PUBLIC VERSION

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 COPYRIGHT ROYALTY JUDGES' ORDER REFERRING A NOVEL QUESTION OF LAW TO THE REGISTER OF COPYRIGHTS

Paul M. Fakler
Xiyin Tang
ARENT FOX LLP
1675 Broadway
New York, NY 10019-5874
Tel: 212.484.3900
Fax: 212.484.3990
paul.fakler@arentfox.com
xiyin.tang@arentfox.com

Martin F. Cunniff
Jackson D. Toof
ARENT FOX LLP
1717 K Street, NW
Washington, D.C. 20006-5350
Tel: 202.857.6000
Fax: 202.857.6395
martin.cunniff@arentfox.com
jackson.toof@arentfox.com

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The Copyright Royalty Judges have referred the following novel material question of substantive 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?" Sirius XM Radio Inc. ("Sirius XM") respectfully submits that the clear answer to this question is "yes." Neither Section 114 nor or any other applicable provision of the Copyright Act authorizes the Judges to set different royalty rates for the performance of sound recordings owned by different types or categories of "licensors" merely because some variance in rates may be found "in the marketplace."

As a preliminary matter, the Librarian of Congress has previously ruled that each performance licensed pursuant to Section 114 should be valued equally, particularly where (as in this proceeding) no participant has proposed differentiated, or tiered, rates, nor a rational methodology for valuing or implementing such differentiated rates. This prior appellate ruling is consistent with the language of the Copyright Act. Congress specifically included language in Section 114 providing that the rates and terms "shall distinguish among the different types of eligible nonsubscription transmission *services*" (emphasis added), but did not include any similar language instructing the Judges to distinguish among different types of copyright owners. Where Congress, in other parts of Sections 114 and 801, intended for the Judges to consider facts relating to both licensed services and copyright owners, it explicitly referenced both groups. In light of this clearly intentional omission, the *expressio unius est exclusio alterius* canon of statutory interpretation militates against reading into the Copyright Act any authority for the Judges to set differentiated rates for different types or categories of sound recording owners.

Even if the Judges were theoretically permitted, in some circumstances, to set differentiated rates for different types or categories of copyright owners, they may not do so in this proceeding because setting different rates for each performance based solely upon the status of the copyright owner would undermine the legislative purpose of the Section 114 license. First, such a rate structure would be inconsistent with Congress's intent that the Copyright Royalty Judges act as a check on the market power of copyright owners when setting reasonable rates. The "willing buyer/willing seller" standard requires consideration of a *hypothetical, competitive* market for blanket licenses. It does *not* permit the Judges to simply replicate distortions in the existing markets that are engendered by the "must have" nature of the major record companies' catalogs (driven solely by the size of those catalogs and the lack of substitution and competition among the majors), resulting in higher royalty rates (as compared to independent labels), in setting the fair market value of the statutory license. Setting higher rates for performances of major label recordings would further undermine this statutory purpose by *increasing* the market power of the major record companies. Any popular artist on an independent label would have little choice but to leave for a major label in order to get the benefit of the higher rates. This would decimate the independent labels (as well as artists wishing to align with those labels) and eliminate any ability of smaller labels to foster competition in a true "willing buyer/willing seller" market.

Second, such a multi-tiered rate structure would require separate determinations for each performance in each reporting period of (1) the then-current ownership status of the recording and (2) which tier of the differentiated rate structure (and it is unclear how many such tiers would be implemented) that owner falls within. Such an unnecessarily complicated new rate structure would greatly increase the burdens on both copyright owners and users, in

contravention of Congress's intent to decrease transaction costs through the statutory license.

Finally, such a significant change to the webcasting rate structure would be particularly inappropriate in this proceeding because, as noted above, no participant ever advocated for such a rate structure. No participant had the opportunity to introduce evidence supporting or refuting this radical departure from the prior rate structure, or demonstrating the undue burdens that would be created by such a change.

