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

No. 16-1159 (consolidated with No. 16-1162)

SOUNDEXCHANGE, INC., and GEORGE JOHNSON,
Appellants,

v.

COPYRIGHT ROYALTY BOARD and LIBRARIAN OF CONGRESS,
Appellees,

IHEARTMEDIA, INC., *et al.,*
Intervenors.

On Appeal from a Final Determination of the Copyright Royalty Board

JOINT BRIEF FOR INTERVENORS NATIONAL ASSOCIATION OF BROADCASTERS, PANDORA MEDIA, INC., AND IHEARTMEDIA, INC. IN SUPPORT OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenors National Association of Broadcasters ("NAB"), Pandora Media, Inc. ("Pandora"), and iHeartMedia, Inc. ("iHeartMedia"), and (collectively, "the Services") certify as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing before the Copyright Royalty Board and in this Court are listed in the Brief for Appellees.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Appellees.

C. Related Cases

There are no cases related to the consolidated cases before this Court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Services respectfully submit the following corporate disclosure statements:

NAB is the leading national trade association for broadcasters. NAB represents commercial local radio broadcasters nationwide, hundreds of which stream their broadcasts over the Internet. NAB has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NAB.

Pandora is the largest webcaster in the United States, with an audience of nearly 80 million active listeners in the United States and annual payments to SoundExchange in excess of $400 million. Pandora is a Delaware corporation, whose stock is publicly traded. No publicly held company has a 10 percent or greater ownership interest in Pandora.

iHeartMedia is the a terrestrial (i.e., over-the-air) radio broadcaster in the United States. Through its iHeartRadio service, iHeartMedia allows listeners to stream terrestrial broadcast stations or listen to Internet-only radio stations. iHeartMedia has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authorities principally relied upon are designated by an asterisk (*).

OTHER MATERIALS

GLOSSARY

Board	Copyright Royalty Board
Copyright Act or Act	Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.*
EX	Hearing Exhibit in this proceeding
FD or *Final Determination*	Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26,316 (May 2, 2016)
Interactive service	Services defined by 17 U.S.C. § 114(j)(7) that that allow listeners to play specific songs on-demand and are ineligible for a 17 U.S.C. § 114 statutory license (e.g., Spotify)
Judges	Copyright Royalty Judges
JA	Joint Appendix
Non-interactive service, Internet radio service, Statutory service, or Webcaster	Services that offer over-the-Internet radio and are eligible for a 17 U.S.C. § 114 statutory license (e.g., Pandora and iHeartRadio)
Order on Novel Question	Memorandum Opinion on Novel Material Question of Law (Sept. 18, 2015)
Play, Spin, or Performance	Performance of a song or track
Register	Register of Copyrights
Rehearing Denial	Order Denying in Part SoundExchange's Motion for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions (Feb. 10, 2016)
Restricted Determination	Confidential version of *Final Determination*

The Services	Intervenors NAB, Pandora, and iHeartMedia
TR	Hearing Transcript in this proceeding
Web I	Determination of Reasonable Rates and Terms for Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240 (July 8, 2002)
Web II	Digital Performance Right in Sound Recording and Ephemeral Recordings, 72 Fed. Reg. 24,084 (May 1, 2007)
Web III Initial Decision	Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026 (Mar. 9, 2011)
Web III Remand	Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings, 79 Fed. Reg. 23,102 (Apr. 25, 2014)

STATUTES AND REGULATIONS

All applicable statutes and regulations have been reproduced in the Brief of SoundExchange and the Brief for Appellees.

INTRODUCTION

At the heart of the Copyright Royalty Judges' determination in *Web IV* are two categories of rulings based on record evidence of how music streaming services operate in the real world. *First*, the Judges found that developments in the non-interactive services market displayed the hallmarks of effective competition and that two voluntary agreements between non-interactive services and record labels from that market — the iHeart-Warner and the Pandora-Merlin agreements — were highly "comparable" to the agreements that willing buyers and sellers would strike in the hypothetical market. As a result, the Judges adopted those agreements as benchmarks.

Second, the Judges found that the interactive services market is not "effectively competitive" because the major record labels exercise complementary oligopoly power in that market, producing supracompetitive rates. As a result, the Judges rejected SoundExchange's proposal to use its long-favored "interactive benchmark" — which was fashioned by SoundExchange exclusively from rates charged on the subscription side of the interactive services market — in setting rates for the largest segment of the non-interactive webcasting services market, which is advertiser-supported and not subscription-based. While the Judges did use the interactive services benchmark in part to set rates for the smaller, subscription-based segment of the non-interactive webcasting services market, the

Judges concluded that the benchmark had to be adjusted downward to account for the anticompetitive effects of the lack of competition among record labels and supracompetitive pricing in the interactive market. As the Government demonstrates, these rulings were amply supported by the record.

Desperate to prevent rates from being set at a competitive level, SoundExchange attacks the Judges' use of agreements drawn from the non-interactive services market as benchmarks. SoundExchange claims further that the Judges should have rubber-stamped so-called "marketplace rates" drawn from the interactive services market, despite the evidence that those rates are distorted by major record labels' anticompetitive use of their oligopoly power in that market. Each of SoundExchange's challenges to the Judges' determination is incorrect. SoundExchange's argument that agreements drawn from the non-interactive services market cannot serve as benchmarks because they are tainted by the "shadow" cast by the existence of the statutory license ignores the economic evidence the Judges carefully considered in reaching their decision. It also is incompatible with the statute, which encourages the Judges to consider "comparable" voluntary agreements, including agreements between non-interactive services and record labels. 17 U.S.C. § 114(f)(2)(B). SoundExchange's argument that the Judges should not have adjusted its "interactive benchmark" to account for the lack of effective competition in the interactive services market is similarly at odds with the statute, as well as SoundExchange's own advocacy. The statute — which requires the Judges to apply the well-established "willing buyer, willing seller" test in setting rates — is designed to ensure that rates are set at an effectively competitive level.

For these reasons, as well as those in the Government's brief, the Court should deny the appeals and affirm the Judges' decision.

SUMMARY OF ARGUMENT

I. During the years leading up to *Web IV*, non-interactive services rolled out new "steering" technology that allowed them to select the music they played based, in part, on price; that is, these services could now choose to play fewer higher-priced songs and more lower-priced songs. This innovation led record labels to compete on price. In voluntary agreements the Judges found highly probative for rate-setting, record labels agreed to per-performance rates *below* the existing statutory rates to entice Pandora and iHeart to play their music more frequently, with the expectation that they would benefit from those additional performances. Even at lower per-performance rates, higher volumes of performances could lead to greater total royalties for the record label and expose more consumers to the record label's music, creating new fans.

