UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

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

OPPOSITION BRIEF OF UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, AND SONY MUSIC ENTERTAINMENT IN RESPONSE TO SEPTEMBER 11, 2015 ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW

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UMG Recordings, Inc., Capitol Records, LLC (collectively, "UMG"), and Sony Music Entertainment ("SME") respectfully submit this Opposition Brief in response to the Copyright Royalty Judges' September 11, 2015 Order Referring Novel Material Question of Law and Setting Briefing Schedule ("Order").

ARGUMENT

In their initial brief, UMG and SME responded to the Order by directly answering the question posed by the Judges, and showing that the plain language of the Copyright Act not only does not prohibit, but firmly supports, setting rates and terms that distinguish among types of licensors. In contrast, A2IM, AFM, and SAG-AFTRA ("A2IM"); iHeartMedia, Inc. ("iHeartMedia"); Pandora Media, Inc. ("Pandora"); and Sirius XM Radio Inc. ("Sirius XM") (collectively, the "Other Parties") largely sidestep the Judges' question and focus on what the Judges *should* do in this proceeding, rather than on what they *can* do under the Act. Putting aside the questionable merits of the Other Parties' arguments, they are entirely irrelevant to the pure question of law posed by the Order. In addition, many of these arguments repeatedly refer to the factual record or purported gaps therein, ignoring the Judges' express instructions to "assum[e] a factual basis in the evidentiary record" and to "not include … factual materials" in the briefs.[1] The few arguments by the Other Parties that do address the question of law posed by the Order simply underscore that nothing in the Act prohibits the Judges from differentiating among types or categories of licensors.

[1] Order at 2-3.

I. No Canon of Statutory Construction Supports A Conclusion That the Judges Are Prohibited From Differentiating Among Licensors.

No party claims that anything in the Act expressly prohibits the Judges from differentiating among types or categories of licensors. Instead, each of the Other Parties argues that because Section 114(f)(2) requires that the rates and terms "distinguish among the different types" of services, but contains no express requirement that they distinguish among licensors, the latter is prohibited by implication.[2]

Whether so characterized by the Other Parties or not, these arguments attempt to invoke the interpretive canon *expressio unius est exclusio alterius*: "the expression of one is the exclusion of others."[3] This canon "depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."[4] It "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference."[5] For example, "a ban on importation of apples, oranges and bananas clearly manifests an intent not to bar grapefruit."[6] In such circumstances, *expressio unius* transforms silence into exclusion.

But the Other Parties' attempt to invoke that canon in this administrative proceeding is mistaken as a matter of law, for at least two reasons. ***First*,** the canon is a "feeble helper in an

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[2] iHeartMedia Br. at 2–3; A2IM Br. at 8–9; Sirius XM Br. at 1, 6–9; Pandora Br. at 2–3.

[3] *Mobile Communications Corp. of America v. F.C.C.*, 77 F.3d 1399, 1404 (D.C. Cir. 1996).

[4] *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

[5] *Id.* at 169-69 (citing E. Crawford, *Construction of Statutes* 337 (1940)) (citations and internal quotation marks omitted).

[6] *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 681 (D.C. Cir. 1994).

administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved."[7] Especially where it is "countervailed by a broad grant of authority contained within the same statutory scheme, the canon is a poor indicator of Congress' intent."[8]

The inapplicability of the canon in administrative settings such as this is vividly illustrated by the D.C. Circuit's recent decision in *Adirondack Medical Center v. Sebelius*. There, the plaintiffs argued that provisions stating that the Secretary of the Department of Health and Human Services "shall" or "may" make certain types of Medicare payment adjustments precluded the Secretary from making other types of adjustments. The D.C. Circuit rejected that

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[7] *Cheney R.R. Co. v. I.C.C.*, 902 F.2d 66, 68–70 (D.C. Cir. 1990) (citing *Chevron*, 467 U.S. at 843–44) (in the administrative context, "the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, *i.e.,* to leave the question to agency discretion"); *see also Mobile Communications Corp. of America*, 77 F.3d 1399 at 1404-05 ("[R]eliance on the *expressio unius* maxim—that the expression of one is the exclusion of others – is misplaced. The maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue.'") (citations omitted).

