PUBLIC VERSION

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

In the Matter of:	)	
	)	
Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)	)))	Docket No. 14-CRB-0001-WR (2016-2020) CRB Webcasting IV

SOUNDEXCHANGE'S PETITION FOR REHEARING

SoundExchange, Inc. ("SoundExchange") respectfully requests rehearing of the Judges' Initial Determination (or "*Web IV ID*"). 17 U.S.C. § 803(c)(2); 37 C.F.R. § 353.1.[1]

STANDARD

"The Copyright Royalty Judges may grant rehearing upon a showing that any aspect of the determination may be erroneous." 37 C.F.R. § 353.1. The Judges have explained that rehearing is appropriate where "(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice." Order Denying Motions for Rehearing, *SDARS II*, Dkt. No. 2011-1 CRB PSS/SATELLITE II, Jan. 30, 2013 (Barnett, C.J.) (quotations omitted).

ARGUMENT

I. ANY BLENDED NONSUBSCRIPTION RATE MUST REFLECT A BLEND OF DISTRIBUTED, NOT OWNED, SHARES

Critical to the Judges' determination of the nonsubscription rate was "blending" rates the Judges derived for majors and for indies (based on iHeart-Warner and Pandora-Merlin,

[1] This Petition includes only those issues that SoundExchange believes merit rehearing. This Petition also accepts *arguendo* certain parts of the Initial Determination. SoundExchange does not concede the correctness of any part of the Initial Determination, including its benchmark considerations, and reserves the right to challenge all of the Initial Determination on appeal.

respectively).[2] The Judges used a 65%-35% ratio for this "blend," and they derived the ratio based on a single internal Pandora document purporting to state percentages of performances *on Pandora*.[3] *Web IV ID* at 200 (citing SX Ex. 269 at 73). This document purports to reflect the percentage of performances on Pandora that are of sound recordings "owned" by majors versus sound recordings "owned" by indies. Owned shares is the wrong measure for what the Judges said they wanted to calculate.

The right measure is "distributed" shares, *i.e.*, shares of recordings that majors and indies distribute. The Judges said they were trying to determine what percentage of the performances would *get paid* at the [REDACTED] rate derived from iHeart-Warner and what percentage would *get paid* at the [REDACTED] rate derived from Pandora-Merlin. Distributed, not owned, shares must be used for that calculation because performances of independently owned sound recordings that majors distribute generally *get paid* pursuant to the majors' deals with such services.[4] Applying owned shares for that calculation is clear error because it contradicts the very benchmarks upon which the Judges rely. The rates in the iHeart-Warner agreement expressly [REDACTED] [REDACTED].[5] Merlin itself is a distributor and does not own the recordings licensed

[2] Without limiting the reservation in note 1, *supra*, SoundExchange disagrees with the Judges' methodology and reasoning for deriving the commercial nonsubscription rates.

[3] The Judges clearly erred in relying on a single page from a Pandora document as the sole basis for determining the major-indie split. There was no testimony about how Pandora derived these shares. And Prof. Shapiro acknowledged they are not representative of the major-indie split on other services. Shapiro WDT at 13, n.19.

[4] The record is undisputed on this point. *See* SX Ex. 20 at 6-7 (Van Arman WDT) ("a substantial portion" of indie sound recordings are distributed to digital services by one of the three majors; in such cases, "generally it is the terms of the major's license with a digital music service that govern the rates and terms for distribution of those sound recordings."); SX PFOF ¶ 541; SX Ex. 17 ¶ 224 (Rubinfeld Corr. WDT).

[5] The agreement states that [REDACTED] [REDACTED] SX Ex. 33 at 1 (emphasis added). [REDACTED] [REDACTED] is defined with reference to [REDACTED], which include, in relevant part,

to Pandora. SX PFOF ¶ 506 (citing PAN Ex. 5022 at 23-24).

The Initial Determination thus should be corrected to blend the nonsubscription rates based on distributed shares. The evidence in this proceeding shows the *distributed* split is no less than 85%-15%. RIAA statistics show that the majors "create, manufacture, and/or distribute approximately 85% of all legitimate recorded music." SX Ex. 469 at 5. Prof. Rubinfeld relied on Billboard data showing that indies control 12.3% of sound recordings based on distribution. SX Ex. 17 at n.131 (Rubinfeld Corr. WDT). Prof. Katz, relying on the Judges' prior findings, noted that majors distribute approximately 85% of sound recordings. NAB Ex. 4000 ¶ 70 (Katz WDT). An 85%-15% blend is a conservative estimate of the distributed shares that would result in the market the Judges hypothesize, as faced with the choice between [redacted] (if distributed at a "major" rate) and [redacted] (if distributed at an "indie" rate), indies would opt to have majors distribute their owned recordings to digital services at even higher numbers than 85%-15%.