II. The Copyright Act encourages the Judges to set rates for non-interactive services using "comparable" marketplace agreements as benchmarks. 17 U.S.C. § 114(f)(2)(B). Agreements from the non-interactive services market are ideal "comparable" benchmarks because these agreements are similar to those that willing buyers and sellers would strike in the hypothetical market: these agreements are between the same parties (non-interactive services and record labels), concern the same rights (a blanket license to stream music as part of a non-interactive services), and are bargained for in an effectively competitive market. In particular in *Web IV*, the Judges correctly determined that two voluntary agreements from the non-interactive services market — the iHeart-Warner and Pandora-Merlin agreements — were sufficiently "comparable" to the agreements that willing buyers and willing sellers would reach in the hypothetical market to serve as suitable benchmarks.

SoundExchange challenges the Judges' decision to adopt these agreements as benchmarks in four ways. None has merit.

First, SoundExchange claims that agreements from the non-interactive services market are invalid benchmarks because they are necessarily influenced by the "shadow" cast by the existing statutory rates. But tossing aside every marketplace agreement influenced by those rates would require discarding *every* voluntary agreement involving any type of music streaming service. As SoundExchange's own economic expert repeatedly testified, *every* voluntary agreement for performances on a music streaming service, including interactive services, is to some extent "affected" by the existing statutory rates.

Second, SoundExchange contends that the Judges erred in considering whether voluntary agreements offered as benchmarks were negotiated in a market with effective competition among record labels in choosing benchmarks, and making adjustments to those benchmarks on that basis. But this analysis was necessary to determine whether the voluntary agreement resembled an agreement that would be struck between willing buyer and sellers in a hypothetical marketplace in which effective competition exists. Moreover, as the Government explained, the requirement that agreements are struck under competitive conditions is an integral component of the well-established willing-buyer/willing-seller test that the statute requires the Judges to apply. Indeed, SoundExchange has itself previously recognized that the hypothetical market would be characterized by effective competition. In this proceeding, its own expert testified that the willing-buyer/willing-seller test "calls for rates that would have been negotiated in a 'competitive marketplace.'" EX29 ¶ 112 (JA___). That SoundExchange was right then and wrong now is confirmed by the legislative history. Congress anticipated that the statutory rate-setting process would prevent "supracompetitive rates" being imposed on non-interactive services because the statutory rate-setting process would ensure rates set at a competitive level. H. Rep. No. 104-274, at 22 (1995).

Third, SoundExchange claims that the Judges should have considered the total compensation that Warner and Merlin expected to receive as a result of the iHeart-Warner and Pandora-Merlin agreements, rather than the effective per-performance rates established by those agreements. SoundExchange's appellate argument is contrary to the position it advanced during the hearing that the only "proper way" to analyze an agreement is by looking at it "on an average effective royalty basis." SoundExchange's Proposed Findings of Fact ¶ 795 (June 19, 2015)

(JA___). Moreover, SoundExchange fails to acknowledge that the reason Warner and Merlin expected to receive greater total competition was that they anticipated that iHeart and Pandora would play Warner's and Merlin's music more frequently if they agreed to *drop* their per-performance prices below the statutory rate.

Fourth, SoundExchange claims, relying on the testimony of its expert, Dr. Talley, that using agreements from the non-interactive services market as benchmarks depresses the statutory rate. SoundExchange fails to acknowledge that, according to Dr. Talley's theory, the "shadow" prevents non-interactive services and record labels from striking deals at rates above *and* below the statutory rate, not merely those above the statutory rate. The Judges correctly concluded that Dr. Talley's theory was too untethered to the facts to be useful in setting rates. In short, there was no credible evidence in the record suggesting that record labels and non-interactive services, absent the statutory "shadow," would necessarily strike agreements materially different from the iHeart-Warner and Pandora-Merlin agreements.

III. The Judges' decision to set separate rates for subscription and non-subscription services is supported by overwhelming record evidence that these services operate in different segments of the non-interactive services market, pay different rates to record labels in voluntary agreements, and attract different types of listeners. SoundExchange challenges this segmentation because it limited the usefulness of its preferred benchmark, which was based exclusively on agreements with interactive services that operate in the subscription segment of that market. The Judges' conclusion that SoundExchange's proposed benchmark was of limited use in the non-subscription segment of the non-interactive market was correct and should have come as no surprise: the Judges in *Web II* and *Web III* had also concluded that it was flawed as a result of its failure to account, in any way, for non-subscription services, and SoundExchange did nothing to cure this defect in *Web IV*.

IV. The Judges' decision to retain the longstanding requirement that audits of payments to SoundExchange must be conducted by a CPA and to clarify that the CPA must be licensed in the jurisdiction is supported by substantial evidence. SoundExchange's belated arguments to the contrary are premised on an erroneous interpretation of the regulation, which the Judges never endorsed.

ARGUMENT

I. THE INTRODUCTION OF STEERING RESULTED IN PRICE COMPETITION AMONG RECORD LABELS IN THE NON-INTERACTIVE SERVICES MARKET

In the years leading up to the *Web IV* proceeding, certain non-interactive services pioneered "steering" technology that allowed them to use more music from specific record labels and less from others based in part on the price of the music. FD26,356 (JA___). Pandora, which uses a proprietary algorithm to select music for each listener based on that listener's musical tastes, had found that it could incorporate a stronger preference for music from particular record labels into its algorithm without negatively affecting the listener experience. TR4199:19-4202:18 (Herring) (JA___-__). iHeartRadio, which transmits programming from iHeartMedia's more than 850 traditional radio stations over the Internet, had developed technology — called "Song Exchange" — that allowed it to insert in its Internet streams different songs or programming that replaced individual songs played during the original radio broadcast. EX3210 (JA___-__); TR3628:16-3630:2 (Littlejohn) (JA___).

Non-interactive services' newfound ability to substitute the music of one record label for another ignited price competition among record labels and paved the way for "mutually advantageous" steering deals in which record labels agreed to lower per-performance royalties in exchange for a greater volume of performances. FD26,366 & n.139 (JA___). These agreements differed in their details, but at the heart of each agreement was the same bargain: "an increase in quantity (more performances) in exchange for a lower price (a lower rate)." FD26,383-84 (JA___-__). The non-interactive service is able to lower its per-performance royalty costs by playing more music from a record label willing to accept a lower per-performance rate. And the record label gets increased performances of its songs on the service, which helps to promote its artists by introducing them to a wider audience, and could lead not only to greater total royalties but also to greater total revenues from new listeners. FD26,367 (JA___).[1] The record label also guards against the possibility that the service will reduce the volume of performances of its catalog if a different label strikes a deal to accept lower rates. FD26,366-67 (JA___-__).

