

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

In the Matter of

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR EPHEMERAL RECORDING AND
WEBCASTING DIGITAL PERFORMANCE OF
SOUND RECORDINGS (Web IV)**

**Docket No. 14-CRB-0001-WR
(2016-2020) (Web IV)**

**MEMORANDUM OPINION
ON NOVEL MATERIAL QUESTIONS OF LAW**

Section 114(f)(5)(C) of the Copyright Act bars the Copyright Royalty Judges (“CRJs” or “Judges”) from taking into consideration in ratesetting proceedings the provisions of agreements entered into under the Webcaster Settlement Act of 2009, which allowed the parties to negotiate alternative rates and terms from those established by the CRJs. Questions have arisen in the pending proceeding to set royalty rates and terms for webcasters’ digital performance of sound recordings and associated ephemeral reproductions about the proper interpretation of this provision. The CRJs determined that these were novel material questions of substantive law and, as required under section 802(f)(1)(B) of the Copyright Act, referred them to the Register of Copyrights for resolution. The Register’s determination follows.

I. Background

The instant proceeding will establish royalty rates and terms for webcasters’ digital performance of sound recordings and the making of ephemeral recordings under the statutory licenses set forth in sections 112(e) and 114(f)(2) of the Copyright Act for the period beginning January 1, 2016 and ending on December 31, 2020. Such rates and terms are to be set under the “willing buyer/willing seller standard,” meaning that the rates and terms should be those “that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”¹ Royalties for the use of sound recordings under these statutory licenses are collected from webcasters by the receiving agent SoundExchange, Inc. (“SoundExchange”), which then distributes them to sound recording copyright owners.²

The rates and terms established in the current proceeding will replace existing royalty rates and terms applicable to webcasters that were agreed to and implemented under the Webcaster Settlement Act of 2009 (“2009 WSA”).³ The 2009 WSA is the third webcaster

¹ 17 U.S.C. § 114(f)(2)(B).

² 17 U.S.C. § 114(f)(2)(A), (g)(1); 37 C.F.R. § 380.2.

³ Pub. L. No. 111-36, 123 Stat. 1926.

settlement act (“WSA”) passed by Congress, following the Webcaster Settlement Act of 2008⁴ (“2008 WSA”) and the Small Webcaster Settlement Act of 2002⁵ (“2002 SWSA”).

The 2002 SWSA was enacted to address a group of small webcasters’ professed inability to pay the fees established by the Librarian of Congress (“Librarian”) under the Copyright Arbitration Royalty Panel system, the predecessor to the current CRJ process.⁶ The 2002 SWSA provided authority, during a limited window of time, for SoundExchange and small webcasters to negotiate and enter into alternative agreements to replace the rates set by the Librarian.⁷ The 2008 WSA provided the same authority as under the 2002 SWSA, but with regard to webcasters of all sizes, and in relation to a 2007 rate determination by the CRJs under the revised ratesetting system adopted by Congress in 2004.⁸ The 2007 determination was also perceived by webcasters as establishing unduly high rates.⁹ The 2009 WSA extended the window of time during which the parties were authorized to reach settlements under the 2008 WSA.¹⁰

The 2002 and subsequent WSAs have been codified in section 114 of the Copyright Act.¹¹ In their current form, the statutory provisions allow the parties to agree to alternative rates in lieu of those set by the CRJs for uses through December 31, 2015, but also foreclose consideration of the provisions of those agreements by the CRJs in ratesetting proceedings. More specifically, section 114(f)(5)(C) provides in pertinent part as follows:

(C) Neither subparagraph (A) [allowing the parties to enter into alternative agreements] nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).¹²

⁴ Pub. L. No. 110-435, 122 Stat. 4974.

⁵ Pub. L. No. 107-321, 116 Stat. 2780.

⁶ Pub. L. No. 107-321, § 2, 116 Stat. 2780, 2780-81 (2002).

⁷ *Id.* § 4, 116 Stat. at 2781-83.

⁸ See H.R. REP. NO. 111-139, at 2-3 (2009).

⁹ See 111 Cong. Rec. H10279 (daily ed. Sept. 27, 2008) (statement of Rep. Berman); H.R. REP. NO. 111-139, at 2 (2009).

¹⁰ H.R. REP. NO. 111-139, at 3 (2009).

¹¹ 17 U.S.C. § 114(f)(5).

¹² 17 U.S.C. § 114(f)(5)(C).

As permitted under the 2009 WSA, SoundExchange entered into settlement agreements (each, a “WSA agreement”) with various webcasters to replace the rates set by the CRJs.¹³ Under the enabling legislation, the rates and terms in each of these WSA agreements are to be made available “to any webcasters meeting the respective eligibility conditions of the agreements as an alternative to the rates and terms of any determination by the [CRJs].”¹⁴ One such WSA agreement with SoundExchange is known as the “Pureplay Agreement,” on which Pandora Media, Inc. (“Pandora”) and other webcasters currently rely for certain uses of sound recordings. Certain individual webcasters, including Pandora and iHeartMedia, Inc. (“iHeartMedia”), have also entered into directly negotiated license agreements with individual record labels (“direct agreements”), rather than with SoundExchange.¹⁵

