

**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 RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (WEB IV)**

**DOCKET NO. 14-CRB-0001-WR
(2016-2020) (Web IV)**

**SOUNDEXCHANGE, INC.’S SUPPLEMENTAL BRIEFING REGARDING NOVEL
QUESTION OF LAW REFERRED TO THE REGISTER**

SoundExchange, Inc. (“SoundExchange”) respectfully submits this brief in response to the Register of Copyrights’ October 14, 2015, Order for Supplemental Briefing Concerning Novel Material Question of Substantive Law regarding the Judges’ September 11, 2015, Order Referring Novel Material Question of Law to the Register of Copyrights.

SoundExchange continues to take no position on the legal permissibility of licensor segmentation under 17 U.S.C. § 114. Some of SoundExchange’s constituent members have expressed different views on that legal question, as reflected in the exhibits to SoundExchange’s prior submissions on this question, and attached hereto as Exhibits 1 and 2.

The briefs from the services, however, have mistaken these differing views for a change in SoundExchange’s position in the proceeding concerning its rate proposal. SoundExchange’s position has not changed. SoundExchange submitted its original rate proposal in this proceeding on October 8, 2014, alongside its written direct case. SoundExchange’s only amended rate proposal was submitted on February 24, 2015, one day after SoundExchange submitted its written rebuttal case. The rate proposal was amended simply to account for SoundExchange’s

proposed and now-adopted settlement with the noncommercial entities covered by its agreement with the Corporation for Public Broadcasting. There have been no further amendments to SoundExchange's rate proposal. Any suggestion to the contrary would be misleading and would confuse the record before the Register and the Judges.

In the proceeding, SoundExchange identified, based on the best marketplace evidence, a single royalty rate for all commercial licensees utilizing the statutory license. The evidence presented by SoundExchange included extensive analysis of over 80 real-world agreements between pairs of licensors and licensees, which encompassed and adjusted for a wide range of willing-seller copyright owners and willing-buyer licensees operating in a marketplace unencumbered by the significant shadow of the statutory license. This evidence accounted for the entirety of the marketplace, rather than ignoring commercially significant copyright holders. The cases presented by the services, by contrast, focused on narrow, unrepresentative agreements made between services and a "sliver" of the universe of copyright holders.¹

In an attempt to skew the record toward their preferred evidence in this proceeding, at least two of the services, iHeartMedia and Sirius XM, have suggested, in briefing the *legal* question before the Register, that the statutory license allows the Judges to exclude or ignore benchmark evidence from some licensors—here, the majors—on the basis of those licensors' alleged "market power."² This is wrong.

It would be clearly erroneous to ignore the major labels' marketplace evidence because the major labels, "by virtue of the depth and breadth of their music catalogues, make up a *critical*

¹ *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23054, 23063 (Apr. 17, 2013) (*SDARS II*).

² Sirius XM Initial Br. at 11-16; iHeartMedia Opp. Br. at 5-6.

portion of the sound recording market.”³ The services’ preferred rate-setting approach—which would altogether disregard the rates negotiated in this critical portion of the market—is impermissible. If there are isolated agreements with specific statutory services that diverge from the prevailing rates—such as the ones that the services contend the Judges should *exclusively* rely upon—a statutory rate derived from only this subset of the market could not fairly be considered a “marketplace rate.”⁴ Second, to the extent that the services make allegations regarding the majors’ “disproportionate market power” in their briefing of this referred question to try to prop up their benchmarks, these attempts must fail and should be ignored.⁵ In the proceeding, SoundExchange demonstrated that the services’ “market power” arguments were both legally and factually without foundation.⁶

Thus, it is no surprise that the record evidence showed conclusively that the services’ proffered benchmark licenses covered only a very small minority of the performances on those services—even when looking only at the share of performances of independently-owned repertoire.⁷ A “sliver of the universe” of rights cannot be a reliable foundation from which to derive a market-wide rate.⁸ Tossing around market power allegations cannot disguise the plain fact that the services’ benchmarks are outliers that do not provide a reasonable basis for setting

³ *SDARS II*, 78 Fed. Reg. at 23063 (emphasis added).

⁴ Order at 5, *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, No. 2000-9 CARP DTRA 1&2 (Oct. 18, 2002) (*Web I*); *Web I Librarian’s Decision*, 67 Fed. Reg. 45240, 45254 (July 8, 2002) (intent of statutory license is “to set a rate at fair market value”).

⁵ Sirius XM Initial Br. at 16; iHeartMedia Opp. Br. at 6.

⁶ See, e.g., SX COL ¶¶ 21-38; SX Reply COL ¶¶ 4-48; SX PFOF ¶¶ 442-486; SX Reply PFOF ¶¶ 255-303.

⁷ See, e.g., SX PFOF ¶ 507; SX Reply PFOF ¶ 753.

⁸ *SDARS II*, 78 Fed. Reg. at 23063.

statutory rates for anyone. These attempts to distort the evidence presented at the proceeding in response to a referral of a legal question presented to the Register should be given no weight.

Dated: October 26, 2015

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EXHIBIT 1

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

In the Matter of

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

Docket No. 14-CRB-0001-WR

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

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This is a Supplemental Memorandum by interested parties, the American Association of Independent Music (“A2IM”), the American Federation of Musicians of the United States and Canada (“AFM”) and the Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”) (collectively, “Interested Independent Record Label and Artists’ Union Parties”), as individual constituents of SoundExchange, in response to the Register’s October 14, 2015 Order for Supplemental Briefing Concerning Novel Material Question of Substantive Law (the “Register’s Oct. 14, 2015 Order”).

A. Standing

As a threshold matter, some parties to the proceeding have raised an issue about the standing of the Interested Independent Record Label and Artists’ Union Parties to have submitted an Initial Memorandum of Law (Oct. 2, 2015, Ex. A hereto) and a Response Memorandum of Law (Oct. 9, 2015, Ex. B hereto) in response to the CRJs’ September 11, 2015 Referral Order. While the undersigned believe they have such standing (*see* Ex. B, at 1 fn. 1), and the Copyright Office has indeed seemed to have accepted the memoranda by virtue of its inclusion of the memoranda and publication of them on the Webcasting IV website, out of an abundance of caution (and since the Register made clear in the Register’s Oct. 14, 2015 Order that interested parties who were not participants can submit responses to the Referral Order), those memoranda are attached hereto as Exhibits A and B and incorporated herein by reference.

B. Response to The Three Specific Questions From The Register

- 1. Is there any evidence in the legislative history of the 1909 Copyright Act, the 1976 Copyright Act, the Digital Performance Rights in Sound Recordings Act of 1995, the 1998 Digital Millennium Copyright Act, the Copyright Royalty and Distribution Reform Act of 2004, or any other legislation, of an intent by Congress to allow or disallow the establishment of rates and/or terms that distinguish among different types or categories of licensors?**

Interested Independent Record Label and Artists' Union Parties are not aware of any legislative history in any of the foregoing acts that speaks directly to this issue. Nor are they aware of any submissions at hearings relating to the passage of those acts that suggested differential rates by licensor should be considered, so that Congress would have even contemplated such a licensing regime. The fact that apparently this issue has not even been considered by Congress is a further indication that Congress did not authorize differential rates in Copyright Office rate proceedings based on the identity or categorization of licensor. Since compulsory statutory licenses are an exception to the freedom to license as a copyright owner sees fit, if Congress intended to include such categorization within the licensing exceptions, it would have spoken up clearly on the issue.

- 2. How might the Register's decision affect other statutory licenses, e.g., the statutory license in section 115 for the making and distribution of phonorecords of nondramatic musical works? How, if at all, should any such broader implications factor into the Register's analysis?**

A finding that there could be differential rates by licensor in Section 114 rate proceedings would impact all Copyright Office rate proceedings. Moreover, the practical reality that ownership of sound recordings and musical compositions is fluid needs to be emphasized. As set forth in the Interested Independent Record Label and Artists' Union Parties' Initial Memorandum (Ex. A, at 9-10, and at 9 fn. 2), as well as succinctly explained in Pandora Media's Initial Brief, October 2, 2015, at 5, there are many practical problems with implementing rates

that make a distinction based on the identity or categorization of licensor. Each of the compulsory or statutory licensing regimes would bring their own unique set of problems that current infrastructures are not equipped to address on a current basis. And, payment to artists and owners would be delayed even further than it is now, which is largely already unacceptable.

3. Are there administrative law or constitutional considerations (including rational basis or due process concerns) that would affect or should guide the Judges' ability to adopt rates and/or terms for the compensation of copyright owners, featured recording artists, and others for the use of sound recordings based on the identity of the licensor?