By early 2015, thousands of record labels had entered into steering deals with non-interactive services. These steering deals included the two agreements that the Judges adopted as benchmarks in *Web IV*: iHeartMedia's agreement with Warner, one of the three Major record labels (the "iHeart-Warner agreement") and Pandora's agreement with Merlin, a global rights agency that represents thousands of Independent record labels (the "Pandora-Merlin agreement"). EX3344 (JA___-__); EX5014 (JA___-__).[2]

[1] Evidence presented at the hearing showed that record labels expected that additional performances on non-interactive services would attract new listeners that, in turn, would generate revenues from traditional sources — such as concerts, music sales, and merchandise — entirely separate from services' increased royalty payments. *See, e.g.*, [redacted]

[2] Between [redacted] of Merlin's approximately [redacted] member record labels opted in to the Pandora-Merlin agreement. Restricted Determination 93 (JA___). Other steering deals — which the Judges did not adopt as benchmarks — included 27 deals between iHeartMedia and independent record labels. EX3338 ¶¶ 7-8 (JA___-__).

Non-interactive services proved that they could use steering to increase substantially the frequency with which they played music from the record labels that agreed to lower rates and to decrease substantially the frequency with which they played music from other labels. iHeartMedia [redacted] and Pandora [redacted] The evidence before the Judges showed that, "by steering, a non-interactive service can: (1) partially 'bypass' one or more Majors and substitute an increased proportion of songs from Indies or other Majors; and (2) thereby reduce their 'proportion' of purchases from higher priced Majors up to a certain level." FD26,347 (JA___) (footnote omitted). Pandora's steering experiments "demonstrated that Pandora was able to steer -15% or +15% for all three Majors without causing a statistically significant change in listening behavior." FD26,358, FD26,369 (JA___, JA___).

That steering ability led directly to lower, more competitive royalty rates in voluntary license agreements. As the Judges concluded, "[s]teering is synonymous with price competition in this market, and the nature of price competition is to cause prices to be lower than in the absence of competition." FD26,366 (JA___); *see also* FD26,367 (JA___) ("[T]he Judges find the economic opinion expressed by Dr. Shapiro — equating steering with price competition — to be correct. The ability of noninteractive services to steer toward lower priced recordings (and, by necessity therefore, away from higher priced recordings) is the essence of price competition."). The Judges correctly observed that non-interactive services did not need to enter into steering deals with every record label for their proven ability and willingness to steer to drive down royalty rates in the non-interactive services market. Record labels, like other types of sellers, are driven to offer lower royalty rates "through the ever-present 'threat' that competing sellers will undercut each other in order to sell more goods or services." FD26,366 (JA___). Those record labels that have not yet agreed to steering deals will find it in their economic interest to offer competitive rates to maintain their market share and avoid losing ground to competitors. FD26,367 (JA___). Indeed, "it would be economically irrational" for those record labels to simply "maintain their position and incur losses." *Id.*[3]

The Judges offered an example of how this price competition could work in the future (and in the hypothetical marketplace). *Id.* Take a non-interactive

[3] iHeartMedia's experts illustrated the robustness of the price competition among record labels in the non-interactive services market by isolating the per-performance rates Warner accepted for additional performances in the iHeart-Warner agreement — $0.0005. EX3034 ¶¶ 19-20 (JA___-__). Warner's own contemporaneous analysis of the iHeart-Warner agreement [redacted] TR5373:2-5375:20, 5381:4-13 (Fischel) (JA___-__) (discussing EX3331 (JA___)).

service that, historically, played 1 million songs monthly from Record Label A, for which the service paid Record Label A $0.0020 per performance. Under a "steering" deal, the non-interactive service promises to play an additional 200,000 songs monthly from Record Label A (a 20% increase above the status quo), and Record Label A agrees to a per-performance rate of $0.0018 (a 10% discount from the status quo). As a result of the "steering" deal, the total royalties that Record Label A receives from the service have increased from $2,000 to $2,160, and potential new fans hear more of Record Label A's music. This is mutually beneficial for the service and Record Label A, but there is a loser: Record Label B. To play Record Label A's music more, the service is playing Record Label B's music less, reducing Record Label B's total royalties. To avoid this loss, Record Label B must compete on price and lower its own price to $0.0018. Over time, the service may be able to obtain a price of $0.0018 without promising any steering; simply *threatening* to steer will be sufficient to compel both Record Label A and Record Label B to compete for plays on the service by offering a price of $0.0018 or less.

II. SOUNDEXCHANGE'S ARGUMENTS REGARDING THE "SHADOW" OF THE STATUTORY LICENSE ARE CONTRARY TO THE STATUTE AND THE RECORD EVIDENCE

SoundExchange attempts to derogate the force of the two agreements that the Judges adopted as benchmarks — which were made in a workably competitive market for the very rights that are the subject of this proceeding — by arguing that these agreements are somehow tainted by the "shadow" of the statutory license. To the contrary, these agreements are ideal benchmarks.

A. In-Market Deals Are Ideal "Comparable" Benchmarks

Congress directed the Judges, in setting rates, to consider "the rates . . . for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements." 17 U.S.C. § 114(f)(2)(B). It is within the "broad discretion" of the Judges to disregard any proposed benchmarks that it determines are not sufficiently "comparable" or to make "adjustments . . . to render them useful." *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1009 (D.C. Cir. 2014). As SoundExchange's own expert testified in *Web IV*, the Judges test whether an agreement is comparable by asking: (1) whether it is a voluntary agreement between willing buyers and sellers; (2) whether it involves the same types of buyers and sellers that would exist in the hypothetical market (record labels and non-interactive services eligible for the statutory license); (3) whether it covers the same rights (a blanket license to perform sound recordings as part of a non-interactive, DMCA-compliant service); and (4) whether it is shaped by the same market forces that would exist in the hypothetical market in which there is no statutory license. FD26,383-84 (JA___-

