Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

PANDORA MEDIA, INC.'S INITIAL BRIEF IN RESPONSE TO THE SEPTEMBER 11, 2015 ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW

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INTRODUCTION

On September 11, 2015, the Copyright Royalty Judges (the "Judges") referred the following novel material question of law to the Register of Copyrights: "Does Section 114 of the Act (or any other applicable provision of the Act) prohibit the Judges from setting rates and terms that distinguish among different types or categories of licensors, assuming a factual basis in the evidentiary record before the Judges demonstrates such a distinction in the marketplace?" Pandora respectfully submits that the Judges are prohibited as a matter of law from setting rates and terms that distinguish among different types or categories of licensors in this proceeding.

This conclusion flows directly from the language, structure, and purpose of Section 114. Section 114(f)(2)(B) expressly contemplates that the Judges will set rates and terms that "distinguish among the different types of eligible nonsubscription transmission services then in operation," but there is no corresponding authorization for the Judges to distinguish among different types or categories of licensors. Consistently, whereas Section 114(f)(2)(B) sets forth a non-exhaustive list of factors for the Judges to consider in differentiating among services, there is no comparable guidance for distinguishing among licensors.

This interpretation is fully supported by controlling precedent. In the first-ever appellate review of a Section 114 proceeding, the Librarian concluded that where at a minimum, as here, no party proposed a methodology for setting different rates and terms for different categories of licensors, it is inappropriate to do so. The soundness of this conclusion is reinforced by the recognition that a determination permitting different rates based on asserted types or categories of licensors would introduce a degree of administrative complexity that would undermine the convenience that Congress sought to provide to services entitled to the statutory license – any attempted resolution of which is nowhere addressed in the hearing record.

Accordingly, the Copyright Office should answer "YES" to the referred question.[1]

ARGUMENT

I. SECTION 114 DOES NOT CONTEMPLATE THE JUDGES SETTING RATES AND TERMS THAT VARY ACROSS DIFFERENT CATEGORIES OF LICENSORS

Nothing in the text of Section 114(f)(2)(B) or of Section 114 more generally authorizes the Judges to distinguish among different types or categories of licensors for purposes of rate-setting. In marked contrast, Section 114(f)(2)(B) explicitly authorizes the Judges to – indeed, mandates that they – distinguish among different types of services when setting rates and terms. *See* 17 U.S.C. § 114(f)(2)(B) (the Judges "shall distinguish among the different types of eligible nonsubscription transmission services then in operation."). In this regard, Section 114(f)(2)(B) enumerates a non-exhaustive list of factors that the Judges are to consider in undertaking this task. 17 U.S.C. § 114(f)(2)(B) (". . . such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers."). Consistent with a complete absence of reference to differentiated rates and terms as relate to licensors, Section 114 provides no comparable set of criteria for the Judges to use in undertaking such distinctions.

This contrasting treatment of rates and terms as between and among services and licensors should carry dispositive weight. Ordinary canons of statutory interpretation – and

[1] Given the purely legal nature of the referred question, we do not address herein the separate question of whether, irrespective of the correct answer to the legal issue posed, the record evidence in the *Web IV* proceeding supports establishing differences in licensor rates and terms. No party advocated for such a result; for its part, Pandora presented expert economic testimony supporting a unitary licensor rate as being most consistent with Section 114(f)(2)(B)'s mandate that the Judges 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."

simple logic – compel the conclusion that if Congress had intended to authorize the Judges to set different rates and terms for different categories of licensors, it would have done so expressly in similar fashion to its treatment of different types or categories of services. The text of Section 114, and of the Copyright Act more broadly, demonstrate that where Congress sought to direct the Judges to consider the conduct or attributes of the licensors specifically, it did so in explicit terms. *See, e.g.*, 17 U.S.C. § 114(f)(2)(B)(ii) (explicitly directing the Judges to consider the relative roles of both the licensor and the service); 17 U.S.C. § 801(b)(B) (explicitly directing the Judges to afford the licensor a fair return and the service a fair income); 17 U.S.C. § 801(b)(C) (explicitly directing the Judges to account for the relative roles of both the licensor and the service). In contrast, Congress' complete silence on the subject of this reference plainly calls for the conclusion that the Judges lack the authority to set different rates and terms for different categories of licensors.

