrated he or she has purchased as a Subpart A Configuration; (c) "limited offerings," which are subscription interactive streaming or limited download services where the consumer has access to a limited number of sound recordings relative to the marketplace or cannot listen to individual sound recordings on demand; and (d) "mixed service bundles" to the extent they bundle locker services or limited offerings with other non-music products or services (such as a phone). *See* 37 C.F.R. § 385.21.[5]

The ten different Subpart B and C categories, each with a different rate and rate structure, resulted from the settlements of the prior *Phonorecords I* and *II* proceedings.[6] These categories are no longer applicable given that the Copyright Owners propose that the same rates and rate structure should apply to all offerings of interactive streams and/or limited downloads, regardless of the business model employed.[7] The parties in *Phonorecords I* and *Phonorecords II* in fact expressly agreed that their settled rates would not be precedential in future Section 115 Proceedings. *See* 37 C.F.R. § 385.17 ("Effect of [Subpart B] rates. In any future proceedings under

[5] The one other Subpart C Configuration – "music bundles" – are offerings of two or more Subpart A products to end users as part of one transaction, and do not involve interactive streams or limited downloads.

[6] *See Matter of Mechanical & Digital Phonorecord Delivery Rate Adjustment Proceedings*, Docket No. 2006-3 CRB DPRA ("*Phonorecords I*"); *Matter of Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, Docket No. 2011-3 CRB ("*Phonorecords II*").

[7] Similarly, for music bundles, the rates set forth in Subpart A should apply to the Subpart A Configurations contained in the bundle.

17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo."); 37 C.F.R. § 385.26 (same with respect to Subpart C).[8]

The Copyright Owners also propose a clarification that an existing term in Subpart A – the late fee provision contained at 37 C.F.R. § 385.4 – applies to late payments made by all licensees of any configurations under Section 115. Because of the persistently late payment of mechanical royalties, the CRJs in *Phonorecords I* adopted the Copyright Owners' proposal that royalty payments that are not timely made be subject to a late fee of 1.5% per month (or the highest lawful rate), calculated from the date on which payment was due until the date it is received by the Copyright Owner. *See* 37 C.F.R. § 385.4. Copyright Owners proposed that the late fee apply to all licensees. However, because the participants reached a settlement with respect to Subpart B and C rates and terms, the CRJs placed the late fee provision in Subpart A (at 37 C.F.R. § 385.4). The Copyright Owners do not believe that it was the intent of the CRJs to limit the provision to only licensees of Subpart A Configurations, but rather, intended it to apply to all Section 115 licensees.

Regardless of the CRJs' intent at the time, there is no reason why one group of licensees (those reproducing and distributing physical phonorecords, permanent digital downloads or ringtones) should be subject to a late fee provision while another group of licensees (those reproducing and distributing interactive streams and limited downloads) should not be subject to such a provision. As the CRJs determined in *Phonorecords I*, a late fee is appropriate to "'provid[e] an effective incentive to the licensee to make payments timely,'" and that a fee of 1.5% per month

[8] The Copyright Owners' proposed, streamlined rate structure will be contained in Subpart B and there will no longer be a need for a Subpart C.

is not "'so high that it is punitive'" and achieves the correct balance.[9] The Copyright Owners therefore propose that the regulations be amended to clarify that the late fee already contained in 37 C.F.R. § 385.4 applies with equal force to Digital Services making interactive streams or limited downloads.[10]

The Copyright Owners therefore propose the following rates and terms for interactive streaming and limited downloads:

Rates

A rate equal to the greater of:

a. $0.0015 per-play for licensed activity (for mechanical rights only); and

b. $1.06 per-end user of the offering per month (for mechanical rights only).

***Definitions*[11]**

1. *Copyright owners* are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license at 17 U.S.C. § 115.

2. *End user* means each unique individual or entity that has access to an offering whether by virtue of the purchase of a subscription to access the offering or otherwise. Licensees or service providers shall be required to obtain from each individual or entity that wishes to access an offering a unique user name and valid e-mail address, and to provide each such individual or entity with a unique password or identifier, prior to granting such access.

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[9] Final Rule, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding ("*Phonorecords I* Final Rule"), Docket No. 2005-3 CRB DPRA, 74 Fed. Reg. 4510, 4510 (Jan. 28, 2009) (quoting Final Rule, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services ("*SDARS I* Final Rule"), Docket No. 2006-1 CRB DSTRA, 73 Fed. Reg. 4080, 4099 (Jan. 24, 2008)).

[10] Note that the late payment fee is not intended to be in lieu of, but rather a supplement to, the Copyright Owners' statutory right to terminate a compulsory license for failure to account or pay royalties on time.

[11] Definitions currently contained in 37 C.F.R. Part 385 Subparts B and C that are not expressly included herein shall no longer apply.

3. *Interactive stream* means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. § 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. § 114(d)(2). An interactive stream is a digital phonorecord delivery under 17 U.S.C. § 115(d).

4. *Licensee* means a person that has obtained a compulsory license to engage in licensed activity under 17 U.S.C. §115 and its implementing regulations.

5. *Licensed activity* means interactive streams or limited downloads of musical works, as applicable.

6. *Limited download* means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the service provider, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the service provider, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a digital phonorecord delivery under 17 U.S.C. § 115(d).

7. *Offering* means a licensee's or service provider's offering of licensed activity under Subpart B. An offering shall include, without limitation, any licensed activity accessible by an end user via a subscription service; on a per-play basis; via an advertiser-supported or other free-to-the-user or "promotional" basis; on a portable, non-portable or mixed use basis; via a "cloud" or "locker" service; whether bundled with any other offering or other music or non-music product or service; or otherwise.

8. *Play* means, for purposes of this subpart, the digital transmission of any portion of a sound recording of a musical work in the form of an interactive stream or limited download, and (a) in the case of an interactive stream, each subsequent playback of

any portion of a sound recording of a musical work from a streaming cache reproduction, or (b) in the case of a limited download, each subsequent playback of any portion of a sound recording of a musical work from the limited download in accordance with the restrictions contained in the definition of limited download.

9. *Service provider* means that entity (which may or may not be the licensee) that, with respect to the licensed activity,

(1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users; and

(2) Is able to report fully on licensed activity on or via the offering and the number of end users of the offering during each accounting period, or to procure such reporting, and to the extent applicable, verify such reporting through an audit.

10. *Stream* means the digital transmission of any portion of a sound recording of a musical work to an end user—

(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction.

11. *Streaming cache reproduction* means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

12. *Subscription service* means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less, whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services.

Term

Late Fee: Without affecting any right to terminate a license for failure to report or pay royalties as provided in 17 U.S.C. § 115 (c)(6), a licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in § 210.16(g)(1) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.

PROPOSED REGULATIONS

Pursuant to 17 U.S.C. § 115, the Copyright Owners propose the following regulations replace and supersede the provisions of 37 C.F.R. Part 385, effective as of January 1, 2018, as the rates and terms for the use of musical works in the making and distribution of physical phonorecords and digital phonorecord deliveries.[12]

Subpart A – Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones

37 C.F.R.

§ 385.1 General.

Effective: January 1, 2018

(a) *Scope*. This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of digital phonorecord deliveries, in accordance with the provisions of 17 U.S.C. § 115.

(b) *Legal compliance*. Licensees relying upon the compulsory license set forth in 17 U.S.C. § 115 shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements*. Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to use of musical works within the scope of such agreements.

§ 385.2 Definitions.

Effective: January 1, 2018

For purposes of this subpart, the following definitions apply:

Copyright owners are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license under 17 U.S.C. § 115.

Digital phonorecord delivery means a digital phonorecord delivery as defined in 17 U.S.C. § 115(d).

Licensee is a person or entity that has obtained a compulsory license under 17 U.S.C. § 115, and the implementing regulations, to make and distribute phonorecords of a nondramatic musical work,

[12] Upon adoption of these proposed rates and terms, corresponding payment and accounting regulations will be implemented to conform the provisions currently embodied at 37 C.F.R. § 210. *See* 17 U.S.C. § 115(c)(5).

including by means of a digital phonorecord delivery.

Permanent digital download means a digital phonorecord delivery that is distributed in the form of a download that may be retained and played on a permanent basis.

Ringtone means a phonorecord of a partial musical work distributed as a digital phonorecord delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

§ 385.3 Royalty rates for making and distributing phonorecords.

Effective: January 1, 2018

(a) *Physical phonorecord deliveries and permanent digital downloads.* For every physical phonorecord and permanent digital download made and distributed, the royalty rate payable for each work embodied in such phonorecord shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones*. For every ringtone made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

§ 385.4 Late payments.

Effective: January 1, 2018

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in § 210.16(g)(1) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.

Subpart B – Interactive Streaming and Limited Downloads

37 C.F.R.

§ 385.10 General.

Effective: January 1, 2018

(a) *Scope*. This subpart establishes rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. § 115.

(b) *Legal compliance*. A licensee that, pursuant to 17 U.S.C. § 115, makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed

pursuant to 17 U.S.C. § 115.

(c) *Interpretation*. This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. § 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. § 115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. § 115, must be obtained.

§ 385.11 Definitions.

Effective: January 1, 2018

For purposes of this subpart, the following definitions shall apply:

Copyright owners are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license at 17 U.S.C. § 115.

End user means each unique individual or entity that has access to an offering whether by virtue of the purchase of a subscription to access the offering or otherwise. Licensees or service providers shall be required to obtain from each individual or entity that wishes to access an offering a unique user name and valid e-mail address, and to provide each such individual or entity with a unique password or identifier, prior to granting such access.

Interactive stream means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. § 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. § 114(d)(2). An interactive stream is a digital phonorecord delivery under 17 U.S.C. § 115(d).

Licensee means a person that has obtained a compulsory license to engage in licensed activity under 17 U.S.C. § 115 and its implementing regulations.

Licensed activity means interactive streams or limited downloads of musical works, as applicable.

Limited download means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the service provider, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the service provider, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific

request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a digital phonorecord delivery under 17 U.S.C. § 115(d).

Offering means a licensee's or service provider's offering of licensed activity under Subpart B. An offering shall include, without limitation, any licensed activity accessible by an end user via a subscription service; on a per-play basis; via an advertiser-supported or other free-to-the-user or "promotional" basis; on a portable, non-portable or mixed use basis; via a "cloud" or "locker" service; whether bundled with any other offering or other music or non-music product or service; or otherwise.

Play means, for purposes of this subpart, the digital transmission of any portion of a sound recording of a musical work in the form of an interactive stream or limited download, and (a) in the case of an interactive stream, each subsequent playback of any portion of a sound recording of a musical work from a streaming cache reproduction, or (b) in the case of a limited download, each subsequent playback of any portion of a sound recording of a musical work from the limited download in accordance with the restrictions contained in the definition of limited download.

Service provider means that entity (which may or may not be the licensee) that, with respect to the licensed activity,

(1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users; and

(2) Is able to report fully on licensed activity on or via the offering or procure such reporting, and the number of end users of the offering during each accounting period or procure such reporting, and to the extent applicable, verify such reporting through an audit.

Stream means the digital transmission of any portion of a sound recording of a musical work to an end user—

(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and,

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction.

Streaming cache reproduction means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission;

provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Subscription service means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less, whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services.

§ 385.12 Royalty rates for making and distributing interactive streams and limited downloads.

Effective: January 1, 2018

(a) *Applicable royalty*. Licensees that make or authorize licensed activity pursuant to 17 U.S.C. § 115 shall pay royalties therefor that are calculated as provided in this section.

(b) *Rate calculation methodology.* Royalty payments for licensed activity shall be calculated as provided in paragraph (b) of this section. If a service provider makes different offerings, royalties must be separately calculated with respect to each such offering.

(1) *Step 1:* Calculate the Per-Play Mechanical Royalty for the offering. For each accounting period, calculate the mechanical royalty for each of the service provider's offerings at $0.0015 per-play.

(2) *Step 2*: Calculate the Per-End User Mechanical Royalty for the offering. For each accounting period, calculate the mechanical royalty for each of the service provider's offerings at $1.06 per-end user of the offering.

(3) *Step 3*: Determine the greater of Step 1 and Step 2. The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the service provider by virtue of its licensed activity for a particular offering during the accounting period. This amount is the greater of the result determined in Step 1 at paragraph (b)(1) of this section, and the result determined in Step 2 at paragraph (b)(2).

(4) *Step 4*: Calculate the Per–Work Royalty Allocation for Each Relevant Work.

(a) In the event that the amount calculated in Step 1 at paragraph (b)(1) is greater than the amount calculated in Step (2) at paragraph (b)(2), then the royalty payable for each relevant work shall be the number of times each relevant work was played during the accounting period, multiplied by $0.0015.

(b) In the event that the amount calculated in Step 2 of paragraph (b)(2) is greater than the amount calculated in Step (1) of paragraph (b)(1), then a per-work royalty allocation for each relevant work must be made. This amount is the amount payable for the reproduction and distribution of each musical work played through a particular offering during the accounting period. To determine this amount, the result determined in Step 2 at paragraph (b)(2) of this section must be allocated to each musical work played through the offering.

The allocation shall be accomplished by dividing the payable royalty pool determined in Step 2 for such offering by the total number of plays of all musical works through such offering during the accounting period to yield a per-play allocation, and multiplying that result by the number of plays of each musical work through the offering during the accounting period.

§ 385.13 Late payments.

Effective: January 1, 2018

Without affecting any right to terminate a license for failure to report or pay royalties as provided in 17 U.S.C. § 115 (c)(6), a Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in § 210.16(g)(1) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.

§ 385.14 [Reserved]

Effective: _____

§ 385.15 [Reserved by 74 FR 6834]

§ 385.16 Reproduction and distribution rights covered.

Effective: January 1, 2018

A compulsory license under 17 U.S.C. § 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, solely for the purpose of providing such licensed activity (and no other purpose).

§ 385.17 Effect of rates.

Effective: January 1, 2018

In any future proceedings under 17 U.S.C. § 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.

Dated: November 1, 2016

Respectfully submitted,

PRYOR CASHMAN LLP

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Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

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

INDEX OF WITNESS STATEMENTS

Statement No.	Witness Name	Title
1	David M. Israelite	President and Chief Executive Officer, NMPA
2	Bart Herbison	Executive Director, NSAI
3	Peter S. Brodsky	Executive Vice President, Business and Legal Affairs, Sony/ATV Music Publishing
4	Thomas Kelly	Executive Vice President, Chief Financial Officer, Sony/ATV Music Publishing
5	David Kokakis	Head of Business & Legal Affairs/Business Development and Senior Vice President, Universal Music Publishing Group
6	Michael J. Sammis	Chief Financial Officer and Executive Vice President of Operations, Universal Music Publishing Group
7	Gregg Barron	Senior Director, Licensing, BMG Rights Management (US) LLC
8	Annette Yocum	Vice President of Finance, Warner/Chappell Music, Inc.
9	Justin Kalifowitz	Chief Executive Officer, Downtown Music Publishing
10	Lee Thomas Miller	Songwriter
11	Liz Rose	Songwriter
12	Steve Bogard	Songwriter
13	Marc Rysman	Expert witness
14	Jeffrey A. Eisenach	Expert witness
15	Joshua Gans	Expert witness
16	Lawrence S. Miller	Expert witness

Before the
COPYRIGHT ROYALTY BOARD
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DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III)	Docket No. 16–CRB–0003–PR (2018–2022)

