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

In the Matter of **DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (*WEB IV*)**	**Docket No. 14-CRB-0001-WR (2016–2020)**

iHEARTMEDIA, INC.'S SUPPLEMENTAL BRIEF REGARDING THE NOVEL LEGAL QUESTIONS REFERRED TO THE REGISTER ON DIFFERENT LICENSOR RATES

iHeartMedia responds in this brief to the first and third questions posed in the Register's October 14, 2015 Order requesting further briefing on the Judges' referred question whether Section 114 can be construed to permit different rates for different copyright owners.[1] As iHeartMedia demonstrated in its prior briefing on that referred question, settled principles of statutory construction preclude the Judges from setting different rates for different copyright owners. Furthermore, even if Section 114 could be interpreted to permit such different rates, the Judges could not do so in *Webcasting IV*, where *no party* proposed to set different rates for different copyright owners and, therefore, no party submitted expert or fact testimony about the likely market distorting effects and insoluble administrative difficulties such differentiation would cause.

The Register's third question goes directly to that latter point, asking whether there are administrative law or constitutional considerations that would prevent the Judges from setting different rates for different copyright owners, even if Section 114 could be construed to permit

[1] iHeartMedia takes no position on the second question posed in that Order.

such differentiation. Basic principles of due process, reflected in both the Constitution and the Administrative Procedure Act, preclude the Judges from setting different rates for different copyright owners in *Webcasting IV*. The D.C. Circuit has repeatedly held an agency violates due process when it sets rates using a methodology no party proposed, without notice and without allowing the parties to present evidence rebutting it. *See, e.g., Public Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1013 (D.C. Cir. 2005); *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 62-63 (D.C. Cir. 1999). Such an opportunity could not be provided here, given the extremely short period left before the statutory deadline for the completion of *Webcasting IV*.

If the Register relies on those decisions, the question whether Section 114 permits the Judges, on a properly developed record, to set different rates for different copyright owners need not be resolved now. But if the Register addresses that question now, the text and legislative history of other statutes establishing compulsory licenses — identified in the Register's first question — confirm that Congress precluded the Judges from setting different rates and terms for different copyright holders under Section 114(f)(2)(B). *First*, as the legislative history of the first compulsory license created by Congress in the 1909 Copyright Act shows, the policy goal of the compulsory licenses is — as it has been for more than a century — to prevent copyright owners from consolidating their market power, forming monopolies, and demanding unreasonable royalty rates for copyrighted works. *Second*, in the Copyright Act of 1976, Congress enacted both Section 111 — which provides for royalties to be distributed "***among***" competing copyright owners — and Section 118 — which requires royalties to be distributed according to a single schedule binding on "***all***" copyright holders. Copyright Act of 1976, Pub. L. No. 94-553, § 111(d)(4), § 118(b)(3), 90 Stat. 2541, 2554, 2566 (1976) (emphases added). Section 114(f)(2)(B) bears no resemblance to Section 111 and instead tracks the language of

Section 118. *Third*, the legislative history of the 1998 Digital Millennium Copyright Act indicates that Congress intended the royalty rates payable pursuant to Section 112(e) and Section 114(f)(2)(B) to "reflect" the "number" of recordings used and the "type of service" — but *not* the identity of the copyright owner. H.R. Rep. No. 105-796, at 90 (1998) (Conf. Rep.).

I. DUE PROCESS FORBIDS SETTING DIFFERENT RATES FOR DIFFERENT CLASSES OF COPYRIGHT OWNERS IN *WEBCASTING IV*

It is undisputed that — consistent with the results of *Webcasting I*, *II*, and *III* — all of the participants in *Webcasting IV*, including SoundExchange (on behalf of virtually all copyright owners), submitted rate proposals with uniform rates for all copyright holders. As a result, no participant in *Webcasting IV* submitted fact or expert evidence detailing the likely marketplace distortions and certain administrative difficulties that would result if the statutory license were — for the first time — to set different rates for different copyright owners. *See* iHeartMedia Reply Br. at 7-10.

The Judges did not notify — or even signal — to the parties that they were considering setting different rates for different copyright holders until it was far too late to submit new evidence. By their own account, the Judges did not consider the possibility of setting different rates for different copyright owners until they had "concluded the hearing" and were "[i]n the course of their deliberations." Order Referring Second Novel Material Question of Law at 1 (Sept. 11, 2015). As a result, as every participant — including SoundExchange — agrees, setting different rates for different classes of copyright owners would raise issues that no participant had reason to address during *Webcasting IV*. *See* SoundExchange Br. at 1-2; iHeartMedia Br. at 3; Pandora Br. at 5-6; Sirius XM Br. at 16-17; NAB Reply Br. 1-2. Even assuming that the evidentiary record contains the "factual basis . . . [for] a distinction in the marketplace" among copyright owners, setting different rates for different copyright owners on this evidentiary record would violate due process.

