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 DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV)*	**DOCKET NO. 14-CRB-0001-WR (2016-2020)**

SOUNDEXCHANGE, INC.'S RESPONSE TO SERVICES' INITIAL BRIEFS REGARDING NOVEL QUESTION OF LAW REFERRED TO THE REGISTER

C. Colin Rushing (DC Bar 470621)
Senior Vice President and General Counsel
Brad Prendergast (DC Bar 489314)
Senior Counsel
SOUNDEXCHANGE, INC.
733 10th Street, NW, 10th Floor
Washington, DC 20001
Telephone: (202) 640-5858
Facsimile: (202) 640-5859
crushing@soundexchange.com
bprendergast@soundexchange.com
Of Counsel

Glenn D. Pomerantz (CA Bar 112503)
Kelly M. Klaus (CA Bar 161091)
Anjan Choudhury (DC Bar 497271)
MUNGER, TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Glenn.Pomerantz@mto.com
Kelly.Klaus@mto.com
Anjan.Choudhury@mto.com
Counsel for SoundExchange, Inc.

Date: August 14, 2015

TABLE OF CONTENTS

I. INTRODUCTION

The Services interpret § 114(f)(5)(C)'s broad prohibitions on admitting or on "otherwise tak[ing] into account" *any* of the terms or conditions of WSA settlement agreements as precluding only the admissibility of the WSA agreements themselves. The Register should reject this interpretation as untenable because it conflicts with the plain language of the statute and the express intent of Congress.

First, the Services' interpretation reads entirely out of the statute Congress's bar on the Judges from "*tak[ing] into account*" the WSA settlement agreements and "any rate structure, fees, terms, [or] conditions . . . set forth therein." 17 U.S.C. § 114(f)(5)(C) (emphasis added). If Congress intended to preclude only the *admissibility* of WSA agreements and their terms, it could have easily done so without including the additional prohibition against "otherwise tak[ing]" them "into account." Congress mandated this broad bar to ensure that *nothing* in these "compromise" settlement agreements, which are the result of "unique business, economic and political circumstances," § 114(f)(5)(C), could be used against the settling parties in future proceedings such as this one. Yet, under the Services' interpretation, a participant could use a WSA agreement against a settling party by simply relabeling the WSA agreement as a direct license or by using its option to fall back on the WSA agreement as leverage to negotiate a slightly tweaked direct license.

Moreover, as a practical matter it is impossible for the Judges to take account of a direct license that was directly influenced by a WSA agreement without also taking account of the WSA agreement itself. In order to determine the extent to which such a direct license is probative of marketplace rates the Judges would necessarily have to "take account" of the WSA agreement, including its rates and terms. For instance, in *Satellite II*, the Judges were forced to consider the effect of the statutory shadow on Sirius XM's direct licenses, which were offered as benchmark agreements. *See Satellite II,* 78 Fed. Reg. 23054, 23065 n.32 (April 17, 2003) (acknowledging that the Judges "considered" the statutory shadow in evaluating Sirius XM's direct licenses). Similarly, Pandora suggests in its Initial Brief that the Judges should consider the statutory shadow, including the Pureplay agreement, to assess "the probative value of the benchmarks before the Judges." *See* Pandora Media, Inc.'s Response To Order Referring Novel Question of Law ("Pandora Br.") at 13 n. 9. But, in attempting to account for the effect of a WSA settlement agreement on a license that was directly influenced by that agreement, the Judges would run into § 114(f)(5)(C)'s bar.

The Pandora – Merlin agreement, in particular, is a transparent effort to enshrine the Pureplay agreement's rates as marketplace rates. Pandora itself admits that under the "realities of how markets operate," the "prevailing" Pureplay rates serve as the baseline for its licensing "decisions." Pandora Br. at 10. Neither the plain language of the statute nor the express will of Congress countenances this use of the Pureplay rates as "prevailing" or baseline rates. And to disentangle the Pandora – Merlin agreement from the effect of these "prevailing" Pureplay rates, the Judges would be forced to take account of the rates and terms of the Pureplay agreement—something the Judges may not do under § 114(f)(5)(C).

Second, the Services misconstrue and distort SoundExchange's interpretation of § 114(f)(5)(C) by claiming that it would bar the consideration of *all* marketplace agreements that are in any way influenced by WSA settlement agreements. This is a red herring. Under SoundExchange's interpretation of § 114(f)(5)(C), not every agreement that is merely influenced by, or even has identical terms to, a WSA settlement agreement, would necessarily be precluded from consideration. As SoundExchange has explained, the question is whether a license is *directly* influenced by the WSA settlement agreement, which can be demonstrated, e.g., by showing that the license incorporates or reflects terms of the WSA agreement where the webcaster could "fall back" on the WSA settlement agreement in the absence of a direct license. Whether any particular agreement is in fact directly influenced by a WSA settlement is a question for the Judges to consider in the first instance *after* the Register clarifies the applicable standard.

Third, Pandora's efforts to convince the Register that § 114(f)(5)(C)'s prohibition does not apply to the Pandora – Merlin agreement should be rejected. This argument plainly raises a question that is beyond the scope of the five specific questions presented by the Judges in the Referral Order, and which is appropriate for consideration by the Judges in the first instance following the Register's ruling. But, in any event, the Pandora – Merlin agreement is so thoroughly tainted by the Pureplay settlement agreement that it is not practical, or even possible, for the Judges to consider it without also taking account of the Pureplay agreement.

