PUBLIC VERSION

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

PANDORA MEDIA, INC.'S RESPONSIVE BRIEF IN CONNECTION WITH ORDER REFERRING NOVEL QUESTIONS OF LAW

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INTRODUCTION

SoundExchange's response to the five Referred Questions reflects a fundamentally mistaken statutory interpretation of Section 114(f)(5)(C) – one which, uniformly applied (which SoundExchange assiduously avoids proposing), effectively would bar the Copyright Royalty Judges from considering ***any*** direct license agreement entered into by statutory and non-statutory digital audio services alike during the time period encompassed by the WSA agreements. In application here, that would result in a record virtually barren of potentially probative benchmarks. This construction of the law would also fly in the face of Section 114(f)(2)(B)'s unqualified invitation to the Judges to consider the rates and terms voluntarily negotiated by statutory services when undertaking rate determinations.

SoundExchange makes only a half-hearted attempt to defend its interpretation of Section 114(f)(5)(C) under the actual language of that provision. As Pandora and the other Services have explained, the plain language merely provides that certain agreements, including any terms contained therein, executed in 2009 between SoundExchange and particular webcasters – *and only those agreements* – cannot (without mutual consent) be "admissible" or "otherwise taken into account" for purposes of rate-setting before the CRB.[1] Because the statutory language undermines its position, SoundExchange pivots to an attempted rewriting of it, first by attaching outsize significance to Section 114(f)(5)(C)'s proscription that WSA agreements cannot be "otherwise taken into account" in rate-setting proceedings, and then by inventing out of whole cloth a test that would bar any agreement that is, by SoundExchange's lights, "directly influenced" by a WSA agreement. SoundExchange proceeds to interpret its invented test in a

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[1] *See* Pandora Initial Br. at 1-3, 7; NAB/NRBNMLC Initial Br. at 1-4, 6-7; iHeartMedia Initial Br. at 2, 8-9.

fashion that just happens to exclude from consideration solely those direct licenses entered into by statutory services like Pandora and not its own benchmarks.

SoundExchange is not saved by its resort to legislative history. As all parties agree, Congress passed the WSAs – first in 2002, and then in 2008 and 2009 – to address "unique business, economic and political circumstances" confronting the webcasting industry in the aftermath of CRB rate determinations that were widely regarded as threatening the viability of that industry. The limited opportunity afforded the parties to confer non-precedential status upon the resultant settlement agreements (tactically and selectively used to advantage by SoundExchange in particular) is a far cry from an authorization to SoundExchange to exercise, in effect, a pocket veto over the admission of subsequent bilateral agreements voluntarily entered into years later between statutory services and individual record companies, let alone to do so on the non-statutory and hopelessly subjective basis that such later agreements were somehow "directly influenced" by a non-precedential WSA agreement. Nothing in SoundExchange's discussion of the legislative history so much as hints at so sweeping a Congressional intention.

So transparently jerry-rigged and unprincipled is SoundExchange's legal argument that SoundExchange does not even apply it to the full range of direct licenses entered into by statutory services that are in evidence. Notwithstanding that SoundExchange advocates for a legal interpretation that would bar consideration of *all* voluntary marketplace agreements involving statutory webcasters, *see* SX Initial Br. at 10, SoundExchange fails to explain why its arguments precipitating this referral seek to strip from the record evidence solely one such set of direct licenses— those entered into by the Merlin record-company members and Pandora (the "Merlin Agreement"). The answer lies in the powerful record facts and economic testimony demonstrating that the negotiation of, and rates reflected in, the Merlin Agreement

paradigmatically reflect the rates that willing buyers would pay willing sellers in a workably competitive market for the rights encompassed by the Section 112/114 statutory licenses. Unable to respond to that record on the merits, SoundExchange seeks to gut the entire fabric of these proceedings with a meritless and untimely evidentiary objection.

ARGUMENT

I. SOUNDEXCHANGE'S STAUTORY INTERPRETATION CONTRAVENES BOTH THE PLAIN TEXT OF SECTION 114(f)(5)(C) AND ITS LEGISLATIVE HISTORY

A. SoundExchange's Argument Fails Under the Plain Text of Section 114(F)(5)(C)

As Pandora has already set forth, the answers to the Referred Questions should begin and end with the plain language of Section 114(f)(5)(C), which bars the Judges from considering a discrete set of settlement agreements entered into a half-dozen years ago between SoundExchange and certain webcasters as a "compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers." *See* 17 U.S.C. § 114(f)(5)(C); *see also* Pandora Initial Br. at 6-13. Despite the straightforward statutory language making plain that the presumptive evidentiary bar was to be applicable solely to provisions of agreements reached in those "unique . . . circumstances," SoundExchange contends otherwise. It fails, however, to muster any credible statutory interpretation to support its far more sweeping contention that the statutory bar extends to subsequently negotiated marketplace agreements that are somehow "directly influenced by the provisions of a WSA settlement agreement." *See* SX Initial Brief at 1.