INDEX OF COPYRIGHT OWNERS' EXHIBITS

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
David M. Israelite	1.1	Industry Revenue Comparisons 2013-2015 (NMPA00001424)	Restricted
David M. Israelite	1.2	Annual Meeting Industry Revenue Steps (2014) (NMPA00000828)	Restricted
David M. Israelite	1.3	Annual Meeting Industry Revenue Steps (2015) (NMPA00000826-00000827)	Restricted
David M. Israelite	1.4	Annual Meeting Industry Revenue Steps (2016) (NMPA00000823)	Restricted
Peter S. Brodsky	3.1A	[redacted] (SONY-ATV00000081-00000116, SONY-ATV00000073-00000080)	Restricted
Peter S. Brodsky	3.1B	[redacted] (SONY-ATV00000117-00000153, SONY-ATV00000156-00000159, SONY-ATV00000001-00000004)	Restricted
Peter S. Brodsky	3.2A	[redacted] (SONY-ATV00000196-00000206)	Restricted
Peter S. Brodsky	3.2B	[redacted] (SONY-ATV00000222-00000233)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Peter S. Brodsky	3.3A	[redacted] (SONY-ATV00002131-00002141)	Restricted
Peter S. Brodsky	3.3B	[redacted] (SONY-ATV00000262-00000278)	Restricted
Peter S. Brodsky	3.4A	[redacted] (SONY-ATV00000623-00000638)	Restricted
Peter S. Brodsky	3.4B	[redacted] (SONY-ATV00000486-00000501)	Restricted
Peter S. Brodsky	3.5A	[redacted] (SONY-ATV00001265-00001281)	Restricted
Peter S. Brodsky	3.5B	[redacted] (SONY-ATV00000997-00001013)	Restricted
Peter S. Brodsky	3.6A	[redacted] (SONY-ATV00001684-00001726)	Restricted
Peter S. Brodsky	3.6B	[redacted] (SONY-ATV00001890-00001932)	Restricted
Peter S. Brodsky	3.7A	[redacted] (SONY-ATV00002372-00002386, SONY-ATV00000595-00000602)	Restricted
Peter S. Brodsky	3.7B	[redacted] (SONY-ATV00002389-00002406, SONY-ATV00001582-00001588)	Restricted
Peter S. Brodsky	3.8A	[redacted] (SONY-ATV00000656-0000673)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Peter S. Brodsky	3.8B	[redacted] (SONY-ATV00001764-00001780)	Restricted
Peter S. Brodsky	3.9A	[redacted] (SONY-ATV00001242-00001253)	Restricted
Peter S. Brodsky	3.9B	[redacted] (SONY-ATV00001603-00001614)	Restricted
Peter S. Brodsky	3.10A	[redacted] (SONY-ATV00001014-00001030, SONYATV00001957-00001961)	Restricted
Peter S. Brodsky	3.10B	[redacted] (SONY-ATV00001727-00001742, SONY-ATV00001952-00001956)	Restricted
Peter S. Brodsky	3.11A	[redacted] (SONY-ATV00000302-00000308)	Restricted
Peter S. Brodsky	3.11B	[redacted] (SONY-ATV00000252-00000259)	Restricted
Peter S. Brodsky	3.12A	[redacted] (SONY-ATV00000395-00000410)	Restricted
Peter S. Brodsky	3.12B	[redacted] (SONY-ATV00000436-00000451)	Restricted
Peter S. Brodsky	3.13	[redacted] (SONY-ATV00002062-00002079)	Restricted
Peter S. Brodsky	3.14A	[redacted] (SONY-ATV00001510-00001528)	Restricted
Peter S. Brodsky	3.14B	[redacted] (SONY-ATV00001844-00001862)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Peter S. Brodsky	3.15A	[redacted] (SONY-ATV00000840-00000854)	Restricted
Peter S. Brodsky	3.15B	[redacted] (SONY-ATV00000965-00000979)	Restricted
Peter S. Brodsky	3.16A	[redacted] (SONY-ATV00001589-00001602)	Restricted
Peter S. Brodsky	3.16B	[redacted] (SONY-ATV00001529-00001542)	Restricted
Peter S. Brodsky	3.17A	[redacted] (SONY-ATV00001488-00001501)	Restricted
Peter S. Brodsky	3.17B	[redacted] (SONY-ATV00000472-00000485)	Restricted
Peter S. Brodsky	3.18A	[redacted] (SONY-ATV00000980-00000996)	Restricted
Peter S. Brodsky	3.18B	[redacted] (SONY-ATV00001070-00001086)	Restricted
Peter S. Brodsky	3.19A	[redacted] (SONY-ATV00001149-00001164, SONY-ATV00001840-00001843)	Restricted
Peter S. Brodsky	3.19B	[redacted] (SONY-ATV00001031-00001046, SONY-ATV00001112-00001115)	Restricted
Peter S. Brodsky	3.20A	[redacted] (SONY-ATV00000801-00000809)	Restricted
Peter S. Brodsky	3.20B	[redacted] (SONY-ATV00001282-00001290)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Peter S. Brodsky	3.21A	[redacted] (SONY-ATV00001405-00001426)	Restricted
Peter S. Brodsky	3.21B	[redacted] (SONY-ATV00001972-00001993)	Restricted
Peter S. Brodsky	3.22A	[redacted] (SONY-ATV00001301-00001315)	Restricted
Peter S. Brodsky	3.22B	[redacted] (SONY-ATV00001125-00001139)	Restricted
Peter S. Brodsky	3.23	[redacted] (SONY-ATV00002165-00002183, SONY-ATV00001627-00001629)	Restricted
Peter S. Brodsky	3.24A	[redacted] (SONY-ATV00001661-00001681)	Restricted
Peter S. Brodsky	3.24B	[redacted] (SONY-ATV00001743-00001763)	Restricted
Peter S. Brodsky	3.25A	[redacted] (SONY-ATV00001545-00001581)	Restricted
Peter S. Brodsky	3.25B	[redacted] (SONY-ATV00001321-00001357)	Restricted
Peter S. Brodsky	3.26A	[redacted] (SONY-ATV00001471-00001487)	Restricted
Peter S. Brodsky	3.26B	[redacted] (SONY-ATV00001454-00001470)	Restricted
Peter S. Brodsky	3.27A	[redacted] (SONY-ATV00001177-00001190)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Peter S. Brodsky	3.27B	[redacted] (SONY-ATV00000729-00000742)	Restricted
Peter S. Brodsky	3.28	[redacted] (SONY-ATV00001820-00001839)	Restricted
Thomas Kelly	4.1	Sony/ATV & EMI Writer Advances (SONY-ATV00005240-00005241)	Restricted
Thomas Kelly	4.2	Sony/ATV & EMI Net Advance Write-offs (SONY-ATV00005242)	Restricted
Thomas Kelly	4.3	Sony/ATV & EMI Operating Expenses (SONY-ATV00005243)	Restricted
Thomas Kelly	4.4	Sony/ATV & EMI Revenue Detail (SONY-ATV00005244)	Restricted
David Kokakis	5.1	[redacted] (UMPG00000937-00001006)	Restricted
David Kokakis	5.2	[redacted] (UMPG00001331-00001349)	Restricted
David Kokakis	5.3	[redacted] (UMPG00001119-00001160)	Restricted
David Kokakis	5.4	[redacted] (UMPG00000566-00000607)	Restricted
David Kokakis	5.5	[redacted] (UMPG00000357-00000386)	Restricted
David Kokakis	5.6A	[redacted] (UMPG00000210-00000216)	Restricted
David Kokakis	5.6B	[redacted] (UMPG00000403-00000407)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
David Kokakis	5.7	[redacted] (UMPG00000127-00000146)	Restricted
David Kokakis	5.8	[redacted] (UMPG00000912-00000921)	Restricted
David Kokakis	5.9	[redacted] (UMPG00001371-00001385)	Restricted
David Kokakis	5.10	[redacted] (UMPG00000854-00000879)	Restricted
David Kokakis	5.11	[redacted] (UMPG00001323-00001330)	Restricted
David Kokakis	5.12	[redacted] (UMPG00001249-00001260)	Restricted
David Kokakis	5.13	[redacted] (UMPG00000196-00000209)	Restricted
David Kokakis	5.14	[redacted] (UMPG00000169-00000181)	Restricted
David Kokakis	5.15	[redacted] (UMPG00000408-00000429)	Restricted
David Kokakis	5.16	[redacted] (UMPG00000232-00000244)	Restricted
David Kokakis	5.17	[redacted] (UMPG00000302-00000313)	Restricted
David Kokakis	5.18A	[redacted] (UMPG00002246-00002254)	Restricted
David Kokakis	5.18B	[redacted] (UMPG00002256-00002264)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
David Kokakis	5.18C	[redacted] (UMPG00002265-00002271)	Restricted
David Kokakis	5.19	[redacted] (UMPG00000387-00000402)	Restricted
David Kokakis	5.20	[redacted] (UMPG00000493-00000508)	Restricted
David Kokakis	5.21	[redacted] (UMPG00002179-00002198)	Restricted
David Kokakis	5.22	[redacted] (UMPG00002225-00002245)	Restricted
David Kokakis	5.23	[redacted] (UMPG00000150-00000168)	Restricted
David Kokakis	5.24	[redacted] (UMPG00000509-00000519)	Restricted
David Kokakis	5.25	[redacted] (UMPG00000447-00000474)	Restricted
David Kokakis	5.26	[redacted] (UMPG00000051-00000078)	Restricted
David Kokakis	5.27	[redacted] (UMPG00001281-00001309)	Restricted
David Kokakis	5.28	[redacted] (UMPG00000182-00000195)	Restricted
David Kokakis	5.29	[redacted] (UMPG00000542-00000555)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
David Kokakis	5.30	[redacted] (UMPG00000769-00000807)	Restricted
David Kokakis	5.31	[redacted] (UMPG00000637-00000651)	Restricted
David Kokakis	5.32	[redacted] (UMPG00000712-00000730)	Restricted
David Kokakis	5.33	[redacted] (UMPG00000475-00000492)	Restricted
David Kokakis	5.34	[redacted] (UMPG00000033-00000050)	Restricted
David Kokakis	5.35	[redacted] (UMPG00002199-00002218)	Restricted
David Kokakis	5.36	[redacted] (UMPG00001232-00001248)	Restricted
David Kokakis	5.37	[redacted] (UMPG00001007-00001052)	Restricted
Michael Sammis	6.1	UMPG Advances to Writers (UMPG00002272)	Restricted
Michael Sammis	6.2	UMPG Overhead Expenses (UMPG00002273)	Restricted
Michael Sammis	6.3	UMPG Mechanical Revenue (UMPG00002274)	Restricted
Gregg Barron	7.1	[redacted] (BMG00000133-00000144, BMG00000071-0000074)	Restricted
Gregg Barron	7.2	[redacted] (BMG00000120-00000132)	Restricted
Gregg Barron	7.3	[redacted] (BMG00000044-00000051)	Restricted
Gregg Barron	7.4	[redacted] (BMG00000286-00000299)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Gregg Barron	7.5	[redacted] (BMG00000379-00000393, BMG00000376-00000378)	Restricted
Gregg Barron	7.6	[redacted] (BMG00000199-00000206)	Restricted
Gregg Barron	7.7	[redacted] (BMG00000079-00000086)	Restricted
Gregg Barron	7.8	[redacted] (BMG00000093-00000095)	Restricted
Gregg Barron	7.9	[redacted] (BMG00000087-00000092)	Restricted
Gregg Barron	7.10	[redacted] (BMG00000209-00000223, BMG00000152-00000153)	Restricted
Gregg Barron	7.11	[redacted] (BMG00000550-00000562)	Restricted
Gregg Barron	7.12	[redacted] (BMG00000394-00000407)	Restricted
Gregg Barron	7.13	[redacted] (BMG00000474-00000480)	Restricted
Gregg Barron	7.14	[redacted] (BMG00000052-00000056)	Restricted
Gregg Barron	7.15	[redacted] (BMG00000165-00000171)	Restricted
Gregg Barron	7.16	[redacted] (BMG00000234-00000241)	Restricted
Gregg Barron	7.17	[redacted] (BMG00000145-00000151)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Gregg Barron	7.18	[redacted] (BMG00000504-00000535)	Restricted
Gregg Barron	7.19	[redacted] (BMG00000224-00000230)	Restricted
Gregg Barron	7.20	[redacted] (BMG00000096-00000103)	Restricted
Gregg Barron	7.21	[redacted] (BMG00000499-00000503)	Restricted
Gregg Barron	7.22	[redacted] (BMG00000411-00000425)	Restricted
Gregg Barron	7.23	[redacted] (BMG00000022-00000043, BMG00000001-00000021)	Restricted
Annette Yocum	8.1	Warner/Chappell U.S. Comparative Cash Flow and Profit & Loss Analysis (WC00001215-00001382)	Restricted
Annette Yocum	8.2	Warner/Chappell Overhead Data (WC00001383-00001386)	Restricted
Annette Yocum	8.3	Warner/Chappell Extended Rights Spending (WC00001387)	Restricted
Justin Kalifowitz	9.1	CRB – DMP Advances & Recoupments 2011-2015 (DR00000157)	Restricted
Justin Kalifowitz	9.2	DMP 2012-2H16 (DR00000156)	Restricted
Justin Kalifowitz	9.3	[redacted] (DR00000001-00000013)	Restricted
Justin Kalifowitz	9.4	[redacted] (DR00000095-00000098)	Restricted
Justin Kalifowitz	9.5	[redacted] (DR00000158-00000179)	Restricted

Sponsoring Witness	CO Ex.	Description	Restricted/ Public
Justin Kalifowitz	9.6	[redacted] (DR00000124-00000140)	Restricted
Justin Kalifowitz	9.7	[redacted] (DR00000148-00000155)	Restricted
Justin Kalifowitz	9.8	[redacted] (DR00000118-00000123)	Restricted
Justin Kalifowitz	9.9	[redacted] (DR00000180-00000198)	Restricted
Lee Thomas Miller	10.1	Biography of Lee Thomas Miller	Public

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

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

DECLARATION OF FRANK P. SCIBILIA
REGARDING RESTRICTED INFORMATION

1. I am a partner at Pryor Cashman LLP, counsel for the National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI" and, together with the NMPA, the "Copyright Owners") in the above-captioned proceeding (the "Proceeding").

2. Pursuant to Section IV.A of the Protective Order issued in the above-captioned Proceeding on July 28, 2016 (the "Protective Order"), I submit this declaration in connection with the Written Direct Statement of Copyright Owners, including the accompanying testimony in witness statements and exhibits thereto (the "Written Direct Statement").

3. I am familiar with the definitions and terms set forth in the Protective Order. Together with attorneys working under my supervision, I am also familiar with the Written Direct Statement and the Redaction Log appended hereto as Attachment A. After consulting with Copyright Owners and entities whose interests Copyright Owners represent in this Proceeding and who have provided confidential information for the preparation of this case, attorneys working under my direction and I have determined in good faith that portions of the Copyright Owners' Written Direct Statement contains "Confidential Information" as defined in and protected under

Section III of the Protective Order. Pursuant to the Protective Order's terms, such confidential information has been designated and marked as "Restricted."

4. The Restricted information that Copyright Owners are submitting includes, among other things, (a) materials or testimony relating to or constituting contracts, contract terms or data that are proprietary, not publicly available, commercially sensitive or subject to express confidentiality obligations in agreements with third parties; (b) materials or testimony relating to or constituting internal business information, negotiating positions, negotiation strategy, financial data and projections, and competitive strategy that are proprietary, not publicly available or commercially sensitive; and (c) third-party information provided in confidence, not publicly available or subject to express confidentiality obligations.

5. In addition, attorneys working under my direction and I have determined that portions of the Copyright Owners' Written Direct Statement contain information previously designated "Restricted" by a participant or producer in this Proceeding pursuant to the terms of the Protective Order.

6. The Restricted materials contain information that, if disclosed, would either competitively disadvantage Copyright Owners, the entities whose interests they represent and their business partners, and other entities; provide a competitive advantage to another entity or participant in the above-captioned proceeding; or interfere with the ability to obtain like information in the future by Copyright Owners, the entities whose interests they represent and their business partners, and other entities.

7. Pursuant to the Protective Order, Copyright Owner is submitting all confidential information designated as "Restricted" under seal and is redacting such information from the Public version of its Written Direct Statement submission. Attachment A is Redaction Log that

identifies the Restricted information in the Copyright Owners' submission and sets forth the basis for each redaction.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: November 1, 2016
New York, New York

Frank P. Scibilia
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New York, New York 10036-6569
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Facsimile: (212) 326-0806
Email: fscibilia@pryorcashman.com

Counsel for Copyright Owners

ATTACHMENT A

Redaction Log for Written Direct Statement of Copyright Owners

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
Statement of David M. Israelite		
p. 24 ¶ 69 (3 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	NMPA
Statement of Peter S. Brodsky		
p. 2 ¶ 5 (2 redactions) p. 5 ¶ 14 (2 redactions) p. 6 ¶ 15 p. 7 ¶ 19 p. 8 ¶ 22 p. 8 ¶ 23 p. 11 ¶ 33 (2 redactions) p. 13 ¶ 39 p. 14 ¶ 43 (2 redactions) p. 16 ¶ 48 (3 redactions) p. 19 ¶ 57 p. 29 ¶ 85 p. 30 ¶ 87 p. 34 ¶ 95 (2 redactions) p. 39 ¶ 110 p. 40 ¶ 110	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Sony/ATV Music Publishing
p. 11 ¶ 31 (2 redactions) p. 11 ¶ 32 (3 redactions) p. 16 ¶ 49 p. 23 ¶ 67 (6 redactions) p. 27 ¶ 78 (8 redactions) p. 27 ¶ 79 (5 redactions) p. 42 ¶ 117	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the	Sony/ATV Music Publishing

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
	above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	
p. 9 ¶ 27 p. 9 ¶ 28 p. 23 ¶ 67 p. 24 ¶ 73 p. 25 ¶ 73 p. 30 ¶ 88 p. 30-31 ¶ 88 footnote 8 (20 redactions) p. 31 ¶ 89 p. 31 ¶ 89 footnote 9 (2 redactions) p. 32 ¶ 90 p. 32 ¶ 91 p. 32 ¶ 91 footnote 10 (2 redactions) p. 32 ¶ 92 p. 32-33 ¶ 92 footnote 11 (12 redactions) p. 33 ¶ 93 (2 redactions) p. 33 ¶ 93 footnote 12 (9 redactions) p. 34 ¶ 98 p. 35 ¶ 98 p. 34 ¶ 98 footnote 13 (6 redactions) p. 35 ¶ 99 p. 35 ¶ 100 p. 36 ¶ 100 p. 36 ¶ 100 footnote 14 (2 redactions) p. 36 ¶ 101 p. 36 ¶ 101 footnote 15 (2 redactions) p. 36 ¶ 102 p. 36 ¶ 102 footnote 16 (2 redactions) p. 36 ¶ 103 p. 37 ¶ 103 p. 37 ¶ 103 footnote 17 p. 37 ¶ 104 (3 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Sony/ATV Music Publishing

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 37 ¶ 104 footnote 18 (6 redactions) p. 37 ¶ 105 p. 38 ¶ 105 p. 38 ¶ 105 footnote 19 (2 redactions) p. 38 ¶ 107 p. 38 ¶ 107 footnote 20 p. 38 ¶ 107 footnote 21 p. 39 ¶ 108 CO Ex. 3.1A CO Ex. 3.1B CO Ex. 3.2A CO Ex. 3.2B CO Ex. 3.3A CO Ex. 3.3B CO Ex. 3.4A CO Ex. 3.4B CO Ex. 3.5A CO Ex. 3.5B CO Ex. 3.6A CO Ex. 3.6B CO Ex. 3.7A CO Ex. 3.7B CO Ex. 3.8A CO Ex. 3.8B CO Ex. 3.9A CO Ex. 3.9B CO Ex. 3.10A CO Ex. 3.10B CO Ex. 3.11A CO Ex. 3.11B CO Ex. 3.12A CO Ex. 3.12B CO Ex. 3.13 CO Ex. 3.14A CO Ex. 3.14B CO Ex. 3.15A CO Ex. 3.15B CO Ex. 3.16A CO Ex. 3.16B CO Ex. 3.17A CO Ex. 3.17B		

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
CO Ex. 3.18A CO Ex. 3.18B CO Ex. 3.19A CO Ex. 3.19B CO Ex. 3.20A CO Ex. 3.20B CO Ex. 3.21A CO Ex. 3.21B CO Ex. 3.22A CO Ex. 3.22B CO Ex. 3.23 CO Ex. 3.24A CO Ex. 3.24B CO Ex. 3.25A CO Ex. 3.25B CO Ex. 3.26A CO Ex. 3.26B CO Ex. 3.27A CO Ex. 3.27B CO Ex. 3.28		
Statement of Thomas Kelly		
p. 4 ¶ 9 (2 redactions) p. 4 ¶ 10 footnote 1 p. 4 ¶ 11 (2 redactions) p. 5 ¶ 12 (2 redactions) p. 5 ¶ 13 p. 6 ¶ 16 p. 6 ¶ 17 p. 7 ¶ 20 (2 redactions) p. 8 ¶ 22 (2 redactions) p. 9 ¶ 25 (2 redactions) p. 10 ¶ 27 p. 10 ¶ 28 p. 11 ¶ 30 p. 13 ¶ 35 (two redactions) p. 14 ¶ 39 (two redactions) p. 18 ¶ 52 p. 18 ¶ 53 (two redactions) p. 19 ¶ 55 (two redactions) p. 19 ¶ 56	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Sony/ATV Music Publishing
p. 8 ¶ 23 p. 9 ¶ 26 p. 10 ¶ 28	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections,	Sony/ATV Music Publishing