As set forth fully in the Interested Independent Record Label and Artists' Union Parties' Initial Memorandum (Ex. A, at 14-23), incorporated fully herein by reference, there are both administrative law and constitutional concerns that mandate that differential rates not be considered in the present Webcasting IV proceeding. Putting aside the merits of the question (*i.e.*, whether in Webcasting V, such differential rates could be considered), in the current proceeding, evidence is closed and no party proposed differential rates. It would thus be fundamentally unfair for the CRJs to consider such rates.

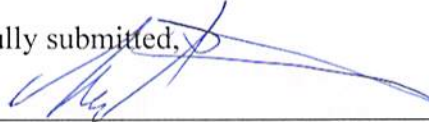
Without repeating the cited cases in the Initial Memorandum, at a minimum, evidence would have to be re-opened, as it would be insufficient to merely permit additional argument without the ability to both introduce new evidence and further cross examine witnesses who have already testified. There is simply insufficient time to do so before a decision must be rendered pursuant to the statute. Further, the enormous resources that would be required to re-open the proceedings have not been budgeted for by the interested parties, especially small and medium sized businesses and artists. When this burden is balanced against the lack of a statutory imperative (*see* Initial Memorandum at 20-21), there simply cannot be any justification for applying differential rates by licensor in the Webcasting IV proceeding.

CONCLUSION

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

DATED: October 26, 2015

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Docket No. 14-CRB-0001-WR

CERTIFICATE OF SERVICE

I, David Leichtman, hereby certify that a copy of the foregoing **SUPPLEMENTAL MEMORANDUM OF LAW OF THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM), THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM), AND SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA)** has been served electronically by agreement of the parties on this 26th day of October, 2015, with hard copy sent by first class mail upon the following parties:

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EXHIBIT A

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

In the Matter of

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

Docket No. 14-CRB-0001-WR

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

The American Association of Independent Music (A2IM), the American Federation of Musicians of the United States and Canada (“AFM”) and the Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”) (collectively, “Interested Independent Record Label and Artists’ Union Parties”), as individual constituents of SoundExchange, jointly file this brief in response to the referral dated September 11, 2015 by the Copyright Office Judges’ (“CRJs”) to the Copyright Register of a “novel material question of law” concerning whether the CRJs can set more than one rate for different categories of licensors in the pending Webcasting IV proceeding to set rates for compulsory licenses pursuant to 17 U.S. Code Section 114(f)(2)(B) for so-called non-interactive services for the term 2016-2020 (the “Referral Order”). The answer is: No.

The Interests of the Parties

A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of over 350 independently owned U.S. music labels. A2IM's members are small and medium-sized music enterprises (SMEs). A2IM's membership includes music labels of varying sizes within the SME definition and varying staffing levels across the United States, from Hawaii to Indiana to Florida, representing musical genres as diverse as its membership. Independent doesn't mean just small artists. For example, A2IM member labels have issued music releases by artists including Taylor Swift, Mumford & Sons, the Lumineers, Vampire Weekend, Adele, Paul McCartney and many others during the past several years. Some of these artists' tracks are distributed by the major recording companies (Universal, Warner and Sony), but it is independent labels who are the owners of the sound recordings and who retain the exclusive right, as label, to license the recordings and collect revenues stemming from non-interactive digital performances in the United States.

SAG-AFTRA is a national labor union representing more than 165,000 recording artists and vocalists, as well as actors, announcers, broadcasters, and other media professionals. SAG-AFTRA exists to secure the strongest protection for media artists in sound recordings, motion pictures, television, and most other forms of media, including all forms of digital media.

AFM is the largest union in the world representing professional musicians, with over 70,000 members in the United States and Canada. Musicians represented by the AFM record music for sound recordings, movie sound tracks, commercials and television and radio programming, as both featured and session musicians. AFM works to protect the economic interests of musicians and to give them a voice in cultural and policy debates that affect them at home and abroad.

Together, SAG-AFTRA and AFM (“Artists’ Unions”) represent the sound recording performers – including featured artists, session vocalists and session musicians (“Artists”) – whose creative work brings American music to life. Without their recorded performances, there would be no sound recording industry, no digital musical services and no radio industry as we know it. The talent, drive and output of American Artists are at the heart of creative works of the greatest cultural and economic value to our country. In recognition of that fact, and as a result of the advocacy of the Artists’ Unions, Section 114 provides that the Artists shall receive 50% of the compulsory statutory license proceeds, with 45% of those proceeds paid to featured artists directly by SoundExchange, and 5% paid to non-featured musicians and vocalists through the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund, the independent administrator for the non-featured artist share.

The Importance Of A Level Playing Field In The Section 114(f)(2)(B) License To The Interested Independent Record Label and Artists’ Union Parties

The Section 114(f)(2)(B) compulsory statutory license, is the appropriate mechanism to ensure fair treatment of creators/investors and their Artists, with rate setting by the CRJs after a fair hearing of all economic factors. As previously determined by the Copyright Register in 1998 (as discussed more fully in Part I.C below), the statutory license should compensate each copyright holder (and the associated Artist share) equally for each performance of a recording.

The identity of the creator of the sound performance or the economic power of the investor in the sound recording should be irrelevant to rate setting. The only differentiation in pay should be based upon consumer demand for the music, *i.e.*, according to the number of streams that occur for each recording, and not according to who owns or controls the applicable rights. That is the basis of the compulsory statutory license; each individual jazz recording, blues recording, pop recording or classical recording should all have the same basic single usage value.

Independent record labels and Artists, who are individuals and small and medium sized businesses, want a statutory license that places all sound recording owners and their Artists on a level playing field. However, statutory price-differentiation based on category of licensors could arbitrarily tip the scales in favor of some participants over others, and it would create a number of unintended and expensive issues for all market participants, especially when there is no market remedy available to any licensor who is arbitrarily not granted a hypothetical “top rate” by the CRJs. This would be a significant additional distortion to the marketplace, dramatically amplifying the effect of the artificial statutory license on the market itself. It would also multiply the number of parties in rate proceedings and create incentives for the interested parties to increase their spending within those proceedings, creating the very inefficiency that the statute intended to ameliorate. Moreover, it would also arbitrarily favor those participants who are able to spend the most to make their case before the CRJs. Furthermore, if any rights holders believe they can achieve a different rate if left to their own devices in a market without a statutory rate, as discussed below, that is accommodated already by the statutory scheme via Section 114(f)(3).

Thus, the legislature could not have intended that government (as opposed to the market itself) would decide who the “winners” and “losers” are based on just a selection of cherry-picked market evidence submitted to the CRJs. If differentiating rates based on licensor was actually intended, and putting aside for the moment the fact that the statutory licensing system brings with it significant efficiencies that benefit all licensors and services, then one could argue that there would be no need for a statutory license at all. If two rates are better than one, then surely three are better than two, four are better than three, and so on. Why stop at anything less than the actual free market itself?

Nevertheless, Congress has elected to regulate licenses and maintain a compulsory

license scheme that, despite compelling copyright owners to license their works without their consent, provides a trade-off in the form of efficiencies for all parties, including lower transactional and administrative costs. Furthermore, the recent United States Copyright Office's report "Copyright and the Music Marketplace" (hereafter, "Copyright Office Music Industry Report") describes the current system of Section 112 and 114 licenses as "one of the few things that seems to be working reasonably well in our licensing system" and further states that the "licensing framework itself is generally well regarded." See Copyright Office Music Industry Report, <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>, at 6-7 and 114. If the sound recording industry is to be regulated in this way, the playing field for all owners must, at least, be level.

ARGUMENT

The CRJs cannot permissibly set a rate under 114(f)(2)(B) that differentiates among copyright owners for a variety of structural legal, practical and historical reasons, as set forth below. Moreover, setting differential rates in the current proceeding, which is now closed, would violate due process and the strictures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 501 *et seq.*

I. Section 114(f)(2)(B) Does Not Permit Setting Different Rates For Different Copyright Owners

A. The Structure of Section 114(f)(2)(B), (C) and (3) Dictate The Legal Conclusion That Congress Did Not Intend The CRJs To Set Differential Rates Based On The Identity Of The Licensor

As a threshold matter, the relevant statute needs to be considered. The first part of Section 114(f)(2)(B) provides, in pertinent part, that:

The schedule of reasonable rates and terms determined by the Copyright Royalty Judges *shall*, subject to paragraph (3), *be*

binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution¹ Act of 2004, or such other period as the parties may agree. Such rates and terms ***shall distinguish among the different types of eligible nonsubscription transmission services*** then in operation and shall include a minimum fee for each such type of service, ***such differences to be based on criteria including***, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.

17 U.S.C. §114(f)(2)(B) (emphasis added).

This first part of the relevant statutory provision makes clear that the CRJs may set different rates based on the type of service being licensed, but makes no distinction as between copyright holders. As such, Congress clearly was focused on differences in music use by different types of services, not on differences in the identity of copyright owners when it passed, and later amended, Section 114(f)(2).