According to SoundExchange, direct agreements sought to be introduced by the webcasting parties in the instant ratesetting proceeding incorporate substantive provisions and/or are otherwise influenced by the Pureplay Agreement entered into under the 2009 WSA.¹⁶ In a pretrial submission, SoundExchange argued that section 114(f)(5)(C) prevents the CRJs from considering the direct license agreements submitted by the licensee services, and that they should be excluded from the current proceeding.¹⁷

In response to these concerns, the CRJs issued an order inviting briefing from the participants regarding five novel material questions of substantive law and, on July 29, 2015, referred the following questions to the Register pursuant to 17 U.S.C. § 802(f)(1)(B):¹⁸

1. Does section 114(f)(5)(C) of the [Copyright] Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that agreement includes any terms that are *copied verbatim* from a [2009] WSA settlement agreement?
2. Does section 114(f)(5)(C) of the [Copyright] Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that agreement includes any terms that are *substantively identical to* terms of a [2009] WSA settlement agreement?
3. Does section 114(f)(5)(C) of the [Copyright] Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that

¹³ See Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,797 (July 17, 2009) (publishing agreement concerning commercial webcasters including small pureplay webcasters); Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 40,614, 40,614 (Aug. 12, 2009) (publishing agreements with Sirius XM Radio Inc., College Broadcasters, Inc., Corporation for Public Broadcasting, and Northwestern College).

¹⁴ Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,797 (July 17, 2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 40,614, 40,614 (Aug. 12, 2009); 17 U.S.C. § 114(f)(5)(B) (“[T]he terms of such [a WSA] agreement shall be available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.”).

¹⁵ See iHeartMedia Initial Br. at 6; Pandora Initial Br. at 1-2.

¹⁶ Order Referring Novel Question of Law and Setting Briefing Schedule, Docket No. 14-CRB-0001-WR (2016-2020) (July 29, 2015) (“Referral Order”) at 1-2.

¹⁷ Referral Order at 2 (citing SoundExchange Proposed Conclusions of Law ¶ 48).

¹⁸ See Referral Order at 1. 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 this title 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).

agreement includes terms that the [Copyright Royalty] Judges conclude have been *influenced* by terms of a [2009] WSA settlement agreement?

4. Does section 114(f)(5)(C) of the [Copyright] Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that agreement *refers to* a [2009] WSA settlement agreement in provisions unrelated to the rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein?
5. If the answer to any of the previous questions is “no,” does section 114(f)(5)(C) of the [Copyright] Act bar the Judges from considering *specific provisions* of a license agreement between a webcaster and a record company that are the same as, are copied from, influenced by or refer to provisions of a [2009] WSA settlement agreement?

II. Summary of the Parties’ Arguments

All parties agree that section 114(f)(5)(C) bars the CRJs from admitting into evidence or otherwise considering provisions of the actual settlement agreements reached pursuant to the 2009 WSA.¹⁹ The issue at hand instead concerns directly negotiated licensing agreements that allegedly incorporate portions of, or the terms of which were influenced by, the WSA agreements.

SoundExchange argues that each of the referred questions should be answered in the affirmative, and that the direct license agreements should be excluded from consideration. On the other side of the issue, the webcasting parties, namely Pandora, iHeartMedia, and the National Association of Broadcasters and National Religious Broadcasters Noncommercial Music License Committee (together, the “Broadcasters,” and all of the licensee parties collectively, the “Webcasters”), assert that the questions should be answered in the negative, and that the CRJs should be able to take these agreements into consideration as benchmarks or corroborative evidence in the current proceeding.²⁰

A. SoundExchange’s Position

SoundExchange reads the statutory bar broadly, arguing that if a direct license agreement incorporates any terms of, is based upon, or is influenced by, the provisions of a WSA agreement, then the CRJs should refrain from considering that agreement pursuant to section 114(f)(5)(C).²¹ SoundExchange offers three primary arguments in support of this contention.

First, SoundExchange claims that section 114(f)(5)(C)’s inclusion of the phrase “otherwise taken into account” demonstrates that the statute’s scope is broader than a mere bar against the admission of evidence.²² SoundExchange maintains that the Webcasters’

¹⁹ SoundExchange Initial Br. at 1; Pandora Initial Br. at 1; iHeartMedia Initial Br. at 2-3; Broadcasters Initial Br. at 1.

²⁰ Initial Brief for SoundExchange at 8, 12, 13, 15, 17, No. 14-CRB-0001-WR (2016-2020) (Web IV) (Aug. 7, 2015) (“SoundExchange Initial Br.”); Initial Brief for Pandora at 25, No. 14-CRB-0001-WR (2016-2020) (Web IV) (Aug. 7, 2015) (“Pandora Initial Br.”); Initial Brief for iHeartMedia at 17, No. 14-CRB-0001-WR (2016-2020) (Web IV) (Aug. 7, 2015) (“iHeartMedia Initial Br.”); Initial Brief for the Broadcasters at 17-18, No. 14-CRB-0001-WR (2016-2020) (Web IV) (Aug. 7, 2015) (“Broadcasters Initial Br.”).

²¹ SoundExchange Initial Br. at 1.

