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

In the Matter of **DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)**	)	**Docket No. 14-CRB-0001-WR**

SIRIUS XM RADIO INC.'S BRIEF IN RESPONSE TO THE ORDER FOR SUPPLEMENTAL BRIEFING ON NOVEL MATERIAL QUESTION OF SUBSTANTIVE LAW

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Sirius XM Radio Inc. ("Sirius XM") submits this brief in response to the Order for Supplemental Briefing Concerning Novel Material Question of Substantive Law (the "Supplemental Briefing Order"), issued by the Register of Copyrights on October 14, 2015.

In its opening and reply briefs previously submitted in connection with the Copyright Royalty Judges' referral to the Register of a novel material question of substantive law (the "Referral"), Sirius XM demonstrated that the Copyright Royalty Judges do not have statutory authority to set differentiated royalty rates in the Webcasting IV proceeding based solely upon differences among copyright owners. Sirius XM supported its argument with applicable language and legislative history of the Copyright Act, as well as applicable precedent from prior rate proceedings addressing administrative law and constitutional concerns all of which are responsive to the Supplemental Briefing Order. Sirius XM will not repeat those arguments, but respectfully refers the Register to its prior briefs for those issues as they relate to the Webcasting IV proceeding.

The Supplemental Briefing Order also raises certain broader questions, including the potential impact that a ruling on the Referral might have upon rate proceedings other than the Webcasting IV proceeding. Sirius XM will address those broader questions in this brief. First, the legislative history of the Copyright Act as well as the statutory treatment of the rates for the only statutory music licenses at the time of the passage of the 1976 Copyright Act demonstrate that Congress did not intend the rates for statutory music licenses to differentiate between categories of copyright owners. Second, even if the Register were to determine that the Judges have the authority to set such differentiated rates in connection with the webcasting license under the willing buyer / willing seller rate standard (she should not), that ruling should be strictly

limited to the Webcasting IV proceeding, and should not extend to other rate proceedings under the Section 801(b) policy-based rate standard.

ARGUMENT

I. INQUIRY ONE: LEGISLATIVE HISTORY

Although the Digital Performance Rights in Sound Recordings Act of 1995 ("DPRSRA"), the 1998 Digital Millennium Copyright Act ("DMCA"), and the Copyright Royalty and Distribution Reform Act of 2004 ("CRDRA") each made certain changes to the statutory licenses contained in the Copyright Act or the rate-setting procedures applicable to those licenses, none of this legislation specifically addressed the possibility of differentiated rates raised in the Referral, nor did these acts of Congress make any fundamental changes to the nature of the statutory licenses. It is therefore not surprising that that the legislative histories for these pieces of legislation do not directly address the question of whether one rate or multiple rates should be set for each given class of licensee based upon differences among copyright owners. The legislative history of the Copyright Act of 1976 (the "1976 Act"), however, as well as the statutory provisions of the 1976 Act and the Copyright Act of 1909 (the "1909 Act") do provide evidence that Congress intended that there be one unitary rate for statutory music licenses.

The 1976 Act is the first version of the Copyright Act to establish an administrative body and procedures for the setting and adjusting of royalty rates for statutory licenses. The legislative history for these provisions, particularly as they relate to the two purely music-related statutory licenses in existence at the time (the Section 115 mechanical license and the Section 116 jukebox license), demonstrates that Congress did not intend or contemplate the setting of differentiated rates for copyright owners. For example, the final House Report discusses rate-setting proceedings for each of four statutory licenses: (1) the Section 111 cable television

