

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174,
07-1177, 07-1178, 07-1179 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERCOLLEGIATE BROADCAST SYSTEM, et al.,
Appellants,

v.

COPYRIGHT ROYALTY BOARD,

Appellee,

SOUNDEXCHANGE, INC.; NATIONAL ASSOCIATION
OF BROADCASTERS,

Intervenors.

ON APPEAL FROM A FINAL DETERMINATION
OF THE COPYRIGHT ROYALTY BOARD

FINAL BRIEF FOR THE COPYRIGHT ROYALTY BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties And Amici. All parties, intervenors, and amici appearing before the Copyright Royalty Judges and in this Court are listed in the opening brief for Noncommercial Broadcasters.

B. Rulings Under Review. The ruling under review is the final determination of the Copyright Royalty Judges, see Final Determination of Rates and Terms, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084 (May 1, 2007) (JA71), as modified, 72 Fed. Reg. 29886 (May 30, 2007) (JA901). Certain appellants additionally challenge the Judges' April 16, 2007 order denying requests for rehearing, which is not published but appears in the joint appendix at JA896.

C. Related Cases.

This case has not previously come before this Court or any other court. One pending appeal involves several of the same parties and substantially similar issues: SoundExchange, Inc. v. Librarian of Congress, No. 08-1078 (D.C. Cir.) (challenge to Judges' determination of royalty rates for sound recording performance rights in satellite radio). There are no other related cases of which we are aware.

/s/

Mark Freeman

GLOSSARY

APA	Administrative Procedure Act
ASCAP	American Society of Composers, Authors and Publishers
ATH	Aggregate Tuning Hours
BMI	Broadcast Music, Inc.
CARP	Copyright Arbitration Royalty Panel
CPI	Consumer Price Index
CPB	Corporation for Public Broadcasting
CRB	Copyright Royalty Board
DiMA	appellant Digital Media Association
DMCA	Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860
FD	Final Determination
JA	Joint Appendix
NPR	appellant National Public Radio
NRBNMLC	appellant National Religious Broadcasters Noncommercial Music License Committee
SWSA	Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780

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FINAL BRIEF FOR THE COPYRIGHT ROYALTY BOARD

STATEMENT OF JURISDICTION

Appellants in these consolidated appeals challenge a final determination of the Copyright Royalty Judges.¹ The final determination was published in the Federal Register on May 1, 2007. See 72 Fed. Reg. 24084 (May 1, 2007). Appellants filed notices of appeal in this Court within the time provided by 17

¹ Appellants refer to the agency as the "Copyright Royalty Board," a term drawn from the regulations. See 37 C.F.R. § 301.1. This brief uses the statutory term "Copyright Royalty Judges," see 17 U.S.C. § 801 et seq., following the Judges' own practice in the final determination below.

U.S.C. § 803(d)(1). This Court has jurisdiction under 17 U.S.C. § 803(d)(1).

STATEMENT OF THE ISSUE

In the proceeding below, the Copyright Royalty Judges established the rates and terms of the statutory licenses under the Copyright Act for non-interactive webcasting for the five-year period from 2006 to 2010.

The question presented is whether the rates and terms established by the Judges are rational and supported by the record.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to the brief for noncommercial webcasters.

STATEMENT OF THE CASE

This is the first appeal to this Court from a final determination of the Copyright Royalty Judges, a three-judge administrative body in the Library of Congress that is responsible for determining the default rates and terms for statutory licenses in the Copyright Act. Previously, this responsibility was vested in the Librarian of Congress, with assistance from ad hoc Copyright Arbitration Royalty Panels (CARPs). See, e.g., Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939, 942-43 (D.C. Cir. 2005). In 2004, Congress repealed the CARP system and provided that, absent a negotiated

agreement among the parties, the rates and terms for statutory licenses under the Copyright Act shall be established in an adversarial administrative trial before the Copyright Royalty Judges, whose determinations are subject to direct review in this Court. See 17 U.S.C. § 803(d)(1).

This case concerns "webcasting" – that is, the transmission of copyrighted sound recordings over the internet. Since 1998, the Copyright Act has provided a statutory license for webcasting, as well as a related statutory license for the creation of ephemeral copies in the process of webcasting. See 17 U.S.C. §§ 114(d)(2) & (f)(2); id. § 112(e)(4) (collectively, the "webcasting statutory license"). Under these provisions, the rates and terms of the webcasting statutory license are to be settled through voluntary negotiation among the interested parties or, if the parties cannot agree, through ratemaking proceedings before the Copyright Royalty Judges.

The Judges commenced the proceeding below to determine the rates and terms of the statutory webcasting license for 2006 to 2010. The administrative litigation lasted more than a year. The Judges received written evidentiary statements from more than thirty parties, heard 48 days of live witness testimony (spanning more than 13,000 transcript pages), and accepted more than 190 exhibits into evidence. See 72 Fed. Reg. 24084, 24084-85 (May 1, 2007) ("FD") (JA72-73).

In their final determination, the Judges established a “per performance” royalty rate for commercial webcasters beginning at eight hundredths of a penny (\$0.0008) and rising to nineteen hundredths of a penny in 2010, with an annual minimum fee of \$500 per station or channel. For noncommercial webcasters below a specified size, including most public radio and college radio stations, the Judges set an annual flat-rate fee of \$500. In addition, the Judges designated SoundExchange, a non-profit corporation run jointly by artists and performers, to act as the default clearinghouse for receiving payments from webcasters and distributing the royalties to copyright owners. Finally, the Judges established several basic terms of the statutory license, including late-payment fees and provisions to ensure the confidentiality of account statements.

These appeals followed. This Court denied appellants’ request for a stay pending appeal.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Copyright Royalty Judges

The Copyright Act confers on the owner of a copyright a set of exclusive rights in the copyrighted work. See generally 17 U.S.C. § 106. In certain cases, however, the Act limits the exclusivity of those rights by granting access to the copyrighted work to any person who satisfies conditions set by law, including

payment of a royalty to the copyright owner. Congress enacted the first such "statutory licensing" scheme in 1909. Recording Industry Ass'n of America v. Copyright Royalty Tribunal, 662 F.2d 1, 3 (D.C. Cir. 1981).

Statutory royalty rates were once fixed by statute. Since 1976, however, Congress has vested responsibility for setting and adjusting such rates in a series of administrative bodies. See generally 70 Fed. Reg. 30901 (May 31, 2005) (discussing the history of royalty ratemaking under the Copyright Act).

The first such agency was the Copyright Royalty Tribunal, which operated for more than fifteen years. See Copyright Act of 1976, Pub. L. No. 94-553, § 801, 90 Stat. 2541, 2594. In 1993, Congress eliminated the Copyright Royalty Tribunal and transferred its functions to the Librarian of Congress, who established statutory licensing fees with assistance from ad hoc Copyright Arbitration Royalty Panels (CARPs). See, e.g., Program Suppliers v. Librarian of Congress, 409 F.3d 395, 397 (D.C. Cir. 2005).

In 2004, Congress eliminated the arbitration process and entrusted the responsibility for royalty ratemaking to a new, permanent panel of three Copyright Royalty Judges. See Copyright Royalty and Distribution Reform Act of 2004, Public Law 108-419, 118 Stat. 2341 (2004) (codified at 17 U.S.C. § 801 et seq.).

"The expectation [was] that the Copyright Royalty Judges,

appointed to staggered, six-year terms, [would] provide greater decisional stability, yielding the advantages of the former Copyright Royalty Tribunal, but with greater efficiency and expertise." 70 Fed. Reg. at 30901.

B. The Webcasting Statutory License

1. Digital Performance Rights In Sound Recordings

This case involves non-interactive "webcasting," also known as "internet radio" – the transmission over the internet of copyrighted sound recordings selected without input from the listener, like a traditional radio station.² The "free internet radio stations" offered by AOL Radio are an example of such a service.³

Webcasting requires a license under the Copyright Act because it involves the "performance" of copyrighted sound recordings by digital audio transmission. See 17 U.S.C. § 106(6). A musical recording, such as a song on a CD, embodies two distinct copyrighted works: a "musical work" and a "sound recording." See 17 U.S.C. § 102 (works eligible for copyright). The "musical work" is the underlying musical composition – the

² The statutory licenses at issue here apply only to non-interactive webcasting services. 17 U.S.C. § 114(d)(2)(A)(i); see id. § 114(j)(7) (defining "interactive service"). Interactive services must negotiate licenses directly with copyright owners.

³ See <http://music.aol.com/radioguide/bb> (last visited May 23, 2008).

notes and lyrics of the song. The "sound recording" is what results when that musical work is performed by a particular artist and the ensuing "series of musical, spoken, or other sounds" is fixed in a recording medium. 17 U.S.C. § 101 (definition of "sound recording"). Although both works are often embodied in a single musical recording, "musical works" and "sound recordings" are distinct works under the Copyright Act, and may be owned and licensed separately. "Typically, a record label owns the copyright in a sound recording and a music publisher owns the copyright in a musical work." FD 24086 (JA74).

The rights enjoyed by owners of copyrighted musical works and sound recordings, however, are not identical. One important difference is that while owners of musical works enjoy the exclusive right to perform those works to the public, that right has generally been withheld from owners of sound recordings. See id. § 106(4); see also 17 U.S.C. § 114(a) ("The exclusive rights of the owner of copyright in a sound recording * * * do not include any right of performance under section 106(4)."). "Public performance" includes not only live performances, but also the transmission of a copyrighted work to the public "by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at

different times.” Id. § 101. As a consequence, broadcasting a song over conventional radio comprises the “performance” of a musical work and requires a license from the music publisher or composer. But the same radio broadcast does not require a license from the owner of the sound recording, because the copyright in a sound recording generally “do[es] not include any right of performance.” Id. § 114(a).

In 1995, however, Congress became concerned that emerging digital technologies threatened to “adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work.” H.R. Rep. 104-274, at 13 (1995). Congress accordingly enacted the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, which granted owners of copyrighted sound recordings the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. §§ 106(6), 114(d). Unlike a traditional radio broadcaster, therefore, a webcaster must obtain a license from the copyright owner before transmitting a copyrighted sound recording to the public.

2. The Statutory License for Webcasting

In addition to creating a digital performance right for sound recordings, Congress in 1995 also created a new statutory license for certain types of digital music services. See 17 U.S.C. § 114(d)(2). The new statutory license, codified in

section 114 of the Copyright Act, originally applied only to subscription-based services. In 1998, however, Congress extended the section 114 license to cover non-interactive webcasting – in the parlance of the statute, “eligible nonsubscription transmission” services.⁴ See Digital Millennium Copyright Act of 1998, Pub. L. 105-304, § 405, 112 Stat. 2860, 2890-2902 (“DMCA”). Congress also clarified the rights of statutory licensees under section 114 by creating an additional statutory license that authorizes the generation of necessary “ephemeral recordings” in the process of webcasting. See 17 U.S.C. § 112(e)(4). For convenience, we refer to the section 114 and 112 webcasting licenses together as “the webcasting statutory license.”

Under the webcasting statutory license, the Copyright Royalty Judges have the responsibility to establish “reasonable rates and terms” that “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 114(f)(2); id. § 112(e)(4). In determining such rates and terms, the Judges must distinguish among different types of webcasting services and “base [their] decision on economic, competitive and programming information presented by the parties,” including:

- (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording

⁴ See 17 U.S.C. § 114(j)(6) (defining “eligible nonsubscription transmission”).

copyright owner's other streams of revenue from its sound recordings; and

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

Id. § 114(f)(2)(B). The rates must also include a minimum fee.

Id. §§ 114(f)(2)(A), 112(e)(4).

As one means of deriving such rates and terms, the Act provides that the Judges "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements" submitted by parties. Id. § 114(f)(2)(B).

3. Prior Webcasting Proceedings

Although this is the first appeal from a determination of the Copyright Royalty Judges, it is not the first time this Court has considered the rates and terms for the webcasting statutory license. In November 1998, shortly after the DMCA was passed, the Copyright Office began proceedings to determine the first statutory royalty rates for webcasting. That process culminated in a 2002 decision by the Librarian of Congress establishing the rates and terms of the webcasting licenses for 1998 to 2002, based on the report of a copyright arbitration royalty panel (CARP). See 67 Fed. Reg. 45240 (July 8, 2002) ("Webcaster I").

The Librarian established a "per performance" royalty of \$0.0007 for commercial webcasters and simulcasters.⁵ For noncommercial webcasters, the Librarian established a rate of \$0.0002 per performance for internet retransmissions of over-the-air broadcasts and up to two "side-channels"; transmissions beyond that limit were subject to the commercial rate of \$0.0007 per performance. See id. at 45272. The Librarian also approved the selection of SoundExchange as the central receiving agent for royalties paid by webcasters. Id. at 45267-68. This Court upheld the Librarian's decision. See Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939 (D.C. Cir. 2005).

In the years following the Webcaster I decision, the statutory rates have been set by an ad hoc combination of negotiation, regulation, and legislation. In 2003 and 2004, the \$0.0007 rate set by the Librarian in Webcaster I increased to \$0.000762 under an agreement negotiated among the parties and accepted by the Librarian.⁶ See 69 Fed. Reg. 5693 (Feb. 6, 2004).

