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U.S. Copyright Office

[Docket No. 2017-20]

Scope of Preexisting Subscription Services

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final order.

SUMMARY: The Copyright Royalty Judges referred novel material questions of substantive law to the Register of Copyrights for resolution in connection with the SDARS III proceeding. The Register responded with a written opinion that is reproduced below.

DATES: Opinion dated November 20, 2017.

FOR FURTHER INFORMATION CONTACT: Sarang V. Damle, General Counsel and Associate Register of Copyrights, by email at sdam@loc.gov, or Jason E. Sloan, Attorney-Advisor, by email at jslo@loc.gov. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION: The Copyright Royalty Judges ("CRJs") are tasked with determining and adjusting rates and terms of royalty payments for statutory licenses under the Copyright Act. *See* 17 U.S.C. 801. If, in the course of proceedings before the CRJs, novel material questions of substantive law concerning the interpretation of provisions of title 17 arise, the CRJs are required by statute to refer those questions to the Register of Copyrights for resolution. 17 U.S.C. 802(f)(1)(B).

On October 23, 2017, the CRJs, acting pursuant to 17 U.S.C. 802(f)(1)(B), referred to the Register novel material questions of substantive law in connection with the SDARS III proceeding, Docket No. 16-CRB-0001 SR/PSSR (2018-2022). The referred questions asked whether a preexisting subscription service's transmissions of multiple, unique channels of music that are accessible through that entity's website and through a mobile application are "subscription transmissions by preexisting subscription services" for which the CRJs are required to determine rates and terms of royalty payments under 17 U.S.C. 114(f)(1)(A), and, if so, whether there are any conditions a service must satisfy to qualify for a license under section 114(f)(1)(A). On November 20, 2017, the Register resolved these questions in a Memorandum Opinion that she transmitted to the CRJs. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety below.

Dated: December 6, 2017.

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Karyn Temple Claggett,
Acting Register of Copyrights and
Director of the U.S. Copyright Office.

[BILLING CODE 1410-30-P]

Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR TRANSMISSION OF SOUND RECORDINGS BY SATELLITE RADIO AND "PREEXISTING" SUBSCRIPTION SERVICES (SDARS III)**	**Docket No. 16-CRB-0001 SR/PSSR (2018-2022)**

MEMORANDUM OPINION ON NOVEL MATERIAL QUESTIONS OF LAW

The Copyright Royalty Judges ("CRJs" or "Judges") concluded the hearing in the above-captioned proceeding with closing arguments of counsel on July 18, 2017. In the course of their deliberations, the CRJs determined that novel material questions of substantive law arose regarding the interpretation of provisions of the Copyright Act and, as required under 17 U.S.C. 802(f)(1)(B), referred them to the Register of Copyrights for resolution. The questions were referred to the Register by the CRJs on October 23, 2017. The Register's determination follows.

I. Background

A. Statutory Background

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"),[1] recognizing the exclusive right of copyright owners to perform sound recordings "publicly by means of a digital audio transmission."[2] The DPRSRA also established a statutory license to allow certain noninteractive digital audio services to make such performances of sound recordings, provided the services pay a royalty fee and comply with the terms of the license. Under the DPRSRA, nonexempt subscription transmissions were subject to statutory licensing if they satisfied certain requirements, and the royalty rates and terms for the statutory license were to be set in accordance with the objectives set forth in 17 U.S.C. 801(b)(1).[3]

In 1998, the statutory license was amended by the Digital Millennium Copyright Act ("DMCA"),[4] a major goal of which was to establish a market-based standard for setting royalty rates paid to copyright owners for use of their works under the statutory license.[5] In doing so, Congress drew a distinction between preexisting subscription services ("PSSs") on the one hand and nonsubscription services and new subscription services on the other. A "preexisting subscription service" is defined in 17 U.S.C. 114(j)(11) as:

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[1] Pub. L. 104-39, 109 Stat. 336 (1995).
[2] 17 U.S.C. 106(6).
[3] Section 801(b)(1) provides that the rates "shall be calculated to achieve the following objectives: (A) To maximize the availability of creative works to the public. (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions. (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication. (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." 17 U.S.C. 801(b)(1).
[4] Pub. L. 105–304, 112 Stat. 2860 (1998).
[5] 71 FR 64639, 64641 (Nov. 3, 2006).

> [A] service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.[6]

Section 114 contains two grandfathering provisions that apply to PSSs and provide benefits to those services not available to new subscription services or nonsubscription services. The first, section 114(d)(2)(B), preserves the DPRSRA's limited qualifications for entitlement to the statutory license, but only for transmissions *made in the same transmission medium* used by the PSS on July 31, 1998. The second, to which the referred questions most directly pertain, is the grandfathered method of setting royalty rates under section 114(f)(1), which applies to a PSS regardless of the transmission medium.

Under this scheme, PSS transmissions in the same transmission medium used on July 31, 1998, are still subject to the DPRSRA's requirements under section 114(d)(2)(B) and are to still have royalty rates and terms set in accordance with the objectives of section 801(b)(1).[7] Nonsubscription services and new subscription services, however, are subject to a more expansive set of qualifications under section 114(d)(2)(C), and are to have their royalty rates and terms set to reflect those that "would have been negotiated in the marketplace between a willing buyer and a willing seller."[8] PSS transmissions made in a *new transmission medium* are subject to the more expansive set of qualifications under section 114(d)(2)(C) imposed on nonsubscription and new subscription services.[9]

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[6] 17 U.S.C. 114(j)(11).
[7] *See id*. at 114(d)(2)(B), (f)(1).
[8] *See id*. at 114(d)(2)(C), (f)(2).
[9] *Id*. at 114(d)(2)(C).

