Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE 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

RESPONSE MEMORANDUM OF LAW OF THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM), THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM), AND SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA)

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Section 114(f)(2)(B) only contemplates a single category of licensors, and thus a single statutory compulsory sound recording rate for each type of licensed non-interactive service.

This is a memorandum in response to the initial brief of UMG Recordings, Inc., Capitol Records, LLC and Sony Music Entertainment (collectively, "UMG-SME"). Interested parties The American Association of Independent Music ("A2IM"), the American Federation of Musicians of the United States and Canada ("AFM") and the Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") (collectively, "Interested Independent Record Label and Artists' Union Parties"), as individual constituents of SoundExchange, respectfully disagree with the conclusions put forward by the UMG-SME brief.[1]

ARGUMENT

While creative, the UMG-SME brief takes liberties with the language of the statute and then presents that language out of context.

As set forth in the initial memorandum of the Interested Independent Record Label and Artists' Union Parties, what Congress intended is clear from the language and structure of Section 114(f)(2)(B), (2)(C) and (3). Specifically, it is clear that to the extent there is language in those sections concerning "differences" in parties to the hypothetical license negotiation that

[1] While Interested Independent Record Label and Artists' Union Parties have participated as parties through SoundExchange in the Webcasting IV proceeding, they note that the September 11, 2015 order of reference specifically refers to interested parties (with small initial "i" and "p" letters) rather than "Interested Parties," as would refer to parties already before the tribunal. As discussed in the Initial Memorandum of the Interested Independent Record Label and Artists' Union Parties, it would violate due process for parties to be represented by a common agent only to find, through a retroactive decision of the Register or the CRJ's, that the agent is conflicted because its constituents have vastly different views. By virtue of the filing by UMG-SME, that potential conflict referenced in the Initial Memorandum has now become real. Accordingly, due process requires that the Register consider the views of the Interested Independent Record Label and Artists' Union Parties, and accept their initial and response memoranda.

the CRJ's are tasked with constructing, all such language refers only to differences either between the services themselves, or between owners and services. The language ***never*** refers to differences among owners. (*See* Initial Memorandum of Interested Independent Record Label and Artists' Union Parties, at 5-9 and 11-13). Thus, the argument made by UMG-SME concerning language about "relative roles" should be rejected.

Having no language to support their position, the UMG-SME brief thus puts heavy emphasis on the incidental pluralization of the words "rates" and "terms." But it is clear that those words are pluralized in the statute precisely because the CRJ's can, and must (to the extent justified by their music use and the record) set different rates and terms for different types of services.[2] Nothing supports the opposite: setting different rates based on categories of licensors.

UMG-SME also place heavy emphasis on the phraseology of the hypothetical license negotiation between a "willing buyer" and a "willing seller." But that is a hypothetical construct; drawn from language in patent and copyright cases where courts instruct juries on what criteria to consider in awarding royalties as infringement damages, the premise is that all parties to the negotiation have perfect information and can consider their next best alternative in deciding whether or not to infringe at the outset of the infringement, and thus would negotiate a fair license fee if they were both willing to enter into a transaction. *See, e.g.*, *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1088 (9th Cir. 2014) (approving use of willing buyer-willing seller hypothetical negotiation framework in copyright case and collecting cases; noting that "[h]ypothetical-license damages assume rather than require the existence of a willing seller and

[2] UMG-SME's reliance on Section 114(f)(2)(C), setting rates for new transmission services does not help their cause. (UMG-SME Br. at 6-7). UMG-SME suggest that there can only be one "new transmission service" during a five year license period, but that is a false hypothetical – of course, there could be, during a five year term numerous different types of new transmission services, and the statute does not contemplate a limit of just one new service.

buyer," and holding that fair market value is based on an objective, not a subjective standard).[3] *See also Gaylord v. United States*, 777 F.3d 1363, 1367 (Fed. Cir. 2015) ("[t]o calculate the fair market value, a court deciding a copyright case may use a tool familiar from patent law, without necessarily following every aspect of patent law's use of that tool. It may hypothesize a negotiation between the parties before the infringement occurred and determine 'the reasonable license fee on which a willing buyer and a willing seller would have agreed for the use taken by the infringer.'"; collecting cases); *Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, Civ. No. 2014-1492, 2015 U.S. App. LEXIS 13622, at *47-48 (Fed. Cir. Aug. 4, 2015) (explaining that central to the willing buyer-willing seller hypothetical negotiation analysis is a "determination of what it would have been worth to [the infringer] to obtain a license to the patented technology taking into account the expected benefits and available alternatives," and also explaining that while past licensing practices of the parties and similar licenses can also provide useful evidence, "such evidentiary use must take careful account of any economically relevant differences between the circumstances of those licenses and the circumstances in the matter in litigation.").

Congress was presumed to understand this background when adding the "willing buyer-willing seller" language to Section 114(f), and said nothing about making distinctions among the

[3] The willing seller-willing buyer test originated with a patent case from the Southern District of New York in 1970. *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1119-20 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971) (setting forth 15 factor test, including factor 15: "The amount that a licensor (such as the patent owner) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount that a prudent licensee – who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention – would have been willing to pay as a royalty and yet be able to make a reasonable profit, and which amount would have been acceptable by a prudent patent owner who was willing to grant a license.").

unwilling licensors who are bound by the statutory license. And, contrary to the argument made by UMG-SME that differences in licensors should be taken into account, particularly telling is that Congress directed that where a differently-situated licensor can negotiate a different rate (for whatever reason), the structural "off ramp" set forth in Section 114(f)(3) can be used for that: a licensor and licensee can volunteer to enter into a direct license with each other, and not be bound as all other sound recording owners and artists are by the normal statutory rates. UMG-SME try to spin this "off ramp" as supporting differential licensor rates but their analysis falls short. (UMG-SME Br. at 8-9). This is the *exception* to the rule that all sound recording owners are bound by the decision of the CRJs, not a talisman to set differential rates.