BACKGROUND

The evidence in this proceeding comprised testimony from 43 witnesses, including representatives of SoundExchange, business executives from both major and independent record companies, executives from various different types of webcasting licensees, and several prominent economists. Notwithstanding the variety of perspectives presented to the Judges, *not a single participant* proposed rates and terms that valued licensed performances differently based upon the size or status of each recording's respective copyright owner. To the contrary, at least one witness testifying on behalf of SoundExchange expressly lauded the benefits of a single, unitary rate for all performances. *See* Testimony of Darius Van Arman ("Van Arman WDT"), Ex. SX 20 at 15 ("When repertoire is given equal value through an equal royalty rate, services have no incentive but to allow sound recordings to compete for the attention of their users and, royalty rates being equal, feature the sound recordings that are most likely to increase users and listening. Consequently, the compulsory license is the best if not only hope for this equal playing field because it is agnostic to the market position of the rights owner when determining the royalty required for a song."). Consequently, not a single participant proposed, or introduced evidence supporting, criteria for how such differentiated values would be determined. Similarly, no participant had the opportunity to present any evidence regarding the administrative burden or other impact such a new royalty structure would have on copyright owners, performers, or

licensees. With no testimony on these key points, the Judges concluded the hearing on July 21, 2015.

On September 11, 2015, the Judges issued the Order addressed herein, referring a novel material question of law to the Register, namely: "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?" Order Referring Novel Question of Law at 2. Although framed in more general terms, in the context of this proceeding the Judges appear to be asking the Register whether they have the authority to set bifurcated or tiered webcasting rates, with different per-performance rates applicable to each performance based upon whether a given recording is owned by a major or an independent record company.

ARGUMENT

I. THE JUDGES DO NOT HAVE AUTHORITY TO IMPOSE DIFFERENT RATES FOR EACH LICENSED PERFORMANCE BASED SOLELY UPON WHETHER THE COPYRIGHT OWNER IS A MAJOR OR INDEPENDENT RECORD COMPANY

In the entire twenty-year history of the Section 114 statutory license, neither the CARPs nor the Copyright Royalty Judges have ever set different royalty rates for different types or categories of sound recording copyright *owners*. There are good reasons for this fact. First, the Librarian of Congress ruled in his appellate review of the very first Section 114 proceeding that all licensed performances by a given category of statutory licensee should be given equal value, particularly where (as in this proceeding) no participant has argued for differentiated rates. Second, the overall language and structure of the relevant provisions of the Copyright Act demonstrate that Congress intended to give the Judges authority to set different rates for different

types or categories of *statutory licensees*, but not for different types or categories of *copyright owners*.

A. The Librarian of Congress Has Previously Ruled That All Sound Recording Performances Should Be Valued Equally

The question of whether different royalty rates may be set based upon differences relating to the individual sound recordings included in the statutory license has already been considered and resolved in a prior proceeding. In that decision, the Librarian of Congress ruled decisively that all performances must be valued equally. *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. 25,394, 25,412 (May 8, 1998) ("Librarian's Determination"). Notably, one key reason given for that ruling was the fact that none of the participants had proposed differentiated rates or given any reasonable methodology for setting such rates. *Id.* This proceeding presents precisely the same scenario: not a single participant at any time proposed that different rates be set based upon the type or category of each recording's copyright owner, nor did any participant propose any methodology for establishing such differentiated rates. Given the same absence in this proceeding of input from the very participants that will be impacted by any radical change to the rate structure envisioned by the Judges' referral, the Register should follow the Librarian's prior ruling and hold that the Judges must set one, unitary rate for each category of statutory licensee.