The Register has explained that "the rationale for [section 114's] grandfathering provisions is to 'prevent disruption of the existing operations by [preexisting subscription] services.'"[10] In discussing the legislative history explaining the objectives of the grandfathering provisions, the Register elaborated:

> While it would appear . . . that Congress's purpose in grandfathering these services was to preserve a particular program offering, it was not its only purpose or even necessarily its major goal. The Conference Report also makes clear that Congress distinguished between preexisting subscription services and new subscription services as a way to prevent disruption of the existing operations of the services that were in existence and operating before July 31, 1998. It understood that the entities so designated as preexisting had invested a great deal of resources into developing their services under the terms established in 1995 as part of the Digital Performance Right in Sound Recording Act of 1995, and that those services deserved to develop their businesses accordingly.[11]

B. Procedural History

The instant proceeding will establish royalty rates and terms for PSSs' (as well as preexisting satellite digital audio radio services') digital performance of sound recordings and the making of ephemeral recordings under the statutory licenses set forth in sections 112(e) and 114(f)(1) of the Copyright Act. Music Choice is the only PSS that participated in the current rate-setting proceedings. The CRJs explain that the referred questions arose in this proceeding because SoundExchange, Inc.,[12] for the first time, is seeking two separate royalty payments from PSSs: (1) for all licensed transmissions and related

[10] 71 FR at 64641 (quoting H.R. REP. NO. 105-796, at 81 (1998) (Conf. Rep.)); *accord SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713, 719 (D.C. Cir. 2017) ("The grandfather provisions were intended to protect prior investments the three [PSS] business entities had made during a more favorable pre-1998 rate-setting regulatory climate.").
[11] 71 FR at 64645 (internal citation omitted).
[12] SoundExchange appears in this proceeding on behalf of the American Association of Independent Music; the American Federation of Musicians of the United States and Canada; the Recording Industry Association of America; the Screen Actors Guild and American Federation of Television and Radio Artists; Sony Music Entertainment; Universal Music Group; and Warner Music Group. Referral Order at 2 n.4.

ephemeral recordings through a television-based service qualifying as a PSS, SoundExchange requests a per-subscriber, per-month royalty; and (2) for all licensed transmissions and related ephemeral recordings through an internet streaming service qualifying as a PSS (or any similar service capable of tracking the individual sound recordings received by any particular consumer and qualifying as a PSS), SoundExchange seeks a per-performance royalty fee that is the same as commercial webcasters are currently required to pay under 37 CFR 380.10 (or, in the alternative, a royalty based on aggregate tuning hours for a PSS that does not have the technological capability to track individual performances).[13] The parties dispute whether it is necessary for the CRJs to decide whether Music Choice's internet and mobile transmissions qualify as part of its PSS.[14]

In response to this dispute, the CRJs found that "consideration of the appropriate royalty rates and terms for a PSS's digital audio transmissions through a website or mobile application in which the PSS streams a variable number of unique channels of music presents a novel material question of substantive law," and referred the following questions to the Register pursuant to 17 U.S.C. 802(f)(1)(B):

1. Are a preexisting subscription service's transmissions of multiple, unique channels of music that are accessible through that entity's website and through a mobile application "subscription transmissions by preexisting subscription services" for which the Judges are required to determine rates and terms of royalty payments under Section 114(f)(1)(A) of the Copyright Act?

2. If yes, what conditions, if any, must the PSS meet with regard to streaming channels to qualify for a license under Section 114(f)(1)(A)? For example, must the streamed stations be identical to counterpart stations made available through cable television? Is there a limitation on

[13] *Id*. at 2–3.
[14] *Id*. at 3.

> the number of channels that the PSS may stream? Is there a limitation on the number or type of customers that may access the website or the mobile application?[15]

II. Summary of the Parties' Arguments

A. Music Choice's Position

Music Choice argues that the statutory language, legislative history, and factual record all support its position that its internet transmissions are part of its PSS and subject to section 114(f)(1). Music Choice begins by disputing, as a factual matter, the claim that its internet transmissions are an "expansion" of its service into a new medium—which it perceives as the premise for the CRJs' referred questions—on the grounds that its "internet transmissions are merely an ancillary part of its residential audio service," the value of its internet transmissions "has always been included in the bundled per-subscriber fee," and "the undisputed evidence establishes that Music Choice has been providing its subscribers with internet-based access to its audio channels since 1996, long before the PSS license was created in the DMCA, and has always included these internet transmissions as a part of its PSS since that time."[16] Music Choice also disputes SoundExchange's claim that webcasting was becoming an "increasingly important part" of its business, claiming that record evidence shows that "usage of Music Choice's internet transmissions has consistently remained at de minimis levels, and today comprises less than one hundredth of one percent of Music Choice's overall audio

[15] *Id*. at 3–4. Section 802(f)(1)(B) provides that "[i]n any case in which a novel material question of substantive law concerning an interpretation of those provisions of [title 17] that are the subject of the proceeding is presented, the Copyright Royalty Judges shall request a decision of the Register of Copyrights, in writing, to resolve such novel question." 17 U.S.C. 802(f)(1)(B).
[16] Music Choice Brief at 1–2, 4–5.

channel usage."[17] Music Choice contends that, in any event, because it was making internet transmissions prior to the codification of the PSS definition in section 114(j)(11), "[u]nder any reasonable interpretation of [the] statutory language, Music Choice's internet transmissions fall squarely within the definition of a PSS."[18]

Music Choice also argues that even if its internet transmissions did constitute an expansion of its services to a new medium, such expansion is permitted and "would not require any new, additional license fee or rate."[19] Music Choice contends that in grandfathering the existing three PSSs, Congress sought to protect their "need for access to the works at a price that would not hamper their growth" and did not "intend[] to limit PSS status to the PSS offerings as they existed in 1998 or otherwise freeze the PSS in time."[20] Music Choice claims that "Congress's intent to provide the PSS with long-term protection is further evinced by the absence of any sunset provision anywhere in the statutory language or discussion of such a provision in the legislative history"[21] and argues that in enacting the DMCA, "the overarching intent of Congress was decidedly not to move the *entire* market to marketplace rates," but rather "to protect the PSS' unique business expectancies."[22]

Citing to Congress's discussion in the DMCA Conference Report, Music Choice asserts that Congress created a "unique feature of the PSS license that allows a PSS to expand into new services in new transmission media while retaining PSS status for those new services, so long as the new service is similar in character to the original PSS

