UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

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

SUPPLEMENTAL BRIEF OF UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, AND SONY MUSIC ENTERTAINMENT IN RESPONSE TO REGISTER OF COPYRIGHTS' OCTOBER 14, 2015 ORDER

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UMG Recordings, Inc., Capitol Records, LLC (collectively, "UMG"), and Sony Music Entertainment ("SME") respectfully submit this Supplemental Brief in response to the Register of Copyrights' October 14, 2015 Order requesting Supplemental Briefing Concerning Novel Material Question of Law ("Order"). UMG and SME own and license the copyrights in a majority of the sound recordings produced and sold in the United States and have an interest in the outcome of this proceeding. As participants in this proceeding through the joint petition filed on their and others' behalf by SoundExchange, UMG and SME filed initial and opposition briefs in response to the Copyright Royalty Judges' September 11, 2015 Order Referring Novel Material Question of Law and Setting Briefing Schedule.[1] UMG and SME incorporate those briefs herein by reference.

BACKGROUND

The Register's Order arises in the context of a rate-determination proceeding by the Copyright Royalty Board under Chapter 8 of the Copyright Act.[2] Under the Act, "the Copyright Royalty Judges shall have full independence in making determinations concerning . . . copyright royalty rates and terms."[3] In making these determinations, it is the Judges who are responsible for determining the appropriate implementation of the statutory authority bestowed by Congress in the Act. As the D.C. Circuit has explained, it "give[s] 'substantial deference' to the

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[1] *See* UMG & SME Initial Br. (Oct. 2, 2015), http://copyright.gov/rulemaking/web-iv/initial-briefs/10-2-15%20UMG%20Capitol%20Records%20and%20Sony%20Initial%20Brief%20in%20Response%20to%20Order%20Referring%20Novel%20Question%20of%20Law.pdf *and* UMG & SME Opposition Br. (Oct. 9, 2015), http://copyright.gov/rulemaking/web-iv/reply-briefs/10-09-15%20UMG%20Capitol%20Records%20Sony%20Opposition%20Brief%20--%20Second%20Referral.pdf.

[2] *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV) (Notice announcing commencement of proceeding with request for Petitions to Participate)*, 79 Fed. Reg. 412 (Jan. 3, 2014).

[3] 17 U.S.C. § 802(f)(1)(A)(i).

ratemaking decisions of the Board because Congress expressly tasked *it* with balancing the conflicting statutory objectives enumerated in the Copyright Act."[4]

While the Register generally has broad authority to effectuate most other provisions of the Copyright Act, the scope of the Register's authority in connection with the Judges' rate determinations is narrowly circumscribed by statute. Section 802 of the Act authorizes the Register only to resolve "material questions of substantive law" concerning the "provisions of this title"—*i.e.*, the Copyright Act.[5] The statute does not authorize the Register to resolve other questions of law, and it specifically provides that the Register is not authorized "to provide an interpretation of questions of procedure before the Copyright Royalty Judges, [or] the ultimate adjustments and determinations of copyright royalty rates and terms."[6]

It is within this statutory framework that the Register addresses the novel material question of law posed by the Judges:

> 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?[7]

Thus, the sole question for the Register to address is whether the Act *prohibits* setting rates and terms that distinguish among types or categories of licensors—i.e., whether a decision to set such rates and terms would be reversible under *Chevron U.S.A. Inc. v. Natural Resources Defense*

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[4] *Recording Indus. Ass'n of Am., Inc. v. Librarian of Cong.*, 608 F.3d 861, 865 (D.C. Cir. 2010) (emphasis added).

[5] 17 U.S.C. §§ 802(f)(1)(A)(ii) and (f)(1)(B)(i); *see also* 17 U.S.C. §802(f)(1)(D) (authorizing the Register to "review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law *under this title* that underlies or is contained in a final determination of the Copyright Royalty Judges") (emphasis added).

[6] 17 U.S.C. § 802(f)(1)(A)(ii).

[7] September 11, 2015 Order at 2.

Council, Inc., 467 U.S. 837 (1984). Based on their prior briefs, and the additional briefing below, UMG and SME respectfully submit that the Register's answer should be "no."