Additionally, that Congress dictated that the rates “shall. . . be binding on *all* copyright owners,” indicates that “all” can only mean “all” equally, unless some further refinement is required based on the remainder of the statute. But the statute only provides for such further refinement with respect to licensees -- not with respect to licensors.

The next part of Section 114(f)(2)(B) also structurally supports just a single rate for all copyright owners:

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. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties, including--

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) ***the relative roles of the copyright owner and the transmitting entity*** in the copyrighted work and the service made available to the public with respect to ***relative*** creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. § 114(f)(2)(B) (emphasis added).

It is evident from this text that the phraseology of the term “relative roles” and “relative” in (ii) refers only to relative roles comparing owners and users, not relative investments and risks among owners.

Following this, Section 114(f)(2) adds sub-section (C), which again makes clear that the only appropriate distinctions to be made are among users, not owners:

(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service ***indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational***, for the purpose of determining reasonable terms and rates of royalty payments ***with respect to such new type of service*** for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for eligible nonsubscription services and new subscription services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

17 U.S.C. § 114(f)(2)(C) (emphasis added).

Finally, Section 114(f)(3) makes clear that to the extent individual copyright owners have the ability to directly license, they may do so and thus not be bound by the statutory rate:

License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more

entities performing sound recordings shall be given effect in lieu of any decision of the Librarian of Congress or determination by the Copyright Royalty Judges.

17 U.S.C. § 114(f)(3).

Accordingly, Section 114(f)(3) provides for a structural “off ramp” for those copyright owners who do not wish to adhere to the statutory rate and have the ability to insist on different rates or terms. While the statutory rate will, in practice, often operate as a ceiling, other economic terms can be added and services altered such that owners can offer additional value to services that result in rates that differ from the statutory rate.

Well-worn maxims of statutory construction, including the maxims of *noscitur a sociis*, *ejusdem generis*, and *casus omissus*, support only a reading that the CRJs may not differentiate between copyright owners in setting statutory compulsory license rates under Section 114(f)(2)(B).

First, the doctrine of *noscitur a sociis*, provides that words must be construed in conjunction with the other words and phrases used in the text of a statute. Translated as “words must be construed by the company that they keep,” it is evident that where Congress intended the CRJs to make distinctions between things in Section 114(f)(2)(B) proceedings, it was only with respect to differences in the services that use music, and there was no intent to make distinctions among owners.

Next, the maxim of *ejusdem generis* also dictates the same conclusion. Where a statute describes things of a particular class or kind accompanied by words of a generic character, the generic words will usually be limited to things of a kindred nature with those particularly enumerated, unless there is something in the context of the statute to the contrary. Here, again, the list of considerations for the CRJs to consider all point to making distinctions between users,

but no language points to distinctions among owners. Under this doctrine, then, the CRJs should not reach to make distinctions among owners.¹

Finally, the canon of *casus omissus pro omisso habendus est*. also applies here. This maxim provides that a person, object, or thing omitted from an enumeration in a statute must be held to have been omitted intentionally. Here, the omission of any stated basis to distinguish rates among owners evidences Congress' intent that the CRJs not do so.

B. Practical Issues Also Compel The Conclusion That Congress Did Not Intend To Permit Differential Rates Based On Ownership

There are also a number of practical issues that dictate a single statutory rate. For example, a service that performs a recording is constant, whereas the entity or person who owns or controls rights of any particular recording can be quite fluid and historically quite hard to keep track of, as ownership and distribution rights change over time.² And, licensees cannot necessarily distinguish between ownership and distribution rights, so, as discussed above, where some labels or persons or entities, including the major-owned distribution companies, distribute copyrighted sound recordings owned or controlled by other labels or persons, the licensee (or the collection agency) usually does not have information readily available and sufficient to make

¹ In addition, the doctrine of *expression unius est exclusio alterius* may apply here. This maxim stands for the proposition that the express mention of one person, thing, or consequence implies the exclusion of all others. Where a statute is expressly limited to certain matters, it may not, by interpretation or construction, be extended to other matters. This rule proceeds from the premise that the legislature would not have made specified enumerations in a statute had the intention been not to restrict its meaning and to confine its terms to those expressly mentioned.

² There is simply no effective way that the Interested Independent Record Label and Artists' Union Parties are aware of for licensees or the collection agent to identify recordings by the "nature of the licensor." Users rarely even report ISRC numbers; and they need SoundExchange's assistance in administering the handful of direct licenses that have been done. The Section 114 system assumes that licensees don't need to worry about determining who owns what, and by and large they have no way to do so.

that distinction.

When the statute was authored, it thus made sense that there was an intention only to differentiate based on the type of service offered by the licensee and not based on some vague characterization of the licensor, which after all, might vary during the term of the five year license. Accordingly, setting differential rates within a licensing system that lacks the tools necessary to distinguish promptly which label, entity or person controls which rights, would add additional levels of complexity to the overall licensing system. This would create significantly higher administrative costs for all parties, contrary to the intention of Congress.

Moreover, differentiation by licensor will only further distort the market. As a regulatory matter, the statutory license compels property rights owners involuntarily to forego the injunction they would otherwise be entitled to if the user did not agree to market place rates and terms. The statutory license thus already introduces a significant distortion in the market. If the CRJs set different rates for different licensors, that will only create a new dynamic, in which certain labels and their artists are advantaged over others.

By way of one example how such a result could occur, there likely would be an unintended effect of creating an incentive for the services to favor content that is cheaper to them, not necessarily rewarding those who are granted a higher rate. So if there was a higher rate for some owners, those owners might not even want a higher statutory rate because the servicer might then play more streams of a repertoire of a competitor that was granted a lower rate. This could potentially reduce the revenue that a label could earn from its copyrights, even with a higher statutory rate. There is also the risk that differential rates might create a secondary market, which would incentivize some rights holders stuck with lower rates to enter into distribution agreements with other rights holders who were granted a higher rate by the CRJs. It clearly could

not have been the intent of Congress, when establishing the statutory license, to allow for the licensing system to arbitrarily grant some companies a self-perpetuating advantage over other companies and invite gaming the system in this way.

C. Historical Rate Setting Precedent Compels The Conclusion That Congress Did Not Intend To Permit Differential Rates By Categories Of Licensors

Finally, there is a set of settled expectations in rate proceedings that rates not be distinguished based on the identity of the licensor. First, in each of the four Webcasting proceedings, including the present Webcasting IV proceeding, there have been multiple users who submitted proposals but, with limited exceptions not relevant here, just one principal representative of the copyright owners. In all cases, no party proposed rates differentiated by category of sound recording owner.³

Indeed, the Interested Independent Record Label and Artists' Union Parties also are not aware of *any* rate proceeding presided over by the CRJs or its predecessors appointed pursuant to Chapter 8 of the Copyright Act (*see* 17 U.S.C. § 801(b)(1)-(2)), under any of Sections 111, 112, 114, 115, 116, 118, 119, or 1004 where a distinction was made as between owners of the same copyright right.

This settled expectation has not been challenged in the current proceeding. No party has

³ *See* Docket No. 2000–9 CARP DTRA 1&2, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings (“**Webcasting I**”), 67 Fed. Reg. 45240, at 45240-42 (describing parties and rate proposed) (July 8, 2002); Docket No. 2005–1 CRB DTRA, Digital Performance Right in Sound Recordings and Ephemeral Recordings (“**Webcasting II**”), 72 Fed. Reg. 24084, at 24084 and 24088-90 (describing parties and rate proposed) (May 1, 2007); Docket No. 2009–1 CRB Webcasting III, Digital Performance Right in Sound Recordings and Ephemeral Recordings (“**Webcasting III**”), 76 Fed. Reg. 13026, at 13026-27 (describing parties and rate proposed) (March 9, 2011); *id.*, 79 Fed. Reg. 23102, at 23106 (“**Webcasting III, Determination After Remand**”) (Apr. 25, 2014) (CRJs expressly stating, in referencing an expert’s testimony, that the expert “properly” identified the “willing sellers” as the “the several record companies.”); Docket No. 14-CRB-0001-WR, Digital Performance Right in Sound Recordings and Ephemeral Recordings, Notice of Participants and Case Scheduling Order (“**Webcasting IV**”) (Feb. 9, 2014).

ever suggested that different owners should receive different rates. In fact, the opposite is true. Rather, the economists for both the services and the owners, to the extent their work is not redacted, all appear to have taken into account differing marketplace rates in arriving at the blended rates reflected in their proposals.