⁵ With exceptions not relevant here, "performance" means a single transmission to a single listener. See 37 C.F.R. § 380.2(i). Thus, a single song transmitted to 10 listeners constitutes 10 performances.

⁶ From 2002 to 2004, certain small webcasters were permitted to pay an alternative royalty under a temporary agreement approved by Congress. See Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780. Congress expressly stipulated, however, that the special rates and terms in that agreement should not be understood to reflect what "would have been negotiated in the marketplace between a willing buyer and a willing seller," and provided that the agreement shall not be

(continued...)

Congress then extended that negotiated rate through 2005 by statute to accommodate the transition from the CARP system to the Copyright Royalty Judges. See Pub. L. No. 108-419, § 6(b)(3), 118 Stat. at 2370. The determination below thus represents the first time that the rates and terms of the statutory webcasting licenses have been determined on a fresh administrative record since the original CARP proceedings in Webcaster I.

C. Ratemaking Proceedings Before The Copyright Royalty Judges

1. Timing

The principal responsibility of the Copyright Royalty Judges is to “make determinations of reasonable terms and rates of royalty payments” under the statutory license provisions of the Copyright Act. 17 U.S.C. § 801. Ratemaking proceedings for statutory licenses take place at regular intervals, and the timing of these proceedings is set by statute. See id. § 804. The Copyright Royalty Judges must commence the next round of proceedings for the webcasting license in January 2009, and thereafter repeat the process “in each subsequent fifth calendar year.” Id. § 804(b)(3)(A).

⁶(...continued)

“taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment” of webcasting royalties. Id. § 4 (codified at 17 U.S.C. § 114(f)(5)(C)). These special rates were subsequently extended through 2005 as part of the transition from the CARP system to the Copyright Royalty Judges. See Pub. L. No. 108-419, § 6(b)(3), 118 Stat. at 2370.

2. Encouragement of Private Negotiation

The goal of the statutory scheme is not administrative ratemaking but private negotiation. Congress contemplated that “by facilitating and encouraging settlement agreements for determining royalty rates,” the Act would “reduce[] the need to conduct full-fledged ratesetting and distribution proceedings.” H.R. Rep. 108-408, at 24 (2004). The Act thus encourages negotiated settlement of rate disputes at several stages of rate-setting proceedings. After the Judges announce the commencement of a ratemaking proceeding, parties with a “significant interest in the proceeding” immediately enter a three-month “voluntary negotiation period.” See 17 U.S.C. § 803(b)(1), (2), (3). If a settlement is reached among some or all of the participating parties, the Act empowers the Copyright Royalty Judges to adopt that settlement “as a basis for statutory terms and rates” that will apply to all parties under the statutory license. 17 U.S.C. § 801(b)(7).

In the statutory license at issue here, Congress gave the parties even wider latitude to depart from the rates and terms set by the Judges. Under the Act, a license agreement negotiated between a copyright owner and a webcaster at any time, even after the Judges’ rate-setting determinations become final, “shall be given effect in lieu of any * * * determination of the Copyright Royalty Judges.” 17 U.S.C. §§ 114(f)(3); id. § 112(e)(5).

The Copyright Royalty Judges thus supply the default rates that will govern in the absence of voluntary agreements between copyright owners and users.

3. Ratemaking By The Copyright Royalty Judges

Absent a settlement, the Copyright Royalty Judges must commence ratemaking proceedings to establish the rates and terms of the statutory license. These proceedings, detailed procedures for which are set forth in the statute, take the form of a multi-party administrative trial. Participating parties must file written direct evidentiary statements, including witness testimony and supporting exhibits, in which they specifically request a particular rate. 17 U.S.C. § 803(b)(6)(C)(i); 37 C.F.R. § 351.4. After written direct statements are filed, discovery commences. 17 U.S.C. § 803(b)(6)(C)(ii). The Judges are empowered to issue subpoenas and compel the production of evidence. Id. § 803(b)(6)(C)(v), (vi), (ix). If, after an additional settlement period, the parties have still failed to negotiate an agreement, see id. § 803(b)(6)(C)(x), the Judges will schedule a hearing for the presentation of the parties' direct cases through live witness testimony, including cross-examination and the introduction of documentary evidence. 37 C.F.R. §§ 351.8, 351.10. After any further necessary discovery, the parties must then prepare and submit written

rebuttal statements, id. § 351.11, followed by proposed findings of fact and conclusions of law, id. § 351.14.⁷

The Act directs the Copyright Royalty Judges to issue their determination within 11 months of the post-discovery settlement conference or 15 days before the expiration of the prior rates and terms, whichever is earlier. 17 U.S.C. § 803(c)(1); 37 C.F.R. § 352.2. The Judges' determination "shall be supported by the written record and shall set forth the findings of fact relied on." 17 U.S.C. § 803(c)(3). Any aggrieved participant may petition the Judges for rehearing, which the Judges may grant "in exceptional cases." Id. § 803(c)(2)(A).

4. Judicial Review

A final determination of the Copyright Royalty Judges is subject to direct appeal to this Court by "any aggrieved participant * * * who fully participated in the proceeding and who would be bound by the determination." 17 U.S.C. § 803(d)(1). This Court has the authority to make its own determinations regarding appropriate royalty rates and terms or to vacate and remand the case to the Copyright Royalty Judges for further proceedings. Id. § 803(d)(3). By statute, the pendency of an appeal does not relieve parties of the obligation to comply with

⁷ Congress in 2006 amended these procedures in minor respects not relevant here. See Pub. L. No. 109-303, 120 Stat. 1478.

the Judges' final determination, including the payment of applicable royalties. See id. § 803(d)(2)(C).

II. PROCEEDINGS BELOW

Congress directed the Copyright Royalty Judges to begin webcasting ratemaking proceedings for the 2006-2010 period "as soon as practicable" after establishing their offices and issuing initial regulations. 17 U.S.C. § 804(b)(3)(A).

A. The Administrative Hearing

The Copyright Royalty Judges convened the proceedings below in February 2005. 70 Fed. Reg. 7970 (Feb. 15, 2005); see 17 U.S.C. § 803(b). The Judges received petitions to participate from 42 parties, including most major webcasters and a variety of industry groups. FD 24084 (JA72). When the parties failed to reach an agreement during the voluntary negotiation period, see 17 U.S.C. § 803(b)(3), the Judges scheduled an adversarial hearing to determine the rates and terms of the statutory webcasting license.

The administrative hearing, which included multiple rounds of discovery and motions practice, required more than a year to complete. The Judges received extensive written evidence and proposals from 33 parties, heard 48 days of live witness testimony and cross-examination, and accepted 192 exhibits into evidence. FD 24804-85 (JA72-73). More than 40 witnesses took the stand, resulting in a record transcript of 13,288 pages.

FD 24805 (JA73). At the close of the hearing, the parties submitted a combined total of more than 3,600 proposed findings of fact.

After the hearing, the Judges invited the parties to submit stipulated terms for the license. None were submitted. FD 24805 (JA73). Closing arguments were heard on December 21, 2006.

B. The Copyright Royalty Judges' Determination

The Copyright Royalty Judges published their final determination on May 1, 2007. See generally Final Determination of Rates and Terms, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084 (May 1, 2007) (JA71) (codified at 37 C.F.R. Part 380).⁸

In a comprehensive and carefully reasoned opinion, see generally JA71-102, the Judges established a "per performance" royalty for commercial webcasters starting at eight hundredths of a penny (\$0.0008) in 2006 and rising to nineteen hundredths of a penny in 2010, with an annual minimum fee of \$500 per station or channel. FD 24905-96 (JA83-84). For noncommercial webcasters such as public radio and college radio stations, the Judges established an annual flat-rate royalty of \$500 to cover up to 159,140 "aggregate tuning hours" (ATH)⁹ of programming per month,

⁸ The determination was later modified to correct a clerical error. 72 Fed. Reg. 29886 (May 30, 2007).

⁹ "Aggregate tuning hours" (ATH) is a measure of the total
(continued...)

with transmissions beyond that limit subject to commercial rates. FD 24100 (JA88). The Judges designated SoundExchange, a non-profit corporation run jointly by artists and performers, to act as the default clearinghouse for receiving and processing royalties paid under the statutory license. FD 24105 (JA93). Finally, the Judges established several basic terms of the statutory license, including late-payment fees and provisions to ensure the confidentiality of account statements. FD 24105-110 (JA93-98).

C. Rehearing

After the Copyright Royalty Judges released their determination, the parties filed motions for rehearing. The Judges invited responses from all parties to the motions. JA896.

In April 2007, after considering all of the motions and responses, the Judges denied rehearing, finding no "exceptional" circumstances that would justify revisiting their determination. JA896 (order denying rehearing); see 17 U.S.C. § 803(c)(2). The Judges did, however, amend their determination to permit the parties to use an optional ATH-based royalty schedule for 2006 and 2007, to ease the transition to the new scheme. See JA899; FD 24096 & n.33 (JA84).

⁹(...continued)
number of listener-hours of transmitted programming. For example, ten hours of music transmitted to 20 listeners is 200 ATH. See 37 C.F.R. § 380.2.

These appeals followed. In July 2007, this Court denied appellants' motion for a stay pending appeal.

SUMMARY OF ARGUMENT

Congress entrusted to the Copyright Royalty Judges the responsibility to establish reasonable rates and terms for statutory licenses under the Copyright Act. After presiding over more than a year of adversarial litigation – including live testimony from nearly 50 industry participants, economists, and other expert witnesses – the Copyright Royalty Judges issued a written determination establishing the default rates and terms for the webcasting statutory license for 2006 to 2010. Because those rates and terms are reasonable, consistent with the Copyright Act, and amply grounded in the record, the determination of the Copyright Royalty Judges should be affirmed.

There is no serious claim in these appeals that the royalty rates set by the Judges violate the Copyright Act or applicable regulations. Nor is there any claim that the Judges failed to follow statutory procedures or otherwise acted contrary to their mandate. Rather, appellants focus their attacks on the Judges' resolution, on the factual record assembled below, of the inescapably uncertain inquiry that Congress required the Judges to undertake in setting the rates and terms of the webcasting statutory license. The Copyright Act directs the Judges to set "reasonable" rates and terms that "most clearly represent the

rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," as evidenced by "economic, competitive and programming information presented by the parties." 17 U.S.C. § 114(f)(2)(B). In urging that the Judges erred in applying this standard to the facts, appellants couch their arguments in terms of legal error, but their contention at bottom is that the Judges drew the wrong inferences from the record evidence.

Factual matters of this kind are quintessentially questions for the Copyright Royalty Judges to decide, and appellants identify no basis in the record for setting aside their determination. As we demonstrate below, the royalty rates established by the Judges fall well within the "zone of reasonableness" supported by the record, which makes plain that webcasting is now a profitable and expanding industry. For commercial webcasters, the Judges established a rate schedule that begins at \$0.0008 per performance in 2006 – an increase of only one hundredth of a penny over the \$0.0007 rate that prevailed in the infancy of the industry in 1998, and an increase of less than four one-thousandths of a penny (\$0.000038) over the rate that appellants themselves voluntarily negotiated in 2003. Similarly, for noncommercial webcasters, the Judges permitted all but the largest stations to satisfy their royalty obligations with a lump-sum annual fee of \$500. The Judges were not

obligated to accept appellants' self-serving claims of inability to pay. Arguments of similar tenor were rejected by the Librarian in 2002, and yet the webcasting industry has continued to thrive; the Judges found no reason in the record to accept the same dire predictions now.

Appellants' challenges to the Judges' reasoning are based largely on selective and self-interested accounts of the evidence that the Judges reasonably did not credit. Moreover, many of appellants' arguments were not timely raised below and therefore may not be pursued here. We explain below why each of appellants' attacks is without basis. The blizzard of objections, however, should not obscure the landscape: the Copyright Royalty Judges applied the correct statutory criteria, rationally explained their reasons for accepting certain arguments and rejecting others, and based their final determinations on substantial evidence in the record. The determination of the Copyright Royalty Judges should accordingly be affirmed.

STANDARD OF REVIEW

Congress specified that the Judges' determinations shall be reviewed under section 706 of the APA. 17 U.S.C. § 803(d)(3). Accordingly, the Court will "treat the [Judges'] factual findings as conclusive as long as they are supported by substantial evidence," Wisconsin Public Power, Inc. v. FERC, 493 F.3d 239, 256 (D.C. Cir. 2007), and affirm the Judges' determination as long as the Judges have "examine[d] the relevant data and articulate[d] a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made,'" ibid. (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

Appellants nonetheless insist that "searching judicial review" of the Judges' determination is appropriate. DiMA Br. 12. That contention both misconceives the scope of APA review of agency ratemaking and disregards the history of this Court's review of copyright royalty ratemaking decisions. This Court has often observed that in the "highly technical" context of ratemaking, courts are especially reluctant to set aside administrative action. E.g., East Ky. Power Coop. v. FERC, 489 F.3d 1299, 470 (D.C. Cir. 2007). "Because agency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise, [the Court's] review thereof is particularly deferential." Time Warner

Entertainment Co. v. FCC, 56 F.3d 151, 163 (D.C. Cir. 1995); see In re Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968).

