

**Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559**

In the Matter of

**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) (Web IV)**

**MEMORANDUM OPINION
ON NOVEL MATERIAL QUESTION OF LAW**

In the above-captioned proceeding (“Web IV”), currently pending before the Copyright Royalty Judges (“CRJs” or “Judges”), the Judges will establish royalty rates and terms for webcasters’ digital performance of sound recordings and making of ephemeral recordings under the statutory licenses embodied in sections 112(e) and 114(f)(2) of the Copyright Act (“Act”), such rates and terms to apply for the five-year period beginning January 1, 2016. The Act requires the CRJs to establish rates and terms that “distinguish among the different types of eligible nonsubscription transmission services and new subscription services”—that is, among different types of webcasting services—but does not include the same instruction vis-a-vis the licensors of sound recordings under the relevant licenses.¹

On September 11, 2015, relying upon section 802(f)(1)(B), the CRJs referred to the Register of Copyrights the following question:

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?²

Section 802(f)(1)(B) requires the CRJs to request a decision of the Register “[i]n any case in which a novel material question of substantive law concerning an interpretation of those provisions of [title 17] that are the subject of the proceeding is presented.”³ The Register’s decision is to be issued within thirty days after the Register receives all of the briefs or comments of the participants and her determination becomes part of the record of the proceeding.⁴

¹ 17 U.S.C. § 114(f)(2).

² Order Referring Novel Material Question of Law and Setting Briefing Schedule, Docket No. 14-CRB-0001-WR (2016-2020) (Sept. 11, 2015) (“Referral Order”).

³ 17 U.S.C. § 802(f)(1)(B)(i).

⁴ *Id.*

For the reasons explained below, the Register of Copyrights concludes that the question posed by the CRJs is not in fact “presented” in this proceeding, and was therefore not properly referred to the Register for decision.

I. Background

Rates and terms under the statutory licenses set forth in sections 112(e) and 114(f)(2) are to be set under the “willing buyer/willing seller standard,” meaning that the rates and terms should be those “that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”⁵ In establishing those rates and terms, the CRJs “may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements.”⁶ The Act also specifies that “[s]uch rates and terms shall distinguish among the different types of [services] then in operation . . . 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.”⁷

Neither section 114 nor any other provision of the Act includes any express language addressing whether or not webcasting rates and terms can distinguish among licensors of sound recordings. Since the inception of the statutory license for the digital performance of sound recordings in 1995, the CRJs—as well as their predecessor, the Copyright Arbitration Royalty Panels—have established uniform rates and terms for all licensors of sound recordings under the section 114 and 112 licenses.⁸

On September 11, 2015, after the close of the record in this proceeding, the CRJs issued an order referring the above-cited novel material question of substantive law to the Register and requesting briefing on the question from the parties.⁹ As noted, the CRJs invoked 17 U.S.C. § 802(f)(1)(B) as the basis for their referral. That provision states that “[i]n any case in which a novel material question of substantive law concerning an interpretation of those provisions of this title that are the subject of the proceeding is presented, the Copyright Royalty Judges shall request a decision of the Register of Copyrights, in writing, to resolve such novel question.”¹⁰ The CRJs must “apply the legal determinations embodied in [a timely delivered] decision of the

⁵ 17 U.S.C. § 114(f)(2)(B); *see also id.* § 112(e)(4).

⁶ 17 U.S.C. § 114(f)(2)(B); *see also id.* § 112(e)(4).

⁷ 17 U.S.C. § 114(f)(2)(B).

⁸ *See generally, e.g.*, Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, 79 Fed. Reg. 23,102 (Apr. 25, 2014); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054 (April 17, 2013); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026 (Mar. 9, 2011); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084 (May 1, 2007); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services, 68 Fed. Reg. 39,837 (July 3, 2003); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (July 8, 2002); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25,394 (May 8, 1998).

⁹ *See* Referral Order at 2.

¹⁰ 17 U.S.C. § 802(f)(1)(B)(i).

Register of Copyrights in resolving material questions of substantive law” and must include the decision “in the record that accompanies their final determination.”¹¹

The CRJs delivered the participants’ initial and responsive briefs to the Copyright Office on October 14, 2015. That same day, the Register invited participants in the Web IV proceeding and other interested parties to file supplemental briefs on three specific issues relating to the novel material question of substantive law:

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?
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?
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?