In his appellate review of the very first Section 114 rate proceeding, the Librarian of Congress noted that implementation of the very type of rate structure at issue in this referral would "require[] the parties [in the proceeding] to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings." *Id.* However, none of the various participants in that proceeding had "proposed any methodology for assigning

different values to different sound recordings." *Id.* Therefore, the Librarian found that he had "no alternative but to find that the value of each performance of a sound recording has equal value." *Id.* The Librarian also held that setting such differentiated rates in that proceeding would be inconsistent with the structure of the statutory license and unsupported by any statutory language or legislative intent. *Id.*

That precedent should control here. *See* 17 U.S.C § 803(a)(1) ("The Copyright Royalty Judges shall act in accordance with . . . prior determinations and interpretations of the . . . Librarian of Congress . . . ."). This current proceeding has seen a variety of participants and witnesses representing many differing interests, including those of record labels spanning the spectrum from major to independent labels of various size, as well as several very different types of webcasters. Yet, even with this broad spectrum of industry perspectives, not a single participant has proposed or introduced any evidence "establish[ing] criteria for establishing differential values for individual sound recordings or various categories of sound recordings." *Librarian's Determination* at 25,412. The Register should apply the Librarian's reasoning in this proceeding and hold that the Judges must establish one unitary rate applicable to all sound recordings for each distinct category of webcasters. Of course, such a ruling would not preclude the Judges from using different benchmark rates to set a range of reasonable rates from which to select that unitary rate, or otherwise select a blended rate that takes multiple benchmarks into account.

B. The Language and Structure of the Copyright Act Indicate That Congress Did Not Intend to Authorize the Judges to Establish Differentiated Rates Based Solely Upon Differences Among "Licensors"

There are no "licensors" under 17 U.S.C. § 114(f). This provision does not involve a license *from copyright owners*, but rather creates a statutory license that is structured as a *limitation* of copyright owners' rights—a statutory *right* to use sound recordings by certain

eligible services. *See* H.R. Rep. No. 104-274, at 14 (1995) ("DPRSRA House Report") (describing the Section 114 license as an important limitation on the sound recording performance copyright); *see also* 17. U.S.C. § 114(d)(2) ("Statutory licensing of certain transmissions" appearing under section titled "Limitations on exclusive right"). In light of this statutory purpose, it is unsurprising that the language of Section 114 never includes the term "licensors" and refers only to copyright owners and eligible services (or users). *Compare* 17 U.S.C. § 114(d)(3), referring to licenses for interactive services, which fall outside the statutory license, and "licensors" as any entity that owns copyrights in sound recordings, *with* 17 U.S.C. § 114(f), referring only to "copyright owners." Simply put, there are not a variety of "licensors" under the statutory blanket license, and therefore no differences among such licensors; there are only different licensees. If the Judges' referral is to be read (and answered) literally, the Copyright Act clearly does not allow the Judges to set different rates for different "licensors" that do not exist under the Act.

To the extent the referral is read less strictly, it may be construed as asking about the Judges' authority to set different rates based upon differences among *copyright owners*, i.e, the record companies that own the copyrights subject to the statutory license. Under this alternative reading, the answer remains the same. The fact that Section 114 expressly gives the Judges authority to consider differences among licensees, but does not even mention differences among copyright owners indicates that Congress did not intend to give the Judges such authority.

The *expressio unius est exclusio alterius* canon of statutory construction provides that where Congress includes a provision expressly applicable to one category of thing, the omission of any reference to a related category of thing is evidence that Congress intended to exclude the omitted category from the operation of that statutory provision. *See, e.g., Dep't of Air Force,*

Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal. v. Fed. Labor Relations Auth., 877 F.2d 1036, 104-41 (D.C. Cir. 1989) (Congress's inclusion of statutory provision expressly granting official time to employees appearing in FLRA proceedings was a "strong signal" that Congress did not intend to also grant such employees travel expenses, which were not mentioned in the statute.).

That canon of statutory interpretation should apply here. The applicable statutory provision, 17 U.S.C. § 114(f)(2), specifically provides that "rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation." Although that express authority to set differentiated rates for different types of licensed services is repeated in both § 114(f)(2)(A) and § 114(f)(2)(B), neither provision says anything about the directly related issue of authority to set differentiated rates for different copyright owners. Moreover, Section 114 itself provides examples of Congress expressly mentioning both copyright owners and copyright users where facts relating to both were meant to be considered in setting rates. *See, e.g.*, 17 U.S.C. § 114(f)(2)(B)(ii) (directing the Judges to consider "the relative roles of the *copyright owner* and the *transmitting entity* in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk") (emphasis added); *see* also 17 U.S.C. § 801(b) ("The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives: . . . (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 . . . .") (emphasis added).