By its terms, the restrictions of Section 114(f)(5)(C) (incorporating by reference the provisions of subsection (f)(5)(A)) pertain solely to provisions of any "agreement" entered into by the record industry's "receiving agent" (SoundExchange) under the auspices of the WSAs,

"including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements *set forth therein*." 17 U.S.C. § 114(f)(5)(C) (emphasis added). This language straightforwardly provides that the terms "set forth" in the defined set of agreements "shall [not] be admissible or otherwise taken into account" in a proceeding such as this.[2] Indisputably, no literal transgression of this bar has occurred here. No service has sought to introduce, or otherwise rely upon, the Pureplay Agreement as a basis for rate-setting here.[3] SoundExchange points to no language in the statute that references, let alone precludes, reliance in a Section 114 proceeding upon rates and terms contained in subsequently negotiated marketplace agreements entered into outside of the unique context of the WSAs.

SoundExchange's textual position hinges on the phrase "otherwise taken into account," which SoundExchange wrenches from its textual moorings and posits broadens the reach of the statute "well beyond" the "limited rule of inadmissibility." SX Initial Br. at 3-4. But SoundExchange fails to demonstrate how this "otherwise taken into account" language expands the subject matter of the bar to a further set of marketplace agreements, insofar as the statutory text remains steadfastly focused on *the WSA agreements* and the terms "set forth therein." Recognizing this fatal infirmity, SoundExchange resorts to rewriting the provision. Without benefit of any textual support, SoundExchange professes that Section 114(f)(5)(C) precludes the Judges from considering subsequent marketplace agreements that have been "directly influenced by" the provisions of a WSA settlement agreement. *See* SX Initial Br. at 1-2, 5-6. But such a

[2] As SoundExchange itself notes, the plain language of Section 114(f)(5)(C) dictates that "absent mutual agreement . . . nothing *in those agreements* would be 'admissible' or 'otherwise taken into account' in any administrative, judicial, or other government' rate proceeding." SX Initial Br. at 3 (emphasis added, emphasis removed).

[3] As previously noted, *see* Pandora Initial Br. at 18-20, it was SoundExchange that sought to support its own rate proposal by reference to the Pureplay Agreement.

naked assertion does not suffice. SoundExchange has no basis to inject "words or elements into [the] statute that do not appear on its face." *See Dean v. United States*, 556 U.S. 568, 572 (2009). It is evident that if Congress had intended so dramatically to expand the targets of the evidentiary bar of Section 114(f)(5)(C), it explicitly could and would have done so. It did not.

Rejecting SoundExchange's position does not mean that the "otherwise taken into account" clause is meaningless statutory surplusage. The commonsense reading of the language is a "belt-and-suspenders" one: that it simply prevents a party from end-running, or the Judges 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. For example, experts oftentimes rely on inadmissible evidence in formulating or corroborating their opinions. Indeed, Rule 703 of the Federal Rules of Evidence expressly permits an expert to base his or her opinions on facts and data that may otherwise be inadmissible. Under the "otherwise taken into account" language of Section 114(f)(5)(C), however, an expert could not invoke the terms of the WSA agreements to corroborate the reasonableness of a party's rate proposal. Nor could a party attempt to reverse-engineer and rely on the rates payable under a WSA agreement by entering account statements or reports of use but not the WSA agreement itself. The "otherwise taken into account of" language would likewise prevent the Judges from taking judicial or administrative notice of, or otherwise relying on, a WSA agreement as a data point to justify their conclusions where the parties did not authorize its submission.[4] This far more natural and plausible reading of the purport of the "otherwise taken

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[4] In *Satellite II*, for example, the Judges considered the rates that they had set in *Satellite I* in deciding what would be an appropriate rate for the next licensing term. *See, e.g.*, 78 Fed. Reg. 23054, 23063 (Apr. 17, 2013) ("The Judges find that Dr. Ordover's proposed benchmark rates of between 30%–32.5% are beyond the zone of reasonableness, given that they are four times greater than the rate of 8% that the Judges set four years ago in *SDARS–I* . . . ."). The statutory language of Section 114(f)(5)(C) would

into account" language contrasts starkly with SoundExchange's effort to extrapolate from it a sweeping post-WSA injunction against use of all later marketplace agreements negotiated by statutory webcasters in the asserted "shadow" of the WSA agreements.