Appellant DiMA stresses that, in creating the Copyright Royalty Judges, Congress repealed the "double arbitrary" test that prevailed under the prior statutory scheme. DiMA Br. 12; see NAB v. Librarian of Congress, 146 F.3d 907, 918 (D.C. Cir. 1998). But by providing for APA review, Congress merely restored the standard that this Court applied in reviewing decisions of the Copyright Royalty Tribunal, the entity charged with setting statutory license rates from 1976 to 1993. See, e.g., RIAA v. Copyright Royalty Tribunal, 662 F.2d 1, 7 (D.C. Cir. 1981). And as this Court has observed, judicial review of the Tribunal's determinations "was already quite deferential." NAB, 146 F.3d at 918. The Court described its review of the Tribunal as equivalent to the "highly deferential" standard employed in FERC cases. See NAB v. Copyright Royalty Tribunal, 772 F.2d 922, 926 & n.3 (D.C. Cir. 1985).

This Court may therefore set aside the rates and terms established by the Judges only if they fall outside a broad "zone of reasonableness." NAB v. Copyright Royalty Tribunal, 675 F.2d 367, 374 (D.C. Cir. 1982); see NAB, 146 F.3d at 918-19. Indeed, if "[r]atemaking generally is an intensely practical affair," National Cable Television Association v. Copyright Royalty Tribunal, 724 F.2d 176, 182 (D.C. Cir. 1983) ("NCTA") (citation

and internal quotation marks omitted), copyright royalty ratemaking is especially so. As this Court has recognized, “[t]he setting of the royalty rate is not a routine exercise in historical cost of service ratemaking for a public utility.” RIAA, 662 F.2d at 8. The Copyright Royalty Judges are charged with estimating the royalty rates and terms that would have been negotiated in the marketplace absent a statutory license. 17 U.S.C. § 114(f)(2)(B). In making such estimates, the Judges are required to consider “economic, competitive and programming information presented by the parties,” and to weigh that information against specific statutory factors that may point in different directions. 17 U.S.C. § 114(f)(2)(B). Because “reconciliation of these objectives is committed to the [agency] as part of its mandate to determine ‘reasonable’ royalty rates,” the determinations of the Judges should not be disturbed unless they depart from a broad zone of reasonableness. RIAA, 662 F.2d at 9; see also NCTA, 724 F.2d at 182.¹⁰

¹⁰ This Court also afforded heightened deference to the Copyright Royalty Tribunal in light of the Tribunal’s short deadlines and meager support staff. See, e.g., NCTA, 724 F.2d at 182 (finding heightened deference appropriate because the “Tribunal confronts the arduous task of simulating the subtleties of the cable marketplace within a one-year decisionmaking period” and because “unlike most administrative agencies, the CRT functions without benefit of legal assistants to embellish or elaborate the Commissioners’ decisions”). The Copyright Royalty Judges operate under similar constraints. The Judges must construct and predict the outcomes of hypothetical marketplace negotiations, see, e.g., 17 U.S.C. § 114(f)(2)(B); they are
(continued...)

Ultimately, “[s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.” Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951). Within that “substantial spread,” it is the prerogative of the Copyright Royalty Judges, and not the parties or the courts, to determine precisely where the “pinpoint” should be placed.

ARGUMENT

I. THE RATES ESTABLISHED BY THE COPYRIGHT ROYALTY JUDGES ARE REASONABLE, CONSISTENT WITH THE STATUTE, AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Congress Expected The Judges To Base Their Ratemaking Determinations On The Factual Record Developed By The Parties.

The Copyright Act makes plain that Congress did not intend the Copyright Royalty Judges to act as regulators, advancing rate proposals of the Judges’ own design. Rather, the Judges preside over adversarial, on-the-record litigation between copyright owners and users, in which each participant attempts to prove that its own proposed rates and terms best satisfy the statutory

¹⁰ (...continued)
responsible for a wide range of royalty ratemaking and distribution proceedings, all of which must be concluded within relatively short periods of time, see id. § 804(b); and Congress has authorized a total of only “3 full-time staff members” to support the Judges, id. § 802(a); see also id. § 802(e) (2) (specifying pay grades).

standard. See generally 17 U.S.C. § 803(b); 37 C.F.R. Part 351. It is on the basis of the factual record developed through this process that the Judges are required to make their determinations.

The procedures that the Judges must follow are set out in unusual detail in the Copyright Act. All participating parties must submit "written direct statements," including supporting evidence and exhibits, in which they specifically propose a particular royalty rate. 17 U.S.C. § 803(b)(6)(C)(i); 37 C.F.R. § 351.4. Discovery then commences, including depositions and interrogatories by all parties. 17 U.S.C. § 803(b)(6)(C)(ii), (vii). The Judges are empowered to issue subpoenas on application from any party, and to compel the production of evidence where necessary. Id. § 803(b)(6)(C)(v), (vi), (ix). The parties then present their cases through live testimony, including cross-examination. 37 C.F.R. §§ 351.9, 351.10. Following the hearing, and after any supplemental discovery the Judges may authorize, the parties file written rebuttal statements, rehabilitating their own rate proposals and attacking those of other parties. 17 U.S.C. § 803(b)(6)(C)(i), (iv). "[N]o evidence, including exhibits, may be submitted in the written direct statement or written rebuttal statement of a participant without a sponsoring witness." Id. § 803(b)(6)(C)(xi).

Ratemaking proceedings before the Copyright Royalty Judges are thus akin to civil litigation between private parties: the Judges preside over the litigation; they have the authority to "make any necessary procedural or evidentiary rulings," 17 U.S.C. § 801(c); and at the close of the proceedings, the Judges must issue a determination that is "supported by the written record" and "set[s] forth the findings of fact relied on by the Copyright Royalty Judges." Id. § 803(c)(3). The Judges may draw freely from the rate proposals advanced by different parties, as they deem appropriate based on the record evidence. But the Judges have neither the authority nor the responsibility to address matters beyond the record assembled in the proceeding.

The particular provisions of the statutory license at issue here further underscore Congress's intent that the Judges base their determinations on the evidence submitted by the parties. Section 114 of the Copyright Act instructs the Judges to establish "reasonable rates and terms" for the webcasting statutory license, and it specifies that the terms selected by the Judges should "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). At the same time, Congress made clear that it is the parties' burden, and not the duty of the Judges, to adduce the evidence necessary to make that determination: "In determining such rates

and terms, the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties." Ibid. (emphasis added).

In light of these provisions, the Copyright Royalty Judges have adopted rules providing clear notice to the parties that it is not the responsibility of the Judges to rescue participants from their own evidentiary failures. See, e.g., 37 C.F.R. § 351.14(b) ("A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party."). The authority of the Copyright Royalty Judges to issue regulations of this kind is not in doubt. See 17 U.S.C. § 803(b)(6)(A) (authorizing the Judges to issue regulations "to carry out their functions under this title"). It was therefore the obligation of the parties below to provide the evidence necessary to support their respective arguments. As the Judges found in their final determination, and as we demonstrate below, appellants here failed to carry that burden in critical respects.

B. The Determination Below Is Supported By The Record.

The webcasting royalty rates established by the Copyright Royalty Judges are amply supported by the record. We address appellants' specific contentions below. It bears emphasizing at the outset, however, what is not in question.

Appellants' heated rhetoric notwithstanding, there is no substantial claim that the royalty rates adopted by the Judges violate the Copyright Act or applicable regulations. Nor is there any claim that the Judges failed to follow statutory procedures or otherwise acted contrary to their mandate. In fact, there was little dispute before the Judges regarding the governing legal standards, which in most respects were established in Webcaster I. FD 24091 (JA79) (noting the parties' general agreement on the applicable legal principles); FD 24097 (JA85) (same); see 67 Fed. Reg at 45243-45.

Rather, at the heart of this case is the Judges' resolution of the hypothetical and inescapably uncertain inquiry that Congress required them to undertake in setting the rates and terms of the webcasting statutory license. Section 114(f)(2)(B) directs the Judges to set "reasonable" rates and terms that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," as evidenced by "economic, competitive and programming information presented by the parties." See also 17 U.S.C. § 112(e)(4). The Judges approached that counterfactual inquiry in the manner suggested by the statute: "In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under

voluntary license agreements" submitted to the Judges by the parties. Id. § 114(f)(2)(B). The parties uniformly concurred in this approach. FD 24092 (JA80).

In consequence, the arguments addressed by the Judges in their final determination – and the claims now raised by appellants in this Court – involve fundamentally factual disputes over the Judges' implementation of the statutory standard in light of the evidence adduced by the parties: which subclasses of webcasters demonstrated an entitlement to separate rates, which voluntary license agreements provided the most "comparable" benchmark, and so on. These are quintessentially the sort of questions that the Copyright Royalty Judges are best positioned to decide.

Typical of appellants' arguments is their challenge to the Judges' selection of the appropriate benchmark for setting the statutory rates. From among the voluntary license agreements submitted by the parties, the Judges determined that the most suitable benchmarks were agreements establishing royalty rates for sound recordings in interactive webcasting services, such as subscription "on-demand" webcasting services. FD 24095 (JA83); see id. § 114(j)(7) (definition of "interactive service"). Because interactive services are not eligible for the statutory license, see id. § 114(d)(2)(A)(i), webcasters must negotiate licenses directly from copyright owners and their agents. The

resulting licenses reflect the royalty rates that the same webcasters have voluntarily agreed to pay for the right to perform copyrighted sound recordings by digital audio transmission.

At the same time, the Judges recognized that the royalty rates for interactive services presumably include a premium for the added benefit to the consumer, and thus value to the webcaster, of interactivity. FD 24092 (JA80). After considering extensive expert testimony on the subject, the Judges found that it was possible to isolate and subtract the portion of the benchmark rates attributable to the value of interactivity through a statistical technique known as hedonic regression. Ibid. Hedonic regression is an analytical tool commonly used in economics to break down the market price of a good and identify the implicit prices for each of its principal characteristics – for example, how much a third bedroom adds to the price of a house in a given neighborhood.¹¹ The Judges concluded that the same tool could be used to derive from the benchmark license agreements an objective estimate of the rates that the same parties would have negotiated for the non-interactive webcasting

¹¹ See generally Dennis Epple, Hedonic Prices & Implicit Markets: Estimating Demand and Supply Functions for Differentiated Products, 95 J. Pol. Econ. 59, 76-78 (1987) (describing applications of hedonic valuation); see also, e.g., Anup Malani, Valuing Laws as Local Amenities, 121 Harv. L. Rev. 1273, 1278 (2008).

services at issue here – precisely the counterfactual inquiry required by section 114(f) (2) (B).

Appellants now argue strenuously that this approach was improper. Yet appellants make no effort to grapple with the Judges' reasoning. As the Judges explained, of the various potential benchmarks urged by the parties, only the interactive webcasting licenses involved the same "buyers" (webcasters), the same "sellers" (record companies), and most critically, the same "product" – a blanket license to perform sound recordings by digital audio transmission. FD 24092 (JA80); see 17 U.S.C. § 106(6). No other benchmarks in the record involved both webcasters and sound recordings.

The principal benchmarks advocated by appellants, by contrast, were the rates paid by webcasters for the right to perform the underlying musical works.¹² FD 24094 (JA82); see, e.g., JA1656-62. As the Judges explained, royalty rates for musical works do not provide a reliable gauge of the rates that the parties would have negotiated for the legally distinct – and commercially more valuable – sound-recording rights at issue under the statutory license. See FD 24094 (JA82) (citing evidence that royalty rates for sound recordings are often

¹² In the time since appellants proposed this benchmark, the musical-works royalty rates for webcasters have substantially increased. See United States v. ASCAP, 2008 WL 1967722 (S.D.N.Y. April 30, 2008) (establishing new musical-works rates for webcasters pursuant to consent decree).

"multiple times" the amounts paid for musical works). As the Judges noted, the Librarian in Webcaster I rejected musical-works benchmarks as unsuitable for similar reasons. FD 24094 (JA82); see 67 Fed. Reg. 45246-47. This Court described the Librarian's reasoning on this point as "perfectly sensible." See Beethoven.com, 394 F.3d at 947 (finding no error in the Librarian's refusal to rely on license agreements that "indisputably cover rights not subject to the statutory licenses involved in this proceeding").

Appellants' failure to come to grips with the Copyright Royalty Judges' reasoning typifies the error of their arguments on appeal. Congress authorized the Judges to look to voluntary license agreements negotiated in "comparable circumstances" in setting the statutory rates. 17 U.S.C. § 114(f)(2)(B). The Judges selected as a benchmark the only voluntarily negotiated license agreements in the record that involved both webcasting and sound-recording rights. That choice was manifestly not arbitrary.

Appellants' arguments regarding the Judges' choice of benchmark are illustrative in another respect as well: much of what appellants attack in the Judges' determination represents a straightforward application of the Librarian's reasoning under the same statutory criteria in Webcaster I, which Congress directed the Judges to treat as precedent. See 17 U.S.C.