The Copyright Act's express references to copyright owners in other parts of the statute

where Congress intended for the Judges to consider facts related to those owners when establishing royalty rates provides further evidence that Congress did not authorize the Judges to set differentiated rates based upon differences among those owners. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally." *Huerta v. Ducote*, 792 F.3d 144, 152 (D.C. Cir. 2015) (also noting that such an omission "says much" about Congress's intent). The Register should therefore find that Congress's silence on the authority of the Judges to set differentiated rates based upon differences among copyright owners while providing just such authority for differences among licensees was intentional. The Register should hold that Section 114 does not provide the Judges with such authority.

II. EVEN IF THE JUDGES ARE NOT PROHIBITED IN ALL CIRCUMSTANCES FROM SETTING DIFFERENTIATED RATES BASED UPON DIFFERENCES AMONG COPYRIGHT OWNERS, DOING SO IN THIS PROCEEDING WOULD UNDERMINE THE LEGISLATIVE PURPOSES OF SECTION 114

Even if the Register determines that the Judges are not prohibited in all circumstances from setting differentiated rates based upon differences among copyright owners, doing so in this proceeding would contravene Congress's intent and legislative purposes in establishing the compulsory license and granting the Judges authority to establish rates for that license. A statute must be interpreted in a manner consistent with its underlying legislative purpose. *See HCA Health Servs. of Oklahoma, Inc. v. Shalala*, 27 F.3d 614, 620 (D.C. Cir. 1994).

Allowing the Judges in this proceeding to establish such differentiated rates would undermine key purposes of the Copyright Act. First, the ratemaking authority of the Copyright Royalty Judges was intended to provide a check on the market power of copyright owners by determining rates that would be set in a hypothetical, competitive marketplace for a blanket sound recording performance license. To the extent major record companies were able to extract

supracompetitive rates in unregulated direct licenses with on-demand streaming services based solely upon the size and resulting "must have" nature of their individual catalogs (particularly as compared to smaller, independent record companies), replicating that rate distinction would undermine this core statutory function of the Judges. Second, the Copyright Act's statutory licenses (and all other collective licensing systems) are meant to reduce transaction costs for market participants. A differentiated rate structure where the rate varied for each performance based on the size or status of the copyright owner would greatly increase transaction costs and create substantial new burdens on both SoundExchange and all licensees.

A. The Section 114 Statutory License and the Ratemaking Role of the Copyright Royalty Judges Are Intended to Prevent Copyright Owners from Using Market Power From Size to Obtain Supracompetitive Rates and Lower Transaction Costs

With the *Digital Performance Rights in Sound Recordings Act of 1995*, Pub. L. No. 104-39, 109 Stat. 336 (1995) ("DPRSRA"), Congress created a new public performance right for a limited category of digital audio transmissions. In doing so, Congress chose to "create a carefully crafted and narrow performance right." S. Rep. No. 104-128, at 13 (1995) ("DPRSRA Senate Report"). One of the ways in which Congress limited this new public performance right was through Section 114, which provides that certain types of non-interactive services need not obtain a license from sound recording copyright owners so long as they pay a reasonable royalty rate. Among the purposes of the statutory license was to reduce licensing transaction costs for eligible services by avoiding the need to enter into potentially hundreds or more direct licenses. The reduction in transaction costs is a common purpose for statutory licenses in the Copyright Act. *See Cablevision Sys. Dev. Co. v. MPAA, Inc.*, 836 F.2d 599, 602 (D.C. Cir. 1988).