__) (applying "the sub-tests implicit in the Judges' prior determinations, as outlined by [SoundExchange's expert]").

The Judges here correctly concluded that two agreements best satisfy this test: the iHeart-Warner and Pandora-Merlin agreements. FD26,358, FD26,365-66, FD26,383-84 (JA___, JA___-__, JA___-__). Both agreements are between willing buyers and willing sellers: each of the parties is a "sophisticated entity capable of negotiating direct agreements in a manner that it understands will advance its economic interests." FD26,383 (JA___); *see* FD26,358 (JA___). Both agreements are between the same types of parties: each agreement is between a non-interactive service eligible for the statutory license and a record label. FD26,358, FD26,383 (JA___, JA___). Both agreements cover the same rights: in each agreement, "[t]he products sold consist[ed] of a blanket license for digital transmission of the record companies' complete repertoire of sound recordings, in compliance with the DMCA requirements." FD26,358, FD26,383 (JA___, JA___). And — critically (as further discussed below) — both agreements are the product of the same market forces that would exist in the hypothetical market: each agreement is the product of price competition among record labels to secure additional plays of their sound recordings on the respective services through steering. FD26,343, FD26,366-67, FD26,383 (JA___, JA___-__, JA___).[4]

Indeed, both the Register of Copyrights ("Register") and the Judges have concluded that in-market agreements are precisely the category of voluntary agreements that Congress contemplated the Judges would use as benchmarks in adopting § 114(f)(2)(B). The Judges explained, in rejecting SoundExchange's argument that all in-market agreements are invalid benchmarks because they are tainted by the "shadow" of the statutory rate, that "voluntary noninteractive direct license agreements" are a "category of benchmarks that Congress has explicitly identified as pertinent to the establishment of the statutory rate." *Rehearing Denial* at 12 n.15 (JA___). Similarly, the Register, in rejecting SoundExchange's argument (not raised here) that § 114(f)(5)(C) prohibited the Judges from considering certain in-market agreements in evidence in *Web IV*, concluded that SoundExchange's argument was incompatible with § 114(f)(2)(B). The Register determined any reading of the statute that would prevent the Judges from considering in-market agreements "would seemingly undermine Congress'

[4] Indeed, as the Judges noted, even SoundExchange's own expert admitted that the Pandora-Merlin agreement was an agreement between willing buyers and sellers of the same type that would exist in the hypothetical market for the same rights. FD26,358 (JA___) (observing that Dr. Rubinfeld "agree[d] that the Pandora/Merlin Agreement satisfied each such criterion"); TR6323:14-6324:7, TR6325:19-6326:7 (Rubinfeld) (JA___-__).

directive in section 114(f)(2)(B), which encourages the [Judges] to 'consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements.'" *Order on Novel Question* at 13 (JA___). "[A]greements between sound recording owners and webcasters for uses covered by the section 112 and 114 licenses would appear to be the very type of evidence that section 114(f)(2)(B) Congress had in mind." *Id.*

The Judges' decision was also consistent with the use of benchmarks to assess fair market value in other contexts. When courts use benchmarks to assess the fair market value of property rights, the general rule is that "the more comparable" the benchmark is, "the more probative it will be of the fair market value." *United States v. 320.0 Acres of Land*, 605 F.2d 762, 798 (5th Cir. 1979) (condemned property). The "'ideally' comparable" benchmark will be one with "virtually identical characteristics" to the property rights being evaluated. *Id.* To determine whether an agreement is sufficiently comparable to be a useful benchmark for determining fair market value, the fact-finder "must consider whether the other agreement dealt with a comparable right, whether it involved similar parties in similar economic circumstances, and whether it arose in a sufficiently competitive market." *Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32, 45 (2d Cir. 2012) (licensing rights for music publishers).

B. Discarding All Agreements SoundExchange Contends Are Affected by the "Shadow" Would Preclude the Judges from Considering Any In-Market Agreements

The practical result of SoundExchange's "shadow" argument directed to the use of in-market agreements would be that the Judges would *never* be able to use a license agreement between a record company and non-interactive music service as a benchmark. As the Judges recognized, SoundExchange's "shadow" argument, if accepted, "would compel rejection of any voluntary noninteractive direct license agreements as benchmarks." *Rehearing Denial* at 12 n.15 (JA___). It reflects nothing less than an attack on "the benchmarking process itself." FD26,330 (JA___). Nor did it escape the Judges' attention that the agreements SoundExchange claimed were compromised by the statutory shadow were all in-market agreements "adverse to [SoundExchange's] positions." FD26,329 (JA___).

In fact, if taken seriously, SoundExchange's "shadow" argument proves too much. SoundExchange's own expert repeatedly testified that the statutory license casts a "shadow" on *every* market for music streaming services, including the *interactive* services market, and, as a result, "interactive rates also have been affected to a certain degree by the statutory . . . rates." EX17 ¶ 91 (JA___); *see, e.g.*, TR6324:24-6325:4 (Rubinfeld) (JA__) (agreeing that "all the license agreements that are before the judges for consideration are affected to some degree by the shadow of the statutory license"). Accordingly, as the Judges recognized, adopting SoundExchange's position would require throwing out *all* potential benchmark agreements and effectively compel "the wholesale abandonment of benchmarking." FD26,331 (JA___). The Judges thus correctly rejected SoundExchange's "shadow" argument as "both nihilistic and self-contradictory." *Id.*: Nihilistic because it dismisses market agreements as meaningless reflections of existing rates, rather than as evidence of market value; self-contradictory because it negates the usefulness of SoundExchange's own "interactive benchmark." *Id.*

C. The Hypothetical Market Is a Market with "Effective Competition" Among Record Labels

The Judges correctly found a glaring disparity in the level of competition between and among record companies in licensing their music to non-interactive services as compared to interactive services. In contrast to the emerging evidence of robust price competition that the Judges found in the non-interactive services market, the Judges found the interactive services market to be devoid of any such competition. Because interactive services must play the specific songs that consumers want to hear, the catalogs of the Majors are "must haves" (or, complements) for interactive services, and these record labels have no need to compete on price. From a record rife with admissions from the major labels, the Judges found "substantial, unrebutted evidence that the interactive services market is *not* effectively competitive." FD26,344 (JA___). In this market, the Majors use their complementary oligopoly power to thwart price competition and extract prices from services that exceed even those of monopoly markets. FD26,342-43, 26,368 (JA___).

On appeal, SoundExchange argues that it was legal error to examine whether the proffered benchmark agreements reflected effective competition or were infected by the oligopoly power of the record companies. SoundExchange ("SX") Br. 38-62. The Judges, in SoundExchange's view, must take benchmarks from the interactive services (that is, non-statutory) market and mechanically incorporate them in the statutory rates, regardless of the degree to which the rates may be infected and inflated by the record companies' market power. Indeed, to do anything else would reflect an unwarranted injection of "policy" into what should be a rote adoption of "market rates." SX Br. 40-44. In practical effect, through this line of argument, the record industry seeks to expand the scope of its supra-monopoly pricing power beyond the interactive services market into the target market here: for non-interactive webcasting service.