[17] *Id*. at 6.
[18] *Id*. at 18–19, 30.
[19] *Id*. at 2, 30.
[20] *Id*. at 14, 19–23.
[21] *Id*. at 15.
[22] *Id*. at 16–17.

offering, i.e., does not take advantage of unique features of the new medium to provide a different listening experience or interactivity while listening to the audio channel."[23] Music Choice further explains that "[a]lthough Congress did not intend to allow the PSS to create fundamentally different types of services, with fundamentally different types of content or interactive audio functionality . . . , it did intend to allow the PSS to continue their development, evolution, and growth of their non-interactive, subscription audio services."[24] Thus, Music Choice argues that "there is no statutory requirement that a PSS offer the exact same channels to all of its subscribers or through each of its different transmission media,"[25] and "there is no hint in the statute or the legislative history of any intent to impose restrictions on the number of channels that may be provided . . . or the number or type of subscribers that Music Choice may serve."[26] Music Choice specifically argues that section 114 cannot be read to require the same exact channels in a new transmission medium as it offers in its original medium because the statute "expressly acknowledges that the programming of a PSS's transmissions in a new medium may be different than those in the original medium, and in some instances requires that they be programmed differently."[27] More generally, Music Choice asserts that its internet transmissions are permissible because they "do not take advantage of the internet's

[23] *Id*. at 15, 17, 23–25.
[24] *Id*. at 24–25, 30.
[25] *Id*. at 19, 27. Music Choice specifically notes that, "of the 75 channels available through the internet, 50 of those are identical to the channels broadcast over the television" and the "additional 25 are identical to the television channels in every way except the genre or sub-genre in which they are programmed." *Id*. at 19.
[26] *Id*. at 2.
[27] *Id*. at 27.

technological capabilities," providing several fact-based arguments for why its internet service is comparable to its television service.[28]

Music Choice rests its argument in part on the U.S. Court of Appeals for the District of Columbia Circuit's recent opinion in *SoundExchange, Inc. v. Muzak LLC*, which held that a music service acquired by Muzak was not entitled to the grandfathered rate that applied to its preexisting subscription service.[29] Music Choice claims that this decision "demonstrate[s] that the PSS definition was not intended to freeze the PSS in time, nor limit PSS status to channels (or customers) that are exactly the same as the channels that were transmitted in 1998 (or the customers who received them at that time)" and that "any rule limiting PSS status to internet-based channels that are exactly the same as those transmitted through cable or satellite, or limiting the number of channels that may be provided by a PSS, would be inconsistent with [the court's] interpretation of the PSS definition."[30] Music Choice concludes that it would be contrary to the court's interpretation of the PSS definition to limit "the expansion of a PSS's service under the same brand" beyond the limitation "that the service must remain within the general category of transmissions identified in the . . . definition: noninteractive audio-only subscription digital audio transmissions made by an entity that was in existence and making that category of transmissions on or before July 31, 1998."[31]

B. SoundExchange's Position

SoundExchange argues that the CRJs should set "distinct statutory royalty rates for delivery of a PSS to television sets and for any webcasting that is provided as part of a

[28] *Id*. at 25–26.
[29] 854 F.3d at 719.
[30] Music Choice Brief at 21.
[31] *Id*. 29–30 (internal quotation marks omitted).

PSS," with the rate for webcasting that is part of a PSS set "at the same level as the statutory rate for other subscription webcasters, because Music Choice's webcasting is equivalent to that provided by other webcasting services, and competes with other webcasting services."[32] SoundExchange argues that this position responds to the "rapid growth in Music Choice's webcasting," which it asserts is demonstrated by record evidence it describes regarding Music Choice's mobile application and website and how Music Choice's internet transmissions differ from its television-based service.[33]

Pointing to the same discussion in the DMCA Conference Report referenced by Music Choice, SoundExchange argues that "Congressional intent was to limit the grandfathering of the PSS to transmissions similar to the cable or satellite service offerings their providers offered on July 31, 1998," meaning that PSS status "extends to a qualifying entity's cable and satellite offerings as they existed at July 31, 1998 . . . and also may extend to a qualifying entity's transmissions in a new medium such as the Internet, if the transmissions are sufficiently similar to the 1998 offerings."[34] SoundExchange contends that assessing similarity "is a fact-intensive inquiry that requires comparison of a PSS provider's new offering with the provider's 1998 offerings," and that "[i]t is not enough to consider only whether a qualifying entity's new offerings makes noninteractive audio-only subscription digital audio transmissions," but rather, "it is necessary to consider the medium used, and the functionality and content provided, in the new offerings."[35] SoundExchange claims that "Congress gave *no* indication that . . . a PSS provider should enjoy PSS rates if it provided an offering *different* from its 1998

[32] SoundExchange Brief at 5.
[33] *Id*. at 2–5.
[34] *Id*. at 9–10.
[35] *Id*. at 10.

offering in a new medium."[36] SoundExchange interprets the legislative history to suggest that Congress "grandfathered the PSS to protect investments that qualifying entities had *already* made at the time the DMCA was under consideration in 1998."[37] SoundExchange understands the D.C. Circuit's decision in *SoundExchange* to be consistent with its interpretation of the legislative history.[38]

SoundExchange argues that the PSS definition must be construed narrowly, particularly in the case of webcasting given that "[i]nternet-based streaming services are a rapidly-growing means of music consumption," and "webcasting by a PSS provider competes with webcasting by services that are currently paying for their use of sound recordings at much higher royalty rates."[39] Such an interpretation, SoundExchange claims, would "ensure that webcasters compete on level terms, eliminating distortions in the market and effectuating the Congressional intent to shift rates towards those that reflect arms-length market transactions."[40]

SoundExchange further argues that, "[a]s a matter of law," "webcast transmissions made through a mobile app, or through a version of a provider's website that has been optimized for display using the browser on a mobile device, are not transmissions by a PSS for which the Judges are to set rates and terms under Section 114(f)(1)."[41] SoundExchange contends that the PSSs' "1998 offerings were residential offerings delivered by means of cable or satellite to fixed points in subscribers' homes," while "[t]he Internet and the wireless networks that are used to deliver service to mobile

