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

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

PANDORA'S REPLY BRIEF IN RESPONSE TO SEPTEMBER 11, 2015 ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW

R. Bruce Rich (N.Y. Bar No. 1304534)
Benjamin E. Marks (N.Y. Bar No. 2912921)
Todd Larson (N.Y. Bar No. 4358438)
Jacob B. Ebin (N.Y. Bar No. 4774618)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: 212.310.8000
Fax: 212.310.8007
bruce.rich@weil.com
benjamin.marks@weil.com
todd.larson@weil.com
jacob.ebin@weil.com

Counsel for Pandora Media, Inc.

October 9, 2015

Pandora Media, Inc. ("Pandora") replies herein to the Initial Brief of UMG Recordings, Inc., Capitol Records, LLC, and Sony Music Entertainment (hereinafter the "Majors' Brief") – the only submission to argue that the Copyright Royalty Judges can and should set statutory license rates that vary by licensor. For the reasons detailed below, nothing in the Majors' Brief undercuts the conclusion, for the reasons collectively marshaled in the opening briefs of Pandora, iHeartMedia, Sirius XM, and A2IM/AFM/SAG-AFTRA, that Section 114 does *not* permit the Copyright Royalty Judges to set rates that vary by licensor.

ARGUMENT

From its initial written direct statement through post-trial briefing and closing arguments, SoundExchange advocated the position that the Judges should set a unitary rate payable to all licensors, Major and independent alike. In support of that position, SoundExchange's expert economist presented empirical data demonstrating that there was no meaningful difference in the marketplace rates charged by Majors and independent labels – and certainly not a difference that would justify differentials in the statutory rate.[1] SoundExchange's position unequivocally represented the views of the Majors: each has a representative on SoundExchange's board of directors,[2] and SoundExchange's written direct and written rebuttal statements in this proceeding included no fewer than five pieces of detailed testimony from high-level executives and lawyers at UMG and Sony in support of SoundExchange's rate proposal.[3] Putting the procedural oddity

[1] *See* 5/5/15 Tr. 1986:25-1987:18 (Rubinfeld); 5/28/15 Tr. 6358:5-22 (Rubinfeld). *See also* SX Ex. 136 at Exs. 8A-D; Rubinfeld CWDT ¶ 221.

[2] *See Board of Directors*, SoundExchange (Oct. 8, 2015), http://www.soundexchange.com/about/our-team/board-of-directors/ (identifying Universal's General Counsel, two executives from Sony, and two from RIAA as board members).

[3] *See Written Direct Statements for SoundExchange, Inc.*, United States Copyright Royalty Board (Oct. 8, 2015), http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/SX/ (including statements from Jeff Harleston and Aaron Harrison of UMG, and Dennis Kooker of Sony);

of the Majors' commenting separately from SoundExchange to one side, it scarcely lies in the Majors' mouths now, after the record has closed, to come forward not only to press arguments directly contrary to their position during the case, but to claim it would in fact be *error* for the Judges to set rates consistent with that position. SoundExchange, which conducted the *Web IV* hearing on the record industry's behalf, and could not credibly support the Majors' arguments, has not sought to do so, stepping instead to the sidelines to allow the Majors to present this freshly-minted advocacy. But SoundExchange's tactical non-intervention cannot mask the starkly contrasting record it built in favor of a unitary rate across licensors, nor the isolated nature of the position here adopted by solely two of SoundExchange's more than hundred-thousand artist and record company members. The Majors' transparent effort to reargue a core premise of the record industry's case through the vehicle of this reference, let alone to do so without benefit of a supporting record, and without the concordance of the rest of that industry and its chosen litigation agent, is a wholly improper and impermissible one: if the Majors believed that the Judges should set different rates for different licensors, they had ample opportunity so to argue at trial, and should not be heard now, after the record is closed, to advocate for that new untested position.