²² *Id.* at 3. SoundExchange argues that this phrase means to “take into consideration; allow for.” *Id.* at 4.

interpretation is faulty because it “reads entirely out of the statute Congress’s bar on the [CRJs] from ‘tak[ing] into account’ the WSA agreements.”²³ SoundExchange urges that if Congress intended only to preclude the admissibility of the WSA agreements, this language would be unnecessary, and that interpreting a statute so as to render language inoperative or superfluous is improper.²⁴

Second, SoundExchange argues that Congress enacted a “very broad rule of exclusion” to prevent the terms of a WSA agreement from being used against a settling party in subsequent proceedings, including in cases where these terms appear in subsequently negotiated agreements.²⁵ SoundExchange contends that Congress was not solely interested in the admissibility of the WSA agreements themselves, but more broadly wanted to allow the parties “to enter into ‘compromise’ agreements, ‘motivated by the unique business, economic and political circumstances’ then facing the settling parties, without fear that the agreement or any of its terms and conditions would later be used in any way to be indicative of terms to which willing buyers and willing sellers would agree.”²⁶ SoundExchange also notes that the legislative history of the 2002 SWSA, which first introduced the language in section 114(f)(5)(C), expressly states that to facilitate settlement, the parties needed assurances that their agreements could not later be used against them in future rate proceedings.²⁷

Third, SoundExchange argues that any contrary interpretation of the statute would be fundamentally unfair because it would permit a party to introduce a licensing agreement that was directly influenced by a WSA agreement, while preventing an opposing party from introducing the WSA agreement itself to show the extent of its influence and to demonstrate why the license agreement should not be given weight as evidence of a market rate.²⁸ SoundExchange argues that such use of WSA agreements as both “a sword and a shield” is impermissible.²⁹

Regarding each of the referred questions specifically, SoundExchange asserts that section 114(f)(5)(C) bars the CRJs from considering terms copied verbatim from a direct license agreement because “[w]here a license agreement is simply a verbatim copy of a WSA settlement agreement, considering the terms of the license agreement is effectively considering all the terms of the WSA agreement from which these terms were copied.”³⁰ SoundExchange further asserts that where only some terms of a direct agreement were copied verbatim from a WSA agreement, the entire direct license agreement nonetheless cannot be considered because as a “fundamental rule of contract interpretation . . . the terms of any agreement are presumed to be dependent and interrelated,” meaning the CRJs should not consider the non-copied terms without also taking into account the copied terms.³¹ SoundExchange additionally argues that in every case where a

²³ Responsive Brief for SoundExchange at 1, No. 14-CRB-0001-WR (2016-2020) (Web IV) (Aug. 14, 2015) (“SoundExchange Responsive Br.”) (emphasis and alteration in original).

²⁴ *Id.* at 3.

²⁵ SoundExchange Initial Br. at 4, 8.

²⁶ *Id.* at 5 (quoting 17 U.S.C. § 114(f)(5)(C)); *see also* SoundExchange Responsive Br at 6.

²⁷ SoundExchange Initial Br. at 6-7 (citing 2002 SWSA, § 2(7), 116 Stat. at 2781).

²⁸ *Id.* at 2, 6; *see also* SoundExchange Responsive Br. at 6 (For the CRJs to “take account of the direct influence of the shadow of the WSA agreement on the negotiation of the direct license, the [CRJs] would be forced to consider the WSA agreement and its terms[, y]et this necessary step of evaluating the probative value of the direct license would run headlong into § 114(f)(5)(C)’s bar.”).

²⁹ SoundExchange Initial Br. at 6.

³⁰ *Id.* at 8.

³¹ *Id.* at 8-12.

webcaster was eligible for the WSA agreement, it should be presumed that the entire license agreement was directly affected by the WSA agreement because “the overarching shadow of the WSA agreement rates would have affected the entire negotiation” and, therefore, the statute should “bar[] consideration of the agreement as a whole.”³²

SoundExchange next argues that if a direct agreement’s terms are substantively identical to the terms of a WSA agreement, the entire agreement should be barred for the same reasons as direct agreements with terms copied verbatim from a WSA agreement; “[o]therwise the party seeking to submit the license agreement could simply slightly re-word the relevant terms.”³³ Recognizing that substantively identical terms could have been arrived at independently of a WSA agreement, SoundExchange proposes a test for the CRJs to employ: (i) if the proffering party was eligible for and could opt into the WSA agreement, that fact should be conclusive proof that the substantively identical terms were derived directly from the WSA agreement; and (ii) if the proffering party was not eligible to opt into the WSA agreement, that party could attempt to show the independent derivation of its agreement through evidence of the parties’ negotiating history.³⁴

Sound Exchange contends that if the terms of a license agreement have been directly influenced by the terms of a WSA agreement, then the entire license agreement should be barred because its consideration “would take ‘into account’ the terms of the WSA agreement, in violation of” the statute.³⁵ Recognizing that “the shadow of a WSA settlement agreement [does not] influence[] all negotiations to an equal extent,” SoundExchange proposes that only agreements evidencing “direct influence” should be barred, and that there should be a “very strong presumption” of such influence where a webcaster was eligible for and could opt into the WSA agreement and could fall back on that option in the absence of the direct agreement.³⁶ SoundExchange maintains that its interpretation would not bar the consideration of all marketplace agreements that are in any way influenced by WSA agreements.³⁷ Rather, SoundExchange contends that its interpretation is limited to those agreements that have been “*directly* influenced” by a WSA agreement.³⁸ SoundExchange argues that its test is “straightforward” and “does not involve ‘arbitrary line-drawing’ or ‘second-guessing regarding parties’ intent.”³⁹

SoundExchange next argues that a direct agreement should be barred in its entirety if it refers to a WSA agreement, including to provisions unrelated to rate structure, fees, terms, conditions, or notice and recordkeeping requirements, because “a reference to a WSA agreement in any provision of a license is a reference to a WSA agreement’s ‘terms’ and ‘conditions’ [because] [t]here are no provisions of a license that are ‘unrelated’ to its ‘terms’ and ‘conditions.’”⁴⁰ SoundExchange points to the “broad language” of section 114(f)(5)(C) to claim that it should “apply expansively, effectively encompassing *all* provisions in a WSA

³² *Id.* at 8-12.