ARGUMENT

In her Order, the Register has posed three specific questions: (1) whether the legislative history of the successive iterations of the Copyright Act and its statutory licensing provisions shed light on Congress's intent to allow or disallow rate differentiation among licensors; (2) how the Register's decision would affect other statutory licensing schemes and whether such broader implications should influence the Register's decision; and (3) whether any administrative law or constitutional concerns affect or guide the Judges' ability to differentiate among licensors.

As we show below, nothing in the legislative history of the Copyright Act reflects any intent to disallow such rate differentiation. To the contrary, different provisions of the Act show that where Congress intended to disallow differentiation, it has specified a unitary rate for statutory licenses—and where it has not specified a unitary rate, differentiation among copyright owners has been permitted. UMG and SME respectfully submit that the Register's second and third questions are beyond the scope of both the question referred by the Judges and the Register's statutory authority in this proceeding. In all events, because the Register has not been asked to resolve whether rate differentiation is prohibited in connection with other statutory licenses, and the Register's decision will not be binding with respect to any other statutory license, any potential implications are speculative and do not bear on whether the statute prohibits differentiation in Section 114 proceedings. Finally, there are no administrative law or constitutional requirements that bear on the Judges' ability to differentiate among copyright owners. The Judges' conduct in this proceeding is governed by Section 803 of the Act, not the notice-and-comment provisions of the Administrative Procedures Act. So long as the Judges'

determination is not arbitrary and capricious, and thus satisfies the appellate review provisions of 5 U.S.C. § 706, it also meets any Constitutional due process or equal protection requirements.

I. Although the Legislative History is Silent as to Congress's Intent Regarding Rate Differentiation Among Copyright Owners, the Language of the 1909 and 1976 Copyright Acts Demonstrates Congress's Intent to Allow Such Rate Differentiation Under Section 114.

Nothing in the legislative history of the Copyright Act suggests that differentiation among copyright owners is prohibited where the statute does not expressly specify a single statutory license rate—and there is certainly no legislative history suggesting that such differentiation is prohibited under Section 114. But the Register need not look to the legislative history to glean Congress's intent. When Congress has intended a single rate for copyright owners, it has expressly mandated that in the text of the various iterations of the Copyright Act. For instance, Section 1(e) of the 1909 Copyright Act provided that a royalty of "two cents" must be paid for each mechanical reproduction of a musical composition.[8] The modern iteration of this right—the right to make and distribute phonorecords—is found in Section 115 of the Copyright Act.[9] Even today, the Act establishes a base statutory license rate of "either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger."[10]

In contrast, where Congress has not expressly required a single royalty rate or valuation for all copyright owners or their works—as Congress did not in Section 114—it has long been understood that the Copyright Royalty Judges are free to differentiate among copyright owners. For instance, with regard to cable retransmission royalties under Section 111, the Judges have

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[8] *See* Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075-76 (repealed 1976).

[9] *See generally* 17 U.S.C. § 115.

[10] 17 U.S.C. § 115(c)(2).

distinguished among different categories of copyright owners in allocating royalties based on distinctions in the marketplace. While the Copyright Act does not expressly set forth a standard for cable royalty allocations,[11] the Judges and their predecessors have applied a "relative marketplace value" standard in awarding different shares to different copyright owner groups representing different television programs and content.[12] The D.C. Circuit has expressly upheld this approach, noting that "it makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory license scheme."[13] There is no credible argument that such differentiation among copyright owners is *prohibited* under Section 114(f)(2)'s willing buyer/willing seller standard, which likewise looks to rates and terms that would have been negotiated in a marketplace "in which no statutory license exists."[14]

II. Whether the Judges Are Prohibited from Distinguishing Between Licensors Under Section 114 Does Not Turn on Any Speculative Implications for Other Statutory Licenses.

The potential ramifications of the Register's decision for other statutory licenses are both beyond the scope of the question referred by the Judges, and not relevant to its resolution. The Register has not been asked to decide whether rate differentiation among copyright owners is prohibited under any other statutory license, and the Register's decision is clearly not binding

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[11] *Distribution of the 2004 and 2005 Cable Royalty Funds (Distribution order),* 75 Fed. Reg. 57063, 57065 (Sept. 17, 2010).