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 11 ¶ 31 p. 12 ¶ 32 (6 redactions) p. 12 ¶ 33 (3 redactions) p. 13 ¶ 34 (two redactions) p. 14 ¶ 38 (two redactions) p. 14 ¶ 39 p. 14 ¶ 40 p. 15 ¶ 40 p. 15 ¶ 41 p. 15 ¶ 44 (two redactions) p. 16 ¶ 44 (two redactions) p. 16 ¶ 46 (three redactions) p. 17 ¶ 47 p. 17 ¶ 48 p. 18 ¶ 51 p. 18 ¶ 54 p. 19 ¶ 57 p. 20 ¶ 58 (two redactions) p. 20 ¶ 59 (six redactions) p. 20 ¶ 60 p. 20 ¶ 61 (two redactions) p. 21 ¶ 61 p. 21 ¶ 63 p. 22 ¶ 65 p. 22 ¶ 66 (two redactions) CO Ex. 4.1 CO Ex. 4.2 CO Ex. 4.3 CO Ex. 4.4	investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	
Statement of David Kokakis		
p. 3 ¶ 8 (2 redactions) p. 3 ¶ 10 p. 4 ¶ 11 (2 redactions) p. 4 ¶ 12 p. 4 ¶ 13 (3 redactions) p. 5 ¶ 19 (2 redactions) p. 6 ¶ 19 (5 redactions) p. 6 ¶ 20 (2 redactions) p. 10 ¶ 31 (2 redactions) p. 11 ¶ 36 (3 redactions) p. 12 ¶ 37 p. 12 ¶ 39 p. 16 ¶ 48 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Universal Music Publishing Group

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 16 ¶ 50 (3 redactions) p. 17 ¶ 51 (5 redactions) p. 17 ¶ 52 (4 redactions) p. 18 ¶ 53 (2 redactions) p. 24 ¶ 72 p. 25 ¶ 72 p. 25 ¶ 75 p. 26 ¶ 75 p. 26 ¶ 76 p. 26 ¶ 77 p. 27 ¶ 79		
p. 12 ¶ 38 p. 13 ¶ 42 p. 14 ¶ 42 p. 14 ¶ 43 (2 redactions) p. 14 ¶ 44 p. 15 ¶ 44 p. 16 ¶ 50 p. 17 ¶ 50 (2 redactions) p. 17 ¶ 51 (5 redactions) p. 17 ¶ 52 (3 redactions) p. 18 ¶ 52 p. 18 ¶ 53 (3 redactions)	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Universal Music Publishing Group
p. 26 ¶ 77 p. 26 ¶ 78 (3 redactions) p. 26 ¶ 78 footnote 7 (8 redactions) p. 27 ¶ 78 p. 27 ¶ 78 footnote 8 p. 27 ¶ 79 p. 27 ¶ 80 p. 28 ¶ 80 p. 28 ¶ 80 footnote 9 p. 28 ¶ 81 p. 28 ¶ 81 footnote 10 (2 redactions) p. 29 ¶ 82 (3 redactions) p. 29 ¶ 82 footnote 11 (4 redactions) p. 29 ¶ 82 footnote 12 p. 29 ¶ 83 p. 29 ¶ 83 footnote 13 (7 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Universal Music Publishing Group

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 31 ¶ 88 p. 31 ¶ 88 footnote 14 p. 31 ¶ 89 (2 redactions) p. 31 ¶ 80 footnote 15 (6 redactions) p. 32 ¶ 90 p. 32 ¶ 90 footnote 16 (2 redactions) p. 32 ¶ 91 p. 33 ¶ 91 p. 33 ¶ 91 footnote 17 (3 redactions) p. 33 ¶ 92 p. 33 ¶ 93 (2 redactions) p. 33 ¶ 93 footnote 18 (2 redactions) p. 33 ¶ 94 p. 34 ¶ 94 p. 34 ¶ 94 footnote 19 p. 34 ¶ 95 (3 redactions) p. 34 ¶ 95 footnote 20 (2 redactions) p. 34 ¶ 96 (3 redactions) p. 35 ¶ 96 p. 35 ¶ 96 footnote 21 (7 redactions) p. 35 ¶ 99 (2 redactions) p. 36 ¶ 99 p. 36 ¶ 99 footnote 22 p. 36 ¶ 100 p. 36 ¶ 101 p. 36 ¶ 101 footnote 23 p. 36 ¶ 102 p. 37 ¶ 102 p. 38 ¶ 105 (5 redactions) CO Ex. 5.1 CO Ex. 5.2 CO Ex. 5.3 CO Ex. 5.4 CO Ex. 5.5 CO Ex. 5.6A CO Ex. 5.6B CO Ex. 5.7		

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
CO Ex. 5.8 CO Ex. 5.9 CO Ex. 5.1 CO Ex. 5.11 CO Ex. 5.12 CO Ex. 5.13 CO Ex. 5.14 CO Ex. 5.15 CO Ex. 5.16 CO Ex. 5.17 CO Ex. 5.18A CO Ex. 5.18B CO Ex. 5.18C CO Ex. 5.19 CO Ex. 5.2 CO Ex. 5.21 CO Ex. 5.22 CO Ex. 5.23 CO Ex. 5.24 CO Ex. 5.25 CO Ex. 5.26 CO Ex. 5.27 CO Ex. 5.28 CO Ex. 5.29 CO Ex. 5.3 CO Ex. 5.31 CO Ex. 5.32 CO Ex. 5.33 CO Ex. 5.34 CO Ex. 5.35 CO Ex. 5.36 CO Ex. 5.37		
Statement of Michael J. Sammis		
p. 4 ¶ 9 (2 redactions) p. 4 ¶ 10 p. 6 ¶ 15 (3 redactions) p. 7 ¶ 17 (2 redactions) p. 7 ¶ 19 (2 redactions) p. 8 ¶ 22 (2 redactions) p. 8 ¶ 23 p. 10 ¶ 29 (2 redactions) p. 11 ¶ 30 p. 12 ¶ 34 (2 redactions)	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Universal Music Publishing Group

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 13 ¶ 37 p. 15 ¶ 43 p. 15 ¶ 44 (2 redactions) p. 15 ¶ 47		
p. 9 ¶ 26 (8 redactions) p. 10 ¶ 27 (2 redactions) p. 11 ¶ 32 (6 redactions) p. 12 ¶ 34 (2 redactions) p. 13 ¶ 38 p. 14 ¶ 41 p. 15 ¶ 45 (2 redactions) p. 16 ¶ 48 (2 redactions) p. 16 ¶ 49 (2 redactions) p. 16 ¶ 50 (8 redactions) p. 17 ¶ 53 p. 18 ¶ 53 CO Ex. 6.1 CO Ex. 6.2 CO Ex. 6.3	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Universal Music Publishing Group
Statement of Gregg Barron		
p. 2 ¶ 5 p. 3 ¶ 8 (2 redactions) p. 8 ¶ 22 p. 8 ¶ 23 (2 redactions) p. 9 ¶ 26 (2 redactions) p. 10 ¶ 27 p. 13 ¶ 37	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG Rights Management
p. 3 ¶ 8 p. 5 ¶ 14 (2 redactions) p. 8 ¶ 23 (2 redactions) p. 9 ¶ 26 (2 redactions) p. 10 ¶ 27	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG Rights Management
p. 13 ¶ 38 p. 14 ¶ 38	Restricted third-party agreements that are confidential, competitively sensitive and	BMG Rights Management

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 14 ¶ 39 p. 14 ¶ 39 footnote 3 (7 redactions) p. 14 ¶ 40 (3 redactions) p. 15 ¶ 40 p. 15 ¶ 40 footnote 5 p. 15 ¶ 41 (4 redactions) p. 15 ¶ 41 footnote 6 (2 redactions) p. 15 ¶ 41 footnote 7 (2 redactions) p. 15 ¶ 42 p. 15 ¶ 42 footnote 8 (5 redactions) p. 16 ¶ 47 p. 16 ¶ 47 footnote 9 (2 redactions) p. 16 ¶ 48 p. 16 ¶ 48 footnote 10 p. 16 ¶ 49 p. 17 ¶ 49 p. 17 ¶ 49 footnote 11 p. 17 ¶ 50 (2 redactions) p. 17 ¶ 50 footnote 12 (2 redactions) p. 18 ¶ 51 p. 18 ¶ 51 footnote 13 p. 18 ¶ 52 p. 18 ¶ 52 footnote 14 (2 redactions) p. 18 ¶ 53 p. 18 ¶ 53 footnote 15 p. 18 ¶ 54 p. 19 ¶ 54 p. 19 ¶ 54 footnote 16 p. 19 ¶ 55 p. 19 ¶ 55 footnote 17 (7 redactions) p. 19 ¶ 57 (2 redactions) p. 20 ¶ 57 (5 redactions) p. 20 ¶ 57 footnote 18 p. 20 ¶ 57 footnote 19 p. 20 ¶ 58	proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 21 ¶ 58 CO Ex. 7.1 CO Ex. 7.2 CO Ex. 7.3 CO Ex. 7.4 CO Ex. 7.5 CO Ex. 7.6 CO Ex. 7.7 CO Ex. 7.8 CO Ex. 7.9 CO Ex. 7.1 CO Ex. 7.11 CO Ex. 7.12 CO Ex. 7.13 CO Ex. 7.14 CO Ex. 7.15 CO Ex. 7.16 CO Ex. 7.17 CO Ex. 7.18 CO Ex. 7.19 CO Ex. 7.2 CO Ex. 7.21 CO Ex. 7.22 CO Ex. 7.23		
Statement of Annette Yocum		
p. 3 ¶ 8 p. 3 ¶ 9 p. 4 ¶ 12 (2 redactions) p. 5 ¶ 16 p. 5 ¶ 17 p. 5 ¶ 18 p. 6 ¶ 18 p. 6 ¶ 19 p. 6 ¶ 21 p. 8 ¶ 26 (2 redactions) p. 10 ¶ 31 p. 10 ¶ 34 p. 12 ¶ 40 (2 redactions) p. 14 ¶ 45 (3 redactions) p. 14 ¶ 46 (2 redactions) p. 14 ¶ 48 (2 redactions) p. 15 ¶ 50 p. 15 ¶ 51	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Warner/ Chappell Music

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 17 ¶ 60		
p. 4 ¶ 13 p. 7 ¶ 22 (3 redactions) p. 7 ¶ 23 (2 redactions) p. 8 ¶ 23 p. 9 ¶ 29 (3 redactions) p. 10 ¶ 31 p. 10 ¶ 33 (2 redactions) p. 12 ¶ 39 p. 12 ¶ 40 (2 redactions) p. 13 ¶ 42 p. 14 ¶ 49 (2 redactions) p. 15 ¶ 52 (3 redactions) p. 15 ¶ 53 (3 redactions) p. 16 ¶ 54 (4 redactions) p. 16 ¶ 55 p. 16 ¶ 56 (2 redactions) p. 17 ¶ 56 CO Ex. 8.1 CO Ex. 8.2 CO Ex. 8.3	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Warner/ Chappell Music
Statement of Justin Kalifowitz		
p. 2 ¶ 4 p. 3 ¶ 6 (3 redactions) p. 6 ¶ 16 p. 7 ¶ 18	Restricted information concerning Producing Participant's/Producer's structure, organization, systems, strategies and/or other confidential business information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Downtown Music Publishing
p. 5 ¶ 12 p. 5 ¶ 14 p. 8 ¶ 22 p. 8 ¶ 24 (4 redactions) p. 9 ¶ 25 p. 9 ¶ 26 p. 9 ¶ 27 (2 redactions) p. 9 ¶ 27 footnote 1 p. 10 ¶ 31 (6 redactions) p. 10 ¶ 31 footnote 2	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with	Downtown Music Publishing

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 11 ¶ 31 p. 11 ¶ 33 CO Ex. 9.1 CO Ex. 9.2	Producing Participant's/Producer's ability to obtain like information in the future.	
p. 12 ¶ 36 (4 redactions) p. 12 ¶ 36 footnote 3 (2 redactions) p. 13 ¶ 36 p. 13 ¶ 36 footnote 4 p. 13 ¶ 40 p. 13 ¶ 41 p. 14 ¶ 41 p. 14 ¶ 41 footnote 5 p. 14 ¶ 42 p. 14 ¶ 42 footnote 6 p. 14 ¶ 43 p. 14 ¶ 44 p. 14 ¶ 44 footnote 7 p. 15 ¶ 46 (2 redactions) p. 15 ¶ 47 (3 redactions) p. 16 ¶ 47 (5 redactions) p. 16 ¶ 47 footnote 8 CO Ex. 9.3 CO Ex. 9.4 CO Ex. 9.5 CO Ex. 9.6 CO Ex. 9.7 CO Ex. 9.8 CO Ex. 9.9	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Downtown Music Publishing
Statement of Marc Rysman		
p. 26 ¶ 44 p. 26 ¶ 44 n.47 p. 37 ¶ 63 p. 38 ¶ 63 figure 7 p. 39 ¶ 64 table 1 p. 41 ¶ 68	Restricted financial information concerning Producing Participant's/Producer's revenues, income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Kobalt
p. 37 ¶ 63 p. 38 ¶ 63 figure 7	Restricted financial information concerning Producing Participant's/Producer's revenues,	Sony/ATV

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 38 ¶ 64 p. 39 ¶ 64 table 1 p. 40 ¶ 66 p. 41 ¶ 68	income, expenditures, expenses, projections, investments and/or other confidential financial information that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	
p. 11 ¶ 21 p. 12 ¶ 21 (5 redactions) p. 12 ¶ 21 n.18	Designated restricted by Producing Participant/Producer.	Apple
p. 8 ¶ 15 n.3 p. 16 ¶ 28 n.29 p. 19 ¶ 30 p. 19 ¶ 30 n.36	Designated restricted by Producing Participant/Producer.	Google
p. 33 ¶ 57 figure 4 p. 34 ¶ 57 figure 5 p. 35 ¶ 60 p. 36 ¶ 60 figure 6 p. 37 ¶ 63 p. 38 ¶ 63 figure 7 p. 38 ¶ 64 p. 39 ¶ 64 table 1 p. 40 ¶ 65 p. 40 ¶ 65 n.57 p. 40 ¶ 66 p. 41 ¶ 68	Designated restricted by Producing Participant/Producer.	Harry Fox Agency
p. 10 ¶ 17 n.15 p. 16 ¶ 28 n.29 p. 54 ¶ 96 n.82 p. 58 ¶ 100 n.85	Designated restricted by Producing Participant/Producer.	Spotify
Statement of Jeffrey A. Eisenach		
p. 15 ¶ 27 p. 16 ¶ 27 p. 16 ¶ 27 footnote 13 p. 16 ¶ 28 p. 16 ¶ 28 footnote 18 p. 17 ¶ 28 p. 17 ¶ 28 footnote 20 p. 48 ¶ 75 p. 54 ¶ 85 p. 54 ¶ 85 footnote 73	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	BMG Rights Management

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 54 ¶ 85 footnote 74 p. 55 ¶ 87 p. 55 ¶ 87 footnote 77 p. 55-56 ¶ 87 footnote 79 p. 60 ¶ 100 p. 61 ¶ 101 p. 61 ¶ 101 footnote 93 p. 62 ¶ 102 (3 redactions) p. 62 ¶ 102 footnote 95 p. 62 ¶ 102 footnote 96 p. 63 ¶ 104 (3 redactions) p. 68 ¶ 116 p. 69 ¶ 116 table 5 p. 71 ¶ 122 (2 redactions) p. 71 ¶ 123 (3 redactions) p. 71 ¶ 123 footnote 117 p. 72 ¶ 124 (2 redactions) p. 73 ¶ 125 (3 redactions) p. 73 ¶ 125 table 6 p. 75 ¶ 128 (2 redactions) p. 75 ¶ 128 table 8 p. 76 ¶ 128 figure 13 p. 76 ¶ 129 (3 redactions) p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138		
p. 48 ¶ 75 p. 63 ¶ 104 (3 redactions) p. 68 ¶ 116 p. 69 ¶ 116 table 5 p. 71 ¶ 122 (2 redactions) p. 71 ¶ 123 (3 redactions) p. 71 ¶ 123 footnote 120 p. 72 ¶ 124 (2 redactions) p. 73 ¶ 125 (3 redactions) p. 73 ¶ 125 table 6 p. 75 ¶ 128 (2 redactions) p. 75 ¶ 128 table 8 p. 76 ¶ 128 figure 13 p. 76 ¶ 129 (3 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Downtown Music Publishing
p. 17 ¶ 28 p. 17 ¶ 28 footnote 20 p. 48 ¶ 75	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either	Kobalt

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 55 ¶ 87 p. 55 ¶ 87 footnote 77 p. 55-56 ¶ 87 footnote 79 p. 60 ¶ 100 p. 61 ¶ 101 p. 61 ¶ 101 footnote 93 p. 62 ¶ 102 (3 redactions) p. 62 ¶ 102 footnote 95 p. 62 ¶ 102 footnote 96 p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138	competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	
p. 15 ¶ 27 p. 16 ¶ 27 p. 16 ¶ 27 footnote 13 p. 16 ¶ 28 p. 16 ¶ 28 footnote 16 p. 16 ¶ 28 footnote 17 p. 17 ¶ 28 p. 17 ¶ 28 footnote 20 p. 48 ¶ 75 p. 54 ¶ 85 p. 54 ¶ 85 footnote 75 p. 55 ¶ 87 p. 55 ¶ 87 footnote 77 p. 55-56 ¶ 87 footnote 79 p. 59 ¶ 97 p. 59 ¶ 97 footnote 91 p. 60 ¶ 100 p. 61 ¶ 101 p. 61 ¶ 101 footnote 93 p. 62 ¶ 102 (3 redactions) p. 62 ¶ 102 footnote 95 p. 62 ¶ 102 footnote 96 p. 63 ¶ 104 (3 redactions) p. 68 ¶ 116 p. 69 ¶ 116 table 5 p. 71 ¶ 122 (2 redactions) p. 71 ¶ 123 (3 redactions) p. 71 ¶ 123 footnote 118 p. 72 ¶ 124 (2 redactions) p. 73 ¶ 125 (3 redactions) p. 73 ¶ 125 table 6	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Sony/ATV Music Publishing