[36] *Id*. at 11.
[37] *Id*.
[38] *Id*. 11–12.
[39] *Id*. at 12.
[40] *Id*. at 12–13.
[41] *Id*. at 13.

devices are a different medium than the PSS used in 1998."[42] Furthermore, SoundExchange contends that mobile services "take[] advantage of the capability of wireless networks to provide portability, allowing listeners to access music anytime and virtually anywhere" as well as offering "different opportunities for user interaction and navigation" that "provide a very different user experience than the stereo receivers and television sets that could receive the PSS' 1998 offerings."[43]

While SoundExchange claims that internet streaming channels could qualify as part of a PSS, so long as it is "sufficiently similar to the provider's 1998 offerings," SoundExchange asserts that this standard requires that the "PSS provider's webcast channels [to] be identical to counterpart stations made available through cable television" in order to qualify for a rate set under section 114(f)(1), as a service offering internet-only channels would lack sufficient similarity to the PSS' 1998 offerings which did not include any internet-only offerings.[44] SoundExchange argues that a PSS's internet transmissions are similarly disqualified if the "number of webcasting channels is [not] sufficiently similar to the provider's pre-1998 offerings."[45] SoundExchange further contends that the number and type of subscribers to the transmission must also be substantially similar, and that a PSS cannot include video programming "other than video related to the service or recording being performed" in order for its webcasting service to qualify as a PSS.[46] SoundExchange also asserts that "[a] trier of fact may also consider

[42] *Id*.
[43] *Id*. at 13–14.
[44] *Id*. at 15–16.
[45] *Id*. 16–17.
[46] *Id*. 17–18.

other factors that bear on similarity of the service offerings, including any differences between Internet-based platforms and cable- and satellite-based platforms."[47]

III. Register's Determination

Although the parties' briefs discuss at length the factual nature of Music Choice's particular internet transmissions, questions of fact are beyond the scope of the Register's inquiry under section 802(f)(1)(B). Thus, without judging the facts as they may pertain to Music Choice (or any other PSS), and having considered the relevant statutory language, legislative history, and the input from the parties, the Register determines that transmissions by a PSS entity that are accessible to a cable or satellite television subscriber through that entity's website and through a mobile application can be "subscription transmissions by preexisting subscription services" for which the CRJs must determine rates and terms of royalty payments under section 114(f)(1)(A), but only if such transmissions are sufficiently similar to the transmissions made to those subscribers via the entity's preexisting residential cable or satellite music service.

A. Legal Standard

Before addressing the appropriate legal standard for determining whether a particular subscription transmission by a preexisting subscription service is subject to the grandfathered method of setting royalty rates for such service offerings under section 114(f)(1), the Register makes a few threshold points about the statute.

First, in analyzing the grandfathering provisions, the Register interprets them narrowly.[48]

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[47] *Id*. at 17.
[48] *See* 71 FR at 64646; *accord SoundExchange,* 854 F.3d at 719.

Second, as the Register has previously held, the definition of "preexisting subscription service" in section 114(j)(11) can pertain to both the business entity operating a service offering and the service offering itself.[49] The D.C. Circuit recently agreed with the Register that "the word 'service,' as used both in the statute as well as the legislative history, sometimes referred to the business entity and sometimes the program offerings."[50] For clarity's sake, the Register generally refers below to a "PSS entity" or a "PSS offering" to distinguish between a preexisting business itself and a specific preexisting program offering by such business.

Third, as a corollary to the second point, the Register concurs with the D.C. Circuit's holding that, under the grandfathering provisions, "the term 'service' contemplates a double limitation; both the business and the program offering must qualify before the transmissions are eligible for the favorable rate."[51] Indeed, Congress was clear that not every subscription transmission made by a PSS entity is subject to section 114(f)(1).[52] Thus, as used in section 114(f)(1)(A), "subscription transmissions by

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[49] 71 FR at 64646, 64647 ("In construing the statutory language together with the legislative history, the logical conclusion is that Congress did use the term 'service' to mean both the program offerings made on a subscription basis to the public and the business entity that secures the license to make the subscription transmissions.").

[50] *SoundExchange*, 854 F.3d at 718.

[51] *See id*. at 719.

[52] *See* H.R. REP. NO. 105-796, at 84–85 (explaining that section 114(f)(2) applies to "subscription transmissions made by a preexisting subscription service other than those that qualify under subsection (f)(1)" in addition to new subscription services and eligible nonsubscription transmissions). Similarly, previous statements made by the Register that preexisting subscription "services deserved to develop their businesses accordingly" pertained to the businesses of the pre-July 31, 1998 PSS offerings—not all businesses engaged in by the PSS entities. *See* 71 FR at 64645. For example, later in the same opinion, the Register elaborated that while "Muzak was the pioneer music service that incurred both the benefits and risks that came with its investment, and one such benefit was its status as a preexisting subscription service," that benefit only exists "so long as [Muzak] provided its music offerings over [DiSHCD]," as it did as of July 31, 1998. *Id*. at 64646.

preexisting subscription services" must refer only to the PSS offerings made by a PSS entity, rather than referring to *all* subscription transmissions made by a PSS entity.