[8] *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014); *see also Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) ("The force of any negative implication, however, depends on context. We have long held that the *expressio unius* canon does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it,' and that the canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'") (internal citations omitted); *Catawba County, N.C. v. E.P.A.*, 571 F.3d 20, 36 (D.C. Cir. 2009) ("When interpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion.' Silence, in other words, may signal permission rather than proscription. For that reason, that Congress spoke in one place but remained silent in another, as it did here, 'rarely if ever suffices for the 'direct answer' that *Chevron* step one requires.") (internal citations omitted); *Railway Labor Executives' Ass'n*, 29 F.3d at 681 (D.C. Cir. 1994) ("Legislative silence may, of course, reflect either a legislative decision to leave the issue unresolved or a failure to focus on the issue sharply. Where the issue arises in administration of a statute that Congress has confided to an agency, *Chevron* tells us how to read such a gap—as a matter to be resolved by the agency."); *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990) ("[W]here an agency is empowered to administer the statute, Congress may have meant that in the second context the choice should be up to the agency.").

argument, in part because *expressio unius* did not "unambiguously suggest[] Congress intended to strip the Secretary of her broad grant of authority."[9] The Court further stated that "[w]e cannot say the use of the word 'shall' [in an allegedly restricting provision] makes much of a difference, for the broad grant of authority enshrined in § 1395ww(d)(5)(I)(i) also employs the same word."[10] The Court also noted that "Congress generally knows how to use the word 'only' when drafting laws."[11]

Like the Secretary in *Adirondack Medical Center*, the CRB has a broad mandate: it "shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[12] In this marketplace, there are "significant variations among *both* buyers and sellers"[13]; each seller is selling a unique product—"a blanket license for *each* record company which allows use of *that* record company's complete repertoire of sound recordings"[14]; and accordingly one would expect "a range of negotiated rates reflecting the particular circumstances of each negotiation. Congress

[9] *Adirondack Medical Center*, 740 F.3d at 697.

[10] *Id.* at 698.

[11] *Id.* at 697.

[12] 17 U.S.C. § 114(f)(2)(B) ("In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.").

[13] *Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule and order)*, 76 Fed. Reg. 13026, 13029 (Mar. 9, 2011) (emphasis in original) [hereinafter "*Webcaster III*"]. *See also Digital Performance Right in Sound Records and Ephemeral Recordings (Final rule and order)*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) [hereinafter "*Webcaster II*"].

[14] *Webcaster II*, 72 Fed. Reg. 24084, 24087 ("*Webcaster I* made clear that 'the willing buyers are the services which may operate under the webcasting license . . . , the willing sellers are record companies and the product consists of a blanket license for *each* record company which allows use of *that* record company's complete repertoire of sound recordings.") (emphasis added).

surely understood this when formulating the willing buyer/willing seller standard."[15] Given this Congressional understanding, there is no basis to conclude that Congress, by expressly *requiring* differentiation among licensees, *stripped* the CRB of discretion to differentiate among types of licensors when warranted by the willing buyer/willing seller standard. Simply put, as reflected in *Adirondack Medical Center*, the *expressio unius* canon cannot be used to nullify the CRB's broad authority to set rates and terms that reflect a marketplace characterized by differences in products and negotiated rates.

Second, even if *expressio unius* could be applied in this case, a proper application of the canon would not compel the conclusion that the CRB is prohibited from distinguishing between copyright owners. Section 114(f)(2)(A) provides that the Judges "shall" distinguish between different types of transmission services, and "shall" include a minimum fee for each such type of service.[16] The use of the word "shall" indicates that this differentiation is mandatory.[17] Thus, properly applied, *expressio unius* would lead at most to the conclusion that because Congress omitted differentiation between sellers from its list of *requirements*, differentiation among licensors is not *mandatory*. But it cannot support a conclusion that such differentiation is not only not required, but is *prohibited*.

The attempt to build an *expressio unius* argument around Section 114(d)(3)(A) fails for the same reasons.[18] That provision limits the duration of certain exclusive licenses to interactive

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[15] *In the Matter of Rate Setting for the Digital Performance of Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Panel to the Librarian of Congress*, Docket No. 2000–9 CARP DTRA 1&2 at 24-25 (Feb. 21, 2002) [hereinafter "*Webcaster I CARP Report*"].

[16] *See* 17 U.S.C. § 114(f)(2)(A).

[17] *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").