[12] *See, e.g., id.* at 57065, 57078-79 (awarding different shares to seven claimant groups); *Distribution of 1998 and 1999 Cable Royalty Funds (Final order),* 69 Fed. Reg. 3606, 3608, 3620 (Jan. 26, 2004) (adopting Register's recommendation to accept CARP awards based on relative marketplace value).

[13] *Program Suppliers v. Librarian of Cong.,* 409 F.3d 395, 401-02 (D.C. Cir. 2005).

[14] *Digital Performance Right in Sound Records and Ephemeral Recordings (Final rule and order),* 72 Fed. Reg. 24084, 24087 (May 1, 2007) [hereinafter "*Webcaster II*"].

with respect to any other statutory licensing provision. In addition, any other ramifications of the decision even with respect to Section 114—let alone with respect to other statutory licenses—are inherently speculative, because a determination that the Judges are not prohibited from differentiating among copyright owners says nothing about whether they will actually do so in this or any other proceeding.

Each statutory license under the Act is different. Among other things, the statutory licenses vary in their governing statutory language, the nature of the licenses, the relevant history and policies, and the marketplaces in which they operate. In fact, with the exception of Section 114's companion provision for ephemeral recordings, Section 112, no other statutory license under the Act even specifies the willing buyer/willing seller standard.[15] As a result, resolution of whether the Judges are prohibited from distinguishing among copyright owners in this Section 114 proceeding will not be binding with respect to the scope of the Judges' authority under any other statutory rate-setting scheme.

Moreover, a determination that the Act does not *prohibit* distinguishing between copyright owners under any statutory license scheme does not mean that the Judges *will* ultimately differentiate among them in setting rates. No party has urged that such differentiation is *required* under the Act; instead, the Judges—whom "Congress expressly tasked . . . with balancing the conflicting statutory objectives enumerated in the Copyright Act"[16]—can pursue different approaches based on the particular circumstances of each statutory license and the factual record before them in a given proceeding. A decision that the Act does not prohibit differentiation among copyright owners in Section 114 proceedings does not mean that the

[15] *See* 17 U.S.C. § 112(e).

[16] *Recording Indus. Ass'n of Am., Inc.* 608 F.3d at 865.

Judges will do so; if they do, that does not mean that they will choose to do so in the context of *other* statutory licenses.

Section 115, which the Register's Order specifically mentions, illustrates these general points. There are key differences between Sections 114 and 115, such that a decision that rate differentiation is not prohibited under Section 114 is neither binding with respect to Section 115 rate determination proceedings, nor indicative of what the Judges might do in such proceedings. To begin with, Section 115 has a long history—the first iteration of the mechanical compulsory license appeared in the 1909 Copyright Act—and has always included a unitary statutory rate for the use of musical works in phonorecords.[17] In contrast, the statutory right in Section 114 is much newer, having been first created by the Digital Performance Right in Sound Recordings Act of 1995,[18] and has never included a hard-coded statutory rate.[19] Second, each section sets forth different objectives for the Judges to consider as they determine reasonable rates and terms for a compulsory license. In proceedings under Section 115, the Judges must set rates that are calculated to achieve the policy objectives set forth in Section 801(b)(1) of the Act.[20] Section 114(f)(2), however, calls for market rates and requires the Judges to "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."[21] Finally, the nature of the marketplace and the attendant policy considerations under the two statutes are different. For

[17] *See* Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075-76 (repealed 1976).

[18] *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

[19] *Cf.* 17 U.S.C. § 115(c)(2).

[20] 17 U.S.C. § 115(c)(3)(D); 17 U.S.C. § 801(b)(1)(B).

[21] 17 U.S.C. § 114(f)(2)(B). *See generally* United States Copyright Office, *Copyright and the Music Marketplace* 142 (Feb. 2015) (discussing differences between the two standards).

example, sound recordings, which are the subject of Section 114, almost always have a single copyright owner, whereas it is common for musical works, which are the subject of Section 115, to have multiple copyright owners. Thus, differentiation among copyright owners would be more complicated under Section 115, since use of a single musical work could trigger royalty obligations to multiple, differently-situated copyright owners. In light of these differences, the Register's decision allowing rate differentiation among copyright owners under Section 114 would neither decide what is permitted under Section 115, nor indicate what the Judges might do to the extent they are permitted to differentiate among copyright owners in such proceedings.

