Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 31 *XXXI*
Number 2

Article 5

2021

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Daniel Abowd
Fordham University School of Law, dabowd@law.fordham.edu

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Cover Page Footnote

J.D. Candidate, 2021 (Evening Division), Fordham University School of Law; M.A., 2014, New York University; B.A., 2011, Cornell University. Thank you to Professor Hugh Hansen, Yuan Yuan Wang, Rilana Wenske, Professor Derek Dessler, the staff and editorial board of the Fordham IPLJ, and especially to my family and wife, Naina. Disclosure: the author is employed as Vice President/General Manager at The Royalty Network, Inc., a music publisher and NMPA member. All views expressed are the author's own and do not reflect the opinions of The Royalty Network, Inc., its clients, or its affiliated songwriters.

Something Old, Something New: Forecasting Willing Buyer/Willing Seller's Impact on Songwriter Royalties

Daniel Abowd*

Mechanical royalties payable to songwriters for digital reproductions of their works on services such as Spotify and Apple Music are determined through a convoluted quasi-trial in front of an administrative body called the Copyright Royalty Board ("CRB"). The CRB is itself governed by statutory rate standards that constrain the types of evidence and analyses it may consider when setting royalty rates.

In 2018, Congress passed a much-heralded, consensus piece of music legislation called the Music Modernization Act ("MMA"). The MMA attacked a broad swath of issues across the music industry, including, most visibly, establishing a blanket license for digital mechanical licenses, and a statutory entity to administer that license. But buried within the MMA was a less-celebrated wrinkle: a provision that replaced the old 801(b) rate standard used by the CRB for mechanical royalties with a new "willing buyer/willing seller" rate standard. While the new standard was seen as a victory for songwriters, its precise practical effects remain unsettled. Will it really increase rates? If so, why? What evidence, arguments, and analysis will it allow—and foreclose—relative to the old standard?

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This Comment seeks to answer these questions through a comparative case study of two past CRB proceedings. First, it dissects the analyses that shaped the CRB's Phonorecords III decision—the most recent mechanical royalty rate-setting proceeding, and the last to use the old 801(b) rate standard. Second, it undertakes a similar analysis of the CRB's Web IV decision, the most recent instance in which the CRB applied the willing buyer/willing seller standard to a rate-setting proceeding for a different rights type (the digital performance of sound recordings). It then compares and contrasts those two proceedings to predict how willing buyer/willing seller will operate in the digital mechanical royalty context. From that comparison it concludes that, while the change does skew songwriter-friendly, there is also a significant amount of uncertainty that may render the change less significant than copyright owners hope—and music licensees fear.

INTRODUCTION

In 2018, Congress enacted the Music Modernization Act (the "MMA").[1] The three-part omnibus bill accomplished quite a bit under a single banner. Title I addressed issues in music publishing, Title II addressed pre-1972 sound recordings, and Title III addressed producer and engineer compensation.[2]

Title I, the "Musical Works Modernization Act," covered the most ground of the three sections. It established a new statutory blanket license for the digital reproduction of musical works, in place of the longstanding work-by-work or catalog-by-catalog licensing default.[3] Going forward, digital interactive streaming services such as Spotify and Apple Music would be (1) able to avail themselves of this license, and (2) assured that they would no longer be liable for good faith (and otherwise) failures to secure mechanical licenses for each of the millions upon millions of musical works embedded in sound recordings available on their platforms.[4] This

1 Orrin G. Hatch—Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018) [hereinafter "MMA"].

2 *See id*.

3 *See* MMA § 102.

4 *See* S. REP. NO. 115-339, at 14 (2018).

blanket license would be administered by a newly formed Mechanical Licensing Collective, to be controlled and operated by music publishers and songwriters while funded by the digital services.[5] Publishers and songwriters would, in theory, benefit from a more efficient administrative system allowing them to more quickly and effectively collect royalties accrued for streams of their works.[6] The digital service providers would benefit by no longer waking up to nine-figure infringement suits.[7]

Buried deep within Title I were a few less-heralded provisions that pertained not simply to the procedures designed to process payable royalties, but the substantive underlying royalties themselves. Two of these changes related to the federal rate court system through which music users and performing rights organizations ("PROs," including BMI and ASCAP) litigate disputes over public performance rates.[8] Post-MMA, these disputes will now be heard by a rotating series of SDNY judges—rather than one assigned judge[9]—and subject to fewer evidentiary restrictions.[10]

The last of the rate-affecting changes was a seemingly benign update to an arcane portion of the Copyright Act: Section 115. Since the early 1900s, mechanical reproduction of musical works—or "compositions," as distinguished from the sound recordings embodying those compositions—have been subject to a compulsory

5 *See id*. at 3.

6 *See* Jose Landivar, *The Music Modernization Act: A Primer for Copyright Holders*, JD SUPRA (Sept. 10, 2019), https://www.jdsupra.com/legalnews/the-music-modernization-act-a-primer-61777/ [https://perma.cc/7TR2-2DRH].

7 *See, e.g.*, *Spotify Settles $1.6bn Lawsuit over Songwriters' Rights*, BBC NEWS (Dec. 21, 2018), https://www.bbc.com/news/business-46646918 [https://perma.cc/R22Z-932D].

8 For more on rate courts, see Brontë Lawson Turk, Note, *"It's Been A Hard Day's Night" for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493, 512–14 (2016).

9 *See* MMA § 104.

10 Importantly, rate court litigants may now substantiate their proposed royalty rates for the public performance of musical works by introducing as evidence royalty rates for the public performance of the sound recording embodying those musical works. *See id.* § 103(a).

license:[11] with a few cursory restrictions,[12] anyone is entitled to a license to reproduce any copyrighted musical work.[13] Section 115 governs the terms of this compulsory license, including the statutory royalty rates paid by licensees to licensors.[14] Under Section 115, these royalties are determined in rate-setting litigations presided over by an administrative body known as the Copyright Royalty Board ("CRB" or the "Board").[15] The MMA did not disrupt this basic structure. However, it did make one subtle adjustment: in place of the old "public-interest"-oriented[16] 801(b) rate standard that songwriters and publishers had long believed unduly depressed royalty rates by compelling the CRB to weigh a slew of non-market-based factors, the MMA now instructed the CRB to set rates using a new "willing buyer/willing seller" rate standard designed to model the rates that would occur naturally in a hypothetical free market.[17]

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11 *See* Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 548 (2014) (contextualizing the origins of the compulsory license as a safeguard against potential "abusive monopolistic practices" by rightsholders). Under a Section 115 compulsory license, anyone who meets certain easily-satisfied criteria can automatically obtain a license to make and distribute a record embodying any nondramatic (i.e. "not created for use in a motion picture or dramatic work") musical composition. *See Compulsory License for Making and Distributing Phonorecords*, U.S. COPYRIGHT OFFICE (Jan. 2018), https://www.copyright.gov/circs/circ73.pdf.

12 For example, recordings of the work must have "previously been distributed to the public in the United States under the authority of the copyright owner of the work." 17 U.S.C. § 115(a)(1)(A)(i).

13 *See id.* § 115.

14 *Id.*

15 *See* MMA § 102. The CRB is an independent tribunal within the Copyright Office; its three judges are appointed to serve six-year terms by the Librarian of Congress. 17 U.S.C. §§ 801–803. Its rate determinations are subject to review for "legal error" by the Register of Copyrights before being published in the Federal Register by the Librarian of Congress. *Id.* Any "aggrieved" party who "who fully participated in the proceeding and who would be bound by the determination" may then bring an appeal in the D.C. Circuit. *Id.* § 803(d)(1).

16 Mark H. Wittow, Katherine L. Staba, & Trevor M. Gates, *A Modern Melody for the Music Industry: The Music Modernization Act Is Now The Law of the Land*, K&L GATES HUB (Oct. 11, 2018), https://www.klgates.com/A-Modern-Melody-for-the-Music-Industry-The-Music-Modernization-Act-Is-Now-the-Law-of-the-Land-10-11-2018 [https://perma.cc/359E-ATVC].

17 *Frequently Asked Questions*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/music-modernization/faq.html (last accessed Feb. 13, 2021) ("The new *market-based* willing buyer / willing seller rate setting replaces the policy-oriented 801(b)(1) rate-setting standard.") (emphasis added).

While the switch to willing buyer/willing seller has generally been considered to be a victory for the copyright community that advocated for it, its practical effects remain unsettled. Will it really increase royalty rates when it is applied to mechanical royalty rates? If so, why? What specific evidence, arguments, and analysis will the new rate standard allow—and foreclose—relative to the old standard?

This Comment seeks to answer these questions by comparing and contrasting two *prior* CRB rate determinations in search of clues indicating what may happen in the *next* CRB mechanical royalty rate determination: *Phonorecords IV*. One past proceeding (*Phonorecords III*) occurred in the same market and rights context as *Phonorecords IV* (mechanical royalties for songwriters), but applied a different rate standard. The other (*Web IV*) occurred in a *different* market/rights context but applied the *same* rate standard as *Phonorecords IV* (willing buyer/willing seller). This Comment acknowledges that while neither of these precedents exactly replicates the circumstances that will occur in *Phonorecords IV*, each offers insight into how the CRB is likely to apply the willing buyer/willing seller standard to mechanical royalties for the first time.

From there, this Comment concludes that while the change from 801(b) to willing buyer/willing seller does skew songwriter-friendly, as many expect, it also incorporates a significant amount of uncertainty that widens the variance of possible outcomes in all directions. This uncertainty is exacerbated by the reality that proceedings under either rate structure are decidedly more similar than they are different, so any attempt to isolate and project their practical distinctions quickly becomes an extraordinarily tangled exercise.

The Comment attempts to tiptoe through those tangles by proceeding in four parts. First, Part I explains the underlying structures that govern mechanical royalties in the U.S. Second, in search of clues as to how the post-MMA CRB will apply the willing buyer/willing seller standard to mechanical royalties, Part II undertakes a comparative case study of two recent CRB rate-determinations: it first (A) unpacks the CRB's 2018 *Phonorecords III* decision, the most recent digital mechanical royalty rate-setting proceeding and the last to use the pre-MMA rate standard; and (B) conducts a similar recounting of the CRB's 2016 *Web IV* decision, the most recent instance in which the CRB applied the willing buyer/willing seller standard in a rate-setting proceeding in a *different* rights context—the digital performance of sound recordings. Part III then compares and contrasts elements from each of the two dissected rate determinations to forecast how the willing buyer/willing seller standard will operate in the digital mechanical royalty context. Finally, Part IV argues that the practical differences between the old 801(b) standard and the new willing buyer/willing seller standard, while broadly more friendly to songwriters than digital services, may be less significant and less certain than licensors hope—and licensees fear.

I. THE MMA AND THE CRB

A. *Mechanical Royalties*

1. 1909-2018

Under the Copyright Act, songwriters—or music publishers acting on their behalf—are due mechanical royalties any time their composition is reproduced in some manner: either via physical sale, digital download, or interactive (i.e. on-demand) digital stream.[18] The copyright owner's exclusive reproduction right dates back to the Copyright Act of 1909, when it was enacted in response to the music publishing industry's successful lobbying efforts to secure a royalty for the mechanical reproduction of self-playing piano rolls.[19] From the beginning, the reproduction right was subject to a compulsory license, granted in exchange for a mechanical royalty payable

[18] To avoid confusion: mechanical royalties do not occur when a track is streamed via a *non*interactive streaming service such as Pandora's primary internet radio service (as distinguished by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104–39 (1995)). 17 U.S.C § 114(j)(7) (defining an interactive service as "one that enables a member of the public to receive a transmission of a program…on request"); *see also* Henry Schoonmaker, *The Two Types of Streaming & How You Can Collect Royalties For Both*, SONGTRUST (May 14, 2020), https://blog.songtrust.com/types-of-streaming-royalties [https://perma.cc/ASY8-7QZB]; Kevin Zimmerman, *Understanding Mechanical Royalties,* BMI (Mar. 28, 2005), https://www.bmi.com/news/entry/Understanding_Mechanical_Royalties [https://perma.cc/F9U6-DWAC].

[19] *See* Zimmerman, *supra* note 18.

at the rate set either directly by statute or as determined by a statutory rate-setting body.[20] The inaugural statutory rate of \$0.02/copy remained in place from 1909 until 1978, by which time the piano roll had long since ceded center stage to a recorded music industry dominated by physical music sales.[21] At the industry's pre-piracy peak in the late 1990s, songwriters were due \$0.07 per song per sale.[22] That rate for downloads and physical sales has plateaued at \$0.091 per song per download or physical sale since 2006.[23] Rates for reproduction on digital streaming services are more complicated and have naturally taken on greater importance as streaming has become the predominant music consumption format.[24]

While mechanical royalties have historically comprised a significant portion of songwriters' incomes, their role has diminished over the past two decades. Mechanicals achieved peak prominence in the 1990s, at the height of the physical CD era. At that time, songwriters typically earned mechanical royalties in roughly equal proportion to performance royalties—fees earned from public performances of their works on radio, television, public venues, and businesses.[25] That ratio promptly plummeted in the post-Napster recorded music industry collapse.[26] Today, even in the midst of the streaming renaissance, songwriters barely generate \$1 in mechanical royalties for every \$3 in performance income.[27]

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20 *See* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 940 (2020).

21 *See How Much Do Songwriters Make from Mechanical Royalties?*, ROYALTY EXCHANGE BLOG (Apr. 3, 2019), https://www.royaltyexchange.com/blog/how-much-do-songwriters-make-from-mechanical-royalties#sthash.O3tc1o9o.dpbs [https://perma.cc/8MMP-C3TV].

22 *Id.*

23 *Id.*

24 *See Streaming Overtakes U.S. Digital Music Sales for First Time: Nielsen*, REUTERS (Jan. 5, 2017, 11:23 AM), https://www.reuters.com/article/us-music-streaming/streaming-overtakes-u-s-digital-music-sales-for-first-time-nielsen-idUSKBN14P1YH [perma.cc/3XTR-XKWA]. For a detailed explanation of how streaming rates are determined, see *infra* Part II.

25 *See* Peter Alhadeff & Caz McChrystal, *Inflation and US Music Mechanicals, 1976–2010*, 13 GLOBAL BUS. & ECON. REV. 1, 2 (2011).

26 *Id.*

27 Tim Ingham, *US Publishers Pulled in \$3.7BN during 2019—Just Over Half What Record Labels Made*, MUSIC BUS. WORLDWIDE (June 11, 2020),

2. 2019 and Beyond: Phonorecords III, Phonorecords III-2, and Phonorecords IV

The steady decay of mechanical royalties may finally have hit an inflection point in the CRB's *Phonorecords III* determination. In *Phonorecords III*, the most recent in a recurring series of administrative rate-setting procedures undertaken every five years (and the last to occur under the pre-MMA 801(b) rate standard), the CRB imposed a 44% mechanical royalty rate increase, to be phased in gradually over five years.[28] As a result, between 2018 and 2019, the share of overall music publishing revenue attributable to mechanical royalties rose from 17.8% to 18.5%, as overall U.S. publishing revenue grew from $3.34 billion to $3.72 billion.[29] This marked the "first time since the bottoming out [of the publishing market]" that mechanical income grew faster than performance income.[30] Industry insiders credited this bump in the share of overall publishing income attributable to mechanical royalties directly to the first stage of the gradual mechanical rate increase under *Phonorecords III*.[31]

Not unrelatedly, the *Phonorecords III* 44% rate increase was seen as a "major victory" for songwriters—a substantial step forward on their long road to recovery from the post-Napster mechanical nadir.[32] It also prompted several streaming providers to mount and win—on procedural grounds only—a controversial appeal and remand to the CRB to issue an adjusted rate determination.[33] At the time this Comment is being finalized, the post-remand adjusted

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https://www.musicbusinessworldwide.com/us-publishers-pulled-in-3-7bn-during-2019-just-over-half-what-record-labels-made/ [https://perma.cc/6KC4-E8Z2].

28 *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1919 (Feb. 5, 2019) (to be codified at 37 C.F.R. pt. 385) [hereinafter "*Phonorecords III*"].

29 Ingham, *supra* note 27.

30 *Id.*

31 *Id.*

32 *See Major Victory for Songwriters as US Streaming Royalty Rates Rise 44%*, MUSIC BUS. WORLDWIDE (Jan. 27, 2018), https://www.musicbusinessworldwide.com/major-victory-songwriters-us-mechanical-rates-will-rise-44-2018/ [https://perma.cc/JY7M-MXV7].

33 *See* Dani Deahl, *Here's Why Apple Is Saying Spotify Is Suing Songwriters*, THE VERGE (Mar. 15, 2019), https://www.theverge.com/2019/3/15/18267288/apple-music-spotify-suing-songwriters-eu-antitrust [https://perma.cc/5YXC-YE7F].

Phonorecords III (hereinafter "*Phonorecords III*-2") determination has yet to be issued.[34]

Meanwhile, alongside all of this, even as the *Phonorecords III* appellate and remand process is still ongoing, under Section 115's five-year CRB timeline, the next five-year mechanical rate determination is already looming. With preliminary proceedings officially underway as of early 2021,[35] *Phonorecords IV* will be the first CRB mechanical rate-setting proceeding to apply the MMA's new willing buyer/willing seller rate standard.[36] It will also occur at a time when—due to the collision of the most impactful music legislation in decades (the MMA), the high-profile 44% *Phonorecords III* rate increase, and rightsholders' lingering bad blood[37] over the services'

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[34] This has left the industry in temporary limbo. While stakeholders had initially pushed the CRB to issue interim rates to apply until the appeal and remand are fully settled, it has yet to do so, leaving services arguing that they are now free to revert to 2012 rates—which has only further inflamed tensions between services and rightsholders. *See* Ed Christman, *Music Publishers Ask CRB to Set Interim Rates, Saying Further Delay May Lead to 'Free-for All'*, BILLBOARD (Nov. 3, 2020), https://www.billboard.com/articles/business/9477565/music-publishers-royalty-board-set-interim-rates-crb-nmpa/ [https://perma.cc/87C3-5UGQ]; Stuart Dredge, *Arguments over US Songwriter Streaming Royalties Kick Off Again*, MUSIC ALLY (Nov. 4, 2020), https://musically.com/2020/11/04/arguments-over-us-songwriter-streaming-royalties-kick-off-again/ [https://perma.cc/2JJW-A2JL] (quoting NMPA president David Israelite: "[T]hese multi-trillion dollar companies are doubling down on their assault against creators…."). In January 2021, in consultation with the Copyright Office, the newly operational, publisher- and writer-controlled Mechanical Licensing Collective officially endorsed this approach. *See Announcement Concerning Interim Mechanical Royalty Rates Pending the Outcome of Copyright Royalty Board Remand Proceedings in Phonorecords III*, MECHANICAL LICENSING COLLECTIVE (Jan. 13, 2021), https://www.themlc.com/press/announcement-concerning-interim-mechanical-royalty-rates-pending-outcome-copyright-royalty ("The CRB is currently presiding over [the *Phonorecords III*] remand proceedings, which are scheduled to run at least into the second half of 2021.").

[35] *See* Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 86 Fed. Reg. 325 (Jan. 5, 2021).

[36] Stuart Dredge, *NMPA Boss Promises Big Fight over 'CRB IV' Streaming Rates*, MUSIC ALLY (June 16, 2020), https://musically.com/2020/06/16/nmpa-boss-promises-big-fight-over-crb-iv-streaming-rates/ [https://perma.cc/AY9R-R388].

[37] See, e.g., David Israelite, *Santa's Guide to Tech Companies: Who's Been Naughty and Who's Been Nice to Songwriters This Year*, MUSIC BUS. WORLDWIDE (Dec. 14, 2020), https://www.musicbusinessworldwide.com/santas-guide-to-tech-companies-whos-been-naughty-and-whos-been-nice-to-songwriters-this-year/ [https://perma.cc/7KEE-8X5C] (listing Spotify and Apple music at the top of the "naughty"-to-songwriters list for their

appeal—mechanical royalty rates have never been more at the forefront of the industry's consciousness.[38] In a *Rolling Stone* interview, NMPA president David Israelite referred to *Phonorecords IV* (or "CRB IV," as publishers are calling it) as "the most important CRB trial we've ever had."[39] *Rolling Stone*'s takeaway was somewhat more colorful: "all-out war."[40]

B. A New Rate Standard

Even as copyright owners and digital services were battling over *Phonorecords III*, they were simultaneously cooperating to push the cross-industry "consensus" MMA through Congress.[41] Signed into law in 2018, the primary focus of the MMA was the mechanism through which digital services remit and allocate royalties to songwriters and publishers—rather than the royalty rates themselves.[42] However, buried among the structural reform was one change that stands to substantively affect underlying mechanical royalty rates beginning with *Phonorecords IV*: a new "willing buyer/willing

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role in the *Phonorecords III* appeal); Lars Brandle, *U.S. Songwriters Association Blasts 'Shameless,' 'Brazen' Spotify and Amazon as Royalties Hike Hits Hurdle*, INDUS. OBSERVER (Aug. 12, 2020), https://theindustryobserver.thebrag.com/nmpa-songwriters-association-blasts-shameless-brazen-spotify-royalties/ [https://perma.cc/S4G9-J9SS]; David Israelite, *NMPA CEO David Israelite to Songwriters: Court Case With Spotify, Amazon Has 'Seismic Implications' (Guest Column)*, BILLBOARD (Mar. 9, 2020), https://www.billboard.com/articles/business/9330522/nmpa-david-israelite-guest-oped-spotify-amazon-court-royalties/ [https://perma.cc/EG7Y-EXMJ] [hereinafter "Seismic Implications"]; *Musicians Have Some Choice Words for Spotify CEO Daniel Ek, Who Says They Should Work Harder*, MKT. WATCH (Aug. 2, 2020, 8:39 PM) https://www.marketwatch.com/story/musicians-have-some-choice-words-for-spotify-ceo-danial-ek-who-says-they-should-work-harder-2020-08-02 [https://perma.cc/2G57EDTQ].

38 *See* Tim Ingham, *Songwriters Are Already Fighting for Better Pay. But in 2021, They Face an Even Bigger Battle*, ROLLING STONE (June 15, 2020), https://www.rollingstone.com/pro/features/songwriters-spotify-amazon-crb-royalties-war-1015116/ [https://perma.cc/39DK-TFZC].

39 *See id.*

40 *See id.*

41 *See* Craig Havighurst, *The Music Modernization Act Is Law, Marking A Bipartisan, Industry-Wide Consensus*, WMOT (Oct. 11, 2018), https://www.wmot.org/post/music-modernization-act-law-marking-bipartisan-industry-wide-consensus#stream/0 [https://perma.cc/DA5Z-ANR5].

42 *See supra* notes 1–7 and accompanying text.

seller" rate standard for mechanical royalties payable starting in 2023.[43]

Under the old, pre-MMA 801(b) standard, the Board was directed to set "reasonable terms and rates" for mechanical reproduction to achieve the following objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[44]

In addition to this guidance, the Board was permitted to "consider rates and terms under voluntary license agreements."[45] The origins of this standard remain somewhat hazy, but the factors "appear to have been planted in Senate hearings in 1967 [during which]

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[43] While the *Phonorecords III* saga continues well after the passage of the MMA, the Board must determine rates in accordance with the prevailing statutory rate standard *at the time of the proceeding*. Thus, even on appeal and remand, the *Phonorecords III* proceedings remain governed by section 801(b). Johnson v. Copyright Royalty Bd., 969 F.3d 363, 369 n.4 (D.C. Cir. 2020). Meanwhile, at the time this Comment is being finalized, preliminary proceedings for *Phonorecords IV* are already underway. *See* Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 86 Fed. Reg. 325 (Jan. 5, 2021).

[44] 17 U.S.C. § 801(b)(1) (prior to 2018 amendment).

[45] 17 U.S.C. § 115(c)(3)(D) (prior to 2018 amendment).

Congress entertained the notion that music publishers should be regulated like public utilities."[46]

Under the MMA's new willing buyer/willing seller standard, the Board is now directed to set "reasonable rates and terms…that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[47] The Board must base its decision upon "economic, competitive, and programming information presented by the parties, including…

> (i) whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works; and
> (ii) the relative roles of the copyright owner and the compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk.[48]

Although the first CRB *mechanical* royalty rate-setting proceeding applying this rate standard, *Phonorecords IV*, is set to begin in 2021, a nearly identical willing buyer/willing seller standard has long governed Section 114 compulsory licenses for the digital *public performance* rights of *sound recordings* on noninteractive streaming services, such as Pandora and iHeart.[49] The most recent Section 114 CRB proceeding, *Web IV*, occurred in 2016.[50] As of the time of this writing, *Web V* is currently underway.[51]

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46 Victor, *supra* note 20, at 944 (hunting for the factors' "difficult to determine" origins amid a "sparse" congressional record). The section 801(b) factors date back to the Copyright Act of 1976, when Congress created the CRB's predecessor, the Copyright Royalty Tribunal, and for the first-time delegated rate-setting to this administrative entity tasked with achieving these "policy-driven" objectives. *Id.*

47 17 U.S.C. § 115(c)(1)(F).

48 *Id.*

49 17 U.S.C. § 114(f)(1)(B).

50 *See infra* Section II.B.

51 *Case Details for Web V*, COPYRIGHT ROYALTY BD., https://app.crb.gov/case/detail/19-CRB-0005-WR%20%282021-2025%29 [https://perma.cc/BT9H-CR35].

C. Stakeholders' Expectations

The legislative runway leading to the MMA primarily focused on structural reform: a new blanket digital mechanical license, and a much-ballyhooed organization created to administer that license.[52] Relatively little attention—at least on the legislative record—was allotted to the updated rate standard.[53]

The discussion that does survive conforms to the ethos driving most of Title I of the MMA (the "MWMA"): the notion that songwriters had long been undercompensated.[54] This notion permeated the MWMA's administrative and licensing changes, and so too did it inform the adoption of the willing buyer/willing seller standard. Citing the "broad[ly]"[55]-held view that the 801(b) standard depressed royalty rates, the Copyright Office had long called for the adoption of a standard "designed to achieve rates that would be negotiated in an unconstrained market."[56] This would also, the Copyright Office argued, carry the benefit of unifying what were, at the

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[52] *See generally* S. REP. NO. 115-339 (2018); H.R. REP. NO. 115-651 (2018); *see also* Dani Deahl, *The Music Modernization Act Has Been Signed into Law*, THE VERGE (Oct. 11, 2018, 12:08 PM), https://www.theverge.com/2018/10/11/17963804/music-modernization-act-mma-copyright-law-bill-labels-congres [https://perma.cc/8BG6-GSD8]; Jordan Bromley, *The Music Modernization Act: What Is It & Why Does It Matter? (Guest Column)*, BILLBOARD (Feb. 23, 2018), https://www.billboard.com/articles/business/8216857/music-modernization-act-what-is-it-why-does-it-matter-jordan-bromley [https://perma.cc/N3U6-EMZW].

[53] The legislative record for the Act is, to be sure, not particularly expansive. *See* Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2550 (2019) ("The inside baseball that drove this massive amendment to the Copyright Act did not even leave time for a formal conference committee report detailing the reconciliation that occurred between the House- and Senate-passed bills.").

[54] *See* S. REP. NO. 115-339, at 1 (citing "inequitable compensation variances for music creators"); *Protecting and Promoting Music Creation for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (written testimony of David M. Israelite, President and CEO, National Music Publishers' Association) [hereinafter "Israelite Testimony"] (testifying that songwriters' "livelihood is threatened by a failure of the law to keep pace with technology").

[55] *See* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 105 (Feb. 2015), available at https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/4NMR-A26S]
(citing copyright owners' frustration that the pre-MMA Section 115 "acts as a ceiling that does not allow them to seek higher royalties through voluntary negotiations," while acknowledging that licensees disagree that the 801(b) standard depressed rates).

[56] *See id.* at 3.

time, several disparate rate standards governing different CRB rate-setting proceedings.[57] The legislative record expressly echoed this push for uniformity.[58]

Songwriters and publishers also pushed for the change—again, as a part of a broader push for higher songwriter compensation. In reality, they would have preferred[59] legislation abolishing the compulsory mechanical license[60] entirely, allowing them to issue mechanical licenses on the open market.[61] Given political realities, however, they were willing to settle for a rate standard that would at least endeavor to *model* an open market.[62] In 2018, they got their wish: a new rate standard that they believe will yield higher royalty rates when tested for the first time in 2021–22. Of course, one

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57 *See id.* (the Copyright Office's official recommendation that Congress "[a]dopt a uniform market-based rate-setting standard for all government rates"); *id.* at 81–82 (characterizing the pre-MMA rate standard disparities as "problematic"). Congress was presented with the Copyright Office's viewpoint in committee hearings. *See* Israelite Testimony, *supra* note 54.

58 *See* H.R. REP. NO. 115-1551, at 22 (2018), https://republicans-judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf [https://perma.cc/9L9E-JZNG] (touting the MMA's creation of a "*uniform* willing buyer, willing seller rate standard" across the various statutory licenses for music) (emphasis added); S. REP. NO. 115-339, at 4 (explaining that the MMA "change[s] the current rate-setting standard [for Section 115 licenses] from that currently found at 801(b) to the 'willing buyer/willing seller' standard now applicable to setting rates for the public performance of sound recordings by noninteractive webcasters under…Section 114"); H.R. REP. NO. 115-651, at 4 (2018) (same exact language); *see also* Loren, *supra* note 53, at 2541 ("One of the ways in which the MMA furthered equal treatment was by establishing that the Copyright Royalty Judges are to use the same set of criteria for setting compulsory royalties for musical works (mechanical copies under § 115) as for the statutory license for sound recordings (digital public performances under § 114").

59 Per NMPA EVP and General Counsel Danielle Aguirre: "Not everybody agrees with the way that…rates are set under Section 115, or the fact that it's a statutory, compulsory license…. Ideally, we would have loved to have a law that got rid of the statutory license and allowed everything in a free market. But we wouldn't all be sitting here today having passed a piece of consensus legislation, and we understood that." MLC, *Join Us in Supporting The MLC*, VIMEO (Oct. 26, 2020), https://vimeo.com/472309284 [https://perma.cc/8783-T9TA] (public industry panel discussing the MMA).

60 *See supra* Section I.A.

61 *See* Israelite Testimony, *supra* note 54, at n. 2 ("I must note here the irony of addressing questions regarding whether proper due process protections have been included in a 100-year-old statute that establishes a compulsory license and deprives songwriters and music publishers of substantive due process protections and control over the licensing and administration of their own intellectual property.").

62 *See* U.S. COPYRIGHT OFFICE, *supra* note 56, at 12.

question lingers: will the new rate standard *actually* increase mechanical royalty rates?

Unsurprisingly, most proponents of the new standard believe that it will have this effect.[63] Indeed, the rightsholder community has already signaled that it now feels empowered to enter the *Phonorecords IV* arena with guns ablaze—to seek "impossibly high" rates under the new standard.[64] Furthermore, there is evidence that many adversely affected stakeholders,[65] scholars,[66] and legislators, have long believed the change in rate standards would yield higher rates. But few have quite gotten around to explaining exactly *how* that will happen. Most discussion tends to be somewhat conclusory: the old standard depressed rates below what would occur in a free market,[67] while the new standard strives for a free market rate,

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63 *See id.* at 82–83; Israelite Testimony, *supra* note 54.

64 *Ingham, supra* note 38.