And *fourth*, implicitly acknowledging the weakness of their own interpretation of § 114(f)(5)(C), the Services resort to various waiver and estoppel arguments to preclude the Register from even considering SoundExchange's construction of the statute. These fact-bound arguments are an improper attempt to sidestep the Judges' limited Referral Order and, at any rate, are wholly without merit. SoundExchange has consistently preserved its objections to the Pandora – Merlin agreement in this proceeding, and its position is not barred by, or inconsistent with, any positions it has taken in earlier proceedings.

II. ARGUMENT

A. The Services' Narrow Interpretation of § 114(f)(5)(C) Cannot Be Reconciled with Its Plain Language

1. Section 114(f)(5)(C)'s Plain Language And Express Purpose Refute The Services' Interpretation

The Services' interpretation of § 114(f)(5)(C) is now clear: in their view, Congress's broad prohibition against admitting WSA settlement agreements into evidence or "otherwise tak[ing]" such agreements "into account" actually precludes only the *admission* of the WSA agreements and their terms. The Services construe the statute as limited to (1) those particular agreements; and (2) only whether they may come into evidence. In the Services' view, any party may transform a WSA settlement agreement into competent marketplace evidence of what a willing buyer and willing seller would agree to across the entire industry, merely by replacing the party names and persuading one counterparty (no matter who) to sign on to its terms. Pandora Br. at 7; iHeartMedia, Inc.'s Initial Brief Regarding the Legal Question Referred To the Register ("iHeart Br.") at 2-3; Initial Brief of the NAB and the NRBNMLC In Response To the Copyright Royalty Judges' Order Referring Novel Question of Law To the Register of Copyrights ("NAB Br.") at 2. Alternatively, the party could simply use the option of the WSA agreement as leverage to negotiate a slightly modified agreement and then present this modified agreement to the Judges. This position relies on an exceedingly narrow interpretation of the statute that cannot be squared with its plain language or the express intent of Congress.

The statute goes much farther than the Services acknowledge. Congress made clear that:

> Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), *<u>including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein</u>*, shall be admissible as evidence *<u>or otherwise taken into account</u>* 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).

17 USC § 114(f)(5)(C) (emphases added). The plain language of § 114(f)(5)(C) is therefore not limited to the question of admissibility of the agreements or their terms. Congress went much further. It decreed 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. *Id*. (emphasis added).

The Services' argument that Congress simply sought to preclude the admissibility of the WSA agreements and their terms reads these words out of the plain text of the statute. Section 114(f)(5)(C) expressly dictates that, in addition to being inadmissible, the provisions of a WSA settlement may not be "otherwise taken into account." This language must mean something. If Congress was interested solely in proscribing the admissibility of the WSA agreements themselves (or their provisions), there would have been no need for the additional phrase "otherwise taken into account." *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[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") (internal citations omitted). The Services' interpretation would treat the phrase "otherwise taken into account" as mere surplusage, anathema to statutory interpretation.

In light of the statute's explicit text, Congressional intent also is obvious. But in the event there were any question, Congress made its intent explicit:

> 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). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant

> to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.

17 USC § 114(f)(5)(C).

Congress's statement of intent demonstrates that it was not concerned solely with the admissibility of the WSA agreements themselves. As the statute expressly states, Congress's purpose was to allow parties to reach "a compromise" in light of "unique business, economic and political circumstances." 17 U.S.C. § 114(f)(5)(C). To induce such compromise, Congress made a commitment that *nothing* in such "compromise" agreements could be used against the settling parties in future proceedings.

The Services' interpretation, by contrast, would allow a participant to do exactly what Congress sought to prevent—that is, use a WSA settlement agreement against one of the settling parties. In particular, a participant who has the ability to opt for a WSA settlement agreement can use its terms as leverage to negotiate a slightly modified direct license. The participant can then submit this agreement as marketplace evidence of a willing buyer/willing seller negotiation. To see through this smokescreen and take account of the direct influence of the shadow of the WSA agreement on the negotiation of the direct license, the Judges would be forced to consider the WSA agreement and its terms. Yet this necessary step of evaluating the probative value of the direct license would run headlong into § 114(f)(5)(C)'s bar.

Make no mistake that Pandora here is attempting exactly the stratagem described above. By virtue of the Pureplay settlement agreement, Pandora has, since 2009, benefited from a rate obtained as a result of "unique business, economic and political circumstances." 17 U.S.C. § 114(f)(5)(C). Pandora knew that the terms under which it was operating were the result of that temporary compromise that would end in December 2015. And it knew that the terms under which it was operating could not be cited as evidence of what a willing buyer and a willing seller would agree to. The Pandora – Merlin agreement represents Pandora's effort to enshrine the Pureplay terms and have the Judges take them "into account" in setting the rates, regardless of what the statute proscribes. And Pandora is well aware that, in order to assess the probative value of the Pandora – Merlin agreement the Judges will have no choice but to take account of the Pureplay agreement. *See* Pandora Br. at 13 n. 9 (suggesting that the Judges can consider the Pureplay agreement to assess "the probative value of the benchmarks before the Judges").

In its Initial Brief, Pandora effectively concedes this point, stating that not "taking [into] account" the terms of the Pureplay agreement "would be tantamount to denying the realities of how markets operate," given that "[a]ll economic actors consider the prevailing prices paid for goods and services in making their own purchase and sales decisions." Pandora Br. at 10 (further noting that parties may "negotiate[] down from statutory rates"). In other words, Pandora openly acknowledges that the baseline for any direct webcasting license had to be the "prevailing" rates that it was paying under the Pureplay agreement. This is a flat admission that Pandora wants to cement as marketplace rates a set of rates that was explicitly labeled a political compromise with a known end date. Section 114(f)(5)(C) clearly does not permit that result.