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 75 ¶ 128 (2 redactions) p. 75 ¶ 128 table 8 p. 76 ¶ 128 figure 13 p. 76 ¶ 129 (3 redactions) p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138		
p. 15 ¶ 27 p. 16 ¶ 27 p. 16 ¶ 27 footnote 13 p. 16 ¶ 28 p. 16 ¶ 28 footnote 15 p. 16 ¶ 28 footnote 19 p. 17 ¶ 28 p. 17 ¶ 28 footnote 20 p. 48 ¶ 75 p. 54 ¶ 85 p. 54 ¶ 85 footnote 75 p. 55 ¶ 86 p. 55 ¶ 86 footnote 76 p. 55 ¶ 87 p. 55 ¶ 87 footnote 77 p. 55-56 ¶ 87 footnote 79 p. 59 ¶ 96 footnote 89 p. 59 ¶ 97 p. 59 ¶ 97 footnote 90 p. 59 ¶ 97 footnote 91 p. 60 ¶ 97 p. 60 ¶ 97 footnote 92 p. 60 ¶ 100 p. 61 ¶ 101 p. 61 ¶ 101 footnote 93 p. 62 ¶ 102 (3 redactions) p. 62 ¶ 102 footnote 95 p. 62 ¶ 102 footnote 96 p. 63 ¶ 104 (3 redactions) p. 68 ¶ 116 p. 69 ¶ 116 table 5 p. 71 ¶ 122 (2 redactions) p. 72 ¶ 124 (2 redactions) p. 73 ¶ 125 (3 redactions) p. 73 ¶ 125 table 6 p. 75 ¶ 128 (2 redactions)	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Universal Music Publishing Group

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 75 ¶ 128 table 8 p. 76 ¶ 128 figure 13 p. 76 ¶ 129 (3 redactions) p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138		
p. 17 ¶ 28 p. 17 ¶ 28 footnote 20 p. 48 ¶ 75 p. 54 ¶ 85 p. 54 ¶ 85 footnote 75 p. 55 ¶ 87 p. 55 ¶ 87 footnote 77 p. 55-56 ¶ 87 footnote 79 p. 63 ¶ 104 (3 redactions) p. 68 ¶ 116 p. 69 ¶ 116 table 5 p. 71 ¶ 122 (2 redactions) p. 71 ¶ 123 (3 redactions) p. 71 ¶ 123 footnote 119 p. 72 ¶ 124 (2 redactions) p. 73 ¶ 125 (3 redactions) p. 73 ¶ 125 table 6 p. 75 ¶ 128 (2 redactions) p. 75 ¶ 128 table 8 p. 76 ¶ 128 figure 13 p. 76 ¶ 129 (3 redactions) p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138	Restricted third-party agreements that are confidential, competitively sensitive and proprietary, and that, if disclosed, would either competitively disadvantage Producing Participant/Producer, provide a competitive advantage to another entity or participant in the above-captioned proceeding, or interfere with Producing Participant's/Producer's ability to obtain like information in the future.	Warner/ Chappell Music
p. 55 ¶ 87 p. 55 ¶ 87 footnote 78 p. 55-56 ¶ 87 footnote 79 p. 56 ¶ 88 p. 56 ¶ 89 p. 56 ¶ 89 footnote 80 p. 56 ¶ 89 footnote 81 p. 56 ¶ 89 footnote 82 p. 56 ¶ 89 footnote 83 p. 57 ¶ 90 p. 57 ¶ 90 footnote 84 p. 57 ¶ 90 footnote 85 (3 redactions)	Designated restricted by Producing Participant/Producer.	Apple

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 57 ¶ 91		
p. 48 ¶ 75 p. 53 ¶ 84 p. 53 ¶ 84 footnote 71 p. 54 ¶ 84 p. 54 ¶ 84 footnote 72 p. 60 ¶ 100 p. 61 ¶ 101 p. 61 ¶ 101 footnote 93 p. 62 ¶ 102 (3 redactions) p. 62 ¶ 102 footnote 95 p. 62 ¶ 102 footnote 96 p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138	Designated restricted by Producing Participant/Producer.	Google
p. 84 ¶ 147 (3 redactions) p. 85 ¶ 147 table 10 p. 86 ¶ 148 footnote 127 (5 redactions) p. 87 ¶ 148 table 11 p. 87 ¶ 149 p. 88 ¶ 150 p. 88 ¶ 152 (2 redactions) p. 89 ¶ 152 table 12 p. 89 ¶ 153 (5 redactions) p. 90 ¶ 155 (4 redactions) p. 90 ¶ 156 (3 redactions) p. 91 ¶ 156 table 13 p. 91 ¶ 157 p. 92 ¶ 157 table 14 p. 92 ¶ 158 (5 redactions) p. 93 ¶ 160 footnote 132 p. 93 ¶ 160 table 15 p. 93 ¶ 161 p. 94 ¶ 162 table 16 p. 94 ¶ 163 p. 94 ¶ 163 table 17 p. 94 ¶ 164 p. 95 ¶ 164 table 18 p. 95 ¶ 165 (2 redactions) p. 96 ¶ 169 (2 redactions) p. 96 ¶ 169 footnote 136 p. 96 ¶ 169 footnote 137	Designated restricted by Producing Participant/Producer.	Harry Fox Agency

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 97 ¶ 169 table 19 p. 98 ¶ 171 (5 redactions) p. 98-99 ¶ 171 footnote 140 (4 redactions) p. 99 ¶ 171 (2 redactions) p. 99 ¶ 172 p. 99 ¶ 173 (2 redactions) p. 100 ¶ 176 (5 redactions) p. 101 ¶ 176 (4 redactions)		
p. 48 ¶ 75 p. 63 ¶ 104 (3 redactions) p. 68 ¶ 116 p. 69 ¶ 116 table 5 p. 71 ¶ 122 (2 redactions) p. 71 ¶ 123 (3 redactions) p. 71 ¶ 123 footnote 121 p. 72 ¶ 124 (2 redactions) p. 73 ¶ 125 (3 redactions) p. 73 ¶ 125 table 6 p. 75 ¶ 128 (2 redactions) p. 75 ¶ 128 table 8 p. 76 ¶ 128 figure 13 p. 76 ¶ 129 (3 redactions) p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138	Designated restricted by Producing Participant/Producer.	Pandora
p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138	Designated restricted by Producing Participant/Producer.	Sony Music Entertainment
p. 97 ¶ 170 p. 98 ¶ 170 (2 redactions) p. 98 ¶ 170 footnote 138	Designated restricted by Producing Participant/Producer.	Spotify
Statement of Joshua Gans		
p. 14-15 ¶ 24 table 1	Designated restricted by Producing Participant/Producer.	Apple
p. 39 ¶ 77 p. 39 ¶ 77 footnote 41 p. 39-40 ¶ 77 table 3 p. 40 ¶ 78 (5 redactions) p. 40 ¶ 79 p. 41 ¶ 79 table 4 p. 42 ¶ 80 (7 redactions) p. 42 ¶ 80 table 5	Designated restricted by Producing Participant/Producer.	HFA

Page/Paragraph/Exhibit	Description and Basis	Producing Participant/ Producer
p. 44 ¶ 84 (4 redactions) p. 45 ¶ 84 table 6 p. 45 ¶ 85 (3 redactions)		
p. 41 ¶ 79 table 4 p. 45 ¶ 84 table 6	Designated restricted by Producing Participant/Producer.	Kobalt

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I caused true and correct copies of the **Written Direct Statement of Copyright Owners (Public Version)** to be served on the individuals and entities in the below-attached Service List via overnight express mail pursuant to 37 CFR § 350.4(h).

By: _____
Frank P. Scibilia

PUBLIC VERSION

Service List

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Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

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

WITNESS STATEMENT OF DAVID M. ISRAELITE

PUBLIC VERSION

PUBLIC VERSION

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

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

WITNESS STATEMENT OF DAVID M. ISRAELITE

1. My name is David M. Israelite. I am President and Chief Executive Officer of the National Music Publishers' Association ("NMPA").

2. I submit this statement to set forth the proposal of the NMPA and the Nashville Songwriters Association International (collectively, "Copyright Owners") in the above-captioned proceeding to set statutory mechanical rates and terms for physical product and digital phonorecords for the period 2018-2022 (the "Proceeding").

3. I further submit this statement to explain why the current statutory mechanical rates and terms for interactive streams and limited downloads, and related products and configurations currently described in 37 C.F.R. Subparts B and C ("Subpart B and C Configurations") should be modified as the Copyright Owners propose, and why doing so would further the objectives set forth in Section 801(b) of the Copyright Act.

I. Professional Background

4. I received a Bachelor's Degree from William Jewell College in 1990, and a Juris Doctor from the University of Missouri in 1994. After law school, I practiced as a commercial litigator at the firm of Bryan Cave, LLP, in Kansas City, Missouri for three years.

5. In 1997, I moved into the public sector to work for Missouri Senator Kit Bond, becoming the youngest Administrative Assistant in the U.S. Senate. I also served as the campaign manager for Senator Bond's successful re-election campaign in 1998. From 1998 until 2001, I served as Director of Political and Governmental Affairs for the Republican National Committee.

6. I was appointed to the Department of Justice in 2001, and served as Deputy Chief of Staff and Counselor to the Attorney General of the United States until 2005. In this capacity I helped manage the Department's 112,000 employees and $22 billion annual budget. In addition to my general management responsibilities, I served as the Attorney General's personal advisor on all legal, strategic and public affairs issues. In 2004, I was named Chairman of the Department's Task Force on Intellectual Property. The Task Force was established that year to help the Department strengthen and improve efforts to combat the theft of intellectual property both nationally and internationally. In that position, I worked closely with other governmental offices and gained a first-hand appreciation for the importance of protecting the nation's valuable intellectual resources.

7. I was named President and CEO of the NMPA in 2005, a position I continue to hold today. In that capacity, I have focused my efforts on both legal and legislative initiatives aimed at advancing the interests of the U.S. music publishing industry and its songwriting partners. To those ends, I frequently contribute op-eds to various music industry trade publications and am often engaged to speak at conferences, and on panels, radio programs and podcasts regarding various issues confronting the music industry. *Billboard Magazine* has on three occasions named me to its annual "Power 100" list, which purports to identify the most influential executives in the music industry. And I have guided the NMPA's efforts in two prior

proceedings before the Copyright Royalty Board: *Phonorecords I* in 2006[1] and *Phonorecords II* in 2011.[2]

II. The Role of the NMPA

8. The NMPA was founded in 1917. For almost a century, the NMPA has served as the leading voice representing all American music publishers and their songwriting partners before Congress, in the courts, in the music, entertainment and technology industries, and to the listening public.

9. In 1927 the NMPA founded the Harry Fox Agency LLC ("HFA"), which the NMPA operated as a wholly-owned subsidiary for over eight decades.[3] In September 2015, the NMPA sold HFA and re-formed as a non-profit trade organization under § 501(c)(6) of the U.S. Tax Code. Whereas the NMPA was historically supported by revenue realized by HFA for issuing mechanical licenses, as of 2014 the NMPA is completely funded by dues collected from its membership (a business decision forced by the decline of mechanical licensing revenue collected by HFA).

10. The NMPA's membership includes music publishers affiliated with a record label or a larger entertainment company (so-called "majors") as well as independently-owned and operated music publishers (so-called "independents" or "indies") both large and small, of all catalog and revenue sizes. Taken together, compositions owned or controlled by NMPA members account for the vast majority of musical compositions licensed for mechanical uses in

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[1] *Matter of Mechanical & Digital Phonorecord Delivery Rate Adjustment Proceedings*, Docket No. 2006-3 CRB DPRA.

[2] *Matter of Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, Docket No. 2011-3 CRB.

[3] HFA licenses and collects royalties on behalf of music publishers for the mechanical rights in copyrighted musical compositions that are the subject of this proceeding. HFA is the largest such U.S. agency active in issuing such mechanical licenses.

the United States, including reproduction and distribution in the form of interactive streams, downloads and physical phonorecords.

11. The NMPA's primary objective is to protect and enhance the value of our members' intellectual property rights, and to shape a business environment that will foster both the creative and financial success of our members. We seek to do so through legislative, litigation and regulatory efforts, and by representing our members in industry negotiations.

12. Our recent legislative and lobbying initiatives have focused on challenging what I view as outdated laws enabling government regulation and oversight of the music publishing industry. These efforts have included seeking revisions to the Copyright Act, including the terms and provisions of the Section 115 compulsory license itself, and the Section 801(b) rate setting standard that is at the core of this Proceeding. They have also included seeking protection from consent decrees and standards that regulate royalties and licensing of the public performance rights in musical compositions.

13. Our lobbying efforts are generally met with fierce resistance from groups with resources well beyond those currently available to the music publishing industry. By way of example, in 2015 alone, the participants representing the interests of licensees in this Proceeding outspent the NMPA on lobbying efforts by a total of $33,850,000 to $715,000, with contributions as follows: Apple ($4,480,000); Amazon ($9,070,000); Google ($17,030,000); Pandora ($1,280,000); and Spotify ($740,000).

14. As we are doing in this Proceeding, the NMPA has also presented the position of music publishers and songwriters in all Section 115 royalty rate-setting negotiations, proceedings and related hearings. Before *Phonorecords I*, *II* & *III*, we represented the interests of music publishers and songwriters in negotiations and formal rate-setting proceedings in the 1980s, as

well as the physical and digital rate-setting negotiations and proceedings in the mid-to-late 1990s.

15. The last decade has been a time of tremendous change in the music industry. Ten years ago, the NMPA's efforts were focused primarily on fighting and prohibiting the outright theft of music and curbing rampant piracy enabled on unauthorized, unlicensed websites by way of lawsuits grounded on claims of copyright infringement. The NMPA was successful in those efforts.

16. While the NMPA continues to engage in efforts to identify and curb the infringement of our members' works on the Internet, our focus has expanded to confront a wide range of issues regarding the use of musical works in the digital environment by emerging new services – including the services operated by the participants in this Proceeding – that use music either pursuant to a license, or that claim the protection of the so-called "safe harbors" of the Digital Millennium Copyright Act (the "DMCA"). It has been a constant challenge to obtain a fair share of the enormous value that our members' musical works have created for these services.

17. Indeed, it is of paramount importance to me to see that our publisher members and their songwriting partners are provided fair market royalties when their musical compositions are exploited. To that end, we have negotiated numerous model agreements with online music service providers, including YouTube, Maker Studios, Genius (formerly known as Rap Genius) and Flipagram. Very often these agreements will take the form of payments for past unauthorized uses, along with licenses to enable new uses on a going-forward basis. Our negotiation of these agreements, which our members may choose to opt into and thereby license these service providers the rights to use their works, is a significant opportunity for our members

– particularly our smaller music publisher members – as it enables them to share in the value created by new business models while sparing them the time and expense of having to negotiate directly with these service providers. It is also of value to the service providers as they are spared the transaction costs of negotiating terms with hundreds of publishers. Through our negotiation and structuring of these model agreements, the NMPA has helped create a healthy digital marketplace for the lawful use of our members' musical works.

18. Consistent with these goals, the NMPA is also active on a policy level in shaping the development of copyright law. For instance, the NMPA participated in briefing the U.S. Department of Justice regarding proposed modifications to the ASCAP and BMI consent decrees. The NMPA has also responded to Notices of Inquiry issued by the Copyright Office on important topics including the treatment of so-called orphan works (where ownership information cannot be identified), the current effectiveness of the DMCA, and the Copyright Office's comprehensive 2015 study on "Copyright and the Music Marketplace."

III. The Copyright Owners' Current Proposal

19. Let me next turn to the Copyright Owners' proposal for rates and terms for the statutory mechanical license.

A. Rates and Terms for Subpart A Configurations

20. On or about June 8, 2016, the Copyright Owners reached a settlement with Universal Music Group ("UMG") and Warner Music Group ("WMG") with respect to the rates and terms for Subpart A configurations (physical phonorecords, permanent digital downloads and ringtones) (the "Subpart A Settlement").

21. On or about June 15, 2016, the parties to the Subpart A Settlement moved the Copyright Royalty Judges ("CRJs") to adopt the rates and terms contained in the Subpart A

Settlement as the rates and terms for all licensees of Subpart A Configurations (or at a minimum, for Subpart A Configurations made by UMG and WMG).

22. On July 25, 2016, the CRJs published the Subpart A Settlement in the Federal Register for comment.

23. The American Association of Independent Music ("A2IM"), representing a diverse group of independently-owned American record labels, submitted comments supporting the Subpart A Settlement.

24. The only parties submitting comments in opposition to the Subpart A Settlement were Sony Music Entertainment ("SME") and George D. Johnson. SME was not opposed to, and in fact expressed support for, the rates contained in the Subpart A Settlement. SME's sole objection was with respect to certain aspects of the late fee term in 37 C.F.R. § 385.4. SME has since settled with the Copyright Owners with respect to this issue, and now approves of the Subpart A Settlement in all respects. On October 28, 2016, SME and the Copyright Owners filed a motion by which SME withdrew its prior objection, and SME and the Copyright Owners requested that the CRJs adopt the Subpart A Settlement industry-wide as the statutory rates and terms for all Subpart A Configurations for the coming rate period.

25. The Copyright Owners (representing the vast majority of licensors of mechanical rights for Subpart A Configurations) and SME, UMG, WMG and A2IM (representing the vast majority of licensees of those rights) have now all expressed support for adoption of the Subpart A Settlement as the rates and terms for all licensees under Section 115, and no other entity has to date filed an opposition to the Subpart A Settlement (other than Mr. George D. Johnson, who represents no interests beyond his own in this Proceeding and has proposed a rate of at least 52¢ per copy, which, in the NMPA's view, is not supportable at this time).

26. Given the broad, industry-wide support for the rates and terms contained in the Subpart A Settlement, the Copyright Owners propose the CRJs adopt them for all Subpart A Configurations made by all licensees.

B. Rates and Terms for Subpart B and C Configurations

27. The Subpart B & C Configurations are licensed by digital service providers ("Digital Sevices"), including, most notably, the five remaining licensee participants in this Proceeding: Amazon, Apple, Google, Pandora and Spotify. The Copyright Owners have been unable to reach an agreement with the Digital Service participants on rates and terms for Subpart B & C Configurations.