§ 803(a)(1) (providing that the Judges shall act “on the basis of” previous ratemaking decisions by the Librarian). Just as the Judges did below, the Librarian in Webcaster I:

- construed the “willing buyer / willing seller” standard in section 114(f)(2)(B) to posit a hypothetical negotiation between webcasters and record companies, see 67 Fed. Reg. at 45244-45;
- rejected revenue-based royalty structures in favor of “per-performance” fees, id. at 45249-50;
- rejected a benchmark analysis based on musical works advanced by the same expert witness, Dr. Jaffe, on whom appellants rely here, id. at 45246;
- refused to adopt a lower royalty rate for simulcasters, id. at 45254-55;
- rejected claims that the proposed rates violated the “willing buyer / willing seller” standard because they would drive smaller entities out of business, id. at 45253-54;
- recognized that large noncommercial webcasters compete with commercial webcasters, and thus imposed a limit on eligibility for the lower noncommercial rates, id. at 45258-59;

- rejected the argument that noncommercial webcasters should be entitled to pay a lower minimum fee, id. at 45259; and
- designated SoundExchange as the “receiving agent” for royalty payments under the statutory license to maximize administrative efficiencies, id. at 45267-68.

It was not arbitrary for the Copyright Royalty Judges to adhere closely to precedent in this fashion. Moreover, the Judges did not mechanically apply the Librarian’s reasoning, but carefully considered at each point whether the record evidence required a different result here. That is the essence of reasoned decisionmaking, and appellants are not entitled to insist on a different outcome now based on their own preferred interpretation of the record.

C. The Rates Are Reasonable.

Nor is there any serious question that the rates selected by the Judges fall within the “zone of reasonableness” supported by the facts. As the record makes plain, webcasting is no longer the nascent, vulnerable, and unprofitable endeavor that it was in 1998, the last time the statutory rates were set on a fresh administrative record. See generally JA1889-90, JA2039-82. Music on the internet is a profitable and expanding industry. From 2004 to 2006, the number of webcasters paying royalties to SoundExchange increased by more than 80%, from 430 to 788; in

2005 alone, the total webcasting royalties received by SoundExchange increased by 40%. JA474. Dedicated advertising firms for webcasting have flourished, JA2041-43, and the marketplace has developed metrics for measuring and tracking audience sizes and advertising exposure, JA2043. The result is that advertising revenues for webcasters are growing at the rate of 90% or more per year; total revenues in 2006 were expected to exceed \$49 million, up from only \$22 million in 2005. JA279; JA2057. At the same time, the cost of transmitting data over the internet has plummeted. JA2067-70. Many webcasting businesses are quite profitable, and becoming more so. JA2055-56; JA2070-72; JA271. As one expert witness testified, "it is clear that the economics of webcasting will continue to improve in future years, as costs fall and revenues rise." JA1280.

Against this background, the royalty rates established by the Copyright Royalty Judges are plainly reasonable. For commercial webcasters, the Judges established a rate schedule that begins at \$0.0008 per performance in 2006. FD 24096 (JA84). That represents an increase of only one hundredth of a penny over the \$0.0007 rate that applied to webcasts in the infancy of the industry in 1998, see Webcaster I, 67 Fed. Reg. at 45272, and an increase of less than four one-thousandths of a penny (\$0.000038) over the rate that the parties themselves negotiated in 2003, see 69 Fed. Reg. 5693. By the end of the licensing term in 2010, the

commercial webcasting rate will rise to \$0.0019, or just 2.5 times the rate that applied to webcasts more than a decade earlier in 1998 (and even less when one accounts for inflation). For noncommercial webcasters such as college radio stations and NPR, the Judges permitted all but the largest stations to satisfy their royalty obligations merely by paying the annual minimum fee of \$500. FD 24100 (JA88). On any view of the record, such rates fall well within the "substantial spread between what is unreasonable because too low and what is unreasonable because too high." Montana-Dakota Utilities, 341 U.S. at 251.

Appellants complain that the Judges adopted SoundExchange's rate proposal "lock, stock, and barrel." DiMA Br. 13. That claim is baseless, as a review of the Judges' opinion demonstrates. See, e.g., FD 24088-90 & nn.13-14 (JA76-78) (rejecting SoundExchange's proposed royalty structure); FD 24096 (JA84) (rejecting wireless premium); FD 24096 n.34 (JA84) (rejecting inflation adjustment); FD 24096 n.35 (JA84) (rejecting bundled services premium); FD 24099 (JA87) (rejecting noncommercial rate proposal). The final determination reflects the Judges' careful consideration of the evidence and the merits of each party's arguments.

The reasonableness of the rates set by the Judges is particularly clear when juxtaposed against the rates proposed by appellants. Commercial webcasters advocated a rate of \$0.00025

per performance – that is, a decrease of more than 66% from the rate that the parties themselves set through negotiation in 2003. See FD 24088 (JA76); JA1566 (DiMA rate proposal); compare 69 Fed. Reg. 5693 (accepting parties' negotiated rate of \$0.000762 per performance). Likewise, NPR proposed a flat-rate annual fee of \$80,000 to cover 798 NPR stations plus up to 200 additional CPB stations, for an effective per-station fee of as little as \$80 – that is, less than one-fifth of the \$500 minimum fee that noncommercial webcasters have been required to pay since Webcaster I. FD 24090 (JA78); see 67 Fed. Reg. at 45259. It was hardly arbitrary for the Judges to refuse to reverse course so drastically.

Appellants' complaint at bottom is that the rates will cut substantially into their revenues. But if that is true, it is because the transmission of copyrighted sound recordings is the very *raison d'être* for most webcasters. Music is their principal input: it is how webcasters, especially commercial webcasters, attract audiences, sell advertising, and charge subscription fees. If the royalties established by the Judges amount to a substantial fraction of a webcaster's revenue, that fact is no more surprising than that a gas station's principal expense is for gasoline, or a newspaper stand's for newspapers. It is their cost of goods sold. And as the Copyright Royalty Judges stressed, nothing in the Copyright Act requires the Judges to set

royalty rates that guarantee all webcasters a profit – no hypothetical voluntary negotiation between webcasters and copyright owners would produce such an outcome. FD 24087 (JA75); FD 24090 (JA78). The royalty rates set by the Judges are reasonable, based on the evidence, and consistent with the Copyright Act, and accordingly should be affirmed.

II. APPELLANTS' ATTACKS ON THE DETERMINATION OF THE COPYRIGHT ROYALTY JUDGES ARE WITHOUT MERIT.

For the most part, appellants' various challenges to the Judges' conclusions are based on selective and self-interested accounts of the evidence that the Judges did not share and were not required to indulge. Appellants also press a range of arguments not timely raised below. For the reasons that follow, appellants' claims must be rejected.

A. COMMERCIAL WEBCASTERS

1. Minimum Fee Cap

The lead argument for commercial webcasters is that the Copyright Royalty Judges erred in adopting an annual minimum fee of \$500 per station or channel. FD 24097 (JA85). Appellants contend that the Judges erred by failing to impose a per-licensee "cap" on this fee, urging that "the uncapped fee could reach astronomical levels for webcasters" with many stations or channels. DiMA Br. 16-19.

As an initial matter, appellants have already rendered moot their dire predictions of "astronomical" fees. After the Judges'

final determination, appellants negotiated an agreement with SoundExchange in August 2007 that establishes a \$50,000 per licensee cap on the minimum fee for the section 114 and 112 statutory licenses. See DiMA Br. 19. By this agreement, SoundExchange – which represents the vast majority of copyright owners affected by the statutory license, including the major record companies – agreed not to seek minimum fees beyond the negotiated cap. It is the government’s understanding that the agreement covers all commercial webcasters, including all of the appellants who now raise the minimum-fee issue in this Court, for the entire 2006-2010 license term. Under the Copyright Act, an agreement of this kind supercedes the determination of the Copyright Royalty Judges by operation of law. See 17 U.S.C. § 114(f)(3) (“License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any * * * determination by the Copyright Royalty Judges.” (emphasis added)); 37 C.F.R. § 380.1(c). Appellants’ suggestion that they face “tens or even hundreds of millions of dollars” in potential liability under the Judges’ determination, DiMA Br. 18, is thus entirely baseless, because their agreement supercedes the determination as a matter of law.

In any event, commercial webcasters failed to seek (or even mention) a cap on minimum fees during the evidentiary proceedings

below. The per-channel minimum fee structure was not a surprise to appellants. Congress directed that the rates established by the Judges "shall include a minimum fee," 17 U.S.C.

§ 114(f) (2) (A), and early in the proceedings SoundExchange proposed a minimum fee "equal to \$500 per channel or station."

JA334-35. Appellants' own filings recognized that

SoundExchange's rate proposal included "a minimum annual fee of \$500 per channel." JA1739. Yet commercial webcasters not only

failed to object to that provision, but also failed to offer any alternative minimum fee proposal of their own. They accordingly

waived any objection to the minimum fee provisions of the final

determination. See 37 C.F.R. § 351.14(b) ("A party waives any

objection to a provision in the determination unless the

provision conflicts with a proposed finding of fact or conclusion of law filed by the party.").

Not until the rehearing stage did commercial webcasters first raise the idea of a fee cap. The Copyright Royalty Judges

denied the motion, explaining that rehearing is not appropriate to save a party from its own failure to raise arguments or

evidence in a timely fashion. JA897. That conclusion was well

within the Judges' discretion. As the Supreme Court has

explained, "courts should not topple over administrative

decisions unless the administrative body not only has erred, but

has erred against objection made at the time appropriate under

its practice.'" Woodford v. Ngo, 126 S.Ct. 2378, 2385 (2006) (quoting United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952)) (emphasis omitted). It was not unreasonable for the Judges to expect compliance with their rules of practice. Id. at 2385-86; see also Exxon Corp. v. FERC, 114 F.3d 1252, 1260 (D.C. Cir. 1997) (agency need not consider matters raised for the first time at rehearing).

Even if the issue were properly presented, the Judges' decision to impose a "per channel" minimum fee was not arbitrary. The Judges reasoned that the minimum fee is intended to cover the cost of license administration, and noted that many record-keeping obligations apply on a per-channel basis. FD 24097 n.39 (JA85). Accordingly, both SoundExchange and simulcasters proposed "per station" or "per channel" minimum fees. See JA2229; JA2460. The Judges did not err by accepting these proposals, particularly absent any objection from commercial webcasters.

Likewise, even if appellants had timely objected to the per-channel structure of the minimum fee, the Judges would not have been required to credit their dire predictions for the commercial webcasting industry. Commercial webcasters conspicuously do not contend that "astronomical" fees will apply to aggregator services such as Live365, but only that such fees might apply if Live365 "were deemed" to include a large number of separate

channels. DiMA Br. 18. Even if it were so “deemed,” the record suggests that Live365, as an aggregator, may pass many fees of this kind on to its client webcasters. JA243-44. Similarly, commercial webcasters now claim that services providing user-customized playlists might be “deemed” to provide hundreds of separate channels. Ibid. But it is far from clear that such services are even eligible for the statutory license, which does not apply to any “interactive service.” Cf. 17 U.S.C. § 114(j)(7) (“interactive service” includes any service that allows the recipient to receive “a program specially created for the recipient,” including sound recordings selected “on behalf of” the recipient).

Finally, appellants urge that the fee cap in the DiMA-SoundExchange agreement should be extended to the entire industry, DiMA Br. 19, but they fail to mention the many features of that agreement – such as more detailed reporting obligations, and cooperation in preventing piracy – that were plainly the consideration for SoundExchange’s agreement to the cap. Appellants identify no principled justification for extracting just one term of the parties’ negotiated bargain and applying it to the entire statutory license.

2. Definition Of The “Marketplace”

Commercial webcasters next attack the Judges’ determination on the theory that the Judges “adopted the wrong legal test.”

DiMA Br. 20. By this assertion, appellants evidently mean that, in determining the royalty rates “that would have been negotiated in the marketplace between a willing buyer and a willing seller,” 17 U.S.C. § 114(f) (2) (B), the Judges erred as a matter of law by failing to posit a sufficiently “competitive” marketplace. DiMA Br. 20.

This contention is difficult to fathom. Nothing in the statutory text requires or even implies a particular degree of competition in the marketplace. As the Judges explained, Congress intended the administrative proceedings under section 114(f) (2) to replicate, as nearly as possible, the royalty rates that would actually have been negotiated between copyright owners and webcasters in the absence of a statutory license. FD 24087 (JA75); FD 24091 (JA79). Thus, consistent with the Librarian’s decision in Webcaster I, the Judges concluded that the “sellers” contemplated by the statute are the record companies, the “buyers” are the webcasting services, and the “product” is a blanket license for sound recordings. FD 24091 (JA78) (citing Webcaster I, 67 Fed. Reg. at 45244). The Judges explained that this is the “marketplace” required by the statute, ibid., and that neither side in a hypothetical negotiation between the record companies and webcasters (including enormous media companies such as Yahoo!, Microsoft, and Clear Channel) would enjoy such disproportionate market power that the other could not

be said to be a "willing" participant, see ibid.; FD 24093 & n.23 (JA81).

This construction, which tracks the Librarian's reasoning in Webcaster I, was not arbitrary or capricious. See 67 Fed. Reg. at 45244-45. Further abstruse arguments regarding the ideal degree of competition in the marketplace for sound recordings were beside the point, and the Judges did not err in rejecting them. See FD 24091 (JA79); FD 24093 (JA81).