Indeed, in the first proceeding under the Digital Performance Right in Sound Recordings Act of 1995, under the predecessor to the current version of Section 114(f) for then extant digital services, the Copyright Register made a specific finding on this point:⁴

2. Value of an individual performance of a sound recording.

The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the ‘blanket license’ for the right to perform the sound recording, without once considering *the value of the individual performance*—a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, *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*

⁴ The rates at issue in this proceeding involved three services, and consistent with all of the Webcasting proceedings, there was a single representative of all sound recording owners, in this case, the RIAA.

*must be afforded equal value.*⁵

Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added); *see also id.*, at 25414, Section 260.2(d): “During any given payment period, the value of each performance of each digital sound recording shall be the same.”). The recent Copyright Office Music Industry Report also repeats this point. *See* Copyright Office Music Industry Report, at 114 (citing A2IM’s May 23, 2014 comments, at 3); *see also id.* at 144 (“In the Office’s view, there is no policy justification to demand that music creators subsidize those who seek to profit from their works.”).

Although Section 114(f)(2) has been amended since 1998, the structural considerations considered in 1998 have not been altered. There is no reason, based on the current record, to alter this conclusion now. Indeed, as discussed in the next section, to do so would be unfair and would violate due process, and even more so because the Webcasting IV proceeding is now closed.

II. Even Assuming, *Arguendo*, Different Rates Were Permitted, The Copyright Office Cannot Apply Them To This Webcasting IV Proceeding, Which Is Closed

It bears repeating that no party to the Webcasting IV proceeding has advocated for or even suggested it would be appropriate for the CRJs to distinguish rates based on the identity of

⁵ For completeness, the Register added:

This determination does not alter the statutory provision that specifies how the copyright owner of the right to publicly perform the sound recording must allocate the statutory fees among the recording artists. See 17 U.S.C. 114(f)(2).

It is clear from context that the Register meant to refer to the then extant version of 114(g) rather than 114(f)(2).

the owners. Accordingly, the independent labels and Artists were satisfied that SoundExchange, acting through a single law firm, could represent all copyright owners and interested Artists equally in the proceeding, and there were no conflicts among the constituents of SoundExchange.

The selection by the parties interested in the proceeds of the Section 114 license of a single representative makes sense because they relied upon the prior history, discussed above, whereby there has never been a rate proceeding that made a distinction among the sound recording owners or owners of the same right and the Register declared that the value of each performance of each digital sound recording shall be the same. It is too late to change that standard now since the Webcasting IV proceeding is closed.

A. The Due Process Standard Under The Constitution and The APA

Due process under the United States Constitution and the Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing “shall be timely informed of ... (the) law asserted.” 5 U.S.C. § 554(b)(3). Courts have uniformly held that for an agency to meet this obligation where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the interested party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard.

In addition, adoption of a new rule here would significantly alter the burden of proof in the Webcasting IV proceeding (by requiring evidence from additional parties and access to a heavily redacted record that A2IM members and Artists do not currently have), which would be a violation of 5 U.S.C. § 556.

Numerous due process decisions in other agency adjudication processes bear this out. For example, in other intellectual property agency adjudicatory proceedings such as those in the patent office, the APA’s requirement that the substantive rules not be changed midstream have

been held to apply.

Most recently, in *Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co.*, Civ. No. 2014-1466, 2015 U.S. App. LEXIS 14826, *7 (Fed. Cir. Aug. 24, 2015), the Federal Circuit held that 5 U.S.C. § 554(b)(3) requires that “[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted”; that § 554(c) requires that agencies give “all interested parties opportunity for . . . the submission and consideration of facts [and] arguments . . . [and] hearing and decision on notice”; and § 556(d) “entitle[s]” an interested party “to submit rebuttal evidence.” Indeed, the *Progressive* court made very clear that § 554(b)(3) means that “***an agency may not change theories in midstream*** without giving respondents reasonable notice of the change” and “the opportunity to present argument under the new theory.” *Id.*, at *7 (emphasis added) (citing *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968)). See also *In re Biedermann*, 733 F.3d 329, 337 (Fed. Cir. 2013) (where PTAB, an adjudicatory body adopted different reasons to support a new ground of rejection of certain patent claims, the APA required the PTO “to provide prior notice to the applicant of all ‘matters of fact and law asserted’ prior to an appeal hearing before the Board,”; finding that failure to follow these procedures required the Court to vacate the Patent Trial and Appeal Board’s adjudicatory decision); see also *Rambus Inc. v. Rea*, 731 F.3d 1248 (Fed. Cir. 2013).

The same holds true in other adjudicatory proceedings. For example, in *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals held that due process was violated where the petitioners’ application for authorization to hold interlocking directorships in certain corporations was rejected. The court held that this rejection was procedurally defective because it stemmed from FERC’s adoption, after the close of the evidentiary hearing, a new legal standard of proof which he was given no opportunity to meet.

It is not just the APA that requires this rigorous “no midstream change” rule. Supreme Court cases have long held that a new standard cannot be applied retroactively as a constitutional imperative of due process. *See, e.g., West Ohio Gas Co. v. Public Utilities Comm’n*, 294 U.S. 63, 70-71 (1935); *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 n.10 (1974) (cases collected). Here, there was no notice of a new standard to apply different rates to different categories of copyright owners in the now closed Webcasting IV proceeding.

B. Even Where Midstream Changes Can Be Applied Retroactively, The Standard Is Difficult To Meet And Has Not Been Met Here

A2IM’s members and the Artists’ Unions had no knowledge that they should consider entering the proceeding with their own separate representation and rate proposals to present appropriate evidence and arguments on the novel hypothetical standard posed by the CRJs. An opportunity to submit evidence on this issue would have been imperative because it affects the rights of A2IM’s and the Artists’ Unions’ members to protect the value of their property rights and royalties in a situation where the government imposes a compulsory license.

The D.C. Circuit has been adamant, for over 40 years, that even where a midstream change is permissible, a rigorous standard must be met before that standard can be applied retroactively. That standard has not been met here. In the seminal case, *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972) (“*First Union*”), the D.C. Circuit held that an agency cannot give retroactive effect to a new legal standard adopted in the course of agency adjudication without taking into account the following five factors:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law,

(3) the extent to which the party against whom the new rule is applied relied on the former rule,

(4) the degree of the burden which a retroactive order imposes on a party, and

(5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. See also *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1553-1554 (D.C. Cir. 1993) (in determining whether a rule announced in an agency adjudication may be given retroactive effect, we have typically considered the five factors set forth initially in [*Retail Union*]).

Taking all of these considerations into account, the D.C. Circuit in *Retail Union* found that the inequity of applying the new rule at issue in that case to the facts far outweighed the interests that might be furthered if it were applied. The same reasoning and result pertains here.

Applying the *Retail Union* factors, it is clear that even if the Register believes that Section 114(f)(2)(B) does not preclude separate rates based on the identity of the copyright owner, it cannot apply such differences in the closed Webcasting IV proceeding.

(1) The case is one of first impression.

Applying the first *Retail Union* factor, the CRJs have already indicated that this is a novel issue of law and thus one of first impression. In such circumstances, it is not appropriate to apply a rule retroactively. See also *Consolidated Edison v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency must adhere to its precedents in adjudicating cases before it; can only change the established law and apply newly created rules in the course of an adjudication where the rule is not arbitrary and capricious). New standards of law can only be applied retroactively to the parties in an ongoing adjudication, if (a) the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard **and** (b) the affected parties have not detrimentally relied on the established legal regime. *Id.* (citing numerous cases including *Retail Union*).

In *Consolidated Edison*, the D.C. Circuit also distinguished between policy statements and changes in substantive law; policy statements can be relied upon during a pending case because they do not carry the force of law, whereas like here, unannounced changes in the substantive standard of adjudication cannot be changed midstream. Here, the rates determined are “binding on all copyright owners,” 17 U.S.C. § 114(f)(2)(B), and thus the proposed change is substantive in nature. Application here would be the very definition of an impermissible “arbitrary and capricious” change, since, as discussed above, there is no basis in the record to make distinctions among many different types of owners and owner-distributor relationships. Plus, the independent labels, representing over a third of the market, did not have sufficiently independent representation of counsel at the pending proceeding to review the redacted agreements in the record in order to even know what differential rates might be proffered.

(2) The novel proposed standard represents an abrupt departure from well-established practice.

Second, as described above, setting differential rates based on categorizing owners would be an abrupt departure from past rate setting decisions and the Register’s 1998 finding. There is no basis in the record as far as A2IM and the Artists’ Unions can tell, to simply make two or more categories of owners, and from the order of reference, it is not even clear if that is what the CRJs are suggesting. Would the lines be drawn by market share? By designation as an independent or major? Independent labels and individual sound recording owners come from many stripes. Would they differentiate between majors? Should there be geographic distinctions? Distinctions based on whether the independently owned records are distributed by the owner, or by a major, or through other means? Can there be distinctions made based on genre of work (*i.e.*, does a popular top 40 song deserve a higher rate than a jazz recording with a specialty audience)? And so on. The CRJs may not make such arbitrary determinations. *See* 5

U.S.C. § 706(2)(A) (requiring courts to set aside an agency decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).⁶

(3) The interested parties relied on the former standard.