2. The Services' Interpretation Would Lead To Results That Contradict § 114(f)(5)(C)'s Express Purpose

As the plain text of § 114(f)(5)(C) makes clear, Congress's intent was to encourage parties to reach compromise agreements by promising that these compromises would not be used against the settling parties in future proceedings. Under the Services' interpretation, however, § 114(f)(5)(C) becomes a powerful tool that actually *strengthens* the value of agreements that are based on or directly influenced by WSA settlement agreements. This is because, under the Services' interpretation, a participant could offer any direct agreement as evidence of what a willing buyer and a willing seller would agree upon, even if that agreement was derived from the

Pureplay agreement and even if the participant admits to using the Pureplay settlement agreement as leverage to negotiate the direct agreement. Yet, under the plain text of the statute, the opposing participants would be unable to offer any evidence showing how the direct agreement was simply a product of the Pureplay settlement agreement. Any such evidence would require the Judges to "take account" of the Pureplay settlement agreement.

3. The Services' "Harmonious Whole" Argument Lacks Merit

The Services attempt to evade the plain text of § 114(f)(5)(C) by contending that the statute must be read as a "harmonious whole." Because § 114(f)(2)(B) allows the Judges to consider marketplace evidence, the Services contend that the Judges should construe § 114(f)(5)(C) to be limited to the WSA agreements themselves. This is wrong, for two reasons. First, SoundExchange's interpretation is not in conflict with § 114(f)(2)(B)'s allowance for the consideration of voluntary agreements. The WSA agreements and their terms simply are not the marketplace evidence contemplated for consideration by the statute. We know that, because the statute tells us so. The terms of the WSA agreements were a result of compromise, unique to a particular time and place. They do not become "marketplace evidence" by incorporating their terms into new contracts. Second, the Services cannot evade the plain text of § 114(f)(5)(C) by evoking the canon of the "harmonious whole." The Supreme Court made that point years ago. Even if an interpretation "does not make for an harmonious whole," Congress's "word is final" when its "language . . . plainly brings a subject matter into a statute." *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 63-64 (1953). Here, the subject matter is explicit—the Judges may not "take[] into account" any terms or conditions of any Webcaster settlement agreement. Even if such language conflicted with § 114(f)(2)(B), which it does not, the doctrine of the "harmonious whole" does not permit the Judges to ignore that plain text. *See also Gilda Indus., Inc. v. United States*, 33 C.I.T. 751 (2009) *aff'd*, 622 F.3d 1358 (Fed. Cir. 2010) ("Although the government asserts that reading the statute as a 'harmonious whole' supports [its] interpretation" of the statute, "such a complicated result cannot be inferred from the statute on its face" and "would be contrary to the plain language of the statute"); *Skelcy v. UnitedHealth Grp.*, No. CIV. 12-1014, 2014 WL 4757805, at *4-5 (D.N.J. Sept. 24, 2014) (although defendants "argue that the statutes" should be "construed together as a unitary and harmonious whole" their "interpretation … contradicts the plain language of the statute").

The Services cannot escape the consequences of the plain text of the statute. If a license agreement explicitly incorporates, is directly influenced by, or is based on—in other words, "take[s] into account"—the provisions of a WSA settlement agreement, then the Judges' consideration of that license agreement would, in effect, cause the Judges to take into account the terms and provisions of the WSA settlement agreement. Thus, if the Judges determine that a license agreement is directly influenced by the provisions of a WSA settlement agreement, the Judges should refrain from considering that agreement pursuant to § 114(f)(5)(C) and give effect to Congress's stated intent to preclude the use of the "compromise" provisions of WSA settlement agreements as evidence of the provisions willing buyers and willing sellers would agree upon.

B. The Services Misconstrue SoundExchange's Position, Which Does Not Automatically Bar Large Swaths of Market Evidence

In an attempt to buttress their strained and unreasonable interpretation of § 114(f)(5)(C), the Services attack a straw man—contending that "[u]nder SoundExchange's interpretation of the law . . . the Judges literally would be blocked from considering provisions of any privately negotiated agreements that ostensibly were *influenced* in some way by a WSA agreement." Pandora Br. at 11; iHeart Br. at 13-14 ("direct licenses for statutory services and interactive services will unsurprisingly be influenced by, or refer to, a Webcaster Settlement Agreement —

and may even copy verbatim from, or include provisions that are substantively identical to, parts of a Webcaster Settlement Agreement.”).

Not so. As explained in SoundExchange’s Initial Brief, under its interpretation of § 114(f)(5)(C), not every agreement that is merely influenced by, or even has identical terms to, a WSA settlement agreement would necessarily be precluded from consideration. First, SoundExchange’s argument only would apply where the Judges would be taking into account a WSA settlement agreement that the webcaster and SoundExchange did *not* agree could be later used in a proceeding. By contrast, for example, the NAB settlement agreement, which has the rates iHeart and other broadcasters otherwise are presently subject to (iHeart Br. at 5), was admitted in prior proceedings and explicitly considered by the Judges (*Web III*), because the parties expressly agreed to it in the settlement agreement.

Furthermore, and as explained in SoundExchange’s initial brief, the relevant question is whether a license is *directly* influenced by the WSA settlement agreement, which can be demonstrated, e.g., by showing that the license incorporates or reflects terms of the WSA agreement where the webcaster could “fall back” on the WSA settlement agreement in the absence of a direct license. In that circumstance, the terms of the license would not reflect the terms that willing buyers and willing sellers would agree to absent a statutory license regime; rather, the overarching shadow of the WSA agreement rates and terms would have affected the entire negotiation, and there should be a conclusive presumption that the license is barred under § 114(f)(5)(C). As the Judges have noted, ‘‘*it is difficult to understand* how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, *could truly reflect ‘fair market value*.’” *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings (Web II)*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) (quoting 63 Fed.