To correct the Judges' error under their own methodology, the Judges should have relied on a ratio of no less than 85%-15%. Making this one change results in a blended nonsubscription rate of $.0018.

II. <u>THE ANNUAL ADJUSTMENT BASED ON CPI CANNOT BE RECONCILED WITH THE WILLING BUYER/WILLING SELLER STANDARD ("WBWS")</u>

The parties submitted numerous multi-year agreements as potential benchmarks. The Judges did not cite (and we are not aware of) any agreements that had an annual adjustment to rates based on CPI. Hence, no willing buyer or willing seller entered into an agreement that escalated rates based on CPI. Tellingly, the two benchmarks the Judges relied on to set the

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[redacted] *Id.* at 10 (emphasis added).

nonsubscription rate contain [REDACTED] . [REDACTED] . *Web IV ID* at 137-138; SX PFOF ¶ 761. Likewise, [REDACTED] .[6] *Id.* at 94. Thus, the [REDACTED] in the agreements that the Judges have determined best meet the WBWS standard [REDACTED] the CPI that the Judges cited for 2015 (0.5%). *Id.* at 199. The CPI escalation cannot be reconciled with the WBWS standard and constitutes legal error.[7]

The record also shows that the five-year term of the statutory license supports a rate escalation greater than CPI. The Judges note the difficulty of predicting what will happen to market rates in the future. *Web IV ID* at 83. That was also true when Pandora, Merlin, iHeart and Warner entered into their multi-year deals, but they all agreed to [REDACTED] in an evolving streaming marketplace. Moreover, because Licensees (but not Licensors) can opt out of the statutory license, an annual increase of at least $.0001 partially protects against the statutory license's inherent asymmetry and the unforeseen marketplace developments over the next five years. *See* SX Reply PFOF ¶ 465 (citing SX PFOF

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[6] That agreement also [REDACTED] PAN Ex. 5014 at § 3(b).

[7] The Judges note that many interactive agreements do not contain rate escalations. *Id.* at 82. But these agreements also generally contain terms significantly shorter than five years and greater-of rate structures with revenue shares, both of which provide additional protections to Licensors. SX PFOF ¶ 425.

¶ 398; SX Ex. 17 ¶¶ 100, 143 (Rubinfeld Corr. WDT)).[8]

The Judges clearly erred by crediting Pandora-Merlin and iHeart-Warner as WBWS agreements for their stated rates but [redacted]. To correct this error, the Judges, at a minimum, should provide for an annual rate increase of at least $.0001, which [redacted]. Since the Judges have determined that $.0017 is the appropriate nonsubscription rate for 2016, the rates for later years should be: $.0018 for 2017; $.0019 for 2018; $.0020 for 2019; and $.0021 for 2020.[9] Likewise, the 2016 subscription rate of $.0022 should escalate to: $.0023 for 2017; $.0024 for 2018; $.0025 for 2019; and $.0026 for 2020.

III. THE JUDGES COMMITTED LEGAL ERROR IN ANALYZING THE INTERACTION BETWEEN THE WBWS STANDARD AND THE STATUTORY LICENSE'S SHADOW

The "Act instructs the Judges to use the willing buyer/willing seller construct, assuming no statutory license." *Web III Remand*, 79 Fed. Reg. 23102, 23107 (Apr. 25, 2014).[10]

To comply with this standard, the Judges must assess (a) whether the terms of a proposed benchmark were materially affected by the "shadow" of the statutory rate and, if so, whether an adjustment to account for the shadow is necessary and feasible; and (b) whether the shadow

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[8] The Judges' rejection of the proposed greater-of structure with a revenue share highlights the importance of a rate escalation. Licensors negotiate for greater-of structures to protect against future uncertainties and to share in the upside if Services succeed. SX PFOF ¶¶ 321-331. Absent a revenue share, annual rate escalations are an even more important means for Licensors to account for this lost value.

[9] This second argument for rehearing assumes the correctness of the Judges' determination of the 2016 rates and only challenges the appropriate escalations for 2017-2020. If the Judges correct the determination for the error identified in Part I, then the appropriate nonsubscription rates should be: $.0018 for 2016; $.0019 for 2017; $.0020 for 2018; $.0021 for 2019; and $.0022 for 2020.

[10] *See also Web II*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) ("[I]t *is difficult to understand* how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, *could truly reflect 'fair market value.'*") (emphases added).

makes the proposed benchmark unreliable and unrepresentative, because the statutory rate eliminated relevant benchmarks that would have been reached above the statutory rate. The Judges fail to assess properly these legal requirements.