Fourth, the Register has previously determined "that the preexisting services must be limited to the three named entities in the [DMCA] Conference Report, *i.e.*, DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and [DiSHCD][53] (operated by Muzak)."[54] Thus, it is long-settled that these three entities are the only PSS entities. What offerings by these entities may constitute PSS offerings, however, has continued to be unsettled, but is now resolved by this memorandum opinion.[55]

Fifth, the Register observes that PSS offerings are not limited solely to the offerings made by PSS entities prior to July 31, 1998. Rather, the statute and legislative history both confirm that Congress intended for PSS entities to be able to expand their service offerings to some limited extent and still have those service offerings be considered PSS offerings. Two provisions of the statute in particular reflect this congressional intent. Section 114(d)(2)(C) sets out more expansive qualifications for the statutory license for transmissions made by a PSS "other than in the same transmission medium used by such service on July 31, 1998." In other words, Congress suggested that

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[53] The Register believes that the DMCA Conference Report's reference to "DiSH Network" was a typo, and that Congress intended to refer to Muzak's "DiSHCD" service, which was transmitted over Echostar's DiSH Network. *See* Report of the Copyright Arbitration Royalty Panel, *In re: Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recordings*, No. 96-5 CARP DSTRA ¶ 27 (Nov. 28, 1997) ("CARP Report") ("Muzak . . . began providing . . . digital music under the name DiSH CD, as part of Echostar's satellite-based DiSH Network."); 63 FR 25394, 25395 (May 8, 1998) (same); *see also* Muzak Limited Partnership, Initial Notice of Digital Transmission of Sound Recordings under Statutory License (July 2, 1998) (listing the service name as "dishCD").

[54] 71 FR at 64646; *see* H.R. REP. NO. 105-796, at 81, 85, 89.

[55] The D.C. Circuit correctly recognized that the Register's previous "opinion did not address whether those three business entities' grandfather status was further limited to the programs they were offering at the time the statute was passed." *See SoundExchange*, 854 F.3d at 718.

a PSS could deliver its offering in a new transmission medium without affecting its status as a PSS offering. Section 114(f)(1)(C), in turn, provides for an out-of-cycle rate proceeding to be held where "a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational." The statute further makes clear that this rate proceeding is to be conducted with reference to the grandfathered rate standard. Such a provision would be unnecessary if PSS offerings were limited to the exact offerings made in 1998; there would never be a "new type of . . . service."

Thus, the ultimate question is whether a particular program offering by a PSS entity qualifies as a PSS offering within the meaning of section 114(j)(11), and is therefore subject to the grandfathered rate standard under section 114(f)(1). The DMCA Conference Report provides particularly helpful guidance in answering this question concerning section 114(f)(1):

> In grandfathering these services, the conferee's objective was to limit the grandfather to their existing services in the same transmission medium and to any new services in a new transmission medium where only transmissions similar to their existing service are provided. Thus, if a cable subscription music service making transmissions on July 31, 1998, were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service. If, however, a subscription service making transmissions on July 31, 1998, were to offer a new service either in the same or new transmission medium by taking advantages of the capabilities of that medium, such new service would not qualify as a preexisting subscription service.[56]

This passage, consistent with the statutory language in sections 114(d)(2) and 114(f), demonstrates Congress's intent to distinguish among three different possibilities:

[56] H.R. REP. NO. 105-796, at 89.

1. A service offering identified by Congress as being a PSS offering as of July 31, 1998, that is still offered today *in the same transmission medium* identified by Congress in 1998 (referred to here as an "**existing service offering**").[57] Such a service offering would be entitled to *both* a rate established under the grandfathered rate standard under section 114(f)(1) and the grandfathered license requirements in section 114(d)(2)(B).

2. A service offering identified by Congress as being a PSS offering as of July 31, 1998, that is still offered today, but *in a different transmission medium* than the one identified by Congress in 1998, *where only transmissions similar to the existing service offering are provided* (referred to here as an "**expanded service offering**").[58] Such a service offering would be entitled to a rate established under the grandfathered rate standard under section 114(f)(1), but would not be able to take advantage of the grandfathered license requirements in section 114(d)(2)(B). Instead, it would be required to comply with more detailed license requirements in section 114(d)(2)(C).

3. A service offering that is not an existing service offering or an expanded service offering (referred to here as a "**different service offering**").[59] This would include any offering that is insufficiently similar to an existing service offering to be considered

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[57] *See id*. (grandfathered services can be "existing services in the same transmission medium").

[58] *See id*. (grandfathered services can be "new services in a new transmission medium where only transmissions similar to their existing service are provided"). While the Conference Report refers to "new services," in the next sentence, it provides an example of a "cable . . . service" expanding into an "Internet service" by "offer[ing] the same music service through the Internet." *See id*. Thus, in context, such services are what the Register has here called "expanded services," and are not meant to encompass wholly new services that are unrelated to an existing service offering. By the same logic, other references in the statute and legislative history to "new" service offerings should be similarly interpreted as being what is referred to here as expanded service offerings. *See, e.g.*, 17 U.S.C. 114(f)(1)(C) (permitting out-of-cycle rate-setting proceedings for a "new type of . . . service").

[59] *See* H.R. REP. NO. 105-796, at 89 (grandfathering "*limit[ed]*" to "existing services in the same transmission medium and to any new services in a new transmission medium where only transmissions similar to their existing service are provided") (emphasis added).

an expanded service offering. A different service offering would not be entitled to either a rate established under the grandfathered rate standard under section 114(f)(1) or the grandfathered license requirements in section 114(d)(2)(B). Instead, the rate would be set under the willing buyer/willing seller standard in section 114(f)(2), and would be required to comply with the license requirements in section 114(d)(2)(C).

These categorizations presume that a service is eligible for the section 114 license. The purpose of separating them into these groups is to determine whether the rate for a service is determined pursuant to section 114(f)(1) or section 114(f)(2). Thus, if a PSS entity began offering, for example, an interactive service, it would not fall into one of these categories, as it is ineligible for the statutory license. The following sections describe the types of service offerings that fall within these three categories.

1. Existing Service Offerings

Implicit in the Register's previous determination that the only PSS entities are the three entities Congress named in the DMCA Conference Report,[60] is that, as a matter of law, the service offerings that Congress sought to identify as PSS offerings as of July 31, 1998, were the ones offered by those entities prior to that date. The legislative history makes clear that Congress further intended to limit what it identified as a PSS offering at that time to the PSS entities' offerings in the specific transmission media affirmatively identified in the DMCA Conference Report: "cable" or "satellite" for DMX and Music Choice, and "satellite" for DiSHCD.[61] Thus, to qualify as an "existing service offering,"

[60] *See* 71 FR at 64646.