The Majors' merits arguments are, in any event, readily responded to. The initial briefs of Pandora, iHeartMedia, Sirius XM, and A2IM/AFM/SAG-AFTRA demonstrated that Section 114(f)(2)(B) expressly contemplates that the Judges will set rates and terms that "distinguish among the different types of eligible nonsubscription transmission services then in operation" without any corresponding authorization for the Judges to make similar distinctions among

---

SoundExchange, Inc. Rebuttal, United States Copyright Royalty Board (Oct. 8, 2015), http://www.loc.gov/crb/proceedings/14-CRB-0001-WR/rebuttals/SX%20Public/SoundExchange.pdf (including statements from Aaron Harrison of UMG and Dennis Kooker of Sony).

different types or categories of licensors. The Majors' Brief is glaringly silent concerning that statutory discrepancy. Whatever limited force the Majors' argument might otherwise have – to the effect that nothing on the face of the statute explicitly denies the Judges the power to set multiple rates among licensors – is wholly absent here where the very statutory text in issue affirmatively addresses the setting of multiple rates as to one category of statutory participant and withholds comparable authority to the Judges concerning the other.

Nor do the Majors locate any statutory support for the contrary argument underlying each of the subsections of their Brief: that the variations across record-company sellers and license agreements one observes in the marketplace necessarily must be "reflected" in statutory rates that exhibit similar licensor-specific variation. Majors' Brief at 6. While the Majors labor to demonstrate the premise of that argument – that meaningful marketplace variation exists – their Brief fails the much more fundamental task of supporting the conclusion they claim flows from such a premise: namely, that the statute requires that the statutory rates set by the Judges replicate marketplace variations on a seller-by-seller basis. The following sections elaborate on this fundamental failing.

1. The Willing Buyer/Willing Seller Standard. The Majors' Brief first argues that the willing buyer/willing seller rate-setting standard "necessarily contemplates a range of negotiated rates," and thus a range of licensor-specific statutory rates, because the Judges have determined in the past that the hypothetical market to be replicated by the Judges consists of multiple record companies, each of which offers a unique repertory of recordings and negotiates somewhat different rates than other record-company sellers. Majors' Brief at 4-6. But the Majors' argument proves both too little and too much. It proves too little because the Majors identify no statutory direction (or, failing that, congressional intent) that any observed variation among

sellers and licensing rates in the marketplace must be translated into statutory rates that precisely "reflect" those same variations. Majors' Brief at 5. The Majors simply assume it to be true and focus on attempting to demonstrate the factual premise rather than establishing the statutory conclusion.[4]

The Majors' argument also proves too much. On its face, it would imply that the Judges are obligated to set a different statutory rate for every seller; after all, only rates that varied licensor-by-licensor would truly "reflect" those found in the marketplace. For the reasons described in the brief submitted by A2IM/AFM/SAG-AFTRA, such an approach would be totally at odds with the fundamental premise and purpose of the compulsory license and CRB rate-setting: to set industry-wide rates for a compulsory license that saves digital services the need to license and pay royalties on a company-by-company basis. *See* Init. Mem. at 4-5, 9-11. It would also create an administrative nightmare for services attempting to compute their license payment obligations, as Pandora, Sirius XM, and A2IM/AFM/SAG-AFTRA spelled out in their initial briefs. The Majors' Brief does not address any of these concerns. Nor does it present any principled reason why the Majors' alternate approach – rate differentiation by licensor category (rather than licensor company) – would "reflect" the market variation with sufficient granularity, while a single set of rates for all licensors would not.

[4] Notably, the statute does <u>not</u> state that the Judges should set rates that "reflect" those that would be found in the differentiated hypothetical marketplace, as the Majors assert, but rather that the Judges should set rates and terms that "*most clearly represent*" those that would be negotiated between "*a*" willing buyer and "*a*" willing seller in the marketplace. The more natural reading of the statutory language, with its focus on a single buyer and seller, is that the Judges should distill out and identify the single set of "most" representative rates and terms to be paid to all licensors, not rates that vary licensor-by-licensor. Indeed, it would be illogical and ungrammatical to identify rates that varied licensor-by-licensor as being "most" representative of what "a" willing seller would charge. Moreover, had Congress intended the reading proposed by the Majors, it would have instructed the Judges to set rates that would be negotiated between "willing buyers and willing sellers."

