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

In the Matter of: Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services	Docket No. 2006-1 CRB DSTRA (2007-2012)

SOUNDEXCHANGE'S REPLY BRIEF IN RESPONSE TO THE JUDGES' ORDER DATED MARCH 9, 2017

When SoundExchange sued Sirius XM in the district court, Sirius XM insisted that the legality of its approaches to calculating Gross Revenues had to be decided by the Judges. After the district court granted Sirius XM's motion and stayed the case, Sirius XM stuck to the same position, arguing that the Judges' continuing jurisdiction encompassed the power to say whether what Sirius XM did was lawful, and urging the Judges to answer that question in the affirmative. Now, however, Sirius XM insists that the Judges went too far in determining whether Sirius XM's revenue exclusions were lawful—perhaps because Sirius XM does not like some of the conclusions in the January 10 Ruling. Not only that, Sirius XM seizes an opportunity to urge reconsideration of the Judges' Premier ruling on the merits. Sirius XM offers no persuasive reason for the Judges to retreat from the January 10 Ruling, which accordingly should be left undisturbed.

I. THE JUDGES' RULING DID NOT INCLUDE APPLICATIONS BEYOND THE SCOPE OF THE DISTRICT COURT'S REFERRAL OR THE JUDGES' JURISDICTION AS CONSTRUED BY THE REGISTER.

Sirius XM argues that "[t]he Judges had the power both to interpret the Regulations and to offer general 'interpretive guidance' as to how the Regulations could be practically implemented."

Sirius XM Radio Inc.'s Memorandum of Law in Response to Order Withdrawing Ruling and Soliciting Briefing on Unresolved Issues at 7, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA (2007-2012) (April 24, 2017) (hereinafter "Sirius XM Br."). SoundExchange agrees that, under the Register's 2015 continuing-jurisdiction ruling, the Judges had this power. Sirius XM also argues, however, that the Judges lacked the power "to engage in a full-scale application of that interpretation to a review of Sirius XM's monthly compliance with the Regulations or to offer opinions regarding liability or damages." *Id.* at 8. SoundExchange disagrees: under the Register's 2015 continuing-jurisdiction ruling, as well as the terms of the district court's primary jurisdiction referral, the Judges did have that power.

First, as previously shown, the district court granted Sirius XM's primary jurisdiction motion precisely so that the Judges could determine whether its approach to calculating Gross Revenues comported with the regulations. *See* SoundExchange's Brief in Response to the Judges' Order Dated March 9, 2017 at 7-8, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA (2007-2012) (April 24, 2017) (hereinafter "SoundExchange Br."). That referral is impossible to square with the notion that the Judges' could not assess Sirius XM's compliance or otherwise apply their interpretation of the regulations.

Second, and again as previously shown, the Register's 2015 continuing-jurisdiction ruling itself made clear that the Judges could evaluate whether Sirius XM's approaches to calculating

Gross Revenues were permissible. *See id.* at 9-10. Again, that pronouncement clearly encompasses assessments of Sirius XM's compliance.[1]

Third, as previously argued, even applying a regulation to a particular factual scenario encompasses interpretation. *See id.* at 6. Indeed, Sirius XM itself appears to acknowledge the difficulty of distinguishing between interpretation and application of regulations. *See* Sirius XM Br. at 7. Here, even as the Judges were addressing the facts presented by the parties, they necessarily were explicating what the regulations *mean*—for instance, that a pre-1972 exclusion methodology had to be reasonable and transparent. Sirius XM, for its part, fails to explain why it was permissible for the Judges to "explain[] what might constitute . . . a reasonable estimation methodology and analyz[e] the reasonableness of Sirius XM's two estimation methodologies," *id.* at 8, but not to assess compliance on a more granular level.

The fact that the district court stated that it would later consider damages does not change any of this. For one thing, no part of the January 10 Ruling purported to quantify damages. *See Ruling on Regulatory Interpretation Referred by United States District Court for the District of Columbia* at 4 n.13, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA (2007-2012) (January 10, 2017) (hereinafter "the January 10 Ruling") ("Determining the precise amounts is not relevant to determining the issues before the Judges. The Judges mention the royalty amounts to make clear the dimensions of the dispute."). Instead, the Judges just decided whether Sirius XM's approaches were permissible in particular periods. For another thing, a computation of damages can be entirely mechanical—here, consisting of application of the statutory royalty rate, as well as the

[1] For this reason, Sirius XM is wrong to contend that the Register's 2015 decision actually *forecloses* the Judges from applying the regulations to the facts before them.