In short, the speculative ramifications of the Register's decision here—ramifications that ultimately turn on how the Judges choose to exercise their statutory discretion in any given statutory-license proceeding—are beyond the scope of, and irrelevant to answering, the statutory question posed by the Judges.

III. The Judges' Novel Material Question of Law Does Not Implicate Any Administrative or Constitutional Law Considerations.

The Register also asked whether there are "administrative law or constitutional considerations (including rational basis or due process concerns) that would affect or should guide the Judges' ability" to distinguish among licensors when setting rates and terms.[22] This inquiry is beyond the scope of both the Judges' novel material question of law under the Copyright Act, and the authority provided by Section 802(f)(1)(B)(i). The question referred to the Register is whether *the Copyright Act* prohibits the Judges from differentiating among types or kinds of licensors in setting rates and terms, assuming an evidentiary basis for doing so in the factual record. In addition, Section 802 limits the scope of the Register's decision to

[22] *See* Order at 2.

interpretations of the provisions of *the Copyright Act*,[23] and expressly does not authorize the Register "to provide an interpretation of questions of *procedure* before the Copyright Royalty Judges."[24] Whether there are other legal constraints that would affect or should guide the Judges' rate determination process is beyond the scope of the question posed by the Judges.

In any event, the answer to the Register's question is "no." First, there are no constitutional considerations that would prohibit the Judges from differentiating among copyright owners. The D.C. Circuit reviews the Judges' determinations under the "highly deferential" arbitrary and capricious standard set out in the APA.[25] Under this standard, the reviewing court need satisfy itself only that the Judges' final determination was "within a zone of reasonableness."[26] Agency actions upheld under the arbitrary and capricious standard also satisfy constitutional due process.[27] This standard likewise subsumes any Constitutional equal protection analysis, since differentiation among copyright owners involves no "suspect

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[23] *See* 17 U.S.C. § 802(f)(1)(B)(i) (requiring referral of "a novel material question of substantive law concerning an interpretation of those provisions *of this title* that are the subject of the proceeding") (emphasis added).

[24] *See* 17 U.S.C. § 802(f)(1)(A)(ii) ("The authority under this clause shall not be construed to authorize the Register of Copyrights to provide an interpretation of questions of *procedure* before the Copyright Royalty Judges.") (emphasis added).

[25] *See* 17 U.S.C. § 803(d)(3) (stating that 5 U.S.C. § 706 applies to appellate review of the Judges' determinations).

[26] *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1114 (D.C. Cir. 2015).

[27] *Jonal Corp. v. D.C.*, 533 F.2d 1192, 1197 (D.C. Cir. 1976) ("The terms 'arbitrary' and 'capricious' are typically associated with constitutional due process standards. Accordingly, the Court interprets the standard intended to be established by the use of those terms to be the appropriate constitutional due process standard.") (internal citations omitted). *See also Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 77 (D.D.C. 2002) *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) (holding that because agency determination "was not arbitrary and capricious under the APA . . . it [is] clear that the agency action did not rise to the level of a constitutional violation.").

classifications" and therefore would be subject only to the highly deferential "rational basis" standard of review.[28]

While one brief submitted in response to the Judges' September 11 Order asserted that differentiation among copyright owners would implicate constitutional retroactivity concerns,[29] that argument is mistaken. Nothing about this proceeding is retroactive; it will not impact the rates or terms for prior license periods, impair a previously vested right, or affect past transactions.[30] It operates only prospectively, setting rates that will not come into effect until January 1, 2016.[31]

Nor are there any administrative law considerations that would prohibit the Judges from differentiating among copyright owners. The brief of A2IM, AFM and SAG-AFTRA in response to the Judges' September 11, 2015 Order presented a detailed argument that the Judges' determination is subject to the procedural requirements of Section 554 of the APA.[32] But those

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[28] *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[29] *See* A2IM, AFM, and SAG-AFTRA Initial Br. at 14.