retransmission license; (2) the Section 115 mechanical license; (3) the Section 116 jukebox license; and (4) the Section 118 public broadcasting license. The Section 115 and 116 licenses are purely music licenses, while the Section 111 and 118 licenses are not. In discussing these licenses, the House Report refers only to the purely music-related mechanical royalty rate and jukebox royalty rate in the singular, but refers to the cable and public broadcasting license rates in the plural. H.R. Report No. 94-1476 (September 3, 1976) at 178-79 (referring to a proceeding "to adjust the cable television *rates*" (plural) for the non-music license "to adjust the public broadcasting royalty *rates*" (plural), but "to adjust the mechanical royalty *rate*" (singular) and "to adjust the juke-box royalty *rate*" (singular)). Notably, when discussing the standard to be used by the Copyright Royalty Tribunal to set the rates for the music licenses, the legislative history repeatedly references a single, unitary rate. *See id.* at 173-74 (discussing Copyright Royalty Commission (which would become Copyright Royalty Tribunal in the final Act as passed), and with respect to the only two statutory music licenses in existence at the time, the Section 115 and Section 116 licenses, discussing what would become the Section 801(b)(1) rate standard and for each policy factor to be considered by the Commission stating that "*the rate*" (singular) should be analyzed in light of that factor) (emphasis added).

The Senate Report for the 1976 Act discusses the procedure for the institution of Copyright Royalty Tribunal rate proceedings, stating that copyright owners and users of the statutory license may file a petition requesting "an adjustment of the statutory royalty *rate*, or a *rate* previously established by the Tribunal." S. Rep. No. 94-473 (November 20, 1975), at 156 (copyright owners and users "may file a petition . .. declaring that the petitioner requests an adjustment of the statutory royalty *rate*, or a *rate* previously established by the Tribunal. The Register shall make a determination as to whether the applicant has a significant interest in the

royalty *rate* in which an adjustment is requested") (emphasis added); *see also id.* at 157 (" . . . to consider and adjustment of the appropriate statutory rate. Only one panel would be established for each royalty *rate*.") (emphasis added); *id.* at 158 (discussion of the effective date of royalty adjustment makes multiple references to the "adjustment of the royalty *rate*") (emphasis added); *id.* at 91-94 (discussing extensive hearings into mechanical license royalty rate, and consistently describing one, unitary rate that would be applicable to all musical compositions).

These references to a unitary rate in the legislative history are also consistent with the long history of the rates set by Congress for the oldest statutory music license, the Section 115 mechanical license. Beginning with the 1909 Act, and for a transitional period after the passage of the 1976 Act, the mechanical license royalty rate was set by statute. This mechanical rate was always one single, unitary rate, which did not differentiate among copyright owners. 1909 Act, 17 U.S.C. § 1(e) (1909); 1976 Act, 17 U.S.C. § 115(c)(2) (1976). Similarly, when Congress created the Section 116 jukebox compulsory license in the 1976 Act, it implemented a unitary initial royalty rate, applicable until such as time as the rates might be adjusted by the Copyright Royalty Tribunal. 1976 Act, 17 U.S.C. § 116(b)(1)(A) (1976).

Given this long history and congressional understanding that statutory music license royalties were set as unitary rates, without differentiating between categories of copyright owners, the Register should not rule that Congress intended to allow the Judges to radically depart from this fundamental feature of those license, particularly with no specific expression of that intent in the statute or the legislative history of the Copyright Act. The very fact that neither the Copyright Royalty Tribunal, any CARP, nor the Copyright Royalty Judges over the course of almost forty years has ever exercised the authority to set different rates based upon differences among copyright owners is further evidence that such authority was not granted by Congress.

Federal Trade Commission v. Bunte Bros., Inc., 312 U.S. 349, 352 (1941) ("But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.").

II. INQUIRY TWO: AFFECT ON OTHER RATE PROCEEDINGS

The Referral arises out of Webcasting IV proceeding. As set forth in more detail in Sirius XM's prior briefs, the Register should rule that the Judges do not have statutory authority to set differentiated rates based solely on differences among copyright owners at all and, even if they are not precluded in all instances from setting such rates, they are precluded under the circumstances presented in the Webcasting IV proceeding.