1.5% monthly rate of interest for late payments. In other words, to the extent that the Judges considered the operation of the Gross Revenues definition in particular factual scenarios, that is fully consistent with the district court's expectation that it would resolve damages. The district court itself made this clear: "If the CRB judges Sirius XM's gross revenue calculations to have been improper, SoundExchange can seek damages in this court." *SoundExchange, Inc., v. Sirius XM Radio, Inc.*, 65 F. Supp. 3d 150, 156-57 (D.D.C. 2014). It is simply not true that the district court "expressly reserved for itself all questions relating to Sirius XM's month-by month compliance with the 2008 Regulations and all issues regarding potential damages." Sirius XM Br. at 10.

Indeed, returning to the district court for an adjudication of damages is inevitable, regardless of the extent to which the Judges address particular factual circumstances. As Sirius XM recognizes, the Judges cannot order a licensee to pay a particular amount of money to SoundExchange, nor can they otherwise enforce a rate determination in the face of a licensee's noncompliance. *See id.* at 10, 16. Any such order, no matter how mechanical, ultimately must come from the district court. Particularly in this light, a statement that the parties should return to the district court for a determination of damages does not connote that damages proceedings will have any particular scope. It also does not disable the Judges from ruling on issues that may bear on the quantum of damages.

II. TO THE EXTENT THAT THE RULING ENCOMPASSES "INTERPRETIVE GUIDANCE," THAT GUIDANCE MUST BE BINDING.

Citing language from the Register's continuing-jurisdiction ruling, Sirius XM argues that portions of the January 10 Ruling addressing its own pre-1972 exclusion methodologies are permissible as "interpretive guidance." *Id.* at 8. It is not clear whether Sirius XM is attempting to draw a distinction between "interpretation," on one hand, and "interpretive guidance," on the other. *See id.* at 7 ("The Judges had the power both to interpret the Regulations and to offer general

'interpretive guidance' as to how the Regulations could be practically implemented . . . ."). Even if the Judges' rulings are characterized as "interpretive guidance," however, they should be binding: assuming that the district court's primary-jurisdiction referral was appropriate in the first place, there is no basis to conclude that the Judges' authority encompasses the ability to issue any sort of *non*-binding guidance. As previously explained, the Copyright Act provides that the rates and terms set by the Judges "shall . . . be binding" on copyright owners and licensees. 17 U.S.C. § 114(f)(1)(B). This underpayment dispute is before the Judges because the Register concluded that it fell within the Judges' continuing jurisdiction over the *SDARS I* proceeding to determine rates and terms. It would be illogical to conclude that rulings issued in the exercise of that jurisdiction constitute mere "interpretive guidance," without "binding" the parties to the same extent as the rate determination in the first instance.

Indeed, construing the Judges' authority as encompassing the issuance of non-binding guidance would be a recipe for redundant litigation, and certainly would not promote the efficient resolution of disputes. If the Judges' continuing jurisdiction gives them the ability to issue non-binding "guidance," then their rulings effectively become subject to challenge in the district court (beyond whatever appeal rights may exist pursuant to 17 U.S.C. § 803(d)(1)), with a dissatisfied party able to argue that the "guidance" should be disregarded. Particularly where the matter was referred to the Judges precisely so that they could bring their expertise to bear in determining the permissibility of Sirius XM's approaches to calculating Gross Revenues, it would make little sense to give a losing party a *further* bite at the apple. Indeed, the district court surely did not refer these issues to the Judges in hopes of obtaining non-binding guidance whose merits it would then have to evaluate.

III. SIRIUS XM'S BELATED MOTION FOR REHEARING OF THE PREMIER ISSUE SHOULD BE DENIED.

Finally, Sirius XM argues that the Judges should "reconsider" their ruling on Sirius XM's Premier exclusions. That request should be rejected.

As an initial matter, Sirius XM's argument amounts to an untimely request for rehearing of the Judges' ruling on the Premier issue. The Judges' regulations provide that "[a] motion for rehearing must be filed within 15 days after the date on which the Copyright Royalty Judges issue an initial determination." 37 C.F.R. § 353.4. Sirius XM elected not to seek rehearing within 15 days of the January 10 Ruling. Having failed to do so during that window, Sirius XM should not now be permitted to relitigate the merits of the Judges' Premier ruling, simply by exploiting the fact that the Judges have withdrawn the January 10 Ruling to evaluate whether it exceeded its permissible scope.

