Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

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)**

RESPONSIVE BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE REGARDING THE COPYRIGHT ROYALTY JUDGES' ORDER REFERRING NOVEL QUESTION OF LAW TO THE REGISTER OF COPYRIGHTS

SoundExchange has repeated its breathtakingly broad construction of the prohibition set forth in section 114(f)(5)(C) even though, as NAB and the NRBNMLC have demonstrated, such a reading is contrary to the statute, impractical, and fundamentally unfair in this proceeding. SoundExchange would foreclose the Judges from considering any direct license agreement entered into by a statutory webcasting service because such licenses necessarily are "influenced by the terms of a WSA [Webcaster Settlement Act] agreement."[1] In advancing this construction, SoundExchange would have the Judges disregard highly probative evidence – direct agreements, not entered into pursuant to any WSA agreement, between the very buyers and sellers at issue in the relevant market. The construction also would require the Judges to ignore the very type of agreements that Congress expressly invited the Judges to consider – *i.e.*, agreements covering statutory webcasting. *See* 17 U.S.C. § 114(f)(2) (providing that "[i]n establishing such rates and

[1] *See* SoundExchange, Inc.'s Initial Br. Regarding Novel Question of Law Referred to the Register 14 (Aug. 7, 2015) ("SoundExchange Br."); *id.* at 13 ("[A]ny agreement in the webcasting space may be said to be influenced by existing statutory rates as well as rates that apply under some WSA agreements.").

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 described in subparagraph (A)" of section 114(f)(2), covering statutory webcasting). Such a construction may serve SoundExchange's efforts to eradicate probative evidence from the Web IV record, but it is not what the statute requires or Congress intended.

SoundExchange's position is based on two fundamental misconstructions of the statutory text. *First,* SoundExchange attempts to divorce the "provisions of" a WSA agreement from the very agreement comprising those provisions, claiming that "by its express terms, the statutory prohibition . . . is not limited to the WSA agreements themselves." *See id.* at 1. But the prohibition is precisely so limited. The statute sets forth the specifically delineated subject of the prohibition – "subparagraph (A)" (the WSA provision) and "any provisions of any agreement entered into pursuant to subparagraph (A)" – in other words, provisions of the WSA agreements themselves and not some other agreement. *See* 17 U.S.C. § 114(f)(5)(C) (emphasis added).

The "provisions of" a WSA agreement are the provisions that appear in that specific WSA agreement. Provisions that appear in a different operative agreement entered into by different parties under different circumstances at a different time from the WSA agreement itself – even if those provisions are copied verbatim from a WSA agreement – are not "provisions of" the WSA agreement but provisions of the different agreement.

Section 114(f)(5)(C) reinforces this conclusion. It specifically describes the "provisions of" a nonprecedential WSA agreement as "including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein" – *i.e.*, the specific provisions set forth in the WSA agreement itself. *Id.* (emphasis added). Later in that section, it again describes those provisions as "any royalty rates, rate structure, definitions, terms, conditions, or notice and

recordkeeping requirements, included in such agreements." *Id.* (emphasis added). And it makes clear that those provisions grew out of the "unique business, economic and political circumstances of webcasters, copyright owners, and performers" that existed at that time. *Id.*

Nothing in the statute suggests that provisions negotiated at a specific time, as part of a WSA agreement, take on a special quality such that substantively identical terms could never be agreed to by willing buyers and willing sellers in a later, different, agreement. Rather, the statutory prohibition extends only to the provisions that were negotiated at a unique business, economic, and political moment in time, as part of a WSA agreement itself, not provisions that were agreed to at a later time, under different circumstances, and by different parties. In fact, the language of the publishing notice of the Pureplay Settlement Agreement that SoundExchange itself cites in paragraph 43 of its Proposed Conclusions of Law makes this very point:

> Unless otherwise agreed to by the parties, the rates and terms set forth in the agreement apply only to the time periods specified in the agreement and have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords.

Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34796, 34796 (July 17, 2009) (quoted in Proposed Conclusions of Law of SoundExchange, Inc. ¶ 43 (June 19, 2015)) (emphasis added). In other words, if parties agree to particular provisions, the fact that those provisions are similar or even identical to provisions that also appear in a nonprecedential WSA agreement cannot be used to bar consideration of the direct license agreements negotiated at another time.

If Congress had intended to bar the Copyright Royalty Judges from considering provisions of a license agreement between a service and a record company that were copied from or otherwise influenced by provisions of a WSA agreement, it easily could have done so by barring the Judges from taking into account "provisions of a license agreement that were copied

from, based on, or otherwise influenced by" provisions of a WSA agreement. That is not the language it wrote.

An example illustrates the absurdity of SoundExchange's expansive contrary interpretation. The Pureplay WSA agreement provides that:

> Commercial Webcasters must make monthly payments once its royalty obligation exceeds the minimum fee it has paid, and provides statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made."