First, the Judges rely on benchmarks that indisputably were affected by the statutory rate. The headline rates in Pandora-Merlin, for example, [REDACTED]. And, in deriving a 2016 rate from Pandora-Merlin, the Judges ignore that [REDACTED]

[REDACTED]

[REDACTED] *See* SX PFOF ¶ 518 (citing PAN Ex. 5014 §§ 1(v), 4(a)). Pandora's own expert thus had to admit that "it's obvious" that Pandora-Merlin was "definitely negotiated in the shadow of the pureplay rates." SX PFOF ¶ 154 (quoting Hr'g Tr. 4583:22-24 (May 19, 2015) (Shapiro)); *see also* SX PFOF ¶ 157 (quoting IHM Ex. 3034 ¶ 48 (Fischel/Lichtman AWDT) (per-play rate in iHeart-Warner "is directly affected by the existing statutory rates")).

Notwithstanding this evidence, the Judges dismiss the shadow as not "meaningfully affect[ing] the effective steered rates" because those "rates are below the otherwise applicable statutory rates, and it would be irrational for a licensor to accept a rate below the statutory rate when it could have rejected the direct deal and enjoyed the higher statutory rate." *Web IV ID* at 32. But as the Judges recognize two pages later, this decision was not "irrational" because Merlin and Warner "voluntarily agreed to rates below the applicable statutory rates (*in exchange for the steering of more plays*), rather than defaulting to the higher statutory rate." *Id.* at 34 (emphasis added). In other words, as the Judges concluded in the context of Pandora-Merlin, Merlin members expressly agreed to "the trade-off of more plays at a lower rate for *more total revenue*" than they would have otherwise received under the statutory license. *Id.* at 126 (emphasis added). But this measure of total revenue relative to what the Merlin members would otherwise have received is inextricably tied to the statutory rate. Hence, Pandora-Merlin

necessarily was "negotiated under the constraints of a compulsory license," and therefore does not "*truly reflect 'fair market value*.'" *Web II* at 24087 (emphasis added).

Second, as the Judges acknowledge, Prof. Talley provided evidence of a "rational and hypothetically correct" economic theory demonstrating that negotiations and agreements for rates above statutory rates will be absent so long as the shadow exists. *Web IV ID* at 33. The Judges erred in discounting this theory as "too untethered from the facts to be predictive or useful in adjusting for the supposed shadow of the existing statutory rate." *Id.* The absence of rates above statutory rates *confirms* Prof. Talley's theory; such absence is not a sound basis for dismissing his analysis. The evidence of agreements *not entered into*—where parties opted for existing statutory or WSA rates—also proves the shadow's downward bias. [REDACTED]

[REDACTED].

This undisputed evidence also shows that iHeart-Warner fails the most basic test of WBWS, namely, "the rates to which, absent special circumstances, *most* willing buyers and willing sellers would agree." *Web II* at 24087 (emphasis added). The record was clear that [REDACTED]. Likewise, many indies did not enter into a deal with Pandora (or anyone else) at the Pandora-Merlin rates. *See* SX PFOF ¶¶ 542-550. And then blending two unrepresentative agreements to arrive at a single, unrepresentative, non-subscription rate only compounds the error.

The Judges' analysis must be corrected either to discount the Pandora-Merlin and iHeart-Warner benchmarks entirely in favor of the interactive benchmarks or to adjust the derived rates upward to account for the shadow's downward impact.

IV. OTHER ERRORS IN THE JUDGES' INITIAL DETERMINATION

A. If The Annual CPI Increase Is Retained, The Proposed Calculation Must Be Clarified To Prevent Manifest Injustice

The proposed regulations do not make it clear whether the CPI adjustment will be (a) applied to reflect the actual cumulative amount of inflation since January 1, 2016 or (b) calculated separately for each year. Unless the CPI adjustment is calculated cumulatively, manifest injustice likely will result. It makes no economic sense that the rate would not increase in the third year if inflation over a two-year period (measured by CPI) would lead to an increase, but the amount of inflation in each year in isolation would not cause an increase. Measuring inflation annually rather than cumulatively, there is a risk the rate will stagnate at $.0017 for five years[11] despite high rates of inflation. At minimum, the Judges should clarify that each annual CPI increase must reflect cumulative inflation from January 1, 2016 to the relevant January 1.

B. It Is Error To Impose A Licensed-In-The-Jurisdiction Auditor Requirement

The Judges clearly erred in adopting NAB/NRBNMLC's proposal that a "qualified auditor" must be a CPA "licensed in the jurisdiction where it seeks to conduct a verification." *Web IV ID* at 194, Ex. A (Am.) at 8. The Judges do not identify any basis for this new requirement, *id.*, and none exists in the record. *See Web III Remand*, at 23124 ("For the Judges to adopt a contested proposed term, the proponent must show support for its adoption by reference to the record of the proceeding."). NAB and NRBNMLC offered no factual or legal

[11] If the CPI is 2.94% each year, a CPI adjustment calculated in isolation would round down to 0 and the rate would stagnate at $.0017 over the term (1.0294 * $.0017 = $.00174998). But if the CPI were 2.94% every year, the *cumulative* inflation rate would be 12.3%.

support for their proposal.[12] The record instead established that most WBWS agreements do not require CPA certification at all, much less that auditors be CPA-licensed in any particular jurisdiction.[13] *See* SX PFOF ¶ 1281, SX Reply PFOF ¶ 1172.