65 *See Music Licensing Under Title 17: Hearing Before the H. Sub. Comm. on Courts, Intell. Prop., and the Internet of the Comm. on the Judiciary*, 114th Cong. (2014) (testimony of Lee Knife, Executive Director, Digital Media Association [DiMa]) ("The willing buyer-willing seller standard has led to higher rates than the § 801(b) standard has led to."); *Protecting and Promoting Music Creation for the 21st Century: Hearing Before the S. Comm. on the Judiciary, 115th Cong.* (2018), https://www.judiciary.senate.gov/meetings/protecting-and-promoting-music-creation-for-the-21st-century [https://perma.cc/ST8G-BBV8] (written testimony of David J. Del Beccaro, President and CEO of Music Choice) ("[C]hanging the Section 115 rate standard to 'willing buyer / willing seller' will cause more unreasonable rate increases."); Spotify Technology S.A., Annual Report (Form 20-F) (Dec. 31, 2019), available at https://www.sec.gov/Archives/edgar/data/1639920/000156459020004357/ck0001639920-20f_20191231.htm [https://perma.cc/LVP2-H2PB] ("The recently enacted MMA makes a number of significant changes to the legal regime governing music licensing in the United States. This legislation could, when fully implemented, increase the cost and/or difficulty of obtaining necessary music licenses."). There is also plenty of dissent and (at least publicly expressed) uncertainty among adversely affected stakeholders, both as to whether the legislature made the right decision, and whether it will actually yield a rate increase. *See Protecting and Promoting Music Creation for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018), https://www.judiciary.senate.gov/meetings/protecting-and-promoting-music-creation-for-the-21st-century [https://perma.cc/XEU9-X3DR] (statement of Christopher Harrison, Chief Executive Officer, DiMa) ("While it remains to be seen whether adoption of the WS-WB standard will result in higher royalty rates, digital music providers agreed to this change in the rate-setting standard as part of the overall reform of Section 115."); U.S. COPYRIGHT OFFICE, supra note 56, at 80–81, 107.

66 *See* Loren, *supra* note 53, at 2531.

67 *See* U.S. COPYRIGHT OFFICE, *supra* note 55, at 105.

and therefore the new rates will be higher than the old rates.[68] At best, there is a sense that by removing the discretion to supplant market forces with public interest concerns such as public availability, arguably better served by lower rates, the new standard cannot help but increase rates.[69] The remaining sections of this Comment attempt to be more specific—going straight to the source to examine how the rate standards operate in practice, and thus what practical effects may be prompted by applying willing buyer/willing seller in the Section 115 context.

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68 *See, e.g.*, *Joint Statement from NMPA President & CEO David Israelite, ASCAP CEO Elizabeth Matthews, BMI President & CEO Mike O'Neill, NSAI President Steve Bogard and SONA Executive Directors Michelle Lewis and Kay Hanley*, ASCAP (Dec. 21, 2017), https://www.ascap.com/news-events/articles/2017/12/joint-statement-from-nmpa-ascap-bmi-nsai-sona [https://perma.cc/SVU4-9NM5] (joint statement from songwriter and publisher organizations claiming that the willing buyer/willing seller rate "improves how mechanical royalty rates are calculated"); Amy Goldsmith, *Musically Inclined: The Music Modernization Act of 2018*, IP WATCHDOG (Nov. 9, 2018), https://www.ipwatchdog.com/2018/11/09/music-modernization-act-2018/id=102954/ [https://perma.cc/62UW-4FXM] ("In a stark change from prior practice, royalty rates will be negotiated using the fair market value concept of the 'willing buyer, willing seller;' the goal is to increase compensation to the music creators…."); Steve Englund, Alison Stein & Ava McAlpin, *Sweeping Music Modernization Act Transforms Music Licensing for the Digital Age*, MEDIA L. RESOURCE CTR., at 14 (Oct. 2018), available at https://jenner.com/system/assets/publications/18448/original/Englund%20Stein%20McAplin%20MLRC%20Oct%202018.pdf?1541780643 [https://perma.cc/8GTQ-LHAH] (noting that the new rate standard replaces an "older standard that had been interpreted to allow below-market rates"); Jem Aswad, *Lawmakers Introduce Music Modernization Act, Which Simplifies Digital Licensing and Increases Rates*, VARIETY (Dec. 21, 2017), https://variety.com/2017/biz/news/lawmakers-introduce-music-modernization-act-which-simplifies-digital-licensing-and-increases-rates-1202647412/ [https://perma.cc/7352-N424] (listing the new rate standard as among a few other factors aimed at "increase[ing] digital rates"); Kathryn O'Leary, *Understanding the Music Modernization Act: 5 Things You Should Know*, ONES TO WATCH (Sept. 20, 2018), https://www.onestowatch.com/blog/understanding-the-music-modernization-act-5, [https://perma.cc/9RNH-Q2E3] ("This [801(b)] standard has ensured that rates do not reflect market value, but the MMA would…get better rates for songs."); Kaitlin Chandler, *The Times They Are A Changin': The Music Modernization Act and the Future of Music Copyright Law*, 21 TUL. J. TECH. & INTELL. PROP. 53, 65 (2019) ("[T]he willing buyer/willing seller standard provides a higher royalty rate for owners….").

69 *See supra* notes 44, 63–68 and accompanying text.

II. OUT WITH THE OLD/IN WITH THE NEW

Part II of this Comment conducts two parallel rate structure case studies. Part A dissects the *Phonorecords III* CRB rate determination under Section 115 of the Copyright Act[70]—the most recent mechanical royalty determination for interactive streaming and the last to apply the old 801(b) standard.[71] Part B then similarly examines the *Web IV* rate determination for the public performance of sound recordings through noninteractive streaming under Section 114 of the Copyright Act[72]—the most recent CRB proceeding to apply the willing buyer/willing seller standard which, although only recently inserted into Section 115 by the MMA, has long governed Section 114.[73]

Together, these two rate determinations comprise the closest thing to relevant precedent for *Phonorecords IV*. The first, *Phonorecords III*, applied a different rate standard (the old 801(b) standard) to the same market and rights type as *Phonorecords IV* (mechanical royalties for the interactive streaming of musical compositions). The second, *Web IV*, applied the *same* rate standard as *Phonorecords IV* (willing buyer/willing seller) to a *different* market and rights type (public performance royalties for the noninteractive streaming of sound recordings).

A. A Section 801(b) Case Study (Phonorecords III)

Section 115 rate-setting proceedings determine the statutory rates governing the reproduction of musical works.[74] Prior to the MMA, these *Phonorecords* proceedings were subject to the old 801(b) rate standard. However, because the rates determined in *Phonorecords I* and *Phonorecords II* were both primarily the product of settlements between copyright owners and—as the rates pertained to digital streaming—streaming services, *Phonorecords III* represented the first fully litigated rate-setting proceeding governing

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70 17 U.S.C. § 115.

71 *See* Johnson v. Copyright Royalty Bd., 969 F.3d 363, 369 n.4 (D.C. Cir. 2020).

72 17 U.S.C. § 114.

73 *See, e.g.*, Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316 (May 2, 2016) (to be codified at 37 C.F.R. pt. 380) [hereinafter "*Web IV*"].

74 *See Johnson*, 969 F.3d at 367–68.

interactive digital streaming.[75] Accordingly, it is the only directly relevant data point for those interested in observing how the Board approaches mechanical rate-setting in the digital streaming context.

For context: to operate lawfully under the Copyright Act, interactive streaming services must obtain licenses for four separate rights: the (1) reproduction and (2) public performance of the *sound recordings* distributed through their platforms, as well as the (3) reproduction and (4) public performance of the *underlying musical works* ("compositions") embodied in those sound recordings.[76] Section 115 rate-setting proceedings like *Phonorecords III* deal only with the reproduction (i.e. mechanical) license for underlying musical compositions.[77]

Importantly, while the Services have subsequently succeeded in petitioning the D.C. Circuit to vacate and remand the *Phonorecords III* determination, and as of this writing the Board has yet to publish its revised *Phonorecords III-2* rates, the initial *Phonorecords III* opinion still stands as an important insight into the Board's processes, logic, and interpretations of its governing rate standards. The D.C. Circuit grounded its decision to vacate firmly in procedural defects.[78] Further, it expressly disclaimed that because it was reaching its decision on procedural grounds, it "need not at this juncture address whether the Board adequately considered [the § 801(b) standard]."[79] Thus, even post-appeal, the initial *Phonorecords III* opinion continues to provide a window into the Board's fundamental

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75 *See generally Phonorecords III*, *supra* note 27.

76 *See* Michelle Castillo, *Spotify IPO Filing Reveals How Insanely Complicated It Is to License Music Rights*, CNBC (Feb. 28, 2018, 5:44 PM), https://www.cnbc.com/2018/02/28/how-spotify-licenses-and-pays-for-music-rights.html [https://perma.cc/ZV2L-DA7Z].

77 They also indirectly touch on composition public performance rates by virtue of the prevailing all-in structure the *Phonorecords III* Board opted to renew. *See infra* notes 96–99 and accompanying text.

78 *Johnson*, 969 F.3d at 375–76 (vacating in relevant part because the Board "failed to provide adequate notice" for its decision to adopt an uncapped TCC prong and "failed to reasonably explain" why it rejected the *Phonorecords II* settlement as a benchmark). In an unrelated, minor substantive quibble, the court also noted that the Board had "failed to identify under what authority it substantively redefined" a statutory term relevant to royalties for bundled services. *Id.*

79 *Id.* at 389.

conceptions of its own authority, discretion, preferences, and interpretation of its statutory mandates.

Of particular import: because the D.C. Circuit explicitly declined to opine on this portion of the initial determination, *Phonorecords III* continues to represent the clearest indication of the ways in which the Board does, and does not, believe itself constrained by its governing Section 115 rate standard.

1. The Previous Mechanical Royalty Rate Scheme

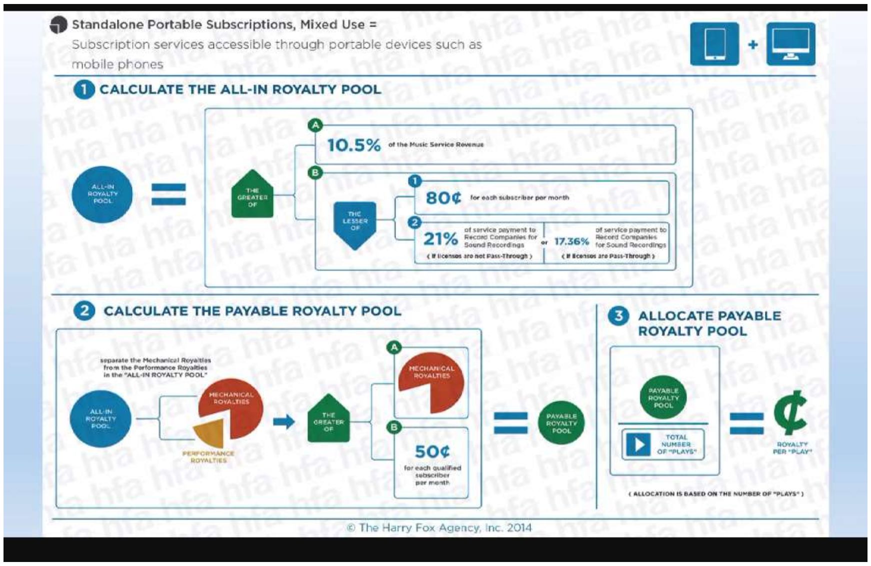
Prior to *Phonorecords III*, the industry operated under the 2012 "flexible," and incredibly convoluted, rate structure. This rate scheme combined various all-in, "greater-of" a percentage total service revenue (i.e. the amount of earnings a service generates through, among other things, subscriptions and advertising revenue), and Total Content Cost ("TCC," i.e. the amount that each service spends on sound recording and composition rights, total, for interactive streaming)[80] prongs, broken out by a litany of different service types, and subject to per-subscriber rate minimums.[81] It was, in a word, complicated.

The scheme for "subscription services accessible through portable devices such as mobile phones" (e.g. Spotify) looked like this:[82]

80 *See Phonorecords III*, *supra* note 28, at 1923 n. 38.

81 *Id.* at 1975 (Strickler, J., dissenting). Overall, streaming services were obligated to pay a "maximum of 10.5% of service revenue," and a minimum royalty rate that varied by service type (e.g., categories such as: the "lesser of 22% of service payments for sound recording rights and $0.50 per subscriber per month" for "standalone non-portable subscription, streaming only" services). *Id.* The basic categories of services included: "'standalone non-portable subscription—streaming only' services (i.e., tethered to a computer); (b) 'standalone non-portable subscription—mixed' (i.e., both streaming and limited download) services; (c) 'standalone portable' subscription streaming and limited download services (i.e., accessible on mobile or other Internet-enabled devices); (d) 'bundled subscription services' which are streaming and limited download services bundled with another product or service; and (e) 'free [to the end user] non-subscription/ ad-supported services.'" *Id.* After deducting the performance portion from this "all-in" rate, the resulting putative rate would then be subject to a mechanical-only per-subscriber floor that also varied by service type (e.g., "$0.50 per subscriber per month" for "standalone portable subscription, mixed use" services). *Id.*

82 *Standalone Portable Subscriptions, Mixed Use*, HARRY FOX AGENCY, https://www.harryfox.com/#/rate-charts [https://perma.cc/DXM7-PEKF].



Effectively, services were obligated to pay a headline rate of 10.5% of service revenue to songwriters, subject to a parade of caveats and complications. This rate was an "all-in" rate, meaning it covered both the mechanical right and performance right implicated by every interactive stream; services could deduct performance royalties paid out to the PROs (which are negotiated and licensed separately, and beholden to an entirely distinct judicial process in the SDNY) from the mechanical royalties they account directly to copyright owners under this rate calculation.[83]

When the *Phonorecords III* scheme is referred to as a "44%" increase over these rates, that figure is referring to the new headline rate of 15.1% of service revenue that streaming services will now have to pay, which is a 43.81% bump from the old 10.5% headline rate.[84] Under *Phonorecords III*, the increase will take place

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83 *See id.*

84 Tim Ingham, *Spotify vs. Songwriters: Publishers Remain Confident that Streaming Platforms Will Be Forced to Increase Royalties in the US*, MUSIC BUS. WORLDWIDE (Aug. 12, 2020), https://www.musicbusinessworldwide.com/spotify-vs-songwriters-publishers-remain-confident-that-streaming-platforms-will-be-forced-to-increase-royalties-in-the-us/ [https://perma.cc/5NG6-XRVH].

incrementally, rising "by around 1% annually" until it reaches 15.1% in 2023.[85]

2. Procedural History and Overall Structure

In 2017, after copyright owners and licensees such as record labels had reached a settlement pertaining to rates for physical reproduction, digital downloads, and ringtones, the Board presided over litigation surrounding the one major context in which stakeholders had not managed to settle: interactive streaming.[86] The Board's eventual *Phonorecords III* opinion was split 2-1, with Chief Judge Barnett and Judge Feder in the majority, and Judge Strickler offering a lengthy dissent and alternative rate structure.[87] The dispute effectively split the litigants into two basic groups of parties—the "Copyright Owners" (songwriters, music publishers, and their trade organizations) and the "Services" (digital streaming services and their trade organizations).[88]

The *Phonorecords III* majority opinion proceeded under the following general structure: first, it evaluated the various parties' rate structure proposals, and the general foundational rate structures underpinning each specific proposal, and undertook to choose one of these structures—or rather to harvest individual traits from several different proposals.[89] Second, once it had selected a structure, the Board then considered marketplace rate benchmarks and expert

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85 *Id.*

86 *Phonorecords III*, *supra* note 28, at 1920.

87 See *id.* at 1963. Notably, post-appeal, former Chief Judge Barnett's term has ended, former Judge Feder is now Chief Judge Feder, and the Librarian of Congress has appointed Judge Steve Ruwe to the Board. *See About Us*, U.S. COPYRIGHT ROYALTY BD., https://www.crb.gov [https://perma.cc/P9HM-LRCC]; *Librarian of Congress Names New Copyright Royalty Judge*, LIBR. OF CONG. (Oct. 18, 2019), https://www.loc.gov/item/prn-19-101/librarian-of-congress-names-new-copyright-royalty-judge/2019-10-18/ [https://perma.cc/5QBA-Y83D].

88 While CRB rate-setting proceedings, which are technically administrative proceedings, in some ways resemble traditional Article III litigation, this is one major point of divergence: the "parties" who argue before the CRB are interested stakeholders, not specific entities directly bound to act by the tribunals' decision. The Board's decision does not directly pertain to the parties. Rather, the Board simply promulgates the terms of a statutory scheme, and the parties then become subject to, and constrained by, that new statutory scheme along with everybody else.

89 *See infra* Section II.A.3.

analysis using those benchmarks, before ultimately relying upon theoretical Shapley economic modeling to determine the numerical rates to plug into this structure.[90] From three separate Shapley proposals, it derived a "zone of reasonableness" for rates fitting within its chosen rate structure, and then chose rates from within that range.[91] Finally, it verified that these rates were consistent with the 801(b) factors.[92]

3. Rate Structure

Each of the participating parties in the rate-setting proceeding submitted proposed rates and rate structures. The Board distilled from each proposal specific features and structural configurations that were evaluated separately from the numerical rates each party advocated.

The Board Rejects a Per-Play Rate. Two adversaries, the Copyright Owners[93] and Apple, each incorporated a per-play prong into their rate proposals. Apple's proposal was comprised entirely of a simple flat rate of $0.00091 per (nonfraudulent) stream, while the Copyright owners incorporated their $0.0015 per-play proposal into a

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[90] *See infra* Section II.A.4.b. Empirical Shapley analysis uses game theory to attempt to attribute the relative marginal value contributed by each market participant. *See* Johnson v. Copyright Royalty Bd., 969 F.3d 363, 372 (D.C. Cir. 2020).

[91] *See infra* Section II.A.4.

[92] *See infra* Section II.A.5.

[93] Here, "Copyright Owners" excluded George Johnson, dba GEO Music Group, a self-published songwriter and musician who appeared *pro se*. *Phonorecords III, supra* note 27, at 1924–25. The Board respectfully declined to incorporate his proposals. *Id.* The Copyright Owners incorporated their "per-play" rate in the context of a proposed "greater-of" structure, wherein the Services would play the "greater of" (1) a "per-play" fee of $0.0015 per stream, or (2) a "per-end user fee" of $1.06 per streaming end user. *Id.* The per-user rate was met with additional criticism from the Services, who argued that a per-user rate would activate for any services who users clocked, on average, fewer than 707 streams per month (and that, historically, Spotify has averaged fewer than 707 streams per month per user)—effectively raising the per-play fee well above $0.0015 per stream. *Id.* at 1931. While the Board did not articulate its reasoning specifically for rejecting a per-user component, beyond its general assertion that the revenue-based structure was the "most efficient" of all the proposals, it appeared to credit this argument from the Services. *Id.* at 1931–34.

more intricate "greater-of" structure.[94] The Board flatly rejected both parties' bid for a per-play rate structure, citing downstream competitive (i.e. competition for streaming consumers) concerns: the Board maintained that a per-play rate would limit services' flexibility to cater to wide variance in end user willingness to pay ("WTP") for digital streaming.[95]

The Board Adopts an "All-In" Rate. While the Services may have split over the per-play issue, all five participating Services unanimously advocated continuing the 2012 settlement's "All-In" feature.[96] Under this structure, the Board is tasked with determining an "all-in" rate, inclusive of both the mechanical *and* performance licenses inherent to every interactive stream. Any time a user streams a song on a service like Spotify, that stream generates both a mechanical and performance royalty. Because only the mechanical portion is subject to Section 115 compulsory licensing, while the performance portion is negotiated with PROs such as ASCAP and BMI, the two components could theoretically exist entirely independently of each other. However, the 2012 settlement provided an "all-in" rate inclusive of *both*.[97] Under this structure, after calculating their total "all-in" payable royalty pool, statutory services deduct performance fees privately negotiated and paid out to the PROs, and then account the remainder directly to rightsholders as mechanical royalties.[98] The Board, in electing to renew this "all-in" approach,

[94] *Id.* at 1924 ("[E]ach month the licensee would pay the greater of (a) a per-play fee ($0.0015) multiplied by the number of interactive streams or limited downloads during the month and (b) a per-end user fee ($1.06) multiplied by the number of end users during the month.").

[95] *Id.* at 1925. The Board agreed with the (non-Apple) Services' view that a fixed upstream per-play rate "would not align" with downstream demand for interactive streaming from consumers with wildly divergent willingness to pay ("WTP") for those services. *Id.* It declined to indulge the Copyright Owner's argument that a per-play rate would vindicate the "inherent value" of a musical work. *Id.* at 1934 n. 64, 1936, 1946 n. 110; *see also infra* Section III.B.2.

[96] *Phonorecords III, supra* note 27, at 1928.

[97] *Id.*

[98] *Id.*

emphasized the "perfect complementarity" of mechanical and performance rights.[99]

The Board Imposes a Mechanical Floor. The Copyright Owners stressed the importance of preserving some kind of mechanical floor—"a rate below which the calculated mechanical license rate [can] not fall" regardless of what the headline rate calculation would yield.[100] They argued that this feature, particularly under a percentage-of-revenue structure, protects against songwriter compensation becoming artificially depressed relative to songwriters' actual value as a result of streaming service business models, long-term planning, and creative accounting.[101] The Board agreed.[102] It adopted a per-user mechanical floor in its rate structure,[103] justifying it as a balancing of the Services' interest in all-in predictability with the Copyright Owners' "need for a failsafe to ensure that mechanical royalties will not vanish either through the actions of the Services" or external forces.[104]

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99 *Id.* at 1934. The Services argued that, because the mechanical and performance portions of a stream are "complementary rights—[t]hat is, each right is worthless without the other"—the Board must group them together "to prevent exorbitant costs." *Id*. at 1928–29, 1997 (internal quotations omitted). The Services underscored the "recent fragmentation and uncertainty in performance rights licensing." *Id.* at 1928–29. They also noted the prevalence of this feature in direct licenses in the marketplace, as well as in the incumbent statutory regime. *Id.* at 1929. For their part, the Copyright Owners objected, to little avail, on jurisdictional and "practical" grounds—that the "upshot" of this structure is to erode mechanical royalties, which allows songwriters to access and recoup advances vital to their livelihoods. *Id*.

100 *Id.* at 1930.

101 *Id*. The Copyright Owners expressed particular concern that when royalties are calculated as a percentage of service revenue, they may be artificially driven down by services deliberately foregoing revenue in pursuit of other goals: for example, by lowering retail subscription prices in order to grow market share in the long-term, or by using streaming as a loss-leader to attract users for other services, or by offering streaming as a part of a bundle with other goods and then attributing revenue to the non-royalty-generating portions of the bundle. *See infra* Section III.B.5.

102 *Phonorecords III, supra* note 28, at 1930 (discounting the Services' concerns that this could lead to a "windfall" for licensors).

103 This varies by service offering type. For example, for "standalone portable subscription offerings," if the calculated effective royalties would otherwise fall below "50 cents per subscriber per month" then the service must nonetheless pay total royalties equal to 50 cents/subscriber/month. *Id.* at 2036.

104 *Id.* at 1935.

2012 Settlement as Benchmark: Flexible Rate Structure. The parties disagreed on what (if any) role the 2012 (*Phonorecords II*) settlement should play in the *Phonorecords III* proceedings. On one side, three Services—Amazon, Pandora, and Spotify—submitted proposals to renew the uber-complicated 2012 "flexible" rate structure with some minor adjustments.[105] Fundamentally, each of their proposals contemplated an "all-in" rate of 10.5 percent of service revenue with no mechanical floor.[106] On the other side, the Copyright Owners, along with one lone service (Apple), advocated jettisoning the 2012 structure entirely, in favor of a predominantly "per-play" rate structure.[107]

The parties in favor of continuing the pre-existing rate structure argued that the 2012 settlement supplied a helpful benchmark for future rates because, they argued, it had been reached in the context of the same rights, the same uses, and the same types of market participants as still exist now, and that, as a relatively recent negotiated agreement, it was reflective of current market forces and consensus.[108] The Copyright Owners, naturally, disagreed.[109]

Ultimately, the Board sided with the Services in concluding that it should adopt a "flexible, revenue-based rate structure" wherein streaming companies' royalty obligations would remain directly tied to their overall revenue derived from subscription sales, advertising, etc.[110] In other words, unlike the fixed rate mechanical royalty

105 *Id.* at 1923. The 2012 structure distinguished rates based on a number of varied service offering types. *See supra* note 81 and accompanying text.

106 *Id.*

107 *Id.* at 1931–34.

108 *Id.* at 1926. They also maintained that, contrary to the Copyright Owners' contention, licensors "ha[d] actually benefitted" from a flexible rate structure that yielded an increase in mechanical and performance revenue offsetting the decrease in publisher revenue from traditional record sales. *Id.* at 1927; *id.* at 1986 (Strickler, J., dissenting).

109 They argued that the 2012 settlement was not a free-market negotiation reflective of market forces, but merely an articulation of the parties' predictions of litigation outcomes; that it had been an "experimental" agreement reached in interactive streaming's infancy; and that in any event it was skewed by the "shadow" of the statutory license. *Id.* at 1931; *see also infra* Section III.D.3.a. As to the practical effects of the current system, they again invoked the business models and incentives that streaming services employ that decrease the amount of royalty-generating revenue available to trickle back to songwriters. *Phonorecords III*, *supra* note 27, at 1931; *see supra* note 101.

110 *Phonorecords III*, *supra* note 28, at 1934.

generated by, say, an iTunes sale (9.1 cents per song downloaded), the royalty generated by a Spotify stream would continue to vary as a function of Spotify's total revenue spread across the total of number streams in any given accounting period.[111] The Board reasoned that such a structure would be "the most efficient means of facilitating beneficial price discrimination" in a downstream market where streaming services were competing over consumers with hugely variant willingness to pay ("WTP") for interactive streaming.[112]

However, even as it acknowledged that some kind of "flexible" approach was called for, the Board declined to rely upon the 2012 settlement as a foundational benchmark for the *Phonorecords III* rate structure.[113] In doing so, the Board eschewed the complex, granular, service-type-specific flexibility of the 2012 structure.[114] Instead, it seized upon a middle ground structural approach proposed by Google.

The Board Adopts Google's Proposed Structure. After considering a number of other structural pitches, the Board adopted Google's proposed structure. Google's (amended) proposal called for consolidating all the individual product types falling under the broad banner of revenue-generating interactive streaming, and for mechanical royalties for all revenue-generating interactive streaming product types to be subject to a single rate calculus.[115] In other words, where the 2012 rates distinguished between streaming medium (e.g. desktop vs. mobile), and revenue mechanism (e.g. ad-supported or

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111 *Id.* at 2035.

112 *Id.* at 1934.

113 The Board's failure to precisely explain this decision was another procedural point that the D.C. Circuit relied upon in its decision to vacate the initial *Phonorecords III* determination. Johnson v. Copyright Royalty Bd., 969 F.3d 363, 387 (D.C. Cir. 2020) ("Because we cannot discern the basis on which the Board rejected the Phonorecords II rates as a benchmark in its analysis, that issue is remanded to the Board for a reasoned analysis."). The court held that, while the Board had critiqued certain Service arguments centering around the *Phonorecords II* structure, it did not explain the wholesale rejection of the benchmark. *Id.* (insisting that arguments included for the first time in the Board's appellate brief defending its own actions, along with "post hoc" justifications offered by the Copyright Owners on appeal, "cannot make up for the Board's failure to adequately explain itself in [*Phonorecords III*]").

114 *Phonorecords III*, *supra* note 28, at 1934; *see supra* Section II.A.1.

115 *Phonorecords III, supra* note 28, at 1923.

subscription), among other variables, under Google's proposal, any revenue-generating product[116] would be subject to the same rates.[117]

The Board enthusiastically adopted this basic structure.[118] It noted that a number of voluntary marketplace agreements included a structure built around the "greater-of" (1) percentage of total service revenue, and (2) TCC.[119] The fact that these agreements occurred "outside the context of litigation" afforded them additional credibility to the Board.[120] Additionally, the Board was drawn to the (relative) simplicity of Google's proposal compared to the sprawling maze of categories in the 2012 settlement.[121]

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116 This includes free-to-the-user, ad-supported streaming wherein the service generates revenue from third parties, but not, for example, temporary free trials. *See id.* at 2036 ("For Free Trial Offerings *for which the Service receives no monetary consideration*, the royalty rate is zero.") (emphasis added).

117 *Id.* In Google's specific proposal, that rate would be the greater of a 10.5% of service revenue (subject to certain adjustments) and 15%—with no cap—of TCC.

118 *Id.* at 1935.

119 *Id.* Individual streaming services and rightsholders are always at liberty to enter into voluntary agreements instead of relying upon the statutory license, and in fact often do so. *See* Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1149 (2014) (arguing that this kind of "private ordering" benefits market participants by permitting parties to "tailor[] terms to fit the contemplated content and use, thereby alleviating concerns presented by the one-size-fits-all nature of a statutory licensing regime"). Parties typically do this in order to allow for a grant of rights that is broader than the statutory grant (e.g., additional non-US territories, non-mechanical rights) or to provide the rightsholder with additional benefits (e.g., access to proprietary data). *See, e.g.*, Anne Steele, *Spotify Strikes New Licensing Deal With Universal Music Group*, WALL ST. J. (July 22, 2020), https://www.wsj.com/articles/spotify-strikes-new-licensing-deal-with-universal-music-group-11595415603 [https://perma.cc/4VEA-4LKY]. However, the underlying rates available under these voluntary licenses are heavily influenced by the rates available under the statutory license. *See* Loren, *supra* note 11, at 549 (even as "almost no one uses the statutory compulsory license to obtain the necessary license to record a musical work" the terms and rates available under the statutory license "significantly affect the behavior in market transactions"). This statutory "shadow" becomes a major point of contention when these agreements, influenced by one set of statutory rates, are then offered as "benchmarks" during CRB proceedings determining the next set of statutory rates. *See infra* Section III.D.3.a.

120 *Phonorecords III*, *supra* note 28, at 1936. The Board noted that agreements that occur in the context of the litigation (i.e. settlements) can be skewed by the parties' desire to avoid the cost of litigation, rather than their pure assessment of the pure market value at play. *Id.*

121 *Id.* at 1936.

Crucially, the Board left the TCC prong uncapped.[122] In doing so, it allowed the effective all-in rate to increase, without limitation, any time the TCC prong exceeds the percentage-of-revenue prong. Because TCC is a direct product of fees payable to *record labels* for the right to stream *sound recordings* (for which there is no compulsory license or statutory rate to limit services' risk), this meant that any time a service's record label royalty obligations increase above a certain threshold, its royalty obligations to songwriters could similarly increase—with no upper bound.[123]

As discussed earlier, interactive streaming services are required to obtain licenses spanning public performance and reproduction rights from both sound recording owners and composition owners.[124] Unlike composition rights, the two sound recording rights—which are typically bundled into a single license with individual record labels, or with entities representing multiple record labels—are negotiated in an open market free from the kinds of regulatory forces that constrain songwriter compensation.[125]

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[122] *Id.* at 1934.

[123] *See* Henry Schoonmaker, *How Spotify Streams Turn into Royalties*, SONGTRUST (July 20, 2020), https://blog.songtrust.com/how-spotify-streams-turn-into-royalties [https://perma.cc/933N-TMZP].

[124] *See supra* notes 76–77 and accompanying text.

[125] For interactive streaming services (unlike noninteractive streaming services, as distinguished by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. 104–39 (1995), these (1) reproduction and (2) public performance sound recording rights are not subject to any compulsory license or statutory rate-setting. 17 U.S.C § 114(j)(7) (defining an interactive service as "one that enables a member of the public to receive a transmission of a program…on request"). By contrast, interactive streaming services must obtain their (3) public performance and (4) reproduction (i.e. mechanical) licenses of the underlying *compositions* from two separate types of entities, neither of which operate in a purely free market. *Mechanical Royalties vs. Performance Royalties: What's the Difference?*, ROYALTY EXCHANGE (Jan. 31, 2019), https://www.royaltyexchange.com/blog/mechanical-and-performance-royalties-whats-the-difference#sthash.aKUVcTlo.dpbs [https://perma.cc/5YCM-6W2T]. Services typically license public performance rights for compositions from PROs such as ASCAP and BMI. *Id.* These rights are not subject to any compulsory license, although they are more constrained than sound recording rights by virtue of rate court jurisdiction, as well as ASCAP and BMI's individual consent decrees with the Department of Justice. *See* Nate Hertweck*, What Songwriters Need to Know About the DOJ's Review Of Consent Decrees*, RECORDING ACAD. (Aug. 15, 2019), https://www.grammy.com/advocacy/news/what-songwriters-need-know-about-dojs-review-consent-decrees [https://perma.cc/Y67A-C7Q5]. Of the four rights interactive

The Board's justification for tying statutory composition rates to these free-market sound recording rates was simple: "The ratio of sound recording royalties to musical works royalties should be lower than it is…."[126] An uncapped TCC prong, it explained, allowed the Board to "influence that ratio directly" by tethering (and presumably increasing) songwriter rates to sound recording royalty rates.[127] This decision was among the most controversial aspects of *Phonorecords III* and figured prominently in the D.C. Circuit's decision to vacate.[128] The D.C. Circuit ultimately overturned this point

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streaming services must license, only the reproduction license for the composition is subject to a compulsory license: the Section 115 compulsory license and statutory mechanical rate-setting scheme that is the focus of this Comment. *See* Loren, *supra* note 53, at 2526.