Appellants also urge that, even if the statute itself does not require a particular degree of competition, the Judges could not properly rely on benchmark rates drawn from uncompetitive markets. DiMA Br. 21-22. But that proposition was never in question. See FD 24091 (JA79); 67 Fed. Reg. at 45245. Rather, the Judges found that the benchmark rates here were, in fact, negotiated in a competitive market, and that appellants had failed to prove otherwise. FD 24093 (JA81). For example, appellants assert that interactive webcasting services have a uniquely disproportionate need for licenses from all record labels, resulting in aberrant royalties. DiMA Br. 26-27. But the Judges found that appellants' arguments on this score were "largely unsubstantiated" and even contradicted by record evidence. See FD 24093 & n.24 (JA81). In renewing this argument on appeal, moreover, appellants rely almost exclusively on the testimony of their own expert witness, Dr. Jaffe, whom the Judges

concluded was not credible. DiMA Br. 26; see FD 24093 (JA81) (rejecting Dr. Jaffe's analysis as "little more than the theoretical speculations of an academic offering a quick outline of possible criticisms without carefully considering the applicable facts or alternative explanations").

3. Choice Of "Comparable" Benchmark

The heart of commercial webcasters' appeal is their contention that the Copyright Royalty Judges chose the wrong benchmark from which to establish royalty rates for non-interactive webcasting. DiMA Br. 27-40; Bonneville Br. 16-33. As already discussed, see supra Part I.B, appellants championed benchmarks involving musical works. The Judges rejected that approach and determined that the most suitable benchmark license agreements in the record were those establishing royalty rates for sound recordings in interactive webcasting services. FD 24092 (JA80). The Judges explained that, of the various potential benchmarks urged by the parties, only the interactive webcasting licenses involved the same "buyers" (webcasters), the same "sellers" (record companies), and the same "product" – a blanket license to perform sound recordings by digital audio transmission. Ibid.

Remarkably, commercial webcasters fail even to mention the Copyright Royalty Judges' reasoning on this score, let alone explain why it was arbitrary for the Judges to select the only

benchmark in the record that involved both webcasting and sound recordings. See DiMA Br. 27-40. Only simulcasters offer any response on the point, advancing the improbable claim that the Judges violated section 114 of the Copyright Act by preferring benchmark licenses involving sound recordings. Sound recordings, of course, are the very copyrighted works whose value section 114 requires the Judges to determine. Nevertheless, in simulcasters' view, the statute "requires the Board to start with a presumption that, where available, it will look to agreements involving the same type of digital audio service," even if the licenses in question involve unrelated types of works under the Copyright Act. Bonneville Br. 19.

Unsurprisingly, the statute establishes no such "presumption." Section 114 provides that the Judges may consider, in predicting the rates that would have been negotiated for sound recordings in the marketplace, "the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in [§ 114(f)(2)(A)]." 17 U.S.C. § 114(f)(2)(B) (emphasis added). Congress thus sensibly permitted the Judges to consider all of the circumstances in evaluating whether proposed benchmark agreements are comparable, not merely whether the digital services in question are "the same." Bonneville Br. 19. This conclusion is underscored by the cross-reference to

“voluntary license agreements described in [§ 114(f)(2)(A)].” That section authorizes “copyright owners of sound recordings or any entities performing sound recordings” to submit license agreements to establish the prevailing market rates “with respect to such sound recordings.” Id. § 114(f)(2)(A) (emphasis added). The Act thus does not forbid the Judges from considering whether proposed benchmarks involve the same category of copyrighted works; if anything, it requires the Judges to do so.

Appellants also urge that, whatever the merits of the interactive webcasting benchmark, the Judges were precluded from relying on it because the Librarian in Webcaster I rejected analogies to the same interactive service agreements. DiMA Br. 32; Bonneville Br. 20 n.15. In Webcaster I, however, the interactive agreements were offered not as benchmarks for webcasting rates, but for the very different purpose of “setting a separate and higher rate for listener-influenced services,” a proposal that the Librarian rejected. 67 Fed. Reg. at 45257. Nothing about that decision is inconsistent with the determination below, in which the Judges accepted interactive webcasting agreements as the best available benchmark, subject to a statistical adjustment reasonably designed to eliminate the very interactivity premium that the Librarian regarded as improper.

Nor is there any merit to appellants' claim that the Judges impermissibly "ignored" other potential benchmarks that were obviously inferior. DiMA Br. 33-36. Appellants criticize the Judges, for example, for failing to rely on Yahoo! webcasting license agreements with small independent record labels.¹³ DiMA Br. 34. But it was hardly arbitrary for the Judges to insist on benchmark license agreements involving the major record companies. Those companies own the copyrights to the vast bulk of music transmitted by webcasters and, absent the statutory license, could not be coerced into accepting lower fees by major webcasters such as Yahoo!. See FD 24091 (JA79) (explaining that it would "make[] little sense" to set the statutory rates based on what entities other than the major record companies would accept). Similarly, it was hardly irrational for the Judges to prefer a benchmark drawn from within the webcasting industry itself, rather than look to rates negotiated in the very different context of subscription satellite radio and "digital audio cable" services. DiMA Br. 34-36. Those rates were negotiated against the backdrop of different statutory factors, see 17 U.S.C. § 801(b)(1), in the infancy of the satellite radio industry in 2003, and the agreement itself expressly provided

¹³ Appellants assert that these small labels represent "significant independent market share." DiMA Br. 34. Whatever that means, it does not mean a significant share of the market as a whole. See JA2803.

that the rates it contained should not be regarded as precedent for any purpose. See JA2808.

Appellants argue at length that interactive and non-interactive webcasting services are not truly "comparable." DiMA Br. 30-33; Bonneville Br. 17-23. This argument is misplaced. No benchmark will be exactly analogous, and any proposed benchmark – including the musical works, satellite radio, and other benchmarks that appellants themselves champion – could be distinguished from webcasting in material respects. Interactive webcasting is "comparable" to non-interactive webcasting in the most significant sense: both involve "streaming" copyrighted sound recordings over the internet to listeners on their personal computers.¹⁴ The only salient difference, as the Judges recognized, is the marginal increase in royalty rates that copyright owners can demand because of the value of interactivity itself, and the model adopted by the Judges employed accepted statistical techniques to account for that difference. See FD 24092 (JA80); JA1924-25.

Appellants next claim that the Judges' choice of benchmark was inconsistent with the statutory factors in 17 U.S.C. § 114(f)(2)(B), including "whether use of the service may

¹⁴ Interactive and non-interactive webcasting services also tend to converge at the margin: a user may be indifferent between generating a "custom" webcasting channel that plays only bluegrass music (interactive) and simply selecting from thousands of specialty webcasting channels playing the same songs (non-interactive). See JA1921.

substitute for or may promote the sales of phonorecords” and “the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public.” DiMA Br. 33; Bonneville Br. 21-23. But as the Judges reasoned, these factors – together with any other factors that reasonable buyers and sellers would consider pertinent – are presumably already incorporated into the rates established in the benchmark voluntary license agreements. FD 24095 (JA83). The Librarian in Webcaster I reached the same conclusion. Ibid. (citing 67 Fed. Reg. at 45244). While appellants insist that particular factors should have weighed more heavily in their favor, they do not explain why the Judges’ approach was in error. And in any event, the Judges expressly considered the record evidence bearing on these factors and found “no acceptable empirical basis for quantifying” any net difference in their application between the interactive and non-interactive markets. FD 24095 (JA83). Cf. 17 U.S.C. § 114(f)(2)(B) (in considering the statutory factors, the Judges “shall base [their] decision on * * * information presented by the parties” (emphasis added)).

Finally, appellants contend that the “interactivity adjustment” was flawed in myriad respects, relying again on the testimony of Dr. Jaffe, their own expert witness. DiMA Br. 36-38; Bonneville Br. 25-33. These arguments are without merit. Appellants identify no reason in principle why the Judges’

approach was improper. Hedonic regression analysis is commonplace in economics: the Bureau of Labor Statistics uses hedonic analysis in calculating aspects of the consumer price index.¹⁵ By using this accepted statistical tool to isolate and subtract the “interactivity” premium from the royalty rates for sound recordings in interactive services, the Judges were able to estimate, directly and objectively, what the same parties would have negotiated for the very rights at issue in the section 114 statutory license.

Nor was there anything irrational about the Judges’ implementation of this approach. The Judges explicitly addressed and rejected the arguments that appellants now advance. See FD 24093-94 (JA81-82). Appellants’ contentions reduce to the objection that, under different assumptions, the interactivity adjustment proposed by Dr. Pelcovits could have yielded rates more favorable to appellants. E.g., DiMA Br. 38. But that proves nothing: economic models are invariably built on assumptions that, if modified, will change the outcome. The relevant question is whether the assumptions employed by Dr. Pelcovits were rationally calculated to yield useful and reliable results. On that score, the Judges specifically found – and appellants do not dispute – that actual royalty rates in the

¹⁵ See, e.g., <http://www.bls.gov/cpi/cpidryer.htm> (last visited May 23, 2008) (describing the use of hedonic regression analysis to derive implicit prices for improved features in clothes dryers).

music industry corroborate the results of Dr. Pelcovits's calculations, providing "some indication of general reasonableness." FD 24092 (JA80). Indeed, the corroborating evidence demonstrated that "in many cases, the price paid by buyers for the rights to utilize a sound recording in various ways is as much as or higher than the rate proposed by Dr. Pelcovits as a result of his benchmark analysis." Ibid. (emphasis added).

Simulcasters nevertheless purport to demonstrate by "simple algebra" that the model proposed by Dr. Pelcovits was flawed. Bonneville Br. 26-27. This feat of pseudo-math fails at every turn. Appellants ascribe to Dr. Pelcovits a "key" assumption that was not an assumption of his analysis at all — i.e., that the absolute dollar amount of the difference between the retail price paid by consumers for webcasting services and the royalty rate paid by webcasters for sound recordings is always the same in both the interactive and non-interactive markets. Bonneville Br. 26 & n.19.

Unsurprisingly, Dr. Pelcovits did not make such an odd assumption. Appellants seize on a brief exchange during the trial in which, in response to a question from webcasters' counsel, Dr. Pelcovits indicated at first that he had no reason to believe that the absolute numbers would necessarily be different — a far cry from suggesting that his entire analysis

depended on the issue.¹⁶ JA1199. And in any event, Dr. Pelcovits quickly realized that he had misunderstood the premise of counsel's questions. See JA1200 ("I think I'm confused about the question then."). Dr. Pelcovits explained that if, as one might predict, webcasters adjusted their prices to take account of higher royalties, the absolute dollar differences would not be the same. See JA1200-1201. This is why the Copyright Royalty Judges explained, in rejecting the same argument from appellants below, that appellants' critique "assumes without basis that the same dollar amount of profit should be earned by services in the non-interactive market." FD 24094 (JA82). In short, the key "assumption" that simulcasters ascribe to Dr. Pelcovits is a postulate of their own false math, and the Copyright Royalty Judges did not err in rejecting it.

Finally, appellants mistakenly argue that the interactivity adjustment was inconsistent with the Judges' subsequent decision in ratemaking proceedings for satellite radio. DiMA Br. 37-38. Because the satellite radio license is subject to statutory standards that do not apply to the webcasting license, see 17 U.S.C. § 801(b)(1), comparisons between the two have little relevance. Regardless, there is no inconsistency. In the satellite radio case, a different expert witness calculated the

¹⁶ The statement that simulcasters attribute to Dr. Pelcovits, see Bonneville Br. 26 n.19, is in fact a quotation from webcasters' counsel. JA1199.

interactivity adjustment using a different method on a different record. See 73 Fed. Reg. 4080, 4093 (Jan. 24, 2008). Although the Judges upheld the alternative approach on the record in that case, they cautioned that “but for the lack of extensive data, these calculations might well be improved through a hedonic regression analysis” – i.e., the same analysis performed by Dr. Pelcovits here. Ibid.

4. Simulcasters

Simulcasters urge that the Copyright Royalty Judges were obligated to afford them special treatment. Bonneville Br. 4-16. Simulcasters insist that the Judges “never address[ed]” their arguments and “completely ignored” their evidence. Id. at 2, 5.

Even a cursory review of the determination below belies these claims. The Copyright Royalty Judges expressly considered simulcasters’ proposals, evidence, and arguments. See, e.g., FD 24088 (JA76) (describing simulcasters’ proposed rate structure); FD 24089 (JA77) (citing simulcaster evidence); FD 24095 n.30 (JA83) (addressing promotional effects of simulcasting); FD 24095 (JA83) (addressing simulcasters’ request for lower rate); FD 24097 n.39 (JA85) (addressing application of minimum fee to simulcasters); FD 24108 (JA96) (addressing simulcasters’ evidence relating to confidentiality).