On October 26, 2015, the Office received supplemental briefing from participants and other interested parties in response to the above questions.

II. Summary of the Parties’ Arguments

A. Position of SoundExchange

SoundExchange, Inc. (“SoundExchange”) is the entity currently designated for purposes of sections 114 and 112 to collect statutory royalties from webcasting (and certain other) services and distribute them to copyright owners and recording artists. In the Web IV ratesetting proceedings before the CRJs, SoundExchange served as the primary representative of copyright owners and artists, including major and independent record labels, featured recording artists, and the two artist unions designated under the statute to receive and distribute royalties to nonfeatured musicians and vocalists—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”).¹² It is undisputed that during the ratesetting proceedings before the CRJs, SoundExchange—acting on behalf of its constituent interests—proposed rates and terms that did not distinguish among licensors of sound recordings.¹³

¹¹ *Id.*

¹² 17 U.S.C. § 114(g)(2)(B), (C).

¹³ SoundExchange Initial Br. at 2; *see also* SoundExchange Supp. Br. at 2 (“In the proceeding, SoundExchange identified, based on the best marketplace evidence, a single royalty rate for all commercial licensees utilizing the statutory license.”).

Although SoundExchange represented the vast majority of copyright owner participants during the Web IV ratesetting proceedings,¹⁴ it has declined to take a position on the question referred by the CRJs.¹⁵ Instead, SoundExchange noted that two groups of its constituents—UMG Recordings, Inc., Capitol Records, LLC, and Sony Music Entertainment (collectively, “Major Labels”), on the one hand, and the American Association of Independent Music, AFM, and SAG-AFTRA (collectively, “Independent Labels and Unions”), on the other—would be filing their own briefs.¹⁶ These groups are represented by separate counsel for the present purpose and, as explained below, take diametrically opposed positions on the merits.

Although SoundExchange has declined to take a position on the merits of the referred question, it does, however, stress that “[b]ecause segmentation by licensor would raise issues that no party has addressed” in the proceeding, if the Register were to determine that segmentation were legally permissible, the parties would need to be given an opportunity to further address those issues.¹⁷

B. Position of Independent Labels and Unions, Music Managers, and Webcasters

The Independent Labels and Unions and Music Managers Forum, along with webcasting parties iHeartMedia, Inc., Pandora Media, Inc., SiriusXM Radio, Inc., and the National Association of Broadcasters and National Religious Broadcasters Noncommercial Music License Committee (“NAB/NRBNMLC”) (the webcasting parties collectively, “Webcasters”), contend that the CRJs lack the authority to adopt different rates and terms for different categories of licensors.¹⁸ These parties argue that the overall structure of section 114 demonstrates that Congress did not intend for parties to adopt differential rates for licensors.

For instance, these parties note that section 114 expressly allows the CRJs to set different rates and terms based on the type of webcasting service being licensed, but is silent as to whether the CRJs can differentiate among types of licensors. Relying on the canon of statutory construction known as *expressio unius est exclusio alterius*—that is, the express mention of one subject impliedly excludes other subjects—this group urges that this silence was purposeful, and shows Congress’s intent to withhold from the CRJs the power to adopt different rates and terms for different licensors. They also point to the provision stating that “[t]he schedule of reasonable rates and terms” adopted by the CRJs “shall . . . be binding on all copyright owners,”¹⁹ and argue that by referring to a single “schedule” that binds “all” copyright owners, Congress anticipated that the CRJs would maintain a single set of rates and terms for all licensors.²⁰

These parties also urge that adopting rates and terms that differentiate among categories of licensors would undermine Congress’s desire for an administrable statutory license. For example, they note that the ownership or distribution rights for any given sound recording can

¹⁴ George Johnson, an individual sound recording owner, represented himself during ratesetting proceedings. *See* George Johnson Initial Br. at 1; NAB/NRBNMLC Response Br. at 1 n.1.

¹⁵ SoundExchange Initial Br. at 1; SoundExchange Response Br. at 1.

¹⁶ SoundExchange Initial Br. at 1.

¹⁷ *Id.* at 2.

¹⁸ *See, e.g.*, Independent Labels and Unions Initial Br. at 24; iHeartMedia Initial Br. at 3; SiriusXM Initial Br. at 1; Pandora Initial Br. at 1; NAB/NRBNMLC Response Br. at 2; Music Managers Forum Supp. Br. at 1.

