

**Before the  
COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
Washington, D.C.**

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**In the Matter of** )

**DETERMINATION OF RATES AND )  
TERMS FOR DIGITAL PERFORMANCE )  
IN SOUND RECORDINGS AND )  
EPHEMERAL RECORDINGS (WEB IV) )**

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**Docket No. 14-CRB-0001-WR**

**SIRIUS XM RADIO INC.'S REPLY BRIEF IN RESPONSE  
TO THE COPYRIGHT ROYALTY JUDGES' ORDER REFERRING A  
NOVEL QUESTION OF LAW TO THE REGISTER OF COPYRIGHTS**

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Sirius XM Radio Inc. (“Sirius XM”) respectfully submits this brief in reply to certain arguments made by non-participants UMG Recordings, Inc., Capitol Records, LLC, and Sony Music Entertainment (collectively, the “Major Record Companies”), and non-participants A2IM, AFM, and SAG-AFTRA (collectively, the “Independent Trade Associations and Unions”) in their briefs in response to the September 11, 2015 Order Referring Novel Material Question of Substantive Law and Setting Briefing Schedule (the “Referral”). In its opening brief, Sirius XM argued that allowing the Judges to set differentiated rates based upon differences among copyright owners (i.e., different rates based upon the size of the record company that owns each recording) would, among other problems, be harmful to independent record companies and recording artists. This argument has already been proven correct.<sup>1</sup>

The mere possibility of differentiated rates has already provoked a civil war within the recording industry. Consistent with prior proceedings, the record labels elected not to participate directly but rather to be represented by SoundExchange, the only Webcasting IV participant representing the interests of the recording industry. With respect to the Referral, however, SoundExchange, whose board consists of representatives of both major and independent record labels, appears unable to take a unitary substantive position on the issue. Instead, SoundExchange has left it to two competing groups of *non-participants*, one representing the interests of major record companies and the other representing the interests of independent record companies and recording artists, to submit dueling briefs.

Neither the Major Record Companies, nor the Independent Trade Associations and

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<sup>1</sup> See, e.g., Ed Christman, *Independents Argue Streaming Rate Difference Between Them and Majors Would 'Have Disastrous Consequences'* Billboard, October 5, 2015, available at <http://www.billboard.com/articles/business/6715503/independents-streaming-rate-majors-disaster>; Statement of World Independent Network on Copyright Royalty Board Review, October 5, 2015, available at <http://winformusic.org/news/win-statement-on-copyright-royalty-board-review-5th-october-2015/>, (“To create imbalances in what companies and the artists signed to them receive from digital transactions will simply cause harm...”).

Unions, have standing to file briefs in response to the Referral because none of them were participants in the Webcasting IV proceeding. The briefs of these non-participants must be struck. To the extent that those briefs are considered, the Major Record Companies' various statutory construction arguments improperly attempt to read phantom language, meaning, and congressional intent into the Copyright Act where none exists. Each of these strained readings must be rejected.

## **ARGUMENT**

### **I. THE INDEPENDENT TRADE ASSOCIATIONS AND UNIONS AND THE MAJOR RECORD COMPANIES DO NOT HAVE STANDING TO SUBMIT BRIEFING IN THIS PROCEEDING**

Neither the Major Record Companies nor the Independent Trade Associations and Unions were participants in the Webcasting IV proceeding. None of them filed Petitions to Participate in the proceeding, nor did any of them submit Written Direct or Rebuttal Statements, or directly participate in any other way in the proceeding.<sup>2</sup> *See* 17 U.S.C. § 803(b)(1)(B) (participation, including submission of briefs and other information, limited to persons who file formal notices of intent to participate); 17 U.S.C. § 803(b)(6)(C)(i) (all participants must file Written Direct and Rebuttal Statements by dates certain). Consequently, none of those entities have standing to file a brief in response to the Referral. *See* 37 C.F.R. § 354.1(b)(1) (only parties to the proceeding may file briefs in response to order referring material question of substantive law). Notably, none of the Major Record Companies or Independent Trade Associations and