In furtherance of this goal, Congress also gave an antitrust exemption to record companies and licensees to allow collective industry negotiation of rates and terms for the

statutory license. *See* 17 U.S.C. § 114(e)(1). In recognition that the large number of works included in the statutory license would give record companies great market power and the resulting ability to extract supracompetitive rates, Congress provided for the CARPs (and later the Copyright Royalty Judges) to establish reasonable rates and terms in the absence of industry agreement. 17 U.S.C. § 114(f)(1)(A) & § 114(f)(1)(B). The legislative history of Section 114 clearly explains the purpose of granting the Judges their ratemaking authority: "[i]f supracompetitive rates are attempted to be imposed on operators, the [Judges] can be called on to set an acceptable rate." DPRSRA House Report at 22.

Allowing the Judges to set differentiated rates for each individual performance, with higher rates for major record company recordings based solely upon the size and resulting market power of those companies, would undermine both Congress's purpose for granting the Judges their ratemaking authority and Congress's goal of reducing transaction costs.

1. Setting Differentiated Rates Would Replicate, Rather than Eliminate, the Supracompetitive Rates Obtained by Major Labels Due to Their Size and Resulting Market Power

Permitting the Judges to establish differentiated rates based solely on the size of a record company's catalog, i.e., whether the copyright owner is an independent or major record company, would undermine Congress's very purpose in granting the Judges their ratemaking authority. As noted above, that purpose was to create a check on the market power of copyright owners inherent in the negotiation of rates for a blanket license covering such a large number of copyrights. Nor did the creation of the "willing buyer – willing seller" standard in the Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405(a), 112 Stat. 2860, 2896 (1998) ("DMCA"), change this purpose. In adopting the "willing buyer – willing seller" rate standard, Congress did not alter the crucial role of the Judges to prevent supracompetitive rates, but merely continued the existing requirement from the DPRSRA that rates should be reasonable, and used

common shorthand for the frequently employed fair market value formula as a new rate-setting standard:

> Consistent with existing law, a copyright arbitration proceeding should be empaneled to determine reasonable rates and terms. The test applicable to establishing rates and terms is what a willing buyer and willing seller would have arrived at in marketplace negotiations. In making that determination, the copyright arbitration royalty panel shall consider economic, competitive and programming information presented by the parties including, but not limited to, the factors set forth in clauses (i) and (ii).

H.R. Rep. No. 105-796 ("DMCA Committee Report"), at 86 (1998).

Under this standard, the Judges are not permitted to simply import rates and terms from a benchmark market simply because those rates and terms were negotiated by actual buyers and sellers. Instead, the Judges must use benchmark evidence (to the extent reliable benchmarks are available) to determine what reasonable rates and terms would be in a *hypothetical, competitive* marketplace transaction. *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order*, 72 Fed. Reg. 24,084, 24,091 (May 1, 2007), *aff'd in relevant part sub nom, Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009) ("*IBS*"). "An effectively competitive market is one in which super-competitive prices or below-market prices cannot be extracted by sellers or buyers, because both bring 'comparable resources, sophistication and market power to the negotiating table.'" *Id.* Put another way, "neither sellers nor buyers can be said to be 'willing' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power." *Id.*

Establishing higher rates for the performance of major record company recordings would undermine Congress's purpose for granting the Judges their ratemaking authority; to the extent evidence from unregulated, potential benchmark markets has shown that major companies were able to obtain higher royalty rates for their catalogs due to those companies' disproportionate

market power, such rates are *supra*competitive and *would not exist* in a hypothetical, competitive marketplace. The Judges should not be permitted to replicate those kinds of market distortions within the statutory license rates and terms. Rather, the Judges' role is to act as an antidote to the problem of supracompetitive rates being imposed in a licensing market devoid of meaningful competition between major labels. *See* DPRSRA House Report at 22.

Uncontroverted evidence was presented in this proceeding establishing that many valuable recordings by major top-40 artists are owned by independent record companies, including recordings by artists such as Paul McCartney, Adele, and Taylor Swift. Van Arman WDT, Ex. SX 20 at p. 4. The record also contains extensive and uncontroverted evidence that, because of the size of their catalogs, on-demand music streaming services cannot provide commercially viable offerings without any one of the major record companies. Consequently, licenses from each of the major record companies are "must haves" for such music services. Given that these catalogs cannot provide substitutes for one another, i.e., a service cannot choose to forego one major's recordings in favor of those of another that offers a lower price, there is a fundamental lack of competition between the major record companies—[redacted]). The record evidence also included statements by some of the major record companies and their representatives, [redacted]. *See* Ex. PAN 5349 at 17 ([redacted]"); Ex. NAB 4129 at 42 [redacted]

[redacted] *id.* [redacted] [redacted]).