Nothing in the record required the Judges to provide a special, lower royalty rate for simulcasters. To the contrary,

as the Judges explained, simulcasters are fundamentally commercial webcasters. The Judges found substantial evidence in the record "indicating that commercial webcasters such as those represented by DiMA in this proceeding and simulcasters such as those represented by Radio Broadcasters in this proceeding regard each other as competitors in the marketplace." FD 24095 (JA83) (citing JA2165-66).¹⁷ "Therefore, the Copyright Royalty Judges do not find a basis for setting a different, lower rate for these simulcasters as compared to other commercial webcasters." Ibid. The Judges pointed out that the Librarian in Webcaster I, applying the same statutory criteria, had rejected a similar claim, finding no factual basis for treating simulcasters differently from other commercial webcasters. Ibid. (citing 67 Fed. Reg. at 45255, 45272). The Judges concluded: "[W]e find no

¹⁷ In a footnote, simulcasters concede the existence of this evidence but dismiss it as "extremely thin." Bonneville Br. 24 n.16. That characterization is baffling. The general manager of Yahoo!'s webcasting services specifically testified that Yahoo! regards Clear Channel and other simulcasters as competitors. JA2166. DiMA's executive director likewise testified that its member companies would oppose a lower rate for simulcasters. JA2165. Clear Channel, for its part, believes that "[s]treaming is core to radio's future," measures its online success against internet-only webcasters such as Yahoo!, and has indicated that Yahoo!'s webcasting audience is "ours for the taking." JA2166. A Clear Channel executive also admitted that one reason radio stations offer simulcasting is to prevent their audiences from switching to internet-only webcasting services that can reach listeners inside office buildings. Ibid. And simulcasters and webcasters compete for the same advertising, as demonstrated by evidence from a webcasting-dedicated advertising firm. Ibid.

facts to persuade us of a change in circumstances since”
Webcaster I. Ibid.

The Judges thus did not “simply assume without any analysis that the approach taken in Webcaster I remained valid,” Bonneville Br. 8, but specifically found that the Librarian’s reasoning remained valid based on the record evidence. This is quintessentially the sort of factual judgment that the Judges are entitled to make.

Simulcasters also argue that their services must be treated differently from other commercial webcasters because of the asserted promotional effects of simulcasting on record sales. Bonneville Br. 12-15. But the Judges found that simulcasters failed to support this claim. See FD 24095 n.30 (JA83). The Judges explained that simulcasters presented “no persuasive evidence that would be useful for quantifying the magnitude of this asserted effect either for over-the-air radio or for non-interactive webcasting and deriving a method for translating such magnitudes into a rate adjustment.” Ibid. What little evidence simulcasters presented on this score, the Judges continued, “consisted largely of assertions, recollections of conversations clearly evidencing common ‘puffing’ in a business context, or anecdotes recounting subjective opinions.” Ibid. This conclusion is amply supported by the record. E.g., JA2123-36.

Simulcasters further insist that they were entitled to pay only a flat fee for the statutory license, asserting that the Judges "ha[ve] not even tried to explain" why simulcasters should have to pay a per-performance fee. Bonneville Br. 14-16. But this claim too is false: the Judges determined that simulcasters should not be treated differently from the other commercial webcasters with whom they directly compete. FD 24095 (JA83); see also FD 24089-90 (JA77-78) (explaining the Judges' decision to adopt a per-performance royalty structure for commercial webcasters). And in any event, what simulcasters actually proposed was not a simple "flat fee," but a complex hive of fees ranging from \$250 to \$8000 depending on the format of the program and the revenue-based size of the corresponding over-the-air radio market, subject to certain exceptions, with mixed-format stations paying a percentage of the music-format fee in relation to the percentage of programming identified as music programming. FD 24088 (JA76) (citing JA2461-63). As the Judges explained, complex royalty arrangements of this type involve difficult problems of measurement that per-performance fees avoid. FD 24089 (JA77) (citing as an example "[m]ixed format webcasters/simulcasters").

Nor were the Judges required to credit simulcasters' claim that per-performance fees are irreconcilable with simulcasting business models. Bonneville Br. 7-8. Simulcasters have been

paying per-performance royalties for sound recordings since the inception of the webcasting statutory license in 1998. See Webcaster I, 67 Fed. Reg. at 45272. Moreover, contrary to appellants' claims that simulcasting plays only "a small role" in their operations and that their "ability to generate revenue from simulcasted stations is extremely limited," *Bonneville Br.* 34, 8 n.4, the record demonstrates that terrestrial broadcasters are rapidly expanding their online operations. The number of simulcasters paying royalties to SoundExchange in 2004 was 81; in 2006, that number was 294. JA1889-90. One of those simulcasters is Clear Channel, the nationwide radio conglomerate. Clear Channel had 52 stations simulcasting their broadcasts in January 2003; by 2006, that number had jumped to 583, a tenfold increase in only three years. Ibid. And it is clear from the record that simulcasting is profitable. JA2055. The Judges were not obligated to accept simulcasters' self-serving claims of inability to pay.

At bottom, simulcasters' objection is that the rates imposed by the Judges are beyond what radio stations are accustomed to paying for music. But it is Congress, not the Copyright Royalty Judges, that created the disparity of which simulcasters complain: public performance of a sound recording over the radio is not an act of copyright infringement, but performing the same sound recording by means of a digital audio transmission – even

simultaneously – is. 17 U.S.C. §§ 106(6), 114(a); see Bonneville Int’l Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003). If simulcasters believe that disparity is unfair, their proper remedy is with Congress.

Finally, simulcasters urge that the Judges should have permitted them to calculate their royalty payments using aggregate tuning hours (ATH). Bonneville Br. 33-34. This argument was not timely raised below. Simulcasters did not mention their purported need for an ATH option in their proposed findings of fact, but raised the issue for the first time in a motion for rehearing. The Judges did not abuse their discretion in declining to entertain this belated claim. See 37 C.F.R. § 351.14(b) (“A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party.”).

5. Small Commercial Webcasters

Lastly, small commercial webcasters urge that the Judges erroneously failed to create a special percentage-of-revenue royalty structure for their benefit. DiMA Br. 43-49. This contention fails in every respect. The Judges explained at length their reasons for declining to adopt a percentage-of-revenues structure for commercial webcasters, see FD 24088-90 (JA76-78), and small webcasters make no effort to show that these reasons were arbitrary or unsupported by the record.

Nor were the Judges required to create a special exception for "small" commercial webcasters – a category that, as the Judges stressed, appellants conspicuously failed to define. FD 24088-89 & n.9 (JA76-77). Appellants now urge that the Judges could have adopted a "self-selecting" definition of small webcasters based on willingness to accept a "gross revenues" royalty model. DiMA Br. 45-46. But this proposal was not timely raised below, appearing for the first time in small webcasters' motion for rehearing, and it was therefore waived. In any event, the term "gross revenues" is hardly self-defining. Cf. Webcaster I, 67 Fed. Reg. at 45268 (discussing proposed definitions of "gross revenues"); 73 Fed. Reg. at 4087-88 (same, satellite radio proceedings). Nor did appellants introduce evidence demonstrating that the problems identified by the Judges with revenue-based models were somehow uniquely inapplicable to "small" entities. Ibid. (emphasizing "the absence of evidence submitted by this group to identify a basis for applying a pure revenue-based structure to them"). The Judges chose a per-performance fee for the reasons they explained, FD 24088-90 (JA76-78), and that choice was both reasonable and based in the record.

Small webcasters emphasize that the Copyright Royalty Judges adopted a percentage-of-revenue royalty for satellite radio services. DiMA Br. 47-48. But the Judges explained in that case

that “we have no true per performance fee proposal before us nor sufficient information from evidence of record to accurately transform any of the parties’ proposals into a true per performance fee proposal.” 73 Fed. Reg. at 4085. Indeed, as the Judges indicated, a true per-performance fee may not be feasible for satellite radio because, unlike webcasters, satellite radio providers cannot easily determine how many listeners receive a particular sound recording. Id. at 4086. There is nothing arbitrary about the Judges’ reaching different conclusions for different technologies on different records.

Small webcasters further complain that the Judges singled out a footnote in the written testimony of their sole witness. DiMA Br. 45. Yet that footnote – which made clear that small webcasters’ true objection is to the amount of the royalty, not the structure, see FD 24088-89 (JA76-77) – well captured the essence of their argument: small webcasters seek a percentage-of-revenue fee because, under almost any other arrangement, some small webcasters will be unable to pay for the music on which their businesses are based. See DiMA Br. 43-44.

This objection is misplaced. Nothing in the Copyright Act requires the Judges to ensure that every webcaster can earn a profit. See FD 24088 n.8 (JA76). To the contrary, small webcasters’ interpretation of the “willing buyer / willing seller” standard, DiMA Br. 48-49, effectively omits the seller’s

half of the equation: a percentage-of-revenue royalty for businesses that generate no revenue is no royalty at all. Small webcasters enjoy no statutory prerogative "to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners." FD 24088 n.8 (JA76). The Judges did not act arbitrarily by refusing to adopt such a scheme.

B. NONCOMMERCIAL WEBCASTERS

Public radio stations, college radio stations, religious groups, and other noncommercial entities urged the Copyright Royalty Judges to establish a separate, lower schedule of royalties for noncommercial webcasters. Cf. 17 U.S.C. § 114(f)(2)(A) (providing that the rates set by the Judges "shall distinguish among the different types" of webcasting services). The Judges agreed, concluding that willing buyers and sellers would have negotiated a lower rate for noncommercial webcasters, except to the extent those webcasters compete directly with commercial webcasters. FD 24097 (JA85). Accordingly, the Judges adopted a simple annual flat-fee royalty of \$500 for noncommercial webcasters, but provided that commercial rates shall apply to transmissions in excess of 159,140 aggregate tuning hours (ATH)¹⁸ of music per month. FD 24100 (JA88).

¹⁸ As previously noted, "aggregate tuning hours" is a measure of the number of listener-hours of transmitted music.

(continued...)

1. Annual Lump-Sum Royalty Of \$500

Noncommercial webcasters contend that the \$500 lump-sum annual fee is unsupported by the record, insisting that the Judges were required to establish a substantially lower flat-fee rate for noncommercial webcasters irrespective of size.

FD 24090-91 (JA78-79); Noncommercial Br. 20-21. This contention is puzzling on its face, as the \$500 noncommercial rate already represents a more generous discount over commercial rates than the equivalent discount provided by the Librarian in Webcaster I.¹⁹

In any event, the Judges' reasoning is supported by the record. Appellants' principal argument on appeal is that the Judges should have employed a 2001 agreement establishing a lump-sum, paid-up license for NPR and certain other public radio stations for the six-year period from 1998 to 2004, see JA3035

¹⁸ (...continued)
37 C.F.R. § 380.2(a).

¹⁹ The noncommercial rate in Webcaster I was 28.5 percent of commercial rate. See 67 Fed. Reg. at 45259 (noncommercial rates of \$.0002 per performance, commercial rates of \$.0007 per performance). Under the Judges' decision, a noncommercial webcaster buys the right to transmit up to 159,140 ATH per month, or 1,909,680 ATH per year, for \$500. Using the optional ATH calculation established by the Judges, see FD 24096 n.33 (JA84), a commercial music webcasting station would have to pay either \$23,489 (internet-only) or \$17,569 (simulcast) to transmit the same yearly quantity of programming. The \$500 flat fee for a noncommercial station with similar music content thus constitutes just 2 to 3 percent of the commercial rate, with that percentage further decreasing over the term of the license.

("NPR Agreement"), as the benchmark for setting noncommercial rates. Noncommercial Br. 17-21. The only party to rely on that agreement below, however, was appellant NRBNMLC. JA1834-36. All other noncommercial webcasters failed to advance this argument before the Copyright Royalty Judges and have consequently waived any objection to the Judges' refusal to rely on the NPR Agreement. See 37 C.F.R. § 351.14(b).

The fact that NPR itself neither relied on the NPR Agreement below nor joins NRBNMLC's argument on appeal, see Noncommercial Br. 17 n.4, is particularly telling. The parties stipulated in the NPR Agreement that the contract would not constitute precedent for any purpose, and specifically included a term prohibiting the introduction of the agreement in future proceedings to set the rates and terms for the webcasting statutory licenses. See NPR Agreement § 5.2 (JA3045). The Judges were thus entirely justified in their concern that the NPR agreement "does not provide clear evidence of a per station rate that could be viewed as a proxy for one that a willing buyer and a willing seller would negotiate today." FD 24098 (JA86). As the Librarian observed in Webcaster I, "[i]f anything, it would have been arbitrary to rely on [the] values" in an agreement containing such a provision absent "an opportunity to examine the circumstances surrounding the adoption of the 'no precedent' clause." 67 Fed. Reg. at 45259; see also 63 Fed. Reg. 49823

(Sept. 18, 1998) (affirming CARP decision to reject benchmark agreements containing "no-precedent clause" because the existence of such a clause indicated that the parties had agreed to "below-market rates").

Even aside from this defect, NRBNMLC offered no principled mechanism for translating the rates and terms of the 2001 NPR Agreement into per-station flat fee rates indicative of what willing buyers and willing sellers would have negotiated in the open market. FD 24089-99 (JA86-87). As the Judges explained, the NPR Agreement "provided for a lump sum amount to cover the entire 74-month term of the contract," with no means either in the contract or in the record to determine the "proper attribution of payments for any given year." Ibid. Appellants argue that the Judges could simply have divided the lump-sum royalty by six to determine the annual rate. Noncommercial Br. 20. But the Judges were not required to assume without evidence that the parties valued each year of the license equally, particularly given the no-precedent clause and the enormous changes in the webcasting industry since 1998. See supra Part I.C.