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<sup>2</sup> Although the Major Record Companies provided certain witnesses to support participant SoundExchange's case, the Judges maintained the distinction between testifying witnesses (and their employers) and the participants that submit testimony from such witnesses. *See* Order Granting SoundExchange's Motion to Compel iHeartMedia to Produce Documents Relating to the Testimony of David Pakman (Discovery Order 7), Docket No. 14-CRB-0001-WR (2016-20), January 15, 2015. In Discovery Order 7, the Judges ordered participant iHeartMedia to produce documents from the files of Venrock, the employer of one of iHeartMedia's witnesses, rejecting iHeartMedia's argument that SoundExchange was not entitled to discovery from Venrock because that company was not a participant. The Judges agreed that Venrock was not a participant, but noted that the discovery requests were properly served on participant iHeartMedia and held that because iHeartMedia chose to submit testimony from a Venrock employee iHeartMedia, as a participant, was required to obtain the responsive documents from non-participant Venrock and witness Pakman. *Id.* at 3.

Unions are listed as participants on the official service list in the proceeding, nor were any identified in the Judges' official listing of participants after the time for filing notices of intent to participate had passed. Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order ("Notice of Participants"), Docket No. 14-CRB-0001-WR (2106-2020), February 19, 2014 ("Participation in this proceeding is limited to parties in interest who filed a timely Petition to Participate. Attached to this Notice and Order as 'Exhibit B' is a list of participants that filed timely Petitions to Participate.").

The Independent Trade Associations and Unions do not cite any authority whatsoever allowing them, as non-participants, to submit briefing in this proceeding. In a futile attempt to manufacture standing, the Major Record Companies cite 37 C.F.R. § 351.1(b)(1)(ii), which provides that "Petitioners with similar interests [in a rate proceeding] may, in lieu of filing individual petitions, file a single petition." The Major Record Companies argue that they are participants in the Webcasting IV proceeding based solely upon the alleged "joint petition filed on their and others' behalf by SoundExchange, whose board of directors includes representatives from both UMG and SME." Major Record Companies' Brief at 1. This argument fails on multiple grounds.

First, the Petition to Participate filed by SoundExchange (the "SoundExchange Petition") could not possibly qualify as a joint petition under the controlling regulations. Those regulations clearly mandate that a joint petition to participate must include, *inter alia*: (1) a list specifically identifying all participants included in the joint petition; and (2) a statement from counsel filing the joint petition, expressly certifying that such counsel or representative has the authority and consent of each of the identified participants to represent them in the rate proceeding. 37 C.F.R. § 351.1(b)(1)(ii). The SoundExchange Petition did not satisfy either of these requirements.

SoundExchange Petition, Docket No. 14-CRB-0001-WR (2016-2020), Jan. 31, 2014.

The Judges did not treat the SoundExchange Petition as a joint petition; as noted above, the Notice of Participants did not include the Major Record Companies, nor any other SoundExchange members (other than GEO Music, which filed its own separate Petition to Participate). Nor did SoundExchange intend for the SoundExchange Petition to be a joint petition covering all of its members. SoundExchange is well versed in the applicable regulations and would have known how to properly file a joint petition if it so intended. Not surprisingly, SoundExchange did not object when the Judges issued the Notice of Participants without including the Major Record Companies or any other of SoundExchange's individual members. Although it submitted a copy of the Major Record Companies' brief with its own brief in response to the Referral, SoundExchange itself tellingly makes no claim that it intended for its Petition to Participate to be a joint petition covering each of its members, as the Major Record Companies allege. The Major Record Companies' attempt to re-write history and manufacture standing based upon a supposed joint petition is wholly unsupported by the facts and must be rejected.

Second, even if SoundExchange's Petition had been a valid joint petition, the Petition would have merely acted to preserve each individual SoundExchange member's right to actively participate in the proceeding, including by filing a Written Direct Statement. None of the Major Record Companies or the Independent Trade Associations and Unions filed written direct statements in this proceeding. Having failed to make these mandatory filings (or otherwise directly participate in the proceeding), they would have defaulted and ceased to be participants. *See* 17 U.S.C. § 803(b)(6)(C)(i) (all participants must file written direct and rebuttal statements by dates certain); 37 C.F.R. § 351.4(a) ("All parties who have filed a petition to participate in the

hearing must file a written direct statement.”).