[30] *See e.g.*, *Celtronix Telemetry, Inc. v. F.C.C.*, 272 F.3d 585, 588 (D.C. Cir. 2001) (holding that agency rule that has future effect on pre-existing license is not retroactive); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) ("In the administrative context, a rule is retroactive if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations *already past*.") (internal quotation marks omitted) (emphasis added); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (defining retroactivity in terms of whether challenged law "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.").

[31] *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV) (Notice announcing commencement of proceeding with request for Petitions to Participate)*, 79 Fed. Reg. 412, 412 (Jan. 3, 2014).

[32] *See* A2IM, AFM, and SAG-AFTRA Initial Br. at 14-22.

provisions are irrelevant to the Judges' determination. Section 803 of the Act provides that the Judges "shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with [the APA] in carrying out the purposes set forth in section 801."[33] In light of this statutory provision, and the Act's detailed provisions governing CRB proceedings, the D.C. Circuit recently stated that the "Board is not governed by the notice-and-comment rulemaking requirements of the APA, but rather by the procedures set forth in the Copyright Act."[34] Accordingly, there are no administrative law requirements here (other than the arbitrary and capricious standard of 5 U.S.C. § 706). The Judges need only comply with the procedural requirements of Section 803, which do not require the Judges to reopen the record following resolution by the Register of a novel question of law. Whether an additional opportunity for comment or evidentiary submissions is warranted is within the discretion of the Judges.[35]

Moreover, even if the APA did apply here, Section 554 would not: it applies only to *adjudications*, whereas this rate determination proceeding is a *rulemaking*. "The D.C. Circuit has explained that when determining whether agency action is rulemaking or adjudicating[,] the focus is not on whether the particular proceeding involved trial-type devices but instead turns on the nature of the decision to be reached in the proceeding."[36] "Rulemaking is prospective in scope and ... directed to the implementation of general policy concerns into legal standards. Adjudication, on the other hand, is individual in impact and . . . directed to the determination of the legal status of particular persons or practices through the application of preexisting legal

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[33] 17 U.S.C. § 803(a)(1).

[34] *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 125 (D.C. Cir. 2015).

[35] *Cf. id. at* 126 (affirming as "reasonable" the Judges' decision not to "to proceed . . . with additional submissions, discovery, and evidentiary hearings" where Copyright Act provided no such procedural requirement).

[36] *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 11 (D.D.C. 2004).

standards."[37] As discussed above, the rate determination here is prospective, and the results will bind all covered parties, regardless of whether they participated in the proceeding. Moreover, the APA specifically defines "rule" to include "the approval or prescription for the future of rates."[38] Finally, the end result of the proceeding is a regulation codified at 37 C.F.R. Part 380.[39] The proceeding is thus clearly a rulemaking and not an adjudication.[40]

Because it "is well settled that section 554 applies only in cases of adjudication, and not to rulemaking proceedings,"[41] the procedural requirements of Section 554, as well as the related standards and jurisprudence on which A2IM, AFM, and SAG-AFTRA rely, is irrelevant.[42] Instead, even were the APA's notice-and-comment provisions to apply (which they do not,

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[37] *F.T.C. v. Brigadier Indus. Corp.*, 613 F.2d 1110, 1117 (D.C. Cir. 1979) (internal quotation marks omitted). *See also Indep. Bankers Ass'n of Ga. v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C. Cir. 1975) ("As a general matter, agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts.'").

[38] 5 U.S.C. § 551(4). The analysis is not changed by the fact that the APA defines "adjudication" as dispositions "other than rule making but including licensing." Licensing in this context refers to the granting or denial of a permit, not the setting of rates under an existing statutory license. *See, e.g., In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 240, 260 (D.D.C. 2011) ("Permit decisions are adjudications, not rulemakings."); *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 992 n. 12 (D.D.C. 1983) ("A permit decision-making proceeding is clearly adjudication rather than rule making.").

[39] *See, e.g., Webcaster III*, Fed. Reg. 13026, at 13406 ("For the reasons set forth in the preamble, the Copyright Royalty Judges revise part 380 of title 37 of the Code of Federal Regulations to read as follow…").