The Judges correctly rejected this effort. For one, they relied on two real-world "market" agreements negotiated by willing buyers and sellers: the Pandora-Merlin and iHeart-Warner agreements. As the Government explains, part of the exercise of determining whether it was appropriate to rely on those benchmarks — as opposed to the interactive service agreements proffered by SoundExchange —

was to determine whether the competitive conditions under which the agreements were negotiated matched those that would prevail in the hypothetical negotiation between a willing record company seller and willing webcaster buyer absent a statutory license. Gov't Br. 43-45. That inquiry necessarily entailed consideration of steering ability and price competition, among other items — *i.e.*, it was an integral *part* of the "willing buyer, willing seller" analysis, not the layering-on of an extra policy dimension. While that alone is sufficient to reject SoundExchange's argument, its position represents a more fundamental attack on the Judges' rate-setting process that should be firmly rejected.

SoundExchange itself has long accepted — and even promoted — the notion that a willing-buyer/willing-seller rate should reflect effective or workable competition rather than unconstrained market power. As Pandora pointed out in its post-trial briefing below, SoundExchange took the position in the *Web II* proceeding that "'[i]t is settled law under the statute that the "willing sellers" are the record companies, and absent new evidence that the record companies have grown so large (or otherwise increased their bargaining power to such a degree) that their size prevents *workably* competitive markets in sound recording copyrights from developing or sustaining themselves, this legal issue of statutory construction should no longer be a litigated matter."[5] Pandora's Reply to SoundExchange's Proposed Conclusions of Law and Findings of Fact ¶ 1 (July 10, 2015) ("Pandora Reply to SX Proposed COL/FOF") (JA___) (quoting SoundExchange's Proposed Conclusions of Law, *Web II*, ¶ 47) (emphasis omitted). In *Web III*, SoundExchange again argued that " '[t]he question of competition is concerned with whether market prices can be unduly influenced by sellers' power or buyers' power in the market. This Court has explained that an effectively competitive market is one in which super-competitive prices cannot be extracted by sellers or buyers, because both bring comparable resources, sophistication and market power to the negotiating table.' " *Id.* ¶ 15 (JA___) (quoting SoundExchange's Proposed Findings of Fact, *Web III*, ¶ 116) (emphasis omitted). SoundExchange's lead economic witness in *this* proceeding, Professor Rubinfeld, likewise testified that he always assumed and understood that "the 'willing seller/willing buyer' standard calls for rates that would have been set in a

[5] SoundExchange similarly devoted an entire section of its *Web II* Proposed Findings of Fact to arguing that its benchmark market (the same interactive services market SoundExchange has relied on in every proceeding) was "workably competitive." Pandora Reply to SX Proposed COL/FOF ¶ 17 (JA___) (citing SoundExchange's Proposed Findings of Fact, *Web II*, ¶¶ 185-208). Its core argument to the Judges was as follows: " 'It may be that these markets are not "perfect" in the eyes of economists — few if any are. But they are what are called "workably competitive" markets . . . .' " *Id.* (quoting SoundExchange's Reply Findings of Fact, *Web II*, ¶ 16).

'competitive marketplace'"). EX29 ¶ 112 (JA___). Another SoundExchange witness explained that any potential benchmark should have been negotiated in a market with "'sufficient competitive factors' to prevent negotiated rates from 'approximat[ing] monopoly rates.'" EX19 at 5 (JA___).

SoundExchange's long-held position squares with the legislative history of the § 114 statutory license and the Copyright Royalty Board, which Congress created specifically to (i) differentiate statutory webcasting from interactive services; and (ii) prevent record companies from imposing "supracompetitive" rates upon the former. Congress established "a very limited antitrust exemption" for record labels so that "owners of copyrights and operators of digital services may negotiate licensing agreements for statutory licenses 'notwithstanding any provision of the antitrust laws.'" H. Rep. No. 104-274, at 22 (1995). This exemption would "not result in anticompetitive terms" because "[i]f supracompetitive rates are attempted to be imposed on operators, the copyright arbitration royalty panel [the predecessor to the Copyright Royalty Judges] can be called on to set an acceptable rate." *Id.*; FD26,330 (JA___) (observing that "the antitrust policy toward the noninteractive streaming market could well be different" in the absence of the statutory license). That is, Congress anticipated that the statutory rate would be set based on an effectively competitive hypothetical market.

SoundExchange's suggestion that the very opposite was intended — *i.e.*, that rate proceedings under the statutory license were designed to protect the *record companies* from being forced to charge *below*-market rates to non-interactive services, *see* SX Br. 39-40 — neither finds support in the legislative history nor makes any sense. If Congress so intended, no purpose would have been served by creating the statutory license in the first instance: non-interactive services would instead have been left to their own devices in unregulated market dealings with the record companies no differently than were interactive services.

D. The Judges Correctly Considered Effective Per-Play Rates

SoundExchange further seeks to diminish the force of the iHeart-Warner and Pandora-Merlin agreements by asserting that the Judges failed to consider whether the "total compensation" afforded the record companies thereunder was in fact less than would be earned under the statutory license and thus truly free of the statutory "shadow." But the Judges explicitly addressed SoundExchange's " 'shadow' argument" and concluded the rates in the iHeart-Warner and Pandora-Merlin agreements were *not* simple reflections of the statutory rate, but rather the product of market forces. FD26,330 (JA___). The rates set in these agreements "were *below* the statutory rates that otherwise controlled." *Rehearing Denial* at 12 (JA___). The record labels were not "compelled by the statutory 'shadow' to agree" to these rates and "could have defaulted instead to the *higher* statutory rate." *Id*. They agreed because these rates were "in their economic interest" as "willing sellers/licensors dealing with willing buyers/licensees" in a market where steering has given rise to price competition among record labels. *Id*.

The Judges likewise concluded that Warner and Merlin decided that rates "*below* the statutory rates that otherwise controlled" were in their economic interest (and other record labels would reach the same conclusion in the hypothetical market) for two reasons. *First*, the promise of steering is highly attractive to record labels because it allows them to seize a larger share of performances on a non-interactive service at the expense of their competitors. *See* FD26,366, FD26,367, FD26,383 (JA___, JA___, JA___). *Second*, the "threat" of steering is significant because a record label stands to lose both royalties and the promotional benefits associated with additional performances if its share of performances on a non-interactive service is reduced. FD26,366-67 (JA___-__) (Merlin agreed to lower per-performance rates, in part, "because they anticipated that Pandora might enter into steering agreements with other record companies").[6]

[6] SoundExchange speculates that some record labels will refuse to compete on price and will accept only per-performance rates above the statutory rate, citing the testimony of a Sony executive that Sony rejected a "horrible" deal with iHeartMedia, the terms of which were not in evidence. SX Br. 37 n.9. SoundExchange's continued reliance on this testimony is remarkable given the Judges' factual finding that Sony decided not to pursue a steering deal with iHeartMedia "at least in part [redacted]

These "steering" agreements thus represented, in the Judges' view, the essence of a competitive negotiation: specifically, suppliers undercutting the price of their rivals (selling at the statutory rate) to gain a higher share of plays on Pandora and iHeart's music channels.