During the course of the proceeding, SoundExchange expressly took the position that its individual member were not participants, as evidenced by its discovery objections. *See* SoundExchange Responses and Objections to Licensee Participants’ First Set of Requests for Production of Documents, attached as Ex. A hereto, at ¶ 23 (SoundExchange objecting to definition of “Record Company” in Services’ document requests on the ground that it “seeks to impose obligations on the thousands of SoundExchange record company members that are not participants in this proceeding and have not provided a witness in this proceeding . . .”).

SoundExchange’s discovery objection demonstrates that it did not consider individual record companies to be participants merely because they provided witnesses—if it did, then all such companies would be participants and the second portion of the above objection would be redundant. On the other hand, if the Major Record Companies’ argument were correct then every one of SoundExchange’s members would be considered a participant, and thus subject to direct discovery, the requirements of filing written direct and rebuttal statements, and participation in the hearing.

Granting the Major Record Companies and Independent Trade Associations and Unions standing to participate in the briefing of this Referral would set a bad precedent, encouraging any of SoundExchange’s thousands of members (or simply interested parties) who did not actually participate in a proceeding, to inject themselves into that proceeding after it has closed with large volumes of briefing that may introduce arguments or issues that the participants never had the opportunity to address while the proceeding was open. This would, in short, create chaos. Because the Independent Trade Associations and Unions and the Major Record Companies do not have standing to submit briefs regarding the Referral, those briefs must be struck.



## **II. THE MAJOR RECORD COMPANIES' STATUTORY CONSTRUCTION ARGUMENTS ARE ERRONEOUS AND UNSUPPORTED**

### **A. The Willing Buyer/Willing Seller Standard Does Not Contemplate Different Rates for Recordings Owned by Different Record Companies**

The Major Record Companies argue that the “willing buyer/willing seller standard necessarily contemplates the possibility of setting different rates for different kinds of copyright owners, because it directs the Judges to set rates and terms that reflect those that would be found in a hypothetical marketplace characterized by precisely such differentiation.” Major Record Companies’ Brief at 6. In making this argument, the Major Record Companies willfully ignore a key fact: that the Judges’ ultimate task in this proceeding is to perform a fair market valuation of the statutory license, covering the entirety of post-1972 recorded music, not separate valuations for licenses from each of the thousands of individual record companies whose recordings are included in the statutory license. In performing that valuation, the Judges are supposed to consider hypothetical, competitive marketplace negotiations between various record companies and licensees, but in doing so, all prior determinations by the CARPs and Judges have used that analysis to develop one, unitary rate.

The very CARP determination that the Major Record Companies cite in an attempt to support their reading recognizes this key fact and actually undermines the Major Record Companies’ novel reading of the willing buyer/willing seller standard. As the Librarian of Congress recognized in his appellate review of the *Webcasting I* determination, “[b]ecause of the diversity among the buyers and the sellers, the CARP noted that one would expect ‘a range of negotiated rates,’ and *so interpreted the statutory standard as ‘the rates to which, absent special circumstances, most willing buyers and willing sellers would agree’ in a competitive marketplace.*” *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240, 45245-46 (July 8, 2002)

(emphasis added). There would be no need to invoke what *most* willing buyer and willing sellers would agree to in a competitive marketplace if in fact the Judges were permitted to simply replicate the full range of negotiated rates found in a benchmark marketplace. As the Major Record Companies concede, the CARP (and on appeal, the Librarian) set one, uniform rate in that proceeding, irrespective of any differences among record companies. *See* Major Record Companies' Brief at 6. In every willing buyer/willing seller proceeding where a range of rates from benchmark agreements has been considered, those individual benchmarks have been evaluated, adjusted, and blended into one unitary rate. This admitted fact wholly negates the Major Record Companies' claim that the willing buyer/willing seller standard itself necessarily contemplates differentiated rates for different categories of record companies.