¹⁹ 17 U.S.C. § 114(f)(2)(B); 17 U.S.C. § 112(e)(4).

²⁰ iHeartMedia Response Br. at 2-3, iHeartMedia Supp. Br. at 9-10; *see also* Independent Labels and Unions Initial Br. at 5-8.

change hands repeatedly, and that it thus may be difficult to know the current owner of any particular recording at a given point in time.²¹ According to these parties, it is unlikely that Congress would have established a scheme that made it difficult for a licensee to know what rates and terms apply to individual sound recordings.²²

In addition to arguments about the merits of the referred question, the Independent Labels and Unions and Webcasters raise procedural concerns of due process under the Constitution and the Administrative Procedure Act.²³ Specifically, they urge that, even if the Register were to conclude that the CRJs could adopt rates that distinguish among categories of licensors, the CRJs could not actually adopt such rates in this ratesetting proceeding.²⁴ The Independent Labels and Unions and Webcasters argue that they had inadequate notice that the CRJs might adopt differential rates.²⁵ They point to the CRJs' uniform historical practice of adopting rates and terms for webcasting that do not distinguish among different categories of licensors,²⁶ and the fact that no party to the ratesetting proceeding proposed rates that distinguish among licensors.²⁷ As NAB/NRBNMLC puts it, "no participant had the opportunity, or any reason, to introduce evidence or to respond to any such proposal, or to demonstrate the potential administrative difficulties or consequences of such rates and terms."²⁸

Indeed, the Independent Labels and Unions urge that they agreed to be represented by SoundExchange in the ratesetting proceedings on the assumption that SoundExchange would seek, and the CRJs would adopt, a single set of rates for all licensors.²⁹ The Independent Labels and Unions suggest that, had the possibility of rates and terms that differentiate among licensors in fact been before the CRJs, SoundExchange could not have fairly represented all of its constituents—who disagree about the desirability of differential rates—and the Independent Labels and Unions would have participated in the proceedings in their own right.³⁰

²¹ See, e.g., Independent Labels and Unions Initial Br. at 9 ("[T]he entity or person who owns or control 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."); Pandora Initial Br. at 5 (explaining that "ownership of sound recordings is hardly static" and providing examples of the different ways a given recording could cross back and forth between various categories of owners); Music Managers Forum Supp. Br. at 1 ("A recording could be made by an artist, licensed to an independent label, sold to a major label and then revert back to the artist.").

²² See, e.g., Independent Labels and Unions Initial Br. at 9-11; iHeartMedia Initial Br. at 3; Pandora Initial Br. at 5-6 ("[M]ost if not all services would be unable to compute the license fees owed to SoundExchange under a differential-pricing regime, as they neither possess, nor have ready access to, all of the information necessary to determine which sound recordings are owned by which licensors, let alone at any given time, and into which licensor-category any given record label may fall.").

²³ See, e.g., Independent Labels and Unions Initial Br. at 14-22; NAB/NRBNMLC Response Br. at 1-2; SiriusXM Initial Br. at 3-4, 17-18; iHeartMedia Supp. Br. at 3-7.

²⁴ See, e.g., Independent Labels and Unions Initial Br. at 22; iHeartMedia Response Br. at 10.

²⁵ See, e.g., NAB/NRBNMLC Response Br. at 1; Independent Labels and Unions Initial Br. at 16; iHeartMedia Supp. Br. at 2, 4-6.

²⁶ See, e.g., Independent Labels and Unions Initial Br. at 11-13; iHeartMedia Supp. Br. at 3.

²⁷ See, e.g., Independent Labels and Unions Initial Br. at 13-14; Pandora Initial Br. at 4; iHeartMedia Response Br. at 9; SiriusXM Initial Br. at 6, 17; NAB/NRBNMLC Response Br. at 1.

²⁸ NAB/NRBNMLC Response Br. at 1; see also Independent Labels and Unions Initial Br. at 13-14.

²⁹ Independent Labels and Unions Initial Br. at 14.

³⁰ *Id.* at 14, 23.

C. Position of the Major Labels and George Johnson

The Major Labels, supported by George Johnson, an individual sound recording owner, contend that the CRJs are permitted to adopt rates and terms that distinguish among types or categories of licensors.³¹ Citing precedent from the U.S. Court of Appeals for the D.C. Circuit, the Major Labels argue that the CRJs have “broad discretion to effectuate their mandate under Section 114 to establish rates that most clearly represent the rates negotiated by a willing buyer and a willing seller in the marketplace.”³² They stress that no provision of the Copyright Act limits the CRJs’ ability to adopt rates that distinguish among licensors.