³³ *Id.* at 12; *see also* SoundExchange Responsive Br. at 4.

³⁴ SoundExchange Initial Br. at 13.

³⁵ *Id.*; *see also* SoundExchange Responsive Br at 2-3, 9-11.

³⁶ SoundExchange Initial Br. at 14.

³⁷ *Id.* at 2.

³⁸ *Id.* at 2-3, 9-11.

³⁹ *Id.* at 11.

⁴⁰ *Id.* at 15.

agreement.”⁴¹ As SoundExchange puts it, “[i]t is difficult to imagine that a license could make a *reference* to a term or condition of a WSA agreement without incorporating that term or condition or otherwise being directly influenced by that term or condition.”⁴²

SoundExchange vigorously disputes the Webcasters’ interpretation of section 114(f)(5)(C), suggesting that under their view, a party could skirt the statutory prohibition by using its option to join a WSA agreement “as leverage” to negotiate and enter into a slightly modified agreement, thereafter presenting this modified agreement to the CRJs as “competent marketplace evidence.”⁴³ Additionally, addressing the Webcasters’ argument that SoundExchange’s interpretation of section 114(f)(5)(C) conflicts with section 114(f)(2)(B)—which provides that the CRJs may consider certain voluntary license agreements in establishing rates and terms under the willing buyer/willing seller standard⁴⁴—SoundExchange contends that the terms of the WSA agreements are the result of compromise and, as such, are not marketplace evidence, and do not become marketplace evidence by being incorporated into new contracts.⁴⁵ SoundExchange maintains that even if there is tension between the statutory provisions as the Webcasters claim, this still does not permit section 114(f)(5)(C)’s plain text to be ignored.⁴⁶

B. The Webcasters’ Position

The various Webcasters’ arguments largely parallel one another. Each of the Webcasters asserts that section 114(f)(5)(C) applies only to the specific settlement agreements entered into with SoundExchange pursuant to the 2009 WSA, and not to any subsequent direct license agreements between a webcasting service and a sound recording owner.⁴⁷

Looking to the text of the statute, the Webcasters urge that, in contrast to the WSA agreements, the direct agreements were not entered into with SoundExchange as contemplated by the statute.⁴⁸ They point out that they were not entered into during the time period for settlements authorized by the statute, do not bind all copyright owners as provided in the statute, were not published in the Federal Register as required by the statute, and do not provide any immunities from liability to the record companies as provided in the statute.⁴⁹ The Broadcasters and iHeartMedia add that, unlike the WSA agreements, the direct agreements were not motivated by the encouragement of Congress to reach an accommodation, and do not represent compromises motivated by the unique business, economic, and political circumstances of webcasters, copyright owners, or performers, as Congress specifically intended in passing the WSAs.⁵⁰

⁴¹ *Id.* at 16.

⁴² *Id.* at 17.

⁴³ SoundExchange Responsive Br. at 4.

⁴⁴ 17 U.S.C. § 114(f)(2)(B) states, in relevant part: “Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. . . . In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements”

⁴⁵ SoundExchange Responsive Br. at 8-9.

⁴⁶ *Id.*

⁴⁷ Pandora Initial Br. at 1; iHeartMedia Initial Br. at 2-3; Broadcasters Initial Br. at 1.

⁴⁸ Broadcasters Initial Br. at 7; Pandora Initial Br. at 7; iHeartMedia Initial Br. at 8.

⁴⁹ Broadcasters Initial Br. at 7; Pandora Initial Br. at 7-9; iHeartMedia Initial Br. at 8.

⁵⁰ Broadcasters Initial Br. at 11; iHeartMedia Initial Br. at 10-11.

The Webcasters reject SoundExchange’s interpretation of the phrase “taken into account” as precluding the consideration of direct license agreements that may contain terms identical to or influenced by a WSA agreement. They argue that SoundExchange’s interpretation would require disregarding every benchmark agreement proposed by the parties, as all license agreements are to some degree impacted by the prevailing rates and terms set under the statute.⁵¹ Pandora contends that its reading does not render the phrase meaningless as SoundExchange claims, but rather offers a “far more natural and plausible reading” that “simply prevents a party from end-running, or the [CRJs] from indirectly circumventing, the statutory admissibility proscription by invoking or relying upon the terms of a WSA agreement without that agreement having actually been moved into evidence.”⁵² iHeartMedia suggests that the phrase merely means that the CRJs “may not take administrative or judicial notice” of the WSA agreements.⁵³