In addition, SoundExchange all but ignores that its interpretation of Section 114(f)(5)(C) squarely conflicts with Section 114(f)(2)(B), and is thus contrary to the well-settled requirement that statutes must be interpreted as a "harmonious whole." *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014).[5] Section 114(f)(2)(B) expressly authorizes the Judges to consider "the rates and terms" of "voluntary license agreements" entered into by the very statutory services whose rates are to be determined here. There is simply no way to harmonize that authorization with SoundExchange's contention that the "overarching shadow of the WSA agreement rates" should "foreclose[]" the statutory services from offering any benchmark agreement "derived even in part from a WSA agreement." SX Initial Br. at 10-11. Here again, had it intended to do so, Congress could have cabined Section 114(f)(2)(B) with cautionary language tied to any alleged limitations imposed by Section 114(f)(5)(C). It did not do so.

B. The Legislative History Cited By SoundExchange In Fact Supports Pandora and the Other Services' Interpretation of the Limited, Non-Preclusive Scope of Section 114(f)(5)(C)

SoundExchange's recounting of the legislative history underlying Section 114(f)(5)(C), *see* SX Initial Br. at 4-8, supports the position of Pandora and the other Services, not SoundExchange. SoundExchange rightly notes that in passing the Small Webcaster Settlement

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appear to prevent the Judges from similarly taking "into account" the rates or other provisions of a WSA agreement.

[5] As the Supreme Court held in a case cited by SoundExchange, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *See Corley v. United States*, 556 U.S. 303, 314 (2009) (cited in SX Initial Br. at 3).

Act ("SWSA") in 2002, as well as the WSAs of 2008 and 2009, Congress was concerned with and, "unlike [in] most statutes," even emphasized in the statutory text itself the "unique business, economic and political circumstances" confronting the webcasting industry generally at those points in time. *Id.* at 4. Although SoundExchange avoids delving into the specifics of those "unique" circumstances, the legislative history cited by Pandora makes clear that Congress was particularly concerned about rates that were set by the Copyright Royalty Judges at such high levels that they threatened the very existence of the webcasting industry. *See* Pandora Initial Br. at 13-16; *cf.* SX Initial Br. at 7 (noting that the SWSA was enacted "in the wake of the first Webcasting proceeding and the Librarian's Final Decision"). That is the reason why Congress provided SoundExchange and the webcasters with "the freedom to enter into 'compromise' agreements" while simultaneously ensuring that those agreements would not be taken as evidence of what a willing buyer and willing seller would agree to. *See* Pandora Initial Br. at 15; SX Initial Br. at 5.[6]

There is simply no support in the legislative history – and SoundExchange cites none – for SoundExchange's core position here: that Congress in effect vested the record industry's "receiving agent" (constrained as it is in its exercise of monopoly power by Section 114(e)) with what would amount to unlimited veto power over the admission or consideration of post-WSA era agreements voluntarily entered into between statutory services and individual record labels based on the premise that the terms of all such agreements are unduly influenced by the non-precedential WSA agreements. Specifically in relation to SoundExchange's attempted application of its position to exclude consideration of the Merlin Agreement, SoundExchange

[6] SoundExchange itself cites Congress' expressed intent in passing the SWSA that "*the agreement* will not be admissible as evidence or otherwise take into account"—even going so far as to italicize the words "the agreement." *See* SX Initial Br. at 7 (citing Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 2(7), 116 Stat. 2780, 2781 (2002)).

fails to identify any trace of legislative intent to permit exclusion from evidence in this proceeding of a 2014 agreement that, among other distinctions: (i) was not negotiated or executed under the auspices of the WSAs; (ii) does not purport to constitute a "compromise" of the "unique" factors that motivated the WSA agreements; (iii) does not set rates that are binding on all copyright owners; and (iv) does not involve SoundExchange in its designated role under the statute as the "receiving agent." *See* 17 U.S.C. § 114(f)(5)(A), (C).

In sum, SoundExchange has completely failed to demonstrate that its uncontainably broad interpretation of the scope of the Section 114(f)(5)(C) evidentiary exclusion is supported by either the text or legislative history of the statute.

II. SOUNDEXCHANGE'S VIRTUALLY LIMITLESS INTERPRETATION OF SECTION 114(f)(5)(C) WOULD, BY DESIGN, NULLIFY ALL VOLUNTARY MARKETPLACE AGREEMENTS REACHED BY STATUTORY WEBCASTERS

Beyond their lack of foundation in the law, SoundExchange's answers to the Referred Questions imply a breathtakingly sweeping scope of the Section 114(f)(5)(C) evidentiary preclusion. Moreover, its proposed line-drawing "tests" betray a transparent effort to carve out from such exclusion solely the evidence that SoundExchange believes favors its case.