[18] iHeartMedia Br. at 2–3.

services, and imposes a longer permissible license period where the licensor holds the copyright to 1,000 or fewer sound recordings. iHeartMedia suggests that this required distinction between copyright holders means that Congress "chose not to" distinguish between them in Section 114(f)(2). But the application of *expressio unius* to Section 114(d)(3)(A) does not support any conclusion regarding the scope of the Judges' authority. As an initial matter, the canon is inapplicable because it "depends on identifying a series of two or more terms or things that should be understood to go hand in hand."[19] Section 114(d)(3)(A), however, is not analogous to or naturally associated with Section 114(f)(2), because it does not relate to ratesetting or to the CRB's authority in any way. In any event, application of *expressio unius* to Section 114(d)(3)(A) would mean, at most, that Congress chose not to impose a *mandatory* distinction between licensors in Section 114(f)(2), as it did in Section 114(d)(3)(A). That is irrelevant to the question of whether the statute *prohibits* distinguishing between copyright owners in ratesetting.[20]

A2IM also puts forward several other canons of interpretation. None of them is applicable here and none supports a conclusion that the Judges are prohibited from distinguishing between copyright owners.

Noscitur a sociis. "[T]he principle of *noscitur a sociis*—a word is known by the company it keeps—[may be relied upon] to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of

[19] *Barnhart*, 537 U.S. at 168.

[20] *See Catawba County,* 571 F.3d at 36 ("When interpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion.' Silence, in other words, may signal permission rather than proscription.") (citations omitted).

Congress.'"[21] For this canon to apply, "the terms must be conjoined in such a way as to indicate that they have some quality in common."[22] Here, no party has identified any word or term that—if limited by the words that accompany it—would state that the CRB is prohibited from distinguishing between copyright owners. There are no such words or terms. Instead, the argument appears to be that Section 114's express differentiation among services must imply a lack of authority "to make distinctions among owners."[23] That is not an application of *noscitur a sociis*, and is refuted by the substantial case law cited above regarding *expressio unius*.

Ejusdem generis. The canon of *ejusdem generis* likewise has no bearing on the question presented here. "[W]here general words follow specific words in a statutory enumeration," *ejusdem generis* provides that "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[24] The Other Parties do not identify any instance in which "general words" in the Act "follow specific words" and, if limited to be like the specific words they follow, result in a prohibition on differentiating among copyright owners. Instead, they attempt to rewrite the canon to mean that "generic words will usually be limited to things of a kindred nature with those particularly enumerated" elsewhere in

[21] *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citations omitted).

[22] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012).

[23] A2IM Br. at 8.

[24] *Washington State Dept. of Social and Health Svcs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (citations omitted); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 n.19 (2012) ("The canon of ejusdem generis limits general terms [that] follow specific ones to matters similar to those specified.") (alteration in original; citations and internal quotation marks omitted).

the statute.[25] Courts routinely reject this sort of attempt to stretch *ejusdem generis* beyond its meaning.[26]

Casus omissus pro omisso habendus est. This canon means that "[n]othing is to be added to what the text states or reasonably implies . . . . That is, a matter not covered is to be treated as not covered."[27] This is substantially similar to the *expressio unius* canon and suffers from all the same infirmities. As shown above, in the administrative context, a matter not covered is presumably left to the discretion of the agency. The Other Parties cite no case applying this canon, because their argument is at odds with the substantial case law cited above. In addition, even if it did apply, it would mean—at most—that a *requirement* to differentiate between copyright owners should not be read into the provision requiring differentiation between services. But the question presented is not whether distinguishing between copyright owners is required; the question is whether such differentiation is prohibited. *Casus omissus* does not support reading an unstated prohibition into the statute.

II. The Other Parties' Reliance on the Librarians' 1998 Ruling is Misplaced.

Several of the Other Parties argue that the Librarian's *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. 25394 (May 8, 1998) ("1998 Ruling") is "controlling

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[25] A2IM Br. at 8.

[26] *See Toto, Inc. v. Sony Music Entertainment*, 60 F. Supp. 3d 407, 415 (S.D.N.Y. 2014) (rejecting argument that *ejusdem generis* applies "when a list of specific terms is *combined* with a general phrase" and stating that general phrase must follow a list of specific terms) (emphasis in original); *see also United States v. Amato*, 540 F.3d 153, 160 (2d Cir. 2008) (the *ejusdem generis* interpretive principle stands for the proposition that "general terms that follow specific ones are interpreted to embrace only objects of the same kind or class as the specific ones"); *Malmsteen v. Universal Music Grp.*, 940 F. Supp. 2d 123, 133 (S.D.N.Y. 2013) (*ejusdem generis* applies "when a general phrase . . . follows a list of specific terms").