[126] *Phonorecords III*, *supra* note 28, at 1934.

[127] *Id.* The Board added that this feature also permitted publishers and songwriters to benefit from the protections against revenue deferral that record companies have been able to negotiate for sound recording rights. While the Services would take umbrage with this decision, later in the actual rate-setting portion of the decision, the Board reduced the actual TCC percentage value beyond where models suggested it should otherwise be, to protect the Services from suffering the effects of the record companies' oligopoly on both the recording and composition side of the equation. *Id.* at 1953.

[128] The D.C. Circuit struck down the uncapped TCC prong on procedural grounds. Johnson v. Copyright Royalty Bd., 969 F.3d 363, 383 (D.C. Cir. 2020) ("[B]ecause the Copyright Royalty Board failed to provide fair notice of the [uncapped TCC] rate structure it adopted, that aspect of its decision must be vacated and remanded for further proceedings."). Importantly, because Google first proffered the uncapped TCC prong in a "post-hearing proposal" (and because no other party proposed an uncapped TCC prong), the notion of an uncapped TCC prong was not an issue directly litigated during the trial stage of *Phonorecords III*. *See id.* The Board's decision to embrace a structure that was proposed post-hearing figured prominently in Judge Strickler's dissent and into the Services' arguments on appeal. *See Phonorecords III*, *supra* note 28, at 1963–64 (Strickler, J., dissenting) ("[T]he majority erred by plucking two rates from the record, combining them post-hearing, and then wrongly declaring that this 'mash-up' was actually based on the record."); Public Initial Brief for Appellants/Intervenors Pandora Media, LLC, Google LLC, Spotify USA Inc. and Amazon Digital Services LLC at 24, Johnson v. Copyright Royalty Bd., 969 F.3d 363 (D.C. Cir. 2020) (No. 19–1028) [hereinafter "Service Brief"] ("[T]he uncapped TCC structure was not proposed before or during the hearing, and the parties had no opportunity to present evidence demonstrating the flaws in that approach."). Judge Strickler also raised substantive issues with the uncapped TCC prong. First, his dissent (and the Services, on appeal) argued that the uncapped TCC prong recklessly imports the record companies' oligopoly market power—which inflates rates on the sound recording side—into the rates for musical works, thus surrounding the Services with market power. *See Phonorecords III*, *supra* note 28, at 1964 (Strickler, J., dissenting) ("[H]ow can it be reasonable to ask the Judges to set a rate that does not itself provide for a fair

on procedural grounds—because the Board had not given the Services sufficient opportunity to litigate the uncapped TCC prong, it could not include it in its final determination.[129]

4. Royalty Rates

After devoting significant time to piecing together a rate *structure*, the Board then turned its attention to the numerical rates themselves. First, the Board evaluated the benchmarks proposed by each party and the expert analysis built upon those benchmarks. While it ultimately determined each benchmark to be inadequate, it found "certain aspects of each" to be instructive.[130] Second, it used several Shapley economic analyses to establish a "zone of reasonableness" from which it plucked its final rates. As a final step, it tested these final rates against the 801(b) factors.

return…but simply puts the Copyright Owners' fair return in the hands of the labels to negotiate terms that will adequately protect the publishers and songwriters as well?"); Service Brief at 24 ("Setting an uncapped rate tethered to a non-competitive market and relying solely on those market forces to evaluate rates is plainly inconsistent with Congress's purpose of lessening the impact of anticompetitive forces.") (internal quotation marks removed). Relatedly, the dissent also characterized as "heroic" and "complacent" the assumption that record companies, knowing that musical work royalty rates are now subject to uncapped TCC prong, "will recognize that they have no choice but to decrease their royalty rates" in order to allow the streaming services "to retain enough revenue to survive." *Phonorecords III*, *supra* note 28, at 1964 (Strickler, J., dissenting) ("[T]here is no factual evidence in the record to sustain the Majority's hypothesis that record labels would voluntarily lower their rates."). Second, per the dissent, the majority failed to consider the potential harms to the Copyright Owners under any TCC prong, such as (1) the record companies acquiring streaming services and offering them "sweetheart" deals, depressing songwriter royalties based on those deals, and (2) for that matter, relying on the product of self-interested record company negotiations for protection in the first place. *Id.* (criticizing as naïve the majority's downplaying the risks associated with an uncapped TCC through "trust in the rational self-interest of the market participants"). *Id.* at 1967. Finally, the dissent argued that the majority's decision to, in effect, "delegate" songwriter royalty rates to record companies through an uncapped TCC prong violated the "private nondelegation doctrine" proscribing "the delegation of statutory duties to private entities." *Id*. at 1967. Judge Strickler ultimately advocated continuing the 2012 structure and rates. *Id.* at 1968. Crucially, the D.C. Circuit declined to opine on any of these substantive critiques of the uncapped TCC prong. *Johnson*, 969 F.3d at 383 ("Because we have vacated the rate structure devised by the Board for lack of notice, we need not address these arguments.").

129 *Id*.

130 *See* Public Initial Brief for Appellees at 17–18, Johnson v. Copyright Royalty Bd., 969 F.3d 363 (D.C. Cir. 2020) (No. 19-1028).

a) Proposed Benchmarks

To provide benchmarks for the "inherent" value of a musical work—the premise underlying its (rejected) per-play proposal—the Copyright Owners advocated looking to license terms for interactive *sound recording* rights.[131] As discussed in Part II.A.3, these sound recording rates, unlike the mechanical rates at issue in *Phonorecords III*, are *not* subject to a compulsory license. Nonetheless, the Copyright Owners' expert justified this benchmark by noting that interactive sound recording licenses (1) covered the same "composite good" as the rates being determined in *Phonorecords III*, meaning the sound recordings embodying the musical works at issue here; and (2) involved the same licensees, the streaming services.[132] Because, however, the actual rights governed by the sound recording licenses native to the benchmark were different from the underlying musical work licenses at issue in this proceeding, he conceded that certain adjustments would have to be made.[133]

In service of these adjustments, the Copyright Owners' expert sought to quantify a general marketplace value ratio between sound recording royalty rates and musical work royalty rates.[134] To do this, he looked to various interfaces in which licensees must license both sound recordings and underlying musical works and calculated the ratio between payments for each right.[135] He derived his range of ratios from the following settings: (A) the 2012 settlement statutory rates;[136] (B) voluntary licenses for interactive streaming, which he discounted because, he argued, their rates were depressed by the "shadow" of the compulsory license;[137] (C) synchronization licenses, or licenses for film and television audio-visual placements,

[131] *See Phonorecords III*, *supra* note 28, at 1936.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] He calculated that the TCC prongs under the 2012 rates suggested a sound recording/musical work ratio of between 4.55:1 and 4.76:1, which he argued was an "upper bound." *Id.* For an elaboration on what the 2012 structure entailed, see *supra* Section II.A.1.
[137] Based on real marketplace agreements, he calculated a sound recording/musical work ratio of between 4.2:1 and 4.76:1, "closely tracking the regulatory ratios implicit in the section 115 TCC." *Id.* at 1937.

which are typically negotiated in a free market for *equivalent* rates on the sound recording and composition side;[138] (D) marketplace YouTube agreements; and (E) marketplace Pandora "opt-out" deals. [139] From these ratios, making certain economic assumptions, he calculated a (redacted) range with a (redacted) midpoint.[140] Presumably, the Copyright Owners' final proposed rates fell within this range.

While it ultimately rejected the Copyright Owners' proposals, the Board found the approach of evaluating benchmark ratios between sound recording and musical work rates to be "a reasonable first step."[141] However, it took issue with some of the expert's data and methodology—that his "wide range" of ratios was the result of data points that "do not relate to the same products and same uses of the two rights,"[142] including some that incorporated "inefficiently high rates" arising in the "unregulated [for interactive streaming] . . . oligopoly" that is the sound recording industry.[143]

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138 Here, he found a sound recording/musical work ratio of 1:1, noting that this was an "important" benchmark because it showed that, in an open market, the two rights are often "equally valued." *Id.*

139 For these two deal types, the terms, and resultant calculated ratios, have been redacted in the public *Phonorecords III* decision: YouTube's agreements with publishers and labels, as well as Pandora's agreements for digital performance rights with labels and with certain music publishers who had partially withdrawn from the PROS between 2012 and 2016. The Board characterized these ratios as falling "in the middle of his range. *Id.* at 1938. Partial withdrawal was disallowed in 2015. *See* Pandora Media, Inc. v. Am. Soc'y Composers, 6 F. Supp. 3d 317, 322 (S.D.N.Y. 2014), *aff'd*, 785 F.3d 73, 77–78 (2d Cir. 2015).

140 *Phonorecords III*, *supra* note 28, at 1940. Typically, the Board redacts from its public opinions proprietary data that it relies upon for its rate determinations.

141 *Id*.

142 *Id.*

143 *Id.* The Board alluded to its reliance in *Web IV* on noninteractive services' ability to counteract these oligopolistic forces by *steering* listeners to lower-cost repertoire, and its conclusion in that case that no similar function exists in interactive streaming—where, by definition, the service must be prepared to serve the listener whichever song the listener wishes to hear. *See Web IV*, *supra* note 73, at 26343. As a result, the Board expressed skepticism that interactive sound recording evidence rates could reliably be used to inform an "effectively competitive rate," as it deemed to be required under section 801(b). *Id.* (citing *Web IV* for the proposition that a benchmark derived from royalty rates negotiated between streaming services and the record label "oligopoly…compromises the value of rates set therein as useful benchmarks for an 'effectively competitive' market…as required by the 'reasonable rate' language in section 801(b)(1)"). Nonetheless, the Board still entertained sound recording/musical work ratios based on these rates. *Id.* at 1940–41.

Specifically, the Board (A) accepted the ratio derived from the 2012 settlement rates as a probative benchmark of "a rate the parties are willing to accept."[144] It also (B) enthusiastically accepted as probative the ratio derived from voluntary interactive streaming licenses, reiterating that a statutory "shadow" is not disqualifying, even as it might affect how the Board ultimately weighs that benchmark.[145] However, it (C) rejected the 1:1 synchronization ratio as a benchmark for interactive streaming rates "because of the large degree of incomparability" between synchronization and mechanical licensing.[146] It also (D) rejected the sound recording/musical work ratio derived from YouTube agreements as a useful benchmark because of differences between the two service types, and the fact that sound recording YouTube rates are depressed by DMCA "safe harbor" provisions—while also dismissing as "conclusory" the Copyright Owners' suggestion that "safe harbor" also drives YouTube *composition* rates downward.[147] Finally, the Board (E) partially

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144 *Id.*

145 *Id.* at 1941. For further background surrounding the statutory "shadow," see sources cited *supra* note 119. While the Board acknowledged that the notion of a statutory "shadow" that constrains marketplace agreements is perfectly valid, it also suggested that this it may have procompetitive effects: it may help to "offset or mitigate the bargaining power of licensors who otherwise have the ability to threaten to 'walk away' from negotiations and thus decimate the licensees' businesses." *Phonorecords III*, *supra* note 28, at 1932–33.

146 *Id.* at 1941 (quoting Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510, 4519 (Jan. 26, 2009) (to be codified at 37 C.F.R. pt. 385) [hereinafter "*Phonorecords I*"]). Per the Board, several factors contribute to this "incomparability." First, synchronization licenses arise in situations where film and television producers may enter a transaction with "a certain musical work in mind," and the option to re-record that work (which is why "cover songs are quite common in films"), deflating the value of any single sound recording of a musical work relative to the work itself. *Id.* Second, the Board concluded that the market for synchronization placements is more competitive than other music licensing markets: in the interactive streaming context, where the services' core product is a comprehensive catalog of many songs, each sound recording is effectively a "must have" complement for every other sound recording. *Id.* Not so in synchronization—there, the Board noted, sound recordings are substitutes for each other, competing for scarce placement opportunities. *Id.*

147 *Id.* at 1942. The Board acknowledged that YouTube does compete directly with the audio-only interactive streaming services governed by Section 115, but that, as a video service, it is not itself subject to Section 115 (nor its "shadow"); it was swayed by the differences between the two service types. *Id.* Nonetheless, in addition to the perceived differences in how "safe harbor" operates for the two copyrights, it emphasized that the

accepted the benchmark derived from Pandora's marketplace deals with publishers who had partially withdrawn digital performance rights from the PROs prior to 2016.[148]

For their part, the Services who advocated renewing the 2012 structure did not "examine in detail" the rates within their general benchmark proposal: the 2012 settlement itself.[149] Rather, they argued that the rates within the 2012 structure were generally reflective of the relevant market, had "baked in" the relevant economic variables, and triggered a reliance interest from various stakeholders and new entrants.[150]

The Board dismissed both the overall "broad" tack taken by the Services, as well as their specific reliance arguments.[151] It "categorically rejected" any reliance argument based on the plain language of the statute providing that each rate determination is *de novo*.[152]

The Services also introduced the newly extended (by settlement between the Copyright Owners and, among others, record labels) mechanical rates for physical sales, digital sales, and ringtones as a benchmark to substantiate their proposed interactive streaming mechanical rates.[153] In support of this benchmark, it argued that

addition of video offerings "creates a bundling of value distinguishable from the value of interactive streaming alone." *Id.*

148 The Board quibbled with some of the Copyright Owners' expert's assumptions, and disregarded a purported downward trend in the sound recording/musical work ratio that he claimed the agreements supported. *Id.* ("His change in the ratio…was driven by expectations regarding the likelihood of an uncertain change in the legal landscape regarding publisher withdrawals from performing rights organizations. Such uncertain potential changes are not well-captured by mapping them over a time horizon."). The Board elected to proceed with the ratio derived from just one of his (redacted) data points as a useable benchmark. *Id.*

149 *Id.* at 1944.

150 *Id.* The Services argued that they had relied upon the 2012 rates continuing in "developing their business models," including choosing to enter the market at all. *Id.* Additionally, they took issue with the Copyright Owners' construction of "the Services" as a monolith, reminding the Board that "not all Digital Services use the same business model." *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at 1945. Musical works are reproduced within the meaning of the Copyright Act in a number of contexts, including physical sales, digital sales, ringtones, and digital streaming. Johnson v. Copyright Royalty Bd., 969 F.3d 363, 371 (D.C. Cir. 2020). All of

because the total revenue created by physical and digital sales was, at that point, roughly equal to the revenues created through interactive streaming, the two avenues were of "equivalent financial importance to publishers" when negotiating.[154] Thus, it provided useful guidance on the "industry's sense of the market rate" as well as the "industry's sense of how the judges would apply [section 801(b)]."[155]

The Board accepted this rate as "somewhat useful," noting that it was a recent, voluntary settlement pertaining to the same licensed rights, by the same licensors.[156] However, it also recognized that the "access value" of owning a specific song or album is dwarfed by the value of access to the comprehensive repertoires offered by interactive streaming services.[157] As a result, the Board concluded that this rate was "at best" a useful guidepost for mechanical floors.[158] Nonetheless, it also accepted portions of the Services' economic analysis using this benchmark and allowed the resulting figure to inform its final rate determination for streaming mechanical rates.[159]

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those reproductions are subject to compulsory licensing and statutory rate-setting. *Id.* at 368. In the lead-up to *Phonorecords III*, stakeholders settled regarding the statutory rates for physical sales, digital sales, and ringtones. *Id.* at 371. The *Phonorecords III* proceedings arose only after a similar settlement was not reached for digital streaming. *Id.*

154 *Phonorecords III*, *supra* note 28, at 1945.

155 *Id.*

156 *Id.* at 1946.

157 *Id.* at 1945. The Board acknowledged that the formal distinction between ownership and access was insignificant, because "[o]wnership is in essence a more comprehensive and unconditional form of access." *Id.* The important difference here was the *scale* of music available via access/ownership, not the "access" or "ownership" label itself. *Id.*

158 *Id.* at 1946.

159 The Services' experts attempted two economic analyses. *Id.* First, they applied the RIAA's streams-downloads "equivalence" factor (150 to 1), and an academic study's attempt at the same metric (137 to 1), against Spotify's streaming data, and the effective 2012 percentage-of-revenue rate, to calculate an appropriate per-stream benchmark rate, which was significantly lower than the per-play rates proposed by both the Copyright Owners *and* by Apple (the latter was derived using a similar methodology). *Id.* at 1946. The Board rejected the first approach out of hand: The Services had neither defined what "equivalence" means, nor why this specific construction of "equivalence" would be significant in this context. *Id.* at 1944. However, the Board accepted the Services' experts' second economic analysis, in which they divided the songwriter royalty rate for downloads and CDs from the average retail price for each format, respectively, and applied those quotients against streaming service revenues, to find that an equivalent percentage-of-

b) Shapley Economic Modeling

Having found the benchmarks derived from real-world agreements each to be inadequate—if occasionally helpful—the Board next evaluated several competing, complex Shapley economic models.[160] The Board quoted expert testimony explaining that the Shapley analysis endeavors to model bargaining in a free and "fair" market by assigning costs to each party "according to its average contribution to cost" and to assign benefit "according to its average contribution to value."[161]

The extent to which the modeled market should be "fair" or "free"—and the extent to which there is an economic difference between those terms—varied by model.[162] In designing her model, the Services' expert, explicitly invoking 801(b) Factor B (requiring a *fair* income for both licensor and licensee) and Factor C (consideration of the parties' relative roles), chose to "intentionally deviate from the market-based distribution of profits" in favor of the ideals espoused in those two 801(b) factors.[163] By contrast, the Copyright

revenue rate would be between 10.2% and 11.3%—right around the 10.5% percent-of-revenue figure in the 2012 rates. *Id.*

160 "The Shapley methodology is a game theory model that seeks to assign to each market player the average marginal value that the player contributes to the market." Johnson v. Copyright Royalty Bd., 969 F.3d 363, 372 (D.C. Cir. 2020). For more on Shapley analyses, see Richard Watt, *Fair Remuneration for Copyright Holders and the Shapley Value*, *in* HANDBOOK ON THE ECONOMICS OF COPYRIGHT 118, 120 (Richard Watt ed., 2014) ("The Shapley model of allocation has long been accepted by economists as providing a fair and equitable sharing rule."); Anne Layne-Farrar, A. Jorge Padilla, & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of Frand Commitments*, 74 ANTITRUST L.J. 671, 693 (2007) (discussing Shapley modeling in the patent licensing context); David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 349–52 (2001) (discussing Shapley values more broadly, beyond the intellectual property context).

161 *Phonorecords III*, *supra* note 28, at 1947–48.

162 *Id*. While the Copyright Owners' primary Shapley expert characterized this analysis as modeling "bargaining processes in a free market," the Services' Shapley expert stressed that the analysis "embodies a notion of fairness." *Id.* The Copyright Owners' rebuttal Shapley expert's characterizations fell in between, describing Shapley analysis as modeling "the outcome in a hypothetical 'fair' market environment…when all bargainers are on an equal footing." *Id.*

163 The Services' expert, unlike the Copyright Owners' experts, also designed her model to "eliminate a separate factor— market power—that she asserts renders a market-based Shapley Analysis incompatible with the objectives of Factors B and C of section 801(b)(1)." *Id.* at 1950.

Owner's expert attempted to predict the sound recording/musical works ratio that would occur "in an unconstrainted market."[164] Unsurprisingly, the Copyright Owners' model produced higher royalty rates than the Services' model. Indeed, the Services' expert concluded that not only should rates be lower than the Copyright Owners' model suggested, but "the fairness component of § 801(b) factors suggests that interactive streaming's mechanical rates should be reduced *from their current level*."[165]

Though they differed in their results, all three Shapley analyses concluded that "the ratio of sound recording to musical works royalty rates should decline" from the 2012 ratio of 5.71:1, which was based on the 10.5% percentage-of-revenue rate versus approximately 60% for sound recordings.[166] In other words, all analyses rejected the reality under the 2012 rates in which sound recording owners were paid nearly *six* times more for streaming activity than the creators of the underlying compositions. While they disagreed on how *much*, all three experts agreed that the gap between artist/label compensation and songwriter/publisher compensation should decrease.

c) Zone of Reasonableness

Having evaluated each of the parties' numerical rate proposals, the Board proceeded to its next task: assembling a "zone of reasonableness," or a range of valid potential rates from which to select final rates. First, the Board converted the three (redacted) ratios derived via Shapley analyses into percentage-of-revenue and TCC figures in order to fit within the rate structure the Board had previously adopted from Google's structural proposal.[167] Then, the Board positioned two of those three putative rates[168] to establish a (redacted)

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164 *Id.*

165 *Id.* at 1949 (emphasis added).

166 *Id.* at 1952.

167 *See id.* at 1948–54; *supra* notes 115–123 and accompanying text.

168 One of the Copyright Owners' experts presented his figures in rebuttal testimony; because the Services' expert did not have a chance to rebut these figures, they were not included in the zone of reasonableness. *See id.* at 1954. No benchmark values were included because the Board had already rejected each of the proffered benchmarks. *See supra* Section II.A.4.a.

"zone of reasonableness" for each of the two prongs.[169] Finally, "[t]aking into consideration the totality of the evidence presented in this proceeding"—without further elaboration[170]—the Board selected a (redacted) final figure from the zone of reasonableness for each prong.[171]

5. Applying the 801(b)(1) Factors

Armed at long last with both a structure and potential numerical rates to populate that structure, the Board now engaged directly with the guiding 801(b)(1) factors. It noted that these four factors compel the Board to use "legislative discretion"[172] in determining "reasonable rates" because the factors "pull in opposing directions," and the Board must therefore choose one rate from a range of reasonable rates that may each "serve all these objectives adequately but to differing degrees."[173]

In the end, the Board found that the rates and structure it had already selected passed 801(b) muster and did not warrant further adjustment upon express application of the 801(b) factors.

As a prelude to its discussion of each factor, the Board discussed the relationship between the 801(b) standard and market-based rates set under the willing buyer/willing seller standard.[174] The key difference: unlike the willing buyer/willing seller standard, "*section 801(b)(1) does not focus on unregulated marketplace rates*."[175]

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169 *Phonorecords III*, *supra* note 28, at 1948–54.

170 *Id.* at 1954. The Services seized upon this point in their appeal. *See* Service Brief, *supra* note 128, at 43 ("[O]nce the Majority established its 'zone of reasonableness, it set the rate by simply choosing the midpoint of the zone. The Final Determination contains no explanation whatsoever for that choice or even an acknowledgment that it made such a facile split…."). The D.C. Circuit did not rely upon this point in its decision to vacate and remand. *See generally* Johnson v. Copyright Royalty Bd., 969 F.3d 363 (D.C. Cir. 2020).

171 *Phonorecords III*, *supra* note 28, at 1954.

172 *Id.* at 1955 (citing SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220, 1224 (D.C. Cir. 2009)).

173 *Id.* (citing Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 9 (D.C. Cir. 1981)).

174 *Id.* at 1955. Of course, while the pre-MMA Board was still not governed by willing buyer/willing seller in the context of mechanical rate-setting under Section 115, it had plenty of experience applying willing buyer/willing seller in the Section *114* context. *See, e.g.*, *infra* Section II.B.

175 *Phonorecords III*, *supra* note 28, at 1955 (emphasis in original).

However, the Board clarified, market-based rates are acceptable, without adjustment, provided that their underlying market forces also satisfy the four itemized factors.[176] If they do not, then the Board "may adjust the reasonable, market-based rate appropriately."[177]

Factor A. The Board first had to resolve a stark, philosophical difference in how the two sides interpreted Factor A: "maximiz[ing] the availability of creative works to the public."[178] The Services urged the Board to view this factor through the demand-focused lens of maximizing consumer access to streaming services and therefore to the works contained therein.[179] The Copyright Owners advocated a supply-focused lens: that chronically depressed rates stifle incentives for creators to continue to generate a supply of creative works that can then be made available to the public.[180]

While it expressed sympathy for the evidence the Copyright Owners presented to demonstrate the very real financial difficulties faced by the songwriter labor force—and expressly stated that these conditions warranted a significant rate increase—the Board opted for the Services' demand-focused interpretation of "availability."[181] It then concluded that the flexible rate standard it had provisionally adopted did, in fact, satisfy the "availability" factor by allowing streaming services to more flexibly and comprehensively cater to varying willingness to pay ("WTP") among downstream consumers.[182] Therefore, it reasoned, no adjustments to its proposed rate structure and numerical rates were warranted under Factor A.[183]

Factors B and C. Next, the Board tackled Factors B and C in tandem. Per these factors, the Board was tasked, respectively, with affording a "fair" return to copyright owners and users , while weighing "the relative roles of the copyright owner and copyright user in

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176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.* at 1956.

180 *Id.* at 1957.

181 *Id.*

182 *Id.* at 1958.

183 *Id.*

the product made available to the public."[184] It remarked that Congress included these factors to allow the Board to move "[b]eyond a strictly market-based analysis," and that the two could be grouped together because, as all parties' experts agreed, the Shapley value "operationaliz[ing] the concept of fair return based on relative contributions" would speak to both.[185] Because its proposed rates were themselves derived from Shapley analyses, which purported to provide a "fair allocation of revenue between copyright owners and services," the Board summarily deemed these two factors satisfied without any further adjustment.[186]

Factor D. The Board opened its discussion of Factor D—avoidance of industry disruption—by citing its own test from *Phonorecords I*.[187] There, it had held that a rate would need adjustment if it caused any "adverse impact that is substantial, immediate and irreversible in the *short-run*."[188] It then noted that it had declined to adopt a per-stream rate for precisely this reason.[189] It added that, while it had not granted the Services' wish to maintain the exact 2012 rate structure, it had adopted many of that structure's attributes in service of this same goal.[190]

The Board disavowed any responsibility under Factor D to account for speculative, long-run hypothetical consequences. It reiterated that "it is not the Judges' role to protect the current players in the industry."[191] It acknowledged that, even under the existing rates,

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184 *Id.* at 1958–59.
185 *Id.* at 1959.
186 *Id.*
187 *Id.*
188 *Id.* (emphasis added). This limited construction of "disruption" was a major point of contention on appeal. *See* Service Brief, *supra* note 128, at 49 ("These rates could cause a significant disruption to the market, including that record labels could adapt by "mov[ing] the streaming service in-house."). The D.C. Circuit did not rule on this point. *See* Johnson v. Copyright Royalty Bd., 969 F.3d 363, 389 (D.C. Cir. 2020) (vacating on procedural grounds, and declining to opine on the Board's interpretation of 801(b) factors B, C, and D).
189 See *Phonorecords III*, *supra* note 28, at 1959.
190 *Id.*
191 *Id.* at 1953 n.137. The majority shrugged off the dissent's suggestion that if mechanical royalty rate increases forced record companies to reduce their own rates, they might one day contemplate the radical step of forming their own streaming services, and

interactive streaming services were not profitable, and stated bluntly that "nothing the Judges do in this proceeding will change the Services' business models to change that circumstance."[192] Furthermore, the Board continued, while mechanical royalty rates certainly have some effect on the bottom-line, even the Services themselves acknowledge that the lack of profitability was primarily "a function of a lack of scale [because] market share is divided among too many competing interactive streaming services."[193] However, the Board conceded, while the Services had certainly demonstrated that they could absorb short-term losses, there could still be an immediate inflection point "beyond which services will be unable to attract capital and survive until the long run market dénouement."[194]

Thus, while the lack of profitability did nothing to convince the Board that it needed to adjust its rate increase *in the long run* to satisfy Factor D, this last point did prompt one temporal adjustment.[195] In order to avoid the "short-run" disruption that Factor D protects

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shutting out third-party services, rather than "docilely accept such a revenue loss." *Id.* at 1953; *see also id.* at 2028 (Strickler, J., dissenting). The majority contended that the risk of the "must-have supplier" record companies walking away from negotiations, effectively shuttering the services, would exist under any rate governance, and the fact that they had not done so "demonstrates that it is not in their economic interest to do so." *Id.* at 1953. This was another matter of contention on appeal. *See* Service Brief, *supra* note 128, at 49 ("Eliminating all existing providers of interactive streaming services, and their substitution with vertically-integrated providers, would 'disrupt' the market under a plain reading of that statutory term. Because the Majority wrongly believed that it was *required* to ignore whether its decision may force all existing streaming services from the market, its decision should be vacated.") (emphasis in original). Vacating *Phonorecords III* on procedural grounds, the D.C. Circuit did not rule on this point. *Johnson*, 969 F.3d at 389 (acknowledging the Services' contention that "the Board failed to account for the possibility that the new rate structure and heightened rate would eventually result in the elimination of all existing providers of interactive streaming services" but that insisting that the court "need not at this juncture address whether the Board adequately considered" this, and other, 801(b)-based substantive arguments) (internal quotation marks omitted).

192 *Phonorecords III*, *supra* note 28, at 1959. In any event, it predicted, perennial "chronic accounting losses," had not and would not preclude streaming services from being in business, nor new services from entering the market. *Id.* at 1959–60. The Board had previously mused that Spotify's market value of over $8 billion at the time "suggest[ed] perhaps, investors' expectations regarding future profits." *Id.* at 1922.

193 *Id.* at 1960.

194 *Id.*

195 *See id.*

against, the Board elected to roll out the 44% rate increase it was about to introduce over a five-year period, rather than overnight.[196]

6. Final Rates

In the end, the Board landed on the following "Subpart C"[197] mechanical royalty rates: a nearly 44% increase over the 2012)rates.[198] The baseline rate is the greater of the following:[199]

TABLE 1 TO PARAGRAPH (b)(1)—2018–2022 ALL-IN ROYALTY RATES

Royalty year	2018 (%)	2019 (%)	2020 (%)	2021 (%)	2022 (%)
Percent of Revenue	11.4	12.3	13.3	14.2	15.1
Percent of TCC	22.0	23.1	24.1	25.2	26.2

These "all-in" rates are then subject to a deduction of performance royalties, typically paid to performing rights organizations, and then divided by stream count to generate a per-stream rate.[200] If that rate falls below the mechanical floor (typically a fixed rate per user per month, such as 50 cents per subscriber per month for "standalone portable subscription offerings") then the mechanical floor rate will apply instead.[201]

B. *A Willing Buyer/Willing Seller Case Study (Web IV)*

While the willing buyer/willing seller standard has only governed mechanical royalties for musical compositions under Section

196 *Id.*

197 Beginning after *Phonorecords III*, "Subpart C" now refers to all streaming services "that are revenue bearing," including ad-supported, subscription, family plans, student plans, annual plans, etc. It does not govern mechanical royalties for physical sales, digital sales, ringtones, or bundles thereof ("Subpart B"). "Subpart D" governs promotional streaming and free trials—streams that are free to the user (including promotional stream, free trials, but *not* ad-supported streams, which fall under "Subpart C"). "Subpart A" provides general definitions and terms governing the statutory license. *Id.* at 1961, 2031–36. Prior to *Phonorecords III*, these subparts were organized differently.

198 *Id.* at 1958. The 44% increase figure refers to the new 15.1% percent-of-revenue prong that is scheduled to arrive in 2022, which is a 43.81% increase from the old 10.5% headline percent-of-revenue prong under the 2012 rates, which remained operative through 2017. *Id.* at 1960, 2024.

199 *Id.* at 2035.

200 *Id.* at 2035–36.