The UMG-SME brief also relies incorrectly on prior "dicta" in various prior Webcasting decisions out of context. For example, in describing the hypothetical negotiation, UMG-SME cite to the statement in Webcasting III to the effect that "the sellers in the hypothetical market. . . consist of multiple record companies," where Webcasting III noted that there are "significant variations among both buyers and sellers," and other similar statements. (UMG-SME Br. at 5, text at FNs 10-12). These statements are truisms, but say nothing about the legal criteria for setting a rate. It is true that there is a plurality of rates in the actual marketplace. But there always will be such evidence adduced in rate proceedings because the job of the CRJs is to look at what the parties put forth as "bench marks." UMG-SME's proposal suggests the work ends there, but that is wrong.

Rather, the CRJs then are to examine those proposed "bench marks," consider the differences between the circumstances surrounding the negotiation of those bench marks and the circumstances surrounding the compulsory statutory rate, and set a blended or unitary rate that reflects the entirety of the licensor marketplace. It is not to select "winners" and "losers" among

the various sound recording owners and artists. Ironically, UMG-SME then cite to Webcasting I where the CARP referred to a "range of negotiated rates," (UMG-SME Br. at 5-6, text at FN 13) as support for their position, while admitting that the CARP then went on to set a unitary rate.[4] Again, yes, there are a range of negotiated rates in the actual marketplace. But the hypothetical willing buyer-willing seller negotiation can only result in one rate since the statutory rate is anything but an actual marketplace negotiation.[5]

UMG-SME makes one further make-weight argument about consideration of promotional vs. substitutional effects. (UMG-SME Br. at 7). This has nothing to do with the identity of the licensor as the music services are either promotional or substitutional, or a melting pot of those,

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[4] As the *Oracle* court explained, when analyzing the hypothetical negotiation between a willing buyer and a willing seller in the context of legal proceedings, the "range" at issue is the range between the buyer's willingness to pay and the seller's willingness to sell, not the range amongst different competitive sellers:

> Fair market value in a voluntary licensing transaction between arms-length parties ordinarily lies somewhere between the two poles of cost to the seller and benefit to the buyer. That is, the seller will not ordinarily charge less for a license than its anticipated cost, and the buyer will not ordinarily pay more for a license than its anticipated benefit. In the case of a hypothetical license, it is often difficult to determine what, at the time of the infringement, the seller and buyer thought would be their respective cost and benefit. Further, even if the cost and benefit can be determined with some degree of certainty, *it is often difficult to determine the range* between the two poles of cost and benefit within which the parties would likely have settled.

Oracle Corp., 765 F.3d at 1089 (emphasis added).

Accordingly, when the CRJs referred to "ranges," understood through the lens of the proposals then before them which all suggested a unitary blended rate, it is clear that they were referring to ranges within the two poles of the aggregate seller costs and the aggregate buyer benefits. At a minimum it is clear that the statement should not be understood to be a reference to differential rates for different licensors.

[5] Furthermore, the UMG-SME brief cites Webcasting III and to *Intercollegiate Broad Sys., Inc. v. Copyright Royalty Board*, 574 F.3d 748 (D.C. Cir, 2009). (UMG-SME Br. at 3 n. 6). But again, those citations refer only to what evidence may be admissible in CRB proceedings; not to the standard to be applied concerning whether multiple rates can be set for different licensors.

with respect to all recordings equally.

Finally, it is telling that Sony and Universal argue only now that the statute always contemplated multiple rates, since they have never themselves proposed multiple rates in any rate proceeding, including the current one. If there was a clear understanding that the statute permitted this, why didn't Sony and Universal, with their claimed market share, ever act to take advantage of this (since they clearly perceive it would be to their advantage). Indeed, they have never even made any mention of it during any part of any prior proceeding, even in proceedings that pre-dated SoundExchange where the RIAA represented the major labels and was free to make arguments on their behalf notwithstanding any contrary views of the artists and independent labels.[6] Rather, it is only now that the UMG-SME parties seem to have come to the conclusion that multiple rates are permissible based on the identity of the licensor where they contemplate it giving them a further market advantage.[7]

At the end of the day, Sony and Universal are the only interested parties making this argument (save for one other individual), whereas all other interested parties who have filed briefs on this question -- labels, artists and services -- resoundingly reject any contorted view or creative interpretation of the Section 114(f) that permits multiple statutory licenses based on category of licensor.

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[6] Prior to the spinoff of SoundExchange as an independent corporation jointly controlled by major and independent labels and artists, the Artists' Unions entered separate appearances as interested parties in all but the first ratesetting proceeding, as did independent record companies, in order to represent their constituents' interests. This fact highlights the point made in the text regarding the failure of Sony and Universal to raise their current argument regarding multiple rates any time in the past. It also highlights our point in note 1, *supra,* that the Independent Record Label and Artists' Union Parties are and always have been interested parties.

[7] The Independent Record Labels and Unions do not repeat here the due process points made in their Initial Memorandum.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Initial Memorandum of the Interested Independent Record Labels and Artists' Union Parties, the Register should reject the setting of rates in Section 114 proceedings that differentiate based on the identity of the licensor.

DATED: October 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Leichtman, hereby certify that a copy of the foregoing **RESPONSE MEMORANDUM OF LAW OF THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM), THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM), AND SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA** has been served electronically by agreement of the parties on this 9th day of October, 2015, with hard copy sent by first class mail upon the following parties:

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