[27] Scalia & Garner at 196.

precedent" which "dictates … as a matter of law" that the Judges are prohibited from setting "different rates for different categories of licensors."[28] In the passage on which they rely, the Librarian stated that

> the Register has made a determination that each performance of each sound recording is of equal value and has included a term that incorporates this determination.
>
> To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, each performance of each sound recording must be afforded equal value.[29]

The Other Parties' argument based on this language fails for three reasons.

First, the relevant passage of the 1998 Ruling was not a ruling of law regarding the scope of the Act. Rather, it was a fact-specific, as-applied determination based on the specific circumstances of that proceeding—including the absence in that record of criteria on which to base differential values for different sound recordings. The question of law posed by the Order,

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[28] Pandora Br. at 3-4. *See also* Sirius XM Br. at 5-6 (arguing that "the Librarian of Congress has previously ruled that all sound recording performances should be valued equally" and concluding that "[t]hat precedent should control here."); A2IM Br. at 11-13 (arguing that "historical rate setting precedent compels the conclusion" that the statute prohibits "differential rates by categories of licensors.").

[29] *1998 Ruling*, 63 Fed. Reg. 25394, 25412.

however, "assum[es] a factual basis in the evidentiary record" sufficient to differentiate among licensors.[30]

In fact, in a carefully-worded footnote, Pandora explains that "[w]e do not address the potential implications of the cited Librarian's Determination for a circumstance not presented here, where such evidence may have been adduced during the hearing phase."[31] But that is in fact *precisely* the circumstance presented by the Order. As the footnote implicitly concedes, the 1998 Ruling does not conclusively answer the pure question of law posed by the Order. If anything, the fact that the 1998 Ruling is grounded in the specific circumstances of that proceeding—and does not identify a *statutory* requirement that each performance of each recording be accorded equal value—shows that nothing in the statute prohibits differentiating among licensors.

Second, the 1998 Ruling is irrelevant because it was rendered in a different procedural posture than the current posture of this proceeding. The 1998 Ruling was an appeal of a final decision in which no methodology for differentiating among licensors was proposed. The Librarian explained that the Register had "no alternative" but to assign equal values "[i]n the absence of an alternative method" where the parties had not "proposed any methodology for assigning different values to different sound recordings."[32] (Sirius XM is mistaken when it asserts that the Librarian based his decision on "the fact that none of the participants had proposed differentiated rates.")[33]

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[30] Order at 2.

[31] Pandora Br. at 4 n. 2.

[32] *1998 Ruling*, 63 Fed. Reg. 25394, 25412.

[33] Sirius XM Br. at 5.

Here, if the Register concludes that the Judges are permitted to set rates that differentiate among licensors, the Judges can call for additional briefing regarding methodologies for differentiating among licensors if they deem it necessary to do so before rendering a final decision.

Third, and finally, the 1998 Ruling is irrelevant because it did not concern the statutory scheme that governs this proceeding. The Librarian concluded that valuing each performance of each sound recording equally was appropriate "*in the absence of* any statutory language or legislative intent to the contrary."[34] At the time, however, Section 114(f) did not require application of the willing buyer/willing seller standard. Instead, the governing provisions were those of Section 801(b).[35] As the Register has already noted in her 2015 report on Copyright and the Music Marketplace, that standard is "more policy-oriented" and "enabl[es] the ratesetting body to . . . establish[] rates lower than what would (at least theoretically) prevail in the free market," whereas the willing buyer/willing seller standard applicable in this proceeding is "more market-oriented in its approach."[36] In particular, as the CARP recognized in the very first *Webcaster* proceeding, one would expect the free market system on which the willing buyer/willing seller standard is based "to generate not a uniform rate, but a range of negotiated rates reflecting the particular circumstances of each negotiation."[37]

Thus, while the statutory scheme that existed at the time the 1998 Ruling was issued did not include "any statutory language or legislative intent to the contrary," the statutory scheme as it exists *today* instructs the Judges to set rates that reflect a marketplace in which different

[34] *1998 Ruling*, 63 Fed. Reg. 25394, 25412 (emphasis added).
[35] *Id.* at 25399 (noting applicability of the "four specific policy objectives" of Section 801(b)(1)).
[36] United States Copyright Office, *Copyright and the Music Marketplace* 142 (Feb. 2015).
[37] *Webcaster I Carp Report* at 24.

categories of licensors would obtain different rates. The 1998 Ruling, decided under a different statutory scheme, is not "controlling precedent" regarding the scope of the Judges' authority in this proceeding.