201 *Id.*

115 since the passage of the MMA, Section 114 rate-setting proceedings, which determine the statutory rates for the public performance of *sound recordings* via *noninteractive* streaming, have long been governed by a willing buyer/willing seller rate standard.[202]

Interactive services differ from noninteractive services in two important respects. First, although not all services of each type are identical, the core distinction between the two categories is that interactive streaming users have full agency in selecting the song they wish to listen to, while noninteractive users cannot select specific songs (and are also subject to other constraints, such as limited skips, song restarts, etc.).[203] Second, the compulsory public performance license for sound recordings under Section 114 applies only to noninteractive streaming services.[204] It does not apply to interactive streaming services.[205] In this sense, it is the exact mirror image of the Section 115 compulsory license, which governs interactive, but *not* noninteractive, streaming.[206]

In the Section 114 context, the Board is tasked with establishing "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing

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[202] *Web IV*, *supra* note 73, at 26316.

[203] *See* Wittow et al., *supra* note 16; *see also, e.g.*, *Skips and Replays*, PANDORA, https://help.pandora.com/s/article/Skips-1519949305278?language=en_US [https://perma.cc/MP6S-4DTJ]. Perhaps the most prominent examples of each are, on the interactive side, Spotify and Apple Music's basic interactive services, whose users can browse and select among vast libraries of individual songs and albums, as distinguished from Pandora's prominent noninteractive internet radio service, whose users can supply artist and genre inputs in order to prompt the service to create a general radio station that is responsive to the supplied preferences without ceding actual control over the specific songs played. *See* Schoonmaker, *supra* note 18. While noninteractive streaming services like Pandora rose to prominence in the US before their interactive counterparts, interactive services like Spotify and Apple Music have come to dominate the streaming market in recent years. *See* Ashley King, *Pandora Is Losing Subscribers—88,000 Left the Service Last Quarter*, DIGITAL MUSIC NEWS (Feb. 4, 2020), https://www.digitalmusicnews.com/2020/02/04/pandora-losing-subscribers-q4-2019 [https://perma.cc/6FJT-G6P8]; Stuart Dredge, *How Many Users Do Spotify, Apple Music and Other Big Music Streaming Services Have?*, MUSIC ALLY (Feb. 19, 2020), https://musically.com/2020/02/19/spotify-apple-how-many-users-big-music-streaming-services/ [https://perma.cc/SJY3-48ZA].

[204] *See* 17 U.S.C. §114(d)(2).

[205] 17 U.S.C. §114(d)(2)(A)(i).

[206] *See supra* note 18.

buyer and a willing seller."[207] To do so, it must sift through "economic, competitive[,] and programming information presented by the parties" in order to ascertain the rate structure that they believe would occur in a "hypothetical marketplace, free of the influence of compulsory, statutory licenses."[208] The statutory language of Section 114 explicitly permits the Board to "consider rates and terms of comparable services and comparable circumstances under voluntary, negotiated license agreements."[209]

1. Overall Structure

The Board's 2016[210] *Web IV* decision proceeded by way of a relatively simple structure, particularly compared to *Phonorecords III*. First, the Board engaged in a very brief rate structure discussion. Second, it evaluated the parties' submissions for prospective benchmarks in the rate-setting process and weighed potential adjustments to those benchmarks. In this case, the relevant parties were: on the licensor side, SoundExchange, the sole performing rights organization designated by the Copyright Office to collect and distribute public performance royalties for sound recordings; and on the licensee side, companies who offer noninteractive internet radio services, including Pandora and iHeart, as well as trade organizations like the National Association of Broadcasters (the "NAB").[211]

Third, the Board synthesized these adjusted benchmarks to establish a zone of reasonableness. Finally, it picked a rate from within that zone of reasonableness. The decision was unanimous. Notably, it was reached by the same three judges who would later split over *Phonorecords III*.

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[207] *Id.* (quoting 17 U.S.C. § 114(f)(2)(B)).

[208] *Id.*

[209] *Id.*

[210] Like Section 115 proceedings, Section 114 rate determinations also occur in five-year intervals. 17 U.S.C. § 112(e)(3). And like Section 115, the parties to Section 114 proceedings are stakeholders whose interest in the litigation is that they will become subject to the new statutory regime. *See supra* note 88.

[211] The Board also briefly disposed of proposals from Sirius XM, the NAB, and *pro se* songwriter/musician George Johnson. *Web IV*, *supra* note 73, at 26355.

2. Rate Structure

In contrast to *Phonorecords III*, the *Web IV* Board made quick work of its primary rate structure decision: it elected to renew the basic pre-existing per-play rate structure. It swiftly and summarily rejected SoundExchange and Pandora's separate "greater-of" rate structure proposals, whereby a statutory service would pay SoundExchange the "greater-of" a per-play rate *or* a percentage of service income.[212]

Before proceeding to evaluate the parties' proposed benchmarks, the Board then dispensed with some other ancillary structural matters. First, it declined to adopt differentiated rates depending on whether or not a streamed recording was being simulcast from a terrestrial radio broadcast.[213] Next, the Board briefly addressed the

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212 *Id.* at 26326 (discounting the relevance of the marketplace agreements that had been proffered in support of that proposal, and rejecting the notion that record companies should be entitled to share in service upside beyond the royalty generated by a properly calibrated per-play rate). The Board also referred to past rate determinations that had opted for a purely pure-play structure, and cited *stare decisis*-like directives from the Copyright Act that the Board should act in accordance with its own prior decisions. *Id.* (citing 17 U.S.C. § 803).

213 Many terrestrial broadcast radio stations offer digital simulcasts of their over-the-air programming. *See, e.g.*, *Listen to Live Radio*, IHEARTRADIO, https://www.iheart.com/live/country/US/city/new-york-ny-159/5 [https://perma.cc/JXX6-X2SC]. In support of the differentiated rates proposal, the testifying expert for the NAB derived the lower bound of the NAB's proposed "zone of reasonableness" for royalty rates from terrestrial radio, where broadcasters are not required to pay royalties for broadcasting sound recordings (they do pay for the underlying compositions), and whose promotional effect, in a hypothetical market, "would drive down royalty rates, possibly even resulting in negative royalty rates if the law permitted record companies to pay broadcasters to play their music (i.e. payola)." *Web IV*, *supra* note 73, at 26390. The Board was unmoved by the comparison to terrestrial radio because, simply, "there is no market for licensing of sound recordings for transmission by terrestrial radio stations, since there is no general public performance right for sound recordings." *Id.* at 26391. The Board also dismissed the *upper* bound of the NAB's "zone of reasonableness" because it was derived from the *SDARS II* CRB rates (governing the public performance of sound recordings via satellite radio), which had been promulgated under the § 801(b) standard, not willing buyer/willing seller. *Id.* at 26391. Finally, the Board deemed the NAB's other arguments irrelevant to whether a record company operating in the hypothetical marketplace would be willing to accept lower rates: (1) that FCC regulations require terrestrial broadcasters to act "in the public interest," (2) that terrestrial broadcasters tend to have a local and community-driven focus, and (3) empirical evidence that a significant percentage of (12.2%) simulcast listening is attributable not to music, but rather to "hosts, DJs, and other on-air personalities." *Id.* at 26321. The Board did, however, briefly entertain arguments

"novel question" of whether it is permitted to establish divergent rates for major and indie record companies.[214] It noted that while the evidence suggested that services entering into voluntary agreements in the actual marketplace do tend to pay higher rates to majors than indies, no party had proposed such a differentiated rate structure.[215] It elected to refer the matter to the Register of Copyrights, who relied on this lack of relevant proposals by actual parties in determining that the question "did not meet the statutory criteria for referral."[216] Without guidance from the Copyright Office, the Board both declined to opine on the legal question and elected not to differentiate rates by category of licensor for purposes of the *Web IV* rate structure.[217]

Finally, the Board declined to independently value substitution (the extent to which revenue and activity from one source crowds out revenue and activity from other sources) and promotion (the extent to which activity and revenue from one source enhances activity and revenue from other sources) effects when reviewing putative benchmark agreements.[218] Instead it proceeded under the presumption that any benchmark agreements already "factor in" any substitution effects and promotion effects.[219]

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surrounding the potential substitution of other sources of record company revenue by simulcasts, as well as the promotional benefits of terrestrial radio, and the effect these dynamics could have on record labels in a hypothetical marketplace. *See id.* at 26322 (declining to credit these arguments because of evidentiary deficiencies, rather than relevancy issues). Ultimately the Board relied upon evidence suggesting a "strong indication that simulcasters and other commercial webcasters operate in the same, not separate submarkets." *Id.* at 26323.

214 *Id.* at 26319.

215 *Id.*

216 *Id.* (quoting Memorandum Opinion on Novel Question of Law at 7, Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316 (to be codified at 37 C.F.R. pt. 380) (Nov. 24, 2015) (No. 14-CRB-0001-WR) [hereinafter "Register's Opinion"]).

217 *Id.*

218 *Id.* at 26321–22.

219 *Id.* The Board dismissed SoundExchange's attempts to offer subjective evidence of agreement participants *not* considering these effects when entering to agreements, as well as its claims that the Services' proffered benchmarks were "too new and untested" for the Board to conclude that these effects are "baked" into them. *Id.* at 26236. It did add, however, that for benchmark agreements imported into these noninteractive proceedings from other markets (e.g., SoundExchange's *noninteractive* benchmark, discussed *infra*

3. Benchmark Proposals

The Board devoted the bulk of its *Web IV* opinion to evaluating prospective benchmarks. It gave most serious consideration to sophisticated rate proposals, anchored in quantitative benchmarks, from SoundExchange, Pandora, and iHeart.[220] As a non-dispositive guide, the Board generally evaluated putative benchmarks using a "Four-Part Test" that it stated had been "implicit in the Judges' prior [*Web* CRB] determinations."[221] First, the *Willing Buyer and Seller Test*: that the benchmark rates are those "that would have been negotiated in a hypothetical marketplace between a willing buyer and a willing seller."[222] Second, the *Same Parties Test*: that the benchmark rates pertained to the same categories of parties that are appearing in front of the CRB.[223] Third, the *Statutory License Test*: that the "hypothetical marketplace" that the benchmark rates purport to actualize "is one in which there is no statutory license."[224] And fourth, the *Same Rights Test*: that the benchmark rates apply to the same rights that the Board is now presiding over.[225]

The Board also held that it is "required by law to set a rate that reflects a market that is *effectively competitive*."[226] In reaching this conclusion, it relied upon the statutory language in Section 114 (which is replicated in the new Section 115) providing that the "Copyright Royalty Judges…shall base their decision on economic, *competitive*, and programming information presented by the parties,"[227] as well as federal caselaw reinforcing this directive.[228] Importantly, the Board construed this requirement as permitting it to infer that

Section II.B.3), that the Board would have to "identify and consider any difference in the promotional/substitutional effects between these markets" in order to translate them into the noninteractive market. *Web IV*, *supra* note 73, at 26327.

220 The Board also swiftly disposed of proposals from Sirius XM, the NAB, and *pro se* songwriter/musician George Johnson.

221 *Web IV*, *supra* note 73, at 26383.

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.* In this case: "a blanket license for digital transmission of the record companies' complete repertoire of sound recordings." *Id.*

226 *See id*. at 26382 (emphasis added).

227 17 U.S.C. § 114(f)(B)(i) (emphasis added); 17 U.S.C. § 115(c)(1)(F).

228 *See Web IV*, *supra* note 73, at 26332 (citing Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 574 F.3d 748, 753 (D.C. Cir. 2009)).

"an excess of market power can preclude a finding that a buyer or seller was a 'willing' participant."[229] In such a scenario, the Board has determined that this requirement allows it to reject a benchmark, or adjust it so that it becomes effectively competitive.[230]

The Board Partially Adjusts, Partially Limits, and Partially Rejects SoundExchange's Benchmark. SoundExchange's proposal contemplated a rate that would be the "greater-of" (1) 55% of service revenue attributable to noninteractive streaming; or (2) an escalating per-play rate starting at $0.0025 per play in 2016 and increasing annually up to $0.0029 per play in 2020.[231] Its expert derived both figures from a benchmark calculated from "80 agreements between *interactive* streaming services and record companies."[232]

As discussed earlier, interactive and noninteractive services offer significantly divergent functionality to their respective users.[233] In spite of these differences, SoundExchange argued that its interactive-based benchmark satisfied the Board's traditional Four-Part Test. [234] In particular, addressing the *Statutory License Test*, its expert stressed that of all possible benchmarks, these voluntary marketplace agreements were least likely to be corrupted by the statutory "shadow"—the notion that the presence of the compulsory license gives licensees no incentive to offer higher rates than the statutory rates.[235] His reasoning: unlike the noninteractive services in *Web IV*, "interactive services *cannot* default to the statutory license."[236] However, addressing the *Same Rights Test*, he conceded that because there are important differences between interactive streaming and noninteractive streaming, his proffered benchmarks would need to be adjusted to fit into the Section 114 framework.[237]

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229 *Id.* at 26333.
230 *Id.* at 26331–32.
231 *Id.* at 26335.
232 *Id.* (emphasis added).
233 *See supra* notes 203–206 and accompanying text.
234 *Web IV*, *supra* note 73.
235 *See id.* at 26330, 26337.
236 *Id.* at 26337 (emphasis added).
237 *Id.* Addressing the *Willing Buyer and Seller Test*, SoundExchange's expert noted that unlike noninteractive agreements, these agreements were "were entered into voluntarily

Without explicitly responding to SoundExchange's invocation of the Four-Part Test, the Board partially adjusted, partially limited, and partially rejected SoundExchange's proposal based on an interactive streaming benchmark. First, it emphasized the need to adjust the benchmark in response to its finding that interactive streaming is not an "effectively competitive" market.[238] Because the business model for interactive streaming services is to offer users the ability to select from essentially comprehensive music libraries, it explained, these services "must have" every major label's repertoire to be "commercially viable."[239] The major labels' repertoires are thus economic "complements"—unable to be substituted for one another—and the resulting dearth of "buyer choice" precludes the market from being "effectively competitive."[240] As a result, in order for this benchmark to be used in any capacity, the Board would have to apply a "steering" adjustment to it.[241]

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between parties who did not have the option of electing the statutory license." *Id.* at 26337. Finally, addressing the *Same Parties Test*, he contended that the parties entering into interactive streaming agreements (record companies and interactive streaming services) were "similar" to the parties in the Web IV proceedings—SoundExchange appearing on behalf of record companies, and noninteractive streaming services. *Id.*

238 *Id.* at 26341. The Board rejected SoundExchange's contention that the mere presence of active negotiations between record companies and services indicated that the market was "effectively competitive." *Id.* at 26344 ("[N]egotiations over price can occur between a monopolist and its customers in order to facilitate price discrimination and increase monopoly profits.").

239 *Id.* at 26341.

240 *Id.* at 26340, 26342.

241 "Steering" is the process by which noninteractive services direct more listening traffic to certain licensors' catalogs in exchange for those licensors agreeing to accept lower royalty rates. *See id.* at 26341. The Board credited the noninteractive Services' contention that the "must-have," on-demand nature of interactive streaming makes it impossible for the interactive streaming services—unlike the noninteractive streaming services—to foster competition through steering. *Id.* Thus, in order for interactive streaming rates to be helpful in the noninteractive streaming context, they must be adjusted to reflect the pro-competitive benefits of steering. *Id.* In imposing this 12% adjustment, the Board cited "hard and persuasive evidence" from Pandora and iHeart's own benchmark agreements that steering "has reduced royalty rates in the [actual] noninteractive market and would do so in the hypothetical [noninteractive] market as well." *Id.* at 26334, 26343–44. The Judges applied economic analysis based on these Pandora and iHeart benchmark offerings to reduce the SoundExchange benchmark by 12% "to reflect an effectively competitive rate." *Id.* at 26341. This approach featured prominently in SoundExchange's appeal of the Board's decision; the Circuit Court deferred to the Board's discretion. *See* SoundExchange, Inc. v. Copyright Royalty Bd., 904 F.3d 41, 53 (D.C. Cir. 2018).

Second, the Board limited the applicability of the SoundExchange benchmark to only noninteractive *subscription* rates (and not the more prominent *ad-supported*, or "free-to-the-user" noninteractive rates). While the Board agreed with SoundExchange that there was "significant evidence of functional convergence"[242] between interactive and noninteractive services and that interactive and noninteractive services do in fact compete with one another for downstream listeners, it relied upon "overwhelming" evidence that in both interactive and noninteractive settings, the subscription and ad-supported models service entirely different classes of consumers—those who have some "willingness to pay" ("WTP") for a streaming service, and those with a WTP of zero (and who are therefore relegated to ad-supported services).[243]

The Board Accepts Pandora's Benchmark. Although similar in some respects, Pandora's benchmark met a different fate. Pandora also proposed a "greater-of" structure[244] spread across a range of possible royalty rates. The low end of the range it argued the Board should use to select rates: the greater-of (1) 25% of eligible Service revenue, or (2) a per-play royalty that would start at $0.00110 per play in 2016 and increase to $0.00118 by 2020.[245] The high end: the greater-of (1) 25% of eligible Service revenue, or (2) a per-play

242 *Web IV*, *supra* note 73, at 26347. SoundExchange had offered evidence detailing the many ways in which both types of services increasingly offer features catering to both "lean forward" and "lean back" listeners—and that within both types of services, the same user often alternates between the two capacities, depending on "the situation and the time of day" and "the mood they're in." *Id.* at 26335–36. Notably, the Board took no issue with SoundExchange grounding its economic analyses in service revenues, rather than profits. It dismissed—"as it pertains to the narrow segment of the market to which the Judges apply the interactive benchmark"—the Services' objections that a noninteractive service buyer would base its willingness to enter into a voluntary agreement based on profits, not revenues. *Id.* at 26348. To that end, it reiterated its holding from *Web II* that it is "not obliged to set the statutory rate at a level that permits a noninteractive service to realize any particular profit in the market." *Id.*

243 *Id.* at 26345. The Board also rejected SoundExchange's attempts to corroborate its benchmark with certain noninteractive agreements between record companies and largely interactive streaming services. It held that SoundExchange's expert had "failed to account for extra-statutory functionality," and to properly contextualize these agreements within the specific relationships that birthed them. *Id.* at 26353.

244 The Board had already rejected this portion of the proposal earlier in its opinion. *See supra* note 93.

245 *Web IV*, *supra* note 73, at 26355.

royalty that would start at $0.00120 per play in 2016 and increase to $0.00129 by 2020.[246] In support of this proposal, Pandora relied upon a benchmark derived solely from its 2014 agreement with Merlin, a rights agency representing independent record labels.[247]

The Board accepted Pandora's benchmark as probative of the rates that a noninteractive service would pay to indie labels in the hypothetical markets for both subscription-based and ad-supported ("free-to-the-listener") streaming.[248] First, while it did not expressly say so, the Board appeared to credit Pandora's argument that the proffered Pandora/Merlin benchmark satisfied a *variant* of the traditional Four-Part Test.[249]

Second, unlike the SoundExchange benchmark, the Pandora/Merlin agreement was native to the noninteractive streaming context. Relatedly, unlike the SoundExchange benchmark, the parties to the Pandora/Merlin agreement had voluntarily provided for pro-competitive "steering," allowing Pandora to disproportionately favor or disfavor certain songs, catalogs, or individual licensors in their selection of content to present to users.[250] The Board emphatically agreed with Pandora that the threat of steering—which "is synonymous with price competition in this market"—drives rates down, mitigating the "effect of complementary oligopoly" that would, if left unchecked, tend to inflate rates.[251] Thus, because it already

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246 *Id.*

247 *Id.*

248 *Id.* at 26365–66.

249 Pandora's argument: it (1) "constitute[d] a competitive and arms-length direct license" between a noninteractive service and individual label members of a collective who were each at liberty to either opt into the agreement, or remain subject to the statutory rates; and concerned (2) the same rights; (3) the same products (public performance of sound recordings via noninteractive streaming); and (4) the same parties as those covered by the statutory license. *Id.* at 26358.

250 *Id.* at 26336.

251 *Id.* at 26366 (adding that "[t]he nature of price competition is to cause prices to be lower than in the absence of competition, through the ever-present 'threat' that competing sellers [i.e., record labels] will undercut each other in order to sell more goods or services" by giving the contracting service a financial incentive to "steer" users towards lower-priced songs and catalogs). The Board gave little credence to SoundExchange's primary criticism: that even if steering may have this effect upon specific deals, it could not—"as a matter of simple arithmetic"—have the same effect upon the market as a whole. *Id*. at 26363–66

incorporated "steering," this benchmark satisfied the "effectively competitive" requirement.[252]

The Board did allow for one caveat: it split the difference between the parties' positions on the extent to which the Pandora/Merlin agreement was representative of the *entire* record industry. Over SoundExchange's objections, the Board held that the agreement was sufficiently representative of indie record companies.[253] However, it credited SoundExchange's criticism that the Pandora/Merlin was not representative of the rates that *majors* would command in the hypothetical marketplace.[254] As a result, the Board stated, it would consider this benchmark to be "only one guidepost" among others in establishing a statutory rate that would apply market-wide, including to majors.[255]

("[A] webcaster cannot commit to steer to *every* record company or label because there is only a total of 100% subject to steering."). While it acknowledged this mathematical reality, the Board maintained that accounting for steering was necessary to counterbalance the many anti-competitive factors tending to inflate rates, including: (1) the "stand-alone monopoly value of any one sound recording;" (2) the "firm-specific monopoly value of each Major's repertoire taken as a whole;" and (3) the omnipresent possibility that the Majors could "utilize their combined market power to prevent price competition among them by virtue of their complementary oligopoly power." *Id.* at 26368.

252 *Id.* at 26366, 26372.

253 In support of this position, the Board cited to "compelling" (redacted) statistics indicating the percentage of Merlin members who had opted into the agreement as well as the lack of evidence showing either coercion or of dissatisfaction among those who had opted in, and dismissed as a "classic principal-agency problem" SoundExchange's contention that Merlin—as a collective (the agent)—had prohibitively divergent incentives from its member labels (the principals). *Id.* at 26371.

254 *Id*. at 26372.

255 *Id.* at 26373. The Board closed its discussion of the Pandora/Merlin benchmark by dispensing with a triumvirate of additional SoundExchange critiques. First, it rejected the notion that the "mere presence of other items of potential value" beyond what would be included in a statutory license constituted grounds to disqualify the Pandora/Merlin benchmark. *Id.* at 26369 (while benchmarks "may be imperfect," to reject a proposed benchmark merely because it includes some extra-statutory features would be "throwing out the baby with the bathwater"). These other items included access to Pandora's proprietary data, its concert promotion apparatus, certain marketing opportunities for new releases, etc. *Id.* at 26359–60. Second, the Board dismissed the notion that Pandora's market power was too outsized to allow one of its voluntary agreements to serve as a reliable benchmark for statutory rates. *Id*. at 26371 (the "key variable" for monopsony power was the share of Merlin members' revenue derived from Pandora—a mere 5% insufficient to constitute market power—*not* Pandora's high listener-share among

The Board Accepts Portions of iHeart's Proposed Benchmarks. Noninteractive service iHeart proposed a per-play rate of $0.0005, relying on economic analysis centered around a benchmark consisting of an agreement between iHeart and Warner Music, a major label.[256] While the iHeart/Warner agreement featured a "greater-of" structure, incorporating a (redacted) per-play rate and a (redacted) percentage of iHeart revenue, its formal proposal simply contemplated a per-play rate, adjusted using what it called an "incremental" approach.[257] In addition to the load-bearing iHeart/Warner agreement, iHeart also proffered twenty-seven separate agreements with indie labels that it argued supported its rate proposal.[258]

While it rejected iHeart's "incremental" analysis, as well as any reliance on the twenty-seven iHeart/indie benchmarks, the Board accepted the per-play rate actually stated in the iHeart/Warner agreement as probative of the rates that a willing noninteractive service

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noninteractive streamers). Finally, it discarded SoundExchange's contention that the Pandora/Merlin agreement was "experimental," and therefore unfit to guide the Board. *Id.* at 26371–72 (remarking that any agreement is experimental to some degree, insofar as the parties are "free to vary the terms of their economic relationship" afterwards).

256 *Id.* at 26375.

257 *Id.* Its expert explained that the percentage-of-revenue component was not relevant because the parties did not believe that the "greater-of" threshold would be met: "So they have a number that both parties looked at and said that number would never actually be used in the real world, so who cares what the number is…." *Id.* at 26377. iHeart's "incremental" rate was derived from, but also differing from, the effective rates under the iHeart/Warner agreement. Its expert explained that the average rate under the iHeart/Warner agreement "does not necessarily reflect the rate…that a willing buyer and willing seller would have reached in a marketplace" because the agreement actually covered two bundles of plays: (1) the number of Warner repertoire plays that would occur absent the agreement (i.e. if Warner's repertoire were subject to the statutory license and rate); and (2) the number of additional Warner repertoire plays that would not occur if the iHeart/Warner agreement did not exist. *Id.* at 26376. Under the (redacted) terms of the iHeart/Warner agreement iHeart apparently had the opportunity to steer additional plays to Warner repertoire, and an incentive to do so under the (redacted, but apparently) sub-statutory rates provided therein. *Id.* Thus, iHeart argued that projections based on the effective rate provided in the iHeart/Warner agreement, which of course applied to both bundles, were "tainted by the upward influence of the statutory rate." *Id.* at 26376–77. iHeart's expert applied the same approach to the 27 iHeart/indie agreements, and used these results to justify its $0.0005 proposed per-play rate. *Id.*

258 *Id*. at 26377. Although these agreements applied to a "relatively small percentage of plays" relative to the iHeart/Warner agreement, iHeart argued that they were probative of what willing buyers and willing sellers would agree to. *Id.*

would pay to a willing major label.[259] It agreed with iHeart that the benchmark—when used correctly—satisfied its traditional Four-Part Test.[260] Notably, the Board dismissed SoundExchange's objections that this agreement's rates were too skewed by the statutory "shadow" to satisfy the *Statutory License Test*.[261] It reasoned that the iHeart/Warner benchmark was a voluntary agreement that its signatories had executed at a time when iHeart was already obligated to pay statutory rates, and that Warner had nonetheless agreed to an effective rate that was less than the statutory rate.[262]

Additionally, the Board held that the benchmark satisfied the *Same Rights Test* because, like the statutory license, it covered the noninteractive digital transmission of a record company's full repertoire of sound recordings.[263] To that end, while acknowledging

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259 *Id.* at 26389. The Board agreed with SoundExchange's criticism that iHeart's "incremental" approach based on the two separate "bundles" of streams under the agreement effectively and erroneously treated the price of half of a "buy one, get one free" transaction as zero, it "intentionally attribute[ing] no market value to the rate and revenue paid for" one of its conceptual bundles. *Id.* at 26379–82 ("If a vendor offered an ice cream cone…for $1.00, but offered two ice cream cones for $1.06, it would be absurd to conclude that the true market price of an ice cream cone is the incremental six cents. Rather, this offer indicates a market price of $0.53, the average price for the two ice cream cones."). Accordingly, in accepting the iHeart/Warner deal as a valid benchmark, the Board insisted upon using the "effective average rate contained in that agreement." *Id.* at 26384 (emphasis in original).

260 *Id.* at 26389. The Board further noted the role that steering had played in satisfying another statutory test: the "effective competitive" requirement—here, price competition leading to an agreement in which a licensor accepted "an increase in quantity (more performances) in exchange for a lower price (a lower rate)." *Id.* at 26383.

261 *Id.* at 26330.

262 *Id.* at 26331. This issue featured prominently in SoundExchange's ill-fated appeal of the Board's decision. SoundExchange unsuccessfully contended that the Board "arbitrarily failed to account for the impact of the statutory license on the rates negotiated in the Pandora and iHeart benchmark agreements," each of which were negotiated with the Service comfortably knowing "that they can simply fall back on the statutory rate if they fail to strike a bargain." SoundExchange, Inc. v. Copyright Royalty Bd., 904 F.3d 41, 50 (D.C. Cir. 2018) (affirming the Board's decision in its entirety, under the deferential "arbitrary and capricious" standard). SoundExchange went on to argue—also unsuccessfully—that the Board "arbitrarily ignored how the statutory license generally prevents parties from negotiating rates above the statutory royalty." *Id.* at 51.

263 *Web IV*, *supra* note 73, at 26383–84. Addressing the other two parts of the test, the Board held that the agreement satisfied (1) the *Willing Buyer and Seller Test*, because each party was sophisticated and "under to compulsion to enter into [it];" and (2) the *Same*

that the iHeart/Warner agreement contained extra-statutory terms—terms present in the marketplace agreement that would not be replicated in the statutory license—it declined to adjust the benchmark rate to reflect these elements.[264] In discussing "whether and how, if at all, to value these non-statutory items," it noted that the parties each had an obvious interest, as litigants, in establishing values to assign to the items that would support their position, and in substantiating those values with data and internal analyses.[265] For that reason, it ruled that it is the burden of the party claiming monetary value for a non-monetary term to prove up that value. Because it deemed that neither party had done so here, it elected to "disregard these unvalued items: not because [as iHeart's experts asserted] they should be presumed to have a net value of zero" but rather due to a "failure of proof of value by sophisticated parties."[266]

4. Zone of Reasonableness and Rate Selection

Thus, the Board emerged from its benchmark assessment and adjustment steps with three "usable" benchmarks that it could use to establish "zones of reasonableness" for commercial subscription and commercial ad-supported rates. For commercial subscription rates, it synthesized (1) the steering-adjusted SoundExchange benchmark ($0.0021 per performance) and (2) the subscription rate from the Pandora/Merlin agreement ($0.0022 per performance, "which already incorporates a steering adjustment") into an "extremely tight" zone of reasonableness spanning from $0.0021 to $0.0022 per performance.[267] From that range, without offering any

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Parties Test because, as in the hypothetical marketplace, the buyer was a noninteractive streaming service and the seller was a record company. *Id.* at 26383.

264 *Id.* at 26384–87. These "non-statutory items" included promotional opportunities "allow[ing] Warner's artists to benefit from particular advertising on iHeart's [platforms]," other (redacted) promotional opportunities, guaranteed payments, etc. *Id.*

265 *Id.* at 26384 ("[T]he Judges would anticipate that the record companies and SoundExchange would present specific evidence of the monetary value for the non-statutory consideration they received under the contract that must be added to the stated ('headline') rate on a per-play basis.… Reciprocally, the Judges would also expect to receive evidence from the webcasters/licensees with regard to their contemporaneous calculation of the monetary value of contractual consideration they allege to have received in addition to the basic right to play sound recordings.").

266 *Id.* at 26387.

267 *Id.* at 26405.

additional explanation, it selected a commercial subscription rate of $0.0022 per performance for the year 2016, adjusted only for inflation over the subsequent four years.[268]

For commercial ad-supported rates, it derived its zone of reasonableness from two (redacted) benchmark rates: (1) the ad-supported portion of the Pandora/Merlin benchmark, and (2) the "adjusted, effective average" rate from the iHeart/Warner benchmark.[269] From this (redacted) zone of reasonableness, it selected a commercial ad-supported rate of $0.0017 per performance.[270]

III. NEW BOSS: SAME AS THE OLD BOSS? APPLYING WILLING BUYER/WILLING SELLER TO SECTION 115

Part III of this Comment compares and contrasts the *Phonorecords III* and *Web IV* decisions explored in Part II. It then uses this comparison to predict how the willing buyer/willing seller rate standard, which has long governed Section 114 proceedings for the *noninteractive* streaming performance of *sound recordings*, will now operate under Section 115 proceedings dictating mechanical rates for the *interactive* streaming of musical *compositions*. *Phonorecords IV* will be the first mechanical rate-setting proceeding to occur after the MMA, and therefore will be the first to apply the new standard. It is set to begin in 2021 and conclude in 2022 with a new rate schedule for the five-year period beginning in 2023.[271]

In particular, Part III seeks to analyze various aspects of the two rate determinations explored in Part II in order to distill discrete indicators for how the *Phonorecords IV* Board is likely to approach a number of impactful issues. Part III.A begins by comparing the statutory language and implications of the switch from the old 801(b)

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268 *Id.*

269 *Id.*

270 *Id.*

271 *See* Mary Ellen Egan, *Pryor Cashman Partners Take on Streaming Music Providers*, BLOOMBERG L. (Feb. 25, 2020, 1:05 PM), https://news.bloomberglaw.com/us-law-week/pryor-cashman-partners-take-on-streaming-music-providers [https://perma.cc/ZWT4-XXMF]. It is worth noting that at least one of the Judges who presided over *Web IV* and *Phonorecords*—former Chief Judge Barnett—has been replaced in the tribunal by Judge Steve Ruwe; now-Chief Judge Feder's term is set to expire in 2020, while Judge Strickler's term expires in 2022. *See Phonorecords III*, *supra* note 28.

standard to the new willing buyer/willing seller standard, as well as the subtle but conspicuous differences between the Section 114 and Section 115 willing buyer/willing seller statutory texts. Next, Part III.B compares and contrasts the *Phonorecords III* and *Web IV* Boards' discussion surrounding several core value and principles. Part III.C then compares the structures and procedural emphases employed in each rate determination. Finally, Part III.D contrasts the role of benchmarks in *Phonorecords III* and *Web IV*, as well as several key arguments raised by the parties in the benchmark context.