[redacted] ultimately led the Federal Trade Commission to conclude: "Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between [two major record labels] Universal and EMI." *See* Written Direct Testimony of Carl Shapiro, Ex. PAN 5022 at 12.

These facts lead to the inevitable conclusion that, to the extent royalty rates for major record company recordings are higher than those for independent record company recordings, such difference is not due to anything inherently more valuable about a recording owned by a major record company, but rather is due to the lack of competition between major record companies and their disproportionate market power—the very same lack of competition and disproportionate market power that Congress intended the Judges to mitigate when setting rates. *See* DPRSRA House Report at 22 ("If supracompetitive rates are attempted to be imposed on operators, the [Judges] can be called on to set an acceptable rate.").

A simple example illustrates that this market power is largely absent from independent record company licensing negotiations, due solely to the relative size of the catalog. Even if an independent record company, like Big Machine Records, owns the recordings of a superstar artist, like Taylor Swift, it is possible for a music service to provide a viable service without one or two superstars at any given moment. This was recently demonstrated when Big Machine Records very publicly pulled Taylor Swift's music from the Spotify on-demand streaming service. Unlike an independent record company, a major record company will control the rights

to many superstars at any given time, making it impossible for an on-demand streaming service to remain viable if it had to remove the entire catalog of even one major. The "must have" nature of a major record company catalog is due to its sheer size, and not to the fact that a recording, by nature of it being owned by a major record company, is somehow more inherently valuable than a recording owned by an independent record label. *See* Van Arman WDT, Ex. SX 20 at 13 ("[A] sound recording from an independent record company is no less valuable than a sound recording from another record company, major or otherwise. The commercial value of the recording should stand and fall on its ability to resonate with consumers. It should not be based according to who has acquired the biggest bucket of rights or who has established the most control over distribution pipelines to consumers.").

Setting higher rates for major record company recordings would not only replicate those companies' market power within the statutory rates, it would further undermine congressional intent by *increasing* that market power. If the major record companies get higher rates, successful artists will have no choice but to move from independent to major record companies in order to get those higher rates. This, in turn, will decimate the independent record companies (and the artists who prefer to associate with independent labels), leading to even more market concentration in the recorded music industry. The only segment of that industry where a competitive, fair market, willing buyer/willing seller transaction is possible (the independent label segment) would be squelched, if not destroyed, eliminating the only viable source for reliable benchmarks.

Given that a major record company's disproportionate market power, exacerbated by the lack of competition between major record companies in the licensing market, is the only differentiating factor that could result in higher royalties for the majors, the Judges should not be

permitted to set differentiated rates based solely upon this distinction, even if it exists in the marketplace. If a rate distinction between major and independent record companies exists in such a marketplace, it should only lead to the conclusion that the deals negotiated with independent record companies reflect negotiation within a marketplace with some degree of competition, and therefore would serve as better benchmarks in the current proceeding. In any event, to the extent that the Judges view both major and independent record company licenses as instructive, the statute certainly allows the Judges to use both types of benchmarks to set a range of potential rates and then select a unitary rate from within that range, a methodology that has frequently been used in prior proceedings.

2. Implementation of a Differentiated Rate Would Impose Tremendous Administrative Burdens on Both SoundExchange and Licensees, Subverting Section 114's Purpose of Reducing Transaction Costs

As noted above, one of the purposes of the Section 114 statutory license is to reduce transaction costs. However, creating a tiered rate system for copyright owners would subvert this legislative purpose by imposing tremendous new administrative burdens on both SoundExchange and licensees.