The Broadcasters add that if the preclusion in subparagraph (C) is applied to direct agreements, “it would force the [CRJs] to engage in arbitrary line-drawing and second-guessing regarding parties’ intent in entering into license agreements in a manner nowhere contemplated or discussed in the statutory prohibition.”⁵⁴ Additionally, iHeartMedia asserts that a recent opinion from a federal district court in the Southern District of New York considering section 114(i)—an allegedly “parallel provision” which contains the same “taken into account” language as section 114(f)(5)(C)—interpreted section 114(i) as precluding “only consideration of the [other] rates themselves” and not “consideration of how these rates influenced the market for musical works.”⁵⁵

Concerning the statute’s legislative history, Pandora argues that Congress passed the WSA in order to encourage SoundExchange to negotiate “less onerous rates” than those announced by the CRJs, and that the bar on subsequent CRJ consideration of the WSA agreements was imposed specifically so that SoundExchange “would not be construed as a ‘willing seller’” in relation to those rates in future CRB proceedings.⁵⁶ Pandora claims that Congress did not intend to limit the CRJs’ ability to consider subsequent marketplace agreements that may be somehow derived from or influenced by a WSA agreement.⁵⁷ iHeartMedia similarly asserts that in enacting the 2002 SWSA, Congress indicated that “it would be ‘in the public interest’ to be ‘clear that *the agreement* will not be admissible as evidence or otherwise taken into account’ in future rate-setting proceedings.”⁵⁸ iHeartMedia argues that this legislative history demonstrates that Congress was only concerned with consideration of the WSA settlement agreements themselves, and not subsequent direct license agreements.⁵⁹

The Webcasters also argue that SoundExchange’s interpretation conflicts with section 114(f)(2)(B), which provides that the CRJs may consider voluntary license agreements to further the objective of establishing rates and terms that most clearly represent those that would have

⁵¹ Pandora Initial Br. at 4, 10; iHeartMedia Responsive Br. at 8; *see also* Pandora Responsive Br. at 1.

⁵² Pandora Responsive Br. at 5.

⁵³ iHeartMedia Responsive Br. at 2, 5-7.

⁵⁴ Broadcasters Initial Br. at 9.

⁵⁵ iHeartMedia Initial Br. at 16 (citing *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 366-67 (S.D.N.Y. 2014)).

⁵⁶ Pandora Initial Br. at 3-4, 14-15.

⁵⁷ *Id.* at 4, 9, 15-16; *see also* iHeartMedia Initial Br. at 9 (“Congress in § 114(f)(5)(C) did not preclude consideration of provisions found *outside* of a Webcaster Settlement Agreement, even where a provision is, for example, copied from or influenced by a provision in an agreement made pursuant to § 114(f)(5)(A).”).

⁵⁸ iHeartMedia Initial Br. at 10 (quoting 2002 SWSA, § 2(1)-(7), 116 Stat. at 2780-81).

⁵⁹ *Id.*

been negotiated in the marketplace between a willing buyer and a willing seller.⁶⁰ As Pandora puts it, that provision “explicitly encourages the [CRJs] to consider marketplace agreements between statutory services and rightsholders.”⁶¹ Pandora argues that section 114(f)(2)(B) “does not qualify that invitation with language excepting agreements that were ‘influenced by’ the statutory rates set forth in . . . WSA agreements, and any such gloss would contravene the settled canon of statutory construction that requires courts to give effect to all provisions of a statute as a ‘harmonious whole.’”⁶² In iHeartMedia’s view, “[a]greements involving the same sellers, the same buyers, and the same statutory services not only are the very agreements Congress authorized the [CRJs] to consider, but also are critical to determining rates and terms that ‘most clearly’ represent what a willing buyer and willing seller in this market would negotiate in the absence of the statutory license.”⁶³ iHeartMedia further asserts that an interpretation that would preclude the CRJs from considering the direct licenses would put section 114(f)(5)(C) into “irreconcilable conflict” with section 114(f)(2)(B), “because every direct license agreement is necessarily negotiated against the background—or in the ‘shadow’—of the statutory regime, which includes the Webcaster Settlement Agreements.”⁶⁴

Pandora additionally asserts that SoundExchange’s position that the statutory licenses and the WSA agreements cast a “shadow” upon the direct license agreements “conflates *admissibility* under Section 114(f)(5)(C) with the *weight* that should be given to the parties’ competing benchmark agreements.”⁶⁵ iHeartMedia agrees, stating “[t]he need to remove the effect of the shadow [cast by the WSA agreements on direct licenses] is part of the analysis under § 114(f)(2)(B), and provides no basis to discard from the evidentiary record—in whole or in part—any voluntarily negotiated direct license between a statutory service and an individual record label.”⁶⁶ Pandora further adds that if, as SoundExchange posits, a party ever attempted to evade section 114(f)(5)(C) by entering into a direct license that copies a WSA agreement for the purpose of admitting it as a benchmark, the CRJs “would be more than capable of issuing rulings assuring a lack of prejudice . . . and assigning such an agreement the evidentiary weight it deserved.”⁶⁷

Finally, the Broadcasters assert that the Register is not authorized to render an opinion on the referred questions, because section 802(f)(1)(B) only allows for the referral of “a novel material question of substantive law,” and the admissibility of evidence is, in the Broadcasters’ view, a purely procedural question.⁶⁸

⁶⁰ 17 U.S.C. § 114(f)(2)(B) states, in relevant part: “Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. . . . In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements”

⁶¹ Pandora Initial Br. at 12.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 13.