Third, independent labels clearly relied upon the existing rule because they did not put in evidence on such distinctions. The only statutory criteria that arguably could even be applied would be the criteria in 114(f)(2)(B)(ii): “creative contribution, technological contribution, capital investment, cost, and risk.” As explained above, these distinctions are not meant to apply vis a vis different types of owners but rather as a comparator between users and all owners.

Nevertheless, had there been notice of the potential for distinctions to be made among owners, independent labels may have demonstrated that they provide a greater degree of creative contribution to recordings they own than the major recording companies, make better technical contributions, make greater capital investments on a track-by-track basis (in absolute or relative terms), and collectively take greater risks at higher costs than majors who have economies of scale.

Moreover, while, at first blush, it might seem that there are blunt lines that can be roughly described in conversation, in practice such differentiation — whether it is between “newer” or “older” recordings, between “major” and “independent” recordings, between different genres of music, or any other distinction that might be drawn — rapidly falls apart, especially when the role of digital distribution is taken into account.

Consider the following type of common occurrence: an artist on a particular “Label A” receives her rights back and decides to self-release her recordings on her own “Label B.” In this instance it would not be reasonable, equitable or an accurate reflection of the market if Label B’s

⁶ This provision of the APA applies to copyright office administrative adjudications. *See* Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25398 (May 8, 1998).

recordings are earning a lower rate the day after it goes from Label A to being self-released.

Accordingly, there is no basis to apply a different statutory rate to different labels, and independent labels and artists relied on the past practice in this regard when they decided not to proffer separate evidence on differential rates.

(4) Retroactive application would impose a huge burden on the parties.

Fourth, a new proposed standard to differentiate rates by categories of ownership would impose significant burdens on independent labels, many of which are extremely small businesses, and the Artists' Unions, to engage their own counsel. That will always be true, but is particularly true with respect to retroactive application of a novel standard to the pending proceeding because there was no expectation, in establishing legal budgets, that such representation would be necessary.

At a minimum, the heavy redactions of the record are hugely problematic since the members of A2IM and the Artists' Unions do not know the terms of the "marketplace" deals under consideration. As one example, comparing the Warner-IHEART deal to the Merlin-Pandora deal, different constituents of SoundExchange (artists, independent labels and the major recording companies, and even entities and individuals within those broader categories) might have differing views of the reasons for such differences and the value of things like steering and other consideration of value aside from the rates.

Also, due to the redactions in the public record, the members of A2IM and the Artists' Unions do not know the terms of the deals Apple did with the majors (*see* Testimony of Darius Van Arman, Oct. 6, 2014, in Webcasting IV, at 12-13), and if those were used as some basis to differentiate rates, the members of A2IM and the Artists' Unions cannot even have an opportunity to explain why any differential rates in the marketplace should or should not be taken into account.

Setting differential rates would also impose a burden on SoundExchange in administering payments under Section 114(g). If a particular track is owned by an independent or individual, but distributed by another entity, the paying agent would have to make additional distinctions based on whether a track falls under one rate or the other. At the moment, there is no administrative process, or dispute resolution process which can rapidly clarify for a licensee what label, entity or person controls the digital performance right for a recording, and it is doubtful one could be developed by January 1, 2016 when the new rates are scheduled to go into effect.

(5) There is no statutory interest in applying a novel proposed standard.

Finally, with respect to the fifth *Retail Union* factor, there is no statutory interest in applying a new standard here over the reliance of the parties on the old standard. As noted, no party to the proceeding advocated for such a differentiating rule, and the economists for both the services and the owners, to the extent their work is not redacted, all appear to have taken into account differing marketplace rates in arriving at blended unitary rates in their proposals.

Moreover, whether inside or outside of the Webcasting IV proceeding, to the awareness of A2IM and the Artists' Unions, no user of music and no Congressional, Judicial or Executive branch entity has expressed an interest in applying differential rates. And, as discussed above, doing so could create an unfortunate dynamic in this and future rate settings, by potentially pitting labels against each other or creating user and/or ownership-licensor gamesmanship.

The current record simply doesn't provide the CRJs with an effective way to draw lines between licensors. The interested parties have no idea what sort of rules the CRJs would apply in determining who would get which rate; in practice any differentiation that might be drawn rapidly falls apart, especially when the role of digital distribution is taken into account. Moreover, because it is impossible to predict how the CRJs would actually draw lines, the interested parties cannot even know what information to provide that might assist in ensuring

that application is not erratic and unpredictable, and unintended consequences do not result. The Section 114 license — and SoundExchange as an organization — is founded on the idea that everyone on the creator side — majors, indies, artists, unions — are pulling in the same direction.

There is no statutory reason to alter this efficient resource, and there would thus be significant prejudice to more than one-third of the affected copyright owners to change course at this point in the proceedings.

III. In The Unlikely Event The Register Approves The Use Of A New Standard For The Present Proceeding, Then At A Minimum Due Process Requires That The Evidentiary Record Be Reopened

The cases discussed above mandate that the Webcasting IV proceeding not be reopened now, and that even if the Register finds that more than one rate differentiated by owner hypothetically could be set, that the CRJs could only do so prospectively in the forthcoming Webcasting V proceeding for rates commencing in 2021.

However, in the unlikely event that the Register believes differential rates could be applied retroactively to the Webcasting IV proceeding, at a minimum, the Constitutional and APA case law discussed above (not restated here) all stand for the proposition that the record must be reopened for the members of A2IM and the Artists' Unions to be provided with additional due process.

This should include, at a minimum: (a) notice precisely of the evidence that the CRJs believe justify a differential rate and what categories of owners such rate or rates would apply to and what criteria the CRJs would consider in determining such differential rates; (b) an opportunity not only to supplement with additional argument based on the existing record that such differentials are or are not justified, but to supplement the record with additional evidence

and renewed cross-examination of any pertinent witnesses; and (iii) consider having their own independent counsel free of potential conflict present their position if it is determined that there are differences in views by the categories of owners that the CRJs identify.

Among other things, as noted above, the members of A2IM and the Artists' Unions would need sufficient time to consider what evidence to present concerning differing creative and technical contributions among owners and artists, as well as the different relative capital investment, cost and risk as between different categories of owners and artists, if those are the criteria to be used. This record cannot be built quickly.

While the better position is that the proceeding should not be reopened, due process and fundamental fairness dictates that if a novel standard is declared permissible and applied retroactively, sufficient process be afforded for the interested parties to address the change.

CONCLUSION

For the foregoing reasons, the CRJs may not set rates under 17 U.S.C. § 114(f)(2)(B) that differ based on the identity of the owners of sound recordings. In the event that the Register disagrees, such differential rates may not be ordered in the current Webcasting IV proceeding retroactively without violating due process under the U.S. Constitution and the APA. Finally, in the unlikely situation where a novel standard is applied retroactively, due process requires that the Webcasting IV proceeding be re-opened, upon notice of the categories the CRJs are considering, for the interested parties to submit both new evidence and new argument.

DATED: October 2, 2015

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EXHIBIT B

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In the Matter of

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

Docket No. 14-CRB-0001-WR

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with respect to all recordings equally.

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

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

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

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

CONCLUSION

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

DATED: October 9, 2015

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EXHIBIT 2

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)**

**SUPPLEMENTAL BRIEF OF
UMG RECORDINGS, INC., CAPITOL RECORDS, LLC,
AND SONY MUSIC ENTERTAINMENT
IN RESPONSE TO REGISTER OF COPYRIGHTS' OCTOBER 14, 2015 ORDER**

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17 U.S.C. § 801.....	7, 11
17 U.S.C. § 802.....	1, 2, 8, 9
17 U.S.C. § 803.....	3, 9, 11, 14
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COPYRIGHT ROYALTY DETERMINATION PROCEEDINGS

Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV) (Notice announcing commencement of proceeding with request for Petitions to Participate),
79 Fed. Reg. 412 (Jan. 3, 2014)1, 10, 13

Digital Performance Right in Sound Records and Ephemeral Recordings (Final rule and order), 72 Fed. Reg. 24084 (May 1, 2007) (“*Webcaster II*”).....5

Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule and order), 76 Fed. Reg. 13026 (Mar. 9, 2011) (“*Webcaster III*”)12

Distribution of 1998 and 1999 Cable Royalty Funds (Final order),
69 Fed. Reg. 3606 (Jan. 26, 2004)5

Distribution of the 2004 and 2005 Cable Royalty Funds (Distribution order),
75 Fed. Reg. 57063 (Sept. 17, 2010)5

OTHER AUTHORITIES

United States Copyright Office, *Copyright and the Music Marketplace* 142 (Feb. 2015)7

UMG Recordings, Inc., Capitol Records, LLC (collectively, “UMG”), and Sony Music Entertainment (“SME”) respectfully submit this Supplemental Brief in response to the Register of Copyrights’ October 14, 2015 Order requesting Supplemental Briefing Concerning Novel Material Question of Law (“Order”). UMG and SME own and license the copyrights in a majority of the sound recordings produced and sold in the United States and have an interest in the outcome of this proceeding. As participants in this proceeding through the joint petition filed on their and others’ behalf by SoundExchange, UMG and SME filed initial and opposition briefs in response to the Copyright Royalty Judges’ September 11, 2015 Order Referring Novel Material Question of Law and Setting Briefing Schedule.¹ UMG and SME incorporate those briefs herein by reference.