In addition, the Major Labels point to provisions of the statute that they claim indicate Congress’s intent to allow the CRJs to establish such differential rates. For example, they argue that the willing buyer/willing seller standard “necessarily contemplates the possibility of setting different rates for different kinds of licensors, because it directs the Judges to set rates and terms that reflect those that would be found in a hypothetical marketplace characterized by precisely such differentiation.”³³ The Major Labels urge that the statutory provisions upon which the Independent Labels and Artists, the Music Managers Forum, and Webcasters rely do not cabin the CRJs’ generally broad discretion to set rates and terms as they deem appropriate in light of the record evidence.³⁴ Furthermore, they dismiss the administrability concerns raised by those groups as irrelevant to the question asked, arguing that those arguments “are outside the scope of the [referral order] and irrelevant to the pure question of law posed by the Judges.”³⁵

The Major Labels similarly dismiss the due process arguments raised by the Independent Labels and Unions and Webcasters as “irrelevant to answering the question posed” by the CRJs, which they again emphasize to be a “pure question of law.”³⁶ They further argue that, even if those issues were relevant, the CRJs are not foreclosed from adopting a rate structure that distinguishes among licensors by crediting evidence already in the record. They point in particular to the CRJs’ notice initiating the ratesetting proceeding, in which the CRJs stated that they were ““open to receiving evidence, testimony, and argument regarding *any reasonable rate structure*,”” requesting participants to “address the importance ‘of the presence of economic variation among buyers *and* sellers.’”³⁷ The Major Labels suggest that these statements provided the parties with sufficient notice that the CRJs were willing to consider rates that differentiate among different licensors. Even so, the Major Labels do not challenge the assertion that no party to the ratesetting proceeding pressed for rates or terms that distinguish among licensors.

D. Position of Music Publishers Regarding Impact on Other Statutory Licenses

In response to the Register’s invitation to non-participants to offer their views, the National Music Publishers Association, Inc. (“NMPA”) and a group comprising the Independent Music Publishers Forum, the Association of Independent Music Publishers, and a group of nine independent music publishers (this group collectively, “IMPF/AIMP”), filed supplemental briefs.

³¹ Major Labels Initial Br. at 2; George Johnson Response Br. at 4-5

³² Major Labels Initial Br. at 3.

³³ *Id.* at 6.

³⁴ *Id.* at 2-8, 12-14.

³⁵ *Id.* at 16.

³⁶ *Id.* at 15.

³⁷ Major Labels Supp. Br. at 13 (quoting 79 Fed. Reg. 412, 413 (Jan. 3, 2014)) (emphasis in original).

NMPA did not take a position on the merits of the referred question.³⁸ IMPF/AIMP, however, adopted the arguments of the Independent Labels and Artists, taking the position that “Section 114 does not permit the Copyright Royalty Judges to award different rates based on the identity or categorization of the licensors.”³⁹

NMPA and IMPF/AIMP also addressed the Register’s question regarding the implications of the decision here for other statutory licenses.⁴⁰ They asked the Register to expressly confine her decision to sections 112 and 114, and state that the decision does not have any impact on the statutory license in section 115 for the making and distribution of phonorecords of nondramatic musical works.⁴¹ According to NMPA, “Section 115 is a very different license than Section 114,” as it concerns “an entirely different type of royalty, and an entirely different group of stakeholders.”⁴²

III. Register’s Determination

Having carefully considered the statutory framework and the parties’ submissions, the Register of Copyrights concludes that there is no basis in the context of the current proceeding on which to render an opinion on the question posed by the CRJs, as the question does not meet the statutory criteria for referral.

In referring the question to the Register for a written opinion, the Judges relied on 17 U.S.C. § 802(f)(1)(B). That provision, however, requires the CRJs to request a decision from the Register only in a “case in which a novel material question of substantive law concerning an interpretation of those provisions of [title 17] that are the subject of the proceeding *is presented*.”⁴³ Similarly, section 802(f)(1)(A)(ii)—which the CRJs did not cite but also could arguably apply—gives the CRJs discretion to obtain a formal written opinion from the Register of Copyrights concerning “any material questions of substantive law that relate to the construction of provisions of this title and *arise in the course of the proceeding*.”⁴⁴ Thus, by their plain terms, these two statutory mechanisms requiring a written opinion from the Register may only be invoked by the CRJs where a referred question is actually “presented” or “arise[s]” in a particular proceeding.