2. "Rates and Terms." The Majors next argue that because the statute instructs the Judges to set "rates and terms" (plural) for statutory licensees rather than "the rate and terms" (singular), it must envision rates that vary by licensor. But no such inference is required or even supportable. First, as noted above, the statute also refers to a single buyer and single seller, as well as rates that are "most" representative, language that more naturally suggests a single set of rates. *See supra* n.4. Second, as detailed in Pandora's opening brief, the statute explicitly instructs the Judges to set rates that vary by service category. *See* 17 U.S.C. § 114(f)(2)(B) (directing Judges to "distinguish among the different types of . . . services" operating under the statutory license). The use of "rates" in the plural properly can be construed to address that requirement, that is, to accommodate any identified variations between service categories. Relatedly, the commonsense reading of the plural in the statute, even as to a given service category, is that the Judges may set "rates" that vary across a licensee's service tiers (*e.g.*, different rates for subscription versus advertising-supported tiers), that offer a licensee a choice as to payment metric (a per-stream rate, a per-aggregate-tuning-hour rate, a percent-of-revenue rate, etc.), that vary year-over-year, or any combination of the above.[5] The Judges, in the past, have set rates with precisely these sorts of variations – but without variation across licensors.[6] SoundExchange itself, including in this proceeding, has routinely advocated for rate proposals calling for the "greater of" percent-of-revenue or per-performance "rates," and for different

[5] This interpretation also explains why Section 114(f)(2)(C) uses the plural "rates" even as to a single new service category. *See* Majors' Brief at 6-7. While the Majors are correct that the use of plural "rates" anticipates the setting of multiple rates for reasons other than distinguishing between types of transmission services, the more plausible and likely intention – backed by prior CRB experience – is rates that vary by service tier, year, or payment metric, not licensor.

[6] *See, e.g.*, *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23102, 23102 (Apr. 25, 2014); *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084, 24096 (May 1, 2007).

"rates" for each year of license period, but without any variation according to the identity of the licensor.[7] In contrast, the Majors are unable to cite any credible basis for claiming the statutory language is aimed at rates that vary by licensor.

3-4. Substitution versus Promotion / "Relative Roles of the Copyright Owner and Transmitting Entity." The Majors next turn to the fact that the statute instructs the Judges to consider whether a licensee service may substitute for or promote the sales of records, as well as the relative creative and technological contributions, capital investments, costs, and risks undertaken by the copyright owner and transmitting entity, respectively. Majors' Brief at 7-8. The Majors argue that because the extent to which a service may be promotional or substitutional may vary across copyright owners, and because copyright owners vary in terms of how much they invest in developing their artists and distributing their recordings, the rates set by the Judges should vary by licensor as well to reflect such differentiation. *Id.* This argument is yet another variation of the argument that variations between "willing sellers" should be reflected in licensor-specific variations in the statutory rate, and suffers from the same flaw. Namely, the Majors' Brief focuses exclusively on attempting to demonstrate the factual predicate of the argument (that record labels may engage in varying degrees of investment)[8] while failing to

[7] *See, e.g.*, Proposed Rates and Terms of SoundExchange, Inc. (October 7, 2014); *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23102, 23105 (Apr. 25, 2014); *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084, 24088 (May 1, 2007).