**B. The Plural “Rates and Terms” Applies Only to Setting Multiple Rates and Terms for Different *Licenses***

The Major Record Companies argue that the use of the plural—“rates and terms”—in Section 114(f)(2)(A) indicates that Congress intended to grant the Judges authority to establish different rates for recordings owned by different record companies. Major Record Companies' Brief at 6. As set out in more detail in Sirius XM's opening brief (Sirius XM Brief at 8-9), that statutory provision clearly explains why “rates and terms” are plural: “Such rates and terms shall *distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation*” 17 U.S.C. § 114(f)(2)(A) (emphasis added).

In an attempt to salvage this argument, the Major Record Companies next argue that the very same usage of “rates and terms” in Section 114(f)(2)(C), dealing with proceedings for new subscription services, demonstrates that the Judges are permitted to set multiple rates to distinguish between types of copyright owners. Major Record Companies' Brief at 6-7. This argument fails because it is premised on the unsupported, erroneous assumption that Congress

contemplated only a “single” new subscription service could be included in such a rate proceeding. *Id.* Certainly a proceeding for a new general type of subscription service could include various sub-categories of services, which in turn could require different rates. For this reason, Section 114(f)(2)(C) expressly incorporates by reference the procedures of Section 114(f)(2)(A), including the requirement that the Judges set different rates for different types of new subscription services, as applicable in new subscription service proceedings. 17 U.S.C. § 114(f)(2)(C).

**C. Statutory Consideration of Promotion, Substitution, and Relative Roles Provides Further Proof that Congress Contemplated Rate Distinctions Among Licensees, But Not Copyright Owners**

Section 114’s provision that Judges may look to “the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers” means exactly what it says: that Judges may look to differences among *licensees* and the extent to which one service may be more substitutional or promotional than another with regard to *the purchase of records by consumers*. It does *not* state that Judges may look to whether use of a service may be more promotional or substitutive of a *particular record label’s catalog*, nor does the statute distinguish among *types* of “phonorecords”—i.e., whether each recording may be owned by a major or independent label. This argument by the Major Record Companies is unsupported by the statutory text, the related legislative history, and the record evidence in this proceeding. Although the Major Record Companies make several speculative factual assertions about how different types of record companies *might subjectively view* the issues of substitution and promotion (Major Record Companies’ Brief at 7), they do not cite any record evidence that could even possibly support a finding that the actual, empirical substitutional effect of a given licensed service varies based solely upon the identity of the copyright owner of each recording. Nor did SoundExchange ever argue during the proceeding (or in the briefing submitted in connection

with the Referral) that the Services may have a greater or lesser promotional impact based solely upon whether the copyright owner happens to be a major or independent record company.

The Major Record Companies' next argument, that Section 114's requirement that the Judges consider "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public" somehow indicates Congress's intent for the Judges to set different rates based upon differences among copyright owners, is similarly flawed. The language of the statute is clear on its face, and specifically concerns the differences *between copyright owners and licensees*, not differences *among copyright owners*. The Major Record Companies do not cite any legislative history or precedent that would support any change to the plain meaning of the statute.

**D. "Comparable Circumstances" Merely Limits the Benchmark Evidence the Judges May Consider**

Finally, the Major Record Companies argue that because Section 114(f)(2)(B) permits the Judges to "consider the rate and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements," this somehow means that the *end rate* the Judges set may differ by copyright owner. This argument is a *non sequitur*.

The cited language does not address the rate standard employed by the Judges, but is merely an evidentiary limitation on the types of benchmark licenses the Judges may consider. Consistent with long-settled benchmarking practice, only comparable benchmarks may be reliably used to set rates. *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23054, 23058 (Apr. 17, 2013) (finding that the various benchmark agreements submitted by SoundExchange for the Pre-existing Subscription Services rate reflected "the licensing of products and rights separate and

apart from the right to publicly perform sound recordings in the context of this proceeding. The buyers are different from the target PSS market; thus, the key characteristic of a good benchmark—comparability—is not present”); *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding (Final Determination of Rates and Terms)*, 74 Fed. Reg. 4510, 4519 (Jan. 26, 2009) (“Potential benchmarks are confined to a zone of reasonableness that excludes clearly noncomparable marketplace situations.”). That is, to be considered as benchmarks, direct licenses must be both for comparable services and comparable rights. The cited statutory language, with its repeated use of the term “comparable,” does nothing more than acknowledge this fundamental rule of benchmarking.