This requirement threatens manifest injustice by increasing costs and weakening audit rights—rights that are critically important under the statutory license, since Licensors have no choice but to license their content. The record evidence showed that webcasters operate in a number of jurisdictions, some of which may have no qualified auditor with any experience in digital royalty issues, and that CPAs with the necessary skill sets already are in short supply. SX PFOF ¶ 1280, SX Reply PFOF ¶ 1171. Even Pandora's CFO, Mr. Herring, acknowledged that CPAs with the requisite technical expertise are "a little bit of a unicorn" in this industry. SX PFOF ¶ 1280 (citing Hr'g Tr. 3403:4-12 (May 13, 2015) (Herring)).

Finally, the revision imposes more rigorous requirements on Qualified Auditors than are posed on CPAs generally.[14] Doing so without any support would be a manifest injustice.

C. Additional Errors In The Amended Regulations Require Correction

The Judges clearly erred by adopting various additional changes to the regulations. *First*, the Judges erred in § 380.2(e) by adopting as the start date of the holding period for unpayable

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[12] The sole reference to the proposal before the close of the hearing was in *un-redlined* proposed regulations in which NAB/NRBNMLC inserted several changes to the existing regulations without identifying or mentioning them in their introductory memoranda or supporting testimony. Given the procedurally improper way in which these changes were presented—above and beyond their complete absence of evidentiary support—they should not have been entertained by the Judges. SX PFOF ¶ 1333; SX Ex. 23 (Bender WRT) at 15.

[13] Even the agreements identified by NAB as requiring CPA certification do not include the licensed-in-the-jurisdiction requirement. *See* NAB PFOF ¶ 622 (citing [redacted]).

[14] Nearly all states have CPA mobility laws that allow CPAs to practice in a jurisdiction other than that in which he or she was licensed. *See* CPA Mobility Resources, American Institute of CPAs, *available at* www.aicpa.org/Advocacy/State/Mobililty/Pages/default.aspx.

funds, without explanation, "the date of final distribution of all royalties." The Judges' insertion of the word "final" is confusing and ambiguous in the context of an unclaimed funds provision. SX Reply PFOF ¶ 1235. Starting the three-year holding period at the date of "final distribution of all royalties" gives no clear guidance as to when that period actually begins. The regulation fails to explain how there could be both unclaimed royalties and a "final distribution of all royalties." The start date should be tied to SoundExchange's processes for distributing royalties, SX Ex. 2 at 6-11, such as the date of the first distribution of royalties from the relevant payment by the Service. At a minimum, the Judges should strike the word "final" from this regulation.

Second, the Judges erred in § 380.6(b) by replacing SoundExchange's right to audit each licensee each year with a term that could be read as permitting it to audit only one licensee per year ("The verifying entity may conduct an audit only once a year"). There are over 2,500 licensees. SX Ex. 2 at 11 (Bender WDT). There is no basis for such a limit.

Third, the Judges erred in § 380.6(g) by giving Services a credit, with interest, [15] for overpayments. The Judges rejected almost exactly this proposal in the context of adjustments to Statements of Accounts. *Web IV ID* at 194. All the same reasons for rejecting that proposal would apply to an overpayment discovered in an audit. *Fourth*, in the § 380.6 definition of "Commercial Webcaster," the Judges should change the reference to "Public Broadcasting Entities" to "Covered Entity under Subpart D" to match the term used in the adopted settlement.

Finally, the Judges adopted several contested changes without explanation or evidentiary support.[16] If it would aid the Judges, SoundExchange is prepared to promptly file a chart identifying the specific language that was adopted without any apparent basis in the record.

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[15] The Judges adopted this language notwithstanding that iHeart specifically withdrew its proposal that Services receive interest on overpayments. *See* IHM Reply PFOF ¶ 1306.

[16] *See* Ex. A (Am.) §§ 380.2(e); 380.4(a)(2); 380.5(c)(1); 380.5(d); 380.6(d); 380.6(g); 380.6 (definition of Performance).

Respectfully submitted,

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December 31, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, I caused a copy of the foregoing RESTRICTED — **SOUNDEXCHANGE, INC.'S PETITION FOR REHEARING PROPOSED PUBLIC VERSION** to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

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