This reading of the statute is reinforced by its legislative history. Originally, when the CRJ system was enacted in 2004, the statute allowed the CRJs to refer material questions of substantive law to the Register under section 802(f)(1)(A)(ii) when they “concern[ed] an interpretation or construction of those provisions of [title 17] that are the subject of the proceeding.”⁴⁵ On its face, this language appeared broadly to permit the referral of questions

³⁸ NMPA Supp. Br. at 2.

³⁹ IMPF/AIMP Supp. Br. at 4.

⁴⁰ See NMPA Supp. Br. at 3-7; IMPF/AIMP Supp. Br. at 4-5. Other parties also addressed this question to varying extents. See, e.g., Independent Labels and Unions Supp. Br. at 2-3 (arguing that a decision here “would impact all Copyright Office rate proceedings”); SiriusXM Supp. Br. at 5-7 (arguing that any ruling here “should be strictly limited” to the Web IV proceeding, discussing differences between the licenses); Major Labels Supp. Br. at 5-8 (arguing that the potential ramifications of any decision on other statutory licenses are beyond the scope of the referred question and irrelevant to its resolution, discussing differences between the licenses).

⁴¹ NMPA Supp. Br. at 7; IMPF/AIMP Supp. Br. at 4-5.

⁴² NMPA Supp. Br. at 3.

⁴³ 17 U.S.C. § 802(f)(1)(B)(i) (emphasis added).

⁴⁴ *Id.* § 802(f)(1)(A)(ii) (emphasis added).

⁴⁵ Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 3(a), 118 Stat. 2341, 2346 (2004).

concerning any provision that was generally the “subject” of the proceeding (*e.g.*, in the current proceeding, sections 112(e) and 114(f)), regardless of whether the specific question was actually implicated by the proceeding. But when Congress made technical corrections to the statute in 2006, it qualified section 802(f)(1)(A)(ii) to clarify that questions may be referred under this provision only when they actually “arise in the course of the proceeding.”⁴⁶ By adding the “arise” requirement, the amendment brought section 802(f)(1)(A)(ii) more closely into alignment with section 802(f)(1)(B)(i), which already contained the “presented” language. In limiting the referral mechanism in both cases, Congress signaled its intent that questions sent to the Register for a written opinion—whether novel and/or material—should be confined to matters actually at issue in a proceeding.

Whether a question of substantive law is actually “presented” or “arises” in a particular case will inevitably depend upon the circumstances of that proceeding. It will often be readily apparent that the question is presented, such as when the question concerns a statutory limitation on the CRJs’ authority to consider certain types of evidence sought to be presented by participants,⁴⁷ whether a specific term proposed by a party for adoption in a settlement is consistent with the Act,⁴⁸ the extent of the CRJs’ continuing jurisdiction over a prior determination under the Act,⁴⁹ or whether a statutory license extends to a particular activity for which a party seeks to have a rate established.⁵⁰ In each of these examples, the Register’s answer to the question will presumably have an impact on the conduct or outcome of the proceeding.

Here, by contrast, the Register finds that the question whether the CRJs may adopt rates and terms for webcasting that distinguish among different types or categories of licensors is merely a theoretical one in the context of this proceeding. As noted, the CRJs have not previously adopted rates and terms for webcasting services that distinguish among licensors. Setting aside the question whether the CRJs have the authority to do so, it is clear from the submissions in response to the referred question that the various participants litigated this case on the assumption that the outcome would be an undifferentiated rate structure for licensors. To be sure, in initiating the proceeding, the CRJs broadly invited parties to provide evidence and argument “regarding any reasonable rate structure” or “the presence of economic variations among buyers and sellers.”⁵¹ But it is undisputed that no participant in the proceeding in fact

⁴⁶ Copyright Royalty Judges Program Technical Corrections Act, Pub. L. No. 109-303, § 3, 120 Stat. 1478, 1478-79 (2006).

⁴⁷ Scope of the Copyright Royalty Judges’ Continuing Jurisdiction, 80 Fed. Reg. 58,300 (Sept. 28, 2015).