**CONCLUSION**

For the foregoing reasons, and the reasons set forth in Sirius XM's Opening Brief, 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.

Dated: October 9, 2015

Respectfully submitted,



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# EXHIBIT A

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.

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

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**SOUNDEXCHANGE, INC.'S RESPONSES AND OBJECTIONS TO LICENSEE PARTICIPANTS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

**GENERAL OBJECTIONS**

1. SoundExchange, Inc. (“SoundExchange”) objects to the Requests, including all Definitions and Instructions, to the extent they purport to impose upon SoundExchange requirements that exceed or are inconsistent with 17 U.S.C. § 803(b), 37 C.F.R. § 351.5, and any other applicable rule or order governing this proceeding, including applicable prior precedent.

2. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek documents that are not “directly related” to SoundExchange’s written direct statement. See 17 U.S.C. § 803(b)(6)(C)(v), 37 C.F.R. § 351.5(b).

3. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they are ambiguous, duplicative, and/or vague.

4. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they are oppressive, harassing, overbroad and/or unduly burdensome.



20. SoundExchange reserves any and all objections to the use or admissibility in this or any proceeding of any information, material, documents identified, produced or disclosed in response to the Requests.

21. The responses and objections contained herein are made to the best of SoundExchange's present knowledge, belief and information, and are based on a reasonable and diligent search. SoundExchange reserves the right to amend or supplement its objections and responses based on, among other reasons, its continuing investigation of this matter, further review, or later acquisition of responsive information.

### **OBJECTIONS TO DEFINITIONS**

SoundExchange objects as follows to the Definitions:

22. SoundExchange objects to the definition of "Digital Service" in Definition No. 1 as overbroad because it purports to define the relevant universe of services without limitation to issues that are relevant to this proceeding and in such a manner that would defeat the statutory provisions defining discoverable material. To the extent the Requests purport to impose an obligation to produce documents related to all of the types of services included in the overbroad definition, SoundExchange objects to the definition as purporting to require the production of documents not "directly related" to SoundExchange's written direct statement, and as overbroad, unduly burdensome, oppressive, harassing and not reasonably limited to subject matters at issue in this proceeding.

23. SoundExchange objects to the definition of "Record Company" in Definition No. 6 as overbroad, unduly burdensome, oppressive, harassing and not beyond the scope of permissible discovery in this proceeding, to the extent it seeks to impose obligations on the thousands of SoundExchange record company members that are not participants in this

proceeding and have not provided a witness in this proceeding, and to the extent it defines a record company to include all companies related to it. Subsidiary and/or affiliate recording companies and record labels within Sony Music Entertainment, Universal Music Group, and Warner Music Group are distinct entities and the documents of these distinct entities are not within the custody and/or control of SoundExchange and/or its witnesses.

24. SoundExchange objects to the definition of “Recording Industry Association of America” and “RIAA” in Definition No. 7 because RIAA is not a participant in this proceeding and has not provided a witness in this proceeding. SoundExchange further objects to the definition as overbroad to the extent it refers to affiliated companies, which could be interpreted to refer to hundreds of record companies, and to the extent it purports to include anyone acting on RIAA’s behalf.

25. SoundExchange objects to the definition of “Sony” in Definition No. 8 as overbroad to the extent it purports to impose an obligation to collect documents from an unreasonably wide array of people and entities, including numerous record labels and anyone acting on Sony’s behalf.

26. SoundExchange objects to the definition of “SoundExchange,” “you” and “your” in Definition No. 10 as overbroad, oppressive, harassing, and unduly burdensome to the extent that its reference to “affiliated companies” seeks to impose obligations on the thousands of record companies to whom SoundExchange distributes royalty payments. SoundExchange also objects to the definition as overbroad and vague to the extent it purports to impose obligations on anyone acting on SoundExchange’s behalf.

27. SoundExchange objects to the definition of “SoundExchange Witness” in Definition No. 11 as overbroad and unduly burdensome to the extent it seeks documents from