UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re **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)**

ORDER REFERRING NOVEL QUESTION OF LAW AND SETTING BRIEFING SCHEDULE

In its pretrial Objections to Testimony and Exhibits, filed on April 20, 2015,[1] and its Proposed Conclusions of Law, filed on June 19, 2015, SoundExchange, Inc. (SoundExchange) argued that section 114(f)(5)(C) of the Copyright Act (Act) bars the Copyright Royalty Judges (Judges) from considering certain direct license agreements offered by the licensee services as benchmarks or as corroborative evidence. According to SoundExchange, the direct license agreements at issue allegedly incorporate substantive provisions of, or are otherwise influenced by, the "Pureplay Settlement Agreement"—a settlement agreement reached under the terms of the Webcaster Settlement Act of 2009 (WSA).

Discussion

Section 114(f)(5)(C) of the Act states that none of the provisions of any settlement agreement between the receiving agent (SoundExchange) and a webcaster reached under the WSA

> 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 ….

The foregoing provision "shall not apply" if the parties to the settlement agreement have "expressly authorize[d] the submission of the agreement in a proceeding under this subsection." *Id.* The parties to the Pureplay Settlement Agreement have not expressly authorized such use.

No party to the instant proceeding has offered as evidence a WSA settlement agreement. However, among the numerous other license agreements that parties have offered as benchmarks

[1] The Judges deferred ruling on all parties' pretrial evidentiary objections until trial or, as in this instance, after the trial.

or corroborative evidence, certain of them allegedly include provisions that mirror terms contained in the Pureplay Settlement Agreement. Others allegedly include provisions that, while not identical to provisions in the Pureplay Settlement Agreement, were influenced by its terms. SoundExchange argues that, if the Judges were to consider any of these agreements, they would be "otherwise tak[ing] … into account" the provisions of the Pureplay Settlement Agreement. 17 U.S.C. § 114(f)(5)(C); *see* SoundExchange Proposed Conclusions of Law ¶ 48.

In opposition, Pandora Media, Inc. (Pandora) argues essentially that it does not seek to "take account of" a Pureplay Settlement Agreement, but rather only "note[s] that Pandora operates under that agreement," and that "[o]ne need not know the Pureplay rates (or even that the Pureplay agreement exists) to read, understand, and apply the [benchmark] Agreement." Pandora Reply to SoundExchange's Proposed Conclusions of Law and Findings of Fact ¶ 45. iHeartMedia, Inc. (iHeart) also rejects SoundExchange's arguments as contrary to the statute. *See generally* iHeart's Response to SoundExchange's Conclusions of Law, at 8-10.

Section 802(f)(1)(B) of the Act requires the Judges to request a decision of the Register of Copyrights (Register) to resolve any "novel material question of substantive law concerning an interpretation of those provisions of [the Act] that are the subject of the proceeding …." The Act defines a "novel question of law" as "a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a)." 17 U.S.C. § 802(f)(1)(B)(ii); *see also* 37 C.F.R. § 354.2(a).

The issue raised by SoundExchange has not been determined in any prior decision, determination, or ruling. Accordingly, the Judges conclude that it is a "novel material question of substantive law" necessitating a referral to the Register.

Referral

Based upon the foregoing, the Judges refer the following novel material questions of law to the Register:

1. Does section 114(f)(5)(C) of the 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 WSA settlement agreement?

2. Does section 114(f)(5)(C) of the 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 WSA settlement agreement?

3. Does section 114(f)(5)(C) of the Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that agreement includes terms that the Judges conclude have been *influenced* by terms of a WSA settlement agreement?

4. Does section 114(f)(5)(C) of the Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if the agreement *refers to* a 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 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 WSA settlement agreement?

In resolving the foregoing questions, the Register should assume that the WSA settlement agreement referred to does not include a provision expressly authorizing submission of the agreement in a future rate proceeding and is therefore inadmissible in the instant proceeding.

Briefing Schedule

In accordance with 37 C.F.R. §§ 354.2(b) and 354.1(b)(1), the Judges establish the following briefing schedule

Initial briefs filed with the Judges: **August 7, 2015**

Responsive briefs filed with the Judges: **August 14, 2015**

The Judges will not allow or accept any reply briefs, unless they direct otherwise in a future Order.

The Judges remind the participants that this referral is one of a novel question of *law*, not of *facts*. Briefs should not include documents, affidavits, and other factual materials, but should include citations to pertinent legal authorities.

SO ORDERED.

Jesse M. Feder
Copyright Royalty Judge

DATED: July 29, 2015