⁴⁸ *See, e.g.*, Scope of the Copyright Royalty Judges Authority to Adopt Confidentiality Requirements upon Copyright Owners within a Voluntarily Negotiated License Agreement, 78 Fed. Reg. 47,421 (Aug. 5, 2013) (in section 115 proceeding, determining that CRJs lacked authority to adopt certain provisions imposing a duty of confidentiality upon copyright owners).

⁴⁹ *See, e.g.*, Scope of the Copyright Royalty Judges’ Continuing Jurisdiction, 80 Fed. Reg. 25,333 (May 4, 2015) (determining that CRJs had the authority to issue a clarifying interpretation of regulations adopted in a prior ratesetting determination).

⁵⁰ Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303 (Nov. 1, 2006).

⁵¹ Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV), 79 Fed. Reg. 412, 413 (Jan. 3, 2014). In that notice, the CRJs also referred generally to the concept of “price discrimination” in free market transactions, and invited participants to address “the potential applicability or inapplicability of price discrimination within the commercial webcaster segment of the market as well.” *Id.* at 413-14. But the CRJs’ discussion focused on price discrimination by *sellers*—*i.e.*, where sellers charge different prices for identical goods with the price differences based on the status of the buyers. *Id.* at 413. That, of course, is the

proposed rates or terms that differentiated among licensors and, accordingly, such a structure was not understood to be a subject of litigation.⁵² Moreover, based on the parties' briefs in response to the referred question and the Copyright Office's review of the Web IV docket, there is no indication that the CRJs went beyond their general invitation at the outset of the proceeding to require that such differentiation be addressed.⁵³ As a result, no party addressed the question of "segmentation by licensor,"⁵⁴ and "no participant had the opportunity, or any reason, to introduce evidence or to respond to any such proposal, or to demonstrate the potential administrative difficulties or consequences of such rates and terms."⁵⁵

In this regard, the Register further observes that the CRJs are statutorily required to make determinations that are "supported by the written record"⁵⁶ and based "on economic, competitive and programming information presented by the parties."⁵⁷ Significantly, the U.S. Court of Appeals for the D.C. Circuit has twice vacated CRJ determinations that relied on theories "first presented in the Judges' determination and not advanced by any participant."⁵⁸ Here—consistent with their rate proposals—the participants' respective proposed findings of fact and conclusions of law submitted at the conclusion of the proceeding uniformly fail to advocate for statutory rates and terms that distinguish among licensors.⁵⁹ Moreover, in briefing the question now before the

type of price discrimination expressly contemplated by the statute, which requires the CRJs to adopt "rates and terms [that] distinguish among the different types of [services] then in operation." 17 U.S.C. § 114(f)(2).

⁵² See NAB/NRBNMLC Response Br. at 1; SiriusXM Initial Br. at 6; Independent Labels and Unions Initial Br. at 11-12; see also Direct Testimony of Kurt Hanson Submitted on behalf of AccuRadio, LLC, 16-18 (Oct. 6, 2014); Written Direct Statement of College Broadcasters, Inc. (Oct. 7, 2014) (attaching proposed regulations); Letter from David Oxenford on behalf of Educational Media Foundation to Copyright Royalty Board (Oct. 7, 2014) (joining in the rate proposal submitted by NRBNMLC); Written Direct Statement of Geo Music Group, 4-5 (Oct. 10, 2014); Written Testimony of Michael Papish on behalf of Harvard Radio Broadcasting Co., Inc. (WHRB) (Oct. 7, 2014); Written Testimony of Frederick J. Kass on behalf of Intercollegiate Broadcasting System (Oct. 7, 2014); Proposed Rates and Terms of iHeartMedia, Inc. (Oct. 7, 2014); Written Direct Statement of the National Association of Broadcasters, Vol. 1B (Oct. 7, 2014); Written Direct Case of the Corporation for Public Broadcasting, on behalf of National Public Radio, Inc., including National Public Radio, Inc.'s Member Stations, American Public Media, Public Radio International, and Public Radio Exchange Broadcasting, 6-8 (Oct. 7, 2014); Written Direct Statement of the National Religious Broadcasters Noncommercial Music License Committee, Including Educational Media Foundation (Oct. 7, 2014); Proposed Rates and Terms of Pandora Media, Inc.; Written Direct Statement of Sirius XM Radio Inc., 1-2 (Oct. 7, 2014); Proposed Rates and Terms of SoundExchange, Inc. (Oct. 7, 2014).

