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 INITIAL BRIEF REGARDING THE NOVEL LEGAL QUESTION REFERRED TO THE REGISTER ON DIFFERENT LICENSOR RATES

Section 114 states that the schedule of reasonable rates and terms "shall . . . be binding on all copyright owners of sound recordings and entities performing sound recordings." 17 U.S.C. § 114(f)(2)(B). Section 114 expressly provides for different rates and terms for different types of *licensees* — based on the quantity and nature of their use of sound recordings, how the licensee services promote or substitute for other sales, and other factors — but it does not provide at all for different rates and terms for different types of *licensors*. *See id*. A construction of Section 114 that equates that absence of authorization with an express authorization to differentiate among types of licensors — reading silence as implied authority — would clash with the text and structure of the statute. Had Congress wanted the Judges to differentiate among licensors, it would have said so, just as it did for licensees. And had Congress wanted the Judges to differentiate among licensors, it would have provided the criteria for doing so, just as it did for licensees.

Differentiating among licensors would also clash with "Congress's expectation that [the Judges] would designate a *single* entity" to act as a representative of *all* copyright holders.

Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 574 F.3d 748, 771 (D.C. Cir. 2009) (emphasis added) (noting that the statute refers repeatedly to "a single 'entity' to receive royalty payments"). The Judges, moreover, have found that having a "single Collective" is the "most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses." Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 72 Fed. Reg. 24084, 24104 (May 1, 2007). As counsel for SoundExchange noted at the closing argument before the Judges, "SoundExchange . . . represent[s] all of them" — all copyright holders — in the proceedings before the Judges. Tr. at 7744:14 (Pomerantz). Differentiating among licensors would create conflicts of interest within SoundExchange, preventing the use of a single collective in conflict with both Congress's expectations as reflected in the statute and the recognized efficiencies of having a single collective. *Cf. In re Diet Drugs* (*Phentermine/ Fenfluramine/Dexfenfluramine*) *Prods. Liab. Litig.*, 385 F.3d 386, 395 (3d Cir. 2004) (holding that "class members with divergent or conflicting interests cannot be adequately represented by the same named plaintiffs") (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26 (1997)).

More broadly, differentiating among licensors conflicts with the remainder of Section 114, which does not distinguish between different types of copyright holders under the statutory license. For example, the criteria for defining which "performance[s] of a sound recording" are subject to statutory licensing do not depend on characteristics of the copyright holder, such as whether the copyright holder is a major label or a small independent. 17 U.S.C. § 114(d)(2). By contrast, in the immediately following subsection — which relates to *interactive* services that are *not* eligible for the statutory license — Congress distinguished between licensors based on their size: namely, whether the licensor holds the copyright to one thousand or fewer sound

recordings. *See id.* § 114(d)(3)(A). Congress thus "knew how to distinguish between" licensors based on their size, "but chose not to do so in" Section 114(f)(2)(B). *Department of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 921 (2015). That decision must be respected.

Creating new distinctions between types of licensors would add considerable administrative difficulty for the Judges and the participants, and should not be lightly undertaken. Differentiating licensors would not simply add to the Judges' burden in these proceedings, but actually would multiply it. If there are *n* types of licensors and *m* types of licensees, the total number of rates to determine would be *n* times *m*, because each licensor may deal with each licensee. It is a familiar principle that a statute should be read to avoid compounding administrative difficulties. *See, e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414-15 (2004) (holding that antitrust courts' difficulty setting remedial terms for dealing with rivals was a consideration in limiting duties to deal). Similar burdens of administration would apply to the participants.

Accordingly, as SoundExchange's counsel explained at the hearing, the CRB has never set rates that distinguish between different types of licensors.

> [A]t the end of the day, because you have to try to come up with a statutory license that's workable and if — you would have to then define what would be a major versus what would be an indie for the next five years, I think that what has happened historically is that I believe the judges either expressly or at least implicitly have done some sort of weighting, and that's what we propose here.

Tr. at 7744:18-7745:1 (Pomerantz); *see id.* at 7745:2-4 (Judge Strickler, "agree[ing]" with SoundExchange's counsel that "what . . . has been done before" is establish statutory license terms that do not distinguish between licensors).

For these reasons, iHeartMedia submits that the best reading of the statute is one that establishes rates and terms without regard to specific characteristics of particular licensors.

Dated: October 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing Initial Brief Regarding the Novel Legal Questions Referred to The Register on Different Licensor Rates of iHeartMedia, Inc. has been served on this 2nd day of October 2015 on the following persons:

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