SoundExchange nonetheless argues that it was economic error by the Judges to focus their inquiry on negotiated *rates* in the first instance, including whether the rates negotiated by Merlin and Warner were below the statutory rate, as opposed to "whether the agreement reflects a copyright owner's willingness to accept *less total compensation* under that agreement than under the alternative statutory license." SX Br. 24-25. This argument lacks merit.

As an initial matter, these appellate assertions as to the correct mode of analytic inquiry stand naked of citation to any hearing support from any of SoundExchange's economists. SX Br. 21-25. That no doubt reflects the fact that SoundExchange's lead economist analyzed the iHeart-Warner agreement by offering his own calculation of the effective *per-performance rate*, not by calculating the total revenues Warner would receive. *See* TR6289:10-17 (Rubinfeld) (JA___); EX17 ¶ 236 (JA___). Similarly, SoundExchange argued in its Proposed Findings of Fact that "the proper way to analyze any benchmark

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rather than merely because the economics of the deal under negotiation were unsatisfactory." *Rehearing Denial* at 12 n.17 (JA___).

agreement is on an *average effective royalty basis*" — the very approach the Judges adopted. SoundExchange's Proposed Findings of Fact (June 19, 2015) ¶ 795 (JA___); FD26,405 (JA___). SoundExchange's argument that the Judges should have focused instead exclusively on total royalties is one invented for appeal *after* the Judges correctly rejected their various proposals for inflating the effective per-play rates established by the Pandora-Merlin and iHeart-Warner agreements. *See* Gov't Br. 34-38; FD26,369-70, FD26,384-87 (JA___-__, JA___-__).

SoundExchange's facile argument that Pandora paid the Merlin labels more rather than less "compensation" than it would have under the statutory license obscures the basis for such an increase: the fact that Pandora, on account of its ability to steer, *played Merlin music much more frequently* than it would have under the statutory license and did so in response to a lower price. That is, the increased compensation above what would have been earned under the statutory license resulted only *because* Merlin dropped its price *below* the statutory rate and Pandora bought *more* of Merlin's product in response. *See* FD26,370 (JA___) (identifying value to Merlin "to lie in steering — that is, the trade-off of more plays at a lower rate for more total revenue").

SoundExchange also is incorrect in arguing (at 27-28) that the per-performance rates paid to Merlin members were "identical" to or "mirror" the statutory rates. While the Pandora-Merlin agreement references the Pureplay (statutory) rates, the rates actually paid under the agreement reflected a *discount* from those statutory rates to the extent Pandora agreed to increase its plays of Merlin music. FD26,356-57 (JA___-__); *see also* Restricted Determination 170 n.197 (noting the "Pandora/Merlin *effective* rate is [redacted] — below the Pureplay rate because of the steering provisions in the agreement"); FD26,366-67 (JA___-__) (Merlin agreed to lower per-performance rates, in part, "because they anticipated that Pandora might enter into steering agreements with other record companies").

Finally, to the extent that SoundExchange claims that the Judges miscalculated the "compensation" to which Warner and Merlin agreed by virtue of various non-pecuniary benefits conferred by iHeart and Pandora, that contention lack record support as well. SX Br. 22, 24-25. Both the iHeart-Warner and Pandora-Merlin agreements included non-pecuniary terms that SoundExchange claimed, on net, benefited the record labels more than the services. But, as the Government has explained, the Board carefully considered SoundExchange's arguments with respect to each of these terms, and SoundExchange offered no credible evidence that these terms had monetary value, much less what that value would be. Gov't Br. 34-38. For example, SoundExchange did not offer any internal analyses from the record labels assigning monetary value to these terms, as one would expect if these terms, in fact, had monetary value to the record labels. FD26,384 (JA___). And even SoundExchange's own expert conceded that he had no way of assigning values to these terms; when "the Judges . . . lamented that they 'have no way of valuing [these terms] . . . ,'" SoundExchange's expert "responded by commiserating, acknowledging that he too did not." FD26,387(JA___).[7]

E. The Judges Correctly Concluded That Professor Talley's Testimony Was Unhelpful

SoundExchange cites the hearing testimony of one of its experts, Professor Talley, in support of its contention that the Pandora-Merlin and iHeart-Warner agreements must constitute a biased sample with artificially low rates, and that, were it not for the presence of the statutory license, there would have been additional agreements between record labels and non-interactive services calling for rates above the statutory level. SX Br. 35-38. Initially, what SoundExchange fails to note is that Professor Talley also asserted that the statutory license prevents agreements from being entered into at rates *below* the statutory level. As Professor Talley put it, the statutory license leads to a "crowding down and a crowding up." TR6112:1-23 (JA___); EX19 at 47-48 (JA___-__) (Professor Talley providing an

[7] In contrast, Pandora's economist, Professor Shapiro, analyzed and factored such benefits into the effective per-play rate derived from the Pandora-Merlin agreement, concluding that rate remained below the statutory license. FD26359-60 (JA___-__).

example of the statutory license pulling what would have been a below statutory rate agreement *up* to the statutory rate). As Professor Talley himself recognized, it may very well be that the agreements that we do not see — those that SoundExchange now asserts were not entered on account of the statutory "shadow" — in fact would have called for rates *below* the prevailing statutory rates. There simply is no credible evidence that suggests that, had other voluntary agreements been entered, they would have called for materially different rates than those found in the Pandora-Merlin and Warner-iHeart agreements. *Rehearing Denial* at 11-12 (JA___-__).

Moreover, even were SoundExchange's characterization of Professor Talley's theory correct, which it is not, this theory fails in another critical respect. As the Judges correctly concluded, Professor Talley's theory is "too untethered from the facts" to be informative. FD26,330 (JA___); *Rehearing Denial* at 11-12 (JA___-__). Most notably, as the Judges recognized, Professor Talley's theory does not allow for the possibility of *competition* between record labels to have their sound recordings performed by non-interactive services. *Id.* As a result, that theory is irrelevant for purposes of evaluating the probative value of the Pandora-Merlin and iHeart-Warner agreements, both of which plainly do embrace price competition. Whatever Professor Talley's theory might have to say about a world that is entirely devoid of any price competition, that is entirely beside the point when, as here, the evaluation undertaken by the Judges was what to make of agreements that explicitly embrace price competition. As the Judges correctly concluded, such agreements are ideal benchmarks for approximating the rates that would emerge in a workably competitive market in the absence of a statutory license.