To demonstrate the stunning implications of SoundExchange's reasoning, one need only consider SoundExchange's responses to **Referred Questions Nos. 3 and 4**, which ask whether Section 114(f)(5)(C) would preclude a license agreement in its entirety if it contains any terms that may have been "influenced by" or that may "refer to" a non-precedential WSA agreement. SoundExchange answers "yes" to both questions so long as *even one term* in such an agreement – *e.g.,* any of its definitions, duration, scope of rights, or other countless examples – can somehow be shown to have been "directly influenced" by a WSA agreement. *See* SX Initial Br. at 13-17. By this logic, any agreement so much as *expiring the same day* as the WSA Pureplay rates would be barred from consideration in its entirety – a reading that would knock out from

consideration scores of possible benchmark agreements, including a number of SoundExchange's own.

In an effort to prevent its own favored benchmarks from being swept into this massive evidentiary black box, SoundExchange first proposes an amorphous "directly influenced" standard found nowhere in the statute, and then provides its own self-interested spin as to how that test ought to be applied: the "influence will be direct in some cases" (*i.e.*, for non-interactive services) but "not sharp" in others (*i.e.*, for interactive services). *Id.* at 14.[7] Even were there a basis to apply a "directly influenced" (or any other non-statutory) test to screen for the admissibility of the various benchmarks proffered in a proceeding – and there is not – it most certainly would not delineate admissible from inadmissible agreements in the categorical manner SoundExchange advocates. SoundExchange itself acknowledges that "any 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." SX Initial Br. at 13.[8] And Pandora and the other Services have already shown that SoundExchange, as part of its affirmative case, itself moved into evidence – and sought to have the Judges "take into account" – multiple agreements that expressly and directly reference the Pureplay rates.[9] Under SoundExchange's "directly

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[7] SoundExchange's only support for this proposition is a lone law review article that states that even interactive service licensing is "profoundly influence[d]" by the statutory framework. *See* Peter DiCola and David Touve, *Licensing in the Shadow of Copyright*, 17 Stan. Tech. L. Rev. 397, 453-54 (2014) (cited in SX Initial Br. at 14).

[8] As Pandora has noted, every economist in this proceeding, including SoundExchange's, has confirmed that *all* of the agreements at issue are influenced to some degree by the prevailing statutory rates (including the Pureplay rates), whether or not the agreements make that connection explicit or not. *See* Pandora Initial Br. at 10 n.4 (citing Rubinfeld CWDT ¶ 91) (SoundExchange's principal economist admitting that "interactive rates also have been affected to a certain degree by the statutory and pureplay settlement rates").

[9] *See* Pandora Initial Br. at 18 (citing SX Ex. 80 ( ); *id.* at 6 ( ); PAN Ex. 5156 at SNDEX0242128, SNDEX0242141 ( ); SX Ex. 100 (

influenced" formulation, why should these multiple agreements be regarded as any less objectionable evidence than the Merlin Agreement?

SoundExchange's only answer is that the statute should be read to include a "very strong presumption" that in the non-interactive webcasting space, *all* terms in *all* voluntary license agreements must be viewed as "directly influenced" by the prevailing WSA rates, and should thus be excluded altogether, because the webcaster could "fall back" on the terms of the statutory license. SX Initial Br. at 14. This atextual "presumption" would conveniently excise *any* agreement entered by a webcaster and record company from the CRB landscape. It also overlooks the testimony offered by SoundExchange's own witnesses that even non-statutory services (for example, on-demand services) threaten record companies that they will convert their services into statutory offerings and opt for (*e.g.*, "fall back" on) the statutory license if they cannot achieve the deal terms they seek. *See*, *e.g.*, Harrison CWDT ¶¶ 18-20; Kooker WRT pp. 19-20; Proposed Findings of Fact of SoundExchange ¶ 475; 7/21/15 Tr. 7725:13-7726:7 (SoundExchange Closing Argument); Pandora Initial Br. at 19.

More fundamentally, this purported presumption, as with SoundExchange's treatment of "the shadow" cast by the statutory license and WSA agreements more generally, conflates *admissibility* under Section 114(f)(5)(C) with the *weight* that should be given to the parties' competing benchmark agreements. Although SoundExchange would prefer not to have its "shadow" thesis put to the test against the extensive trial testimony addressing its effects on the range of benchmarks offered by the parties, that evaluation by the Judges is the appropriate way to take account of any claimed distorting effects of a WSA agreement on the terms of later

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[REDACTED]). SoundExchange also admitted agreements between the [REDACTED] that [REDACTED]. *Id.* at 19 (citing [REDACTED]).

agreements offered for consideration as benchmarks. It is decidedly *not* the proper province of the Judges to exclude consideration of the marketplace agreements altogether on the basis of a supposed litmus test for admissibility – "direct influence" by a WSA agreement – that finds no support in the statute.