Constitutional due process mandates that, when an agency sets a matter for a hearing, it "provide . . . adequate notice of the issues that would be considered, and ultimately resolved, at that hearing." *Williston Basin*, 165 F.3d at 63. The parties are "entitled . . . to know the issues on which [the] decision will turn" and the facts on which the agency may rely, and are also entitled to "an opportunity to offer a contrary presentation." *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974)). The Administrative Procedure Act ("APA") echoes these guarantees, providing that, "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing," the parties "shall be timely informed of . . . the matters of fact and law asserted," and guaranteeing parties the opportunity "to submit rebuttal evidence." 5 U.S.C. §§ 554(a)-(b), 556(d).

Courts have "uniformly held" that, when an agency introduces a new legal standard or adopts a new theory, both constitutional due process and the APA mandate that the agency give "the part[ies] before the agency . . . notice and an opportunity to introduce evidence bearing on the new standard," especially when "additional facts of a different kind may now be relevant for the first time." *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981) (collecting cases) (agency violated due process by failing to provide notice of a change in the standard of proof and a meaningful opportunity for the petitioner to submit evidence meeting the new standard); *see, e.g.*, *Rodale Press, Inc. v. FTC,* 407 F.2d 1252, 1256-57 (D.C. Cir. 1968) (agency violated due process by basing its decision on a new theory not presented during the hearing).

In the rate-setting context, the D.C. Circuit has repeatedly held that an agency entrusted with setting rates after a hearing cannot use a methodology that the parties did not have adequate notice would be considered and that was not advocated by any party during the hearing. In *Public Service Commission of Kentucky*, 397 F.3d at 1013, the D.C. Circuit, in an opinion by then-Judge Roberts, held that the Federal Energy Regulatory Commission ("FERC") violated due process by failing to give to the parties to a rate-making proceeding adequate notice that it was considering adding a premium on top of the rate it calculated using a return-on-investment formula.

The D.C. Circuit found that FERC's decision to add the premium was not entitled to the deference ordinarily due to FERC's rate-making decisions because "FERC is entitled to deference only if it plays fair," *id*. at 1006, and FERC ceased to play fair when it "failed to place petitioners on notice that it would consider an incentive-based premium," *id*. at 1013. The D.C. Circuit rejected FERC's argument that the parties should have been on notice that FERC might consider adding a premium because it had the power to do so by statute, holding that "FERC's power to take such action does not carry with it the authority to exercise such power without adequate notice of the basis for doing so." *Id*. at 1012. The D.C. Circuit also rejected FERC's argument that the agency had cured the due process violation by considering the parties' requests for rehearing, which "contained extensive challenges to the premium," because considering the parties' "arguments . . . is not the same thing as allowing them to present evidence on the issue." *Id.*

Similarly, in *Williston Basin Interstate Pipeline Co*, 165 F.3d at 64, the D.C. Circuit held that FERC violated due process by selecting a rate using its staff's estimates of GDP growth, where the agency had specifically invited the parties to address a different industry-specific metric for economic growth during the hearing, and "[n]o party at the hearing had presented, advocated, or even mentioned the use of GDP data." The D.C. Circuit reached this conclusion even though it was "convinced" that FERC's decision to use GDP data was supported by the record. *Id*.

These cases demonstrate that SoundExchange is wrong to suggest that the Judges could cure the due process issues by providing the parties with "an opportunity to file additional briefs" on the question of setting different rates for different copyright owners. SoundExchange Br. at 1-2. Additional briefs are not evidence, and there is insufficient time left before the December 15, 2015 statutory deadline for a decision, *see* 17 U.S.C. § 803(c)(1), to give the parties an adequate opportunity to compile such evidence and present it to the Judges. That new evidence would include both fact and expert pre-filed testimony. Parties would then need to be given the opportunity to test that evidence, through written discovery and depositions, as occurred after the parties submitted the testimony in support of their rate proposals containing uniform rates for copyright owners. Because no party previously had any reason to compile that evidence earlier in the proceeding, it would take considerable time for the parties to do so, and for the Judges to resolve any discovery disputes that arise. The Judges would then have to hold an additional hearing at which the new fact and expert witnesses would testify and be subject to cross-examination.[2] All of these steps, moreover, would need to be completed sufficiently before

[2] Indeed, even when there "is no genuine issue of material fact . . . and all participants in the proceeding agree" to the Judges making a determination on the papers without a hearing, the Judges are *still* required by statute to make their decision on the basis of a complete written record that includes "the written direct statement by the participant, the response by any opposing participant, and one additional response by each such participant." 17 U.S.C. § 803(b)(5).