A. Comparing the Statutory Rate Standards

1. 801(b) vs. Willing Buyer/Willing Seller (Section 115)

The MMA struck Section 115's 801(b) rate standard in its entirety. Under the pre-MMA statute, the Board was directed to use the four 801(b)(1) factors—(A) maximize the public availability of copyrighted works; (B) afford a fair return for the copyright owner and user; (C) reflect the relative roles of the copyright owner and user; and (D) minimize industry disruption—to determine "reasonable" rates.[272] The Board was also permitted to "consider rates and terms under voluntary license agreements" in determining its own rates and terms.[273]

Post-MMA, the Board must now "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[274] In doing so, it is to consider "economic, competitive, and programming information presented by the parties," including two specific elements.[275] First, it must consider the extent to which the compulsory use may "substitute for or may promote" recorded music sales or otherwise boost or depress revenue the copyright owner may earn from other uses of its musical works.[276] Second—the lone holdover from 801(b)—the Board must look to "the relative roles of

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272 *See* 17 U.S.C. § 801(b)(1) (prior to 2018 amendment).
273 17 U.S.C. § 115(c)(3)(D) (prior to 2018 amendment).
274 17 U.S.C. § 115(c)(1)(F).
275 *Id.*
276 *Id.*

the copyright owner and the compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk."[277]

Almost of all of the other pre-MMA rate guidance is gone. The other three 801(b) factors have disappeared. So too—conspicuously—has the language permitting the Board to "consider rates and terms under voluntary license agreements."[278]

2. Willing Buyer/Willing Seller (Section 114) vs. Willing Buyer/Willing Seller (Section 115)

The statutory text articulating the willing buyer/willing seller standards in Sections 114 and 115 governing, respectively, statutory rates for digital performances of sound recordings (*Web IV*), and mechanical royalty rates for musical works (*Phonorecords III*) are nearly identical. In fact, they track each other essentially word-for-word *except* for the clause in Section 114 permitting the Board to "consider rates and terms under voluntary license agreements."[279] This clause—again, conspicuously—is not mirrored in Section 115.[280]

3. 801(b) vs. Willing Buyer/Willing Seller (Section 114)

In *Phonorecords III*, the Board devoted some effort to broadly contrasting the 801(b) standard from the willing buyer/willing seller standard that was, at that time, employed only in Section 114 proceedings. The key difference, it explained, was that unlike willing buyer/willing seller, 801(b)(1) "does not focus on unregulated marketplace rates."[281] However, the Board was quick to make clear that 801(b) rates *could* be market-based, provided that those market-based rates also satisfied the 801(b) factors.[282] Only if the Board were to produce putative market-based rates, and then discover that

[277] *Id.*
[278] *See id; compare id. with* § 115(c)(3)(D) (prior to 2018 amendment).
[279] *See* 17 U.S.C. § 114(f)(1)(B)(ii).
[280] *See* 17 U.S.C. § 115.
[281] *See Phonorecords III*, *supra* note 28, at 1955 (emphasis removed).
[282] *See id.*

these rates failed to satisfy any of the 801(b) factors, would further adjustments be necessary.[283]

Furthermore, the Board emphasized, it was entirely possible that divergent rate proposals could each satisfy all of the 801(b) factors "adequately but to differing degrees," in which case the "legislative discretion" to choose among differing qualifying rates lay with the Board itself.[284] In short, the Board's view was that, while not all rates set under the Board's broad "legislative discretion" in an 801(b) setting would satisfy the willing buyer/willing seller standard, any market rate set under willing buyer/willing seller could pass 801(b) muster as long as it satisfied each of the factors to *some* degree.[285]

4. The Board's Discretion under Each Standard

The *Phonorecords III* and *Web IV* Boards operated under differing statutory guidance. Although both were tasked with determining "reasonable"[286] and "effective[ly] compete[tive]"[287] rates, they were ultimately subject to divergent rate standards.[288]

While the 801(b) factors colored the entire proceeding, the *Phonorecords III* majority's written opinion explicitly invoked them quite sparingly, at least until *after* it had already derived prospective rates from the parties' submitted Shapley analyses.[289] Only as a final step did the Board test its provisional rates and structure against 801(b) to ensure they did indeed satisfy each of the factors.[290] The Board then applied its own "legislative discretion" in support of its declaration that it was permitted to choose among any number of divergent rates, provided that each potential rate satisfied the 801(b) factors to some degree.[291]

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283 *See id.*
284 *Id.*
285 *See id.*
286 *See supra* notes 44–47 and accompanying text.
287 *See supra* notes 143, 226–230 and accompanying text.
288 *See generally supra* Section II.
289 *See supra* Section II.A.4–5.
290 *See supra* Section II.A.5.
291 *See supra* notes 284–285 and accompanying text.

The *Web IV* Board claimed no such legislative role. It interpreted its mandate, under willing buyer/willing seller, as determining the rates that would actually have been negotiated in a "hypothetical marketplace, free of the influence of compulsory, statutory licenses."[292]

This view will likely guide the *Phonorecords IV* Board as well, as it applies willing buyer/willing seller to Section 115 proceedings for the first time. The *Phonorecords III* Board's discussion of "legislative discretion" was strictly confined to the balancing of the various 801(b) factors. Outside of the presence of those factors, as the *Web IV* Board demonstrated, the *Phonorecords IV* Board will not—at least expressly—construe its role as involving public interest, public policy, or "legislative" judgments, beyond whatever judgments are embedded in the Board's analysis of what a willing buyer would pay, and what a willing seller would accept, in a hypothetical competitive market.

Importantly, there is good reason to suspect that the *Phonorecords IV* Board will do its best to conform to the *Web IV* Board's construction of the willing buyer/willing seller standard. Past Boards have consistently emphasized their *stare decisis*-esque mandate under the Copyright Act. Although the Board is an administrative body, not an Article III court formally bound by *stare decisis*, Section 803 provides that it "shall act in accordance with…prior determinations and interpretations of…the Copyright Royalty Judges."[293] The Board is well aware of this provision: it expressly relied on it in electing to continue the existing per-play structure in *Web IV*.[294] And just two years later, Judge Strickler (whose term continues until 2022) cited it in his *Phonorecords III* dissent.[295]

[292] *See Web IV*, *supra* note 73, at 26316 (citing Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24087 (to be codified at 37 C.F.R. pt. 380) (May 1, 2007) [hereinafter "*Web II*"]).

[293] 17 U.S.C. § 803.

[294] *See Web IV*, *supra* note 73 at 26326 (citing 17 U.S.C. § 803).

[295] *See Phonorecords III*, *supra* note 28, at 1980 (Stricker, J., dissenting) (citing 17 U.S.C. § 803).

5. Statutory Implications for *Phonorecords IV*

Together, *Web IV* and *Phonorecords III* establish that the move from 801(b) to willing buyer/willing seller is—formally, at least—a *restrictive* change. It removes certain discretion from the Board without, at least expressly, adding any discretion. Under 801(b), the Board was already permitted to establish free-market-analogous rates, provided that those rates also satisfied the 801(b) factors. However, it was also free to establish rates that were *not* intended to mimic a free market, again provided that those rates also satisfied the 801(b) factors.

Under willing buyer/willing seller, the Board perceives its role to be more constrained: it must simply approximate the rates that would occur in a free market, unconstrained by statutory licenses. Thus, it is now *required* to do something that before it was merely *permitted*—subject to the 801(b) factors—to do. It may wield no "legislative discretion" and consider no factors that do not expressly fall within the purview of this narrow task.

The precise implications of this change remain uncertain. They depend, of course, on whether the 801(b) factors, which did not necessarily preclude free-market rates, tended to nonetheless compel the Board to arrive at below-market or above-market rates. There is a general consensus, particularly among the rightsholder community, that the net effect of the 801(b) factors was to depress rates below what would have been achieved in an open market.[296] And while there is certainly evidence to support this view scattered throughout the *Web IV* and *Phonorecords III* determinations, those cases also highlight ways in which the elimination of the 801(b) factors may foreclose certain protections for copyright owners.[297]

B. Values and Principles

The *Phonorecords III* and *Web IV* Boards confronted many overlapping concepts. The similarities, and differences, in their dispositions may presage the *Phonorecords IV* Board's approach.

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296 *See supra* notes 57–68 and accompanying text.

297 For further discussion, see *infra* Section III.B.4.c.

1. The Board's Own Authority and Discretion

The *Phonorecords III* Board wielded broad authority and discretion in its rate-setting role. First, it exercised the *a la carte* freedom to build its own rate structure using ingredients distilled from several different party proposals—an approach the D.C. Circuit broadly condoned on appeal, even as it relied on related procedural defects in its decision to vacate the Board's results.[298] Second, the Board emphatically denied that it was at all beholden to stakeholders' reliance interests in continuity from one rate-setting period to the next: "The statute is plain in its requirement that the rates be established *de novo* each rate period."[299]

Third, the *Phonorecords III* Board expressly asserted the authority to condition rates on forces outside of its jurisdiction. It adopted a TCC prong that expressly tied mechanical rates to the rates independently negotiated by streaming services and third-party record labels for sound recording rights.[300] It also rejected the Copyright Owners' "jurisdictional argument" opposing the all-in rate configuration.[301] Because, the Copyright Owners had argued, performance rates are ultimately the province of rate court proceedings in the Southern District of New York, and because the Copyright Act takes great pains to establish separate mechanical and performance rights, an administrative tribunal charged only with establishing rates for mechanical licenses does not have the authority to make decisions encompassing performance rights.[302] The *Phonorecords III* Board was unmoved by this logic. It was unequivocal in its authority to impose an "all-in" rate structure, and elected to do so, crediting the

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298 *See* Johnson v. Copyright Royalty Bd., 969 F.3d 363, 381–82 (D.C. Cir. 2020) (while "some degree of deviation and combination [among parties' proposals] is permissible," in this case the Services were crucially "deprived of the opportunity to voice their objections" to the uncapped TCC prong because it was first raised in a post-hearing proposal).

299 *Phonorecords III*, *supra* note 28, at 1944.

300 *See supra* notes 118–129 and accompanying text.

301 *See supra* notes 96–99 and accompanying text. While the D.C. Circuit struck down the uncapped TCC prong on procedural grounds, nothing in its decision foreclosed future Boards from allowing these kinds of external forces to influence rates, provided that they provide the parties adequate notice and explanation. *See supra* note 128.

302 *Phonorecords III*, *supra* note 28, at 1929.

Services' emphasis on the "perfect complementarity" of mechanical and performance rights.[303]

While the *Web IV* Board's statement of its own authority was not quite so ambitious, this difference was likely more a product of context than of restraint. It gave no indication that its rationales for adopting a per-play rate—a structure plucked directly from party proposals, in continuation of the existing rate structure—had anything to do with limited authority to adopt other structures.[304] Likewise, while it elected to adopt a pure per-play rate, rather than any structure expressly contingent on third-party forces, the Board did not suggest that this was the product of a lack of authority to do otherwise.[305] Nor did it give any indication that its earnest reliance on third-party benchmarks—which included SoundExchange's benchmark derived from the unregulated interactive streaming sound recording market—was informed by a need for caution regarding the effect of extra-jurisdictional forces on statutory royalty rates.[306]

Looking forward, neither *Web IV*, nor the statutory changes, are likely to foreclose the *Phonorecords IV* Board from echoing the authority and discretion it flexed in *Phonorecords III*. As a result, it is likely to continue the all-in rate configuration, leaving mechanical rates tethered to third-party rate court jurisdiction. And while the D.C. Circuit's procedural rebuke may give the Board pause as it considers whether to reprise some version of the controversial TCC prong, there continues to be no substantive authority precluding the Board from tying songwriter earnings to the unregulated negotiations between interactive streaming services and record companies.

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303 *Id.* at 1934. The Board stressed that nothing in its decision actively regulated performance rates. *Id.* Rather, an "all-in" deduction was just that: a deduction. *Id.* In his dissent, Judge Strickler agreed with the majority, and stated further that, contrary to the Copyright Owner's view, it would be a dereliction of duty *not* to establish an "all-in" rate —"the perfect complementarity of the two licenses would be ignored, and the interactive streaming services would pay two times for the same economic right…to stream the musical work embodied in the sound recording." *Id.* at 1997 (Strickler, J., dissenting).

304 Rather, the Board rejected the proposed "per-play" alternatives for substantive reasons. *See supra* Section II.B.2.

305 *See generally id.*

306 *See generally supra* Section II.B.3.

2. Downstream Competitive Effects

Both the *Phonorecords III* and *Web IV* Boards placed significant emphasis on competitive forces. In addition to inferring an "effective competition" requirement from the statutory language governing both rate standards,[307] both Boards considered downstream competitive effects (i.e. competition among individual services for end users) to be relevant to the upstream royalty rates each Board was tasked with determining.

Phonorecords III: Per-Play Rate Structure? In *Phonorecords III*, the effects on downstream competition played a central role in the Board's choice of upstream rate structure. Two adversaries (the Copyright Owners[308] and Apple) each incorporated a fixed per-play prong into their rate proposals and justified that proposed structure by way of its downstream competitive effects. Although their proposals differed greatly in execution, the two parties agreed that a uniform per-play rate of some kind would level the downstream competitive playing field.[309] By aligning the Services' content costs with "actual demand for and consumption of their content," they argued, a per-play structure would forge a baseline "level of equality" among all streaming services competing for end users "without regard to business models" (i.e. free/ad-supported services, paid subscription services, bundled services, etc.).[310] Conversely, they

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[307] *See Phonorecords III*, *supra* note 28 at 1940; *Web IV*, *supra* note 73, at 26332.

[308] Here, "Copyright Owners" excluded George Johnson, dba GEO Music Group, a self-published songwriter and musician who appeared *pro se*. *Phonorecords III*, *supra* note 28, at 1924–25. The Board respectfully declined to incorporate his proposals. *Id.*

[309] *Id.*

[310] *Id.* Interactive music streaming configurations continue to proliferate. Some music streaming services are offered in bundles alongside video streaming services. *See, e.g.*, *Premium with Hulu*, SPOTIFY, https://support.spotify.com/us/article/premium-and-hulu/ [https://perma.cc/4E2C-6M4D]. Others are bundled with cellular data or broadband plans. *See, e.g.*, *AT&T and Spotify Bring Customers More Options*, AT&T (Aug. 05, 2019), https://about.att.com/story/2019/att_spotify_more_options.html. [https://perma.cc/GQR5-X4R6]. Still others are bundled with other offerings from the same company. *See, e.g.*, *YouTube Premium*, YOUTUBE, https://www.youtube.com/premium/ [https://perma.cc/T6YS-KMSJ]. Even among standalone, non-bundled offerings, there is an ever-increasing variety of offering types, spanning from "free" ad-supported services where the consumer pays no monetary fee, to "premium" subscriptions where the consumer pays a recurring subscription fee in exchange for increased functionality, flexibility, repertoire, audio

argued, the current scheme of upstream rate complexities[311] was not necessary to facilitate any particular downstream streaming model.[312]

The Board agreed that downstream competitive effects were of vital importance, but disagreed that a nominally level "per-play" playing field was the right way to manifest these concerns. Instead, it prioritized maximizing service *flexibility* to meet diverse downstream consumer willingness to pay ("WTP") for interactive streaming.[313] Because downstream users vary greatly in their willingness and ability to pay for interactive streaming, the Board reasoned, a fixed per-play rate could limit the Services' ability to effectively compete for low-WTP (and especially no-WTP) users, who may not generate sufficient revenue to cover fixed content costs.[314] By contrast, it reasoned, a flexible, percentage-of-revenue structure would enable the price discrimination necessary to allow both existing services and potential new entrants to compete for as many of those downstream users as possible, while also deriving (and passing along to songwriters) greater value from high-WTP consumers.[315]

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quality, and other benefits. *See, e.g.*, *What are the Differences Between the Amazon Music Subscriptions?*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GW3PHAUCZM8L7W9L [https://perma.cc/C24E-YNQW] (disaggregating Amazon's three different standalone streaming tiers—a free-to-the-user, ad-supported tier; a paid subscription tier; and a more expensive, high definition, paid subscription tier—as well as its Amazon Prime bundled service). Many services also offer multiple pricing tiers *within* certain offering types, such as student discounts, family plans, and other promotional discounts. *See, e.g.,* Matthew Lynley, *Spotify Plays the Long Game with Family and Student Plans Even as Revenue Per User Drops*, TECHCRUNCH (Feb. 28, 2018), https://techcrunch.com/2018/02/28/spotifys-family-and-student-plans-are-reducing-some-revenue-per-user-but-they-are-sticking-around-longer/./ [https://perma.cc/7337-9DKN].

311 *See supra* Section II.A.1.

312 *Id.*

313 *See Phonorecords III*, *supra* note 28, at 1934. The Board appeared to credit the non-Apple Services' arguments that rate flexibility was essential to accommodate the broad spectrum of downstream WTP, as evidenced by an increase in interactive streaming consumers, interactive streams, interactive streaming services, and "companies providing those services" that had occurred under the 2012 rate structure. *See id.* at 1926. The non-Apple Services had emphasized that "an upstream per-play rate would not align with the downstream demand for 'all-you-can-eat' streaming services." *Id.* at 1925. Despite appearing to credit these views, the Board still declined to extend the full, granular, service-type-specific flexibility of the 2012 structure. *Id.* at 1934.

314 *See supra* note 95 and accompanying text.

315 *See Phonorecords III*, *supra* note 28, at 1934.

Notably, the Board first articulated this decision without reference to the 801(b) factors.[316] However, much of this material resurfaced when it tested its proposed rates and rate structure against 801(b)(1) Factor A—maximizing the availability of works to the public.[317] The Services had contended that the 2012 settlement rates best satisfied Factor A because, once again, increased rate flexibility would ensure more downstream price discrimination, which in turn would allow more members of the public to access interactive streaming services (and, therefore, the creative works offered therein).[318] For their part, the Copyright Owners urged the Board to view Factor A through the lens of maximizing the supply of future works—by spurring creation through higher rates for songwriters who "would see low rates as a disincentive."[319]

The Board embraced the Services' interpretation of Factor A.[320] It acknowledged that the term "availability" could plausibly take on multiple meanings: (1) incentivizing songwriters (upstream) to create more through higher rates, or (2) maximizing options for consumers (downstream) and therefore, presumably, consumption.[321] In opting for this second construction, the Board contended that not only does price discrimination facilitate consumption by low-WTP end users, but that this in turn actually benefits copyright owners by maximizing service revenue.[322] Thus, the Board construed Factor A as requiring it to favor an upstream rate structure that facilitated downstream price discrimination—which supported its choice to adopt a flexible revenue-based rate structure.[323]

Web IV: Evaluating Benchmarks. In *Web IV*, the Board considered similar dynamics, in the same market, in a different procedural context: evaluating parties' proposed benchmarks. SoundExchange justified its proposed per-play royalty rate for the *noninteractive, ad-supported* (i.e. free-to-the-user) streaming performance of its sound

[316] *Id.*
[317] *See supra* Section II.A.5.
[318] *See Phonorecords III*, *supra* note 28, at 1956.
[319] *Id.* at 1958.
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *Id.*

recordings using a benchmark derived from 80 *interactive, subscription* (i.e. not free-to-the-user) marketplace agreements between record companies and interactive streaming services.[324]

While it allowed this benchmark to be considered for certain limited purposes,[325] the *Web IV* Board rejected its validity as a benchmark for noninteractive ad-supported rates—the most consequential rates on the *Web IV* docket. It did so not because of the differences in the upstream *rights* licensed, but rather because the divergence in WTP between the downstream *consumers* of each service type.[326] It cited "overwhelming" evidence in the record of a "sharp dichotomy" between listeners with a positive WTP for streaming, and those with a WTP of zero.[327] In other words: because people who are willing to pay for streaming subscriptions comprise such a distinct class of consumers from those who are unwilling to pay for streaming subscriptions, it would not be "reasonable" to use subscription-derived benchmarks to determine ad-supported rates.[328]

Notably, the *Web IV* Board concluded that—in one context, at least—downstream competitive considerations took a backseat to other competitive forces. The *Web IV* Board did provisionally accept interactive subscription benchmarks (to be considered when setting statutory noninteractive *subscription* rates only, but not ad-supported rates), but it took care to apply adjustments to the rates in order to render them "effectively competitive."[329] In doing so, the Board credited the testimony of the Services' experts that, because of the major record labels' outsized market power, the upstream interactive streaming market is not "effectively competitive."[330] Accordingly, rates negotiated in that market tend to skew higher than

[324] *Web IV*, *supra* note 73, at 26337. For an overview of the various streaming configurations available to consumers, see *supra* note 310.

[325] The Board did accept interactive streaming benchmark subscription rates as a benchmark for noninteractive *subscription* rates, in part because functional convergence of the two service types had led to competition for the same downstream listeners between interactive and noninteractive services, see *Web IV*, *supra* note 73, at 26347.

[326] *See supra* notes 242–243 and accompanying text.

[327] *See Web IV*, *supra* note 73, at 26345.

[328] *See id.* at 26346.

[329] *See supra* notes 238–241241 and accompanying text.

[330] *See Web IV*, *supra* note 73, at 26341.

would occur in a hypothetical "effectively competitive" market.[331] Thus, those rates would have to be adjusted downwards in order to serve as a fair benchmark in this market.[332] In reaching this conclusion, the Board acknowledged that interactive streaming services compete for downstream listeners,[333] but nonetheless disregarded SoundExchange's argument that downstream competition for streaming consumers—between interactive streaming services and the threat of piracy, and as well as free-to-the-user services like YouTube—could offset the effects of the upstream record company oligopoly.[334]

Projecting Phonorecords IV: Per-Play Rate Structure? While the *Phonorecords IV* will no longer have access to 801(b) Factor A, the *Web IV* Board's discussion of downstream competition in a willing buyer/willing seller context demonstrates that the absence of Factor A is unlikely to stop the future Boards from weighing downstream competitive effects in general—even as it may sometimes deem other competitive forces to be more powerful. Under both rate standards, the Board clearly considers downstream consumer WTP relevant to determining upstream rates.

However, without 801(b) Factor A in the mix, the *Phonorecords IV* Board may be more likely to adopt a per-play rate structure. Without Factor A, the Board cannot prioritize the "availability" of copyrighted works simply for "availability's" sake. Had the *Phonorecords III* Board been swayed by the Copyright Owners' supply-side interpretation of "availability," this change could have been detrimental to songwriters. But the Board was not so swayed. Instead, it sided with the Services on this point, construing the "availability" factor as consistent with its decision to proceed with a revenue-based rate structure to encourage more varied, flexible service offerings that would be accessible to a broader range of consumers.[335] The *Phonorecords IV* Board will no longer be permitted to factor in "availability" in this way, which may prompt it to prioritize other forces above downstream competitive forces—as it did in

331 *See id.*
332 *See id.*
333 *Id.* at 26347.
334 *See id. at* 26343–47.
335 *See supra* Section III.B.2.

Web IV—and, thus, look more favorably on the per-play rate structure that the Copyright Owners have long sought.

3. Simplicity: Per-Play Rate Structure?

The Board may also have given per-play advocates fresh ammunition for *Phonorecords IV* in the text of the *Phonorecords III* decision itself. The Board justified its decision to do away with the ten-category 2012 settlement structure in favor of a uniform, two-pronged approach by contending that for rate structures, absent authority or arguments to the contrary, "simpler is better."[336] It remarked that, compared to the "Rube-Goldberg-esque complexity and impenetrability" of the 2012 settlement, a single two-pronged rate calculus for all revenue-generating streaming activity would help avoid "confusion and conflict," particularly for new entrants that might not fit into any of the 2012 settlement's ten separate rate categories.[337] Admittedly, the Board did not find the "simpler is better" adage quite compelling enough to embrace the simplest proposal it heard: the per-play rate structure that its proponents professed would promote simplicity and transparency by transforming royalty accounting into a simple multiplication problem.[338]

Conversely, while the *Web IV* Board did not make statements suggesting express reliance on simplicity for simplicity's sake, it did opt for a straight-ahead per-play structure—which also happened to be the simplest structure proposed by any of the parties in that proceeding.[339]

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336 *Phonorecords III*, *supra* note 28, at 1935.

337 *Id.* The dissent took issue with this. *See id.* at 1967 (Strickler, J., dissenting) (arguing that because "the issue of regulatory complexity is not a factor or objective in the rate-setting process under section 801(b)(1)," the majority erred in favoring simplicity for simplicity's sake). The D.C. Circuit did not invoke this point in its decision to vacate. *See generally* Johnson v. Copyright Royalty Bd., 969 F.3d 363 (D.C. Cir. 2020).

338 *Phonorecords III*, *supra* note 28, at 1925. This would have been a far cry from the current rate complexities that continue to make it onerous for publishers and songwriters to verify the accuracy of accounting data that streaming services remit to them. *See, e.g.*, Ed Christman, *NMPA Questions Whether Spotify & Amazon Have Miscalculated, Underpaid Publisher Royalties*, BILLBOARD (Aug. 27, 2019), https://www.billboard.com/articles/business/publishing/8528526/nmpa-spotify-amazon-royalties-miscalculated-underpaid?utm_campaign=Platform%20%26%20Stream&utm_medium=email&utm_source=Revue%20newsletter [https://perma.cc/FG3S-XB5S].

339 *See supra* Section II.B.2.

Ultimately, the "simplicity" argument may be more useful to the Board as extra padding for other, meatier arguments. Still, because the *Phonorecords III* Board did not invoke this point in the context of any of the 801(b) factors—and because there is nothing in *Web IV* suggesting that "simplicity" is incompatible with willing buyer/willing seller—Copyright Owners once again shooting for a per-play rate in *Phonorecords IV* are likely to parrot the Board's words back to itself, assuming those words (which the D.C. Circuit did not take issue with)[340] are not negated in the Board's revised determination.[341]

4. The Extent of the Board's Obligation to Protect Stakeholders

Streaming Services' Business Models. The *Phonorecords III and Web IV* Boards each stated, unequivocally, that the Board has no obligation to protect streaming services' businesses. In *Phonorecords III*, the Board's declaration that it "cannot and will not set rates to protect any particular … business model"[342] echoed its insistence in *Web IV* that it was "not obliged to set the statutory rate at a level that permits a … service to realize any particular profit in the market."[343] Crucially, the *Phonorecords III* Board made this statement even while constrained by 801(b) Factor D—the "avoidance of disruption" prong.[344]

Creators' Livelihoods and the "Inherent Value" of their Creations. In *Phonorecords III*, the Board was, at times, sympathetic to certain evidence of economic hardship among the songwriter labor force. While it ultimately preferred the Services' consumer-centric interpretation of 801(b) Factor A—maximizing availability of works to the public—to the Copyright Owners' supply-incentivizing view, it did devote a portion of its Factor A discussion to songwriter

340 *See generally Johnson*, 969 F.3d.
341 *See supra* note 339 and accompanying text.
342 *See Phonorecords III*, *supra* note 28, at 1945.
343 *See Web IV*, *supra* note 73, at 26348.
344 *See supra* Section II.A.5. The Board was not entirely dismissive of the relationship between overall industry "disruption" and individual stakeholders' positions, which is why it elected to roll its rate increase out over five years, rather than immediately. *See id.*

livelihoods.[345] Even in adopting the Services' interpretation of Factor A, the Board brushed aside the Services' suggestion that, under a decade of this basic rate structure, "there is no evidence that songwriters as a group have diminished their supply of musical works to the public" under the existing rate structure.[346] Instead, while it acknowledged that no party had submitted empirical evidence on this precise question, it countered that the record reflected "uncontroverted testimony" that songwriters' mechanical royalty rates had undergone a "marked decline" over the prior two decades.[347] Further, it acknowledged the "critical role" mechanical royalties play in allowing professional songwriters to earn a living as professional songwriters, particularly through all-important publisher advances,[348] which it noted had recently become significantly less available to songwriters, leading to a decrease in songwriters entering the profession to begin with.[349] It cited testimony estimating that the number of songwriters in Nashville—dubbed the "Songwriting Capital of the World"[350]—had decreased by over 75% in the prior

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345 *See id.*

346 *See Phonorecords III*, *supra* note 28, at 1957.

347 *See id.*

348 Advances are lump sums paid out by publishers to their songwriter clients, which are then recoupable against future royalties: in other words, rather than remitting to songwriters their share of earnings as they trickle in over time, the publisher pays the writer up front (or in a period of installments) and then retains the writer's share of earnings until the value of the advance has been recouped. *See* Benom Plumb, *The Songwriter & Music Publisher Relationship: Part II*, ROYALTY EXCHANGE (Dec. 28, 2017), https://www.royaltyexchange.com/blog/the-songwriter-and-music-publisher-relationship-pt-2#sthash.X4Topeh7.dpbs. [https://perma.cc/37MD-5BVP]. Traditionally, advances have represented one of the relatively few ways in which songwriters have access to large amounts of capital at once, allowing them to sustain themselves as they create new works. *See* Frances Katz, *The Truth about Advances in the Music Business*, SONGTRUST (Apr. 9, 2020), https://blog.songtrust.com/the-truth-about-advances# [https://perma.cc/FT55-ZMR6] (explaining that advances, while certainly not "free money" for songwriters, help writers with "cash flow problems" and represent "additional financing to keep the lights on").

349 *See Phonorecords III*, *supra* note 28, at 1957.

350 *See* Margaret Littman, *Nashville Songwriting Community Spotlighted in New Web Series*, ROLLING STONE (July 23, 2014), https://www.rollingstone.com/music/music-country/nashville-songwriting-community-spotlighted-in-new-web-series-176343 [https://perma.cc/47JM-ABZQ]; *The Story of Music City*, VISIT MUSIC CITY, https://www.visitmusiccity.com/explore-nashville/music-and-entertainment/story-music-city [https://perma.cc/K3D9-S976].

decade.[351] From this evidence, the Board soberly concluded that the existing rate structure for interactive streaming had contributed to "the decline in songwriter income," which, in turn, had "led to fewer songwriters."[352] Thus, even though the plight of songwriters was not directly relevant to the Board's consumer-centric construction of the 801(b) "availability" factor, the Board insisted that it should "not go unheeded," and indeed that it warranted a significant rate increase.[353]

Furthermore, although it did not do so in the context of 801(b) Factor A, the *Phonorecords III* Board cited many of these same concerns in the context of its adoption of a mechanical floor.[354] It held that the mechanical floor operates as a "failsafe to ensure that mechanical royalties will not vanish."[355] It credited testimony again demonstrating the "critical role that mechanical royalties play in making songwriting a viable profession," including through the funding and recouping of advances (an "important source of liquidity to songwriters").[356]

By contrast, the *Phonorecords III* Board gave little credence whatsoever to one of the centerpieces of the Copyright Owners' proposals: the "inherent value" of a musical work.[357] The Copyright Owners emphasized that the incumbent percentage-of-revenue approach counterintuitively permitted a "decreasing effective per play

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351 *See Phonorecords III*, *supra* note 28, at 1957.
352 *See id.*
353 *See id.*
354 *See supra* notes 100–104 and accompanying text.
355 *See Phonorecords III*, *supra* note 28, at 1935.
356 *See id.* at 1934–35. Performance income cannot fund songwriter advances from publishers in the same way, because—unlike mechanical income—songwriters typically receive performance income directly from performing rights organizations. *See Education*, SONA, https://www.wearesona.com/education [https://perma.cc/LS6T-NPH6]; *see also Assignment of Royalties,* BMI, https://www.bmi.com/creators/royalty/miscellaneous_royalty_rules [https://perma.cc/484Q-78V4] (articulating the hoops BMI requires its songwriter members to jump through in order to assign the writer share of their performance royalties to third parties such as music publishers). Thus, without a mechanical floor, if the performance portion "substantially reduces or fully eliminates the mechanical portion of [the all-in rate], the pool of funds available for advances and recoupments would be reduced." *Phonorecords III,* supra note 28, at 1997 (Strickler, J., dissenting) ("Liquidity funding for songwriters is a necessity, just as heat is a necessity—and the complementary nature of the rights to the Services is of no relevance"). *Id.* at 1935.
357 *See supra* note 95.

rate" even as increases in consumption outpaced increases in service revenue (and, consequently, royalties).[358] Thus, they argued, a per-play rate would better reflect the "inherent value" of a musical work.[359] The Board disagreed. In opting for a revenue-based structure as, again, "the most efficient means of facilitating beneficial price discrimination in the downstream market,"[360] it declined to formalize any underlying "inherent value" to copyrighted works.[361]

Conspicuously, the *Web IV* Board did not engage in any discussion centered around creators' well-being whatsoever.[362] To be sure, it may be the case that SoundExchange and record companies simply do not invoke such arguments as frequently as songwriter organizations do.[363] But it may also be the case that the Board does not consider these points relevant to an impassive, market-driven analysis under the willing buyer/willing seller standard.

