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

In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2009-1 CRB Web III

SOUNDEXCHANGE'S COMMENTS IN RESPONSE TO THE JUDGES' NOTICE OF INTENTION TO CONDUCT PAPER PROCEEDINGS ON REMAND AND SOLICITATION OF COMMENTS FROM THE PARTIES

SoundExchange respectfully submits these comments in response to the Copyright Royalty Judges' ("Judges") *Notice of Intention To Conduct Paper Proceedings On Remand And Solicitation of Comments From The Parties* (Sept. 17, 2013) ("Notice"). After review of the existing record, the Judges should re-adopt the rates and terms that were previously set for noncommercial webcasters. Those rates and terms were set after careful and extensive consideration by the Judges and are fully supported by the record. In addition, as no party has challenged the Judges' prior determination of rates and terms for commercial webcasters, there is no basis to reconsider them. Indeed, as discussed below, SoundExchange submits that any reconsideration of the previously determined commercial rates and terms would be contrary to law.

I. The Judges Should Adopt the Previously Set Noncommercial Rates and Terms.

SoundExchange agrees with the Judges' determination that "it would be neither fair, nor efficient, nor economical to proceed as proposed by IBS with additional submissions, discovery, and evidentiary hearings," and agrees with the Judges' decision "to confine their review to the voluminous existing record in Web III." Notice at 8. As the Notice states, the D.C. Circuit's decision authorizes the Judges to "issue a new final determination that substantively makes the

same findings and reaches the same conclusions, in whole or in part, as the prior Final Determination." Notice at 5.

Based on the extensive record, the Judges should re-adopt the findings and conclusions of the prior Final Determination with regard to non-commercial rates and terms. The record in *Web III* is based on a proceeding that lasted well over a year, during which IBS had every opportunity to take discovery, submit written testimony and evidence, present and cross-examine witnesses, submit written findings and conclusions, and make oral arguments and objections.

The record fully supports the noncommercial rates and terms adopted by the Judges. SoundExchange will not repeat that extensive record here, but notes that it presented detailed findings of fact that justify the Judges' noncommercial rates and terms. *See* SoundExchange's Proposed Findings of Fact ¶¶ 65-68; 469-485; 486-543; 601 (Sept. 10, 2010); SoundExchange's Proposed Reply Findings of Fact ¶¶ 186-217; 220 (Sept. 27, 2010).

By contrast, IBS failed to offer any sound basis for the Judges' to adopt different rates and terms. Based on the record, the Judges "rejected *in toto* the contentions and claims of IBS." 76 Fed. Reg. 13,026, 13,042 (2011). The Judges concluded that IBS' vague and non-specific objection to the SoundExchange-CBI settlement was both procedurally improper and substantively meritless. *Id.* at 13,039-13,040. With regard to noncommercial webcasters not covered by the SoundExchange-CBI settlement, the Judges struck the testimony of IBS' witness that did "not comply with the verification rule in filing his written rebuttal statement," and "was not familiar with substantial portions of his testimony, which had been drafted by IBS' counsel." *Id.* at 13,041 n.25. The Judges also observed that "[e]ven if his testimony had been admitted, it did not contain support for IBS' new rate proposals, nor could it given that such testimony would be outside the scope of the rebuttal proceedings." *Id.* at 13,041. The Judges also correctly

rejected IBS' request to "make . . . a distinction for small and very small noncommercial webcasters," given that it did not present "one iota of evidence regarding the relative quantities of music used by these services, nor the nature of their use of sound recordings covered by the license," nor "any evidence that would enable the Judges to determine the degree to which these proposed services promoted or substituted for the purchase of phonorecords by consumers." *Id.* at 13,041. As the Judges stated, the purpose of the proceedings is to determine "[t]he rates that would be negotiated in the marketplace between a willing buyer and willing seller." But "IBS' constantly changing rate proposals were not fashioned with this standard in mind (let alone the evidence to support it), but rather appeared to spring from some undefined meaning of 'fairness,' or more likely the impressions of Mr. Kass as to what his members would like to pay for statutory royalties." *Id.* IBS' contentions have not improved with age, and should be rejected.