[61] *See* H.R. REP. NO. 105-796, at 89 ("As of July 31, 1998, DMX and Music Choice made transmissions via both cable and satellite media; the [DiSHCD service] was available only via satellite.").

the service must not only have existed as of July 31, 1998, but it must have also been providing its offering in the specific transmission media identified by Congress.

Music Choice urges that it was already making internet transmissions of its subscription music service as of July 31, 1998.[62] In so doing, it is effectively asking for its current internet transmissions to be treated as an "existing service offering" under the rubric set forth above. But even assuming Music Choice, or another service, were making such pre-1998 internet transmissions,[63] it was clearly to an inconsequential degree: any such transmissions were entirely unacknowledged by the Copyright Arbitration Royalty Panel ("CARP"), in setting royalty rates for the statutory license under the DPRSRA; the Librarian of Congress and the Register of Copyrights, in reviewing that CARP decision; and Congress, in enacting the DMCA in 1998. The CARP report describes the three PSSs at length and, notably, makes an explicit finding of fact that the services are the "only three digital audio music subscription services available to residential subscribers in the United States" and that they "offer their digital music via satellite, or cable, or both," making no mention of any internet retransmissions.[64] In comprehensively reviewing the CARP report and adopting rates and terms for PSSs, the Register of Copyrights and the Librarian of Congress made no mention of any internet transmissions by those PSS entities.[65] To the contrary, that decision concluded that the PSSs "face new competition *from the internet*."[66] These factual findings are further reflected in the DMCA Conference Report, where Congress clearly identified the three qualifying services and

[62] Music Choice Brief at 1–2, 4–6, 18–19, 30.
[63] The Register notes that the only apparent evidence offered by Music Choice of such pre-1998 internet transmissions is the testimony of Music Choice CEO David Del Beccaro. *See id*. at 5.
[64] CARP Report ¶ 43.
[65] *See* 63 FR 25394.
[66] *Id*. at 25407 (emphasis added).

only described them as making transmissions via cable and/or satellite media.[67] Given this background, it is highly improbable that Congress would have intended, *sub silentio*, to treat internet transmissions as subject to the grandfathering provision under section 114(d)(2)(B).

This understanding is strongly reinforced by the new requirements Congress added in section 114(d)(2)(C) that webcasting services and new subscription services, as well as preexisting subscription services other than in the same transmission medium used by such service on July 31, 1998, had to comply with to qualify for the statutory license. The rationale behind the DMCA's amendments to the DPRSRA, including the new requirements in section 114(d)(2)(C), was to "address[] unique programming and other issues raised by *Internet transmissions*."[68] If a PSS were permitted to make internet transmissions under the less stringent requirements of section 114(d)(2)(B), it would undermine the design of this statutory scheme and blur the distinction that Congress intended to draw when dividing PSS transmissions between paragraphs (B) and (C) based on the transmission medium used on July 31, 1998.[69]

Thus, in accordance with the principles of narrow construction afforded to grandfathering provisions, the Register finds that, as a matter of law, it is irrelevant

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[67] *See* H.R. REP. NO. 105-796, at 81, 89.

[68] *See* STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4TH, 1998, at 50 (Comm. Print 1998) (emphasis added); *id.* at 51 ("At the time the DPRSRA was crafted, Internet transmissions were not the focus of Congress' efforts."); *see also* H.R. REP. NO. 105-796, at 83 (explaining explicitly that the reason for one of the new requirements was because of "a disturbing trend on the Internet" pertaining to the "unauthorized performance of sound recordings not yet released for broadcast or sale to the public").

[69] *See* 17 U.S.C. 114(d)(2)(B)–(C); *see also* H.R. REP. NO. 105-796, at 89 (indicating that a "cable subscription music service" that offers "the same music service through the Internet" is engaged in the delivery of its service "in a new transmission medium").

whether or not Music Choice or another PSS entity, to some limited degree, was making transmissions via a different medium than those specified in the legislative history on July 31, 1998, such as the internet. If such a service was in fact doing so, it would not be as part of an existing service offering—any such transmissions today would be considered either an expanded service offering or a different service offering, depending on the analysis described below.

At the same time, the Register emphasizes that an existing service offering can grow and expand significantly within the same transmission medium while remaining a PSS offering. The Register has found no indication that Congress meant to freeze existing service offerings exactly as they were on July 31, 1998, in order for them to continue to qualify for the grandfathering provisions. The user interface can be updated, certain functionality can be changed, the number of subscribers can grow, and channels can be added, subtracted, or otherwise changed.[70] The only restriction is that the existing service offering as it is today must be fundamentally the same type of offering that it was on July 31, 1998—*i.e.*, it must be a noninteractive, residential, cable or satellite digital audio transmission subscription service.[71]

[70] *See, e.g.*, 78 FR 23054, 23085 (Apr. 17, 2013) (increasing the royalty rate due to Music Choice's announced intention to increase its number of channels from 46 to 300).
[71] *See* 17 U.S.C. 114(j)(11); H.R. REP. NO. 105-796, at 81, 89; 63 FR at 25414; CARP Report ¶¶ 43–44, 51–78, 109.

2. Expanded Service Offerings

In addition to expanding within its congressionally-recognized transmission medium, an existing service offering can also expand to a *different* transmission medium, provided that the subscription transmissions are similar.[72]

This expansion, however, is subject to an important threshold limitation. For a service offering to qualify as an expanded service offering, the PSS entity must continue to operate its existing service offering. The basis for the grandfathering provisions is to protect existing service offerings and limited direct outgrowths of them. If such a limited outgrowth—*i.e.*, an expanded service offering—were to exist alone, divorced from the existing service offering, the rationale for including them within the existing service offering's grandfather protection becomes less tenable. Furthermore, the legislative history is explicit that a service offering that is not an existing service offering can only be subject to the grandfathering provision if it provides "transmissions similar to their existing service."[73] Ascertaining similarity requires comparison, and if a PSS entity discontinues its existing service offering, there would be nothing to compare against.[74]

As Music Choice and SoundExchange agree, in assessing whether a service offering is an expanded service offering, and thus qualifies as a PSS offering, a

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[72] *See* H.R. REP. NO. 105-796, at 89 (the grandfathering covers "a new transmission medium [but] where only transmissions similar to their existing service are provided"); 71 FR at 64641 ("[A] preexisting service does not lose its designation as such in the event the service decides to utilize a new transmission medium, *provided that the subscription transmissions are similar*.") (emphasis added).