Likewise, the NPR Agreement on its face covered 410 stations, without regard to whether those stations were actually webcasting at the time of the agreement and with no indication of "how additional stations beyond the 410 covered by the agreement

were to be handled.” FD 24098 (JA86); see JA3035. NRBNNMLC disregarded the 410 figure and proposed to divide the lump-sum payment in the agreement by 798 stations, the number of NPR stations in existence in 2004. FD 24098 (JA86). Appellants insist that this approach was permissible because, on their reading, the NPR Agreement covered not only the 410 NPR stations in existence in 2001, but also any number of additional stations that might become NPR members during the license term. Noncommercial Br. 19-20. Yet if that is correct, it only underscores the Judges’ point: the lump-sum payment in the NPR Agreement was not negotiated with a specific number of webcasting stations in mind, and NRBNNMLC identified no principled basis in the record on which the Judges could derive from that payment a meaningful per-station royalty rate.²⁰ FD 24098-99 (JA86-87).

NRBNNMLC’s proposals also failed to take account of “the time value of money in the latter years of the contract” or “the erosion in the purchasing power of the dollar since 2004.” FD 24099 & nn.42-43 (JA87). Appellants object that the Judges “could have addressed” this omission “by simple math.” Noncommercial Br. 20. But it was not the Judges’ obligation to cure the defects in appellants’ proposals, just as it was not the

²⁰ This concern is highlighted by appellants’ claim that only 75% of the 798 stations in 2004 were actually webcasting. See Noncommercial Br. 20. Dividing the lump-sum figure in the NPR Agreement by 798 consequently would not yield a useful estimate of the per-station value placed by the parties on the webcasting license.

Judges' obligation to disregard the other defects in the NPR Agreement as a benchmark.

Appellants' emphasis on the NPR Agreement in this Court represents a shift in strategy from the proceedings below, in which noncommercial webcasters (like commercial webcasters) relied primarily on a benchmark based on musical-works licenses. See, e.g., JA2509. Appellants now abandon that approach, and with good reason: as the Judges noted, minimum fees for noncommercial entities in the musical-works marketplace are substantially higher than \$500. FD 24099 n.45 (JA87) ("\$636 for college stations in 2006 and \$1135 for other public broadcasting entities"); see also Webcaster I, 67 Fed. Reg. at 45259 (noting that a \$500 minimum fee for noncommercial broadcasters cannot be "deemed excessive in light of what these entities pay * * * for the public performance of musical works"). Nevertheless, appellants urge that the musical-works benchmark should have been used "as evidence that * * * supports a flat-fee structure." Noncommercial Br. 22. That argument is difficult to fathom: the Judges did establish a flat-fee structure for the vast majority of non-commercial webcasters. See infra; FD 24099-100 (JA87-88) (usage cap expected to cover 80% of noncommercial stations).

Noncommercial webcasters next contend that the Judges should not have derived their flat fee from the \$500 minimum fee for commercial broadcasters, objecting that SoundExchange's "actual

administrative costs may be much lower.” Noncommercial Br. 23. This argument is doubly mistaken. First, SoundExchange proposed a \$500 minimum fee early in these proceedings, and expressly applied that proposal to noncommercial webcasters. JA656-67. If appellants believed SoundExchange’s administrative costs were lower than \$500, they had every incentive and opportunity to obtain discovery and introduce evidence to establish that fact. E.g., 37 C.F.R. §§ 351.5, 351.10. They failed to do so.

Second, there is ample support in the record for the Judges’ decision. Noncommercial webcasters have been required to pay a \$500 minimum fee since Webcaster I, in which the Librarian required noncommercial entities to pay the same \$500 minimum fee as commercial entities. 67 Fed. Reg. at 45259. The Judges found that the \$500 fee proposed by SoundExchange was “substantially smaller” than the minimum fees that were required by benchmark marketplace agreements. FD 24096 (JA84); see also JA2230-31 (describing minimum fee arrangements). And there was affirmative evidence that a \$500 minimum fee was acceptable to webcasters: one noncommercial webcaster, Intercollegiate Broadcasting, itself originally proposed a \$500 fee before amending its proposal to request a lower amount. FD 24099 (JA87). In addition, the webcasters and SoundExchange agreed to a minimum fee of \$500 as part of their earlier agreement to push forward rates and terms in 2003. FD 24097 n.38 (JA85).

2. Limitation on Noncommercial Rate

Appellants further urge that the Judges acted arbitrarily in imposing a cap on the quantity of noncommercial programming per month that is covered by the \$500 flat fee. Noncommercial Br. 24-29. In appellants' view, the Judges could not permissibly impose limits on the discounted noncommercial rate.

As appellants do not dispute, the Librarian in Webcaster I imposed limitations on the discounted royalty rate for noncommercial webcasters "to avoid the possibility that a [noncommercial] broadcaster could use its unique position to essentially become a commercial webcaster." Webcaster I, 67 Fed. Reg. at 45259. Under Webcaster I, noncommercial webcasters paid less than one-third of the commercial rates, but only for one simultaneous internet retransmission of over-the-air programming and up to two "side channels"; all other transmissions were subject to the full commercial rate. Ibid.

The Copyright Royalty Judges' decision to adopt an analogous structure here is easily supported by the record. The Judges explained that, as in Webcaster I, any lower rate for noncommercial webcasters must incorporate limits designed to prevent large noncommercial webcasters from cannibalizing the market for commercial webcasting, thereby "adversely affect[ing] the value of the digital performance right in sound recordings." FD 24097-98 (JA85-86). The Judges reached this conclusion "after

a careful consideration of the characteristics that help to delineate the noncommercial submarket, juxtaposed against evidence in the record that those characteristics may be changing for at least some members of the submarket." FD 24098 (JA86). The result of those changes, the Judges explained, was increasing "competition for audience" between commercial and noncommercial webcasters. Ibid.

Appellants contend that competition is not the proper focus of the "willing buyer / willing seller" standard. Noncommercial Br. 26. But appellants do not dispute the economic principles of price discrimination upon which the Judges' determination is based. See FD 24097 (JA85). Multiple prices for the same good can exist in a marketplace only to the extent that the market is segmented into distinct classes of buyers; if the good in question derives its demand from its ultimate use, market segmentation can persist only when users cannot easily transfer the good between ultimate uses. Ibid. All of the economists who testified in the proceeding agreed with these basic principles. FD 24097 n.41 (JA85). And those principles support the Judges' conclusion that, where commercial and noncommercial webcasters become direct competitors for the same listener ears, no market justification exists for permitting the noncommercial webcasters to pay a separate, lower rate. FD 24097 (JA85).

The record below contains substantial evidence of convergence between the noncommercial and commercial webcasting submarkets, "ultimately resulting in competition for audience." FD 24098 (JA86). The Judges found, for example, that "[p]ublic and collegiate radio stations no longer necessarily face a limited geographic audience," and compete with commercial webcasters "worldwide." Ibid.; see JA301-302; JA2165; JA2187. Similarly, the Judges found that some college radio stations use Live365, a commercial webcasting service, to stream their simulcasts, and thus compete for listeners alongside commercial music programming. FD 24098 (JA86). Programming originally developed for commercial broadcasts has been adopted by noncommercial webcasters, and many noncommercial services have begun using "side channels" as music-only outlets. Ibid.; see JA2168-69; JA2170; see also JA2183 (noting that one NPR station attracts 500,000 listeners per month with an all-jazz side channel). The Judges further found that sophisticated noncommercial webcasters solicit sponsorships and other funding with "the functional equivalent of marketing materials that emphasize the size, income and demographics of their audience in much the same manner that commercial stations make their advertising sales pitches." FD 24098 (JA86). Finally, the Judges cited testimony and other evidence that major noncommercial and commercial webcasters in fact perceive each

other as competitors for audiences interested in sound recordings. FD 24098 (JA86); see JA2168; JA2183.

Noncommercial webcasters urge that this evidence is flawed because it relates only to "the largest NPR stations." Noncommercial Br. 29. But that is no criticism at all: the Judges themselves recognized that "evidence of convergence in the record appears to apply more clearly to the stations at the larger end of the range of NPR station size," FD 24099 (JA87), and consequently established a monthly transmission limit for the discounted noncommercial rate at a level calculated "to include the typical NPR experience" within the annual flat fee while excluding the largest stations. FD 24100 (JA88).

Appellants next attack the Judges' use of listenership levels, as measured by aggregate tuning hours, to define the point at which the noncommercial and commercial webcasting markets begin to converge. Noncommercial Br. 28-29. But appellants do not identify any other metric in the record that would have provided a better gauge. And as just discussed, appellants themselves assert that the evidence of convergence between noncommercial and commercial webcasting is clearest among "the largest NPR stations." Noncommercial Br. 29. Accordingly, it was hardly arbitrary for the Judges to select a measure of audience size as the "proxy for assessing the convergence point

between Noncommercial Webcasters and Commercial Webcasters.”
FD 24100 (JA88).

Lastly, appellants contend that the specific limit of 159,140 ATH/month established by the Judges is “an arbitrary point” at which to set the cap. Noncommercial Br. 28-29. But any specific limit of this kind could in some sense be described as arbitrary; the relevant question is not whether the number is exactly right, but whether it falls within a permissible “zone of reasonableness.” See NAB, 146 F.3d at 918-19. Here, the Judges’ determination was both reasonable and firmly grounded in the record. Citing a 2004 survey of NPR stations, the Judges found that NPR webcasting stations averaged 218 simultaneous listeners per station, or approximately 159,140 ATH of programming per month.²¹ FD 24099-100 (JA87-88). This average was strongly influenced, however, by “several very large stations at the upper end of the distribution”: the median number of simultaneous listeners among NPR webcasting stations was only 50. FD 24099-100 & n.49 (JA87-88). As a result, the 159,140 ATH/month figure encompassed “all but a handful of NPR stations positioned at the

²¹ Appellants mistakenly contend that the 2004 survey on which the Judges relied was “meaningless” because 79% of NPR stations failed to respond. Noncommercial Br. 29. In fact, as the survey report explains, 79% of NPR stations failed to respond to two particular questions (Nos. 26 and 27) concerning ATH data. See JA2900; JA2931. The Judges did not rely on the answers to those questions, but on answers to a different question (No. 7) to which a much larger number of stations responded. See FD 24100 (JA88) (citing JA2894; JA2192-15); JA2928.

extreme high end of the listenership distribution," FD 24099-100 (JA87-88), and thus provided a reasonable proxy for the point at which the Judges had concluded that the noncommercial and commercial webcasting submarkets converge. FD 24100 (JA88).

III. THE COPYRIGHT ROYALTY JUDGES REASONABLY SELECTED A SINGLE ENTITY TO ACT AS THE DEFAULT CLEARINGHOUSE FOR ROYALTY PAYMENTS UNDER THE STATUTORY LICENSE.

The Copyright Royalty Judges designated SoundExchange to serve as the "Collective" for the statutory webcasting license – that is, the default clearinghouse for receiving, processing, and distributing royalties to copyright owners. FD 24105 (JA93); see 37 C.F.R. § 370.5(b)(1). Appellant Royalty Logic, LLC contends that the Judges lacked the authority to grant SoundExchange a "private monopoly" of this kind. RL Br. 11-12.

This argument fundamentally misconceives the Judges' determination. Nothing in the Judges' decision prohibits copyright owners from designating their preferred agents to negotiate licenses or receive payments under the antitrust exemptions in section 114(e)(1) and 112(e)(2). Congress granted copyright owners the right to act through common agents of their own choosing in direct negotiations with webcasters, and further provided that any resulting license "shall be given effect in lieu of any * * * determination by the Copyright Royalty Judges." 17 U.S.C. § 114(f)(3). As a result, copyright owners remain free to negotiate licenses incorporating any mechanism of royalty

distribution that the parties may care to design, including any common agents copyright owners may designate. See FD 24103-104 (JA91-92) (rejecting Royalty Logic's premise "that an agent must be formally recognized by the Copyright Royalty Judges * * * before it can have any involvement in the royalty distribution process").

Royalty Logic is thus mistaken in claiming that the Copyright Royalty Judges created a "private monopoly" and "mandat[ed]" that SoundExchange "receive royalty payments on behalf of all copyright owners." RL Br. 12, 21. As the Act itself makes clear, SoundExchange enjoys no such monopoly; it has no right to insist that copyright owners include SoundExchange in their privately negotiated license agreements. The Judges merely established the default mechanism for collecting and distributing royalties under the statutory license in the absence of private arrangements.

Royalty Logic does not deny that some type of default clearinghouse was warranted. As the Judges explained, Congress could not have intended webcasters to locate and make separate arrangements to pay each of the thousands of copyright owners whose works they perform, thereby eliminating the very efficiencies the statutory license was designed to achieve. FD 24104 (JA92). Nor does Royalty Logic dispute that it was legitimate for the Copyright Royalty Judges to establish license

terms designed to "promote administrative efficiency and economy and reduce transaction costs wherever possible." FD 24104 (JA92). In its filings below, Royalty Logic itself recognized that efficiency considerations are paramount in the collection and distribution of statutory royalties. JA 3309 ("The [Judges] must evaluate the evidence presented, to determine the best means for effectuating the Copyright Act's intent of ensuring the fair, prompt and efficient collection and distribution of royalties under the Statutory Licenses."). Nonetheless, Royalty Logic contends that the Judges were required to permit multiple agents to share the role of default license administrator under sections 114 and 112.