Nor should IBS be allowed to present "additional submissions" or to make new arguments or objections "[o]n remand . . . for the first time." Notice at 4 n.3; 8. As stated in the Judges' Notice, review must be limited to the "existing record." *Id.* at 8.[1]

II. The Judges Should Not Reconsider the Previously Set Commercial Rates and Terms.

In *Web III*, the Judges determined rates and terms for both commercial webcasters and noncommercial webcasters. Because IBS does not represent any commercial webcasters, it was not affected by, and was not involved in, the dispute over commercial rates and terms. Rather, IBS presented evidence exclusively with regard to rates for small noncommercial webcasters. 76 Fed. Reg. 13,026, 13,027 (2011). The dispute over commercial rates and terms was between SoundExchange and a different party, Live365. *Id.*

[1] If the Judges were to consider new arguments or submissions that IBS makes for the first time on remand, SoundExchange requests that the Judges give SoundExchange an opportunity to respond.

In the Notice, the Judges stated that "the entire Final Determination in the captioned matter has been vacated by the D.C. Circuit and is before the Judges on remand." *Id.* at 4. The Notice did not state specifically whether the Judges believe the *commercial* rates and terms are before them on remand. SoundExchange respectfully submits that there is no basis for the Judges to review the commercial rates and terms on remand, and that the commercial rates and terms adopted by the Judges in *Web III* should be re-adopted.

First, the D.C. Circuit did not vacate the commercial rates and terms. In concluding that "the entire Final Determination . . . is before the Judges on remand," the Judges relied on the following statement from the D.C. Circuit's opinion: "we vacate and remand *the determination*." Notice at 4 (quoting *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1342 (D.C. Cir. 2012) (emphasis in original, quotation marks omitted). But the D.C. Circuit's phrase "the determination" refers to the determination *challenged by IBS*, rather than the Final Determination as a whole. This is clear from several statements in the D.C. Circuit's opinion:

- In its discussion of *Web III*, the D.C. Circuit stated: "After reviewing the evidence and testimony from the remaining participants, the CRJs issued a *final determination in which they adopted as statutory rates the royalty structure agreed to in the settlement between SoundExchange and College Broadcasting*. . . . Intercollegiate appealed *the CRJs' determination* pursuant to 17 U.S.C. § 803(d)(1)." 684 F.3d at 1335. In this passage, it is clear that the phrase "Intercollegiate appealed *the CRJs' determination*" refers to the Judges' determination regarding the *non-commercial* rates, rather than the *commercial* rates that were irrelevant to IBS.

- The D.C. Circuit stated: "SoundExchange entered voluntary settlements with almost all of the participants, leaving only two webcasting participants, Intercollegiate and one other licensee, Live365 (a commercial webcaster). (*Live365 originally appealed the CRJs' determination as to commercial webcaster rates but reached a settlement with SoundExchange before the filing of opening briefs.*)" *Id.* at 1335 (emphasis added). Thus, the D.C. Circuit specifically distinguished Live365's challenge to the Judges' "determination as to commercial webcaster rates" from IBS' challenge to the determination which "adopted as statutory rates the royalty structure agreed to in the settlement between SoundExchange and College Broadcasting." *Id.* Indeed, if the D.C. Circuit believed that IBS' petition granted it jurisdiction over both the determination as to commercial rates and the determination as to noncommercial rates, the D.C. Circuit's reference to Live365's challenge would have been superfluous.
- One of IBS' arguments in the D.C. Circuit was that "all determinations made by the CRJs are void because the relevant appeal provision purports to ask Article III courts to take actions of a kind beyond their constitutional jurisdiction." *Id.* at 1335. The D.C. Circuit concluded that it "need not address this objection because it has no bearing on [IBS's] case." *Id.* at 1336. This demonstrates that the D.C. Circuit analyzed IBS's objections only to the extent that they affected IBS, which would be inconsistent with vacating a portion of the Final Determination that did not affect IBS.

Second, to the extent the D.C. Circuit's opinion is ambiguous as to whether it is vacating the entire Final Determination, the Judges should construe it only as vacating the noncommercial rates. This is because it would have exceeded the D.C. Circuit's jurisdiction under Article III of the Constitution to even *consider* the commercial rates. It is well-settled that "[b]ecause Article

III standing is a prerequisite to a federal court's exercise of jurisdiction," a court "cannot proceed at all in any cause unless it first determine[s] that a party seeking to be heard" has standing. *Nat'l Ass'n of Clean Water Agencies v. EPA*, -- F.3d --, 2013 WL4417438, at *44 (D.C. Cir. Aug. 20, 2013). Here, IBS plainly did not have standing to challenge the commercial rates, given that IBS represented only non-commercial broadcasters,[2] and Live365 did not participate in the D.C. Circuit appeal. Thus, the D.C. Circuit did not have jurisdiction to consider the commercial rates, and could not possibly have vacated them.