BACKGROUND

The Register’s Order arises in the context of a rate-determination proceeding by the Copyright Royalty Board under Chapter 8 of the Copyright Act.² Under the Act, “the Copyright Royalty Judges shall have full independence in making determinations concerning . . . copyright royalty rates and terms.”³ In making these determinations, it is the Judges who are responsible for determining the appropriate implementation of the statutory authority bestowed by Congress in the Act. As the D.C. Circuit has explained, it “give[s] ‘substantial deference’ to the

¹ See UMG & SME Initial Br. (Oct. 2, 2015), <http://copyright.gov/rulemaking/web-iv/initial-briefs/10-2-15%20UMG%20Capitol%20Records%20and%20Sony%20Initial%20Brief%20in%20Response%20to%20Order%20Referring%20Novel%20Question%20of%20Law.pdf> and UMG & SME Opposition Br. (Oct. 9, 2015), <http://copyright.gov/rulemaking/web-iv/reply-briefs/10-09-15%20UMG%20Capitol%20Records%20Sony%20Opposition%20Brief%20--%20Second%20Referral.pdf>.

² *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV) (Notice announcing commencement of proceeding with request for Petitions to Participate)*, 79 Fed. Reg. 412 (Jan. 3, 2014).

³ 17 U.S.C. § 802(f)(1)(A)(i).

ratemaking decisions of the Board because Congress expressly tasked *it* with balancing the conflicting statutory objectives enumerated in the Copyright Act.”⁴

While the Register generally has broad authority to effectuate most other provisions of the Copyright Act, the scope of the Register’s authority in connection with the Judges’ rate determinations is narrowly circumscribed by statute. Section 802 of the Act authorizes the Register only to resolve “material questions of substantive law” concerning the “provisions of this title”—*i.e.*, the Copyright Act.⁵ The statute does not authorize the Register to resolve other questions of law, and it specifically provides that the Register is not authorized “to provide an interpretation of questions of procedure before the Copyright Royalty Judges, [or] the ultimate adjustments and determinations of copyright royalty rates and terms.”⁶

It is within this statutory framework that the Register addresses the novel material question of law posed by the Judges:

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, assuming a factual basis in the evidentiary record before the Judges demonstrates such a distinction in the marketplace?⁷

Thus, the sole question for the Register to address is whether the Act *prohibits* setting rates and terms that distinguish among types or categories of licensors—*i.e.*, whether a decision to set such rates and terms would be reversible under *Chevron U.S.A. Inc. v. Natural Resources Defense*

⁴ *Recording Indus. Ass’n of Am., Inc. v. Librarian of Cong.*, 608 F.3d 861, 865 (D.C. Cir. 2010) (emphasis added).

⁵ 17 U.S.C. §§ 802(f)(1)(A)(ii) and (f)(1)(B)(i); *see also* 17 U.S.C. §802(f)(1)(D) (authorizing the Register to “review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law *under this title* that underlies or is contained in a final determination of the Copyright Royalty Judges”) (emphasis added).

⁶ 17 U.S.C. § 802(f)(1)(A)(ii).

⁷ September 11, 2015 Order at 2.

Council, Inc., 467 U.S. 837 (1984). Based on their prior briefs, and the additional briefing below, UMG and SME respectfully submit that the Register’s answer should be “no.”

ARGUMENT

In her Order, the Register has posed three specific questions: (1) whether the legislative history of the successive iterations of the Copyright Act and its statutory licensing provisions shed light on Congress’s intent to allow or disallow rate differentiation among licensors; (2) how the Register’s decision would affect other statutory licensing schemes and whether such broader implications should influence the Register’s decision; and (3) whether any administrative law or constitutional concerns affect or guide the Judges’ ability to differentiate among licensors.

As we show below, nothing in the legislative history of the Copyright Act reflects any intent to disallow such rate differentiation. To the contrary, different provisions of the Act show that where Congress intended to disallow differentiation, it has specified a unitary rate for statutory licenses—and where it has not specified a unitary rate, differentiation among copyright owners has been permitted. UMG and SME respectfully submit that the Register’s second and third questions are beyond the scope of both the question referred by the Judges and the Register’s statutory authority in this proceeding. In all events, because the Register has not been asked to resolve whether rate differentiation is prohibited in connection with other statutory licenses, and the Register’s decision will not be binding with respect to any other statutory license, any potential implications are speculative and do not bear on whether the statute prohibits differentiation in Section 114 proceedings. Finally, there are no administrative law or constitutional requirements that bear on the Judges’ ability to differentiate among copyright owners. The Judges’ conduct in this proceeding is governed by Section 803 of the Act, not the notice-and-comment provisions of the Administrative Procedures Act. So long as the Judges’

determination is not arbitrary and capricious, and thus satisfies the appellate review provisions of 5 U.S.C. § 706, it also meets any Constitutional due process or equal protection requirements.

I. Although the Legislative History is Silent as to Congress’s Intent Regarding Rate Differentiation Among Copyright Owners, the Language of the 1909 and 1976 Copyright Acts Demonstrates Congress’s Intent to Allow Such Rate Differentiation Under Section 114.

Nothing in the legislative history of the Copyright Act suggests that differentiation among copyright owners is prohibited where the statute does not expressly specify a single statutory license rate—and there is certainly no legislative history suggesting that such differentiation is prohibited under Section 114. But the Register need not look to the legislative history to glean Congress’s intent. When Congress has intended a single rate for copyright owners, it has expressly mandated that in the text of the various iterations of the Copyright Act. For instance, Section 1(e) of the 1909 Copyright Act provided that a royalty of “two cents” must be paid for each mechanical reproduction of a musical composition.⁸ The modern iteration of this right—the right to make and distribute phonorecords—is found in Section 115 of the Copyright Act.⁹ Even today, the Act establishes a base statutory license rate of “either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.”¹⁰

In contrast, where Congress has not expressly required a single royalty rate or valuation for all copyright owners or their works—as Congress did not in Section 114—it has long been understood that the Copyright Royalty Judges are free to differentiate among copyright owners. For instance, with regard to cable retransmission royalties under Section 111, the Judges have

⁸ See Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075-76 (repealed 1976).

⁹ See generally 17 U.S.C. § 115.

¹⁰ 17 U.S.C. § 115(c)(2).

distinguished among different categories of copyright owners in allocating royalties based on distinctions in the marketplace. While the Copyright Act does not expressly set forth a standard for cable royalty allocations,¹¹ the Judges and their predecessors have applied a “relative marketplace value” standard in awarding different shares to different copyright owner groups representing different television programs and content.¹² The D.C. Circuit has expressly upheld this approach, noting that “it makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory license scheme.”¹³ There is no credible argument that such differentiation among copyright owners is *prohibited* under Section 114(f)(2)’s willing buyer/willing seller standard, which likewise looks to rates and terms that would have been negotiated in a marketplace “in which no statutory license exists.”¹⁴

II. Whether the Judges Are Prohibited from Distinguishing Between Licensors Under Section 114 Does Not Turn on Any Speculative Implications for Other Statutory Licenses.

The potential ramifications of the Register’s decision for other statutory licenses are both beyond the scope of the question referred by the Judges, and not relevant to its resolution. The Register has not been asked to decide whether rate differentiation among copyright owners is prohibited under any other statutory license, and the Register’s decision is clearly not binding

¹¹ *Distribution of the 2004 and 2005 Cable Royalty Funds (Distribution order)*, 75 Fed. Reg. 57063, 57065 (Sept. 17, 2010).

¹² *See, e.g., id.* at 57065, 57078-79 (awarding different shares to seven claimant groups); *Distribution of 1998 and 1999 Cable Royalty Funds (Final order)*, 69 Fed. Reg. 3606, 3608, 3620 (Jan. 26, 2004) (adopting Register’s recommendation to accept CARP awards based on relative marketplace value).

¹³ *Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 401-02 (D.C. Cir. 2005).