Reg. 49823, 49835 (September 18, 1998)) (emphases added). Contrary to the Services' suggestion, this is a straightforward test for evaluating the influence of a WSA settlement agreement on a direct license that does not involve "arbitrary line-drawing," or "second-guessing regarding parties' intent." NAB Br. at 9-10; *see also* Pandora Br. at 5 (characterizing test as "line drawing" that is "fraught with subjectivity"). This is even more so the case where the license may explicitly incorporate and reference terms of the WSA settlement agreement, and testimony and documentary evidence concerning the parties' negotiation of the license plainly shows that the terms of the license were directly *caused* by the WSA agreement (all of which is the case with respect to the Pandora – Merlin agreement, as discussed *infra*).

To be sure, whether any particular agreement is in fact directly influenced by a WSA settlement is beyond the scope of the Referral Order and is a question for the Judges to consider in the first instance and based on a complete record *after* the Register clarifies the appropriate standard. Although the Register need not, and should not, reach these particular issues, because the Services have directly raised them, SoundExchange responds briefly to them. The Pandora – Merlin license expressly incorporates and is *directly* influenced by the Pureplay settlement agreement precisely because Pandora not only can opt into, but *has opted* into, the Pureplay agreement. As iHeart acknowledges in its brief, Pandora was not "compelled" to "enter into a direct license agreement" with Merlin and "could have continued doing business on the pre-existing terms available" under the "Pureplay Settlement Agreement." iHeart Br. at 10-11. Likewise, Pandora itself acknowledges that it "had the Pureplay Agreement to 'fall back on.'" Pandora Br. at 20. [redacted] Pandora's admission that the "prevailing" rates of the Pureplay agreement heavily influenced its own licensing decisions, given the "the realities of how markets operate," Pandora Br. at 10, simply further reinforces that Pandora seeks to enshrine as marketplace rates a set of rates from a WSA settlement agreement.

The other license agreements the Judges presently are considering are plainly differently situated than the Pandora – Merlin agreement. The interactive service agreements (e.g., discussed at NAB Br. at 5; iHeart Br. at 13) are the furthest removed from the shadow of the statutory rates and the Pureplay settlement agreement rates. Because interactive services could *not* have opted into the Pureplay rates without fundamentally altering their service offerings, the influence of the Pureplay rates on the interactive service licenses is most limited. Pandora's own expert, Prof. Carl Shapiro, testified that the interactive agreements that Pandora cites were less influenced by the shadow of the statutory license. Hr'g Ex. PAN 5023 at 4 (noting that because "interactive services do not have the option of electing the statutory license" interactive licenses "are less influenced by the statutory license"); *see also* Peter DiCola and David Touve, "Licensing in the Shadow of Copyright," 17 Stan. Tech. L. Rev. 397, 453-54 (2014) (noting that the law's "shadow is not sharp" for voluntarily licensed interactive services as compared to statutory services). Accordingly, these licenses would not be barred under SoundExchange's interpretation of § 114(f)(5)(C).

Likewise, the other direct licenses submitted in the proceedings and referenced in the Services' briefs, such as the Apple iTunes Radio agreements (Pandora Br. at 18-19; NAB Br. at 5-6) and iHeart's agreements with Warner and various independent labels (iHeart Br. at 6), also are differently situated. The existing Pureplay settlement agreement is for "*pureplay*" webcasters, i.e., those webcasters that derive an overwhelming portion of their revenue from the streaming of sound recordings and are willing to include their *entire* gross revenue from all lines of business in a percentage-of-revenue calculation (25%) to determine their royalties. *See* 74 Fed. Reg. 34796, 34799 (July 17, 2009). Not surprisingly, neither Apple nor iHeart has opted into, or realistically can opt into, the Pureplay settlement agreement, given that a substantial portion of their revenues—indeed, the vast majority of their revenues—are derived from non-streaming related business activities (e.g., iPhone sales for Apple, and terrestrial advertising sales for iHeart). In these circumstances, the WSA settlement agreement is not a realistic outside option, and therefore does not so thoroughly infect all negotiated terms in the license agreement.

The directly influenced test also refutes iHeart's suggestion that SoundExchange's position "would put § 114(f)(5)(C) into irreconcilable conflict with § 114(f)(2)(B)" because it would prohibit "29 direct licenses admitted into evidence in the hearing." iHeart Br. at 13. As discussed, SoundExchange's position would not automatically bar large swaths of marketplace agreements that otherwise could be considered under § 114(f)(2)(B), and for this reason (and other reasons, discussed *supra*), there is no conflict between SoundExchange's interpretation of § 114(f)(5)(C) and the text of § 114(f)(2)(B).

In sum, the Services' claim that all direct licenses which are in any way influenced by a WSA settlement agreement would necessarily be barred under SoundExchange's interpretation is incorrect and distorts SoundExchange's position.