The fact that both the commercial and noncommercial rates and terms were determined in the same Final Determination does not mean that IBS' challenge to a portion of the Final Determination vested the D.C. Circuit with jurisdiction to vacate the entire Final Determination. To the contrary, the Supreme Court has made clear that "standing is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U. S. 991, 999 (1982). Rather, "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Environemntal Services (TOC), Inc.*, 528 U.S. 167, 185 (2000); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352-53

[2] Indeed, in the portion of its D.C. Circuit brief addressing standing, IBS stated: "IBS comes before this Court as the oldest and largest association of academically affiliated *non-commercial webcasters*. . . . [T]he Board's order fails the "scalability" test by burdening the small education webcasters in disproportion to (i) their size and (ii) any benefit from the aggregate burdens on the smaller *non-commercial webcasters*." Brief of Appellant in *Intercollegiate Broadcasting Systems, Inc. v. Copyright Royalty Bd.*, No. 11-1083 (filed Sept. 6, 2011), p. 7 (emphasis added).

(2006) (rejecting contention that "standing as to one claim . . . suffice[s] for all claims arising out of the [same] 'nucleus of operative fact'" as "a significant revision of our precedent interpreting Article III" that would render standing requirement a "hollow rhetoric"). Thus, the D.C. Circuit invariably analyzes standing on an issue-by-issue basis, rather than bootstrapping a party's challenge to a portion of an order into jurisdiction over the entire order. *See, e.g.*, *Conference Group, LLC v. FCC*, 720 F.3d 957, 962 (D.C. Cir. 2013) ("We hold that The Conference Group has standing to challenge the Commission's decision as procedurally unlawful rulemaking, but lacks standing to challenge the merits of the decision adopted in the InterCall Order if it was an adjudication."); *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 202 (D.C. Cir. 2003) (dismissing portion of appeal for lack of standing and other portion of appeal on the merits). The Judges should not interpret the D.C. Circuit's decision in a way that would render that decision unconstitutional.

Third, even if the Judges concluded that the D.C. Circuit vacated the commercial rates, they should reinstate those rates. The only party to contest the commercial rates in *Web III* was Live365, and Live365 and SoundExchange have now settled. 684 F.3d at 1335. Thus, if the Judges reconsidered the commercial rates on the paper record, then in effect they would be reconsidering the merits of a dispute between SoundExchange and Live365 which no longer even exists. No other party participated in *Web III*; and as the Judges stated in the Notice, no party other than SoundExchange submitted a proposal for remand proceedings. Notice at 2 n.1. The Judges correctly concluded that "no purpose would be served by subjecting the

SoundExchange-NAB settlement to further review." Notice at 8. The same holds true for the commercial rates and terms set by the Judges.[3]

Finally, if the Judges nonetheless review the commercial rates and terms on remand, the existing record fully supports the rates and terms previously set by the Judges. SoundExchange will not rehash the entire record here, but notes that SoundExchange's extensive findings of fact justify the Judges' determination. *See* SoundExchange's Proposed Findings of Fact ¶¶ 1-91; 96-485; 544-688 (Sept. 10, 2010); SoundExchange's Proposed Reply Findings of Fact ¶¶ 1-185; 218-235. (Sept. 27, 2010).

CONCLUSION

For the foregoing reasons, the Judges should adopt the Judges' prior determination.

[3] If some webcaster steps forward to challenge the commercial rates and terms for the first time at this late date, the Judges should not reconsider those rates. Such a new challenge would be grossly untimely, given that the D.C. Circuit's vacatur is already over a year old, and SoundExchange would be deprived an opportunity to respond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Albert Peterson, do hereby certify that copies of the foregoing **SoundExchange's Comments in Response to the Judges' Notice of Intention to Conduct Paper Proceedings on Remand and Solicitation of Comments From the Parties** were sent via electronic mail on the 27th day of September, 2013, to the following:

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