III. The Other Parties' Remaining Arguments Under Section 114 Are Wrong.

The Other Parties point to a hodgepodge of language in Section 114 that they claim indicates that Congress prohibited the Judges from differentiating among licensors when implementing the willing buyer/willing seller standard. None of these arguments withstand any scrutiny.

"All." A2IM argues that because the schedule of rates and terms established by the Judges in a rate-setting proceeding is binding on "*all*" copyright owners, it implies that the Judges may not differentiate between copyright owners.[38] But A2IM does not explain why the word "all" gives rise to such an implication; the term simply ensures that the rates and terms apply to owners regardless of whether they participate in the proceeding. Specifically, Section 114(f)(2) establishes the system for the Judges to set rates and terms for statutory copyright licenses of sound recordings in accordance with 17 U.S.C. Chapter 8. Section 803, in turn, establishes that participants with an interest in the outcome of the proceeding are permitted, but not required, to participate in the proceeding.[39] By stating that the schedule of rates and terms the Judges set is binding on "*all*" copyright owners and users, Section 114(f)(2)(B) merely clarifies that all affected individuals are bound by the outcome of the proceeding regardless of their participation therein.

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[38] A2IM Br. at 6.

[39] 17 U.S.C. § 803(b).

In addition, the assertion that "all" means "equal" is refuted by the fact that other schedules of rates and terms in the U.S. code apply to "all" or "every" affected person, yet differentiate among those persons.[40] For example, the tax code binds all individuals, but differentiates among them with respect to the applicable tax rate. 26 U.S.C. § 1 initially identifies five categories of filers—married individuals filing jointly, married individuals filing separately, heads of household, unmarried individuals, and estates and trusts. The statute applies schedules of income tax rates that apply to "every" person within each category, but set forth different rates within each group based on differences in income.[41] There is no support for the idea that rates and terms applicable to "all" or "every" affected person cannot differentiate among such persons.

"Relative." In setting statutory rates and terms, Congress required the Judges to consider "the relative roles of the copyright owner and the transmitting entity."[42] According to A2IM, this factor demonstrates that the Judges must only compare the relative roles of the "owners and users, not relative investments and risks among owners."[43] As SME and UMG discussed in their initial brief, however, proper attention to this factor requires the Judges to consider the significant variation in the resources that record labels invest to develop their collection of sound recordings, and resulting differences in the product being licensed.[44]

In any event, A2IM does not explain how the requirement to consider a particular non-exclusive factor that does not distinguish among owners prohibits differentiating among

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[40] *See Ward v. Thomas,* 207 F.3d 114, 121 (2d Cir. 2000) ("'All' means every."); *Edwards v. McMahon*, 834 F.2d 796, 799 (9th Cir. 1987) (same).

[41] 26 U.S.C. § 1.

[42] 17 U.S.C. § 114(f)(2)(B)(ii).

[43] A2IM Br. at 7.

[44] SME and UMG Br. at 8.

licensors based on all of the other "economic, competitive and programming information" that the Judges consider.

"Single Entity." iHeartMedia also contends that differentiating among licensors conflicts with "Congress's expectation that [the Judges] would designate a *single* entity to act as a representative of *all* copyright holders."[45] iHeartMedia points to *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, in which the court concluded that the Judges were within their power to "designate[] a single organization . . . to receive royalties from licensees and distribute payments . . . ." to the recipients.[46]

But the fact that the Judges appointed a single administrative entity lends no weight to the argument that the statute requires equal treatment for all copyright holders. That SoundExchange is a *representative* of all copyright holders does not imply a prohibition on setting rates and terms under which SoundExchange would collect different rates on behalf of different copyright holders. In fact, nothing in the Act requires that copyright owners be represented by a single entity; the court in *Intercollegiate Broad. Sys.* specifically noted that, by private agreement, "[a]ny copyright owner is free to negotiate, on its own or through an agent, for a method of payment that bypasses SoundExchange."[47]

IV. A2IM's Due Process Concerns Under the Administrative Procedure Act are Irrelevant to the Legal Question Posed by the Judges' Order.