[73] *See* H.R. Rep. No. 105-796, at 89.

[74] In the event that technology evolves such that a PSS decides to completely discontinue its cable or satellite service and limit its offerings solely to another transmission medium, such as the internet, this limitation would act as a type of "sunset provision," which, contrary to Music Choice's argument with respect to such provisions, demonstrates that Congress did not in fact intend for the grandfather status to apply to a service indefinitely regardless of the offerings it provides and the way it is transmitted.

comparison must be made between the service offering in question and the existing service offering to see if it is sufficiently similar. Because, as discussed above, an existing service offering can expand over time while remaining a PSS offering, the comparison should be made to the existing service offering as it exists *at the time of the comparison*, not, as SoundExchange argues, as it existed on July 31, 1998.

To determine whether or not such a service offering is sufficiently similar to the existing service offering, the fact-finder should compare the offerings by analyzing certain factors, including but not limited to:

(1) Whether the service offering has a similar effect on displacing or promoting sales of phonorecords.[75]

(2) Whether the quantity and nature of the use of sound recordings by the service offering is similar.[76]

(3) Whether the service offering provides similar content to similar groups of users.

(4) Whether the service offering is consumed in a similar manner, provides a similar user experience, and has similar form, feel, and functionality.

(5) Whether and to what degree the service offering relates to the same pre-July 31, 1998 investments Congress sought to protect.[77]

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[75] *See* 17 U.S.C. 114(f)(2)(B) (providing this as one of the examples of criteria to be used in distinguishing among different types of non-PSSs).

[76] *See id*. (providing this as one of the examples of criteria to be used in distinguishing among different types of non-PSSs).

[77] *See* 71 FR at 64641 ("[T]he rationale for [the] grandfathering provisions is to 'prevent disruption of the existing operations by such services.'") (quoting H.R. REP. NO. 105-796, at 81); *SoundExchange*, 854 F.3d at 719 ("The grandfather provisions were intended to protect prior investments the three [PSS] business entities had made during a more favorable pre-1998 rate-setting regulatory climate.").

(6) Whether and to what degree the service offering takes advantage of the capabilities of the medium through which it is transmitted (*i.e.*, whether and the extent to which differences between the service offerings are due to limitations in the existing service offering's transmission medium that are not present in the other service offering's transmission medium).[78]

Note that even if a service offering is found to be an expanded service offering qualifying for the section 114(f)(1) grandfathering provision, it would still not be eligible for the section 114(d)(2)(B) grandfathering provision by virtue of its being transmitted via a different transmission medium. Such an offering would be subject to the requirements in section 114(d)(2)(C).

3. Different Service Offerings

As a matter of law, a wholly different service offering can never qualify as a PSS offering because it would not be one of the specifically identified pre-July 31, 1998, business operations (*i.e.*, the three PSS offerings) Congress sought to protect when it enacted the DMCA.[79] This is true regardless of whether the service offering is developed internally or acquired. As the D.C. Circuit recently held, the DMCA's amendments to section 114 were "designed to move the industry to market rates," and if a PSS entity "were permitted to pay the grandfather rate for transmissions made to customers who subscribed to a 'service' that was previously provided by [a different, non-PSS entity], what would prevent . . . the complete elimination of the market-rate regime by [such PSS

[78] *See* H.R. REP. NO. 105-796, at 89 ("If . . . a subscription service making transmissions on July 31, 1998, were to offer a new service either in the same or new transmission medium by taking advantages of the capabilities of that medium, such new service would not qualify as a preexisting subscription service.").
[79] *See id*. at 81, 89; 71 FR at 64641, 64645–46; *SoundExchange*, 854 F.3d at 719.

entity's] acquisitions strategy."[80] The Register agrees that "when [such entity] expands its operations and provides additional transmissions to subscribers to a *different* 'service,' . . . this is an entirely new investment" and is not a PSS offering.[81]

B. Transmission Medium

As noted above, the statute and legislative history focus extensively on whether a PSS offering is being provided through the same or a different "transmission medium" than the one identified by Congress in 1998, and the analysis above follows Congress's lead in that regard. At first blush, one might conclude that Congress intended to draw a distinction among the kinds of physical wires or radiofrequency channels used to deliver signals from a service to a listener—*e.g.*, coaxial cable, optical fiber, radio spectrum. But this would not be a proper understanding of the statutory scheme. The legislative history makes repeated references to "cable," "satellite," and the "internet" as different "transmission[] . . . media."[82] Congress surely understood that the internet is a layer of services that can be reached through a variety of delivery mechanisms, for example, through phone lines, satellite signals, and optical fiber. Similarly, a "cable" service can be transmitted over different media, such as coaxial cable, optical fiber, or microwaves—a fact Congress explicitly understands.[83]

Thus, for section 114 purposes, the better understanding is that, in referring to the "transmission medium" in the context of a PSS offering, Congress was referring to the

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[80] *SoundExchange*, 854 F.3d at 719.
[81] *See id*. (emphasis added). The Register thus agrees with the D.C. Circuit's holding that a service offering that is acquired by a PSS entity does not qualify as a PSS offering.
[82] *See* H.R. REP. NO. 105-796, at 81, 89 (referring to "transmissions via both cable and satellite media" and explaining that under appropriate circumstances, a "cable . . . service" may be transmitted "through the Internet").
[83] *Cf*. 17 U.S.C. 111(f)(3) (defining a "cable system" as, among other things, making transmission by "wires, cables, microwave, or other communications channels").