⁶⁵ Pandora Responsive Br. at 10 (emphasis in original).

⁶⁶ iHeartMedia Responsive Br. at 12.

⁶⁷ Pandora Responsive Br. at 11.

⁶⁸ Broadcasters Initial Br. at 17; Broadcasters Responsive Br. at 6.

III. Register's Determination

Having considered the relevant statutory language and the input from the parties, the Register determines that it is appropriate to opine on the referred questions, and that the answer to each of the referred questions is “no.” The Register finds that section 114(f)(5)(C) prohibits consideration of the provisions of the WSA agreements by the CRJs but does not bar the CRJs from considering directly negotiated license agreements that incorporate or otherwise reflect provisions in a WSA agreement. The Register further concludes, however, that the statutory bar does not preclude SoundExchange from introducing evidence or argument concerning the existence of the WSA agreements themselves, including their general influence or impact on the negotiation of the direct agreements, provided that individual provisions of the WSA are not introduced in the proceeding.

A. The Questions Were Properly Referred

Under 17 U.S.C. § 802(f)(1)(B), the CRJs are required to refer to the Register “novel material question[s] of substantive law.”⁶⁹ The Broadcasters raise a threshold concern that the referred questions were improperly referred by the CRJs because they “relat[e] primarily to the admissibility of evidence,” and are therefore procedural in nature.⁷⁰

The Register finds the questions to be substantive rather than procedural, and that they were therefore properly referred by the CRJs. The referred questions require the Register to interpret the scope of section 114(f)(5)(C)'s prohibition, including what it means to take various types of agreements and their provisions “into account” for purposes of the ratesetting proceeding.⁷¹ This goes well beyond a mere matter of procedure, as the interpretation of this statutory provision speaks to the benchmark evidence that the CRJs may appropriately consider, a core concern of the ratesetting process. The referred questions are thus readily distinguishable from simple issues of admissibility arising under the CRJs' evidence-related rules, such as whether proffered evidence is properly authenticated or whether an application of the hearsay rule is appropriate.⁷² The questions were thus properly referred by the CRJs.

B. Analysis of the Referred Questions

As noted above, the Register concludes that section 114(f)(5)(C) prohibits consideration of provisions of settlement agreements entered into pursuant to the 2009 WSA and does not bar the CRJs from considering direct license agreements containing provisions that are copied from, are substantively identical to, have been influenced by, or refer to, the provisions of a WSA agreement. This result is compelled not only by the language of section 114(f)(5)(C), but by the legislative intent behind that statute as well.

⁶⁹ 17 U.S.C. § 802(f)(1)(B).

⁷⁰ *Id.*; see also Broadcasters Responsive Br. at 6 (comparing section 802(f)(1)(B) with section 801(c), which states that “[t]he Copyright Royalty Judges may make any necessary procedural or evidentiary rulings”).

⁷¹ Referral Order at 1-3.

⁷² See 37 C.F.R. § 351.10(a).

1. Section 114(f)(5)(C) Does Not Bar Consideration of Direct License Agreements

A reading of the entirety of section 114(f)(5) makes clear that the material excluded under subparagraph (C) is limited to the provisions of actual settlement agreements entered into pursuant to the WSA. Subparagraph (C) bars consideration of “subparagraph (A)” and “any provisions of any agreement entered into pursuant to subparagraph (A).”⁷³ Subparagraph (A), in turn, permits SoundExchange and webcasters to enter into the WSA agreements.⁷⁴ Subparagraph (B) requires that any such agreement will “be published in the Federal Register” and that “the terms of such agreement shall be available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.”⁷⁵ Subparagraph (F) adds that “[t]he authority to make settlements pursuant to subparagraph (A) shall expire at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009.”⁷⁶

Accordingly, the “provisions of . . . agreement[s]” barred under section 114(f)(5)(C) must be contained within agreements: (i) between SoundExchange and webcasters; (ii) that are binding on all copyright owners; (iii) that are published in the Federal Register; (iv) that are available as an option to any eligible webcasters; and (v) that were entered into on or before July 30, 2009.⁷⁷ Based only on the requirement to publish in the Federal Register, the only agreements meeting these criteria are the WSA agreements themselves. A direct license agreement’s provisions cannot be the subject of the statute’s prohibition because the direct agreement containing them cannot satisfy these criteria—such a direct agreement was not “entered into pursuant to subparagraph (A).” This is true regardless of whether the direct license’s provisions are copied from or influenced by a WSA agreement’s provisions.

Additionally, section 114(f)(5)(C) includes an explicit statement of Congress’s intent concerning the evidentiary bar:

It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, *included in such agreements* shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).⁷⁸

The reference to “such agreements” subparagraph (C) clearly refers to the WSA agreements Congress was authorizing under subparagraph (A). The provisions that are barred from consideration are thus those “included” in WSA agreements—not other agreements.

This interpretation is confirmed by relevant legislative history as well. When Congress enacted the 2002 SWSA, which first contained this statutory language, it explained that it

⁷³ *Id.* (emphasis added)

⁷⁴ 17 U.S.C. § 114(f)(5)(A). Note, subparagraph (A) refers to the “receiving agent,” which is identified as SoundExchange by 37 C.F.R. § 261.2 and 261.4(b).

⁷⁵ 17 U.S.C. § 114(f)(5)(B).