II. CONTROLLING AUTHORITY MANDATES THAT, WHERE NO PARTY HAS PROPOSED A METHODOLOGY FOR SETTING DIFFERENT RATES FOR DIFFERENT CATEGORIES OF LICENSORS, DRAWING SUCH DISTINCTIONS WOULD BE INAPPROPRIATE

In the first-ever appellate review of a Section 114 proceeding, the Librarian considered whether it would be appropriate to assign different rates to different groups of sound recordings when no party had proposed a methodology for doing so. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings (Final rule and order)*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394, 25412 (May 8, 1998). The Librarian concluded that in the absence of any party-proposed methodology for "establishing differential values for individual sound recordings or various categories of sound recordings," there is "no alternative but to find that the value of each performance of a sound recording has equal value." *Id.*

This controlling precedent speaks directly to the issue at hand. As noted above, no party to this proceeding has advocated for rates and terms that vary across different licensors. As such, it is of no surprise that the record is entirely devoid of any proposed methodology for establishing different rates and terms to different categories of licensors, let alone (as further discussed below) the practical implications of doing so. Absent such record evidence, this controlling precedent dictates that, as a matter of law, it would be inappropriate for the Judges to set different rates for different categories of licensors.[2]

III. COMPLEXITIES OF ADMINISTRABILITY AND STATUTORY COMPLIANCE UNDERSCORE THE IMPROPRIETY OF PERMITTING THE SETTING OF DIFFERENT RATES AND TERMS FOR DIFFERENT LICENSORS

The conclusion that the text of Section 114 and controlling precedent do not permit the Judges to set rates that vary among licensors is reinforced by a recognition of the daunting administrative and compliance complexities that would result from a contrary determination. The dramatic increase in the complexity of calculating, reporting, and auditing statutory royalties that would flow from differentiating rates by licensor type would destabilize the licensees' justifiable reliance upon the statutory license as a safe harbor against harassing infringement claims and as an administratively straightforward mechanism for determining royalties owed. These consequences are of the kind and magnitude to warrant careful legislative consideration prior to their imposition. Pandora is not aware of any evidence that Congress has heretofore considered these issues in relation to fee-setting under Section 114 – a recognition that should further lead the Register to conclude that the pertinent legislation as written does not call for varying rates and terms amongst licensors.

[2] We do not address the potential implications of the cited Librarian's Determination for a circumstance not presented here, where such evidence may have been adduced during the hearing phase.

The most salient concern is that most if not all services would be unable to compute the license fees owed to SoundExchange under a differential-pricing regime, as they neither possess, nor have ready access to, all of the information necessary to determine which sound recordings are owned by which licensors, let alone at any given time, and into which licensor-category any given record label may fall.[3]

Even were such information readily available at the start of the five-year license term (which would not be the case), a host of complexities would almost certainly arise over the course of the license term given that ownership of sound recordings is hardly static. These include, but are not limited to, the following:

- Were the rights to a sound recording sold by a label in one category to a label in a different category, a determination would have to be made as to the appropriate rate to apply to that sound recording after the sale – the rate of the original label or that of the label that acquired the sound recording. The same issue would arise if a label from one category acquired a label in a different category.

- Were a sound recording originally released by a label in one category later included on a compilation album put out by a label in a different category, a determination would have to be made as to what rate to apply to the sound recording included on the compilation album – that of the original label or that of the label that put out the compilation album.

- In the event that a label in one category entered into a distribution agreement with a label in a different category, a determination would have to be made as to whether the rate paid for performing the sound recordings at issue be that of the label that owns the recordings or that of the label that controls the distribution. In this regard, a significant difference in rates could create incentives for labels in lower-rate categories to enter into distribution agreements with labels in higher-rate categories solely to game the system and take advantage of higher rates.

- If ownership changes from a label in one category to a label in another category in the middle of a reporting period, and assuming *arguendo* that the service could timely learn of the ownership change, would the service pay a single rate for the entire period or have to account for the change even within a reporting period?

[3] For the same reason, most if not all services likely would be unable to factor in the specific rate for performing a given sound recording when deciding whether or not to perform that sound recording.

These are just a few of the questions that would arise, and likely dramatically increase the burdens associated with reporting and auditing if the Judges were to determine that different rates and terms should be applied to different categories of licensors. Section 114 lacks any meaningful guidance for working through these inquiries and, as importantly, Pandora submits that the industry presently lacks any real-world mechanism to implement such a differential-pricing regime such that it could take effect as a practical matter as of the beginning of the 2016-2020 period.

CONCLUSION

The combination of the clear import of the statutory text of Section 114(f)(2)(B), controlling precedent, and the disruptive effects of implementation of any different interpretation should lead the Register to respond "YES" to the referred question.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2015, I caused a copy of the foregoing Initial Brief in Response to the September 11, 2015 Order Referring Novel Material Question of Law to be served by email and first-class mail to the participants listed below:

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