To begin with, it is unclear what criteria would be used to distinguish between a major versus independent record company, or whether there might have to be several different rates for different-sized independent record companies. This line-drawing problem is further complicated by the fact that many independent record labels distribute their recordings through major record companies. *See* Van Arman WDT, Ex. SX 20 at 6. Moreover, music catalogs are frequently bought and sold between major and independent labels. Both licensees and SoundExchange would have to constantly (with every new royalty statement) monitor the label status of every recording performed to ensure accurate royalty calculations and payment. Not only would rate calculations and royalty distributions be unduly complicated by such a new structure, but the

added complexity would inevitably lead to increased royalty disputes. As noted below, even the potential for such undue burden and increase in transaction costs renders a differentiated rate structure inappropriate in this proceeding because the participants did not have any opportunity to present evidence regarding these increased burdens and transaction costs.

III. THE JUDGES MAY NOT IMPLEMENT SUCH A SIGNIFICANT CHANGE IN THE STRUCTURE OF THE WEBCASTING RATE IN THIS PROCEEDING BECAUSE THE PARTICIPANTS DID NOT HAVE THE OPPORTUNITY TO INTRODUCE RELEVANT EVIDENCE EITHER SUPPORTING OR REFUTING THE APPROPRIATENESS OF THAT NEW STRUCTURE

The record in this proceeding comprises testimony from 43 witnesses with diverse interests and perspectives, including SoundExchange employees, executives from major record companies, independent record companies, several different kinds of webcasting services, and several prominent economists. Not a single one of the participants, however, proposed different rates for major and independent record company-owned recordings. Consequently, no participant had the opportunity to present evidence on the appropriateness of such a rate structure. It is axiomatic that the Judges' determinations must be supported by substantial record evidence. 17 U.S.C. § 803(a)(1); *Intercollegiate Broad. Sys., Inc.*, 574 F.3d at 767.

This requirement also prohibits the Judges from making determinations based on a lack of evidence to the contrary. In *IBS*, the Copyright Royalty Judges had imposed a $500 per channel minimum fee based upon a finding that this amount would cover SoundExchange's administrative costs, although SoundExchange itself had not argued that basis for its minimum fee proposal and there was no evidence of SoundExchange's administrative costs in the record. The D.C. Circuit reversed that part of the Judges' determination, cautioning:

> [The Board] offers that if there was a lack of evidence of SoundExchange's administrative costs, the fault lies with noncommercials, which did not obtain discovery and introduce evidence to establish that fact. But this approach is inconsistent with rational decisionmaking, which requires more than an absence

> of contrary evidence; it requires substantial evidence to support a decision. Furthermore, because SoundExchange did not base its minimum-fee proposal on administrative costs, noncommercials could hardly challenge a theory first presented in the Judges' determination and not advanced by any participant. In effect, noncommercials cannot be faulted for failing to present "contrary" evidence of administrative costs, because no evidence existed yet to counter.

IBS at 767 (internal citations omitted).

In this proceeding, as in *IBS*, not a single party had the chance to introduce evidence supporting or refuting the imposition of different rates for the performance of sound recordings based upon the size of the owner of each sound recording because such a structure was not proposed by any participant. Following *IBS*, the Judges should not be permitted to impose such a radical departure from prior rate structures, a departure proposed for the very first time in this referral to the Register, within an evidentiary vacuum.

CONCLUSION

For the foregoing reasons, 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.

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Respectfully submitted,

Paul M. Fakler (N.Y. Bar No. 2940435)
Xiyin Tang (N.Y. Bar No. 5103023)
Arent Fox LLP
1675 Broadway
New York, New York 10019
Tel: (212) 457-5445
Fax: (212) 484-3990
Email: paul.fakler@arentfox.com
xiyin.tang@arentfox.com

Martin Cunniff (D.C. Bar No. 424219)
Jackson D. Toof (D.C. Bar No. 482609)
Arent Fox LLP
1717 K Street, NW
Washington, DC 20006-5344
Tel: (202) 857-6000
Fax: (202) 857-6395
Email: martin.cunniff@arentfox.com
jackson.toof@arentfox.com

Counsel for Sirius XM Radio Inc.