⁷⁶ 17 U.S.C. § 114(f)(5)(F).

⁷⁷ *See* 17 U.S.C. § 114(f)(5). The 2009 WSA was enacted on June 30, 2009. Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009). Thirty days thereafter was July 30, 2009.

⁷⁸ 17 U.S.C. § 114(f)(5)(C) (emphasis added).

intended to make “clear that *the agreement* will not be admissible as evidence or otherwise taken into account.”⁷⁹ In referencing “the agreement,” Congress was clearly referring to a specific agreement—namely, the alternative agreement with SoundExchange it was authorizing under that legislation.⁸⁰ There was no suggestion that Congress was referencing other agreements as well.

The Register further observes that section 114(f)(5)(C) is addressed to individual provisions contained in the WSA agreements, rather than the agreements as a whole. Section 114(f)(5)(C) provides that no “provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein,” shall be taken into consideration.⁸¹ It is apparent from both this language enumerating specific examples of rates and terms, and the language setting forth Congress’ intent quoted above, that Congress meant to exclude from consideration in future proceedings the particular rates and terms “included” in a WSA agreement—rather than the existence or fact of the agreement itself. Had Congress intended to bar any consideration of the WSA agreements whatsoever, it could have easily have said so. But it did not. Instead, Congress made clear it was referring to the individual “provisions of”—*i.e.*, the rates and terms contained in—the WSA agreements.

Section 114(f)(5)(C) also provides that “subparagraph (A)” itself shall not be admissible as evidence or otherwise taken into account.⁸² Based on a plain reading of the statute, the Register determines that this simply means that the language of subparagraph (A) cannot—either in whole or in part—be introduced into evidence or otherwise considered in a CRJ proceeding. Accordingly, the reference to subparagraph (A) in section 114(f)(5)(C) does not preclude consideration of the existence or effects of the WSAs entered into as a result of subparagraph (A) so long as the language of subparagraph (A) is not introduced. Again, had Congress wished to articulate a broader proscription, it could have done so. The Register will not read section 114(f)(5)(C) more broadly than it is written.

Contrary to SoundExchange’s assertions, the phrase “taken into account” in section 114(f)(5)(C) does not alter the Register’s reading of the statutory language. SoundExchange’s interpretation—that consideration of the terms of a direct license agreement that have been copied from or directly influenced by the terms of a WSA agreement would impermissibly “take into account” the terms of the WSA agreement—is overreaching. The Register agrees with the Webcasters that such a reading could effectively exclude all potentially probative benchmark agreements from consideration because virtually every voluntary agreement could be said to be influenced to some extent by the background statutory scheme—which includes the WSA agreements.⁸³ Indeed, this is the nature of a compulsory licensing regime in general; the existence of a statutory “fallback” can influence the direct agreements that are entered into in its

⁷⁹ Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 2(7), 116 Stat. at 2781 (2002) (emphasis added).

⁸⁰ *See id.*

⁸¹ 17 U.S.C. § 114(f)(5)(C).

⁸² *Id.*

⁸³ *See, e.g.*, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054, 23065 n.32 (Apr. 17, 2013) (noting that although the CRJs “question whether any agreements regarding sound recording rights could be purely market-based given the current statutory framework,” they “do not have the luxury of ignoring record evidence of the contemporaneous results of arm’s length negotiations between the same buyers and sellers and rights involved in the market for which the Judges are charged to determine a reasonable rate.”).

shadow. While the Register is sympathetic to SoundExchange’s argument that the direct agreements have been shaped by the availability of the Pureplay Agreement as an alternative option for licensees, the same would be true of direct agreements entered into with CRJ-determined rates as a fallback.

The far more plausible reading of the “otherwise take into account” language, which the Register determines is what Congress intended, is simply that the CRJs are not only barred from admitting WSA agreement terms into evidence, but that they also cannot consider the provisions of WSA agreements even if not offered as evidence. For example, the broader “taken into account” language would prohibit the CRJs from taking notice of provisions of the WSA agreements that have been published in the Federal Register, even if not introduced into evidence.⁸⁴ Thus the phrase is not superfluous, as SoundExchange suggests.

To interpret section 114(f)(5)(C) as preventing the CRJs from taking direct license agreements into consideration would seemingly undermine Congress’ directive in section 114(f)(2)(B), which encourages the CRJs to “consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements.”⁸⁵ Direct agreements between sound recording owners and webcasters for uses covered by the section 112 and 114 licenses would appear to be very the type of evidence that section 114(f)(2)(B) Congress had in mind. Had Congress intended the exclusionary rule to extend to directly negotiated agreements as SoundExchange suggests, it presumably would also have acted to reconcile section 114(f)(5)(C) with section 114(f)(2)(B).

Finally, the Register agrees with the Webcasters that as a practical matter, it could be very difficult to draw lines between negotiated agreements that were “directly influenced” by WSA agreements and those that were not. SoundExchange’s suggested rule would require the CRJs to sort admissible from inadmissible agreements based on amorphous criteria, which would be a challenging task to say the least.

2. Section 114(f)(5)(C) Does Not Preclude Consideration of the General Effect of WSA Agreements on Direct License Agreements

Although the Register finds that the CRJs may take into consideration direct licenses that incorporate or otherwise reflect WSA agreement terms, it is also the case that they are entitled to weigh the value of any such evidence in light of the overall circumstances of the marketplace, including any general impact of the WSA agreements.