The Judges did not err in rejecting this approach, which has no foundation in the statute and could multiply the costs and delays associated with processing and disbursing royalties. See FD 24104 (JA92). Notwithstanding its insistence that the Judges "crossed a statutory bright line" (RL Br. 21), Royalty Logic identifies nothing in the Copyright Act requiring the Judges to appoint multiple agents to perform the administrative clearinghouse function. To the contrary, the Act expressly anticipates the single-clearinghouse approach adopted by the Judges. Section 803, which establishes the basic requirements for rate determinations by the Copyright Royalty Judges, twice refers to "the entity designated by the Copyright Royalty Judges

to which such royalties are paid by the copyright user (and any successor thereto).” 17 U.S.C. § 803(c)(2)(E)(iii) (emphasis added); see id. § 803(d)(2)(C)(ii) (same). Royalty Logic makes no effort to reconcile its arguments with these provisions, which belie its claim that the Judges have “no role to play” in designating default recipients for the payment of statutory royalties. RL Br. 5.

The purported “bright line” on which Royalty Logic relies, by contrast, does not address administration of the statutory license at all. Section 114(e), captioned “Authority for Negotiations,” merely provides a limited exemption from the antitrust laws for copyright owners and webcasters to employ common agents “in negotiating statutory licenses in accordance with subsection (f)” – for example, during the voluntary negotiation periods that Congress required the Judges to provide in all rate-setting proceedings, 17 U.S.C. § 803(b)(3), or in negotiating the bilateral license rates and terms that Congress provided would supercede any determination by the Copyright Royalty Judges, see id. § 114(f)(3) (private license agreements apply in lieu of rates set by Judges). Accord 17 U.S.C. § 112(e)(2) (antitrust exemption for ephemeral copies license). The parties took advantage of that exemption here: the minimum fee cap agreement on which commercial webcasters rely, for example, was negotiated between DiMA (representing commercial

webcasters) and SoundExchange (representing thousands of copyright owners). Sections 114(e) and 112(e) have no bearing on the very different issue raised by Royalty Logic: the Judges' authority to designate a default license administrator in the absence of private arrangements.

Nor is there any merit to Royalty Logic's reliance on the Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (SWSA). Royalty Logic stresses that the SWSA addressed the deduction of certain costs by "nonprofit" license administrators – implying, in Royalty Logic's view, a congressional preference for multiple administrators. RL Br. 27-28 (citing 17 U.S.C. § 114(g)). But Royalty Logic identifies nothing in the SWSA that requires multiple license administrators; the statute merely accommodates the possibility of multiple administrators. That Congress included such a provision in the SWSA is hardly surprising: the explicit purpose of that Act was to permit privately negotiated license terms for small webcasters after Webcaster I, in which the Librarian accepted the parties' proposal to appoint both SoundExchange and Royalty Logic as "designated agents." See § 2, 116 Stat. 2780-81 (findings of Congress); Webcaster I, 67 Fed. Reg. at 45266-68 & n.45 (discussing the parties' negotiated collection scheme).

In any event, Congress made clear that the provisions adopted in the SWSA do not reflect Congress's own determination

regarding the appropriate statutory license terms. See § 2, 116 Stat. 2780-81. The Act stipulates that the rates and terms thereby approved may not be “taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment” of webcasting royalties. Id. § 4, 116 Stat. 2781-83. And with respect to the particular provisions on which Royalty Logic relies, Congress further indicated that its intent was only to adhere to the parties’ voluntarily negotiated arrangements for royalty collection in Webcaster I. See id. § 5(a), 116 Stat. 2783-84. That collection scheme expired in 2002, at the end of the Webcaster I license term, see FD 24102 (JA90), and with it expired any meaningful congressional intent that can be gleaned from the SWSA.

Finally, the Judges were not required to credit Royalty Logic’s arguments regarding the benefits of competition among license administrators in the unique context of a statutory license.²² The Judges reasonably concluded that, although

²² Contrary to Royalty Logic’s contention, RL Br. 10 & n.10, nothing about the Judges’ determination below is inconsistent with the efforts of the Antitrust Division to promote competition among performing rights organizations in the licensing of musical works. As the DOJ memorandum cited by Royalty Logic makes clear, the Antitrust Division’s concerns with performing rights organizations focus not on the administrative function of collecting and distributing royalties, but rather on the significant market power that ASCAP and other performing rights organizations wield over music users in license negotiations – concerns that arise in large measure because musical works, with limited exceptions, are not subject to a statutory license.

competition among licensing agents is beneficial in direct licensing schemes in which royalty rates are set through private negotiation, the benefits of competition among administrators of the statutory license – where the rates and terms are set by law – would be less significant. FD 24104 (JA92). At the same time, the Judges reasoned, there would be substantial disadvantages to such a system: webcasters would incur added expense and delay in monitoring the shifting portfolios of artists and copyright owners affiliated with the different administrators, and difficult problems would arise “in resolving how unaffiliated copyright owners and performers should receive their royalty distributions.” Ibid. Nor is it apparent how disputes between the administrators would be resolved: Royalty Logic proposed that the Judges themselves could decide any such disputes, see JA786-87, but the parties disputed whether such a system would be practicable and whether the Judges could even retain jurisdiction for such a purpose, see JA2872. Cf. 17 U.S.C. § 803(c)(4) (specifying the purposes for which the Judges may exercise continuing jurisdiction).

Royalty Logic could have introduced evidence to assuage the Judges’ concerns on this score. But Royalty Logic presented no evidence demonstrating that competition would yield benefits for copyright owners sufficient to offset the inherent disadvantages of such a scheme, or even that Royalty Logic’s own costs of

administering the statutory license would be lower than SoundExchange's. FD 24104 (JA92). By contrast, the Judges reasoned that SoundExchange's nonprofit status, combined with the equal representation of copyright owners and performing artists on its board of directors, provided reasonable assurance that SoundExchange would not engage in wasteful conduct. FD 24105 (JA93). The Judges also found "particularly persuasive" the testimony of copyright owners and performing artists in support of designating SoundExchange as the Collective. FD 24105 (JA93); see FD 24104-105 (JA92-93) (citing testimony). No similar testimony in the record favored Royalty Logic.²³ FD 24105 (JA93).

Against this background, the Copyright Royalty Judges did not err in establishing a single default clearinghouse for processing and distributing webcasting royalties, or in designating SoundExchange to perform that role.

IV. THE NON-ROYALTY LICENSE TERMS ESTABLISHED BY THE JUDGES ARE REASONABLE AND BASED IN THE RECORD.

A. Late Fees

Commercial webcasters contend that the Judges could not permissibly raise the fee for late royalty payments from 0.75% to 1.5% of the unpaid royalty. DiMA Br. 40. There was no error. The late fee set by the Judges was supported by "several

²³ Royalty Logic did submit written testimony from one artist, but the artist failed to appear at trial and the Judges consequently declined to consider his statement. FD 24102 n.63 (JA90).

marketplace agreements between record companies and services containing, on average, a late payment fee of 1.5% per month, with a high of 2.0%." FD 24107 (JA95) (citing evidence). In addition, SoundExchange presented evidence that the late fee established in Webcaster I was "nominal" and "actually encourage[d] late payments" when "coupled with the high cost of bringing an infringement action" to collect unpaid royalties. Ibid.

Although appellants insist that "evidence of industry custom" supported a lower fee, DiMA Br. 41, commercial webcasters' chief witness was unable to "provide a single agreement that his company had for music service that contained such a rate." FD 24107 (JA95). In fact, the witness admitted that his company "had agreements with a number of suppliers (including [the major performing rights organizations]) that provide for late fees ranging from 12% to 18% per year," which corresponds to 1% to 1.5% a month. Ibid. (citing JA715, JA716).

B. Confidentiality

Appellants also challenge the terms adopted by the Judges to govern the confidentiality of the statements of account that webcasting services must deliver to SoundExchange with their royalty payments. Statements of account contain the information necessary to calculate the webcaster's royalty obligation. See 37 C.F.R. § 262.4(f). No party disputed that the reports should

remain confidential from the general public, and the Judges adopted that restriction. FD 24108 (JA96-97). The webcasting services, however, urged that the statements of account should also be confidential from the copyright owners and performers whose sound recordings the webcasters perform. FD 24108 (JA96).

The Copyright Royalty Judges rejected this contention, concluding that "copyright owners and performers should not be excluded from obtaining the information contained in a statement of account of a [webcaster] that performed his or her work." FD 24108 (JA96). The Judges reasoned that "[w]ithout the information contained in a statement of account, a copyright owner and/or performer cannot begin to make an informed judgment as to whether a [webcaster] is complying with its statutory obligations and making the correct payments." Ibid. At the same time, the Judges stressed, denying access to copyright owners would grant SoundExchange, as the Collective, "an inordinate amount of control as the only party knowledgeable of the compliance of each of the [licensees]." Ibid.

Commercial webcasters contend that the Judges improperly departed from the regulations adopted by the Librarian in Webcaster I, which included stricter confidentiality terms. DiMA Br. 41. But as the Judges explained, the confidentiality provisions were not disputed by the parties in Webcaster I; the Librarian merely accepted a set of negotiated terms, without any

finding that webcasters have a legitimate interest in denying copyright owners access to this information. FD 24108 (JA96); see 67 Fed. Reg. at 45275. The Judges found scant evidence in the record that the disclosure of statements of account to copyright owners (but not the public) would result in competitive harm. Ibid. The only witness that commercial webcasters produced in support of their restrictive confidentiality proposal “did not articulate how the information contained in the statements can or could injure the competitiveness of a Service, or otherwise negatively affect its operation.” Ibid. (citing JA718, JA719). Indeed, the Judges noted that “much of the same information” is available from commercial firms such as Arbitron. Ibid.

Appellants cite various marketplace agreements containing confidentiality provisions, urging that “willing buyers and willing sellers routinely protect each other’s competitively sensitive information.” DiMA Br. 42. But as the Judges explained, those agreements are inapposite because they “do not deny the licensor – the copyright owner – access to this information.” FD 24108 (JA96). It was entirely rational for the Judges to conclude that webcasters’ reports of sound-recording performances should be available on request to the copyright owners whose works are performed.

C. Record-Keeping

The Copyright Act requires the Judges to “establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.” 17 U.S.C. § 114(f) (2).

Noncommercial webcasters, with the exception of NRBNNMLC, contend that they should not be made to follow the same record-keeping requirements as other webcasters. Noncommercial Br. 36-40. Yet the only party to ask for different record-keeping requirements below was NRBNNMLC, which now “takes no position” on the issue. Id. at 36 n.11. The other noncommercial broadcasters may not now step into NRBNNMLC’s shoes and press an issue that they failed to raise before the Judges. See 37 C.F.R. § 351.14(b).

In any event, the Judges reasonably declined to establish record-keeping rules in the proceedings below, explaining that the record-keeping requirements under sections 114 and 112 are the subject of separate rulemaking proceedings and that interim requirements have already been established. FD 24109-110 (JA97-98); see 69 Fed. Reg. 11515, 11521-522 (March 11, 2004) (interim rules establishing content and scope of record-keeping obligations); 71 Fed. Reg. 59010, 59012 (Oct. 6, 2006) (interim

rules establishing format and delivery of usage reports). The Judges emphasized that because these record-keeping rules "are interim and not final, there is ample opportunity to again address the Services' costs in a future rulemaking." FD 24110 (JA98).

Furthermore, the arguments pressed by noncommercial webcasters here were expressly considered and rejected by the Copyright Office in the first rulemaking related to record-keeping obligations under section 114. See 69 Fed. Reg. at 11521-22 (rejecting arguments from webcasters, "in particular noncommercial webcasters," seeking exemptions from record-keeping requirements). Against this background, it was not arbitrary for the Judges to decline to revisit record-keeping issues in this proceeding.

V. IF THE COURT FINDS ERROR IN THE JUDGES' DETERMINATION, THE APPROPRIATE REMEDY IS TO VACATE AND REMAND.

For the foregoing reasons, the determination of the Copyright Royalty Judges is reasonable and based in the record. It should therefore be affirmed.

If the Court finds error in the Judges' determination, however, the appropriate remedy is to vacate the Judges' decision and remand to the Copyright Royalty Judges for further proceedings. See 17 U.S.C. § 803(d)(3). The Court has the authority under the Copyright Act directly to modify the Judges' determination, or even to make its own rate-setting

determinations. Ibid. Given the number of parties involved in these consolidated appeals, the complexity of the underlying technology, and the potential need for further discovery or factfinding, the Copyright Royalty Judges are better positioned to remedy any error this Court may identify, consistent with the Court's instructions.

CONCLUSION

For the foregoing reasons, the determination of the
Copyright Royalty Judges should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify pursuant to Fed. R. App. P. 32(a) that the foregoing brief contains 18,779 words, according to the count of Corel WordPerfect 12, and consequently complies with the word limit established in this Court's order dated November 15, 2007.

/s/

Mark R. Freeman

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2008, I caused copies of the foregoing brief to be filed with the Court by hand delivery, and served upon the following counsel by electronic mail and first-class U.S. mail:

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