[40] *Cf. Recording Indus. Ass'n of Am., Inc. v. Librarian of Cong.*, 608 F.3d 861, 864 (D.C. Cir. 2010) (stating that in Section 115 context, "the Copyright Royalty Board currently serves as the *rulemaking* body for" the system of "figur[ing] out how much the licensee owes the copyright owner and what the terms for paying that rate should be."); *Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1084 (D.C. Cir. 1982) (characterizing royalty adjustment proceedings as rulemakings).

[41] *Hercules, Inc. v. E.P.A.*, 598 F.2d 91, 117 (D.C. Cir. 1978).

[42] *See, e.g.*, A2IM, AFM, and SAG-AFTRA Initial Brief, at 14-22. *See also Motion Picture Ass'n of Am., Inc. v. Oman*, 750 F. Supp. 3, 7 (D.D.C. 1990) ("[T]he *Retail, Wholesale* test is not applicable when, as in this case, the agency's actions constitute rulemaking.").

because the procedures under Chapter 8 of the Copyright Act apply), the relevant statute would be Section 553. Under that standard, an agency need only publish notice of "either the terms or substance of the proposed rule or a *description of the subjects and issues involved.*"[43] The agency need not, however, "specify every precise proposal which [it] may ultimately adopt as a rule."[44] Rather, so long as the final rule is a "logical outgrowth" of the original notice, the requirements of the APA have been satisfied. A party's "failure to anticipate the exact contours of the [agency's] final rule does not compel the conclusion that the final rule is not a logical outgrowth of the proposed rule."[45]

Here, the CRB's initial notice of this proceeding made clear—in a section entitled "Scope of Proceeding"—that the "Judges are open to receiving evidence, testimony, and argument regarding *any reasonable rate structure*."[46] The Judges also recited the Librarian's observation from *Webcaster I* that "a marketplace unconstrained by a statutory license would experience a range of negotiated rates," and asked participants to address the importance "of the presence of economic variation among buyers *and* sellers."[47] Thus, even were the APA's notice-and-comment requirements applicable to the Judges' rate determinations, it would not prevent the Judges from adopting a rate structure that differs from past rate structures.

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[43] *Action for Children's Television v. F.C.C.*, 564 F.2d 458, 470 (D.C. Cir. 1977) (emphasis added) (quoting 5 U.S.C. § 553(b)(3)).

[44] *Id.*

[45] *Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 41 (D.D.C. 2000).

[46] *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV) (Notice announcing commencement of proceeding with request for Petitions to Participate)*, 79 Fed. Reg. 412, 413 (Jan. 3, 2014).

[47] *Id* (emphasis added).

The D.C. Circuit's decision in *Program Suppliers v. Librarian of Congress* is instructive on this point.[48] There, a party argued that a Copyright Arbitration Royalty Panel failed to provide sufficient notice that it would reject a survey methodology that previous panels had relied upon, thereby "depart[ing] inexplicably from precedent."[49] The D.C. Circuit rejected this argument: "While due process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard, *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981), *the CARP made no such change*. . . . Program Suppliers cite no case, nor are we aware of one, holding that due process requires agencies to give advance notice of what evidence they intend to credit."[50] So too here—assuming that the APA is relevant at all in light of Section 803(a)(1) and *Intercollegiate Broadcasting*—the Judges would be under no obligation to accept additional submissions merely because, having notified the parties that the Judges will consider any reasonable rate structure, they credit evidence supporting a different rate structure than they have adopted in the past.

CONCLUSION

The Copyright Act vests the Copyright Royalty Judges with complete independence in determining rates and terms under Section 114, and charges them with balancing the various policy considerations reflected in the statute. Regardless of any arguments about what the Judges *should* do—whether based on general policy considerations, or on the specific evidentiary record developed here—and regardless of any arguments about the procedures employed by the Judges in this proceeding, nothing in the Act prohibits them from choosing to

[48] 409 F.3d 395 (D.C. Cir. 2005).

[49] *Id.* at 401.

[50] *Id.* at 402 (emphasis added).

differentiate among types or kinds of copyright owners where there is a basis in the record to do so. The answer to the novel material question of law referred by the Judges to the Register in their September 11, 2015 Order is "no."

October 26, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, I caused a copy of the foregoing – OPPOSITION BRIEF OF UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, AND SONY MUSIC ENTERTAINMENT IN RESPONSE TO SEPTEMBER 11, 2015 ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

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