¹⁴ *Digital Performance Right in Sound Records and Ephemeral Recordings (Final rule and order)*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) [hereinafter “*Webcaster II*”].

with respect to any other statutory licensing provision. In addition, any other ramifications of the decision even with respect to Section 114—let alone with respect to other statutory licenses—are inherently speculative, because a determination that the Judges are not prohibited from differentiating among copyright owners says nothing about whether they will actually do so in this or any other proceeding.

Each statutory license under the Act is different. Among other things, the statutory licenses vary in their governing statutory language, the nature of the licenses, the relevant history and policies, and the marketplaces in which they operate. In fact, with the exception of Section 114's companion provision for ephemeral recordings, Section 112, no other statutory license under the Act even specifies the willing buyer/willing seller standard.¹⁵ As a result, resolution of whether the Judges are prohibited from distinguishing among copyright owners in this Section 114 proceeding will not be binding with respect to the scope of the Judges' authority under any other statutory rate-setting scheme.

Moreover, a determination that the Act does not *prohibit* distinguishing between copyright owners under any statutory license scheme does not mean that the Judges *will* ultimately differentiate among them in setting rates. No party has urged that such differentiation is *required* under the Act; instead, the Judges—whom “Congress expressly tasked . . . with balancing the conflicting statutory objectives enumerated in the Copyright Act”¹⁶—can pursue different approaches based on the particular circumstances of each statutory license and the factual record before them in a given proceeding. A decision that the Act does not prohibit differentiation among copyright owners in Section 114 proceedings does not mean that the

¹⁵ See 17 U.S.C. § 112(e).

¹⁶ *Recording Indus. Ass'n of Am., Inc.* 608 F.3d at 865.

Judges will do so; if they do, that does not mean that they will choose to do so in the context of *other* statutory licenses.

Section 115, which the Register’s Order specifically mentions, illustrates these general points. There are key differences between Sections 114 and 115, such that a decision that rate differentiation is not prohibited under Section 114 is neither binding with respect to Section 115 rate determination proceedings, nor indicative of what the Judges might do in such proceedings. To begin with, Section 115 has a long history—the first iteration of the mechanical compulsory license appeared in the 1909 Copyright Act—and has always included a unitary statutory rate for the use of musical works in phonorecords.¹⁷ In contrast, the statutory right in Section 114 is much newer, having been first created by the Digital Performance Right in Sound Recordings Act of 1995,¹⁸ and has never included a hard-coded statutory rate.¹⁹ Second, each section sets forth different objectives for the Judges to consider as they determine reasonable rates and terms for a compulsory license. In proceedings under Section 115, the Judges must set rates that are calculated to achieve the policy objectives set forth in Section 801(b)(1) of the Act.²⁰ Section 114(f)(2), however, calls for market rates and requires the Judges to “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.”²¹ Finally, the nature of the marketplace and the attendant policy considerations under the two statutes are different. For

¹⁷ See Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075-76 (repealed 1976).

¹⁸ See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

¹⁹ Cf. 17 U.S.C. § 115(c)(2).

²⁰ 17 U.S.C. § 115(c)(3)(D); 17 U.S.C. § 801(b)(1)(B).

²¹ 17 U.S.C. § 114(f)(2)(B). See generally United States Copyright Office, *Copyright and the Music Marketplace* 142 (Feb. 2015) (discussing differences between the two standards).

example, sound recordings, which are the subject of Section 114, almost always have a single copyright owner, whereas it is common for musical works, which are the subject of Section 115, to have multiple copyright owners. Thus, differentiation among copyright owners would be more complicated under Section 115, since use of a single musical work could trigger royalty obligations to multiple, differently-situated copyright owners. In light of these differences, the Register’s decision allowing rate differentiation among copyright owners under Section 114 would neither decide what is permitted under Section 115, nor indicate what the Judges might do to the extent they are permitted to differentiate among copyright owners in such proceedings.

In short, the speculative ramifications of the Register’s decision here—ramifications that ultimately turn on how the Judges choose to exercise their statutory discretion in any given statutory-license proceeding—are beyond the scope of, and irrelevant to answering, the statutory question posed by the Judges.

III. The Judges’ Novel Material Question of Law Does Not Implicate Any Administrative or Constitutional Law Considerations.

The Register also asked whether there are “administrative law or constitutional considerations (including rational basis or due process concerns) that would affect or should guide the Judges’ ability” to distinguish among licensors when setting rates and terms.²² This inquiry is beyond the scope of both the Judges’ novel material question of law under the Copyright Act, and the authority provided by Section 802(f)(1)(B)(i). The question referred to the Register is whether *the Copyright Act* prohibits the Judges from differentiating among types or kinds of licensors in setting rates and terms, assuming an evidentiary basis for doing so in the factual record. In addition, Section 802 limits the scope of the Register’s decision to

²² See Order at 2.

interpretations of the provisions of *the Copyright Act*,²³ and expressly does not authorize the Register “to provide an interpretation of questions of *procedure* before the Copyright Royalty Judges.”²⁴ Whether there are other legal constraints that would affect or should guide the Judges’ rate determination process is beyond the scope of the question posed by the Judges.

In any event, the answer to the Register’s question is “no.” First, there are no constitutional considerations that would prohibit the Judges from differentiating among copyright owners. The D.C. Circuit reviews the Judges’ determinations under the “highly deferential” arbitrary and capricious standard set out in the APA.²⁵ Under this standard, the reviewing court need satisfy itself only that the Judges’ final determination was “within a zone of reasonableness.”²⁶ Agency actions upheld under the arbitrary and capricious standard also satisfy constitutional due process.²⁷ This standard likewise subsumes any Constitutional equal protection analysis, since differentiation among copyright owners involves no “suspect

²³ See 17 U.S.C. § 802(f)(1)(B)(i) (requiring referral of “a novel material question of substantive law concerning an interpretation of those provisions *of this title* that are the subject of the proceeding”) (emphasis added).

²⁴ See 17 U.S.C. § 802(f)(1)(A)(ii) (“The authority under this clause shall not be construed to authorize the Register of Copyrights to provide an interpretation of questions of *procedure* before the Copyright Royalty Judges.”) (emphasis added).

²⁵ See 17 U.S.C. § 803(d)(3) (stating that 5 U.S.C. § 706 applies to appellate review of the Judges’ determinations).

²⁶ *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1114 (D.C. Cir. 2015).

²⁷ *Jonal Corp. v. D.C.*, 533 F.2d 1192, 1197 (D.C. Cir. 1976) (“The terms ‘arbitrary’ and ‘capricious’ are typically associated with constitutional due process standards. Accordingly, the Court interprets the standard intended to be established by the use of those terms to be the appropriate constitutional due process standard.”) (internal citations omitted). See also *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 77 (D.D.C. 2002) *aff’d*, 333 F.3d 156 (D.C. Cir. 2003) (holding that because agency determination “was not arbitrary and capricious under the APA . . . it [is] clear that the agency action did not rise to the level of a constitutional violation.”).

classifications” and therefore would be subject only to the highly deferential “rational basis” standard of review.²⁸

While one brief submitted in response to the Judges’ September 11 Order asserted that differentiation among copyright owners would implicate constitutional retroactivity concerns,²⁹ that argument is mistaken. Nothing about this proceeding is retroactive; it will not impact the rates or terms for prior license periods, impair a previously vested right, or affect past transactions.³⁰ It operates only prospectively, setting rates that will not come into effect until January 1, 2016.³¹

Nor are there any administrative law considerations that would prohibit the Judges from differentiating among copyright owners. The brief of A2IM, AFM and SAG-AFTRA in response to the Judges’ September 11, 2015 Order presented a detailed argument that the Judges’ determination is subject to the procedural requirements of Section 554 of the APA.³² But those

²⁸ See *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

²⁹ See A2IM, AFM, and SAG-AFTRA Initial Br. at 14.

³⁰ See e.g., *Celtronix Telemetry, Inc. v. F.C.C.*, 272 F.3d 585, 588 (D.C. Cir. 2001) (holding that agency rule that has future effect on pre-existing license is not retroactive); *Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (“In the administrative context, a rule is retroactive if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations *already past*.”) (internal quotation marks omitted) (emphasis added); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (defining retroactivity in terms of whether challenged law “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”).

³¹ *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV) (Notice announcing commencement of proceeding with request for Petitions to Participate)*, 79 Fed. Reg. 412, 412 (Jan. 3, 2014).