⁵³ See Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, Docket No. 14-CRB-0001-WR (2016-2020), 1 (Feb. 19, 2014) (asking parties to "address expressly issues relating to categories of licensees," but omitting any mention of issues relating to categories of licensors).

⁵⁴ SoundExchange Initial Br. at 2. In this regard, it is notable that SoundExchange finds itself unable to put forth a unified view on the question of differentiated rates. Presumably SoundExchange could not have acted as the representative of virtually all of the rightsholders in the proceeding if the question of a differentiated rate structure was actually in contention. See Independent Labels and Unions Initial Br. at 14.

⁵⁵ See NAB/NRBNMLC Response Br. at 1.

⁵⁶ 17 U.S.C. § 803(c)(3).

⁵⁷ *Id.* § 114(f)(2)(B).

⁵⁸ *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1121 (D.C. Cir. 2015) (quoting *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 767 (D.C. Cir. 2009) (internal quotation marks omitted)).

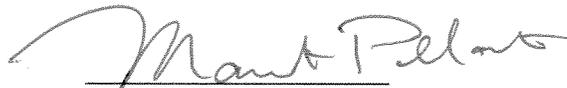
⁵⁹ See Proposed Findings and Conclusions of Intercollegiate Broadcasting Systems, 13 (July 19, 2015); Proposed Findings of Fact of iHeartMedia, Inc., 207 (June 24, 2015); National Association of Broadcasters' Proposed Findings of Fact and Conclusions of Law (July 19, 2015) (attaching NAB's Proposed Rates and Terms); The National Religious Broadcasters Noncommercial Music License Committee's Corrected Proposed Findings of Fact and Conclusions of Law (June 24, 2015) (attaching NRBNMLC's Proposed Noncommercial Webcaster Rates and

Register, no party has identified any basis upon which the CRJs could reasonably rely to adopt a differentiated rate structure.⁶⁰ Thus, even assuming for the sake of argument that they possess the legal authority to establish rates that differentiate by licensor,⁶¹ it seems that under the current circumstances, the CRJs could not meet their basic obligation “to make [a] reasoned decision[] supported by the written record before them.”⁶²

In sum, given the posture of the case, the question referred by the CRJs appears to be only a theoretical one in that the Register is unable to discern how a written decision at this juncture could substantively impact the conduct or outcome of this proceeding.⁶³ Indeed, the question itself is presented in hypothetical terms: it asks the Register to “assum[e] a factual basis in the evidentiary record” for a distinction among licensors. As significant as the question of a differentiated rate structure for licensors might be under different circumstances, the Register does not believe that the statute contemplates the issuance of a written opinion when the inquiry is wholly theoretical in nature.

The language of the Act makes clear that the referral procedure under section 802(f)(1)(B) is limited to novel material questions of substantive law that are actually “presented.” As the Register has concluded that the question set forth in the CRJs’ September 11, 2015 order is not actually presented in this proceeding, she leaves the answer for another day.

November 24, 2015



Maria A. Pallante
Register of Copyrights and Director,
United States Copyright Office

Terms); Pandora Media, Inc.’s Proposed Findings of Fact and Conclusions of Law, 1-2 (June 19, 2015); Sirius XM Radio Inc.’s Proposed Findings of Fact, 1 (June 19, 2015); Proposed Findings of Fact of SoundExchange, Inc., 94-96 (June 19, 2015); Proposed Findings and Conclusions on behalf of Harvard Radio Broadcasting Co., Inc. (WHRB) (June 19, 2015).

⁶⁰ Although the Major Labels suggest that the CRJs could “credit evidence supporting a different rate structure than they have adopted in the past,” they do not point to any actual argument or evidence in the record that would support such an approach. *See* Majors Labels Supp. Br. at 14. In any event, as noted, such an approach would appear to run afoul of controlling precedent. *See Settling Devotional Claimants*, 797 F.3d at 1121 (reversing CRJ determination where theory was “first presented in the Judges’ determination and not advanced by any participant”).

⁶¹ In considering these procedural issues, the Register does not mean to suggest any conclusion concerning the CRJs’ legal authority to adopt rates and terms that distinguish among licensors.

⁶² *Settling Devotional Claimants*, 797 F.3d at 1121.

⁶³ Referral Order at 2.