28. The Subpart B Configurations are all formats for delivering or offering interactive streams and/or limited downloads (as defined in the regulations). Subpart B Configurations include: (a) standalone non-portable (i.e., tethered to a computer) subscription streaming-only services; (b) standalone non-portable subscription streaming and limited download services; (c) standalone portable (i.e., accessible on mobile or other Internet-enabled devices) subscription streaming and limited download services; (d) bundled subscription services which are streaming and limited download services bundled with another product or service (such as a mobile phone); and (e) free to the user non-subscription advertiser supported services. *See* 37 C.F.R. §§ 385.13(a)(1) to (5).

29. As discussed below, in the Copyright Owners' Introductory Memorandum and Proposed Rates and Terms, and in witness statements submitted by the Copyright Owners, because we believe each interactive stream or play of a limited download of a musical work has an inherent value that should not depend on the business models or pecuniary interests of the

Digital Services, we think the same rates and rate structure should apply to each of these Subpart B Configurations.

30. The Subpart C Configurations also predominantly constitute different methods for delivering or offering interactive streams and/or limited downloads. These include: (a) "limited offerings," which are subscription interactive streaming or limited download services where the consumer has access to a limited number of sound recordings relative to the marketplace or cannot listen to individual sound recordings on demand; (b) "paid locker services," which permit users paying a subscription fee to stream from the Digital Service's server copy a sound recording embodying a musical work that the user has demonstrated is present on the user's hard drive; (c) "purchased content locker services," which permit users to stream from the Digital Service's server copy a sound recording embodying a musical work that the user has demonstrated he or she has purchased as a Subpart A Configuration; and (d) "mixed service bundles" to the extent they bundle locker services or limited offerings with permanent downloads, ringtones or non-music products or services (such as a phone). *See* 37 C.F.R. § 385.21.[4]

31. Again, because we believe each interactive stream or play of a limited download of a musical work has an inherent value that should not depend on the business models or pecuniary interests of the Digital Services, we think the same rates and rate structure should apply regardless of the Configuration.

32. While the details of the Copyright Owners' rate proposal are set forth in the Copyright Owners' Proposed Rates and Terms, the basic elements of the proposal are as follows:

[4] The one other Subpart C Configuration – "music bundles" – are offerings of two or more Subpart A products to end users as part of one transaction, and do not involve interactive streams or limited downloads. *See* 37 C.F.R. § 385.21 (defining "music bundles").

Rates.

For all interactive streams and limited downloads, a rate equal to the greater of:

(1) $0.0015 per-play of an interactive stream or limited download (for mechanical rights only) (the "per-play" rate herein); and

(2) $1.06 per-end user of an interactive streaming or limited download service per month (for mechanical rights only) (the "per-user" rate herein).

Term.

Late Fee: Without affecting any right to terminate a license for failure to report or pay royalties as provided in § 115(c)(6), late fees shall be assessed at 1.5% per month (or the highest lawful rate, whichever is lower) from the date payment should have been made (the twentieth day of the calendar month following the month of distribution) to the date payment is actually received by the Copyright Owner.

C. The Rates and Rate Structure Proposed by the Copyright Owners Recognize the Inherent Value of a Musical Work

33. The current statutory rates and rate structure were negotiated ten years ago when the business models for delivering interactive streams and limited downloads were experimental and no one was certain how they might develop. While those rates and that structure reflect the uncertainty inherent in a developing industry, it is now clear that they have outlived their utility. Under the current rate structure, the amounts paid to songwriters and publishers for their intellectual property vary with and depend upon how a Digital Service chooses to structure its business. The result is that the songwriters and publishers are undercompensated and end up subsidizing the consumer and market share acquisition and other business schemes of the Digital Services. The rates proposed by the Copyright Owners eliminate this inherent unfairness and recognize that each play of an interactive stream or limited download has an inherent value that should not be tied to the business model of the Digital Service.

34. Take Spotify, for example. Spotify offers a free-to-the-consumer service that provides access to the same vast catalog of songs as its paid subscription service. It does not limit free access to this catalog to a period of time, or to just a portion of the catalog. Users can stream the same music in the free tier as long as they occasionally listen to an advertisement. While Spotify is obligated to pay a portion of the ad revenue to the owners of the music, it deliberately chooses not to sell too many ads because it wants to attract as many consumers as it can to grow its market share and enterprise value.

35. Similarly, Google, arguably the most ubiquitous presence on the Internet, maintains its own interactive streaming service through its Google Play network, which offers subscriptions at $9.99 a month and with significant discounts available for users participating in family subscription plans.[5] This feature helps Google maintain users engaged within its vast network of online features, including its search engine, email service and even GPS mapping application that taken together have created one of the valuable corporations in the world.[6] That is a value music publishers and songwriters do not share in under the current regulatory framework, but a value they have helped create nonetheless.

36. Apple likewise sells a subscription interactive streaming and limited download service for $9.99 per month.[7] The service permits each consumer to stream as many songs as he or she wishes. However, Apple provides significant discounts from the $9.99 price – 50% or higher – to attract certain customers such as students or individuals on a "family plan."[8] Apple's

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[5] Google Play Music, https://play.google.com/music/listen#/now (last visited Oct. 23, 2016).

[6] Paul R. La Monica, *Google Is Worth More Than Apple Again*, CNN Money (May 12, 2016), http://money.cnn.com/2016/05/12/investing/apple-google-alphabet-most-valuable.

[7] Membership, Apple Music, http://www.apple.com/apple-music/membership/ (last visited Oct. 17, 2016).

[8] *Id.*

discounts cause the revenue-based royalty payable to songwriters and publishers to be slashed, while at the same time the songwriters and publishers do not benefit from the fact that students and families likely stream more music than a basic individual subscriber. Moreover, when Apple discounts music, it further benefits Apple by growing its customer base, which it can leverage to sell more Apple products, but the songwriters and publishers do not share in that benefit either.

37. Amazon's plan to subsidize its business at the expense of songwriters and publishers is perhaps even more direct. Amazon has launched a subscription music service that offers the same expansive catalog as Apple's and Spotify's services, yet reduces the monthly subscription price by 60% (to $3.99 from $9.99) for customers who stream through Amazon's Echo Bluetooth speaker.[9] Of course, Amazon will not be sharing its speaker revenues with songwriters and publishers, just as it has not shared with songwriters and publishers any of the money that its subscribers pay for Amazon Prime subscriptions, even though it provides free music streaming as an inducement to purchase a Prime subscription.

38. With each Digital Service slashing subscription prices and offering greater discounts and incentives to attract customers – to gain market share not only to sell more subscriptions but also to sell consumers other products or services – revenues will continue to decrease, and publishers and the songwriters they represent will earn less and less. Copyright Owners have been and will continue to be subsidizing the largest companies in the world in their highly calculated customer acquisition strategies.

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[9] Now Streaming: Amazon Music Unlimited, Amazon Press Releases (Oct. 12, 2016), http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle_pf&ID=2211067; Hannah Karp & Laura Stevens, *Amazon's Music-Streaming Service Competes on Price and Robotic Assistance*, The Wall Street Journal (Oct. 12, 2016), http://www.wsj.com/articles/new-amazon-music-streaming-service-costs-echo-speaker-owners-4-a-month-1476255600.

39. Each of these Digital Services effectively pay to the publishers and songwriters a different per-play royalty. That makes no sense. Indeed, tying the statutory rate to a narrowly defined version of the Services' revenues (one that excludes sources of revenue such as the sale of other products linked to the sale of the music) as opposed to users' consumption – the basis of most statutory rates, including the rates for Subpart A products such as downloads and ringtones – results in publishers and songwriters being paid less and less on an effective per-play basis as consumption increases. Because there is no minimum per-play payment, and because I understand that in some cases the number of streams per month is growing at a more rapid rate than the revenue, a songwriter can have more streams than in a prior month and actually make less money.[10] It is counter-intuitive for something that is so highly valued that it gets played more and more to earn less and less.

40. In sum, it is clear that a revenue-based royalty rate structure, without a per-play value, leaves copyright owners vulnerable to the ulterior motives of the Digital Services in entering the interactive streaming market. A per-play value is, therefore, an essential component of a fair and reasonable rate.

41. As numerous witnesses will describe, the Copyright Owners' proposed per-play rate is fair, supported by existing benchmark agreements and sound economic theory, and satisfies the Section 801 criteria to be used in determining appropriate statutory royalty rates in this Proceeding.

42. The Copyright Owners also believe it is important that the rate structure include a per-user royalty as part of a "greater of" calculation. The publishers and songwriters provide

[10] *See* Jeff Price, *The More Money Spotify Makes, The Less Artists Get Paid…*, Digital Music News (June 11, 2015), http://www.digitalmusicnews.com/2015/06/11/the-more-money-spotify-makes-the-less-artists-get-paid/.

value to the Digital Services and their end users by making all of their musical works available on these Services because the ability to access any of those works at any given time attracts users regardless of which works a particular user streams each month or the level of streaming by that user that month. 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. Users are willing to and do pay Digital Services for such access, and advertisers are willing to and do pay Digital Services to sell their products and services to those users, who are only willing to listen to the ads because they want the access to the music.

43. Another reason a per-user rate is needed is technology often begets other, less benign technology. A host of "stream ripping" websites and applications have been developed that enable users to convert interactive streams into permanent downloads. 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, a heavily-trafficked website with tens of millions of users, which facilitates copyright infringement by enabling users to strip the audio from YouTube videos and convert the file to a permanently-playable .mp3 file.[11] Also last month, a product called "The Mighty" was released. The Mighty is a handheld .mp3 player that enables users of Spotify's interactive streaming subscription service to permanently download playlists – up to 48 hours of music in total. Once such playlists have been downloaded, the user can play them offline via the device,

[11] *See UMG Recordings, Inc. v. PMD Technologie UG d/b/a YouTube-mp3*, Docket No. 2:16-cv-07210 (C.D. Cal. 2016); David Kravets, *RIAA Takes on Stream-ripping in Copyright Lawsuit Targeting YouTube-mp3*, Ars Technica (Sept. 26, 2016), http://arstechnica.com/tech-policy/2016/09/riaa-takes-on-stream-ripping-in-copyright-lawsuit-targeting-youtube-mp3/.

which means that the plays will never be counted, so their value will not be captured by a per-play payment.[12]

44. It is also important that the rate structure include a per-user rate even for the free, so-called "advertiser"-supported tier that some Digital Services offer. The royalties paid by such services should not be different from the royalties paid by subscription services. Both provide on-demand streams to users. To those users, the value of the stream is the same. The royalties paid to the publishers and songwriters for those streams (and for the value they provide to the service in creating and licensing all of the songs) should have nothing to do with how the Digital Service chooses to monetize or not monetize the songs that it licenses. If a record label wants to give away permanent downloads for promotional or other purposes, under Subpart A, it still has to pay the statutory mechanical royalty for the use and consumption of the underlying musical works. The Digital Services should have to do the same. Alternatively, they could sell enough advertisements to cover their mechanical licensing costs. The mere fact that they presently choose to operate their businesses by minimizing their revenues from advertising in order to maximize their customer base does not mean that the Copyright Owners should be required to subsidize their business model involuntarily.

45. For this reason, Copyright Owners' proposed regulations have defined "end users" to include all unique individuals or entities that have access to an offering regardless of whether they are paid subscribers or individuals who use a Digital Service's free tier. Digital Services should easily be able to track non-paying users by requiring users to sign up to use the service with an e-mail address, user name and password.

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[12] *See* Raymond Wong, *Hands-on With The Mighty, An MP3 Player That Lets You Listen To Spotify Without A Phone*, Mashable (Sept. 22, 2016), http://mashable.com/2016/09/22/mighty-spotify-mp3-player/#AVwjdTwRCmqJ.

46. Again, as supported by the Copyright Owners' submission, the proposed per-user rate is fair, supported by existing benchmark agreements and sound economic theory, and satisfies the Section 801 criteria to be used in determining appropriate statutory royalty rates.

47. The Copyright Owners' proposed rate structure of the greater of a per-play and a per-user rate will also simplify the Digital Services' accountings to licensors and provide some greatly needed transparency under the compulsory license. The current rate structure makes it extremely difficult for songwriters and publishers to determine whether they are being paid correctly, as not only are the required calculations complex, but many of the required inputs are not easily verifiable by songwriters and publishers, and afford the Digital Services some discretion, for example, in allocating what portions of their revenue constitutes "service revenue." It is far simpler to calculate the number of plays and the number of end users in a given accounting period.

48. Finally, because each play has an inherent value, the Copyright Owners propose one rate for all forms of interactive steaming and limited downloading. Whether interactive streams and limited downloads or offered on a subscription basis, an advertiser-supported or other free-to-the-user or "promotional" basis, on a portable, non-portable or mixed use basis, via a "cloud" or "locker" service, or bundled with any other music or non-music product or service, the rate should be the same. For this reason, the Copyright Owners propose to simplify the existing Subparts B and C into a single set of rates and terms that do not differ based on offering type.

D. A Late Fee Should Also Be Imposed

49. The timely payment of statutory license fees continues to be a persistent problem. Although the current statute and accompanying implementing regulations set out a detailed

timeframe for payment of royalties, not all licensees pay on time. In fact, mechanical royalty payments by the Digital Services are chronically late. The compulsory license is not meant to be an interest-free loan. Individual songwriters should not have to act as financiers for Apple, Google and Spotify.

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

51. Copyright Owners proposed that the late fee apply to all licensees. However, because the participants reached a settlement with respect to Subpart B and C rates and terms, the CRJs placed the late fee provision in Subpart A (at 37 C.F.R. § 385.4). The Copyright Owners do not believe that it was the intent of the CRJs to limit the provision to only licensees of Subpart A Configurations, but rather, intended it to apply to all Section 115 licensees.

52. Regardless of the CRJs' intent at the time, there is no reason why one group of licensees (record labels) should be subject to a late fee provision while another group of licensees (Digital Services) should not be subject to such a provision. As the CRJs determined in *Phonorecords I*, a late fee is appropriate to "'provid[e] an effective incentive to the licensee to make payments timely,'" and that a fee of 1.5% per month is not "'so high that it is punitive'" and achieves the correct balance.[13]

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[13] Final Rule, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding ("Phonorecords I Final Rule"), Docket No. 2005-3 CRB DPRA, 74 Fed. Reg. 4510, 4510 (Jan. 28, 2009) (quoting Final Rule, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services ("SDARS I Final Rule"), Docket No. 2006-1 CRB DSTRA, 73 Fed. Reg. 4080, 4099 (Jan. 24, 2008)).

53. Copyright Owners therefore propose that the regulations be amended to clarify that the late fee already contained in 37 C.F.R. § 385.4 applies with equal force to Digital Services and other entities offering interactive streams or limited downloads. Doing so will discourage these chronic late payments and, hopefully, get songwriters paid on a timely basis.[14]

IV. An Increase in Mechanical Royalty Rates is Warranted

54. There are myriad reasons why the mechanical royalty rates that are presently being paid by the Digital Services to the publishers and songwriters should be increased. While some of those reasons are alluded to in Section III above, below I will discuss several specific reasons why the modest increase proposed by the Copyright Owners is necessary and warranted, and furthers the Section 801(b) objectives.[15]

A. The Compulsory License Depresses Rates that Copyright Owners Could Obtain In The Free Market

55. While I recognize that the CRB's mandate is to determine reasonable terms and rates of royalty payments under the Section 115 compulsory license, and not to decide whether the Section 115 license continues to be necessary a century after its inception, I feel it is important to at least briefly address the history of the compulsory license, and to express my view that it is no longer necessary and is, in fact, disadvantageous – a view that has been

[14] Note that the late payment fee is not intended to be in lieu of, but rather a supplement to, the Copyright Owners' statutory right to terminate a compulsory license for failure to account or pay royalties on time, a right which often must be exercised. *See* 17 U.S.C. § 115(c)(6).

[15] Section 801(b)(1) of the Copyright Act sets forth the following objectives that the CRJs should look to achieve in setting reasonable rates and terms under the statutory license: (a) to maximize the availability of creative works to the public; (b) to afford the copyright owner a fair return for his or her creative work and afford the copyright user a fair income under existing economic conditions; (c) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to .the opening of new markets for creative expression and media for their communication; and (d) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

expressed by the Register of Copyrights. The reason I feel it is important for me to do so is that I believe it bears upon the Section 801(b) factors.

56. The compulsory license to make a mechanical reproduction of a musical work is over 100 years old. *See* Copyright Act of 1909, Public Law No. 60-349, 35 Stat. 1075 (1909). The need for this compulsory license has long been the subject of debate, and in the digital age that debate has become even more pronounced.

57. The compulsory license was born from Congress' concern about purportedly anti-competitive behavior between one aggressive player piano manufacturer – the Aeolian Company – and the music publishing community. The concern was that the Aeolian Company was entering into exclusive licenses to reproduce mechanically a significant number of musical compositions on player piano rolls.[16] The concern about anti-competitive activity could, and probably should, have been remedied by direct action taken against the Aeolian Company. Anti-trust enforcement today is much more sophisticated and focuses on the parties actually engaged in the alleged anti-competitive activity, but that was not the approach taken by Congress in 1909. The purported monopoly in 1909, whether real or imagined, was regarded as a serious threat at a time when effective anti-trust regulation was still in its infancy.[17] Rather than focusing on punishing the player piano company for the alleged anti-competitive behavior, Congress instead punished all songwriters and music publishers by implementing the compulsory license, to the

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[16] *See* Statement of Marybeth Peters, The Register of Copyrights, Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary, United States House of Representatives, 108th Congress, 2d Session (March 11, 2004) [hereinafter Peters Statement].

[17] Russell Sanjek, *Pennies From Heaven: The American Popular Music Business In The Twentieth Century* 22 (1996).

benefit of the Aeolian Company, and really all subsequent distributors, including the Digital Services participating in the Proceeding a century later.[18]

58. Historical evidence supports the conclusion that the Section 115 compulsory license was adopted more as a political compromise to ensure passage of the 1909 Copyright Act, than as a sensible or fair approach to music licensing. Many in the songwriting and music publishing community strongly opposed the compulsory license at the time, including such songwriting luminaries as John Philip Souza and Victor Herbert – both of whom testified against the bill in Congress.[19] Songwriters and music publishers viewed the compulsory license as an unprecedented and unwarranted form of governmental price control and manipulation of an otherwise functioning music marketplace. They recognized the compulsory license would undercut their interests in a free and fair market in which they could control the fruits of their creative and financial investments. As documented in the Copyright Owners' submissions on behalf of music publishers and songwriters, these concerns are all too real in the present day.

