Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress
Washington, D.C. 20559

In the Matter of		
Determination Of Royalty Rates And Terms For Ephemeral Recordings And Webcasting Digital Performance Of Sound Recordings (Web IV)	**Docket No.**	**14-CRB-0001-WR (2016-2020) (Web IV)**

NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.'S SUPPLEMENTAL BRIEF ADDRESSING SPECIFIC ISSUES RELATED TO THE COPYRIGHT ROYALTY JUDGES' REFERRED NOVEL MATERIAL QUESTION OF SUBSTANTIVE LAW

Pursuant to the October 14, 2015 *Order For Supplemental Briefing Concerning Novel Material Question Of Substantive Law* ("October 14 Order") issued by the Register of Copyrights ("Register"), the National Music Publishers' Association, Inc. ("NMPA") hereby submits a supplemental brief addressing the novel material question of substantive law that the Copyright Royalty Judges ("Judges") referred to the Register in connection with the captioned proceeding, as well as the specific questions related to that referred question raised by the Register in the October 14 Order.

INTRODUCTION

Founded in 1917, NMPA is the largest music publishing trade association in the United States, and the voice of music publishers and their songwriter partners. Its mission is to protect, promote, and advance the interests of music's creators on the legislative, judicial, and regulatory fronts. NMPA was one of the principal participants representing the interests of copyright owners in the 1980, 1987, 1997, 2006, and 2011 rate proceedings under Section 115 of the

Copyright Act, 17 U.S.C. § 115 ("Section 115"), and continues to maintain a significant interest in all matters related to, or that could have an impact on, the Section 115 license.

NMPA is not a participant in the instant Web IV proceeding brought under Sections 114 and 112 of the Copyright Act, 17 U.S.C. §§ 112 and 114. Indeed, the Judges struck NMPA's Petition to Participate in this proceeding.[1] Accordingly, NMPA takes no position on the resolution of the specific question referred by the Judges, which relates to the scope of the Judges' authority to set rates and terms under the Section 114 license. NMPA submits the instant filing because the Register's October 14 Order raised, for the first time, the question of whether the Register's resolution of the novel material issue of substantive law referred by the Judges could also "affect other statutory licenses," including Section 115. *See* October 14 Order at 1-2.

NMPA submits that the scope of the Register's inquiry in connection with the referred novel material question of substantive law should be limited to the Section 114 license and not expanded to implicate other statutory licenses not at issue in the Web IV proceeding pending before the Judges. This approach is correct, both as a matter of law and policy.

First, both the text of the question referred by the Judges, and Section 802(f)(1)(B) of the Copyright Act, limit the scope of the Register's resolution of the question referred by the Judges to the rates and terms acceptable under the Section 114 statutory license, the particular license at issue in the Web IV proceeding. Legislative history also supports this interpretation of Section 802(f)(1) of the Copyright Act. Given these express limitations on the scope of the instant inquiry, and the fact that the record before the Judges does not include any evidentiary submissions from stakeholders with a significant interest in the Section 115 license, the Register

[1] Although NMPA initially filed a Petition to Participate in this proceeding, the Judges subsequently struck it from the record. *See Notice of Further Proceedings*, Docket No. 14-CRB-0001-WR (2016-2020) at 1 (July 1, 2014).

should not expand its analysis of the referred question in a manner that would implicate rates and terms under Section 115.

Second, the objectives underlying Section 115, including the legislative history associated with its promulgation, show that Section 115 is a very different license than Section 114. Because the Section 115 license concerns an entirely different type of royalty, and an entirely different group of stakeholders, it would be inappropriate for the Register to effect a legal or policy change in connection with the instant Section 114 rate proceeding—assuming such change would even be warranted under the language of Section 114—that could implicate rates and terms under the Section 115 license. Accordingly, the Register should specifically limit the scope of its analysis on the referred question to the Section 114 license. Moreover, any decision issued by the Register should state, affirmatively, that it has no precedential impact on any later proceedings involving the Section 115 license.

ARGUMENT

I. The Register's Resolution Of Referred Novel Material Questions Of Substantive Law Should Not Be Expanded To Licenses Not At Issue In The Proceeding Before The Judges.

On September 14, 2015, the Judges referred the following novel question to the Judges for resolution:

> Does Section 114 of the Act (or any other applicable provision of the Act) prohibit the Judges from setting rates or 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 14 Order at 1. As the text of the question makes clear, the Judges specifically limited the scope of their referred novel material question of substantive law to the Section 114 license, referencing both the statutory provisions of Section 114 and the evidentiary record before the Judges in the Web IV proceeding, which is limited to the determination of appropriate rates and

terms for webcasters under the Section 114 and 112 licenses. The limited scope of the referred question is consistent with Section 802(f)(1)(B) of the Copyright Act, which requires the Judges to refer novel questions of law to the Register concerning the proper interpretation of provisions of the Copyright Act "that are the subject of the proceeding" before the Judges, and contemplates only reasonable opportunities for comment on the request "by participants in the proceeding." *See* 17 U.S.C. § 801(f)(1)(B). It is also consistent with the Copyright Act's mandate that the Judges include the Register's decision on a referred novel question of law in the record that accompanies their final determination in the pending proceeding that gave rise to the referred novel question. *See id.*; *see also* H.R. Rep. 108-409 at 118 (2004) (recognizing Congress' intent that all referred questions of law, including novel questions "will remain as part of the proceeding's record").