The *Web IV* Board also made no mention of any "inherent value" of copyright argument; if anything, the Board was more sympathetic to value inherently attributable to the *Services*. In its refusal to adopt a "greater-of" structure with a percentage-of-revenue prong, the *Web IV* Board effectively suggested that because a proper per-play rate (under the willing buyer/willing seller standard) already purports to fully compensate rightsholders for the full value of their works, "[a]bsent proof that the per-play prong had been set too low, there is no justification for assuming that the record companies

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358 *Id.* (emphasis removed).

359 *Phonorecords III,* supra note 28, at 1982 (Strickler, J., dissenting).

360 *Id.* at 1934.

361 *See id.* at 1931 n. 64.

362 *See generally Web IV*, *supra* note 73.

363 *See, e.g.*, *Billboard: At Annual Mtg, Music Publishers Lament 'Criminal' Returns From Digital Services*, NMPA, https://nmpa.org/billboard-at-annual-meeting-music-publishers-lament-criminal-returns-from-digital-services-call-for-industry-to-expand-the-pie/ (last visited Jan. 24, 2021) [https://perma.cc/2Q73-Q2KW]; *NMPA Statement on Senate Introduction of the Songwriter Equity Act*, NMPA (May 12, 2014), http://nmpa.org/press_release/nmpa-statement-on-senate-introduction-of-the-songwriter-equity-act/ [https://perma.cc/F5ZC-9593]; *Tim Ingham, Martin Bandier: 'Songwriters' Livelihoods are under Threat Like Never Before'*, MUSIC BUS. WORLDWIDE (Feb. 8, 2015), https://www.musicbusinessworldwide.com/martin-bandier-songwriters-livelihoods-threat-like-never/ [https://perma.cc/9DT6-VPPG].

should share" in any additional value the services generate.[364] In other words: if per-play rates are properly calibrated, then any additional Service upside is attributable to the Service's own inherent ingenuity, not to its musical repertoire, and therefore there is no call for record companies to share in that upside.[365]

Protecting Stakeholders in Phonorecords IV. The Boards' stances on protecting stakeholders tend to cut both ways when projected onto *Phonorecords IV*. On the one hand, the *Phonorecords IV* Board certainly seems likely to continue the view that it is in no way beholden to the Services' bottom lines and indeed to wield that perspective even more freely without 801(b) Factor D ("disruption") to navigate. This is a huge win for the Copyright Owners, who can rest easier knowing that they will not have to fend off rhetoric surrounding overall service profitability (or lack thereof).[366] However, it is also unchanged from before: the Copyright Owners *already* enjoyed this benefit prior to the MMA, so it is unclear whether the sentiment's survival will help them cover any additional ground under willing buyer/willing seller.

On the other hand, the *Web IV* Board's avoidance of the kinds of creator-wellbeing themes that expressly informed the 44% rate increase in *Phonorecords III* could have significant pro-Service implications for *Phonorecords IV*.[367] It suggests that Copyright Owners will have a harder time convincing the *Phonorecords IV* Board to consider these pro-songwriter policy considerations. While songwriter advocates may, on the whole, rejoice in the fact that the 801(b) factors are gone, this may be one drawback. Copyright Owners can no longer look to Factor A—the context in which the *Phonorecords III* Board considered the songwriter livelihood arguments[368]—nor Factor B's "fair income" language—the other natural

364 *See* W*eb IV*, *supra* note 73, at 26326. It also noted that "none of the percentage-of-revenue prongs in the greater-of agreements in the record has been triggered." *Id.* at 26325.
365 *See id.* at 26326.
366 *See supra* notes 191–192 and accompanying text*; see also* Tim Ingham, *Loss-Making Spotify Will Continue to Put Growth Ahead of Profit for 'Next Few Years'*, MUSIC BUS. WORLDWIDE (May 6, 2020), https://www.musicbusinessworldwide.com/loss-making-spotify-will-continue-to-focus-on-growth-over-profit-for-next-few-years/ [https://perma.cc/D69B-72U6].
367 *See supra* notes 362–363 and accompanying text.
368 *See supra* notes 345–346 and accompanying text.

context for advocacy grounded in well-being and equity[369]—to make this case. The lone holdover is Factor C, the "relative roles" of copyright owner and user prong, which played a fairly minor role in *Phonorecords III*.[370] And in any event, the *Web IV* Board's presumption that any excess service upside is attributable solely to streaming services' inherent value suggests that this factor is just as likely to weigh in the Services' favor as it is to weigh in the Copyright Owners' favor.[371] Certainly, there is little reason to believe the *Phonorecords IV* Board will be any more sympathetic to arguments centered around the "inherent value" of a musical work than was its forebearer.[372]

These points highlight perhaps the greatest liability to songwriters posed by the MMA's new willing buyer/willing seller rate standard for mechanical royalties. The songwriter-wellbeing arguments were expressly tied to the dramatic rate increases secured for songwriters in *Phonorecords III*.[373] They also directly informed an important safeguard for songwriters: the mechanical floor.[374] If the *Phonorecords IV* Board no longer feels they are germane—or at least *as* germane—to its task, then both future equity-drive rate increases and the mechanical floor could be more difficult for the Copyright Owners to secure in *Phonorecords IV*.[375]

5. Dissecting Streaming Services' Business Models: Deferral, Displacement, "Loss Leader"

One key dynamic to *Phonorecords III* that was effectively absent from *Web IV* was a fierce debate surrounding the interaction between the streaming services' business models and creator compensation. The *Phonorecords III* Board considered, in multiple

369 *See supra* Section II.A.5.
370 *See supra* notes 44, 48 and accompanying text.
371 *See supra* notes 364–365 and accompanying text.
372 *See supra* notes 358–361 and accompanying text.
373 *See supra* notes 345–353 and accompanying text.
374 *See supra* Section II.A.5.
375 This is of particular importance in the wake of the COVID-19 pandemic, which has had a disastrous impact on many areas of the music industry, including for songwriters. *See Global Creators' Royalties Expected to Decline by up to €3.5 Billion in 2020*, CISAC, https://www.cisac.org/Newsroom/news-releases/global-creators-royalties-expected-decline-eu35-billion-2020 [https://perma.cc/9WAT-W35D].

contexts, the Copyright Owners' argument that linking service revenue to royalty rates tended to depress songwriter compensation through (1) revenue deferral, (2) "loss leading", and (3) revenue displacement.

First, the Copyright Owners argued that, while streaming services warring for turf sacrifice present revenues in an effort to grow market share (for example, through extended free trials, discounted student and family plans, promotional bundles, etc.)[376] may hope to reap the benefits of *future* profits, songwriters *currently* subsisting on royalties calculated as a percentage basis of those deflated revenues suffer immediate consequences without the hope of a future windfall.[377] Second, they suggested that some streaming services may intentionally operate as "loss-leaders," sacrificing streaming revenue (and therefore mechanical royalties) to capture consumers for their other products (which do not generate mechanical royalties).[378] Finally, services offering interactive streaming as a part of a larger product bundle have every incentive to attribute as little of the bundled revenue pie to the royalty-generating interactive streaming slice.[379]

The *Phonorecords III* Board was generally receptive to the underlying premises of these arguments, but not necessarily to the conclusions the Copyrights Owners drew from them. Indeed, while even the Services conceded that these dynamics *could* occur, and the *Phonorecords III* Board found further support in the record that at least some *do* occur, the Board concluded that this configuration was a sensible allocation of risk to facilitate the development of the interactive streaming market.[380] Because of "the reliance on scaling for success," and the resulting "competition [among streaming services] *for the market* rather than simply competition *in the market*," the Board emphasized that for the Services to sacrifice current revenue for market share was no mere exercise in vanity: it was

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376 *See supra* note 310.

377 *See supra* note 101.

378 *Phonorecords III*, *supra* note 28, at 1927.

379 *See id.*

380 *See id.* at 1927–28 (concluding that the record does support revenue deferral among streaming services, but that "there is no support for any sweeping inference that cross-selling [i.e. intentional revenue displacement] has diminished the revenue base").

"rational."[381] For the Services, maximizing immediate revenue could be "inconsistent [with] competing for the market long-term."[382] Thus, the Board reasoned, by absorbing some of the effects of the immediate revenue deferral, songwriters are simply assuming some of the risk inherent to streaming services continuing to compete, exist, and grow—and are thus helping to safeguard "the ultimate existence of that future revenue."[383]

In effect, per the *Phonorecords III* Board, this configuration helps songwriters help themselves: it is in songwriters' interest for streaming services to thrive so that streaming revenue can continue to be available to songwriters in the future, and therefore it is appropriate for them to bear some of the risk that allows the services to compete for viability.[384] After all, there can be no future royalty-generating streaming revenue without future streaming services.[385] The Board also stressed that it had found no evidence of services *intentionally* displacing bundled revenue from streaming to other products.[386] However, the Board did tip its hat to these same concerns when it justified a mechanical floor as a failsafe against mechanical royalties (and the liquidity they provide songwriters) "vanish[ing]" due to these same deferral and displacement concerns.[387]

Because the *Web IV* Board did not confront these issues—perhaps because these arguments are more relevant in a percentage-of-revenue context, which is a structure the *Web IV* board quickly dismissed for other reasons[388]—recent CRB proceedings provide scant evidence for how these arguments will play in a willing buyer/willing seller world. Still, the *Phonorecords III* Board avoided using 801(b)-driven language in this context, instead favoring logic driven by the respective parties' self-interests. There is little reason to think that this approach will be dramatically different under a market-driven standard in *Phonorecords IV*. As a result, an ongoing matter

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381 *Id.* (emphasis in original).
382 *Id.* at 1928.
383 *Id.*
384 *Id.* at 1927–28.
385 *See id.*
386 *See id.* at 1928.
387 *See supra* notes 100–104 and accompanying text.
388 *See supra* Section II.B.2.

of frustration for rightsholders will likely continue to be a matter of frustration under the new rate standard.

6. Industry Disruption

The role of potential industry disruption varied significantly between *Phonorecords III* and *Web IV*. In fact, it was not discussed in *Web* IV at all—the word "disrupt" literally does not appear even once in the *Web IV* decision.[389] This is intuitive enough. The *Phonorecords III* Board was still governed by the 801(b) standard, which expressly contemplated "minimiz[ing] any disruptive impact;" by contrast, *Web IV* applied willing buyer/willing seller, which incorporates no such provision.[390]

Despite its statutory mandate, however, the *Phonorecords III* Board took a fairly hands-off view of what would constitute undue disruption. Per *Phonorecords III*, even a 44% increase in headline royalty rates need not run afoul of 801(b) Factor D.[391] Factor D merely prompted the Board to adjust the *timing* of the rate increase—spaced out over a half-decade, rather than overnight.[392] This was, to be sure, not an unimpactful adjustment. Still, it demonstrated that the Board was less inclined to allow Factor D to trump its other analysis than to smooth over the effects of that analysis.

However, there was one significant exception: the Board invoked Factor D as expressly supporting its decision not to adopt a per-play rate.[393] While it also offered other rationales that—at least on their face—did not relate to Factor D, its linking of Factor D to its denial of the central feature of the Copyright Owners' proposed structure is conspicuous in a post-MMA world in which Factor D no longer exists.

This link suggests one of the two major implications for the new role (or lack thereof) of "disruption" analysis in *Phonorecords IV*. The first implication: every individual piece of armor that is removed from the current service-revenue-driven rate structure

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389 *See generally Web IV*, *supra* note 73.
390 *See id.*
391 *See supra* note 195 and accompanying text.
392 *See supra* notes 195–197 and accompanying text.
393 *See supra* note 189 and accompanying text.

increases the chances that future Copyright Owners will manage to land meaningful per-play jabs in future *Phonorecords* proceedings. The per-play goal was central to their approach in *Phonorecords III*, and—as frustrations surrounding having rates tied to loss-leading and non-revenue-maximizing services linger[394]—it figures to play a starring role again in *Phonorecords IV*.

The second implication is more neutral, and yet still impactful in spite of its neutrality. Other than the per-play issue (which, of course, is a massive caveat) it is unclear that the absence of Factor D will cut in either side's favor in *Phonorecords IV*. The Board was already primed to make significant rate changes while still constrained by a disruption-avoidance governor. Thus, *Phonorecords III* offers no reason to think the *absence* of Factor D will unlock any further willingness to make impactful change, in either direction, in *Phonorecords IV* (nor does the *Web IV* Board's silence on the matter). The Services can hardly have emerged from *Phonorecords III* imagining that either their disruption arguments, their reliance arguments, or their profitability arguments would have constituted a silver bullet, even under the policy-driven 801(b) standard. Accordingly, there is no reason to think that willing buyer/willing seller will have cost them any leverage on these points. However, the absence of Factor D does ensure one thing: whatever changes the *Phonorecords IV* does yield, there will no longer be any statutory force to dissuade the Board from imposing them *immediately*. This should raise already-heightened stakes even higher, since any rate changes imposed are less likely to be staggered across a full five-year CRB term, a la *Phonorecords* III. Among other effects, this may all but guarantee another appeal next time around.

C. Structure

The *Phonorecords III* and *Web IV* Boards structured their approaches differently. The overall frameworks were similar: consider one-off rate structure elements, then look to benchmarks and economic analysis to establish a zone of reasonableness, and then pick rates from that zone.[395] But navigation within that framework

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394 *See supra* Section I.B.5.

395 *See generally supra* Sections II.A–B.

diverged significantly. In *Web IV*, the initial rate structure discussion served as a prologue to an opinion devoted primarily to marketplace benchmarks under a per-play structure that seemed almost inevitable.[396] By contrast, in *Phonorecords III*, the various rate structure proposals were the primary battleground, while the marketplace benchmarks became an afterthought to rates arrived at via Shapley models.[397]

1. The Significance of Benchmarks

In *Web IV*, the benchmarks were the ballgame. The Board devoted the majority of its energy to sifting through the various marketplace-derived benchmark proposals, accepting, adjusting, or rejecting them.[398] It then positioned those accepted and adjusted benchmarks—and *only* those accepted and adjusted benchmarks—to form a zone of reasonableness, before ultimately selecting its final rate from that zone.[399]

The *Phonorecords III* Board took a very different approach. Before even considering the individual benchmarks, it adjudicated various rate structures distilled from the party proposals; while those proposals were themselves informed by, and justified using, benchmarks, the Board's scope of inquiry was far broader than the benchmark-specific analysis employed in *Web IV*.[400] Even where it relied upon principles embedded in the 2012 Settlement benchmark, or where it adopted structures from Google's benchmark, the *Phonorecords III* Board did so by distilling and discussing the virtues (or vices) of the benchmark's structure, not simply by evaluating the benchmark on its own terms.[401] Only after considering these discrete structural issues did the *Phonorecords III* Board proceed to evaluate specific benchmark rate proposals. Then, while it found some of the benchmarks to be helpful, it ultimately declined to rely upon any of them.[402]

396 *See generally supra* Section II.B.
397 *See generally supra* Section II.A.
398 *See supra* Section II.B.3.
399 *See supra* Sections II.B.3–4.
400 *See supra* Section II.A.3.
401 *See supra* Sections I.A.3–4.
402 *See supra* Section I.A.4.

2. Shapley Analysis and 801(b) Verification

Instead, just a few years after publishing a *Web IV* decision that did not include any mention of Shapley analysis, the *Phonorecords III* Board (which consisted of the same three judges) relied exclusively upon Shapley analyses to establish the zone of reasonableness from which it selected its final rates.[403] It construed them both as valid reflections of the 801(b) guidance, as well as instructive models of free market forces.[404] It permitted models to adjust for market power or to proceed under real-world competitive conditions.[405] It then used these models to triangulate a range of appropriate sound recording/musical work ratios, which it converted into ranges of reasonableness for both prongs of the structure it had already decided to adopt—percentage of revenue and TCC—and selected provisional rates from the middle of those ranges.[406] After vetting those provisional rates against the 801(b) factors—its first concerted application of those factors, aside from a few passing references—it adopted them as final.[407]

3. Projected Structure of *Phonorecords IV*

It is difficult to predict precisely how much the new rate standard will compel the Board to rejigger its Section 115 (i.e. *Phonorecords)* approach to more closely resemble its Section 114 (i.e. *Web*) approach. Much will depend on the Board's interpretation of its new statutory marching orders in Section 115—particularly the conspicuous absence of language permitting it to consider voluntary agreements—and how this informs its approach to using benchmarks.[408] Much will also depend on how instructive the Board finds *Phonorecords III* as a benchmark.[409] If the Board concludes that its hands are tied on benchmarks, it may have to afford them even less emphasis than it did in *Phonorecords III*, moving even further away

403 *See supra* Section II.A.4.b.
404 *See supra* notes 161–166 and accompanying text.
405 *See supra* notes 163–164 and accompanying text.
406 *See supra* Section II.A.4.c.
407 *See supra* Sections II.A.5–6.
408 *See infra* Section III.D.1.
409 *See infra* Section III.D.2.

from its approach in *Web IV*. This would be an odd result, in light of the supposedly unified rate standards.[410]

Regardless of how the benchmark issues pan out, there is little reason to believe that the new rate standard will preclude the *Phonorecords IV* Board from continuing to entertain Shapley analyses. Although it did not do so in its most recent willing buyer/willing seller proceeding, nothing in the *Web IV* decision suggests that it was foreclosed from doing so. While the Services' Shapley models and analyses were informed by the 801(b) standard, the Copyright Owners' primary Shapley expert was transparent in his efforts to model a free market result.[411] The Board was unequivocal in stating that satisfying the 801(b) standard was not, by definition, antithetical to market-based rates.[412] Thus, the transition from 801(b) to willing buyer/willing seller is more likely to constrain *how* Shapley models are used than *whether* they are used.[413] As a blanket sentiment, this favors neither the Copyright Owners, nor the Services.

However, Copyright Owners are likely to embrace it. First, they will be happy to see the Board focusing on *any* inputs other than voluntary agreement benchmarks—at least any that come within shouting distance of a compulsory license—which they almost always criticize as distorted by the statutory "shadow."[414] Second, while the Services' experts will no doubt find other means of producing models favorable to their clients, the removal of the 801(b) factors as available Shapley inputs will preclude tools that, in the past, allowed their Shapley models to produce lower rate proposals.[415]

Furthermore, while the remaining structural makeup of *Phonorecords IV* will likely resemble the commonalities between

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410 *See supra* notes 57–58 and accompanying text.

411 *See supra* notes 163–164 and accompanying text.

412 *See supra* notes 174–177.

413 One potential argument against continuing the use of Shapley analyses in the willing buyer/willing seller context, should someone choose to make it: Shapley models purport to determine "fair and equitable" outcomes. *See* Watt, *supra* note 160. While a "fair and equitable" outcome *may* overlap with the free-market outcome sought under willing buyer/willing seller, there is certainly no reason to assume that those two outcomes *must* overlap. *See supra* notes 160–162 and accompanying text.

414 *See supra* notes 137, 235 and accompanying text.

415 *See supra* note 163.

Phonorecords III and *Web IV*, there is of course one additional change that the Copyright Owners are sure to welcome. As in *Phonorecords III* and *Web IV*, there will likely be a discussion of one-off rate structure issues, followed by a review of the parties' rate proposals, by way of benchmarks and/or Shapley analysis. From there, as in *Phonorecords III* and *Web* IV, the Board will likely derive a zone of reasonableness and then cull final rates from that zone. And as in *Phonorecords III,* the Board may choose to combine aspects of different proposals into its ultimate structural and numeric decisions.[416] The upshot of all this structural continuity is almost certainly neutral. However, crucially, after doing all that work, the *Phonorecords IV* Board—unlike its *Phonorecords III* predecessor—will no longer be compelled (or allowed) to check those final rates against the 801(b) factors. For songwriters and publishers who have long believed 801(b) to be a royalty albatross, this is cause for celebration.

D. Benchmarks

1. Marketplace Benchmarks?

The *Web IV* and *Phonorecords III* Boards' differing approaches to benchmarks occurred in spite of points of statutory overlap between the pre-MMA Section 114 and Section 115 that no longer exist post-MMA. Prior to the MMA, Section 115 provided that—in addition to the 801(b) factors—the Board could "consider rates and terms under voluntary license agreements."[417] That language is echoed in both pre- and post-MMA Section 114.[418] However, it is notably absent from the post-MMA Section 115 willing buyer/willing

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[416] The D.C. Circuit agreed that the Board possesses the flexibility to adopt one party's proposal as presented, adjust party proposals, or select features *a la carte* from multiple proposals. Johnson v. Copyright Royalty Bd., 969 F.3d 363, 381–82 (D.C. Cir. 2020). The only constraint: "[T]he ultimate proposal adopted by the Board has to be within a reasonable range of contemplated outcomes." *Id.* at 382. Per the D.C. Circuit, the *Phonorecords III* Board ran afoul of this requirement when it adopted an uncapped TCC prong without giving parties sufficient notice to litigate the issue. *Id.* at 381–82. Thus, assuming future Boards offer litigants proper notice and adequate explanations, nothing in the D.C. Circuit's opinion precludes them from once again stitching together elements from separate proposals.

[417] 17 U.S.C. § 115(c)(3)(D) (prior to 2018 amendment).

[418] *See* 17 U.S.C. § 114.

seller standard, which is otherwise identical to the Section 114 willing buyer/willing seller standard.[419]

The *Phonorecords IV* Board will have the opportunity to use these discrepancies to conduct a masterclass in textualism and statutory construction. It will be difficult for any judicial or quasi-judicial body to ignore the absence of this term from the post-MMA Section 115, particularly given its presence in *both* the pre-MMA Section 115 (meaning Congress had to actively strike the language) as well as in the otherwise identical Section 114 (meaning Congress had to actively choose not to precisely duplicate a rate standard that it was otherwise seeking to unify).

The clause's absence poses something of a mystery. While the House, Senate, and Conference Reports are all silent as to the precise intent behind removing this language, each emphasizes that the MMA's goal was to align the rate standards governing Sections 114 and 115.[420] This congressional push for uniform rate standards and equal treatment jibed with the Copyright Office's recommendation that "all music users should operate under a common standard, and that standard should aim to achieve market rates to the greatest extent possible."[421]

However, this push for uniformity makes the absence of actual uniformity all the more striking. The textualist argument writes itself: Congress knew how to write the clause, because it appears elsewhere in the statute—and in fact, Congress *already* included the clause in *this same* section, and then *erased* it. Therefore, its absence must be significant. It will be difficult for any court, or administrative adjudicator such as the CRB, to ignore that argument.

There is some possibility that the Board could formally refer the question to the Copyright Office, as the *Web IV* board did when considering whether it could differentiate rates between major and indie labels.[422] Here, unlike in that instance, it is improbable that the *Phonorecords IV* parties' presumably divergent benchmark

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419 *See supra* Sections III.A.1–2.

420 *See supra* notes 57–58 and accompanying text.

421 U.S. COPYRIGHT OFFICE, *supra* note 55, at 172.

422 *See supra* notes 214–217 and accompanying text.

approaches would give the Copyright Office an opening to deem the issue moot.

If the Copyright Office were to rule on the issue, there is precedent suggesting it would seek to allow the use of marketplace benchmarks. In the past, it has issued guidance in favor of the practice. In a study cited throughout the legislative process that birthed the MMA—and was therefore, of course, published prior to the enactment of the new Section 115 language—it recommended the use of marketplace benchmarks, even as it recognized that using marketplace benchmarks can be "an elusive enterprise, since there are no freely negotiated licenses to inform the tribunal."[423] In spite of the awkwardness, "[e]ven where rates remain subject to government oversight," it opined that "copyright policy—and specifically the desire to fairly compensate creators—will be better served by a greater opportunity to establish rates with reference to real market transactions."[424] Of course, if the Copyright Office were to issue a ruling consistent with this opinion, and the Board were to act on it, the textualist counter would still be available to the D.C. Circuit on appeal.

If the Board does allow marketplace agreements to serve as benchmarks, it is likely to review similar agreements to those offered by the parties in *Phonorecords III*, as well as other voluntary streaming agreements, both for interactive streaming, noninteractive streaming, and new service types arising after *Phonorecords III*.[425] Finally, even if it does not allow them to directly establish benchmarks, it could greenlight their influence in other, less direct ways—perhaps as an input for expert economist analysis,[426] or by limiting their application to structure, but not numerical rates.

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423 *See* U.S. COPYRIGHT OFFICE, *supra* note 55, at 172.

424 *See id.*

425 *See, e.g.*, Colin Stutz, *Time's Up, TikTok: Labels, Publishers Eye Better Licensing Deals with the Buzz-Making App*, BILLBOARD (May 9, 2019), https://www.billboard.com/articles/business/8510825/tiktok-music-licensing-deals-major-labels-publishers [https://perma.cc/SP5A-JCLD]; Todd Spanger, *Peloton Settles Legal Fight with Music Publishers*, VARIETY (Feb. 27, 2020, 6:46 AM), https://variety.com/2020/digital/news/peloton-settles-music-publishers-lawsuit-1203517495/ [https://perma.cc/SN4N-H68B].

426 Though obviously an administrative tribunal, not an Article III court, the Board could model its approach after Federal Rule of Evidence 703—allowing experts to rely upon

Fundamentally, the Copyright Owners are likely to view any deemphasis of voluntary marketplace benchmarks hailing from highly regulated, compulsory-license-beholden markets as a victory. Their position that it is effectively impossible for voluntary agreements to escape the statutory "shadow" is unlikely to have changed in the few years since *Phonorecords III*—indeed, it may have been reinforced by the reality that the *Phonorecords III* Board itself opted to place greater weight on Shapley analyses than voluntary benchmarks, and after doing so, promptly handed songwriters a 44% rate increase.

2. Other Benchmarks?

If the *Phonorecords IV* Board were to disallow, or limit its consideration of, marketplace benchmarks, it would—in addition to placing greater weight on Shapley analyses—thrust *other* benchmarks into greater prominence. For that matter, even if voluntary agreements are permitted to serve as benchmarks, other benchmarks are likely to play a role.

Phonorecords IV will test the limits of CRB precedent as benchmark. On the one hand, the Board is typically open to benchmark proposals built around past CRB settlements and decisions. In *Phonorecords III*, the Board ruled that the 2012 Rates Settlement (*Phonorecords II*) was instructive, even as it elected not to rely on it.[427] On the other hand, the *Web IV* Board's decision not to allow an earlier CRB determination—*SDARS II*, which covered satellite rates, not the noninteractive digital streaming rates it was being offered as a benchmark for—to serve as a benchmark because it was governed by 801(b), not willing buyer/willing seller, has obvious implications for *Phonorecords IV*.[428] Were either party to propose using *Phonorecords III* as a benchmark, the *Phonorecords IV* Board, bound by Section 803's *stare decisis*-esque guidance, would have to navigate around this *Web IV*/*SDARS II* decision in order to permit it.[429]

otherwise inadmissible evidence where "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." *See* FED. R. EVID. 703.

427 *See supra* notes 105–114 and accompanying text.

428 *See supra* note 213.

429 *See supra* notes 293–295 and accompanying text.

If it were motivated to do so, the *Phonorecords IV* Board could offer a few points in favor of permitting a *Phonorecords III* benchmark. First, it could argue that *Phonorecords III* is distinguishable because, unlike *SDARS II* it applied to the exact same rights and parties: it was a member of the *Phonorecords* family. Second, it could attempt to limit its applicability—perhaps by only relying on portions of the determination that did not touch on 801(b) whatsoever. At the very least, at some point the *Phonorecords IV* Board is presumably going to have to actually quantify the difference between 801(b) and willing buyer/willing seller. How better to do so than by utilizing *Phonorecords III*—a benchmark involving the same rights, the same parties, the same market, and thereby allowing the Board to control for almost every variable other than rate standard?

In addition to past CRB authority, parties may also attempt to use voluntary opt-in settlements as benchmarks. The National Music Publishers Association ("NMPA") routinely negotiates opt-in settlements on behalf of its members—which include the vast majority of the U.S. music publishing community, including all of the major publishers and many indies.[430] The *Web IV* Board laid the foundation for them to be deemed relevant and representative. Over SoundExchange's objections, it found that the Pandora/Merlin opt-in agreements were representative of the larger indie label

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[430] *See, e.g.*, Ed Christman, *Vast Majority Join Royalties Settlement Between Spotify and Publishing Group*, BILLBOARD (July 11, 2016), https://www.billboard.com/articles/business/7431272/nmpa-spotify-settlement-most-members-join [https://perma.cc/C2B7-JQF6]; *NMPA and YouTube Reach Agreement to Distribute Unclaimed Royalties*, NMPA (Dec. 8, 2016), http://nmpa.org/press_release/nmpa-and-youtube-reach-agreement-to-distribute-unclaimed-royalties/ [https://perma.cc/C554-ZJSZ]; *see also* Robert Levin, *How the NMPA Fights For Music Publisher—With Help From Sting, Steven Tyler, Bon Jovi and More*, BILLBOARD (Jan. 20, 2017), https://www.billboard.com/articles/business/7662334/national-music-publishers-association-100th-anniversary [https://perma.cc/5X5U4QDK]. Of course, in the event that the Board chooses not to consider voluntary agreements, opponents of these benchmarks would presumably argue that opt-in settlements *are* voluntary agreements. However, proponents might then counter by echoing the Board's own language back to itself: the *Phonorecords III* Board distinguished Google's benchmark agreements, reached in the marketplace, from the 2012 Rate Settlement benchmark because the parties to the latter were potentially motivated by the "context of litigation." *Phonorecords III*, *supra* note 28, at 1935. A motivated litigant could construe the Board as having suggested that the settlement was, effectively, a less "voluntary" voluntary agreement.

community, in spite of the fact that not all indie publishers are Merlin members, not all Merlin members opted in, and the agreement was negotiated by the agent (Merlin) rather than the principals (its members).[431] Additionally, while the *Web IV* Board was not convinced that the Pandora/Merlin agreements were representative of *major* labels, this will be of little comfort to opponents of the NMPA opt-in benchmarks: the NMPA represents majors and indies alike.[432]

Although the full extent to which the *Phonorecords IV* Board's reliance on other benchmarks aside from voluntary marketplace agreements would skew songwriter- or service-friendly is unclear, it is likely a practice the Services would view more favorably. Fundamentally, tethering rates to any pre-existing data point—particularly those that are, at least in the Copyright Owners' view, depressed by the statutory "shadow"—would tend to make dramatic rate increases less likely.