59. Several rate proposals were debated in Congress in 1909. Some legislators proposed a flat 2¢ rate, others a tiered system and others a 10% rate for certain categories of works. The ultimately successful bill set the rate at a flat 2¢ and was accompanied by a Congressional report indicating that the compulsory license provision was "a compromise to placate the expressed fears regarding the Aeolian Co."[20] As a result, the Aeolian Company reaped the benefit of a lower compulsory license rate than their "exclusive" arrangement with

[18] *Id.* at 23.

[19] *Id.* at 22.

[20] *Id.* at 29 (quoting Senator Herbert in S. Rept. 1782, 71st Congress, 3d Session, pp 26-27 (1931)).

publishers that triggered the concern initially.[21] Consequently, the player piano companies in 1909 – like music services today – paid a below-market rate resulting from governmentally-imposed price controls.

60. These price controls continue to suppress the rates that songwriters and publishers are paid for the use of their property. Songwriters and publishers are essentially playing a game that favors the status quo. The statute instructs that the compulsory rate is to be determined in a manner that achieves certain policy objectives. *See* 17 U.S.C, § 801(b). But because the rates themselves cannot be derived from the Section 801(b)(1) policy factors, the CRJs have recognized that a determination of a reasonable mechanical rate should "begin with a consideration and analysis of benchmarks and testimony submitted by the parties."[22] *See also* 17 U.S.C. § 115(c)(3)(D) ("In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the Copyright Royalty Judges may consider rates and terms under voluntary license agreements. . . ."). The problem is that the royalty rate contained in virtually any agreement that is made by a music publisher or songwriter with a licensee for rights subject to the compulsory license will be depressed by the availability of the compulsory license. Parties rarely will pay more than they need to pay and so, unless the licensee requires other non-compulsory rights or has other business reasons for paying more than the law may currently require, the statutory rate often acts as a ceiling on what can be achieved in direct negotiations undertaken in the shadow of the compulsory license.

61. Such a shadow is long, and influences not only direct negotiations between copyright owners and licensees, but also negotiations between and among industry stakeholders made in the context of the Phonorecords rate-setting proceedings. The existing rates, which in

[21] *Id.* at 22-23.

[22] SDARS I Final Rule, 73 Fed. Reg. at 4084.

this context were agreed in a negotiation made nearly ten years ago when the streaming industry was in its infancy (*see* Section IV.C, *infra*), are themselves put forth as a "benchmark," supported by direct deals made at that very same statutory rate. The result is something of a closed loop making it very difficult for copyright owners to meaningfully change the existing statutory rates either in negotiations or in rate proceedings.

62. The Copyright Office has recognized on numerous occasions, including most recently in its comprehensive 2015 Music Marketplace report, that the compulsory license is obsolete and that mechanical licensing should be left to the free market. In that report, the Office, after taking submissions from all interested parties, concluded that the Section 115 compulsory license "should become the basis of a more flexible collective licensing system" that would permit individual music publishers "to opt out" of the compulsory license.[23] As envisioned by the Copyright Office "the mechanical opt-out right would extend to interactive streaming rights and downloading activities – uses where sound recording owners operate in the free market . . . ."[24]

63. I strongly agree with the Copyright Office's conclusions. Between the compulsory mechanical license and the antitrust consent decrees requiring that royalty rates for performance licenses issued by ASCAP and BMI be set by a federal "rate court," over 70% of a

[23] U.S. Copyright Office, Copyright and the Music Marketplace, at 5 (Feb. 2015).

[24] *Id.*; *see also* Peters Statement ("While the Section 115 statutory license may have served the public interest well with respect to a nascent music reproduction industry after the turn of the century and for much of the 1900's, it is no longer necessary and unjustifiably abrogates copyright owners' rights today. . . . .[T]he Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration.").

songwriter's income comes from rates set by the government, making songwriting one of the most heavily regulated professions in the United States.[25]

64. The CRJs should recognize and factor into their setting of reasonable rates that provide copyright owners a fair return for the use of their works that the existence of the statutory license has served to unfairly (and unnecessarily) abrogate their rights and depress the rates that they would otherwise be able to obtain in a free market.

B. An Increase In The Statutory Rate Is Needed To Afford Songwriters and Publishers a Fair Return for Their Work and the Value They Provide to Digital Services and Their Customers

65. Interactive streaming and limited download services provide consumers with something of incredible value that they never had before: instant access to virtually every song ever recorded, on a device that can be carried in your pocket (or on virtually any other computer, music player or speaker). Music publishers and their songwriters provide an essential element of this value: their catalogs of songs. Without these songs there would be no recordings, much less interactive music streaming or download services.

66. Songs have value, and that value should be recognized under the directives of Section 801(b). Songs cost money (and time) to create. As described in the statements of the songwriter witnesses, songwriters labor long and hard to create songs to which people will want to listen And as detailed in the statements of the music publisher witnesses, publishers invest substantial amounts of money to, among other things: discover songwriters; support songwriters so that they can write full-time; provide creative support to songwriters so they can write better songs; market, promote and license those songs; and track, collect and process the income earned from those songs. None of this happens cheaply or easily. Publishers and songwriters invest the

[25] CO Ex. 1.1.

time and money needed to create these songs because they expect that they will be able to receive at least a fair return for their efforts. That expectation is becoming more and more difficult to meet in the digital streaming environment. Nonetheless the creative contributions and capital investment of songwriters and music publishers have played an essential role in the expansion of the new market represented by the rapid, unparalleled growth of interactive streaming and limited downloading. *See* 17 U.S.C. § 801(b)(1)(C).

67. There is consensus within the industry that there is more music being accessed from more sources than at any time in history, on a scale of use that past generations, reliant principally on physical media for the delivery of music, could not possibly have envisioned. While one would think the proliferation of services that can place in one's pocket virtually every song ever written would generate greater revenues for the songwriters and publishers who create all of those songs, that has not been the case.

68. A large volume of these countless billions of uses directly implicate the mechanical right of reproduction and distribution and as such require the payment of mechanical royalties that are at issue in this Proceeding. 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.

69. In 2013, for instance, mechanical revenue accounted for [redacted] of music publisher income; in 2014 it [redacted]; and in 2015 it [redacted] of music publisher revenue.[26] To my understanding, this was a continuation of a trend that has developed

[26] CO Ex. 1.2; CO Ex. 1.3; CO Ex. 1.4.

over the last statutory rate period. It's hardly a coincidence that such decline coincided with the rise in popularity of interactive streaming services.

70. Total interactive streaming (by number of streams) increased by 54% from 2013 to 2014, and by an additional 92.8% from 2014 to 2015.[27] At the same time, the sale of digital albums decreased by 9.4%, and digital track sales decreased by 12.5% from 2013 to 2014.[28] Digital album sales and digital track sales decreased by an additional 2.9% and 12.5%, respectively, from 2014 to 2015.[29] According to revenue information collected by the NMPA from its members on an annual basis, the total U.S. mechanical revenues for the songwriting and publishing industry decreased by 11.6% from 2013 to 2014, and by another 2.6% from 2014 to 2015.[30]

71. On a personal level, as President of the principal U.S. trade association representing the interests of songwriters and music publishers, I constantly hear from songwriters that, as a result of the shift to streaming and the concomitant low mechanical royalty payments from the streaming services, they cannot make a fair wage today.

72. At our annual meeting this year, we presented Sting with the NMPA's Songwriter Icon award. Sting reminisced about writing songs in a barely habitable apartment forty years ago and not knowing if anybody else would ever hear them. Now, he said there is "no greater feeling" than when he hears an audience sing one of his songs back to him when he is

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[27] *See* 2014 Nielsen Music U.S. Report at 1, 8 (2015), *available at* http://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/Soundscan/nielsen-2014-year-end-music-report-us.pdf [hereinafter 2014 Nielsen Report]; 2015 Nielsen Music U.S. Report at 8 (2016), *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2016-reports/2015-year-end-music-report.pdf.pdf [hereinafter 2015 Nielsen Report].

[28] 2014 Nielsen Report at 2.

[29] 2015 Nielsen Report at 7, 8.

[30] CO Ex. 1.1.

performing. Songwriting "is important work," he said. But, he added, he was grateful that he could make a living from his craft. "The same is not true for young songwriters starting out today," he lamented. "They can't make a fair wage."

73. Sting's sentiments have been echoed by many songwriters, some to me privately, and others in public forums, for those with access to the media.

74. Taylor Swift, for example, has been perhaps the most famous defender of songwriters against the devaluation of music by the streaming services. In June of 2015, when Taylor learned that Apple Music was planning to offer a free three-month trial to anyone who signed up for the service – during which Apple would pay no royalties to songwriters or artists – she wrote an "open letter" to the Silicon Valley giant critical of the policy. "This is not about me," she wrote. "Thankfully I am on my fifth album and can support myself, my band, crew, and entire management team by playing live shows. This is about the new artist or band that has just released their first single and will not be paid for its success. This is about the young songwriter who just got his or her first cut and thought that the royalties from that would get them out of debt. This is about the producer who works tirelessly to innovate and create, just like the innovators and creators at Apple are pioneering in their field . . . but will not get paid for a quarter of a year's worth of plays on his or her songs."[31] As a result of Taylor's letter, Apple reversed its policy on not paying royalties for free trials.[32]

75. Taylor also took issue with Spotify's so-called "ad-supported," free streaming tier. Spotify streams billions of tracks on its ad-supported tier, but pays miniscule royalties

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[31] To Apple, Love Taylor (June 21, 2015), http://taylorswift.tumblr.com/post/122071902085/to-apple-love-taylor.

[32] Shirley Halperin, *Apple Music Backs Down: Will Pay Labels During Free Trial After Taylor Swift Letter*, The Hollywood Reporter (June 21, 2015), http://www.hollywoodreporter.com/news/apple-music-backs-down-will-804050.

based on a percentage of its advertising revenues of which it is incentivized to earn very little. And that's because Spotify is more concerned with building a user base to bolster its enterprise value (currently sitting at over $8 billion) for its highly-publicized contemplated IPO.[33] In other words, by being forced to supply Spotify with content under the statutory license, songwriters and music publishers are subsidizing gigantic paydays for Spotify's current owners once Spotify's stock is publicly traded on the free market.

76. Taylor Swift was not willing to tolerate Spotify's business model. Luckily for her, she is a recording artist in addition to being a songwriter. As a recording artist whose sound recording rights are not subject to the compulsory mechanical license, she has the ability to pull her works from Spotify, which she did. She said that she pulled her music from Spotify because "there should be an inherent value placed on art," which she didn't see happening on Spotify. She said that while some services require payment for a premium package to access her albums, Spotify does not. In other words, any user can access the same vast catalog of songs on Spotify's free tier as on its or any other Digital Service's paid subscription tier.

77. Aloe Blacc, is a songwriter and musician whose songs include "Wake Me Up" (co-written with Avicii, and which reached Number 1 in over 103 countries), "I Need A Dollar" (which was used as the theme song to the HBO series "How To Make It In America") and "The Man" (which was featured as background music in Beats by Dr. Dre TV commercials). In a recent *Wired* magazine editorial, Aloe eloquently summarized the problems facing songwriters in a marketplace dominated by interactive streaming services:

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[33] Madeleine Johnson, *Will Spotify Stream Into an IPO in 2017?*, NASDAQ.com (Sept. 23, 2016), http://www.nasdaq.com/article/will-spotify-stream-into-an-ipo-in-2017-cm683941.

> The abhorrently low rates songwriters are paid by streaming services – enabled by outdated federal regulations – are yet another indication our work is being devalued in today's marketplace.
> . . .
> The reality is that people are consuming music in a completely different way today. Purchasing and downloading songs have given way to streaming, and as a result, the revenue streams that songwriters relied upon for years to make a living are now drying up.
>
> But the irony of the situation is that our music is actually being enjoyed by more people in more places and played across more platforms (largely now digital) than ever before. Our work clearly does have value, of course, or else it would not be in such high demand. So why aren't songwriters compensated more fairly in the marketplace?
>
> I, for one, can no longer stand on the sidelines and watch as the vast majority of songwriters are left out in the cold, while streaming company executives build their fortunes in stock options and bonuses on the back of our hard work.
> . . .
> I will do my part to try to convince people that the music they love won't exist without us, and that we, as songwriters, cannot continue to exist like this. And you can do your part to protect the music you love by buying albums and urging streaming services to uphold the value of songwriting. After all, if songwriters cannot afford to make music, who will?[34]

78. In sum, higher rates are needed to provide a fair return for the creative work required to produce new music. *See* 17 U.S.C. § 801(b)(1)(B). In the years since the current rates were established, the Copyright Owners have continued to work hard to create high-quality new music, which is the foundation of the value provided by the streaming services to their users. Music publishers have continued to make a tremendous effort to find, develop, support and promote songwriters. The results of these creative contributions have been consistently innovative, exciting and attractive to music consumers. Yet the Copyright Owners' share of revenue derived from mechanical royalties no longer matches the effort required to earn mechanical royalties.

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[34] Aloe Blacc, *Streaming Services Need To Pay Songwriters Fairly*, Wired (Nov. 5, 2014), https://www.wired.com/2014/11/aloe-blacc-pay-songwriters/.

79. A rate increase would also better reflect the relative roles of the Copyright Owners, the Digital Services and the record labels in making the creative product available. As I have described, and other witnesses will relate in detail, the effort songwriters and music publishers must make to produce hit songs has not changed. On the other hand, the costs of the record labels have been declining. They no longer incur costs for physical distribution where the Digital Services are the distributors. They also no longer incur packaging costs in these scenarios. And their costs and investments in finding and developing recording artists are hardly more significant than the costs and investments that publishers make in finding and developing songwriters, as detailed in the statements of the music publisher witnesses. In fact, a recent article in Music Business Worldwide reported the results of a study that revealed that, in the UK, record labels spent £178 million on A&R in 2014, while music publishers spent £162 million.[35] Yet, as it has also been publicly reported, the Digital Services generally pay the record labels between 55% and 60% of their revenues, and songwriters and publishers a fraction of that amount.[36] There is no justification for the contributions that the Copyright Owners and their songs make to these services to be valued at such a small fraction of the labels' contributions.

80. The Digital Services, for their part, keep approximately 30% of revenues for themselves. But in the music ecosystem, Digital Services are merely distributors. They are, essentially, delivery services, or in the vernacular of other content providers, "dumb pipes." In the physical world, record distributors are paid significantly less than 30% of sales. Services that deliver other products are also paid far less. For example, food delivery service GrubHub is paid

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[35] Tim Ingham, *Major Label A&R Spend Has Shot Up In The UK. So Why Are Old Artists Dominating This Week's Chart*, Music Business Worldwide (Nov. 9, 2015), http://www.musicbusinessworldwide.com/major-label-ar-spend-has-shot-up-in-the-uk/.

[36] Tim Ingham, *Spotify Is Out Of Contract With All Three Major Labels – And Wants To Pay Them Less*, Music Business Worldwide (Aug. 22, 2016), http://www.musicbusinessworldwide.com/spotify-contract-three-major-labels-wants-pay-less/.

13-15% of the order price for the delivery.[37] There is no justification for so devaluing the relative contribution that the Copyright Owners and their songs make to these Digital Services.

C. An Increase in the Current Rate Will Still Afford the Digital Services More Than a Fair Income, and Will Not Be Disruptive

1. The Current Rate and Rate Structure Were Negotiated When the Streaming Industry Was Nascent and Without Information About the Business Models of the Digital Services

81. When the current statutory rates and rate structure were negotiated, interactive streaming was in an experimental phase. No one knew who would be operating streaming services (it was thought that it might be the labels) or what their business models might be.

82. To understand how the current statutory rate and rate structure came into being, one needs to take a brief look back at the history of the Section 115 rate proceedings and settlement negotiations.

83. In 1980, the Copyright Royalty Tribunal ("CRT") convened the first proceeding to determine rates for the Section 115 license.[38] The Recording Industry Association of America ("RIAA") represented the interests of record labels and the NMPA represented the interests of music publishers and songwriters in that proceeding, which resulted in the statutory license rate increasing from 2.75¢ to 4¢ per phonorecord with interim adjustments over the following 7-year period.[39]

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[37] *GrubHub: A Proper Valuation*, Seeking Alpha (Apr. 11, 2016), http://seekingalpha.com/article/3964501-grubhub-proper-valuation; Zachary M. Seward, *GrubHub and Seamless Take a 13.5% Cut of Their Average Delivery Order*, Quartz (Mar. 1, 2014), http://qz.com/182961/grubhub-and-seamless-take-a-13-5-cut-of-their-average-delivery-order/.

[38] *See* Final Rule, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding ("Phonorecords I Final Rule"), Docket No. 2005-3 CRB DPRA, 74 Fed. Reg. 4510, 4513 (Jan. 28, 2009).

[39] *Id.*

84. In 1987, the CRT was to convene a subsequent proceeding to adjust 115 rates.[40] The NMPA, however, was able to negotiate a settlement with RIAA (still the only entity representing the interests of licensees at that time) avoiding the need for a proceeding. The 1987 CRT settlement raised the rate to 5.25¢ per phonorecord with a schedule of rate increases over the next ten years.[41]

85. In 1993, Congress abolished the CRT and replaced it with a similar tribunal, the Copyright Arbitration Royalty Panel ("CARP"). Copyright Royalty Tribunal Reform Act of 1993, H.R. 2840, 103d Cong. (1993).

86. In 1995, in response to the rapid growth of the use of music in digital formats (i.e., via online, webcast and subscription satellite uses), Congress passed the Digital Performance in Sound Recordings Act (the "DPRA"), Public Law No. 104-39, 109 Stat. 336, which created a digital performance right for sound recordings subject to the separate, newly created compulsory license at Section 114 of the Copyright Act. Significantly as well, the DPRA expanded the Section 115 compulsory license to cover "digital phonorecord deliveries" ("DPDs"), which it defined in relevant part as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording . . ." 17 U.S.C. § 115(d).[42]

87. With the expiration of the 1987 CRT settlement, the first Section 115 proceeding under the CARP regime was set to begin in 1997. This would have been the first proceeding to

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[40] *Id.* at 4514.