To the limited extent that Sirius XM even *attempts* to place this argument within the framework of the Judges' March 9 Order, moreover, that attempt founders on its premise. Assailing the Judges' ruling as "somewhat confusing" and "inconsistent," Sirius XM states: "[T]he proper course would have been to provide an appropriate construction of the 'separate charge' language by resolving whether it incorporated a hidden and additional requirement that the offering be on a standalone basis, and only then offer interpretive guidance as to what would be necessary to meet it." Sirius XM Br. at 16. Although its brief is not entirely clear, Sirius XM appears to be arguing that the Judges did not actually interpret the language at issue. In fact, the Judges' ruling was that "Sirius XM's use of a bundled price is inconsistent with the regulatory requirement that premium channels must be priced at a 'separate charge.'" January 10 Ruling at 17; *see id.* ("The Judges find and conclude that the language in the revenue exclusion described in subsection (vi)(B) did *not* permit Sirius XM to exclude from the Gross Revenues royalty base the price difference, *i.e.*,

the Upcharge, between the Premier package and the Basic package.") (emphasis in original). Quite clearly, their conclusion was that "offered for a separate charge" means, at a minimum, "not offered for a bundled price."

Indeed, the January 10 Ruling devoted nearly five pages to supporting that conclusion. The Judges began by looking to the text of the regulation, contrasting "bundled" with the definition of "separate." *Id.*; *see id.* (noting that "separate" is an antonym of "bundle"). The Judges then went further, explaining why construing "separate charge" to exclude a "bundled price" was consistent with the context in which the relevant exclusion was promulgated. First, the Judges cited the *SDARS I* decision's explanation for why the exclusion was put in place. *See id.* at 18 (referring to premium nonmusic channels "that are offered for a charge separate from the general subscription charge," and "the separate fee generated" for such channels). Second, the Judges cited the *SDARS I* decision's flexibility-based explanation for the "separate charge" provision and observed that a bundled price "introduces an economically indeterminate and self-serving 'flexibility' that simply confuses the issue as to which portion of the entire subscription price reflects which type of channel." *Id.* Third, the Judges cited language in the *SDARS I* rehearing order to show that "the *SDARS I* Judges clearly understood that a failure by Sirius XM to set separate charges for bundled services that included services both in the royalty base and outside the royalty base would be contrary to the regulatory scheme, rendering the royalty base indeterminate." *Id.* at 21. Summing up, the Judges "conclude[d] that Sirius XM's combined charge for the Premier package is inconsistent with the plain meaning . . . and with the purpose of the 'separate charge' requirement." *Id.* All of this was by way of interpreting "separate charge" to mean "not a bundled price."[2]

[2] Sirius XM suggests that the Judges should have "resolv[ed] whether [the 'separate charge' language] incorporated a hidden and additional requirement that the offering be on a standalone basis." Sirius XM Br. at 16. That is just a pejorative way of characterizing the ruling that the

To the extent that the Judges ruled on whether *Sirius XM's approaches* were permissible, that falls well within what Sirius XM asked the Judges to do. Sirius XM invoked the doctrine of primary jurisdiction in the district court so that the Judges could determine "whether Sirius XM's calculation of royalty payments under that definition was proper." Defendant Sirius XM Radio Inc.'s Memorandum of Law in Support of Its Motion to Dismiss at 1, *SoundExchange, Inc. v. Sirius XM Radio, Inc.*, 65 F. Supp. 3d 150 (D.D.C. 2014); *see id.* at 2 (arguing that the Judges should determine "whether Sirius XM's exclusion of revenues associated with pre-1972 sound recordings and non-music programming . . . was a correct application of the definition of 'Gross Revenues'"). In its written merits submission to the Judges, Sirius XM asked the Judges to "clarify . . . that the clearly identifiable upcharge for the 'Best of' (and 'Premier') channels satisfies the 'separate charge' standard in the definition." Written Merits Opening Submission of Sirius XM Radio, Inc. at 6, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA (2007-2012) (July 29, 2015); *see id.* at 16 (arguing that "it is clear that the 'Best of' and 'Premier' packages were (and are) offered for a 'separate charge' under paragraph 3(vi)(B)"). Then, when asked to provide a statement of issues on which it sought a ruling, Sirius XM presented the following question concerning the Premier issue: "Was *the upcharge for the incremental non-music channels offered by Sirius XM* in its 'Best of' and 'Premier' packages during the 2007-2012 license period *appropriately excluded* under the 'Gross Revenues' definition codified in the *SDARS I* final rate determination?" Sirius XM's Statement of Issues at 2, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB

Judges *did* make. The requirement that an offering be on a standalone basis is not "hidden" or "additional" to the "separate charge" language. It is just the flip side of interpreting that language to exclude bundled offerings—the very conclusion that the Judges carefully justified.

DSTRA (2007-2012) (October 14, 2016) (emphasis added). Sirius XM also presented the following question: "If it were determined that *Sirius XM's exclusion of the upcharge* for the incremental non-music channels offered in its 'Best of' and 'Premier' packages during the 2007-2012 period *was not clearly permitted* under the regulations as written, should the regulations or SDARS I determination be amended and/or clarified to confirm that *the exclusion of an additional charge* for non-music content, above and beyond the base package price, *was acceptable* as consistent with the intent of the regulations to confine the obligation to pay royalties to the transmission of recordings subject to the statutory license?" *Id.* (emphasis added). All of these were requests for definitive rulings regarding whether what Sirius XM did was permissible, not what would have been permissible in the abstract—and Sirius XM should not now be heard to argue otherwise.

In all events, Sirius XM offers no reason to conclude that the Judges' Premier ruling was incorrect on the merits. In the face of the Judges' careful consideration of testimony from the parties' respective experts, Sirius XM's plea for reconsideration cites no evidence at all—even though it reads like an expert report in its own right. *See* Sirius XM Br. at 16-19. And even so, Sirius XM's reconsideration request just rehashes arguments from its initial and responsive merits submissions.

Sirius XM's arguments fail on their own terms, too. First, contrary to Sirius XM's contention, the "separate charge" language *was* the foundation for the Judges' focus on the indeterminacy of apportioning revenues to the components of its bundled Premier packages. The Judges explained that, under the *SDARS I* rehearing decision, the "separate charge" language was meant to ensure that royalty-bearing revenues could be clearly delineated from non-royalty-bearing ones. *See* January 10 Ruling at 21. Bundled pricing prevents this delineation.

Second, Sirius XM is wrong to assert that its bundled pricing of Premier does permit identification of the revenues attributable to the music portion of the bundle (because the Select package itself has a standalone price), and that attributing the Select price to that portion could even be too generous to SoundExchange. The Judges had all of these arguments before them when they issued the January 10 Ruling. The Judges properly rejected them, largely on the strength of testimony from SoundExchange's expert, Dr. Lys, and observed that Sirius XM's argument "misses the economic point." *Id.* at 19-20. For any given Premier subscriber, the value of the music component *might* be only the Select price—but it might be higher, because of the role that bundled pricing plays in capturing consumer surplus. *Id.* at 20. True, a subscriber might value the incremental Premier channels higher than the difference between the Premier and Select prices—but the subscriber also might value the Select channels higher than the Select price.

Third, Sirius XM misses the point when it argues that "the Regulations themselves say nothing about issues of bundling or unbundling or issues of revenue attribution relating thereto, but only require that . . . there be an identifiable 'separate charge' for the non-music programming that is readily discernible, transparent, and identifiable to consumers." Sirius XM Br. at 18. The very point of the Judges' detailed, five-page analysis was to explain why "for a separate charge" means "not for a bundled price." Sirius XM offers no reason to disturb that careful analysis.

CONCLUSION

The January 10 Ruling should be left intact, and the questions posed in the March 9 Order should be answered in a manner consistent with this brief and with SoundExchange's opening brief.

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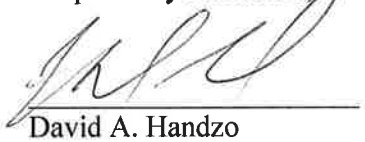
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Joshua M. Segal, hereby certify that the foregoing Reply Brief In Response To The Judges' Order Dated March 9, 2017 was served via electronic mail and overnight delivery on the 15th day of May, 2017, to the following:

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