As discussed above, in rate determinations, the CRJs are tasked with replicating a “hypothetical market” where “the webcasting statutory license [does] not exist.”⁸⁶ Among the tools at the CRJs’ disposal to accomplish this task are “the rates and terms for comparable types

⁸⁴ See 5 U.S.C. § 556(e) (acknowledging that “an agency decision [can] rest[] on official notice of a material fact not appearing in the evidence in the record”); 17 U.S.C. § 803(b)(6)(C)(xi) (noting that “[n]o evidence, including exhibits, may be submitted in the written direct statement or written rebuttal statement of a participant without a sponsoring witness, *except where the Copyright Royalty Judges have taken official notice*”) (emphasis added).

⁸⁵ See 17 U.S.C. § 114(f)(2)(B). The Register notes that this section does not restrict this consideration to only those agreements that do not contain terms that are copied verbatim from, are substantively identical to, have been influenced by, or refer to terms of a WSA settlement agreement.

⁸⁶ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 131 (D.C. Cir. 2015) (internal alterations omitted).

of digital audio transmission services and comparable circumstances under voluntary license agreements.”⁸⁷ As Webcasters seem to acknowledge, when considering a voluntary agreement, the CRJs may consider whether an agreement was made in the “shadow” of a statutory rate or WSA agreement in evaluating its worth as a benchmark.⁸⁸ As the U.S. Court of Appeals for the D.C. Circuit has stressed, “[i]t is generally within the discretion of the Judges to assess evidence of an agreement’s comparability and to decide whether to look to its rates and terms for guidance.”⁸⁹ This “broad discretion” includes the ability to “discount . . . benchmarks” offered by the parties.⁹⁰ Although section 114(f)(5)(C) may preclude the consideration or comparison of individual rates and terms contained in the WSA agreements, it does not prevent the CRJs from considering the agreements at all.

Section 114(f)(5)(C) bars the CRJs from considering the terms of agreements negotiated under the 2009 WSA. Nowhere does the statute suggest that the mere existence of such agreements, or their general effect on the marketplace or particular negotiations, may not be considered. As noted above, the statutory language is specific in limiting the scope of the prohibition to the “provisions of any [WSA] agreement.”⁹¹ Section 114(f)(5)(C) provides examples of the types of provisions Congress had in mind: “rate structure, fees, terms, conditions, or notice and recordkeeping requirements.”⁹² This list, which appears twice in subparagraph (C),⁹³ makes clear that the ban applies only to a WSA agreement’s specific terms, as embodied in particular provisions.

A recent case from federal district court in the Southern District of New York speaks to this issue.⁹⁴ As part of a rate determination for the performance of musical compositions by Pandora in a ratesetting proceeding conducted under a federal consent decree, the court discussed section 114(i) of the Copyright Act, which contains the same “taken into account” language as section 114(f)(5)(C).⁹⁵ Section 114(i) provides relevant part:

License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.⁹⁶

During the course of the federal court proceeding, the licensing organization, ASCAP, the licensor, proposed a variety of benchmarks for the court to consider, including a series of licensing agreements negotiated directly between copyright owners and licensees outside of the consent decree process.⁹⁷ At trial, the parties disputed the extent to which the court could consider evidence relating to the rate for the public performance of sound recordings (as opposed

⁸⁷ 17 U.S.C. § 114(f)(2)(B).

⁸⁸ See Pandora Responsive Br. at 10-11; iHeartMedia Responsive Br. at 12.

⁸⁹ *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 759 (D.C. Cir. 2009).

⁹⁰ *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1009 (D.C. Cir. 2014).

⁹¹ See 17 U.S.C. § 114(f)(5)(C) (emphasis added).

⁹² See *id.*

⁹³ 17 U.S.C. § 114(f)(5)(C).

⁹⁴ See *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014).

⁹⁵ See *id.* at 366-67.

⁹⁶ 17 U.S.C. § 114(i).

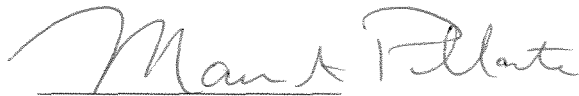
⁹⁷ *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 320.

to musical works).⁹⁸ While the presiding judge noted that she could “not take the [sound recording rate] into account in determining the fair market rate for a public performance license [for musical compositions],” she went on to state that “one observation may be safely made”:⁹⁹

I don’t understand that that testimony about motive in negotiations and turmoil within ASCAP over these different rates [for sound recordings] would be inadmissible pursuant to Section 114. Indeed, I think it would be difficult to deal with the facts on the ground as they exist and to set a rate that is reasonable in the context of the facts . . . without knowing about that.¹⁰⁰

This commentary in the consent decree case further supports the Register’s determination that evidence concerning the general impact and influence of the WSA agreements—and the statutory licensing regime that gave rise to them—may appropriately be considered by the CRJs in evaluating the probative value of the direct agreements.

September 18, 2015



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⁹⁸ Transcript of Trial at 729:18-733:1, *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014) (Nos. 12 Civ. 8035, 41 Civ. 1395).

⁹⁹ *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 366-67.

¹⁰⁰ Transcript of Trial at 731:1-7, *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014) (Nos. 12 Civ. 8035, 41 Civ. 1395).