[41] *Id.*

[42] Non-interactive streaming transmissions subject to the Section 114 compulsory license were expressly carved out of the Section 115 compulsory license. *See* 17 U.S.C. § 115(d).

determine rates for DPDs (then, predominantly permanent digital downloads). Again, however, the proceeding was obviated by a settlement negotiated between RIAA on behalf of record labels and the NMPA on behalf of music publishers. The 1997 CARP settlement set the rate for physical phonorecords at 7.1¢ per track as of January 1, 1998, with rate increases every two years over the next ten-year period, leading to a rate of 9.1¢ per track as of January 1, 2006. The rates adopted for DPDs for the 10-year period were to be the same as those for physical phonorecords.

88. A few years after the 1997 CARP settlement, the technology to deliver interactive streams and limited downloads became sufficiently developed. At the time, the record labels expressed a desire to deliver phonorecords on either a subscription or ad-supported basis via this emerging technology. In fact, the major record labels formed two joint ventures to effectuate these streaming business models: Pressplay and MusicNet.[43]

89. In October 2001, the NMPA, along with HFA, entered into a license agreement with RIAA covering all reproduction rights for the delivery of on-demand streams and limited downloads on the new subscription services. The 2001 agreement did not specify a royalty rate, but rather provided that a license rate would be set in the future.

90. Subsequently Congress passed the Copyright Royalty and Distribution Reform Act of 2003, Public Law No. 108-419, 118 Stat. 2341, which effectively replaced the CARP regime with the Copyright Royalty Board, which was deputized to determine rates and terms for the Section 115 compulsory license as the CRJs are, of course, doing in these proceedings.

91. In the interim, the market for subscription music streaming services stalled out. Failing to meet the expectations of the record labels, the record companies sold their stakes in

[43] *See* Al Kohn & Bob Kohn, *Kohn on Music Licensing* 757 (4th ed. 2010).

Pressplay and MediaNet.[44] Several technology companies instead began to enter the interactive streaming and limited download market. Around the same time, a coalition of emerging technology companies formed the Digital Media Association ("DiMA"). There remained significant questions, however, as to how these technology companies would monetize subscription music services.

92. In January 2006, the CRB issued a notice for petitions to participate in the *Phonorecords I* proceeding.[45]

93. Following an unsuccessful negotiation period, the CRB accepted written direct statements from the following groups: RIAA; Copyright Owners (a joint group of participants led by the NMPA); and DiMA (joined by its member companies America Online, Inc., Apple Computer, Inc., MusicNet, Inc., RealNetworks, Inc., Napster, LLC, and Yahoo! Inc.[46]). Significantly, none of the streaming services represented in the current Section 115 proceeding were even in existence at the time of *Phonorecords I.*[47] None of the market intelligence, information and data about the functionality of the interactive streaming market or the business models of the Digital Services currently available to the participants in this Proceeding was available to the parties in *Phonorecords I*.

94. The *Phonorecords I* proceedings were contentious and costly. In addition to written direct and rebuttal statements, the record in the case consists of over 8,000 pages of

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[44] *See id.* at 760.

[45] *See* Phonorecords I Final Rule, 74 Fed. Reg. 4510, 4510 (citing 71 Fed. Reg. 1454).

[46] Napster and Yahoo later withdrew from *Phonorecords I. Id.* at 4510 n.2.

[47] With respect to the streaming services represented in the current proceeding, Spotify launched in the United States in 2011; the Apple Music streaming service launched in 2015; Google Play launched in 2013; Amazon launched its Prime Music streaming service in 2014 and Pandora is presently in the process of entering the on-demand streaming market, having been a solely non-interactive streaming service licensable under Section 114 of the Copyright Act for many years.

transcripts, over 140 admitted exhibits and over 340 pleadings, motions and orders on the docket.[48] After a prolonged discovery period, the CRB heard live testimony from January 28, 2008 to February 26, 2008 and rebuttal testimony from May 6 to May 21, 2008.[49]

95. On May 15, 2008, towards the end of the hearing, the parties, acting through RIAA, NMPA and DiMA, informed the CRB that they had reached a partial settlement of the proceeding by agreeing to rates and terms for limited downloads and interactive streaming.[50] All parties were equally motivated by uncertainty to reach a settlement. The interactive streaming market was untested and the outcome of a CRB proceeding to determine rates and terms for completely new service offerings was no more certain. The parties' settlement led to the creation of the existing "Subpart B" regulations. *See* 37 CFR §§ 385.10 to 385.17.

96. The parties left the determination of rates and terms for physical configurations, permanent downloads and ringtones to the discretion of the CRB. By some estimates the parties spent over $17 million in litigation. The end result: the rate for physical reproductions and downloads was set at 9.1¢, which was the rate in effect at the start of the proceedings under the schedule set by the CARP in 1997.[51] The CRB also enacted a rate of 24¢ per ringtone and provided for a late fee of 1.5% a month for any payments received after the statutory deadline.[52] These provisions are all captured in the "Subpart A" portion of the regulations corresponding to Section 115.[53] 37 CFR §§ 385.1 to 385.4.

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[48] *Id.* at 4511.

[49] *Id.* at 4510-11.

[50] *Id.* at 4511.

[51] *Id.* at 4510, 4514.

[52] *Id.* at 4510.

[53] As noted above, because the Subpart A regulations were enacted by the CRB, and the Subpart B regulations were the product of settlement, there is a drafting error in the placement of the late

97. The final determination in *Phonorecords I* was published in the Federal Register in January 2009.[54] By and large it is still how rates for physical product, downloads and interactive streaming services operating under the Section 115 compulsory license are determined today.

98. The CRB next called for petitions to participate in proceedings to set the compulsory license in January 2011.[55] The tremendous expense of the *Phonorecords I* proceedings and the result – which effectively maintained the status quo in terms of physical and download rates – was not far from the minds of the participants entering *Phonorecords II*. Thus, the parties had little appetite for litigation in *Phonorecords II.*

99. The parties also, again, had little real data to rely upon. At that time, the interactive streaming market was really only beginning to take shape. Spotify would not launch in the United States until later that year, followed by Google Play Music. The other participants representing the interests of Digital Services in the current proceedings would all launch their interactive streaming services much later (one has still not yet launched).

100. For these reasons, the parties to *Phonorecords II* came prepared to quickly negotiate a settlement and were able to do so in the proceedings without need to file a written direct statement, take any discovery or engage in any hearings.

101. On April 10, 2012, the parties to *Phonorecords II* filed a motion to adopt a settlement, which essentially encompassed a roll-forward of the existing rates and terms in

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fee provisions in Subpart A. The Copyright Owners have always understood the late free provision at 35 C.F.R. § 385.4 to apply to all late payments under the Section 115 statutory license.

[54] Phonorecords I Final Rule, 74 Fed. Reg. at 4510-36.

[55] Final Rule, Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords ("Phonorecords II Final Rule"), Docket No. 2011-3 CRB Phonorecords II, 78 Fed. Reg. 67938, 67939 (Nov. 13, 2013).

Subparts A and B.[56] In addition, the parties provided for the addition of a new set of categories which they described as follows:

> an agreement has been reached on rates and terms for certain new categories of services, including mixed service bundles, paid locker services, purchased content locker services, limited offerings and music bundles that either have been developed since the last proceeding or are likely to be launched over the term covered by this one.[57]

These new categories were embodied in a new Subpart C of the regulations. 37 CFR §§ 385.20 to 385.26.

102. A final order settling the *Phonorecords II* proceedings with the roll forward of the Subpart A & B rates and terms with the addition of the new Subpart C rates and terms was published in the Federal Register in 2013.[58] These are the rates and terms that currently comprise the Section 115 statutory license. Though the Subpart C regulations were added later in time, it is the Subpart B regulations, where there has been explosive growth over the last five years, that are of the greatest interest to the Copyright Owners in these Proceedings.

2. The Copyright Owners' Proposed Rates and Terms Better Reflect the Realities of the Current Market Than the Existing Rates and Terms

103. At the time and in the context of the *Phonorecords I* and *II* settlements, when the streaming services were experimental ventures, the then-newly implemented rates and rate structure might have made sense. But the streaming services are no longer experimental ventures. They are mature businesses operated by huge technology companies. And there can be no doubt that these companies can afford to pay more to the copyright owners who provide

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[56] *Id.*

[57] Motion to Adopt Settlement dated Apr. 10, 2012, *Matter of Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, Docket No. 2011-3 CRB Phonorecords II.

[58] Phonorecords II Final Rule, 78 Fed. Reg. 67938.

them with all of the music. In fact, I understand from publicly available data that many of these companies have already paid effective per-play rates that are at the same or at even a higher level than the per-play rate proposed by the Copyright Owners, and they are still highly profitable.[59] The Copyright Owners' proposal would, therefore, still afford the Digital Services a more than fair income. *See* 17 U.S.C. § 801(b)(1)(B).

104. In fact, while these companies often try to paint music publishers as the power-wielding giants, the reality is that the entire publishing industry in the United States is worth around $2.5 billion annually.[60] While that number in the abstract may seem large, size is, of course, relative. Spotify **alone** was recently valued at over $8 billion.[61] Pandora's market cap sits at about $3 billion.[62] Apple, of course, is not only one of the biggest tech companies in the world, it is (as of May 2016, as reported by Forbes) the 8th largest company in the world and the 4th largest in the United States, with revenues in the past year of $233 billion, profits of $53 billion, assets of $239 billion, and a market cap of $586 billion.[63] Alphabet, Inc., a newly founded holding group for Google, has a market cap of nearly $560 billion and had revenues in

[59] Analysis of Music Streaming Services for 2014, Audiam (2015), *available at* https://docs.google.com/file/d/0BwsIBPX1QCEWTTdqaDNPQnp3UDQ/.

[60] CO Ex. 1.1.

[61] Madeleine Johnson, *Will Spotify Stream Into an IPO in 2017?*, NASDAQ.com (Sept. 23, 2016), http://www.nasdaq.com/article/will-spotify-stream-into-an-ipo-in-2017-cm683941.

[62] Pandora, Bloomberg Markets, http://www.bloomberg.com/quote/P:US (last visited Oct. 18, 2016).

[63] Samantha Sharf, *The World's Largest Tech Companies 2016: Apple Bests Samsung, Microsoft And Alphabet*, Forbes (May 26, 2016), http://www.forbes.com/sites/samanthasharf/2016/05/26/the-worlds-largest-tech-companies-2016-apple-bests-samsung-microsoft-and-alphabet.

the past year of around $75 billion, with profits of over $16 billion.[64] Amazon's revenues topped $107 billion, with over $65 billion in assets, $596 million in profits, and a market cap of $389 billion.[65]

105. Perhaps the best evidence that the interactive streaming industry is a lucrative one – for the streamers – is that some of the largest companies in the world have been eager to either enter it, or invest in it. In May 2014, Apple paid $3 billion to acquire Beats, which was operating an unsuccessful interactive streaming service, to facilitate Apple's entry to the market.[66] In December 2015, Pandora paid $75 million in cash to buy the streaming technology of the bankrupt interactive streaming service Rdio, to help it diversify into the interactive space.[67] In March 2016, Spotify raised $1 billion in convertible debt from investors.[68] Last month, iHeartMedia Inc. (formerly Clear Channel), the biggest U.S. radio broadcaster and the creator of iHeartRadio, announced that it too will be launching a subscription interactive streaming service

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[64] Alphabet Inc., Bloomberg Markets, http://www.bloomberg.com/quote/GOOG:US (last visited Oct. 18, 2016); Alphabet Inc., Annual Report at 21 (Form 10-K for 2015), *available at* https://www.sec.gov/Archives/edgar/data/1288776/000165204416000012/goog10-k2015.htm.

[65] Amazon.com, Inc., Annual Report at 17, 39 (Form 10-K for 2015), *available at* https://www.sec.gov/Archives/edgar/data/1018724/000101872416000172/amzn-20151231x10k.htm; Amazon.com Inc., Bloomberg Markets, http://www.bloomberg.com/quote/AMZN:US (last visited Oct. 18, 2016).

[66] Apple to Acquire Beats Music & Beats Electronics, Apple Press Info (May 28, 2014), https://www.apple.com/pr/library/2014/05/28Apple-to-Acquire-Beats-Music-Beats-Electronics.html.

[67] Lillian Rizzo, *Pandora Wins Approval to Buy Rdio for $75 Million*, The Wall Street Journal (Dec. 23, 2015), http://www.wsj.com/articles/pandora-wins-approval-to-buy-rdio-for-75-million-1450886123.

[68] Douglas Macmillan et al., *Spotify Raises $1 Billion in Debt Financing*, The Wall Street Journal (Mar. 29, 2016), http://www.wsj.com/articles/spotify-raises-1-billion-in-debt-financing-1459284467.

this January.[69] And there have been numerous rumors that Spotify may soon purchase SoundCloud, and that Facebook may purchase Spotify.[70]

106. These technology companies are generating a lot of money for themselves from the songs provided by the publishers and their songwriters. Their profitability or their massive enterprise value growth (which will eventually translate into profitability at a time of their own choosing) is demonstrated not only by their public financial statements, but also by the fact that new entrants are eager to get into the game. For these reasons, it seems equally clear that the rates proposed by the Copyright Owners would not significantly disrupt the interactive streaming industry. *See* 17 U.S.C. § 801(b)(1)(D). Mechanical license fees are a relatively minor fraction of the streaming companies' costs, and the rates we propose can no doubt be borne by the services, particularly since those works are the essential inventory input for their services. If anything will disrupt the industry, as indicated in the witness statements of the finance executives employed by the music publishers, it will be the price slashing and deep discounting that each of these services has begun to undertake in order to seize market share from each other.

D. If the Current Rates Are Not Increased, There Will Be Fewer Songs Created

107. Below market royalties impact more than just the pocketbooks of the songwriters and publishers. They will also lead inevitably to fewer songs being created because fewer new writers will obtain publishing deals. As the witness statements of the Copyright Owners'

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[69] *iHeartMedia Revolutionizes Live Radio and Introduces on Demand with New Services 'iHeartRadio Plus' and 'iHeartRadio All Access,'* Business Wire (Sept. 23, 2016), http://www.businesswire.com/news/home/20160923005207/en/iHeartMedia-Revolutionizes-Live-Radio-Introduces-Demand-Services.

[70] Matthew Garrahan, *Spotify In Advanced Talks To Buy SoundCloud*, Financial Times (Sept. 28, 2016), https://www.ft.com/content/f301392f-069c-32f0-8087-18f3377e0e10; Jill Bederoff, *One Of Spotify's Owners Says It's NOT Unlikely That Facebook Buys The Company*, Business Insider Nordic (Sept. 16, 2016), http://nordic.businessinsider.com/gp-bullhound-facebook-might-buy-spotify-before-the-ipo-2016-9/.

songwriter and publisher witnesses confirm, below market royalty rates lead to music publishers having less capital to invest in new songwriters, forcing them to reduce the number of songwriters they can sign, and songwriters, in turn, will have less incentive and less financial ability to invest the time necessary to create great music. If a creator does not believe she will recoup her financial and time resource investment, she will not be incentivized to create new works.

108. In sum, the current statutory rate and rate structure results in the devaluing of songs by the Digital Services. If this devaluation continues, there will be fewer professional songwriters writing songs and even those that can continue to write will find less and less economic incentive to do so. Publishers will not be able to continue to furnish the same level of support to songwriters and will end up signing fewer songwriters, depriving others of the support they need to perhaps create the "evergreen" songs of the future. Better rates, more attuned to the realities of the now mature streaming marketplace, are needed to support the music industry eco-system that has worked so well for over a century, where music publishers support the songwriters of the future through the income generated by their existing catalogues of songs. If that support erodes because the income being generated diminishes, at least some of the unknown songwriters of today will never become the Yip Harburg or Taylor Swift or Leonard Bernstein or Nobel Laureate Bob Dylan of tomorrow because they will be unable to support themselves by writing and will have to turn to other work to pay their bills. The public as well as the Digital Services will be the poorer for that loss. More realistic rates are needed to allow music publishers to continue to provide a strong support system for their current songwriters and expand their rosters to develop the careers of more new songwriters. Adopting the Copyright Owners' proposed rates and terms will, in my view, go a long way towards assuring, at least in

the next years, that there is no significant diminution in the number or quality of works that are created, furthering the statutory objective set forth in Section 801(b)(1)(A).

V. Conclusion

109. The current rates are neither reasonable, fair nor negotiated with the relevant information concerning the business models of the Digital Services. They are insufficient to provide American songwriters and music publishers with adequate compensation. An increased mechanical royalty rate consistent with the Copyright Owners' proposal will, by contrast, fairly compensate the Copyright Owners and help ensure the continued creation of new songs: the heart and soul of American musical culture and the American music industry.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 28, 2016

David Israelite

CO Ex. 1.1

RESTRICTED DOCUMENT

Subject to Protective Order in
Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)

CO Ex. 1.2

RESTRICTED DOCUMENT

Subject to Protective Order in
Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)

CO Ex. 1.3

RESTRICTED DOCUMENT

Subject to Protective Order in
Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)

CO Ex. 1.4

RESTRICTED DOCUMENT

Subject to Protective Order in
Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

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

WITNESS STATEMENT OF BART HERBISON

PUBLIC VERSION

PUBLIC VERSION

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

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

WITNESS STATEMENT OF BART HERBISON

1. My name is Bart Herbison. I have served as the Executive Director of the Nashville Songwriters Association International ("NSAI") since 1997. I have also served on the boards of: Leadership Music; Nashville Mayor's Music Council; Nashville State Community College Foundation; the national musicunited.net campaign; the Nashville Chamber of Commerce Government Relations Advisory Board; and Tennessee Governor's Board for Economic Growth and Development.

2. I am a Tennessee native, born and raised in Paris, Tennessee. Before entering the music industry, I worked in politics – first as a staff member for former Tennessee Governor Ned McWherter, and for ten years after that, as a staff member of U.S. Rep. Bob Clement (D-Nashville).

3. I respectfully submit this statement to the Copyright Royalty Board in support of the rate proposal of NSAI and the National Music Publishers' Association ("NMPA" and together with NSAI "Copyright Owners"). Based on my many years of experience, I hope to provide the Judges with a window into American songwriting in the digital era and explain the negative effects on the songwriting profession brought about by the combination of recent technological changes, a below-market compulsory license, and the outdated consent decrees

that the United States Department of Justice imposed on ASCAP and BMI in 1941. The songwriting profession is in a moment of great instability.

