Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C. 20559

In the Matter of	)	
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'S RESPONSE TO THE REGISTER'S ORDER FOR SUPPLEMENTAL BRIEFING

R. Bruce Rich (N.Y. Bar No. 1304534)
Benjamin E. Marks (N.Y. Bar No. 2912921)
Todd Larson (N.Y. Bar No. 4358438)
Jacob B. Ebin (N.Y. Bar No. 4774618)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: 212.310.8000
Fax: 212.310.8007
bruce.rich@weil.com
benjamin.marks@weil.com
todd.larson@weil.com
jacob.ebin@weil.com

Counsel for Pandora Media, Inc.

October 26, 2015

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?" On October 14, 2015, the Register of Copyrights invited supplemental briefing to address three specific inquiries implicated by the Judges' referral. Pandora writes briefly to address the first and third of those inquiries.[1]

With respect to the first inquiry, Pandora refers the Register to Pandora's October 2, 2015 Initial Brief in Response to the September 11, 2015 Order Referring Novel Material Question of Law (Pandora's "Opening Brief"), which demonstrated that there is no evidence of an intent by Congress to allow for the establishment of rates and terms that distinguish among different types or categories of Section 114 licensors. Indeed, as was pointed out, the language and structure of Section 114 point in the opposite direction, compelling the conclusion that Congress intended that the Judges would *not* distinguish among different types or categories of licensors when setting rates and terms. Pan. Op. Br. 2-3. Had Congress intended otherwise, it would have done precisely what it did when granting the Judges the authority to distinguish between services: explicitly grant such authority and provide a list of criteria to consider in making such distinctions. *Id.* Where Congress has provided explicit authority and guidance for differentiating between licensees but is completely silent as to licensors, ordinary canons of statutory interpretation and simple logic compel the conclusion that Congress did not intend to

[1] Pandora takes no position on the Register's second inquiry regarding the impact that a decision to the question posed by the Judges here might have on proceedings addressing other statutory licenses, *e.g.*, the Section 115 license.

authorize the Judges to set different rates and terms for different categories of licensors. *Id.* Pandora's review of the legislative history cited in the Register's first question reveals nothing that remotely calls this conclusion into question.

With respect to the third inquiry from the Register, Pandora's prior briefing highlighted controlling precedent dictating that where, as here, no party has proposed a 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." Pan. Op. Br. 3-4 (quoting *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 soundness of that conclusion is reinforced by the recognition that a determination permitting different rates based on asserted types or categories of licensors would unleash a host of administrative and compliance complexities 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. *See* Pan. Op. Br. 4-6. Such a conclusion is also completely in line with basic principles of due process, as reflected in both the Constitution and the Administrative Procedure Act, which prohibit the Judges from setting rates and terms that distinguish between categories of licensors when no party has proposed such distinctions and no party has had the opportunity to be heard on the likely consequences of doing so. Section I of iHeartMedia Inc.'s Supplemental Brief explores those due process concerns at length; Pandora joins in that portion of iHeartMedia's briefing.

For the foregoing reasons, and for those set forth in the prior briefing of Pandora, iHeartMedia, Sirius XM, the National Association of Broadcasters, and A2IM/AFM/SAG-AFTRA, the Register should respond "YES" to the referred question.

Dated: October 26, 2015

Respectfully submitted,

/s/ R. Bruce Rich

R. Bruce Rich
Benjamin E. Marks
Todd Larson
Jacob B. Ebin
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: 212.310.8000
Fax: 212.310.8007
bruce.rich@weil.com
benjamin.marks@weil.com
todd.larson@weil.com
jacob.ebin@weil.com

Counsel for Pandora Media, Inc.