[8] While not germane to the legal issue, the Majors' suggestion that promotional impact varies across licensors is not in fact supported by the record. The experiment conducted by Pandora witness Dr. Steven McBride and his team of data scientists at Pandora – the only empirical data that actually tested the promotional impact of Pandora on indies and Majors – revealed that while there was a positive promotional impact from Pandora spins, it did not vary meaningfully across licensor categories. *See, e.g.*, Shapiro WDT, Appendix E p. 2; *see also* McBride WDT ¶ 48 ("From a statistical perspective, there is no evidence of a difference in promotional impact between majors and indies per spin.").

establish – either from the language of the statute or other indices of Congressional intent – that such variation should be reflected in statutory rates that vary by licensor. While the Judges clearly are to consider the enumerated factors, *nothing* in the statute requires the Judges to vary statutory rates licensor-by-licensor on account of such marketplace variation, or would support the interpretation espoused by the Majors. The Majors' argument boils down merely to the suggestion that it *should*. Nor do the Majors account for the fact that the statute also directs the Judges to consider the relative contribution of the singular "transmitting entity" as well as the "copyright owner"; were the Majors correct in their interpretation, the Judges could set a separate statutory rate not only for each copyright owner, but each licensee service as well – a nonsensical result. The statutory license is not intended to capture and replicate every nuance of the voluntary licensing marketplace.

5. "Comparable Circumstances." The Majors' final argument turns on the statute's invitation to the parties to submit benchmark marketplace agreements reflecting "comparable circumstances." Majors' Brief at 9. The gist of the Majors' argument appears to be that a marketplace agreement between one licensor record company and a digital service cannot be used to set the statutory rate for other record company licensors because the parties' situations are not "comparable," and that rates that vary by licensor are therefore necessary to comply with the statute and avoid the application of a benchmark rate to a licensor who is not "comparably situated." *Id.* But there is no reason to the believe that the statutory reference to "comparable circumstances" means anything more than that the Judges should consider whether a proffered benchmark agreement is appropriate as a benchmark, or should be given less (or no) weight because of some circumstances unique to its negotiation.

Moreover, reading comparability in the narrow fashion proposed by the Majors, where a license signed by one licensor is necessarily non-comparable to a license that would be signed by another licensor, would dramatically limit the evidence available to the Judges. Because of the presence of the statutory license, and a well-documented concern on the part of record labels about setting "bad" CRB precedent, there are very few voluntary license agreements negotiated between statutory services and record companies. If even those few licenses were, by the Majors' logic, deemed suitable solely as a benchmark for the particular licensor, the Judges would be left with little if any evidence of "comparable" market transactions to draw upon as benchmarks for setting industry-wide rates. Moreover, such an interpretation would further encourage the Majors to refuse to enter into voluntary marketplace licenses with statutory services (as is their common practice) while at the same time claiming that licenses negotiated by other labels (for example, independent labels) cannot, as a matter of law, act as benchmarks for the Majors because they are "non-comparable"; this effectively would allow the Majors to eliminate *any* marketplace evidence of competitive willing buyer/willing seller rates, and inevitably drive statutory rates in one direction: up.

CONCLUSION

For reasons described in the opening briefs of Pandora, iHeartMedia, Sirius XM, and A2IM/AFM/SAG-AFTRA, as well as the failure of the Majors to offer any credible arguments to the contrary, as detailed above, the Register should respond "YES" to the referred question.

Dated: October 9, 2015

Respectfully submitted,

R. Bruce Rich /BMH

R. Bruce Rich
Benjamin E. Marks
Todd Larson
Jacob B. Ebin
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: 212.310.8000
Fax: 212.310.8007
bruce.rich@weil.com
benjamin.marks@weil.com
todd.larson@weil.com
jacob.ebin@weil.com

Counsel for Pandora Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I caused a copy of the foregoing Reply Brief in Response to September 11, 2015 Order Referring Novel Material Question of Law to be served by email and first-class mail to the participants listed below:

Cynthia Greer Sirius XM Radio Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com Tel: 202-380-1476 Fax: 202-380-4592 Patrick Donnelly Sirius XM Radio Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com Tel: 212-584-5100 Fax: 212-584-5200 *Sirius XM Radio Inc.*	Paul Fakler Arent Fox LLP 1675 Broadway New York, NY 10019 paul.fakler@arentfox.com Tel: 202-857-6000 Fax: 202-857-6395 Martin Cunniff Arent Fox LLP 1717 K Street, N.W. Washington, DC 20036 martin.cunniff@arentfox.com Tel: 202-857-6000 Fax: 202-857-6395 *Counsel for Sirius XM Radio Inc.*
C. Colin Rushing Bradley Prendergast SoundExchange, Inc. 733 10th Street, NW, 10th Floor Washington, DC 20001 Tel: 202-640-5858 Fax: 202-640-5883 crushing@soundexchange.com bprendergast@soundexchange.com *SoundExchange, Inc.*	Glenn Pomerantz Kelly Klaus Anjan Choudhury Munger, Tolles & Olson LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 glenn.pomerantz@mto.com kelly.klaus@mto.com anjan.choudhury@mto.com Tel: 213-683-9100 Fax: 213-687-3702 *Counsel for SoundExchange, Inc.*

Mark C. Hansen John Thorne Evan T. Leo Scott H. Angstreich Kevin J. Miller Caitlin S. Hall Igor Helman Leslie V. Pope Matthew R. Huppert Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, NW, Suite 400 Washington, DC 20036 mhansen@khhte.com jthorne@khhte.com eleo@khhte.com sangstreich@khhte.com kmiller@khhte.com chall@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com Tel: 202-326-7900 Fax: 202-326-7999 *Counsel for iHeartMedia, Inc.*	Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Basse Road San Antonio, TX 78209 donnaschneider@iheartmedia.com Tel: 210-832-3468 Fax: 210-832-3127 *iHeartMedia, Inc.*
Bruce G. Joseph Karyn K. Ablin Michael L. Sturm Wiley Rein LLP 1776 K Street, NW Washington, DC 20006 bjoseph@wileyrein.com kablin@wileyrein.com msturm@wileyrein.com Tel: 202-719-7000 Fax: 202-719-7049 *Counsel for National Association of Broadcasters*	David Oxenford Wilkinson Barker Knauer, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com Tel: 202-383-3337 Fax: 202-783-5851 *Counsel for National Association of Broadcasters, Educational Media Foundation*

Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com Tel: 916-251-1600 Fax: 916-251-1731 *Educational Media Foundation*	Suzanne Head 1771 N Street, NW Washington, D.C. 20036 shead@nab.org Tel: 202-429-5430 Fax: 202-775-3526 *National Association of Broadcasters (NAB)*
Karyn K. Ablin Jennifer L. Elgin Wiley Rein LLP 1776 K Street, NW Washington, DC 20006 kablin@wileyrein.com jelgin@wileyrein.com Tel: 202-719-7000 Fax: 202-719-7049 *Counsel for National Religious Broadcasters Noncommercial Music License Committee*	Russ Hauth Harv Hendrickson 3003 Snelling Drive, North Saint Paul, MN 55113 russh@salem.cc hphendrickson@unwsp.edu Tel: 651-631-5000 Fax: 651-631-5086 *National Religious Broadcasters NonCommercial Music License Committee*
Jeffrey J. Jarmuth Law Offices of Jeffrey J. Jarmuth 34 East Elm Street Chicago, IL 60611 jeff.jarmuth@jarmuthlawoffices.com Tel: 312-335-9933 Fax: 312-822-1010 *Counsel for AccuRadio, LLC*	Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com Tel: 312-284-2440 Fax: 312-284-2450 *AccuRadio, LLC*
William Malone 40 Cobbler's Green 205 Main Street New Canaan, Connecticut 06840 malone@ieee.org Tel: 203-966-4770 *Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.*	Frederick Kass 367 Windsor Highway New Windsor, NY 12553 ibs@ibsradio.org IBSHQ@aol.com P: 845-565-0003 F: 845-565-7446 *Intercollegiate Broadcasting System, Inc. (IBS)*

George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com Tel: 615-242-9999 *GEO Music Group*	Jane E. Mago 4154 Cortland Way Naples, Florida 34119 jem@jmago.net Tel:703-861-0286 *Counsel for National Association of Broadcasters*

/s/ Elisabeth Sperle

Elisabeth Sperle