III. THE JUDGES CORRECTLY REFUSED TO USE AGREEMENTS WITH SUBSCRIPTION SERVICES TO SET THE RATES WILLING BUYERS AND WILLING SELLERS WOULD AGREE TO PAY FOR AD-SUPPORTED SERVICES

In *Web IV*, the Judges correctly concluded that SoundExchange had failed to demonstrate how rates drawn from interactive subscription services could be applied to free, ad-supported services given the significant differences in consumers' willingness to pay for music in those two distinct market segments — a failing that plagued SoundExchange's case in *Web II* and *Web III* as well. FD26,347, FD26,353 (JA___, JA___). As a result, the Judge relied on SoundExchange's "interactive benchmark" solely in setting rates for *subscription* non-interactive services (and only after making significant adjustments to the minimum per-play rates in the agreements), and refused to use it in setting rates for the non-subscription segment of the market. FD26,404-05 (JA___-__).

SoundExchange argues that it was error for the Judges to announce lower rates — a "subsidy" — for free, ad-supported services as compared to subscription services, implying that absent such improper segmentation, the rates for free webcasters would necessarily rise to the level codified for the subscription services. SX Br. 74. But SoundExchange has its arguments backward. The Judges' determination is based on a wealth of uncontroverted evidence — including from SoundExchange's own witnesses — that consumer willingness to pay for subscription services translates into different, higher royalty rates in that small sliver of the market. Moreover, to the extent SoundExchange challenges such segmentation, the lone, limited rationale for using its otherwise discredited subscription interactive-service benchmark (namely, its similarity to *subscription* non-interactive services) falls away completely.

A. In *Web IV*, Substantial, Uncontroverted Evidence Confirmed the Existence of Market Segmentation Between Subscription and Non-Subscription Non-Interactive Services

The fact that the non-interactive services market is segmented between subscription and non-interactive services was clearly established by the Pandora-Merlin agreement, which sets substantially different rates for performances on Pandora's subscription and non-subscription products. Indeed, [redacted] This agreement, therefore, is "probative of *the two* *distinct royalty rates*" that a non-interactive service would pay for subscription and non-subscription products. FD26,365-66 (JA___-__).[8]

This stark difference in the royalty rates Pandora pays Merlin for its subscription and non-subscription products mirrors the stark difference between the willingness to pay of the consumers who use Pandora's subscription product (which is positive) and the willingness to pay of the consumers who use Pandora's non-subscription product (which is zero). When Pandora launched in 2005, it offered only a subscription product. EX5000 ¶ 18 (JA___). Pandora quickly concluded that this model was "flawed" because most consumers would use the ten free hours of listening that Pandora offered as an introduction to the service and then never pay the fee to subscribe. *Id.* Pandora adapted to this reality of consumer behavior by launching a non-subscription version of Pandora that is free to the listener and funded by advertising. *Id.* The non-subscription version of Pandora has successfully tapped into a much larger pool of consumers than its subscription product was ever able to attract: 95% of Pandora listeners use its non-subscription product. TR3435:25-3436:2 (Herring) (JA___).[9]

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[8] The parties to the iHeart-Warner agreement had no reason to distinguish between rates for subscription and non-subscription services because iHeartRadio was entirely free to the listener and ad-supported; it did not have any subscribers.

[9] SoundExchange is wrong to argue that Pandora's recent experience with listening caps suggests that subscription and non-subscription services compete for

Indeed, the Judges found “overwhelming” evidence that there is a “sharp dichotomy” between the relatively few consumers who are willing to pay to subscribe to music streaming services, and the larger group of consumers who are unwilling to pay any price — other than listening to ads — to listen to music streaming services. FD26,327, FD26,345-46 (JA___, JA___-__). Subscription services compete for the first group, and non-subscription services target the larger second group. *Id*. Notably, the bulk of this evidence was uncontroverted: there was “no dispute that subscribers constitute a minority of overall streaming listeners” on both interactive and non-interactive services, and no dispute that many consumers are simply unwilling to pay for music. FD26,328, FD26,345 (JA___, JA___). One of SoundExchange’s own experts conducted a survey that found a “divide between those who are willing to pay for these services . . . and those who are averse to paying for music streaming services.” EX15 ¶ 10 (JA___), *quoted in* FD26,345 (JA___). The “group of consumers” who are averse to paying

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the same pool of listeners. SX Br. 72. In fact, that experience confirms that the majority of Pandora users are unwilling to pay for a subscription. During the six-month period the caps were in place, other free-to-the-user, ad-supported services saw sudden increases in listenership, *see* EX3054 ¶¶ 16-20; EX3056; EX3057; EX3058 (JA___-__, ___-__), and only a minority of Pandora listeners opted to pay for a subscription to continue listening without limitation, *see* TR3395:9-3396:9 (Herring) (JA___) (the percentage of subscribers increased from roughly 1.8% (1.4 million of 77 million active users) to 4.1% (3.2 million of 77 million active users)).

for music streaming services "place a high value on no out-of-pocket expenses" and are "likely to remain [on] or adopt free plans." *Id.* ¶ 56 (JA___), *quoted in* FD26,345 (JA___).[10]

SoundExchange questions why record labels would be willing to accept lower per-performance rates from an ad-supported non-subscription service that brings in less revenue than subscription services. SX Br. 69-71. In fact, the economic rationale is readily apparent: ad-supported non-subscription services allow record labels to earn royalties from a large group of consumers who would otherwise produce zero royalties for the record label. [redacted]

B. SoundExchange Failed To Establish That Its "Interactive Benchmark" Applies to Non-Subscription Services

In *Web IV*, SoundExchange proposed the same "interactive" benchmark that it had offered in *Web II* and *Web III*, without fixing flaws the Judges had identified in those earlier proceedings, including its "fail[ure] to take account of, or

[10] This finding was confirmed by one of the Services' experts, who concluded, based on his own survey, that "the majority of people are essentially . . . seeking free services . . . so that even if all free online services were eliminated, they would likely switch not to a paid service but to some other form of free." TR3742:4-10 (Rosin) (JA___), *cited in* FD26,346 (JA___).

adequately adjust for, the dominant ad-supported (free-to-the-listener) segment of the noninteractive market." FD26,353 n.116 (JA___). SoundExchange, therefore, should not have been surprised by the Judges' determination that the usefulness of its "interactive" benchmark was "circumscribe[d]" to the subscription segment of the market and could not be used in setting rates for the non-subscription segment of the market: the Judges had put SoundExchange on notice. FD26,351 (JA___).