December 15 to give the Judges time to consider the new evidence in reaching a decision. There simply is not enough time to provide the participants with the process that is due.

II. THE LEGISLATIVE HISTORY OF OTHER COPYRIGHT LAWS CONFIRMS THAT CONGRESS DID NOT GRANT THE JUDGES DISCRETION TO DISTINGUISH AMONG CLASSES OF COPYRIGHT OWNERS IN SECTION 114

A. Congress Created Compulsory Licenses To Limit Copyright Owners' Market Power

Interpreting Section 114(f)(2)(B) to allow copyright owners with the greatest market power to get higher royalty rates would be fundamentally at odds with the basic purpose of compulsory licenses. The animating purpose of compulsory licenses for copyrighted works is — and has been since the creation of the first compulsory license in 1909 — to ensure that copyrighted goods are available to the public at accessible prices by restraining copyright owners from using market power to demand unreasonable prices. As then-Register of Copyrights Marybeth Peters observed in testimony before Congress, "the more market power" that a copyright owner (or collection of copyright owners) has, "the greater would be the justification for supervision by a rate court or other governmental entity." *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), *available at* http://www.copyright.gov/docs/regstat071205.html.[3]

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[3] *See*, *e.g.*, Alan M. Fisch, *Using Copyright Law to Mitigate Monopolistic Behavior*, 32 Harv. J. on Legis. 403, 417 (1995) ("The strongest argument for adoption of the proposed compulsory license is the mitigation of monopolistic behavior, a rationale used to justify . . . existing copyright compulsory licenses."); Neil Weinstock Netanel, *Copyright and A Democratic Civil Society*, 106 Yale L.J. 283, 376 (1996) ("[C]ollective licensing organizations are plagued by problems of monopoly power and pricing. For that reason, both in the United States and in other countries, such organizations are typically subject to considerable state-enforced constraints on the license fees they may exact and the extent of the rights they may represent.") (footnotes omitted).

Congress created the first compulsory license in the 1909 Copyright Act. This compulsory license covered musical compositions and set a uniform royalty rate of two cents per copy. *See* 1909 Copyright Act, Pub. L. No. 60-349, §1(e), 35 Stat. 1075, 1076 (1909). The House Committee report states that Congress designed the 1909 Copyright Act to give musical composers a copyright to their musical compositions "without establishing a great music monopoly." H.R. Rep. No. 60-2222, at 6 (1909). Congress understood that, if it gave musical composers a copyright to their musical compositions without creating a compulsory license, "the probable effect of this would be the establishment of a mechanical-music trust." *Id*. at 7. Congress foresaw a "danger . . . that some one company might secure, by purchase or otherwise, a large number of copyrights of the most popular music, and by controlling these copyrights monopolize the business." *Id*. In a report to Congress, the Copyright Office has explained that Congress created the compulsory license in 1909 because "the public interest was thought to require the compulsory license to forestall the danger of monopoly in musical recording." Register of Copyrights, 87th Cong., Rep. on the General Revision of the U.S. Copyright Law 32-33, 35 (H.R. Comm. Print 1961).

Because the purpose of the compulsory license is to restrain the concentration of market power, even where (unlike here) Congress has differentiated between groups of copyright owners — that control more copyrights — and individual copyright owners — that control fewer copyrights — it has required that royalties be distributed evenly. When Section 116 was enacted as part of the Copyright Act of 1976, Congress drew a distinction between any "copyright owner not affiliated with a performing rights society" and "the performing rights societies" in the "distribution of fees" collected from jukebox owners, but required that all copyright owners be paid according to their “pro rata share.” Copyright Act of 1976, Pub. L. No. 94-553, § 116(c)(4), 90 Stat. 2541, 2564 (1976).

B. The Copyright Act of 1976 Demonstrates Congress Would Have Used Different Language In Section 114(f)(2)(B) If It Intended To Allow Distinctions Among Copyright Owners

In the Copyright Act of 1976, Congress created two new compulsory licenses for copyrighted works: the Section 111 license for cable operators, and the Section 118 license for noncommercial broadcasters. The text and legislative history of the Copyright Act of 1976 indicate that Congress intended for the Copyright Royalty Tribunal to distinguish among copyright owners in distributing fees under Section 111, but treat all copyright owners equally under Section 118. Notably, when Congress enacted Section 114(f)(2)(B), it chose language similar to what it had used Section 118.