Legislative history makes it clear that Congress intended that the Copyright Office bear the responsibility for creating and implementing copyright policy, and that determinations of the Judges were to be confined to the particular case or controversy before them in a proceeding. Indeed, Congress created the referral provisions in Section 802(f) of the Copyright Act as a means to effectuate this division of responsibility. *See* H.R. Rep. 108-409 at 26 ("This section was intended to help effectuate the Committee's goal that the Copyright Office retain the responsibility for creating and implementing copyright policy, while the CRJs will retain sole responsibility for making factual and legal determinations regarding matters before them in a proceeding.").

Given the limited scope of the pending Web IV proceeding, and the fact that no evidentiary record has been presented by stakeholders with a significant interest in the Section 115 license, NMPA respectfully requests that the Register expressly limit its decision on the

referred question to the Section 114 license. Any analysis of rates and terms applicable to the Section 115 license should be expressly reserved to proceedings addressing that license, where all Section 115 stakeholders are afforded an adequate opportunity to not only brief the matter, but also present evidence on the rates and terms appropriate for Section 115. Accordingly, NMPA respectfully requests that the Register confine its analysis of the referred question to the rates and terms appropriate under Section 114, and include specific language in its decision stating that its opinion has no precedential impact on any future proceedings related to Section 115.

II. The Section 115 License Implicates Different Policy Concerns And Different Stakeholders Than The Section 114 License.

The Section 115 compulsory license was introduced in 1909 to prevent certain copyright users from purportedly monopolizing the music industry by acquiring exclusive rights for the reproduction of musical works and to guarantee "access to copyright music" to all copyright users while ensuring that music publishers and songwriters receive an appropriate royalty. *See* Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords: Rates and Adjustments of Rates, 46 Fed. Reg. 10466, 10483 (Feb. 3, 1981) (the "1981 Mechanical Rate Determination"); *see also* Mechanical & Digital Phonorecord Delivery Rate Adjustment Proceeding, Docket No. RF 2006-1 (Oct. 16, 2006), 71 Fed. Reg. 64303, 64306 (the "Ringtones Opinion"). As the 1981 Mechanical Rate Determination explains, the Section 115 license was intended to compensate individual copyright owners for the use of their works on a per-unit basis:

> The legislative history of the Act makes clear that Section 115 of the Act contemplates the compulsory use of an individual song, by an individual record manufacturer, after voluntary negotiation with an individual copyright owner has failed. Further, in exchange for that compulsory use, the Act contemplates a per-unit rate of

> compensation payable to the copyright owner on an individual basis by a copyright user.

1981 Mechanical Rate Determination at 10479. A significant majority of Section 115 license rates are calculated on a per-unit basis.[2] Thus, in a proceeding to set Section 115 rates and terms, the critical question is the return to an individual songwriter for an individual use of a musical work. NMPA represents thousands of individual songwriters and music publishers, the copyright owner stakeholders with a significant interest in Section 115. Section 115 rates must be set at a reasonable royalty rate, calculated to fulfill the statutory objectives set forth in Section 801(b) of the Copyright Act. *See id.* ("application of Section 115 is limited by the market deficiency which justifies its existence").

In contrast, the Section 114 license is designed to compensate copyright owners of sound recordings for the public performances of those sound recordings by webcasters over the Internet. Section 114 requires the Judges to establish rates for the license based on "the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). The Section 114 license involves a different group of stakeholders, requires applications of different legal standards, and was designed to address very different policy objectives than the Section 115 license. Moreover, Section 115 stakeholders, like NMPA, have not been permitted to participate in the instant proceeding or present evidentiary submissions to the Judges. In light of the foregoing, it would be inappropriate for the Register (or the Judges) to effect a legal or policy change in connection with the instant Section

[2] A minority portion of the Section 115 rates covering interactive streaming is calculated based on a percentage of service revenue. *See* 37 C.F.R. §385.12. This rate was adopted by the Judges following voluntary settlements among the parties in past Section 115 rate proceedings. *See* 73 Fed. Reg. 57033, 57037 (October 1, 2008) (Proposed Rule); 74 Fed. Reg. 4510 (January 26, 2009) (Final Rule); *see also* 77 Fed. Reg. 29256 (May 17, 2012) (Proposed Rule); 78 Fed. Reg. 67938 (November 13, 2013) (Final Rule).

114 rate proceeding that could implicate rates and terms under the Section 115 license.[3] Accordingly, the Register should specifically limit the scope of its analysis on the referred question to the Section 114 license, and include specific language in its decision stating that its analysis has no impact on, or precedential value for, future proceedings related to Section 115.

CONCLUSION

For all of the foregoing reasons, the Register should treat the novel material question of substantive law referred by the Judges narrowly, expressly limiting their findings to an interpretation of Section 114 of the Copyright Act. NMPA respectfully requests that any decision issued by the Register on this matter include language expressly limiting its application to the specific statutory licenses for webcasters at issue in the pending proceeding, and state clearly that the decision will have no precedential impact on any other statutory license, including Section 115.

Respectfully submitted,

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[3] Since the Judges denied NMPA the opportunity to participate in this proceeding, any expansion of the proceeding at this late date to include consideration of Section 115 raises significant due process concerns for NMPA. Should the Register issue a decision in relation to the Judges' novel question referral that has precedential impact on future proceedings related to Section 115, NMPA would have grounds to seek reconsideration of the Judges' order striking its Petition to Participate in the instant proceeding, and ask that the record be reopened to accommodate evidentiary submissions from NMPA.