A2IM also argues that if the Judges adopt a rate structure that differentiates among licensors in this proceeding, its members will be denied the due process they are entitled to under the Administrative Procedure Act ("APA") and the Constitution. This argument is wrong on the

[45] iHeartMedia Br. at 1-2 (internal quotation marks omitted).

[46] 574 F.3d 748, 770 (D.C. Cir. 2009).

[47] *Id.* at 771.

merits. But UMG and SME do not address it here, because the argument is irrelevant to answering the question posed by the Order: whether the Act prohibits the Judges from differentiating among licensors when setting rates. Instead, A2IM argues that assuming Section 114 *does* permit differentiation among licensors, doing so at *this* stage of *this* proceeding would violate due process. This is an as-applied argument that does not purport to answer the pure question of law that the Order presents.

In any event, should the Register determine that the Judges are permitted to set rates and terms that distinguish among licensors, then providing another opportunity to file briefs that take account of that guidance would address any due process concerns.[48]

V. The Remaining Arguments of the Other Parties Are Outside the Scope of the Judges' Referral Order.

The question that the Order presents is purely legal: "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 …?"[49] It "raises the question whether the Judges *may* set rates that reflect marketplace differences among licensors"[50]—not whether the Judges *should* set different rates based on the particular circumstances of this case, policy considerations, lack of evidence, or administrative concerns. Accordingly, the Judges instructed the parties to comment on the "substantive law, not [the] facts."[51] The Judges also

[48] *See e.g., Watergate Imp. Associates v. Pub. Serv. Comm'n*, 326 A.2d 778, 786-87 (D.C. Cir. 1974) ("Despite this original defect, we nevertheless find that no prejudice resulted as any possible prejudice was adequately cured by the Commission's subsequent actions in allowing Watergate to be heard.").

[49] Order at 2 (emphasis added)

[50] *Id.*

[51] *Id. at* 3.

told the parties to "assum[e] a factual basis in the evidentiary record" for differentiated rates[52]—not argue that the record was insufficient.

Despite this clear guidance, most of the arguments raised by the Other Parties fall well outside the scope of the Judges' Order. While the Other Parties frame these arguments in different ways, they all boil down to asserting that even if the Judges are permitted to set different rates for different copyright owners, they should not do so in this proceeding for a variety of reasons, including:

- lack of opportunity to introduce relevant evidence into the record (Sirius XM, A21M)
- administrative burden on the parties and Judges (Sirius XM, iHeartMedia, Pandora, A21M)
- the parties' reliance on a single-rate standard (A21M)
- differentiating between types of licensors would upset the "level playing field" (A21M)
- multiple rates would be "supracompetitive" (Sirius XM) and "invite gaming the system" (A21M)

In addition, at least one party, Sirius XM, cited to the factual record for its arguments on numerous occasions[53]—even though the Judges expressly ordered "that Briefs should not include … factual materials."[54]

SME and UMG disagree with the substance of these arguments, but will not respond to them here because they are outside the scope of the Order and irrelevant to the pure question of law posed by the Judges.

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[52] *Id.* at 2.

[53] *See, e.g.*, Sirius XM Br. at 13-16.

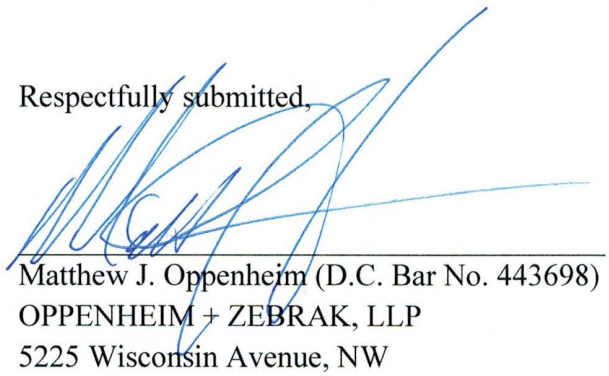
[54] Order at 3.

CONCLUSION

For the foregoing reasons, neither Section 114 of the Act, nor any other applicable provision of the Act, prohibits 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.

October 9, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I caused a copy of the foregoing – **OPPOSITION BRIEF OF UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, AND SONY MUSIC ENTERTAINMENT IN RESPONSE TO SEPTEMBER 11, 2015 ORDER REFERRING NOVEL MATERIAL QUESTION OF LAW** to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

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