4. I understand that this Board cannot repeal the Section 115 compulsory mechanical license, or dissolve the ASCAP and BMI consent decrees. However, to determine the mechanical rate and structure for interactive streaming and limited downloads, it is imperative to consider that typically over seventy percent of songwriters' income is regulated by the federal government, and that government regulation has led to deeply depressed mechanical rates and public performance royalties that are not even close to market rates. In my view, a compulsory mechanical license rate that deviates from the rate that songwriters and publishers could negotiate in a free market is neither reasonable nor fair. Songwriters need substantially higher rates and an improved rate structure for interactive streaming to make careers in songwriting once again viable.

5. Soon, interactive streaming will be the primary source of mechanical income for songwriters. Compulsory mechanical rates should compensate songwriters fairly no matter how their songs are distributed to the public. Songwriters should not be worse off depending on whether their songs are streamed on-demand, downloaded or sold in physical albums. But under the existing rate structure for interactive streaming, songwriters are dramatically worse off when their songs are streamed than when their songs are purchased.

6. Songwriters are paid an effective rate of micro-pennies per stream and 9.1 cents per download of an album track. The inequity is compounded as interactive streaming is cannibalizing physical sales and downloads. There is no justification for this enormous discrepancy.

7. I am told that this Board is required to consider whether the rate and rate structure for interactive streaming sought by the songwriters and publishers will cause disruption to the interactive streaming industry, represented in these Proceedings by some of the largest companies in the world. It seems apparent the answer is "No." On the other hand, the current rates have already disrupted the songwriting and music publishing industries. If the statutory mechanical rate structure for interactive streaming does not change to provide songwriters fair compensation for their contributions, songwriters will stop writing songs. The losses not just to the songwriting community but to our society will be immeasurable.

I. NSAI

8. NSAI was established in 1967 as an advocacy group for the American songwriting profession. NSAI's reach has grown significantly since that time. Today, we are the largest not-for-profit songwriter trade association in the world, with approximately 5,000 members and nearly 150 local chapters. Our mission is to advocate for songwriters' legal and economic interests and educate a new generation of American songwriters.

9. To accomplish this mission, NSAI provides an array of services to songwriters. Some services are educational. For instance, NSAI helps songwriters improve their craft through: workshops; mentoring from experienced songwriters; feedback on songs from experienced writers and peer-to-peer review; online services for our members; regularly-held song contests and other events; pitch sessions; and in connecting aspiring professional songwriters with colleagues in the music industry. We promote songwriters' public profile by holding an annual songwriters' festival called "Tin Pan South," where hundreds of professional songwriters perform. Every year, we hold two "Song Camps" where songwriters can network and attend

songwriting lectures and workshops, and an education symposium called "Spring Training." These are just a few examples of the services we provide directly to songwriters.

10. NSAI also represents songwriters on Capitol Hill. During my nineteen years as Executive Director, I have personally met with hundreds of members of the United States Congress or members of their staff on a variety of copyright issues. I am typically accompanied by one or more aspiring or professional songwriters who inform lawmakers about the profession's challenges, and offer the Representative or Senator a live musical performance. I have found that songwriter advocacy requires a personal touch – because music is personal and the economic struggles of songwriters are, too. I have also found that Representatives and Senators, like the rest of us, enjoy taking a break from statistics and statutes to hear about the creation of a song and enjoy a performance.

11. NSAI's efforts were responsible for adoption of the "Songwriters Capital Gains Tax Equity Act," which became law in May 2006 and permits songwriters to treat the sale of their song catalogues as a capital gain. We also regularly participate in rate-setting proceedings such as this one; for instance, our past-president, Steve Bogard, advocated for songwriters during the 2006 *Phonorecords I* proceeding.

II. The American Songwriting Profession

12. Some of America's greatest performers, such as Frank Sinatra, Elvis Presley and Barbara Streisand never wrote songs. Instead, they depended on non-performing songwriters and composers for the music that shaped their careers and touched people's lives.

13. Songwriters are the backbone of the American music industry. They are akin to the farmer whose efforts sustain the entire food industry. In today's environment, however, songwriters typically reap the smallest rewards. When people enjoy a song, they don't realize

that two copyrights are involved: the songwriter's "underlying work" or "musical work" copyright and the record label-artist's "sound recording" copyright. In the interactive streaming space, the songwriter's copyright is regulated by the federal government, while the sound recording copyright operates in the free market. This has resulted in a massive disparity in the two copyrights and has crippled the songwriting profession. Importantly, the recording artist's copyright in his sound recording is *not* subject to a compulsory mechanical license, unlike the songwriter's copyright in her musical composition, which is. Non-performing songwriters are not recording artists and do not participate in free market royalties earned by sound recordings.

14. When I accepted my position as Executive Director for NSAI in 1997, the songwriting profession in Nashville and around the United States was at its peak. At that time, there were several thousand professional songwriters in Nashville who earned a living writing songs that defined American culture. With sales of albums in their peak years, revenues from mechanical licenses were robust. All of those songwriters depended on the mechanical royalties they earned on album cuts to sustain their livelihood. A big radio hit was a luxury, while mechanical royalties were the career-sustaining necessity. Today, the formerly career-sustaining album cuts produce very little income.

15. NSAI's mission in those days primarily was: to address issues like controlled composition clauses where record labels would ask songwriters for rates below the statutory compulsory mechanical rates when wanting to include more than ten songs on an album; to work with music publishers to gain greater royalties for songwriters, called "co-publishing," after a songwriter achieved success; and to work with music publishers to include reversion rights and mutual extension options in songwriter-publisher agreements. Now, in the digital era, the

Section 115 mechanical rates and structure and World War II-era consent decrees are the songwriters' major challenges.

16. Nashville has a rich musical culture and history, and its music industry has historically been located at "Music Row." Music Row is centered on two main avenues and several side streets to the southwest of downtown Nashville. It is host to many record labels, publishers, recording studios, live music venues, and more. Music Row is the creative epicenter for country music in America, but not just country. The Nashville music scene has also had tremendous influence on American rhythm and blues and has deep roots in American music that even pre-date Music Row, such as 19th Century hymnal publishing.

17. That began to change in the digital era. First came music piracy, then digital downloads, and now streaming. And as the digital distribution of music has proliferated, the size and scope of Music Row has diminished. Noticeably so. One Music Row publisher commented on the problem to a member of the United States House of Representatives by saying, "Just take a left out of the parking lot when you leave here and look at all of the damn FOR SALE signs when you leave."

18. NSAI took that cue and created one of the most impactful visual aids we've used in Congress – posters showing those FOR SALE signs, and the buildings that once housed working songwriters and other music businesses. Some of the most iconic songs, such as "Always on My Mind," "I Fall to Pieces," "Change the World," and many more, were written in those buildings which were destined to, and soon became, condos or dentist offices.

III. Challenges Facing Songwriters: Changes In Technology

19. The technological advancements in the past 20 years have, of course, transformed modern life entirely. Some of those changes have also undermined the music industry.

Engineers developed new audio coding formats for digital audio, like the mp3, which compressed song files to sizes that could be shared across the Internet. Consumer access to higher speed Internet connections grew, and peer-to-peer file sharing networks emerged. The Internet became a vehicle for "file-sharing" (or, as the songwriters called it, "file-stealing").

20. When legal music downloading picked up speed, customers started downloading singles from the iTunes Store instead of albums. Album sales still continue to drop today; mid-year sales data released by Billboard and Nielsen Music shows that album sales in the first half of 2016 were at their lowest since Nielsen Music (and formerly SoundScan) began tracking sales data in 1991.[1] In the late 90's, a top-selling album originating in Nashville, "Wide Open Spaces" by the Dixie Chicks, sold 14 million copies. Many albums went gold or platinum. But today, aside from Taylor Swift, selling even one million units is considered monumental and, in the country genre, there may be only 2 or 3 albums to achieve that status each year.

21. Following the decline in mechanical royalties, songwriters prayed for a broadcast radio single in order to generate enough royalty income to make ends meet. However, income from broadcast radio has become more elusive for the vast majority of songwriters. Record labels are releasing fewer singles so that songs stay on charts longer and there are far fewer record labels. A single in the top twenty used to pay decent royalties. But today, playlists are dramatically smaller and only the top-charting songs earn significant income. As such, even those songwriters who are fortunate enough to get singles on the radio often average less income.

[1] Ed Christman, *U.S. Record Industry Sees Album Sales Sink to Historic Lows (Again) -- But People Are Listening More Than Ever*, Billboard (July 6, 2016), *available at* www.billboard.com/articles/business/7430863/2016-soundscan-nielsen-music-mid-year-album-sales-sink-streaming-growth.

22. Next, came what songwriters call a "legal form of piracy," digital streaming. This format for legally delivering music has exploded in popularity,[2] yet songwriters earn next to nothing from digital streaming. At an event that NSAI and the NMPA held in Washington, D.C. prior to a Congressional hearing to illustrate how dire it has become, five iconic songs were performed. The five songwriters described that they had each received *less than $200 for 35 million streamed performances* of their songs. Their co-writers and publishers received similar royalties. And as consumers have flocked to digital streaming, they have moved further away from physical and digital download sales.[3]

23. As these changes took place, one narrative that gained popularity was that the music industry's struggles resulted from the industry's own failure to "adapt" to modern circumstances. That story was at times advanced opportunistically, including by those who promoted music piracy, or at least sought to excuse it. Regardless, that narrative ignores a multitude of industry innovations and misdiagnoses the source of songwriters' struggles.

24. The infrastructure for paid, legal music consumption is in place, as the widespread use of digital streaming and legal digital downloads demonstrates. While some continue to steal music online, the problem of music piracy long predates the Internet and will never disappear fully. Many millions of Americans **are** using legal services to get their music, and overall consumption of music is at an all-time high and rising.[4] The central problem is that songwriters and publishers *are not paid market rates* because compulsory licensing deprives them of the

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[2] Nielsen, *2016 U.S. Music Mid-Year Report* (Announcement) (July 7, 2016), *available at* http://www.nielsen.com/us/en/insights/reports/2016/2016-us-music-mid-year-report.html.

[3] U.S. Copyright Office, Copyright and the Music Marketplace, at 71-72 (Feb. 2015).

[4] Nielsen, *Nielsen Releases 2016 Mid-Year U.S. Music Report* (July 7, 2016), *available at* www.nielsen.com/us/en/press-room/2016/nielsen-releases-2016-mid-year-us-music-report.html.

right to negotiate mechanical rates and the established compulsory license royalty rates do not remotely reflect music's real-world value.

25. It is not just current songwriters who feel the impact of severely reduced income. I worry for the future of songwriting, too. As songwriter income decreases and becomes more concentrated in the hands of very few songwriters, American music suffers. That is already happening.

IV. Challenges Facing Songwriters: Compulsory Licenses

26. A copyright grants the creator of a work a right of a monopoly over the work he created for a set period of time. Article I, Section 8 of the United States Constitution empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." To subject that Constitutional right to compulsory licensing is inherently to limit the creator's control over his own income and the public distribution of his works. Our founding fathers chose James Madison to author that section of the Constitution knowing he would carefully craft special protections for authors, including songwriters. They knew the promise of the new nation would be its ideas and creativity. I am sure they never envisioned two copyrights emerging with the "author" having much less control than the performer of their work.

27. The compulsory license undermines the value of the songwriter's copyright. The songwriter cannot be paid a premium for the exclusive right to make mechanical reproductions of her work because she has no power to say no to a licensee. The songwriter has no control over who makes those mechanical reproductions of her work and the record labels and digital music services distributing her work never have to negotiate with her for the right to make and distribute mechanical reproductions of her song. If such negotiations do occur, the compulsory

license disadvantages the songwriter at every step, because the copyright user can walk away at any point and simply pay the songwriter the compulsory rate. That the compulsory rates are *far below* what the songwriter could obtain in a free market compounds this harm to the songwriter; it prevents them from being paid what their songs are worth.

28. If there ever were good reasons for making mechanical licenses compulsory, they no longer exist. They have not existed for a very long time. The compulsory mechanical license at Section 115 was originally created to counteract the perceived threat that copyright *users* – then the creators of player pianos and piano rolls – could gain a monopoly over the right to make mechanical reproductions of musical compositions. However, that antitrust justification is undermined by a glaring inconsistency in U.S. copyright law: musical compositions are subject to compulsory licensing for mechanical reproductions, but sound recordings are not. Why should the law guarantee the open exploitation of musical compositions by all comers, to the detriment of songwriters and music publishers, while granting performing artists an absolute right to control their recordings, to the benefit of record labels? The purported antitrust concerns must be weighed against the harm of the compulsory license to songwriters and publishers, *who create the very music we enjoy*.

29. Former U.S. Register of Copyrights, Marybeth Peters, drew the same conclusion: "The more time I have spent reviewing the positions taken by the music publishers, the record companies, the online music services, the performing rights societies and all the other interested parties, the more I have become convinced that . . . the Section 115 license should be repealed

and that licensing of rights should be left to the marketplace, most likely by means of collective administration."[5]

V. Challenges Facing Songwriters: The Consent Decrees

30. The ASCAP and BMI consent decrees were imposed many decades ago, at a time when no one could have anticipated the advent of the digital distribution of music. Seventy years after their creation, the ASCAP and BMI consent decrees continue to place unfair market restrictions on American songwriters who belong to those performing rights societies, create inefficiencies in the licensing and collections process and stifle creativity because the income songwriters can earn, particularly with respect to digital streaming, are vastly less than what songwriters could negotiate in the free market. Additionally, the U.S. Department of Justice recently concluded an investigation into the ASCAP and BMI consent decrees, by determining that the consent decrees "require full-work licensing" – meaning ASCAP and BMI would be required to license the entirety of a work even if a member or affiliate controls only a fractional share of a work.[6] While this determination has met with judicial challenge,[7] it has nonetheless already resulted in songwriters eliminating co-writing relationships with collaborators who do not belong to the same performing rights society. Now the government is not only imposing

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[5] *Music Licensing Issues: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong. 1 (2005) (statement of Marybeth Peters, Register of Copyrights).

[6] *See* Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Aug. 4, 2016), *available at* https://www.justice.gov/atr/ file/882101/download.

[7] Judge Stanton, sitting in the Southern District of New York, rejected the Department of Justice's interpretation of the BMI Consent Decree. Ed Christman, *BMI Rate-Court Judge Rules Against Dept. of Justice's '100 Percent' Licensing Decision*, Billboard (Sept. 16, 2016), http://www.billboard.com/articles/news/7511194/bmi-rate-court-judge-rules-against-dept-of-justices-100-percent-licensing.

unfair rules when it comes to establishing fair streaming royalty rates for songwriters, it is also dictating and destroying creative relationships.

VI. The Decline of the American Songwriting Industry

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. NSAI estimates that twenty years ago, there were roughly 4,000 music publishing deals available for songwriters in Nashville. Today, that number has plummeted to between 400 to 500. 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.

32. Mechanical royalties have decreased and continue to decrease at an alarming rate. Many songwriters with whom I have spoken report that these royalties have been more than halved. As streaming becomes more popular, songwriters' mechanical income continues to drop. Non-performing songwriters are threatened with extinction. At the current compulsory rates, the non-performing songwriter cannot survive. Every day great songwriters come to my office, asking if I know of any possible opportunity for a publishing deal. The unfortunate answer is, "No."

33. The huge disparity between what record companies are paid and what publishers and songwriters earn stems from the record companies' power to negotiate rates in the free market, while publishers and songwriters must labor under a compulsory royalty rate. In the

synchronization marketplace – an area where both publishers and record labels negotiate in the free market – the underlying musical work and sound recording copyrights typically share in equal value.[8]

34. Songwriters, however, cannot deny licenses to certain users or make exclusive deals with others. Record labels and recording artists are afforded such latitude, as they should be. Garth Brooks for years did not permit his albums to be sold digitally. When he first did, he made it available online only at his website, because he was unable to get Apple to agree to sell his works on a full-album basis.[9] Likewise, Taylor Swift famously pulled her entire catalog from Spotify when she released her most recent album, "1989."[10] The work of songwriters and publishers must be afforded similar value.

35. So long as the section 115 compulsory license and the ASCAP and BMI consent decrees are in place, royalties paid under these licenses must approximate those that songwriters could obtain in a truly free market. For that reason, I strongly support the rates and rate structure that the Copyright Owners have proposed in this proceeding. Rates must be changed to counteract the deterioration of the songwriting profession that I have described and set the music

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[8] U.S. Copyright Office, Copyright and the Music Marketplace, at 56 (Feb. 2015) ("A notable feature of the synch market is the relatively even balance between royalties paid for the musical works rights and those paid for the sound recording rights. Musical work and sound recording owners are generally paid equally—50/50—under individually negotiated synch licenses.").

[9] Billboard, *Garth Brooks to Finally Go Digital at "a Stupid Price"* (July 10, 2014), *available at* www.billboard.com/biz/articles/news/digital-and-mobile/6157420/garth-brooks-to-finally-go-digital-at-a-stupid-price. Garth Brooks also recently entered an exclusive streaming deal with Amazon, again a power he has by virtue of being a recording artist (not as a songwriter). Libby Hill, *Garth Brooks joins Amazon Music and ends standoff with streaming services*, Los Angeles Times (Oct. 19, 2016), http://www.latimes.com/entertainment/music/la-et-ms-garth-brooks-amazon-streaming-20161019-snap-story.html.

[10] Steve Knopper, *Taylor Swift Abruptly Pulls Entire Catalog From Spotify*, Rolling Stone (Nov. 3, 2014), www.rollingstone.com/music/news/taylor-swift-abruptly-pulls-entire-catalog-from-spotify-20141103.

industry back on the proper path. Furthermore, the inherent value of songwriters' work must be respected through the inclusion of a per-play royalty calculation as part of the overall rate structure. A songwriter who writes a song that is streamed millions of times ought to be able to put food on the table. A per-user royalty can help ensure the contributions of songwriters and publishers in providing digital music services access to song repertoires are properly valued.

36. We can better compensate songwriters without denying digital music service operators a fair rate of return on their investment in technology. All of this can happen while the music consumer is provided more music access than ever – millions of songs at their fingertips – at a fair price. I believe that the Copyright Owners' proposal moves our country toward this win-win-win outcome. The status quo, however, deprives songwriters of their fair share while advancing the pecuniary interests of already prosperous technology companies and undermining the long-term health of American music.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 28, 2016

Bart Herbison