C. Pandora's Arguments Regarding the Pandora – Merlin Agreement Are Improper And Incorrect

Pandora devotes significant attention in its Initial Brief to the argument that § 114(f)(5)(C)'s prohibition does not apply to the Pandora – Merlin agreement. But this argument does not address any of the five questions that the Judges referred to the Register. Rather, the question whether the Pandora – Merlin agreement may be considered under

§ 114(f)(5)(C) is a question that is best considered by the Judges in the first instance and based on the complete record *after* the Register clarifies the applicable legal standard. In any event, the Pandora – Merlin agreement itself demonstrates why the Judges should not take account of agreements directly influenced by a WSA settlement agreement. The Pandora – Merlin agreement is so thoroughly tainted by the Pureplay settlement agreement that it is not practical, or even possible, for the Judges to take account of the Pandora – Merlin agreement without also taking account of the Pureplay agreement.

Section 802(f)(1)(A)(ii) authorizes the Judges to request from the Register an interpretation of "material questions of substantive law" and § 802(f)(1)(B) requires the Judges to refer to the Register any "novel material question[s] of substantive law." Under the statute, a "question of substantive law" does not encompass *any* legal question but, instead, must involve the "interpretation" or "construction" of a provision of the Copyright Act. 17 U.S.C. § 802(f)(1)(A), (B).

Pursuant to the mandatory referral provision of § 802(f)(1)(B), the Judges referred to the Register five questions of law concerning the proper interpretation of § 114(f)(5)(C). None of these questions asked the parties to address whether the Pandora – Merlin agreement (or any other agreement) is subject to § 114(f)(5)(C)'s bar. And, consistent with the statute, the Judges reminded the participants that "this referral is one of a novel question of law, not of facts" and directed the participants not to include "factual materials" in their briefing. Order Referring Novel Question of Law ("Referral Order") at 3 (July 29, 2015).

Despite the fact § 802(f)(1)(B) is expressly limited to novel questions of law involving the construction of the Copyright Act and despite the Judges' clear instructions, Pandora's Initial Brief includes extensive factual argument regarding the Pandora – Merlin Agreement. Indeed, Section II of Pandora's brief is titled: "The Judges May Consider the Merlin Agreement In its Entirety, Including Its Rate Provisions." And Pandora's brief is replete with citations to the record, including to the rates and terms of the Pandora – Merlin agreement.

The Register should decline to consider Pandora's arguments that the Pandora – Merlin agreement is not subject to § 114(f)(5)(C). This is not a question that the Judges referred to the Register and, accordingly, there is no statutory authority for the Register to consider this issue. In addition, the statute contemplates referral of only questions of law involving the construction or interpretation of the Copyright Act. Thus, while the Register may interpret § 114(f)(5)(C), the question whether a particular agreement falls within § 114(f)(5)(C)'s prohibition is best left to the Judges to resolve in the first instance based on the complete record. As Pandora's numerous citations to the record demonstrate, considering whether a specific agreement is subject to § 114(f)(5)(C) requires a complete evidentiary record.

In any event, to the extent the Register *does* consider the Pandora – Merlin agreement, that agreement demonstrates exactly why § 114(f)(5)(C) precludes the Judges from taking account of agreements that are directly influenced by the Pureplay settlement agreement. Numerous terms of the Pandora – Merlin agreement are copied verbatim from, or directly reference, the Pureplay agreement. Coupled with the fact that Pandora readily could fall back on the Pureplay settlement agreement in the absence of a direct license, and its admission that the "prevailing" rates of the Pureplay agreement set the baseline for its own licensing decisions (Pandora Br. at 10), it is clear that the Pandora – Merlin Agreement is based on and inextricably intertwined with the Pureplay Agreement. Taking account of the Pandora – Merlin agreement would necessarily require the Judges to take account of the Pureplay agreement.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

D. The Services' Waiver, Estoppel and Authorization Arguments are Unavailing

As an alternative to their unpersuasive arguments about the meaning of § 114(f)(5)(C), Pandora and NAB offer several reasons why they believe the Judges should not have referred their questions to the Register in the first place. Pandora argues that SoundExchange waived its objection to the admissibility of the Merlin Agreement for various reasons and that SoundExchange also should be "judicially estopped" from making such an objection. Pandora and NAB both argue that, under § 114(f)(5)(C), SoundExchange "expressly authorize[d]" use of the Pureplay settlement agreement (and thus the Pandora – Merlin Agreement) in this proceeding. These arguments are beyond the scope of the Referral Order and are not permitted by the federal regulations. The Register should reject Pandora and NAB's improper attempts to sidestep the Judge's referral of five specific legal questions. Pandora and NAB's fact-bound and improper arguments lack merit in any event.

1. The Register Should Decline to Consider Pandora and NAB's Arguments of Waiver, Estoppel and Authorization Because They Are Outside the Scope of the Referral Order

The Judges referred five "novel material questions of law to the Register" pursuant to 17 U.S.C. § 802(f)(1)(B) and 37 C.F.R. § 354.l(b)(l), 354.2(b). Referral Order at 2. Each of these questions relates to the meaning of § 114(f)(5)(C). *Id*. at 2-3. The Judges' Referral Order, consistent with controlling regulations, provided a schedule for the parties' briefing *of those specific questions*. 37 C.F.R. § 354.l(b)(l) ("The referral will state the issue(s) to be referred and the schedule for the filing of briefs by the parties of the issue(s)."). The Judges did *not* refer any questions regarding waiver or estoppel or authorization under § 114(f)(5)(C).

Accordingly, even if Pandora's or NAB's arguments had merit—and they do not, as shown below—these briefs to the Register would not be the proper time or place to raise them. If Pandora and NAB wanted to preempt the Judges' application of § 114(f)(5)(C) on the ground of waiver or estoppel or authorization, then they should have asserted these positions in their post-trial findings and conclusions. They did not do so.[1] Pandora and NAB's untimely arguments are not permitted by the Referral Order. That order was not a blanket invitation for the parties to second-guess whether the Judges should be considering the meaning of § 114(f)(5)(C) in the first instance. Nor are Pandora and NAB's arguments permitted by federal regulations, which require the parties' briefs to address the referred questions themselves. 37 C.F.R. § 354.l (b)(l). Finally, Pandora and NAB's arguments raise numerous factual issues that the Register is neither equipped nor permitted to address at this stage. The Register should decline to consider Pandora and NAB's extraneous arguments.