To the extent, however, the Register believes that the Judges do have the authority to set differentiated rates, any ruling to that effect should be strictly limited to the Webcasting IV proceeding. As noted above, in the over-100-year history of statutory music licenses under the Copyright Act, no such license has ever had differentiated rates based upon differences among copyright owners. The radical departure from this history proposed by the Referral has the potential to cause a substantial adverse impact throughout the affected industries. As noted in Sirius XM's prior briefing, even the Webcasting IV participants did not have the opportunity to present relevant evidence or otherwise address the appropriateness of differentiated rates during the pendency of the proceeding. For these reasons, sound policy and principles of stare decisis, issue preclusion, and due process dictate that any ruling allowing the Judges to set differentiated rates should be strictly limited to the Webcasting IV proceeding. There are many music industry participants that would be impacted by a more broad ruling, which were given little (or no) notice of this potential change in rate structure and no ability to present relevant evidence to help inform the Register's decision.

Finally, the very premise of the Referral, that the willing buyer / willing seller standard instructs the Judges to replicate rate differences found in the marketplace, even it were not so fatally flawed, is simply inapplicable to rate proceedings under the Section 801(b)(1) policy standard. Rates for several of the Copyright Act's statutory licenses, including the Section 115 mechanical license and the SDARS license under which Sirius XM operates the vast majority of its business, are set pursuant to the Section 801(b)(1) policy standard. The 801(b)(1) standard prescribes that such reasonable rates be calculated to achieve the following policy 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 expressions and media for their communication; and
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 801(b)(1).

Unlike in rate-setting proceedings pursuant to the marketplace rate standard applicable to webcasters, the Section 801(b)(1) standard requires that the Copyright Royalty Judges exercise "legislative discretion" in making independent policy determinations that balance the interests of copyright owners and users. *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1224 (D.C. Cir. 2009); *RIAA v. CRT*, 662 F.2d 1, 8-9 (D.C. Cir. 1981) (holding that the statutory rate-setting factors of Section 801(b)(1) "invite the Tribunal [now Judges] to exercise a

legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users.").

It is well established that the Section 801(b)(1) standard is *not* a marketplace standard and the resulting rate need not bear any relationship to the marketplace. In the first-level appeal of the first Pre-existing Subscription Service ("PSS") rate determination, the Librarian of Congress adopted the Register of Copyright's clear holding that the standard for setting the PSS rate "is not fair market value." *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings (Final Rule and Order),* 63 FR 25394, 25399 (May 8, 2008). The Register flatly rejected the argument, made by SoundExchange's predecessor RIAA, that the PSS rate had to be consistent with market rates, holding that the PSS rate "need not mirror a freely negotiated marketplace rate -*and rarely does*- because it is a mechanism whereby Congress implements policy considerations *which are not normally part of the calculus of the marketplace rate*." *Id*. at 25409 (emphasis added).

At the second level of appeal, the D.C. Circuit affirmed on this point, holding that "RIAA's claim that the statute clearly requires the use of 'market rates' is simply wrong." *RIAA v. Librarian of Congress*, 176 F.3d 528, 533 (D.C. Cir. 1999). The court went on to note that the Section 801(b)(1) rate standard "does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be 'reasonable' and vice versa." *Id*.

Given that the Section 801(b)(1) standard is fundamentally distinct from the willing buyer / willing seller standard and, unlike the rate standard at issue in the Referral, a rate set pursuant to Section 801(b)(1) "need not mirror a marketplace rate – and rarely does," any ruling

that the Judges have the authority to replicate marketplace rate differences based upon categories of copyright owners cannot extend to rate proceedings subject to the Section 801(b)(1) rate standard.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Sirius XM's opening and reply Briefs, the Register should hold that Section 114 does not permit the Judges to set different rates and terms for the performance of sound recordings based solely upon differences among the owners of each sound recording. In the alternative, and only to the extent that the Register holds that the Judges do have such authority, that authority should be strictly limited to proceedings under the willing buyer / willing seller standard.

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