Equally unavailing is SoundExchange's contention that the Services can use Section 114(f)(5)(C) strategically to shield benchmark agreements from proper cross-examination by SoundExchange's counsel. *See* SX Initial Br. at 6 (identifying the Services' purported ability to use a WSA agreement "as both sword and shield" in a CRB proceeding). This is a classic red herring. The hearing record confirms that SoundExchange conducted extensive cross examinations of witness after witness – without drawing a single objection from Pandora (whether under Section 114(f)(5)(C) or otherwise) – aimed at showing that Pandora's Merlin Agreement benchmark was supposedly influenced by the Pureplay Agreement. *See* Pandora Reply Findings § II.B. Moreover, it strains credulity to suggest that a SoundExchange member label (and, in the case of Merlin, a SoundExchange *board member*) would comply with an attempt by a webcaster to use Section 114(f)(5)(C) to tie SoundExchange's hands before the CRB; SoundExchange's argument overlooks the fact that voluntary marketplace agreements such as the Merlin Agreement necessarily require *willing sellers* who must agree to the terms in those agreements, and could walk away if there were any indication of the sort of gamesmanship SoundExchange warns against. In any event, were the issue to present itself in a different setting – for example, an attempt by a record company and service intentionally to evade the Section 114(f)(5)(C) bar with a direct license constituting a carbon copy of a WSA agreement – the Judges would be more than capable of issuing rulings assuring a lack of prejudice to the opposing party and assigning such an agreement the evidentiary weight it deserved. There is no

need to warp the Section 114(f)(5)(C) evidentiary bar to address that unlikely hypothetical situation.

Nor is there justification to adopt a general rule that would bar solely particular contractual terms from arm's length marketplace agreements where such terms are "copied from" or "substantively identical" to terms found in a WSA agreement. In its responses to **Referred Questions Nos. 1 and 2**, SoundExchange itself maintains that all contract clauses – no matter how disparate or inconsequential – are "dependent and interrelated" with one another and cannot be "disentangle[d]" one from the other. SX Initial Br. at 9-10. This only underscores the point that subsequent marketplace agreements, even where they may incorporate particular terms of a WSA agreement verbatim, inevitably are *different* from the WSA agreement on account of the remainder of their provisions. The Merlin Agreement, for example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. And SoundExchange went to great lengths at trial to point out the many other allegedly unique terms of value conferred on the Merlin labels under the agreement, none of which are contained in the Pureplay Agreement. *See* SX Proposed Findings of Fact ¶¶ 588-92, 600-39; SX Reply Proposed Findings of Fact ¶¶ 799, 803-07. Here again, common sense dictates that artificially isolating discrete terms within an integrated agreement on the basis that they may bear similarity to one or more terms of a WSA agreement loses the forest for the trees.[10] Where the all-important "bottom line" economics of a marketplace agreement reflect rates meaningfully different than those in a WSA agreement – [REDACTED]

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[10] The artificiality would be even more extreme where an agreement merely references a WSA agreement. As noted, the Merlin Agreement's sole explicit reference to a WSA agreement is a [REDACTED]

[REDACTED]." *See* Pandora Initial Br. at 11 n.5.

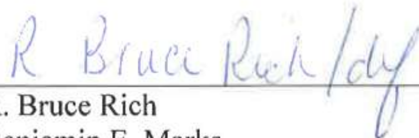
[REDACTED] – the Section 114(f)(5)(C) evidentiary bar should not, and does not, apply.

CONCLUSION

For all of the reasons detailed above, and those detailed in Pandora's Initial Brief, Pandora respectfully submits that, under its plain language and in light of its legislative history, Section 114(f)(5)(C) unequivocally does not bar the Judges from either admitting or taking into account voluntary, marketplace agreements that may contain terms that are copied from (Question 1), that are substantively identical to (Question 2), that are influenced by (Question 3), or that refer to (Question 4), a WSA agreement. The limited statutory proscription concerns the WSA agreements themselves and does not preclude the submission of subsequent privately-negotiated bilateral agreements as probative evidence either in whole or in part (Question 5), as expressly contemplated under Section 114(f)(2)(B). Accordingly, Pandora respectfully requests that the Copyright Office answer "No" to each of the Referred Questions.

Dated: August 14, 2015

Respectfully submitted,



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