2. Pandora and NAB's Waiver, Estoppel And Authorization Arguments Are Meritless In Any Event

a. SoundExchange Preserved Its Argument that § 114(f)(5)(C) Precludes the Judges from Using the Merlin Agreement As a Benchmark

Pandora claims that SoundExchange waived any argument that the Merlin Agreement is inadmissible because it did not file a motion *in limine* to exclude the Pureplay settlement agreement, and because it subsequently conducted cross-examinations that referenced the

[1] Pandora's reply conclusions of law and findings of fact argued that SoundExchange's objection to the Merlin Agreement under § 114(f)(5)(C) was "at odds with the position" it took in *Satellite II*, although it did not claim that SoundExchange was judicially estopped from relying on § 114(f)(5)(C) here. Pandora Reply Findings ¶¶ 56-60. The Judges apparently were not persuaded by Pandora's argument, otherwise presumably they would not have referred the questions at issue to the Register.

agreement.[2] These arguments fail. SoundExchange expressly ***preserved*** its position that § 114(f)(5)(C) barred the Pandora – Merlin Agreement. As the Referral Order explains, SoundExchange asserted its position both in its pretrial Objections to Testimony and Exhibits and again its Proposed Conclusions of Law. Referral Order at 1. In particular, SoundExchange proposed provisionally admitting evidence related to the Pureplay settlement agreement so that the parties could develop a full record regarding the extent to which the Pandora – Merlin Agreement was a byproduct of the Pureplay agreement. This, in turn, was intended to enable the Judges to make an informed decision about whether § 114(f)(5)(C) in fact precluded the Services' reliance on the Pandora – Merlin Agreement.

Pandora objected vigorously when SoundExchange initially set forth this position. It complained then, as it does now, that SoundExchange waived its position by not filing a motion *in limine* regarding the Pureplay agreement. In response, SoundExchange explained why Pandora's waiver argument was meritless—including that it was entirely proper to ask the Judges to address the admissibility of the Pandora – Merlin agreement upon a full record, rather than in advance of trial.[3] The Referral Order itself demonstrates that the Judges rejected Pandora's waiver argument and thus will consider the application of § 114(f)(5)(C) based on the Register's guidance regarding this statute. It would be improper for the Register to reconsider the Judge's conclusion on waiver through the referral mechanism.

---

[2] NAB makes this point as well, although it does so in the context of requesting that the Register decline even to address the Judges' referred questions.

[3] *See Intelligent Verification Sys., LLC v. Microsoft Corp.*, No. 2:12-cv-525, 2015 WL 1518099, at *13 (E.D. Va. Mar. 31, 2015) ("Often, whether evidence should be admissible will depend upon the factual context in which it is placed."); *Mixed Chicks LLC v. Sally Beauty Supply LLC*, 879 F. Supp. 2d 1093, 1094-95 (C.D. Cal. 2012) (offering prudential advice for parties on what constitutes "proper" versus "improper" reasons for motions *in limine*).

Pandora expands its previous waiver argument by suggesting that SoundExchange cannot object to the Pandora – Merlin Agreement because it moved into evidence agreements that purportedly reference the Pureplay rates as well. This new and untimely argument also fails. If Pandora believed SoundExchange's benchmarks were barred by § 114(f)(5)(C), or that SoundExchange otherwise improperly referenced the Pureplay Agreement, it could have and should have made those arguments to the Judges. But it did not. Pandora cannot ask the Register, upon the Judge's referral of legal questions, to make a factual determination regarding the agreements and testimony it cites. And even if the Register *could* consider the factual record, the record would not support Pandora's position that SoundExchange's proffered agreements, including the interactive service agreements and the Apple iTunes Radio agreements, were *directly* influenced by the Pureplay agreement. *See supra*, Section II.B.

3. "Judicial Estoppel" Does Not Prevent The Judges From Complying With § 114(f)(5)(C)

Pandora also contends that SoundExchange is "judicially estopped" from advocating a position regarding the proper scope of § 114(f)(5)(C) that is "at odds with" the position it purportedly took in *Satellite II*. This argument is unpersuasive. Even if SoundExchange has taken inconsistent positions (which it has not, as discussed below), the meaning of § 114(f)(5)(C) is a pure question of law. Courts have held that judicial estoppel does not apply in such circumstances.[4] Judicial estoppel is particularly inappropriate here because the Register and/or

[4] *See, e.g.*, *United States v. Villagrana-Flores*, 467 F.3d 1269, 1278 (10th Cir. 2006) (noting that "the position to be estopped must generally be one of fact rather than of law or legal theory"); *Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 274 (4th Cir. 2003) (same); *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n*, Local 38, 288 F.3d 491, 504 (2d Cir. 2002) (same), *vacated on other grounds by* 123 S. Ct. 1572 (2003); *see also Consol. Edison Co. v. Herrington*, 752 F. Supp. 1082, 1087 n.8 (D.D.C. 1990) ("Judicial estoppel precludes a party from taking a position inconsistent with one previously taken *with respect to the same facts* in an (footnote continued)

the Judges need to interpret this statute correctly *regardless* of the positions SoundExchange has taken in the past. They certainly cannot apply an incorrect interpretation of the statute—and circumvent the will of Congress—on the basis of arguments that SoundExchange has made.