Id. at 34800. Under SoundExchange's interpretation, if a license agreement between a service and a record company included a similar 45-day payment deadline provision that was influenced by the Pureplay WSA agreement provision but included no other terms from that agreement, the entire license agreement would be inadmissible. *See* SoundExchange Br. at 8 ("§ 114(f)(5)(C) would bar the Judges from considering the copied terms as well as the <u>other</u>, non-copied terms."). Congress simply did not write language with this vast of a reach. Its choice to limit the statutory prohibition to "provisions of" a nonprecedential WSA agreement itself, rather than provisions of a different agreement, should be honored.

Second, SoundExchange attempts to expand the subject of the prohibition (provisions of the WSA agreements themselves) by an untenable reading of the verb phrase "otherwise taken into account." It argues that its construction is required to "give[] effect" to the phrase. SoundExchange Br. at 3. But that argument is transparently false. The phrase more properly is included in the statute to make clear that the Judges may not consider WSA agreements on their own even if a party does not seek to admit the agreement into evidence. Thus, even if no party tries to admit a non-precedential WSA agreement into evidence, the Judges may not consider those WSA agreements or their terms to be precedent or to provide a guidepost for their decision.

For example, the Judges would not be able to consider a nonprecedential WSA agreement itself as a rate-setting guidepost in the way that they considered the *SDARS I* rates as a guidepost to setting rates in *SDARS II*. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services: Final Rule and Order*, 78 Fed. Reg. 23054, 23066 (Apr. 17, 2013) ("Lastly, the Judges consider the prevailing statutory rate of 8%, which the Judges adjusted down from a 13% rate in *SDARS-I* based on the fourth Section 801(b) factor."). Similarly, an expert could not base an opinion on the WSA agreement even if no party tries to admit the WSA agreement into evidence.

Nothing in the statute, however, alters the subject of the prohibition – the WSA agreements themselves. If a new agreement is entered into by a record company and a webcaster, or even by SoundExchange and a webcaster, there is no prohibition on the admission or consideration of that agreement.

SoundExchange's brief also confirms the argument in NAB's and the NRBNMLC's Initial Brief that SoundExchange itself has done exactly what it now claims may not be done. SoundExchange relied for its own benchmarks on agreements that referenced the Pureplay WSA agreement and on agreements that were directly influenced by the Pureplay WSA agreement. *See* Initial Br. of NAB and the NRBNMLC in Resp. to the Copyright Royalty Judges' Order Referring Novel Question of Law to the Register of Copyrights at 5-6, 15 (Aug. 7, 2015) ("NAB/NRBNMLC Br."). SoundExchange asserts that the Judges may not take account of such agreements. See SoundExchange Br. at 15 ("[I]f the terms have been directly influenced by the terms of a WSA settlement agreement, consideration of the directly influenced terms, along with other provisions in the license, would 'take into account' and consider the terms of the WSA

settlement agreement, in violation of § 114(f)(5)(C).”). Under SoundExchange’s view, the Judges would be prohibited from relying on SoundExchange’s own benchmarks.

Moreover, as NAB and the NRBNMLC demonstrated in their Initial Brief, SoundExchange’s reliance on the Pureplay WSA agreement in ways that it now claims would be prohibited by section 114(f)(5)(C) constitutes express authorization of such use. NAB/NRBNMLC Br. at 15. SoundExchange admits that parties may use, and the Judges may consider, WSA agreements that SoundExchange and a webcaster authorize to be used. *See* SoundExchange Br. at 4. By relying on the Pureplay WSA agreement rate itself and by including license agreements that are influenced by the Pureplay WSA agreement in its benchmark analysis, SoundExchange has expressly authorized use of the Pureplay WSA agreement, rendering its arguments that prompted this referral moot.

Finally, SoundExchange makes no mention of the statutory distinction between “a novel material question of substantive law,” which the Judges are required to refer to the Register, and “any necessary procedural or evidentiary rulings,” which the Judges are expressly authorized to make on their own, without referral to the Register. *Compare* 17 U.S.C. § 802(f)(1)(B) (“In 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.”) *with id.* § 801(c) “The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter . . . .”). The extent to which private agreements between a service and a record company are admissible is precisely the type of “evidentiary ruling[]” that is appropriate for the Judges themselves to decide on the basis of the record before them. *See* NAB/NRBNMLC Br. Part V.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the NAB/NRBNMLC Initial Brief, the Register should decline the Referral Order and allow the Judges to answer the questions presented. If the Register does answer the questions, she should determine that the answer to each of the questions referred to by the Copyright Royalty Judges is that section 114(f)(5)(C) does not bar the Judges from considering all or any part of license agreements between a webcaster and a record company, even if such agreements: (i) include terms that are copied verbatim from a WSA settlement agreement; (ii) include terms that are substantively identical to terms of a WSA settlement agreement; (iii) include terms that the Judges conclude have been influenced by terms of a WSA settlement agreement; or (iv) refer to a WSA settlement agreement.