3. Evaluating Individual Benchmarks

In addition to providing guidance on which benchmarks will be allowed to shape the *Phonorecords IV* proceedings, the *Web IV* and *Phonorecords III* determinations also provide guidance on how the Board will evaluate each of those individual benchmarks.

a) Four-Part Test

Benchmarks tossed into the *Phonorecords IV* gauntlet will presumably be routed through the Board's traditional Four-Part test for willing buyer/willing seller benchmarks.[433] While the *Web IV* Board did entertain, and rely upon, proffered benchmarks that did not fully

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431 *See supra* notes 253–255 and accompanying text. The Board did rely in part on the fact that a "compelling" (but redacted) number of Merlin members had in fact opted in. *See id.*

432 Notably, however, the major publishers often license independently from other NMPA members, and therefore are presumably less likely to actually avail themselves of general NMPA-negotiated opt-ins. *See, e.g.*, Frank D'Angelo & Mariah Volk, *Downtown Music Publishing LLC v. Peloton Interactive, Inc.*, LOEB & LOEB, LLP (Jan. 29, 2020), https://www.loeb.com/en/insights/publications/2020/01/downtown-music-publishing-llc-v-peloton-interactive-inc. [https://perma.cc/Q8KA-58H3].

433 *See supra* Section II.B.3.

satisfy this test,[434] it tended to look more favorably upon those that came the closest.[435] The four prongs are:

(1) The *Willing Buyer and Seller Test*—were the parties sophisticated and "under no compulsion" to enter the agreement?[436]

(2) The *Same Parties Test*—did the agreement govern the same, or similar, parties?[437]

(3) The *Statutory License Test*: to what extent is the benchmark probative of the Platonic "hypothetical marketplace…in which there is no statutory license?"[438]

(4) The *Same Rights Test*: does the proffered benchmark apply to the same rights that the Board is currently assigning rates for?[439]

"Shadow" of the Statutory Rate? One issue that is sure to figure every bit as prominently in *Phonorecords IV* as it did in *Web IV* and *Phonorecords III* is the alleged statutory "shadow"—the notion that even voluntary rates set in a marketplace governed by the compulsory license yield depressed rates because licensees have no incentive to agree to any rate that exceeds the statutory fallback.[440] Because almost every possible benchmark agreement—including marketplace agreements, settlements, past CRB rate determinations, and beyond—will have occurred in a regulated market, almost every proffered benchmark will be subject to this attack.[441] The discussion will likely occur, as in *Web IV*, in the context of the Four-Part-Test's third prong: the *Statutory License Test.*[442]

Unfortunately for Copyright Owners hoping to invoke the "shadow" against benchmarks that they feel reflect depressed royalty rates, neither the *Web IV* nor *Phonorecords III* boards were particularly sympathetic to this argument. In *Phonorecords III*, the Copyright Owners argued that the pre-existing rates—along with

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434 *See id.*
435 *See id.*
436 *See Web IV*, *supra* note 73, at 26383.
437 *See id.*
438 *See id.*
439 *See id.*
440 *See* U.S. COPYRIGHT OFFICE, *supra* note 55, at 5.
441 *Id.* at 172.
442 *See supra* Section II.B.3.

other Service benchmarks—were "inherently suspect" because they were formed under the "shadow" of the statutory license.[443] Because any licensee understands that it can simply walk away from the bargaining table and accept a compulsory license, they argued, licensors have no leverage to deviate from statutory rates.[444] Thus, it would be perversely circular to use "voluntary" negotiations influenced by the statutory license to then influence the next statutory license.[445]

The *Phonorecords III* Board did acknowledge that the statutory "shadow" is not a myth, but it maintained that a "shadow"-ed benchmark is neither disqualified, nor even "per se inferior," but rather a dynamic for the Board to consider when weighing any particular benchmark.[446] Even more ominously for Copyright Owners, it mused that the "shadow" might actually have *pro*-competitive effects: a "countervailing" power to offset the oligopolistic licensors' ability to threaten to walk away from any negotiation.[447]

The *Phonorecords IV* Copyright Owners may find some solace in the fact that the *Phonorecords III* Board's analysis of the statutory "shadow" relied on two pieces of *pre*-MMA authority. First, it justified its decision to accept the arguably "shadow"-ed 2012 rates as a viable benchmark by citing the D.C. Circuit's holding in a 2014 appeal of a *SDARS* determination promulgated *under the 801(b) standard* that "the Judges may 'use[ ] the prevailing rate as the starting point of their Section 801(b) analysis.'"[448] Second, it invoked the provision in (the old) Section 115 providing that "in addition to the objectives set forth in section 801(b)(1), in establishing such

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443 *Phonorecords III*, *supra* note 28, at 1932.

444 *See id.* The Copyright Owners argued that this "shadow" can be cast in two directions: (1) prior statutory rates shaping parties' expectations for subsequent rates, and (2) upcoming proceedings affecting parties' motivations to enter into voluntary agreements. *Id.*

445 *See id.* at 1932–33.

446 *See id.* at 1933, 1941. The Board contended that there may very well be some marketplace benchmark agreements that are "unaffected by the shadow" but perhaps "subject to their own imperfections." *Id.* at 1933.

447 *See id.* at 1933.

448 *See id.* at 1933 (quoting Music Choice v. Copyright Royalty Bd., 774 F.3d 1000, 1012 (D.C. Cir. 2014) (holding that it is permissible for the Board to conclude that the prevailing market rate was "reasonable given the Section 801(b) factors")).

rates and terms, the Copyright Royalty Judges may consider rates and terms under voluntary license agreements."[449] Thus, the two pieces of authority the *Phonorecords III* Board relied on in downplaying the "shadow" argument were (1) language from an appeal of an 801(b) determination—a rate standard which no longer applies to Section 115[450]—and (2) statutory language directing the Board to consider voluntary agreements—language which no longer exists in Section 115.[451]

For its part, the *Web IV* Board acknowledged a consensus view among experts for both parties that the statutory rate operated as a "ceiling." [452] Even so, it signaled that, in a willing buyer/willing seller context, it was perfectly content to hold one marketplace licensor's voluntary decision to grant rights below the statutory rate against statutory licensors. Over SoundExchange's objections, the *Web IV* Board relied upon the fact that the iHeart/Warner benchmark—which provided for sub-statutory rates—was a direct agreement executed at a time when iHeart was already obligated to pay statutory rates, but that Warner had nevertheless accepted rates that "[were] not statutory rates."[453] It reasoned, simply enough, that because the effective rate under the iHeart/Warner agreement was less than the statutory rate, and because Warner was under no obligation to opt for a rate decrease instead of "default[ing] to the higher" statutory rate, the agreement satisfied the *Statutory License Test*.[454]

For the *Web IV* Board, this theory of meaningful voluntary divergence from the statutory rates was apparently a one-way street. Despite holding that Warner's voluntary decision to accept *sub*-statutory rates did not disqualify that benchmark, the Board held that Apple's decision to acquire rights *above* the statutory rate suggested

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449 17 U.S.C. § 115(c)(3)(D) (prior to 2018 amendment); *Phonorecords III*, *supra* note 28, at 1932–33 (emphasizing, under the pre-MMA statutory scheme that "it is beyond dispute that Congress has authorized the Judges, in their discretion, to consider such agreements as evidence, notwithstanding the argument that the compulsory license may cast a shadow over those agreements").

450 *See supra* Section III.A.1.

451 *See supra* Section III.A.2.

452 *See Web IV*, *supra* note 73, at 26352.

453 *Id.* at 26383.

454 *Id.* (declining to credit SoundExchange's contention that its rates were "too heavily influenced by the 'shadow' of the statutory rates" to satisfy this test).

something was too "amiss" to allow that agreement to serve as a reliable benchmark.[455]

This bodes ill for Copyright Owners in *Phonorecords IV*. If the Board allows voluntary agreements to serve as benchmarks, Apple agreements may play a similar role as they did in *Web IV*. Apple has positioned itself as the one streaming service that is a "friend of artists."[456] As part of this effort, it has made a point of sitting out the *Phonorecords III* appeal being brought by its competitors Spotify, Amazon, Google, and Pandora (although it certainly still stands to benefit if the rate increases are curtailed).[457] Furthermore, its willingness—even eagerness—to pay above the statutory rate is not confined only to the sound recording agreement the Web IV board disregarded, but has also occurred on the publishing side, perhaps as a larger part of its "friend of artists" strategy.[458] And of course in *Phonorecords III*, it was the lone Service to join the Copyright Owners' push for a (much lower, naturally) per-play rate.[459] These efforts have earned Apple the public praise of the NMPA for "tak[ing] a different approach and treat[ing] songwriters more like business partners."[460] To the extent that these efforts have filtered into

455 *See id.* at 26352 (because "economists for both licensors and licensees agreed that the statutory rate effectively sets a ceiling on rates for statutory services," the fact that "that the effective rates under the Apple agreements are substantially higher than the statutory rates strongly suggests that something is amiss").

456 Dani Deahl, *Here's Why Apple is Saying Spotify is Suing Songwriters*, VERGE (Mar. 15, 2019, 2:51 PM), https://www.theverge.com/2019/3/15/18267288/apple-music-spotify-suing-songwriters-eu-antitrust [https://perma.cc/2SKX-RJTT].

457 Jem Aswad & Shirley Halperin, *Apple Is the Real Winner in Spotify's Battle Against Songwriters' Rate Hike*, VARIETY (Apr. 9, 2019, 7:07 AM), https://variety.com/2019/music/news/spotify-rate-hike-apple-real-winner-1203183647/ [https://perma.cc/SEP3-4AY3].

458 Tim Ingham, *Apple Wanted to Improve Songwriter Pay to $0.00091 Per Stream. Spotify and Google Weren't Keen*, MUSIC BUS. WORLDWIDE (Sept. 9, 2019), https://www.musicbusinessworldwide.com/apple-wanted-to-improve-songwriter-pay-to-0-00091-per-stream-spotify-and-google-werent-keen/ [https://perma.cc/8BDE-LFTQ]; *But see What is Apple Music Up to with the MLC?*, TRICHORDIST (Dec. 10, 2020), https://thetrichordist.com/2020/12/10/what-is-apple-music-up-to-with-the-mlc/ [https://perma.cc/PVK2-GC3C] (reporting that Apple may be positioning itself to abandon its above-statutory agreements and revert to statutory rates administered by the MLC).

459 *See supra* notes 93–94 and accompanying text.

460 *Compare Seismic Implications*, *supra* note 37, *with Spotify Defends Its CRB-Rates Appeal—but NMPA Boss Isn't Impressed*, MUSIC ALLY (Mar. 12, 2019),

voluntary agreements proffered as benchmarks in *Phonorecords IV*, it
will do Copyright Owners little good if the Board once again discards these above-stat data points as "amiss" and unreliable—particularly if, as it did in *Web IV*, the Board then takes no issue with any marketplace licensors' decision to voluntarily license at substatutory rates.

Taken together, *Web IV* and *Phonorecords III* provide little reason for Copyright Owners to feel hopeful that their "shadow" arguments will enjoy a warmer welcome in *Phonorecords IV*. Of course, if the role of marketplace benchmarks themselves is diminished, then it is also possible that there will be less occasion to make this argument in the first place.[461]

Licenses for Related Rights? Another issue that featured heavily in *Phonorecords III* that will now, newly, be subject to the Board's Four-Part test for willing buyer/willing seller benchmark agreements is the probative value of licenses for related rights. These will likely be argued in the context of the fourth prong of the Four-Part test: the *Same Rights* test.[462] In *Phonorecords III*, while the Copyright Owners did not convince the Board to consider as many related rights as they had hoped, they did manage to score a few points in this arena. The Board accepted as at least somewhat helpful several benchmarks derived from rights other than interactive streaming mechanical rights. These included digital performance rights for noninteractive streaming (offered by the Copyright Owners), sound recording rights for interactive streaming (at least insofar as it embraced the Copyright Owners' sound recording/musical work ratio approach relative to those rights), and mechanical rates for physical and digital sales (offered by the Services).[463] However, the Board rejected the Copyright Owners' most ambitious benchmark—the 1:1 sound recording/musical work ratio in synchronization licenses—due to divergent upstream competitive dynamics.[464] It also

https://musically.com/2019/03/12/spotify-defends-its-crb-rates-appeal-but-nmpa-boss-isnt-impressed/ [https://perma.cc/5UN5-7R6G].

461 *See supra* Section III.D.1.

462 *See supra* note 225 and accompanying text.

463 *See supra* Section II.A.4.a.

464 *See supra* note 146 and accompanying text.

dismissed another songwriter-friendly sound recording/musical work ratio benchmark derived from YouTube agreements, this time due to the depressing effect of Section 512 "safe harbor" on sound recording YouTube rates.[465]

Ultimately, the *Phonorecords III* Board expressly linked mechanical rates to rates for other rights, both directly and inversely. In adopting a TCC prong, it *directly* tied mechanical rates to sound recording interactive streaming rates: as sound recording rates increase, so too do mechanical royalty rates (beginning when the TCC prong exceeds the percentage-of-revenue prong).[466] And by adopting an all-in rate, the Board expressly created an *inverse* relationship between mechanical rates and the rates payable for the complementary performance right.[467]

Rates for related rights also played a (less prominent) role in *Web IV*. There, the Board rejected the NAB's bid for a bifurcated rate structure for terrestrial/web simulcasters that the NAB justified in part using the royalty rate for sound recordings performed on terrestrial radio (which just so happens to be zero).[468] The Board roundly refused to consider as probative a right for which "there is no market" because "there is no general public performance right" for sound recordings on terrestrial radio.[469] However, the *Web IV* Board quickly clarified that this decision was more a product of the NAB's somewhat extreme approach than of a wholesale aversion to considering related rights: it accepted (with a steering adjustment) SoundExchange's benchmark derived from unregulated *interactive* streaming sound recording rates.[470]

Together, the *Phonorecords III* and *Web IV* decisions augur that, with some limitations along the outer flank, the *Phonorecords IV* Board is likely to be receptive to benchmarks derived from licenses

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465 *See supra* note 147; 17 U.S.C. 512.

466 *See supra* notes 122–129 and accompanying text.

467 *See supra* notes 96–99 and accompanying text. Importantly, while neither of these rate structures were new, prior to *Phonorecords III* they had been the product of settlement, so the *Phonorecords III* Board was the first to impose them in the context of a fully-litigated rate-setting proceeding. *See supra* Section II.A.1–2.

468 *See Web IV*, *supra* note 73, at 26390.

469 *See id.* at 26391.

470 *See supra* notes 238–241 and accompanying text.

for rights other than mechanical streaming. The limitations are as follows: first, NAB's *Web IV* whiff stands for the unremarkable proposition that the *Phonorecords IV* Services will probably not be allowed to rely upon rates for rights for which there is no right at all.[471] Second, the Copyright Owners will likely continue to have a tough time convincing the Board that synchronization sound recording/musical work ratios are probative of "reasonable" mechanical royalty rates.[472] Even as Copyright Owners continue to harp on the reality that synchronization is the one significant songwriter income source that is negotiated in the free market,[473] and even as *Phonorecords IV* will be the first mechanical rate-setting proceeding that is mandated by statute to approximate the free market, the *Phonorecords III* and *Web IV* Boards gave little reason to think that a new rate standard will trump the upstream competitive concerns the Board has relied upon in the past—concerns that so often shape the Board's analysis under any rate standard.[474] As long as songs continue to be substitutes in competition with one another in the synchronization setting and "must have" complements for one another in the interactive streaming setting, the *Phonorecords III* Board's disregard for the synchronization market—which did not rely at all upon 801(b) factors—will likely survive the change in rate standards.[475]

Setting these limitations aside, the *Phonorecords IV* Board should continue to be receptive to the related rights it considered in *Phonorecords III*. Additionally, the *Phonorecords III* Copyright Owners were put on notice that, absent factual support, their "conclusory" allegations regarding the effect of "safe harbor" provisions

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471 *See supra* notes 468–469 and accompanying text.

472 *See supra* note 146.

473 *See, e.g.*, Ingham, *supra* note 38 ("The music publishers' [*Phonorecords IV*] plan, quite deliberately, is to go in impossibly high. As [NMPA president David] Israelite tells it, in the world of synchronization, licensing fees in the US are broadly split 50/50 between publishers (and songwriters) and record labels (and artists)"); Ed Christman, *NMPA: David Israelite, RIAA's Cary Sherman Work to Mend Fences Between Publishers, Labels*, BILLBOARD (June 13, 2013), https://www.billboard.com/articles/business/1566903/nmpa-david-israelite-riaas-cary-sherman-work-to-mend-fences-between [https://perma.cc/PH2F-NWKA].

474 *See infra* Section III.D.3.b.

475 *See supra* note 146.

on YouTube composition rates were insufficient to compel the Board to consider that benchmark.[476] Assuming they heed this warning, they will arrive at *Phonorecords IV* armed with evidence to support their contention that "safe harbor" depresses YouTube composition rates every bit as much as it depresses YouTube sound recording rates. And assuming their evidence is convincing, this will unlock an additional related right benchmark for the *Phonorecords IV* Board to consider—likely a win for songwriters.[477]

b) "Effective Competition" and the Influence of Market Power

There is perhaps no greater unifier between the 801(b)-governed *Phonorecords III* determination and the willing buyer/willing seller-governed *Web IV* determination than the two Boards' respective deference to competitive concerns. Both Boards concluded that inherent to each respective rate standard was an "effective competition" requirement.[478] Both Boards agreed that benchmarks skewed by anti-competitive, oligopolistic market power—notably, in the view of both Boards, among the major record companies—could not, as a rule, satisfy this requirement.[479] However, both Boards also agreed that marketplace rates reached in such an environment could still be useful if handled prudently.[480] More generally, both Boards consistently grounded their analysis of any issue (including benchmarks, rate structure, Shapley analysis, etc.) in competitive concerns. There

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476 *See supra* note 147 and accompanying text.

477 Again, this is assuming the Board considers marketplace benchmarks at all. *See supra* Section III.D.1. However, this discussion introduces another avenue through which the Board could formally honor the textually-significant absence of language permitting it to consider voluntary agreements, while also shrinking the scope of this limitation. *See id.* The Board could construe this limitation as applying only to voluntary licenses for the same rights (mechanical reproduction rights for interactive streaming) or only to rights subject to compulsory licensing (which would add noninteractive digital sound recording rights to the mix). *See id.* This interpretation would still permit the Board to consider benchmarks for many of the related rights it deemed helpful in *Web IV* and *Phonorecords III*. *See supra* Sections II.A.4.a, II.B.3.

478 *See supra* notes 143, 226–230 and accompanying text.

479 *See supra* notes 143, 238–241 and accompanying text. The mere presence of negotiation is not enough to qualify a benchmark as "effectively competitive." *See Web IV*, *supra* note 73, at 26344.

480 *See supra* notes 143, 238–241 and accompanying text.

is no reason to think that *Phonorecords IV* will be any different, particularly as tensions between record labels and major streaming services continue to foment.[481]

While the effects of this renewed priority are too sprawling to cleanly isolate, the *Phonorecords IV* Services will certainly use it as a shield against one recurring Copyright Owner argument: that mechanical rates for interactive streaming should more closely resemble sound recording rates for interactive streaming. Both the *Phonorecords III* and *Web IV* Boards fully adopted the view that the market for interactive streaming rights of sound recordings is heavily slanted by the oligopoly power of the record company. That view makes it difficult for the Copyright Owners to use those sound recording rates to convince the Board to do much of anything. This is unlikely to escape the Services' attention.

481 The competition concerns could also ratchet up at any time if there is a renewal in record company consolidation, or if the trend towards streaming services acquiring interests in record labels continues. *See, e.g.,* Shan Li & Mauro Orrù, *Tencent Buys 10% Stake in Record Label of Billie Eilish, Drake,* WALL ST. J. (Dec. 31, 2019), https://www.wsj.com/articles/tencent-buys-10-stake-in-record-label-of-billie-eilish-drake-11577793085 [https://perma.cc/ETQ4-RLMQ]; *Mergers: Commission Clears Universal's Acquisition of EMI's Recorded Music Business, Subject to Conditions*, EUR. COMM'N (Sept. 21, 2012), https://ec.europa.eu/commission/presscorner/detail/en/IP_12_999 [https://perma.cc/7JRM-PG27]. As it is, there are a myriad of tension points. *See, e.g.*, Ben Sisario, *A New Spotify Initiative Makes the Big Record Labels Nervous*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/business/media/spotify-music-industry-record-labels.html; [https://perma.cc/8459-JS3G]; Lucas Shaw, *The Tension is Building Between Spotify and the Music Industry*, STAR (Sept. 6, 2018, 7:00 AM), https://www.thestar.com.my/tech/tech-news/2018/09/06/the-tension-is-building-between-spotify-and-the-music-industry [https://perma.cc/RRG8-AK58]; Lucas Shaw, *Spotify's Newest Pitch to Labels and Musicians: Now You Pay Us*, BLOOMBERG (Mar. 2, 2010, 5:00 AM), https://www.bloomberg.com/news/articles/2020-03-02/spotify-s-newest-pitch-to-labels-and-musicians-now-you-pay-us [https://perma.cc/QUV9-HVT5]; Stuart Dredge, *Are Spotify, Apple Music and YouTube the New Record Labels?*, MUSIC ALLY (June 4, 2019), https://musically.com/2019/06/04/are-spotify-apple-music-and-youtube-the-new-record-labels/ [https://perma.cc/25DE-93DU]; Tim Ingham, *Who Are the Two 'Major Labels' that Have Signed New Deals with Spotify? Clue: Not Universal or Warner.*, MUSIC BUS. WORLDWIDE (July 31, 2019), https://www.musicbusinessworldwide.com/who-are-the-two-major-labels-that-have-signed-new-deals-with-spotify-clue-not-universal-or-warner/ [https://perma.cc/53UU-U8A6].

c) Analysis of Individual Benchmarks

Substitution and Promotional Value. The statutory definition of the willing buyer/willing seller rate standard includes a requirement that the Board consider substitution and promotional effects. "Substitution" effects refer to the extent to which revenue from one type of copyright use *replaces* revenue from other types of copyright uses, while promotion effects refer to the extent to which one type of copyright use *encourages* revenue from other types of copyright uses.[482] The exact statutory text compels the Board to consider "whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works." [483] This guidance is included in both Section 114, and the post-MMA Section 115, but was not a part of the pre-MMA Section 115 801(b) standard.[484]

Given that reality, it is perhaps unsurprising that substitution and promotion effects figured more prominently in *Web IV* than in *Phonorecords III*. While the *Phonorecords III* Board barely discussed either,[485] the *Web IV* Board engaged deeply with both phenomena. First, it made the impactful choice not to consider the substitution effects and promotion effects separately from any of the benchmark agreements it reviewed, but rather to deem them "baked into" those agreements.[486] However, this approach only extended to same-market benchmarks; the Board held that for benchmarks imported from *other* markets (e.g. interactive streaming), the Board would have to "identify and consider any difference in the promotional/substitutional effects" between the two markets in order to properly quantify the imported benchmark.[487] Furthermore, the Board signaled that it could be sympathetic to arguments that

482 *See supra* notes 218–219 and accompanying text.

483 17 U.S.C. § 115.

484 *See* 17 U.S.C. §§ 114–15; 17 U.S.C. §§ 115, 801 (prior to 2018 amendment).

485 Outside of a passing reference to one Shapley model's accounting for substitution (*Phonorecords III*, *supra* note 28, at 1948), and the Services' argument that the 2012 Settlement suggested an "implicit consensus on such issues as substitutional effects" (*id.* at 1926), the *Phonorecords III* Board's only reference to either force was actually through an inconsequential citation to *Web IV*. *See id.* at 1933 n. 68.

486 *See Web IV*, *supra* note 28, at 26326.

487 *See id.* at 26327.

licensors are willing to accept lower rates when a licensed use does not cannibalize other revenue, or when a licensed use generates enough promotional value.[488]

Now equipped with the same statutory directive that spurred its *Web IV* analysis, the *Phonorecords IV* Board is certain to entertain substantial substitution and promotion discussion from both sides—both inside and outside of the benchmark context. Under Section 803's *stare decisis*-esque guidance, the Board will likely consider both effects to be "baked into" any intra-market voluntary benchmarks, as it did in *Web IV*. However, for benchmarks summoned from beyond the interactive streaming mechanical space, and for arguments outside of the benchmark context entirely, it will be open season.

The tacks taken by each party will greatly depend on how prominent a role benchmarks play in the proceedings. Indeed, the parties' strategies inside of the benchmark context will be diametrically opposed to their strategies outside of the benchmark context.

For Copyright Owners, the value of any marketplace agreement is equal to the royalty rate, plus the promotional benefit, and minus the revenue earned under the benchmark agreement that substitutes for revenue that would otherwise have been earned elsewhere. For example, if interactive streaming decreases consumers' demand for CDs, then interactive streaming revenue has, to some extent, *substituted* for CD sales revenue—presumably prompting the licensor to demand a higher royalty rate than it would otherwise agree to in order to make up for the lost CD revenue. Conversely, if interactive streaming activity encourages a movie producer to place a song in an upcoming film, then the interactive streaming license has *promoted* synchronization revenue—presumably encouraging the licensor to be open to a lower royalty rate than it would otherwise agree to, because it is motivated by its ability to generate extra value

[488] *See supra* note 212. The *Web IV* Board declined to adopt these arguments due to underlying evidentiary deficiencies, even as it accepted that the phenomena were plausible. *See Web IV*, *supra* note 73, at 26322–23 ("Assuming for the sake of argument that a promotional impact could justify a discounted royalty rate for simulcasters, the NAB would be required to demonstrate that such promotional effect is greater for simulcasting than for other forms of commercial webcasting to an extent that would justify a lower rate for simulcasters. The NAB has not done so.").

elsewhere. Thus, when discussing the rate included in that interactive streaming license as a potential benchmark, the licensor has an incentive to claim that the promotional effect was *more* significant than the substitution effect, to show that the benchmark agreement rate is actually *lower* than it would otherwise have been, absent the extra benefit granted under *that* marketplace license that is not transferring over to *this* statutory license. The licensee, of course, has the exact opposite incentive.

Outside of the benchmark context, the calculus flips. In a Shapley analysis, for example, the licensor has an incentive to argue that the promotional effect under *this* statutory license for interactive streaming is minuscule, and the substitution effect gargantuan. For the purposes of rate-setting, the licensor does not want to concede that under *this* interactive streaming license it will be generating any value other than the royalty—willing sellers, of course, are willing to sell for less if they are getting something extra on the side. And for the purposes of rate-setting, the licensor will want to claim that interactive streaming is gutting physical and digital sales such that a willing seller of interactive streaming would demand *extra* royalties to make up for the decimation of the rest of its business.

In *Web IV,* iHeart's expert attempted to straddle these two divergent goals in a manner that may be instructive. Tasked with devaluing a prospective Spotify interactive benchmark being applied in a noninteractive rate-setting proceeding, he presented expert testimony purporting to show that "noninteractive services are 15 times more promotional than interactive services."[489] If the Board had credited this testimony (it did not),[490] it would have supported the proposition that the statutory rates currently being set should be lower than the marketplace benchmark would otherwise indicate, because all else equal, licensors would be willing to accept a lower noninteractive rate (along with its huge promotional benefits) than the interactive benchmark (with its lack of promotional benefits) would otherwise suggest.

489 *See id.* at 26328.
490 *See id.*

Given the questionable statutory standing of marketplace benchmarks in *Phonorecords IV*,[491] the *Web IV* Board's limitations on independent consideration of substitution and promotion values,[492] and the *Phonorecords III* Board's favoring of Shapley analysis,[493] it seems most likely that these arguments will have a greater impact outside of the marketplace benchmark context. Thus, Copyright Owners will likely come prepared to quantify the many ways in which interactive streaming appears to have harmed other sources of music revenue.[494] Their adversaries, the Services, will be prepared to discuss the many promotional benefits of interactive streaming.[495] The projected outcome of those efforts remains

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491 *See supra* Section III.D.1.

492 *See Web IV*, *supra* note 73, at 26321–22.

493 *See supra* Section II.A.4.b.

494 *See, e.g.*, Ben Sisario & Karl Russell, *In Shift to Streaming, Music Business Has Lost Billions*, N.Y. TIMES (Mar. 24, 2016), https://www.nytimes.com/2016/03/25/business/media/music-sales-remain-steady-but-lucrative-cd-sales-decline.html [https://perma.cc/Z55N-T74K]; Ashley King, *Spotify Will Overtake Pandora's Total U.S. Listener Count by 2021, Report Predicts*, DIGITAL MUSIC NEWS (Mar. 25, 2019), https://www.digitalmusicnews.com/2019/03/25/spotify-pandoras-listeners/ [https://perma.cc/5492-GMBM]; Amy X. Wang, *Album Sales Are Dying as Fast as Streaming Services Are Rising*, ROLLING STONE (Jan. 3, 2019, 5:11 PM), https://www.rollingstone.com/music/music-news/album-sales-dying-as-fast-as-streaming-services-rising-774563/ [https://perma.cc/VZG7-7R3V]. *But see* Tim Ingham, *Global Recorded Music Industry Revenues Topped $20BN Last Year—But Streaming Growth Slowed*, MUSIC BUS. WORLDWIDE (May 4, 2020), https://www.musicbusinessworldwide.com/the-global-recorded-music-industry-generated-over-20bn-last-year-but-streaming-growth-slowed/ [https://perma.cc/ATT8-S9W6]. The Copyright Owners may even arrive equipped with visual aids. *See, e.g.,* SONA, *Gently Down the Stream*, YOUTUBE (Apr. 27, 2016), https://www.youtube.com/watch?v=OllDCF_llHc&feature=emb_title. [https://perma.cc/6BUW-THG5].

495 *See, e.g.*, Peter Robinson, *Streams Ahead: The Artists Who Made It Huge Without Radio Support*, GUARDIAN (Dec. 1, 2016, 11:32 AM), https://www.theguardian.com/music/2016/dec/01/artists-made-it-huge-streaming-spotify-apple-music [https://perma.cc/A9C2-A3BG]; Patrick McGuire, *How Streaming Platforms Are Changing Music Promotion and Discovery*, TUNECORE (Feb 13, 2018), https://www.tunecore.com/blog/2018/02/streaming-platforms-changing-music-promotion-discovery.html [https://perma.cc/WZS7-FNLD]; Lisa Robinson, *Why Chance the Rapper Makes Music for Free (and How He Actually Makes Money)*, VANITY FAIR (Feb. 9, 2017), https://www.vanityfair.com/hollywood/2017/02/why-chance-the-rapper-music-is-free-and-how-he-makes-money [https://perma.cc/D46W-WMFZ]. *But see What Is the Value of Exposure When Exposure is All There Is?*, MIDIA: MUSIC INDUS. BLOG (May 6, 2020), https://musicindustryblog.wordpress.com/2020/05/06/what-is-the-value-of-exposure-when-exposure-is-all-there-is/ [https://perma.cc/RHH2-2TSQ]. The Services have their

uncertain: it will likely depend on which experts the Board finds most compelling.

Extra-Statutory Terms and Functionality. A very similar dynamic occurs when discussing extra-statutory terms and functionality. In the benchmark setting, Copyright Owners have every incentive to exaggerate the extra benefits received by licensors in a marketplace setting that would not be received by the licensors in *this* statutory setting, to show that the benchmark licensors agreed to artificially low monetary rates because they were also receiving additional benefits. Thus, they would argue, those benchmark monetary rates need to be increased if they are being applied in a setting devoid of those extra benefits that are not available under the statutory license—such as access to proprietary data, or promotional services, as were discussed in the *Web IV* Pandora/Merlin and iHeart/Warner benchmark agreements.[496] As before, the Services have the opposite incentive, or indeed an incentive to highlight the extra-statutory benefits the *licensees* received in those benchmark transactions (such as additional rights or favorable indemnification terms) that would not be available to statutory licensees.[497]

In *Web IV*, the Board considered several extra-statutory terms in benchmark agreements but rarely found them dispositive. While it did dismiss some of SoundExchange's noninteractive benchmarks for failing to account for extra-statutory functionality,[498] it did not do the same for either the Pandora or iHeart benchmarks. In both of those instances, the Board acknowledged the presence of statutory terms, but declined to adjust for them because it was not convinced that the parties had actually ascribed to these terms any value that would have affected the monetary royalty rates.[499]

Importantly, the Board made two important rulings that could factor into *Phonorecords IV*. First, extra-statutory terms do not

own visuals. *See, e.g., Promoting Your Work*, SPOTIFY, https://artists.spotify.com/videos/the-game-plan/promoting-your-work [https://perma.cc/CR7D-KKGW].