Pandora's argument also fails because "[j]udicial estoppel may be applied only when the earlier statements are unequivocally inconsistent with the later ones." *Herrington*, 752 F. Supp. at 1087. SoundExchange's position in *Satellite II* is not "unequivocally inconsistent" with its position here. As an initial matter, the expert testimony SoundExchange propounded in *Satellite II* did not discuss the Pureplay settlement agreements rates and terms or discuss any agreement based on the Pureplay rates and terms, whereas the Services' proffered evidence and arguments here plainly do so. *See* Ordover WRT ¶ 59, *Satellite II* (August 8, 2012). Indeed, Dr. Ordover's testimony in *Satellite II*, explicitly *confirmed* that Pandora's Pureplay rates "are not available as precedent." *Id.* Moreover, Dr. Ordover's testimony did not invite the Judges to take account of the Pureplay rates. Rather, his testimony simply criticized Sirius XM's expert for failing to consider public information regarding Pandora's revenues and costs. Accordingly the Register should decline Pandora's invitation to conclude that SoundExchange is precluded from answering the questions the Judges have raised. "Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits." *Shea v. Clinton*, 880 F. Supp. 2d 113, 117 (D.D.C. 2012) (citation omitted).

4. SoundExchange Did Not "Expressly Authorize" Use Of The Pureplay Settlement Agreement in This Proceeding

earlier litigation.") (emphasis added); *aff'd sub nom. Consol. Edison Co. of New York v. Watkins*, 927 F.2d 1227 (Temp. Emer. Ct. App. 1991).

Finally, both Pandora and NAB argue that SoundExchange, through its conduct, authorized consideration of the Pureplay settlement agreement. Pandora relies on the same conduct here that it uses to support its waiver argument: SoundExchange's failure to move *in limine* to exclude the Pureplay agreement, its purported references to terms of the Pureplay agreement on cross-examination and otherwise, and its reliance on agreements that purportedly reflect Pureplay terms. NAB's authorization argument relies exclusively on a footnote in the written testimony of Dr. Blackburn, one of SoundExchange's experts. Setting aside that Pandora and NAB mischaracterize the record, their authorization argument fails because the evidence they cite plainly does not show that SoundExchange "expressly authorize[d]" use of the Pureplay settlement agreement. 17 U.S.C. § 114(f)(5)(C).

"Express" means "[c]learly and unmistakably communicated; directly stated." Black's Law Dictionary 620 (8th ed. 2004). "'[E]xpress' authorization means just that—precise language granting, in black and white, the exact authority that is sought." *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 46 (Bankr. D. Del. 1999). Pandora and NAB do not cite any evidence that SoundExchange stated precisely, in black and white language, the exact authority that these Services now seek: permission to rely on the Pureplay settlement agreement or agreements derived from it. Instead, Pandora and NAB rely on *inferences* to support their authorization argument. These inferences cannot constitute *express* authorization. *See* Black's Law Dictionary 620; *id*. at 770 ("Implied" means "[n]ot directly expressed; recognized by law as existing inferentially.").

Ironically, NAB itself demonstrated what "express authorization" looks like in its 2009 agreement with SoundExchange. The terms of that agreement stated, in a section titled "Use of Agreement in Future Proceedings," that "[p]ursuant to 17 U.S.C. 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. 114(f) is expressly authorized." NAB Agreement § 6.3(b). The Pureplay agreement itself, of course, contains no express authorization. And SoundExchange never has provided express authorization of this nature, either.[5]

III. CONCLUSION

For these reasons and those stated in SoundExchange's Initial Brief, the Register should adopt SoundExchange's interpretation of § 114(f)(5)(C).

Dated: August 14, 2015

Respectfully submitted,

By: Glenn D. Pomerantz /K.S.

Glenn D. Pomerantz (CA Bar 112503)
Kelly M. Klaus (CA Bar 161091)
Anjan Choudhury (DC Bar 497271)
MUNGER, TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Glenn.Pomerantz@mto.com
Kelly.Klaus@mto.com
Anjan.Choudhury@mto.com

Counsel for SoundExchange, Inc.

[5] Likewise, no "webcaster that is a party" to the Pureplay agreement has provided express authorization for the Pureplay agreement to be used in this proceeding. *See* 17 U.S.C. § 114(f)(5)(C). Pandora was not a party to that agreement, although it has been a *beneficiary* of the agreement. The webcasters that were parties to the agreement were AccuRadio, Radio IO, and Digitally Imported, none of which has expressly authorized submission of the Pureplay agreement. Accordingly, even if SoundExchange were deemed to have authorized submission of the agreement, the mutual consent provision of § 114(f)(5)(C) would not be satisfied.