In *Web II* and *Web III*, SoundExchange offered its "interactive benchmark" through its expert Dr. Michael Pelcovits. Dr. Pelcovits' analysis was based on a comparison of subscription prices in the interactive and the non-interactive services market. He "elected to ignore" the revenues generated by "advertising-supported . . . streaming in his analysis" despite "acknowledging that most listening to noninteractive webcasting is by non-subscribers." *Web III Remand*, 79 Fed. Reg. at 23,116-18. Dr. Pelcovits claimed there was no need to consider the revenues earned by ad-supported non-subscription services because he could "infer differences in consumer willingness-to-pay [between the interactive and non-interactive services markets] (and by extension how much the webcaster would be willing to pay for the license) from observed prices for subscription services." *Id.* at 23,116 (quoting Dr. Pelcovits). That is, Dr. Pelcovits assumed that the consumers attracted by subscription and non-subscription music streaming services would have the same willingness to pay.

The Judges twice identified Dr. Pelcovits' failure to consider ad-supported non-subscription services as a flaw in his analysis that limited its usefulness in setting rates for those services. In *Web II*, the Judges "recognized the potential implications of a benchmark analysis that focuses on only subscription services," noting that "ad-supported non-interactive services might pay less than subscription-based interactive services to use the same music." *Web III Initial Decision*, 76 Fed. Reg. at 13,031 (describing *Web II*, 72 Fed. Reg. at 24,094). In *Web III*, the Judges criticized Dr. Pelcovits for ignoring the "reality" that most consumers use ad-supported non-subscription services and concluded that Dr. Pelcovits' "interactive benchmark" was "compromised, and its usefulness reduced, by its failure to take into account the advertising revenue received in both the interactive benchmark market and the statutory noninteractive market." *Web III Remand*, 79 Fed. Reg. at 23,118.

In *Web IV*, SoundExchange offered the same "interactive benchmark" through a new expert, Dr. Daniel Rubinfeld, who candidly acknowledged that he was following the "past practices" of Dr. Pelcovits. FD26,338 n.82, FD26,344 (JA___, JA___). Dr. Rubinfeld's analysis, like that of Dr. Pelcovits, was based on a comparison of retail subscription prices in the interactive and non-interactive markets. And, like Dr. Pelcovits, Dr. Rubinfeld ignored the revenues earned by non-subscription services and instead assumed that his analysis could be applied to those services because "the listeners who willingly pay for a subscription to a service have a [willingness-to-pay] equal to the [willingness-to-pay] of those who use ad-supported (free-to-the-listener) services." FD26,345 (JA___).

The Judges determined that "Dr. Rubinfeld's interactivity analysis failed to cure all of the defects . . . found to exist in the similar interactivity analysis proffered by Dr. Pelcovits and rejected by the Judges in the *Web III Remand*." FD26,353 n.116 (JA___). The defect "of greatest importance" to the Judges was that "Dr. Rubinfeld's interactivity model fails to take account of, or adequately adjust for, the dominant ad-supported (free-to-the-listener) segment of the noninteractive market." *Id.* Because the assumption that the consumers that use subscription and non-subscription services have the same willingness to pay had been squarely disproven by "abundant evidence" that "a large cohort of the listening public simply will not pay for streamed music" and "flock to ad-supported (free-to-the-listener) noninteractive services," the Judges correctly found that "the usefulness of Dr. Rubinfeld's benchmark" was "circumscribe[d]" to the subscription segment of the market and could not be used to set rates for the non-subscription segment of the market. FD26,351, FD26,353 n.116 (JA___, JA___).

IV. THE JUDGES PROPERLY REQUIRED AUDITORS TO BE LOCALLY LICENSED

In *Web IV*, SoundExchange urged the Judges to abandon the longstanding rule that only Certified Public Accountants ("CPAs") may audit a service's royalty payments to SoundExchange. FD26,403 (JA___). NAB opposed this change, which would have allowed "audits to be conducted by non-CPAs and even persons who are not independent and objective, such as SoundExchange's own in-house personnel." NAB's Proposed Findings of Fact ¶ 619 (June 19, 2015) (JA___). NAB argued that using a CPA "provides a number of benefits," including that "CPAs are governed by the principles, rules, and requirements promulgated by their applicable state accountancy boards." *Id.* Indeed, as NAB's accounting expert, Professor Weil, testified, if CPAs fail to adhere to the rules set by local boards, they face the "equivalent of [being] disbarred" — they lose their license to practice in the jurisdiction. TR3938:2-14 (Weil) (JA___). Based on this record, the Judges decided to retain the rule that only CPAs may conduct audits, and added a clarification proposed by NAB, which specifies that the CPA must be "licensed in the jurisdiction." FD26,404 (JA___).

SoundExchange objects to the local-licensure requirement on the ground that it will prevent CPAs from practicing pursuant to mobility laws, which allow CPAs to practice outside their home licensure states in the same way that a lawyer can practice outside the state in which she is barred if admitted *pro hac vice*. SX Br. 76-77. As the Government explains, SoundExchange's objection must be rejected because SoundExchange failed to give the Judges an opportunity to address this objection below. Gov't Br. 57-61.

Furthermore, even if it had been properly raised, SoundExchange's objection should be rejected because it is premised on a crabbed reading of the rule that neither the Judges nor NAB, as the proponent of the clarification, ever endorsed. SX Br. 76-77. There is no reason to believe that the Judges intended "licensed in the jurisdiction" to mean anything other than authorized to practice within the jurisdiction under the laws of that jurisdiction and subject to local discipline, including the CPA equivalent of disbarment. Indeed, the Judges described the local-licensing requirement as a "requirement that the auditor submit itself to the jurisdiction of the local CPA governing bodies and local courts." FD26,404 (JA___). That requirement would be satisfied by any mobility law based on the Uniform Accountancy Act, which requires the visiting CPA to consent to "the personal and subject matter jurisdiction and disciplinary authority of the [local] Board [of accountancy]" before enjoying "all the privileges of licensees" within the state. Uniform Accountancy Act § 23 (7th ed. 2014).

CONCLUSION

The *Final Determination* of the Copyright Royalty Judges should be affirmed.

Respectfully submitted,

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May 31, 2017

CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ *Michael K. Kellogg*
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May 31, 2017

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitations set forth in this Court's January 18, 2017 order, because it contains 8,714 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface (Times New Roman, 14 point).

/s/ *Michael K. Kellogg*
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May 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on May 31, 2017, I electronically filed the Redacted Joint Brief for Intervenors in Support of Appellees with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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