Section 111 required the Copyright Royalty Tribunal to distribute the royalties collected from cable broadcasters “***among***” three categories of copyright owners whose works are used in cable broadcasts. Copyright Act of 1976, § 111(d)(4)-(5), 90 Stat. at 2555 (emphasis added). Congress did not include “particular, limiting standards for distribution,” because it intended for the Tribunal to have wide discretion to make an “appropriate division ***among*** competing copyright owners.” H.R. Rep. No. 94-1476, at 97-98 (1976) (emphasis added). In contrast, Section 118 required the Tribunal to distribute the royalties collected from public broadcasters based on “***a schedule*** of rates and terms” — singular — that “shall be binding on ***all owners of copyright***.” Copyright Act of 1976, § 118(b)(3), 90 Stat. at 2566 (emphases added).

When Congress created the compulsory license in Section 114(f)(2)(B) in 1998, Congress opted to use language similar to the language it had used in Section 118 in 1976 to require a single schedule of rates binding on all copyright owners. Section 114(f)(2)(B) required the

Copyright Arbitration Royalty Panel to determine "***a schedule*** of reasonable rates and terms" — singular — that "shall . . . be binding on ***all copyright owners***." Digital Millennium Copyright Act, Pub. Law No. 105-304, § 405, 112 Stat. 2860, 2896 (1998) (*amending* 17 U.S.C. § 114(f)(2)(B)) (emphases added).

C. The Legislative History of the 1998 Digital Millennium Copyright Act Indicates Congress Did Not Intend for Rates Payable Under Section 114(f)(2)(B) To Reflect the Identity of the Copyright Owner

In the 1998 Digital Millennium Copyright Act, Congress created two new compulsory licenses for copyrighted works: the compulsory license for ephemeral copies in Section 112(e) and the compulsory license for the use of sound recordings used by a nonsubscription service in Section 114(f)(2)(B). Congress used nearly identical language in Section 112(e) and Section 114(f)(2)(B) in 1998. Both Section 112(e) and Section 114(f)(2)(B) required the Copyright Arbitration Royalty Panel to determine "***a schedule*** of reasonable rates and terms" — singular — that "shall . . . be binding on ***all copyright owners***" using the same "willing buyer and willing seller" test. Digital Millennium Copyright Act, § 405, 112 Stat. at 2896, 2900 (*amending* 17 U.S.C. §§ 112(e), 114(f)(2)(B)) (emphases added); *see* H.R. Rep. No. 105-796, at 91 (1998) (Conf. Rep.) (recognizing that the two provisions enact "parallel . . . procedures"). In the Conference Report, Congress stated its expectation that the rates payable to copyright holders under the Section 112(e) license would depend on the type of service and the number of copies made — not any attribute of the copyright owner. Congress stated, with respect to the Section 112(e) license: "The conferees intend that the royalty rate payable under the statutory license may reflect the number of phonorecords of a sound recording made under a statutory license for use in connection with each type of service." *Id*. at 90. Because the same Congress that passed Section 112(e) also passed Section 114(f)(2)(B), and used the same language in both sections, it is clear that Congress intended the royalties payable under both statutory licenses to vary with the type of service and the number of works used — but not the identity of the copyright owner.[4]

CONCLUSION

For these reasons, iHeartMedia submits that even if Section 114(f)(2)(B) permits the Judges to set a single rate schedule applicable to all copyright owners — it does not — the Judges cannot set different rates for different classes of copyright owners in *Webcasting IV* without violating due process.

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Respectfully submitted,

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[4] When Congress made the "technical amendments" "necessary . . . to confer authority on the CRJs" — who replaced the CARP — in 2004, it changed the phrase "a schedule" to "[t]he schedule" in both Section 112(e) and Section 114(f)(2)(B). H. Rep. No. 108-408 at 42 (2004); *see* Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 805(5)(b)(2)(A), 118 Stat. 2341, 2362 (2004) (*amending* 17 U.S.C. § 112(e)); *id*. § 805(5)(c)(1)(B)(i), 118 Stat. at 2362 (*amending* 17 U.S.C. § 114(f)(2)(B)). The change from "a" to "the" is further confirmation that Congress meant one schedule.

CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing NOT RESTRICTED version of the Supplemental Brief Regarding the Novel Legal Questions Referred to The Register on Different Licensor Rates of iHeartMedia, Inc. has been served on this 26th day of October 2015 on the following persons:

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