[496] *See supra* notes 264–265 and accompanying text; *supra* note 255.

[497] *See, e.g.*, Steele, *supra* note 119 (outlining a marketplace agreement in which Spotify received, among other things, the right to charge Universal's artists for promotional tools and opportunities).

[498] *See Web IV*, *supra* note 73, at 26353.

[499] *See supra* notes 264–265 and accompanying text; *supra* note 255.

disqualify a prospective benchmark.[500] Second, recognizing that a party claiming extra-statutory terms has an incentive to quantify those terms, it held that the burden to establish an extra-statutory term's quantifiable value lies with the party claiming that the term has value.[501]

Because the *Phonorecords III* Board did not engage with this issue, the *Web IV* Board's guidance remains intact heading into *Phonorecords IV*. As with promotional and substitution effects, the parties' arguments will depend upon whether they are characterizing a benchmark marketplace license, or the statutory license itself. Of course, by definition, the statutory agreement itself cannot contain non-statutory terms. However, where streaming services are providing publicly available benefits to rightsholders, they may attempt to argue that lower rates are warranted, just as if these benefits were available under the statutory license. For example, Spotify—perhaps to strengthen its testy relationship with songwriters[502]—has been rolling out a series of songwriter- and publisher-facing tools. These have included proprietary analytic insights for publishers, visible songwriter credits, songwriter playlists, and songwriter promotional landing pages.[503]

Presumably, in a hypothetical marketplace, some licensors might ascribe enough value to some of these features to be willing

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500 *See Web IV*, *supra* note 73, at 26369.

501 *See id.* at 26387.

502 *See, e.g.*, Elias Leight, *Threats, Bullying and Misinformation: Inside Spotify's Battle With Songwriters*, ROLLING STONE (Apr. 19, 2019, 12:15 PM), https://www.rollingstone.com/music/music-features/threats-bullying-misinformation-spotify-battle-songwriters-820969/ [https://perma.cc/FG9T-6LKW]; *Spotify's Relationship with Publishers Hits the Rocks—Again*, MUSIC ALLY (June 24, 2019), https://musically.com/2019/06/24/spotifys-relationship-with-publishers-hits-the-rocks-again/ [https://perma.cc/A34F-BQET].

503 *See Introducing Spotify Publishing Analytics in Beta,* SPOTIFY (Nov. 8, 2018), https://newsroom.spotify.com/2018-11-08/introducing-spotify-publishing-analytics-in-beta/ [https://perma.cc/9V3D-LLEJ]; Dani Deahl, *Spotify Now Lets You Search by Songwriter With Clickable Credits*, VERGE (Feb. 12, 2020, 11:45 AM), https://www.theverge.com/2020/2/12/21134557/spotify-search-songwriter-pages-clickable-credits [https://perma.cc/MMA8-Y72U]; Murray Stassen, *A Year After Trying To Cut Songwriters' Pay, Spotify Boosts Writer Visibility With Launch of Pages Features*, MUSIC BUS. WORLDWIDE (Feb. 12, 2020), https://www.musicbusinessworldwide.com/a-year-after-trying-to-cut-songwriters-pay-spotify-boosts-writer-visibility-with-launch-of-pages-feature/ [https://perma.cc/ZFS6-S8FM].

to lower their royalty rates in order to access them. Crucially, then, if Spotify were to include these benefits as a part of *individual* licensing agreements, they could pose a rate-setting liability: were those agreements to be offered as a benchmark, the Copyright Owners would argue that the presence of these valuable extra-statutory benefits led to artificially low royalty rates because licensors were willing to sell for less in order to secure the extra benefits that would not be available under the statutory license. However, by making these features *publicly* available, Spotify has not only foreclosed that benchmark argument, but it has also opened the door for the Services to argue that the *statutory* rates should be lower because companies like Spotify are providing extra value to the entire publisher and songwriter communities at large. Should the Services attempt such an argument, per *Web IV*, they will bear the hefty burden to prove the quantifiable presence of a market-wide benefit.[504]

As with substitution and promotional value, the net effect of this variable is difficult to project and will likely also boil down to a battle of the experts.

Prevalence of a Feature in the Marketplace. The Board's review of individual benchmark terms is not confined only to extra-statutory features. Both the *Phonorecords III* and *Web IV* Boards signaled the relevance of a structural term's ubiquity in the marketplace—irrespective of any purported self-fulfilling statutory "shadow." The *Phonorecords III* Board noted the prevalence of its core rate structural elements on its way to adopting each of them: all-in,[505] "greater-of" percentage-of-revenue and TCC structures[506] all apparently predominate in the voluntary marketplace.[507] Similarly, the *Web IV* Board relied upon the lack of effective marketplace prevalence in its primary structural choice: declining to adopt a "greater-of" rate structure.[508]

To the extent it considers marketplace benchmarks, the *Phonorecords IV* Board is likely to adopt a similar approach. This

504 *See Web IV*, *supra* note 73, at 26387.
505 *See Phonorecords III*, *supra* note 28, at 1929.
506 *Id.* at 1935.
507 The *Phonorecords III* Board did not rely upon marketplace prevalence in adopting the mechanical floor. *See supra* notes 100–104 and accompanying text.
508 *See supra* note 212 and accompanying text.

may make it even more difficult for Copyright Owners looking to establish a per-play rate, who will at that point be swimming upstream against over a decades-worth of market organization around the percentage-of-revenue rate structure. On the other side, it provides an opportunity for Services to mount, in effect, a populist revolt against the uncapped TCC prong: presumably, if enough streaming services manage to convince publishers to enter into voluntary agreements without an uncapped TCC prong, the Board will look less favorably on reinstating this feature.

The net effect of this dynamic is difficult to predict before seeing and dissecting the structural elements of the marketplace agreements that will inform the *Phonorecords IV* Board's analysis on this point.

Agreement Context and Participants. Both the *Phonorecords III* and *Web IV* Boards agreed that the context in which a benchmark agreement occurs can be relevant to the Board's conclusion as to whether the benchmark is probative of "reasonable" rates. The *Phonorecords III* Board used the "context of litigation"—and its potential to distort bargaining positions with transaction cost avoidance—as a justification to ding a settlement benchmark in favor of a marketplace benchmark.[509] The *Web IV* Board went a step further: it cited SoundExchange's failure to consider the context and business relationships that birthed a proffered voluntary benchmark agreement as grounds to wholly disregard it.[510] The *Phonorecords IV* Board will likely feel empowered to take similar steps.

Similarly, there is one recurring contextual argument that both the *Phonorecords III* and *Web IV* have uniformly rejected: the "experimental" agreement argument. The licensor parties have attempted to make this case to invalidate both marketplace agreements[511] and CRB settlements.[512] In each context, the Board has essentially said the same thing: all agreements are experiments.[513]

[509] *See Phonorecords III*, *supra* note 28, at 1935.
[510] *See Web IV*, *supra* note 73, at 26353.
[511] *See supra* note 255.
[512] *See supra* note 109 and accompanying text.
[513] *See Web IV*, *supra* note 73, at 26371–72. While the *Phonorecords III* majority did not expressly respond to this argument, it declined to endorse it, leaving Judge Strickler to be more explicit in his dissent: "At a high level, all markets are not 'mature,' in the sense that

There is no reason to think that this argument will become any more compelling to the *Phonorecords IV* Board as streaming continues its climb from industry niche to industry overlord.[514]

Finally, while the matter did not arise in *Phonorecords III*, the *Web IV* Board established that, in a willing buyer/willing seller context, the *participants* themselves are relevant to a benchmark's reliability.[515] In addition to its split baby regarding the Pandora/Merlin benchmark's representativeness of the *licensor* market at large,[516] the Board also examined whether Pandora was representative of the *licensee* market at large. Did Pandora's market share afford it too much market power for its negotiated rates to be representative of the market at large? In answering this question, the Board set forth a guiding legal principle: market power in a bilateral marketplace agreement is not a product of the *licensee's* percentage share of its own market, but rather the percentage of the *licensor's* revenue that is derived from the licensee's business.[517] Thus, Pandora's irrefutably expansive share of the noninteractive music market was trumped by the relatively insignificant 5% of Merlin member revenue it

they are dynamic and thus subject to change, making all rate structures 'temporary,' if not 'experimental.'" *Phonorecords III*, *supra* note 27, at 2000 (Strickler, J., dissenting).

514 *See* Sarah Perez, *TechCrunch: Streaming Services Accounted for Nearly 80% of All Music Revenue in 2019*, RIAA (Feb. 25, 2020), https://www.riaa.com/techcrunch-streaming-services-accounted-for-nearly-80-of-all-music-revenue-in-2019/ [https://perma.cc/9BPY-3NU8]. The ever-refreshing supply of new streaming entrants should ensure that Copyright Owners are never entirely bereft of arrows in their "experimental" quiver. *See, e.g.*, Anne Freer, *TikTok Secures Licensing Deal with Major Music Publishers*, BUS. OF APPS (Apr. 3, 2020), https://www.businessofapps.com/news/tiktok-secures-licensing-deal-with-major-music-publishers/ [https://perma.cc/4TPW-BJAQ]; Dami Lee, *Snap Is Looking into Licensing Music for Users to Embed in Posts*, VERGE (May 24, 2019), https://www.theverge.com/2019/5/24/18638984/snap-snapchat-music-licensing-copyright; [https://perma.cc/F8TR-G57S]; Cherie Hu, *Unbundling The Song: Inside The Next Wave Of Recorded Music's Disruption*, FORBES (May 13, 2018), https://www.forbes.com/sites/cheriehu/2018/05/13/unbundling-the-song-inside-the-next-wave-of-recorded-musics-disruption/#645ca6109cae [https://perma.cc/3QT3-4FB4]; Jon Blistein, *Twitch Licenses Music Now. But the Music Industry Says It's Skirting the Rules*, ROLLING STONE (Oct. 1, 2020), https://www.rollingstone.com/pro/features/twitch-soundtrack-licensing-sync-1069411/ [https://perma.cc/2WUK-S2DQ].

515 *See Web IV*, *supra* note 73.

516 *See supra* notes 253–255 and accompanying text.

517 *See supra* note 255.

accounted for: Pandora was not too powerful to be representative of other licensees.[518]

This issue's *Phonorecords III* absence is noteworthy. Like non-interactive streaming, interactive streaming has a few dominant players: for interactive audio-only streaming, Spotify has a large plurality market share,[519] and for interactive video music streaming, YouTube is dominant.[520] While the percentage of each licensor's revenue that each streaming service accounts for is, of course, proprietary, streaming revenue as a whole accounted for nearly 80% of all recorded music revenue in 2019.[521] It stands to reason, then, that for at least some of the licensors—either publishers, or *especially* record labels—who were party to the Spotify and YouTube voluntary agreements that the Copyright Owners offered as benchmarks in *Phonorecords III*,[522] Spotify or YouTube would have accounted for significantly more than the 5% of revenue that the *Web IV* Board ruled was insufficient to constitute market power.[523]

The *Phonorecords IV* Board may very well see a benchmark challenged on these grounds, likely to the benefit of the Copyright Owners. The fact that the *Phonorecords III* Board did not have to rule on whether Spotify or YouTube was representative of other, less powerful services was probably due to the fact that these benchmarks were proffered by the Copyright Owners—the same party

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518 *See id.*

519 *See* Stuart Dredge, *Report: Spotify Has 36% Market Share of Music-Streaming Subs*, MUSIC ALLY (Dec. 9, 2019), https://musically.com/2019/12/09/report-spotify-has-36-market-share-of-music-streaming-subs/ [https://perma.cc/C2PZ-NQQ5].

520 YouTube reportedly accounts for 47% of *all* (not just video) on-demand music streaming. *See* Matt Binder, *YouTube Accounts for 47 Percent of Music Streaming, Study Claims*, MASHABLE (Oct. 10, 2018), https://mashable.com/article/youtube-47-percent-of-on-demand-music-streaming/ [https://perma.cc/UQ33-G83S]. For the avoidance of confusion: interactive video streaming is not subject to the Section 115 compulsory license. *See FAQs for YouTube Content Uploaders*, ASCAP, https://www.ascap.com/help/music-business-101/youtube-faq-uploaders [https://perma.cc/2LUP-NQGY]. *See also* Bruce Houghton, *"YouTube is Becoming More Important to Music than Music is to YouTube," says MIDiA's Mark Mulligan*, HYPEBOT (Nov. 18, 2020), https://www.hypebot.com/hypebot/2020/11/youtube-is-becoming-more-important-to-music-than-music-is-to-youtube-says-midias-mark-mulligan.html [https://perma.cc/V6M2-5JNU].

521 *See* Perez, *supra* note 514.

522 *See supra* Section II.A.4.a.

523 *See supra* note 257.

who would have had the incentive to argue that Spotify/YouTube's market power had depressed the benchmark rates—and not the Services.[524] That could easily change in *Phonorecords IV*. It is also possible that the *Phonorecords III* Board considered this entire issue to be more relevant in a willing buyer/willing seller context than an 801(b) context—a matter more appropriate for *Web IV* (which engaged with it) than for the pre-MMA *Phonorecords III* (which did not). If so, that *will* change in *Phonorecords IV*. The bottom line: any extent to which the Board finds marketplace benchmark rates to be anticompetitively depressed by streaming services' market power can only help the Copyright Owners.

IV. What Comes Next? Projecting the Impact of These Changes

Interested onlookers attempting to use the *Phonorecords III* and *Web IV* determinations to predict the MMA's effect on mechanical royalty rates are apt to see what they want to see. There is enough pro-licen*see* material in the *Phonorecords III* decision that appears to have been influenced by the now-vanquished 801(b) factors to give licensors hope that *Phonorecords IV* will raise rates beyond the incumbent 44% increase—assuming it survives remand. Conversely, there is also enough pro-licen*sor* material in *Phonorecords III* that appears to conflict with *Web IV* to give licensees hope that the willing buyer/willing seller may be less copyright-friendly than its advocates hope.

In reality, the two decisions are more similar than they are different. Each undertook similar approaches, albeit with somewhat divergent emphases: (1) each began with structural determinations, followed by (2) evaluating specific benchmarks and economic analyses; (3) each then synthesized these data points into zones of reasonableness before (4) selecting final rates.[525] Both Boards placed special emphasis on competitive concerns.[526] Finally, both Boards engaged in substantial market analysis, even where (in the case of

524 *See supra* Section II.A.4.a.
525 *See supra* Sections I.A–I.B.
526 *See id.*

Phonorecords III) they were not expressly charged with setting market rates.[527]

Of course, even subtle changes can have dramatic impact on songwriters struggling to scrape out a living in the new streaming economy, and on streaming services continuing their slow trek towards consistent profitability. And, to be sure, the two opinions contain a number of subtle—and less-than-subtle—differences. Together, the *Phonorecords III* and *Web IV* determinations stand for the proposition that songwriters should remain cautiously optimistic that the willing buyer/willing seller rate standard will boost their rates.

Part IV of this Comment explains why. First, Section A discusses the reasons for songwriter optimism—recapping and elaborating upon the positive implications suggested by this Comment's analysis of *Phonorecords III* and *Web IV*. Sections B and C then explain why that optimism should be tempered with caution—by, respectively, recapping and discussing the pro-*service* implications for the change to willing buyer/willing seller, and finally by cataloging the many points of uncertainty.

A. Pro-Songwriter Implications

A side-by-side comparison of *Phonorecords III* and *Web IV* illuminates several points of optimism for songwriters. This is not, in and of itself, particularly surprising: the switch to willing buyer/willing seller was pushed for by rightsholders, not licensees, after all. But even beyond the consensus, conclusory feeling that a mandate to set market-based rates will result in higher songwriter compensation than past rate standards, there are specific granular matters from within the two Board's reasonings that suggest further rate increases may be on deck.

Most notably, the Copyright Owners have never been better equipped to pursue their coveted per-play rate. First, the absence of 801(b) factor A—the "availability" factor that the Board construed as regulating pro-service demand considerations, rather than pro-songwriter supply considerations—removes the most explicit per-

527 *See id.*

play obstacle cited in *Phonorecords III*.[528] While *Web* IV demonstrates that the absence of Factor A will not preclude the Board from considering the downstream competitive effects that ultimately dissuaded it from adopting a per-play rate, it also shows that, in the willing buyer/willing seller context, the Board is perhaps more amenable to other factors trumping downstream competitive effects.[529] Second, per-play advocates may also rejoice in the post-MMA absence of 801(b) factor D (industry disruption), which the Board similarly linked to its decision not to adopt a per-play rate.[530] Third, in a world in which the Board has declared itself bound by something close to *stare decisis*, and just recently imposed a per-play rate on its most contemporary willing buyer/willing seller rate determination (*Web IV*), it may feel some pressure to allow its newly unified inputs (i.e. rate standards) to yield unified outputs (i.e. rate structures).[531] Finally, these per-play hopes are only further bolstered by the *Phonorecords III* Board's express statement of preference for simplicity: there is, of course, no simpler structure than a straightforward per-play rate.[532]

Even in the absence of a per-play rate, the Copyright Owners should also feel relatively confident that the structural protections they currently do approve of are not (for the most part) in any particular danger. Nothing in *Web IV* forecloses any of the reasoning the *Phonorecords III* Board used to arrive at a mechanical floor or a TCC prong—both of which activate when diminished service revenue would otherwise lead to reduced royalties.[533] Here, songwriters may take extra solace in both the *Web IV* and *Phonorecords III* Board's insistence that they are in no way obligated to protect any specific service's business models, nor ensure anyone's profitability.[534] This should continue to foreclose the Services from effectively weaponizing low-revenue services—for whom these alternate, non-revenue-based prongs might pose a hardship—in order to

528 *See supra* Section III.B.2
529 *See id.*
530 *See supra* Section III.B.6.
531 *See supra* Section I.A.4.
532 *See supra* Section I.B.3.
533 *See generally supra* Part II.
534 *See supra* Section III.B.4.

convince the Board to abandon these protections in the name of protecting these fledgling services.

Beyond structure, songwriters may also reasonably feel optimism regarding the future numerical rates themselves. Fundamentally, the absence of the 801(b) factors relieves the Board of its former "legislative discretion," which allowed it to maintain—at least in songwriters' estimation—below-market rates wedged into songwriter-hostile structures.[535] Whether or not those assessments are accurate, it is undeniably true that the post-MMA Board no longer has the discretion to stray from market-based rates.[536] Where the *Phonorecords III* Board was permitted—indeed required—to entertain economic analyses across the fair market/free market spectrum, the *Phonorecords IV* Board will only be permitted to consider analysis that at least purports to model a free market.[537] While the parties will no doubt submit widely divergent analyses that each purport to imitate a free market, it is significant that no party—particularly the Services—will be able to factor in non-market values and principles. In the end, the removal of the 801(b) factors as available *Shapley* inputs may be the most consequential change of all.

The resulting upward pressure on rates should work in tandem with the *Phonorecords IV* Board's likely renewed emphasis on Shapley analyses. First, there is a real possibility that the statutory text itself may forestall the use of marketplace benchmarks altogether.[538] Even if they are permitted, they will likely be deemphasized relative to the Shapley analyses that the *Phonorecords III* Board already revealed itself to be partial to.[539] For rightsholders convinced that benchmark rates derived from within the Section 115 marketplace are inherently shaded downwards by the statutory "shadow," this would be a welcome development.[540]

To the extent that the Board does rely upon marketplace benchmarks—which did of course figure prominently into the *Web IV* Board's construction of the willing buyer/willing seller rate

535 *See supra* Section I.A.5.
536 *See id.*
537 *See id.*
538 *See supra* Section I.D.1.
539 *See supra* Section I.C.2.
540 *See supra* notes 440–461 and accompanying text.

standard[541]—*Web IV* does provide at least one beacon of hope for songwriters. After ignoring the issue in *Phonorecords III*, the *Web IV* Board showed itself willing to evaluate whether certain Service benchmarks reflected market power on behalf of the contracting service.[542] For a streaming industry that is certainly not getting any *less* concentrated, this may give Copyright Owners some cause to believe that their benchmark arguments in *Phonorecords IV* may fare better than in the past.[543] It may also afford them a plausible counter to the *Phonorecords III* and *Web IV* Boards' insistence that interactive streaming sound recording rates are inflated by major label market power.[544] Fundamentally, anything the Copyright Owners can do to link their rates to those much higher sound recording rates is a win for songwriters. Finally, next time around, the Copyright Owners should be able to at least attempt to substantiate their claims that "safe harbor" depresses both sound recording *and* composition rates from YouTube, giving their YouTube benchmark (a favorable benchmark for songwriters in *Phonorecords III*) a fighting chance.[545]

B. Pro-Service Implications

While many of the implications of the new rate standard tend to cut against the Services' interests, the Services certainly benefit from the inertia suggested by the similarities between *Phonorecords III* and *Web IV*. For one—perhaps most importantly to the Services—the *Web IV* Board's competition-driven approach is entirely consistent with the *Phonorecords III* Board's emphasis on the perfectly complementary nature of mechanical and performance streaming rights, and its resulting decision to renew the all-in rate structure.[546] The all-in rate structure allows the CRB to effectively cap the Services' obligations to songwriters (in the U.S.): sure, they must still negotiate with the PROs, and go to rate court where necessary, but anything that comes out of their left pocket will

541 *See supra* Section I.B.3.
542 *See supra* notes 516–518 and accompanying text.
543 *See supra* notes 521–523 and accompanying text.
544 *See supra* Section III.D.3.b.
545 *See supra* notes 478–479 and accompanying text.
546 *See supra* notes 303–306 and accompanying text.

ultimately be credited to their right pocket anyway.[547] Second, *Web IV* also offered Copyright Owners no additional ammunition in their fight to show that the services effectively suppress royalty rates through revenue deferral, "loss-leading," revenue displacement, and other business practices and models.[548] The *Phonorecords III* Board proved itself fairly resistant to these arguments, and the Services will be happy that the *Web IV* Board avoided discussing them altogether.[549] They will also, no doubt, be grateful that the Board views the record companies as an oligopoly—and therefore any inflated benchmark rates involving record company negotiations as inherently suspect—regardless of which rate standard it is applying.[550]

Further, while *Web IV* does supply new market-based ammunition for the Copyright Owners' per-play crusade, it also appears to hinder their ability to leverage several non-market arguments. First, to the (limited) extent that *Phonorecords III* may have left the door open for the Copyright Owners to re-run their "inherent value" argument, the *Web IV* Board's conspicuous silence on all equity matters seems to confirm that such arguments have no place in a willing buyer/willing seller landscape.[551]

Of even greater consequence: while the Board did not expressly allow these songwriter-wellbeing arguments to inform its interpretation of the 801(b) factors, it did invoke these concerns in its 801(b) discussion, and ultimately expressly tied them to its conclusion that mechanical royalty rates should be significantly increased from their 2012 levels.[552] Thus, even if the Services believe that the switch to willing buyer/willing seller may increase the chances of a modest rate increase in *Phonorecords IV*, they will no doubt be heartened that much of the evidence that the *Phonorecords III* Board most directly mobilized in its decision to enact a *significant* rate hike is no longer relevant to the new rate standard.

547 *See supra* notes 96–99 and accompanying text.
548 *See supra* notes 379–387389 and accompanying text.
549 *See id.*
550 *See supra* 481–483 and accompanying text.
551 *See supra* notes 347–355 and accompanying text.
552 *See supra* notes 360–367 and accompanying text.

C. Uncertain Implications

In some respects, the differences between *Phonorecords* and *Web IV* yield more questions than answers. For one, there is the entirely unsettled issue surrounding the role (or possible lack thereof) of marketplace benchmarks under the new Section 115.[553] The *Web IV* Board devoted by far more time to evaluating benchmarks than it did to any other portion of its analysis. If it is unable to do the same in *Phonorecords IV*, then it may be impossible for willing buyer/willing seller to truly embody the "unified" rate standard trumpeted by both Congress and the Copyright Office.[554] Nor is it possible to confidently predict what the effect of such an outcome would be on royalty rates. While licensors may hope that the uncertainty around benchmark admissibility will help them escape the statutory "shadow"—and it certainly may—its most likely outcome is an increase in outcome variance, which could ultimately swing either way (or back-and-forth over time, depending on the makeup of any particular triumvirate of judges).

Second, the heightened statutory emphasis on substitution and promotion effects adds an extra layer of volatility.[555] All that is certain is that substitution and promotion effects will factor prominently into the Board's analysis.[556] What remains entirely unclear is which side this will benefit. For one, as discussed supra, both substitution and promotion effects operate opposite to themselves depending on whether they are discussed in the benchmark context, or outside of it.[557] Thus, their import is directly linked to the uncertainty surrounding the role of benchmarks. And even if, as seems likely, the Board ends up entertaining promotion and substitution arguments primarily outside of the benchmark context, both the Copyright Owners (stressing, in this context, substitution) and the Services (countering, in this context, with promotion) will have plausible arguments in support of their respective positions. In the end, the Board will simply have to choose a narrative it prefers. The only thing that is certain about this choice is that the statute now

553 *See supra* Section III.D.1.
554 *See supra* notes 57–58 and accompanying text.
555 *See supra* Section III.D.3.c.
556 *See id.*
557 *See id.*

expressly provides that the Board should afford this tug-of-war significant attention.[558]

A similar —albeit, unanointed by the statute—uncertainty exists surrounding the import of extra-statutory functionality contemplated by prospective benchmarks[559] and of the prevalence of certain features in the marketplace: it is impossible to know which way these factors will cut until the parties have actually furnished these putative benchmarks.[560] It is entirely plausible that both services and publishers alike will have sought to score CRB points by ensuring that any voluntary agreements entered into tend to conform to structural features they hope to see reflected in future CRB determinations. Finally, it is difficult to predict the role that the context surrounding future proffered benchmarks will play without knowing what those benchmark agreements are, and when and how they were entered into. For example: were the parties on the verge of infringement litigation, or in the purgatory period between the MMA's passage and the date its effective sunsetting of service liability became active, etc.?[561] And finally, once again, how probative of a benchmark will *Phonorecords III* itself—a hugely litigious, controversial, statutorily-mandated ruling, applying a defunct rate standard—prove to be?[562]

Meanwhile, lurking beneath all of this will be the absence of 801(b) Factor D (industry disruption).[563] To be sure, as discussed supra, the upshot of this change does skew songwriter-friendly.[564] But apart from that general leaning, Factor D's disappearance unlocks something else: instability. While the *Phonorecords III* Board did not view Factor D as sufficiently imposing to preclude a 44% increase, that does not necessarily mean Factor D did not act as a governor on the Board's ultimate wishes. For one, it may be the case that the majority actually wished to impose a *greater* rate increase, but felt barred from doing so under Factor D. In any event, it

558 *See supra* notes 484–486 and accompanying text.
559 *See supra* Section III.D.3.c.
560 *See id.*
561 *See id.*
562 *See supra* notes 429–431 and accompanying text.
563 *See supra* Section III.B.6.
564 *See supra* note 532 and accompanying text.

certainly *is* the case that the Board felt that it had to delay the full effect of its rate increase over a half-decade purely out of deference to Factor D.[565]

There are a few other potential wild cards. For example, structures and proposals not considered in either *Web IV* or *Phonorecords III* may arise for the first time in *Phonorecords IV*. One proposal that has gained some widespread support is the notion of "user-centric" royalty accounting, whereby streaming services would pay rightsholders—particularly labels, but also potentially publishers, subject to CRB adoption—rates prorated by user, rather than by overall stream count.[566] In other words, a user paying $10/month who only streams one song that month would see all $10 of their user fee (less Spotify's share) paid through to rightsholders for that one song, rather than have their one stream lumped into a general fund paid out *pro rata*, treating all streams as equal.

Finally, regardless of whether the uncapped TCC that was struck down on appeal re-emerges on remand in *Phonorecords III*-2, the concept of an uncapped TCC prong is likely to reprise its role as a hot button item in *Phonorecords IV*. Importantly, the D.C. Circuit made its ruling on procedural, not substantive, grounds, leaving the door open for future Boards to explore this structure again—provided they give the parties sufficient notice and opportunity to litigate the point.[567] If and when TCC comes up in *Phonorecords IV*, the ticking time bomb that is the major label oligopoly could very

565 *See supra* Section II.A.5.

566 *See* Mark Mulligan, *Creator Support: A New Take on User Centric Licensing*, MIDIA (Apr. 26, 2019), https://www.midiaresearch.com/blog/creator-support-a-new-take-on-user-centric-licensing/ [https://perma.cc/YW78-EXLV]; *cf.* Victor Luckerson, *Is Spotify's Model Wiping Out Music's Middle Class?*, RINGER (Jan. 16, 2019, 5:30AM), https://www.theringer.com/tech/2019/1/16/18184314/spotify-music-streaming-service-royalty-payout-model [https://perma.cc/7T7G-UJCB]. *See also* Joseph Dimont, Note, *Royalty Inequity: Why Music Streaming Services Should Switch to A Per-Subscriber Model*, 69 HASTINGS L.J. 675, 694 (2018).

567 Johnson v. Copyright Royalty Bd., 969 F.3d 363, 383 (D.C. Cir. 2020) (clarifying that "because we have vacated the rate structure devised by the Board for lack of notice, we need not address" the Services argument that the Board's decision to adopt an uncapped TCC prong was arbitrary and capricious, but that "[s]hould the Board on remand provide notice that it is again contemplating such a scheme, the Streaming Services can present their concerns to the Board").

well compel the Board to reconsider tying publishing rates directly to what the Board itself believes to be undue label market power.

CONCLUSION

While the differences between the *Phonorecords III* and *Web IV* determinations certainly tend—generally, if not at all uniformly—to shade in favor of songwriters, the two proceedings' similarities suggest that the distance between the old 801(b) standard and the new willing buyer/seller standard for Section 115 licenses may not be quite as pronounced as either the MMA's rightsholder champions hope, or its detractors fear. Indeed, the *Phonorecords III* Board itself, in effect, made this point when it noted that 801(b) rates and market rates were not mutually exclusive.[568] Under both rate standards, the Board is guided by competition considerations, exercising broad discretion and flexibility in choosing both rate structures and numerical rates. Licensors hoping that the new rate standard will reinvigorate their favorite arguments—service revenue deferral, the statutory "shadow," synchronization as free market bastion, and "experimental" benchmark invalidity—are likely to be disappointed.

Furthermore, to the extent that *Phonorecords III* and *Web IV* do highlight some real, operative differences between the two rate standards, these differences also unlock a significant degree of volatility. In other words, while songwriter's may on average expect to benefit from the new rate standard, they should also steel themselves for an even broader spectrum of possible outcomes—in both directions.

Still, the median value within that broadened spectrum does appear to be more songwriter-friendly under willing buyer/willing seller than it was under 801(b). Songwriters have perhaps never had a better shot at a per-play rate, nor more structural avenues to de-emphasize statutorily "shadow"-ed benchmarks—even if the substantive "shadow" critique itself is unlikely to fall on friendlier ears post-MMA than was the case pre-MMA. More fundamentally, their fate is now in the hands of a tribunal with neither the "legislative

[568] *See supra* Section III.A.3.

discretion" nor the "public interest" mandate to do anything other than attempt to approximate market rates. And so there is certainly cause for songwriters and publishers to bask in the promise of the new rate standard they fought for. Nonetheless, they would do well to temper their optimism with a significant dose of caution, even as they prepare to aim "impossibly high" in the "all-out war" that is soon to come.[569]

Only one thing is certain: the distance between the final buzzer for *Phonorecords III* and the opening tip-off for *Phonorecords IV* will be, at most, a few months.

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[569] *See* Ingham, *supra* note 38.