Respectfully submitted,

/s/ Bruce G. Joseph
Bruce G. Joseph (D.C. Bar No. 338236)
Karyn K. Ablin (D.C. Bar No. 454473)
WILEY REIN LLP
1776 K St. NW
Washington, DC 20006
Phone: 202-719-7000
Facsimile: 202-719-7049
bjoseph@wileyrein.com
kablin@wileyrein.com

Counsel for the National Association of Broadcasters and the National Religious Broadcasters Noncommercial Music License Committee

August 14, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

Cynthia Greer Sirius XM Radio, Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com P: 202-380-1476 F: 202-380-4592 *Sirius XM Radio Inc.*	Patrick Donnelly Sirius XM Radio, Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com P: 212-584-5100 F: 212-584-5200 *Sirius XM Radio Inc.*
Paul Fakler Martin Cunniff Jackson Toof Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Martin.Cunniff@arentfox.com Jackson.Toof@arentfox.com *Counsel for Sirius XM Radio Inc.*	Gary Greenstein Wilson Sonsini Goodrich & Rosati 1700 K Street, NW, 5th Floor Washington, DC 20006 ggreenstein@wsgr.com P: 202-973-8849 F: 202-973-8899 *Counsel for Pandora Media, Inc.*
Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com P: 510-858-3049 F: 510-451-4286 *Pandora Media, Inc.*	R. Bruce Rich Todd Larson Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153 r.bruce.rich@weil.com todd.larson@weil.com P: 212-310-8170 F: 212-310-8007 *Counsel for Pandora Media, Inc.*

C. Colin Rushing Bradley Prendergast SoundExchange, Inc. 733 10th Street, NW, 10th Floor Washington, DC 20001 crushing@soundexchange.com bprendergast@soundexchange.com P: 202-640-5858 F: 202-640-5883 *SoundExchange*	Glenn Pomerantz Kelly Klaus Anjan Choudhury Melinda LeMoine Munger, Tolles & Olson LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 Glenn.Pomerantz@mto.com Kelly.Klaus@mto.com Anjan.Choudhury@mto.com Melinda.LeMoine@mto.com P: 213-683-9100 F: 213-687-3702 *Counsel for SoundExchange*
Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com P: 202-642-2849 *Counsel for College Broadcasters Inc.*	David Golden Constantine Cannon LLP 1301 K Street, NW, Suite 13000N Washington, DC 20004 dgolden@constantinecannon.com P: 202-204-3500 F: 202-204-3501 *Counsel for College Broadcasters Inc.*
William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 P: 203-966-4770 Malone@ieee.org *Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.*	Jeffrey Jarmuth Law Offices of Jeffrey Jarmuth 34 E Elm St Chicago, IL 60611-1016 jeff.jarmuth@jarmuthlawoffices.com P: 312-335-9933 F: 312-822-1010 *Counsel for Accuradio*
Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Base Rd. San Antonio, TX 78209 DonnaSchneider@iheartmedia.com P: 210-832-3468 F: 210-832-3127 *Counsel for iHeartMedia, Inc.*	George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com P: 615-242-9999 *GEO Music Group*

Kenneth Steinthal Joseph Wetzel King & Spaulding LLP 101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com P: 415-318-1200 F: 415-318-1300 *Counsel for the Corporation for Public Broadcasting*	Mark Hansen John Thorne Evan Leo Kevin Miller Scott Angstreich Igor Helman Leslie Pope Matthew Huppert Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, NW, Suite 400 Washington, DC 20036 mhansen@khhte.com jthorne@khhte.com eleo@khhte.com kmiller@khhte.com chall@khhte.com sangstreich@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com P: 202-326-7900 F: 202-326-7999 *Counsel for iHeartmedia, Inc.*
Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com P: 916-251-1600 F: 916-251-1731 *Educational Media Foundation*	David Oxenford Wilkinson Barker Knauer, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com P: 202-383-3337 F: 202-783-5851 *Counsel for National Association of Broadcasters and Educational Media Foundation*
Frederick Kass Intercollegiate Broadcasting System, Inc. 367 Windsor Highway New Windsor, NY 12553-7900 ibs@ibsradio.org ibshq@aol.com P: 845-565-0003 F: 845-565-7446 *Intercollegiate Broadcasting System, Inc.*	Gregory A. Lewis National Public Radio, Inc. 1111 North Capital Street, NE Washington, DC 20002 glewis@npr.org P: 202-513-2050 F: 202-513-3021 *Counsel for National Public Radio, Inc. (NPR)*

Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com P: 212-872-7483 F: 212-872-1002 *Counsel for Pandora Media, Inc.*	Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com P: 312-284-2440 F: 312-284-2450 *AccuRadio, LLC*
Ethan Davis King & Spalding 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006 edavis@kslaw.com Tel: 202-626-5400 Fax: 202-626-3737 *Counsel for National Public Radio, Inc.*	

/s/ Wesley E. Weeks
Wesley E. Weeks