³² See A2IM, AFM, and SAG-AFTRA Initial Br. at 14-22.

provisions are irrelevant to the Judges' determination. Section 803 of the Act provides that the Judges "shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with [the APA] in carrying out the purposes set forth in section 801."³³ In light of this statutory provision, and the Act's detailed provisions governing CRB proceedings, the D.C. Circuit recently stated that the "Board is not governed by the notice-and-comment rulemaking requirements of the APA, but rather by the procedures set forth in the Copyright Act."³⁴ Accordingly, there are no administrative law requirements here (other than the arbitrary and capricious standard of 5 U.S.C. § 706). The Judges need only comply with the procedural requirements of Section 803, which do not require the Judges to reopen the record following resolution by the Register of a novel question of law. Whether an additional opportunity for comment or evidentiary submissions is warranted is within the discretion of the Judges.³⁵

Moreover, even if the APA did apply here, Section 554 would not: it applies only to *adjudications*, whereas this rate determination proceeding is a *rulemaking*. "The D.C. Circuit has explained that when determining whether agency action is rulemaking or adjudicating[,] the focus is not on whether the particular proceeding involved trial-type devices but instead turns on the nature of the decision to be reached in the proceeding."³⁶ "Rulemaking is prospective in scope and . . . directed to the implementation of general policy concerns into legal standards. Adjudication, on the other hand, is individual in impact and . . . directed to the determination of the legal status of particular persons or practices through the application of preexisting legal

³³ 17 U.S.C. § 803(a)(1).

³⁴ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 125 (D.C. Cir. 2015).

³⁵ *Cf. id.* at 126 (affirming as "reasonable" the Judges' decision not to "to proceed . . . with additional submissions, discovery, and evidentiary hearings" where Copyright Act provided no such procedural requirement).

³⁶ *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 11 (D.D.C. 2004).

standards.”³⁷ As discussed above, the rate determination here is prospective, and the results will bind all covered parties, regardless of whether they participated in the proceeding. Moreover, the APA specifically defines “rule” to include “the approval or prescription for the future of rates.”³⁸ Finally, the end result of the proceeding is a regulation codified at 37 C.F.R. Part 380.³⁹ The proceeding is thus clearly a rulemaking and not an adjudication.⁴⁰

Because it “is well settled that section 554 applies only in cases of adjudication, and not to rulemaking proceedings,”⁴¹ the procedural requirements of Section 554, as well as the related standards and jurisprudence on which A2IM, AFM, and SAG-AFTRA rely, is irrelevant.⁴²

Instead, even were the APA’s notice-and-comment provisions to apply (which they do not,

³⁷ *F.T.C. v. Brigadier Indus. Corp.*, 613 F.2d 1110, 1117 (D.C. Cir. 1979) (internal quotation marks omitted). *See also Indep. Bankers Ass’n of Ga. v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C. Cir. 1975) (“As a general matter, agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of ‘legislative fact.’ Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular ‘adjudicative facts.’”).

³⁸ 5 U.S.C. § 551(4). The analysis is not changed by the fact that the APA defines “adjudication” as dispositions “other than rule making but including licensing.” Licensing in this context refers to the granting or denial of a permit, not the setting of rates under an existing statutory license. *See, e.g., In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 240, 260 (D.D.C. 2011) (“Permit decisions are adjudications, not rulemakings.”); *Nat’l Wildlife Fed’n v. Marsh*, 568 F. Supp. 985, 992 n. 12 (D.D.C. 1983) (“A permit decision-making proceeding is clearly adjudication rather than rule making.”).

³⁹ *See, e.g., Webcaster III*, Fed. Reg. 13026, at 13406 (“For the reasons set forth in the preamble, the Copyright Royalty Judges revise part 380 of title 37 of the Code of Federal Regulations to read as follow...”).

⁴⁰ *Cf. Recording Indus. Ass’n of Am., Inc. v. Librarian of Cong.*, 608 F.3d 861, 864 (D.C. Cir. 2010) (stating that in Section 115 context, “the Copyright Royalty Board currently serves as the *rulemaking* body for” the system of “figur[ing] out how much the licensee owes the copyright owner and what the terms for paying that rate should be.”); *Nat’l Cable Television Ass’n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1084 (D.C. Cir. 1982) (characterizing royalty adjustment proceedings as rulemakings).

⁴¹ *Hercules, Inc. v. E.P.A.*, 598 F.2d 91, 117 (D.C. Cir. 1978).

⁴² *See, e.g., A2IM, AFM, and SAG-AFTRA Initial Brief*, at 14-22. *See also Motion Picture Ass’n of Am., Inc. v. Oman*, 750 F. Supp. 3, 7 (D.D.C. 1990) (“[T]he *Retail, Wholesale* test is not applicable when, as in this case, the agency’s actions constitute rulemaking.”).

because the procedures under Chapter 8 of the Copyright Act apply), the relevant statute would be Section 553. Under that standard, an agency need only publish notice of “either the terms or substance of the proposed rule or a *description of the subjects and issues involved*.”⁴³ The agency need not, however, “specify every precise proposal which [it] may ultimately adopt as a rule.”⁴⁴ Rather, so long as the final rule is a “logical outgrowth” of the original notice, the requirements of the APA have been satisfied. A party’s “failure to anticipate the exact contours of the [agency’s] final rule does not compel the conclusion that the final rule is not a logical outgrowth of the proposed rule.”⁴⁵

Here, the CRB’s initial notice of this proceeding made clear—in a section entitled “Scope of Proceeding”—that the “Judges are open to receiving evidence, testimony, and argument regarding *any reasonable rate structure*.”⁴⁶ The Judges also recited the Librarian’s observation from *Webcaster I* that “a marketplace unconstrained by a statutory license would experience a range of negotiated rates,” and asked participants to address the importance “of the presence of economic variation among buyers *and* sellers.”⁴⁷ Thus, even were the APA’s notice-and-comment requirements applicable to the Judges’ rate determinations, it would not prevent the Judges from adopting a rate structure that differs from past rate structures.

⁴³ *Action for Children’s Television v. F.C.C.*, 564 F.2d 458, 470 (D.C. Cir. 1977) (emphasis added) (quoting 5 U.S.C. § 553(b)(3)).

⁴⁴ *Id.*

⁴⁵ *Nat’l Ass’n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 41 (D.D.C. 2000).

⁴⁶ *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV) (Notice announcing commencement of proceeding with request for Petitions to Participate)*, 79 Fed. Reg. 412, 413 (Jan. 3, 2014).

⁴⁷ *Id.* (emphasis added).

The D.C. Circuit’s decision in *Program Suppliers v. Librarian of Congress* is instructive on this point.⁴⁸ There, a party argued that a Copyright Arbitration Royalty Panel failed to provide sufficient notice that it would reject a survey methodology that previous panels had relied upon, thereby “depart[ing] inexplicably from precedent.”⁴⁹ The D.C. Circuit rejected this argument: “While due process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard, *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981), *the CARP made no such change*. . . . Program Suppliers cite no case, nor are we aware of one, holding that due process requires agencies to give advance notice of what evidence they intend to credit.”⁵⁰ So too here—assuming that the APA is relevant at all in light of Section 803(a)(1) and *Intercollegiate Broadcasting*—the Judges would be under no obligation to accept additional submissions merely because, having notified the parties that the Judges will consider any reasonable rate structure, they credit evidence supporting a different rate structure than they have adopted in the past.

CONCLUSION

The Copyright Act vests the Copyright Royalty Judges with complete independence in determining rates and terms under Section 114, and charges them with balancing the various policy considerations reflected in the statute. Regardless of any arguments about what the Judges *should* do—whether based on general policy considerations, or on the specific evidentiary record developed here—and regardless of any arguments about the procedures employed by the Judges in this proceeding, nothing in the Act prohibits them from choosing to

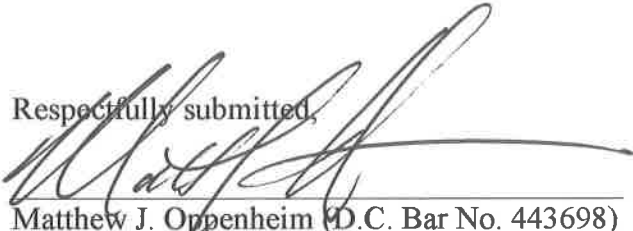
⁴⁸ 409 F.3d 395 (D.C. Cir. 2005).

⁴⁹ *Id.* at 401.

⁵⁰ *Id.* at 402 (emphasis added).

differentiate among types or kinds of copyright owners where there is a basis in the record to do so. The answer to the novel material question of law referred by the Judges to the Register in their September 11, 2015 Order is “no.”

October 26, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 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
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Matthew J. Oppenheim

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, I caused a copy of the foregoing – [NR] **SOUNDEXCHANGE, INC.’S SUPPLEMENTAL BRIEFING REGARDING NOVEL QUESTION OF LAW REFERRED TO THE REGISTER** to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

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A copy of the above-referenced brief was also served via United States Postal Service Express Mail to the Copyright Royalty Board, P.O. Box 70977, Southwest Station, Washington, DC 20024-0977.



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