basic *telecommunications service* through which that offering is being delivered to the user. For example, an existing service offering that on July 31, 1998, was delivered to residential cable television subscribers through coaxial cable, may today be delivered to such cable television subscribers through optical fiber without constituting an expansion to a new "transmission medium" within the meaning of section 114. In other words, this service offering would still be an existing service offering, rather than an expanded service offering or different service offering, because it would still be part of what is traditionally considered to be a residential cable television service; this is true even though optical fiber may provide certain advantages over coaxial cable. By the same token, however, when an existing cable music service is made available to cable television subscribers over the internet, it is being transmitted through a *different* transmission medium regardless of how the internet is being reached; for section 114 purposes, internet service is a different telecommunications service from a residential cable service, even if delivered by the same operator through the same infrastructure.[84]

C. Application to the Referred Questions

The CRJs' referral to the Register of Copyrights specifically asked how the legal analysis would apply specifically to "transmissions of multiple, unique channels of music that are accessible through that entity's website and through a mobile application," and the degree to which differences between a PSS entity's internet service and its existing service in terms of the numbers or types of channels or subscribers would result in the

[84] To be clear, this discussion relates to the meaning of section 114and should not be construed as having broader application to other areas of copyright law, such as the section 111 cable retransmission license.

exclusion of the internet service from a grandfathered rate.[85] Although ultimately it is not for the Register to apply the above-described inquiry to Music Choice's current program offerings, the Register offers the following observations about transmissions made via the internet and made available on portable devices, and general guidance about application of the analysis to the scenarios identified in the referral order.

Under the standard articulated above, the mere fact that a service offering is transmitted to cable or satellite television subscribers over the internet does not automatically disqualify the service offering from being an expanded service offering subject to the grandfathered rate standard, so long as the service offering, as a factual matter, after considering the factors described above, is sufficiently similar to the PSS entity's existing cable or satellite service offering.

In evaluating whether a service offering is "sufficiently similar" to the PSS entity's existing cable or satellite service offering so as to qualify as an "expanded service offering," the CRJs should consider the degree to which making the existing service offering accessible outside the home of the subscriber constitutes a fundamental change to the offering. One notable fact about PSS offerings in 1998 is that they were all limited to listening to music within the subscriber's home. Indeed, in the first ratesetting proceeding under the DPRSRA, portable listening does not appear to have been considered and the final rate was based on a percentage of gross revenues "resulting from *residential services* in the United States"[86]—which is how the rate is currently

[85] Referral Order at 3–4.

[86] *See* 63 FR at 25414 (to be codified at 37 CFR 260.2(a)) (emphasis added); *see also* CARP Report ¶ 109 ("The Panel finds that the Services are primarily responsible for creating a new media and market for digital music subscription services *for residential consumers*.") (emphasis added). It also bears noting that in the last rate proceeding, the CRJs deleted the word

calculated.[87] To be sure, technological developments since that time have made it easier to deliver digital audio transmissions outside the home (including over mobile networks). But, at least in the cable television market, there appears to be a distinction drawn between accessing content within the home and accessing that same content outside of it.[88] To be clear, this distinction is one based on the *location* where the PSS offering is consumed, not the type of device on which the service is accessed. If the service offering is available through an internet-connected smartphone or tablet, but is designed so that the service offering will only work when accessed within the confines of the subscriber's residence, then it would be within the home and more similar to the PSS entity's existing cable or satellite service offering.

As the second referred question specifically asks about differences in channel offerings and customers, the Register offers the following guidance. In comparing the number and type of channels offered by a service offering to an existing service offering, examples of factors to consider could include how many additional or fewer channels there are, how many channels offer different programming, and how different that programming is. One should also consider the reasons why any such differences exist. For example, if the service offering in question has more channels because of some

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"Residential" and its definition from the rate provision for preexisting satellite digital audio radio services because it was argued that "the concept is a confusing artifact of a comparable term used in the PSS regulations" because "the SDARS service is not primarily residential in terms of being delivered to homes and the term residential subscriber simply means a subscriber," yet the term remained for purposes of the PSS rate. 78 FR at 23074–75, 23096, 23098 (internal quotation marks omitted).

[87] 37 CFR 382.3(a).

[88] *See, e.g.*, *Out of Home – XFINITY Stream App Error Message*, XFINITY, https://www.xfinity.com/support/xfinity-apps/xfinity-tv-app-unable-to-connect/ (last visited Nov. 17, 2017) ("In order to watch live TV or XFINITY On Demand content using the XFINITY Stream app, you'll need to be connected to your in-home XFINITY WiFi network.").

benefit the internet affords, such as greater bandwidth or different contractual arrangements with cable operators, then it would be taking advantage of the capabilities of the internet as a transmission medium. Depending on the evaluation of the other factors discussed above and how much weight is ultimately given to the difference in channels in an overall comparison between the service offerings, it may or may not be enough to disqualify the offering from the grandfathered royalty calculation method. The number and type of customers should be similarly compared.

At the same time, the Register agrees with Music Choice that differences in a service offering that directly and solely result from the imposition of the section 114(d)(2)(C) requirements that do not apply to the existing service offering (which is subject to section 114(d)(2)(B)), should not alone disqualify it from the grandfathered rate. Similarly, minor differences in the user interface necessitated by the change in medium also should not alone disqualify the service offering, even if they are perceived as an advantage offered by the medium. For example, a service offering should not be disqualified from being an expanded service offering merely because instead of needing to press a button on a remote control, the user can click a mouse or navigate using a touch screen. Additionally, minor differences in visual presentation, such as having a different aspect ratio or displaying less content due to differences in screen size, would not be so significant as to disqualify a service offering from being an expanded service offering.

D. CRJs' Ability to Set Different Rates

In closing, the Register briefly notes that, even if a service offering qualifies for the grandfathered method of setting rates, the CRJs still have the authority under section 114(f)(1)(A) to "distinguish among the different types of digital audio transmission

services . . . in operation." Thus, if there are material differences between an existing service offering and an expanded service offering, the CRJs can set separate rates and terms based on those differences, albeit using the section 801(b)(1) standard, and not under the willing buyer/willing seller standard under section 114(f)(2).

November 20, 2017

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Karyn Temple Claggett,
Acting Register of Copyrights and Director of the U.S. Copyright Office

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