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, I caused a copy of the foregoing – PUBLIC **SOUNDEXCHANGE, INC.'S RESPONSE TO SERVICES' INITIAL BRIEFS REGARDING NOVEL QUESTION OF LAW REFERRED TO THE REGISTER** to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com Telephone: (312) 284-2440 Facsimile: (312) 284-2450 *AccuRadio, LLC*	George D. Johnson, an individual d.b.a. Geo Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 E-mail: george@georgejohnson.com Telephone: (615) 242-9999 *George D. Johnson (GEO), an individual and digital sound recording copyright creator d.b.a. Geo Music Group*
Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com Telephone: (916) 251-1600 Facsimile: (916) 251-1731 *Educational Media Foundation*	Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Basse Rd. San Antonio, TX 78209 DonnaSchneider@iheartmedia.com Telephone: (210) 832-3468 Facsimile: (210) 832-3127 *iHeartMedia, Inc.*
Frederick Kass Intercollegiate Broadcasting System, Inc. (IBS) 367 Windsor Highway New Windsor, NY 12553-7900 ibs@ibsradio.org ibshq@aol.com Telephone: (845) 565-0003 Facsimile: (845) 565-7446 *Intercollegiate Broadcasting System, Inc. (IBS)*	Russ Hauth, Executive Director Harv Hendrickson, Chairman 3003 Snelling Avenue, North Saint Paul, MN 55113 russh@salem.cc hphendrickson@unwsp.edu Telephone: (651) 631-5000 Facsimile: (651) 631-5086 *National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)*

Gregory A. Lewis National Public Radio, Inc. 1111 North Capital Street, NE Washington, DC 20002 glewis@npr.org Telephone: (202) 513-2050 Facsimile: (202) 513-3021 *National Public Radio, Inc. (NPR)*	Patrick Donnelly Sirius XM Radio, Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com Telephone: (212) 584-5100 Facsimile: (212) 584-5200 *Sirius XM Radio Inc.*
Cynthia Greer Sirius XM Radio, Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com Telephone: (202) 380-1476 Facsimile: (202) 380-4592 *Sirius XM Radio Inc.*	Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com Telephone: (510) 858-3049 Facsimile: (510) 451-4286 *Pandora Media, Inc.*
David Oxenford WILKINSON BARKER KNAUER, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com Telephone: (202) 373-3337 Facsimile: (202) 783-5851 *Counsel for Educational Media Foundation and National Association of Broadcasters (NAB)*	Jeffrey J. Jarmuth Law Offices of Jeffrey J. Jarmuth 34 E. Elm Street Chicago, IL 60611-1016 Telephone: (312) 335-9933 Facsimile: (312) 822-1010 Jeff.jarmuth@jarmuthlawoffices.com *Counsel for AccuRadio, LLC*
William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 Malone@ieee.org Telephone: (203) 966-4770 *Counsel for Harvard Radio Broadcasting Co., Inc. (WHRB) and Intercollegiate Broadcasting System, Inc. (IBS)*	Bruce Joseph, Karyn Ablin Michael Sturm, Jillian Volkmar WILEY REIN LLP 1776 K Street, NW Washington, DC 20006 bjoseph@wileyrein.com kablin@wileyrein.com msturm@wileyrein.com JVolkmar@wileyrein.com Telephone: (202) 719-7000 Facsimile: (202) 719-7049 *Counsel for National Association of Broadcasters (NAB)*

Kenneth L. Steinthal, Joseph R. Wetzel Ethan Davis KING & SPALDING LLP 101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com edavis@kslaw.com Telephone: (415) 318-1200 Facsimile: (415) 318-1300 *Counsel for National Public Radio, Inc. (NPR)*	Mark Hansen, John Thorne Evan Leo, Scott Angstreich, Kevin Miller, Caitlin Hall, 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 sangstreich@khhte.com kmiller@khhte.com chall@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com Telephone: (202) 326-7900 Facsimile: (202) 326-7999 *Counsel iHeartMedia, Inc.*
R. Bruce Rich, Todd Larson Sabrina Perelman, Benjamin E. Marks WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue New York, NY 10153 r.bruce.rich@weil.com todd.larson@weil.com sabrina.perelman@weil.com benjamin.marks@weil.com Telephone: (212) 310-8170 Facsimile: (212) 310-8007 *Counsel for Pandora Media, Inc.*	Karyn Ablin Jennifer Elgin WILEY REIN LLP 1776 K St. N.W. Washington, DC 20006 kablin@wileyrein.com jelgin@wileyrein.com Telephone: (202) 719-7000 Facsimile: (202) 719-7049 *Counsel for National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)*
Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com Telephone: (212) 872-7483 Facsimile: (212) 872-1002 *Counsel for Pandora Media Inc.*	Gary R. Greenstein WILSON SONSINI GOODRICH & ROSATI 1700 K Street, NW, 5th Floor Washington, DC 20006 ggreenstein@wsgr.com Telephone: (202) 973-8849 Facsimile: (202) 973-8899 *Counsel for Pandora Media Inc.*
Paul Fakler Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Telephone: (212) 484-3900 Fax: (212) 484-3990 *Counsel for Sirius XM Radio Inc.*	Martin F. Cunniff Jackson D. Toof Arent Fox LLP 1717 K Street, N.W. Washington, D.C. 20006-5344 Martin.Cunniff@arentfox.com Jackson.Toof@arentfox.com Telephone: (202) 857-6000 Fax: (202) 857-6395 *Counsel for Sirius XM Radio Inc.*

Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com Telephone: (202) 642-2849 *Counsel for College Broadcasters Inc. (CBI)*	Antonio E. Lewis King & Spalding, LLP 100 N. Tryon Street, Suite 3900 Charlotte, NC 28202 Tel: 704-503-2583 Fax: 704-503-2622 E-Mail: alewis@kslaw.com *Counsel for National Public Radio, Inc. (NPR)*
David Golden CONSTANTINE CANNON LLP 1001 Pennsylvania Ave. NW, Suite 1300N Washington, DC 20004 dgolden@constantinecannon.com Telephone: (202) 204-3500 Facsimile: (202) 204-3501 *Counsel for College Broadcasters Inc. (CBI)*	Jane E. Mago 4154 Cortland Way Naples, FL 34119 Tel: 703-861-0286 jem@jmago.net

Martha Larraondo-Klipper

Martha Larraondo-Klipper