PUBLIC VERSION

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

In the Matter of **DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (*WEB IV*)**	**Docket No. 14-CRB-0001-WR (2016–2020)**

iHEARTMEDIA, INC.'S RESPONSE BRIEF REGARDING
THE LEGAL QUESTIONS REFERRED TO THE REGISTER

SoundExchange urges the Register to read § 114(f)(5)(C) to preclude the Judges from considering any agreement negotiated in the "shadow" of a Webcaster Settlement Agreement, if it contains even a single provision that was "directly" influenced by that Settlement Agreement. SoundExchange Br. at 1, 8-9, 13. SoundExchange's intent is clear: to exclude from consideration in-market deals in which record labels have agreed to accept *lower* rates from statutory services, and one deal in particular — the Pandora-Merlin Agreement.

The 29 in-market direct licenses between statutory services and individual record labels that were admitted into evidence during the hearing constitute the best "evidence of marketplace value" between willing buyers and willing sellers,[1] which is what § 114(f)(2)(B) directs the Judges to determine. SoundExchange provides no reason to conclude that Congress, in enacting § 114(f)(5)(C) in 2002, intended to foreclose consideration of any of that evidence in setting rates for statutory services.

[1] Final Rule and Order, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240, 45252 (2002) ("*Webcasting I Remand*") ("[I]t is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the marketplace.").

On the contrary, as iHeartMedia and the other Services showed, § 114(f)(5)(C) exists for a narrow purpose: to exclude from the rate-setting process the specific settlement agreements entered into with SoundExchange during the time-limited settlement periods Congress authorized in the Webcaster Settlement Acts. The text, legislative history, and other provisions of § 114 all confirm that the prohibition in § 114(f)(5)(C) is limited to the Webcaster Settlement Agreements made pursuant to § 114(f)(5)(A). That section does not reach voluntarily negotiated, marketplace agreements between statutory services and individual record labels outside of those time periods and that — as is the case with *every* in-market direct license in the record — change the terms of the statutory service's and record label's economic relationship. This interpretation also harmonizes § 114(f)(5)(C) with § 114(f)(2)(B), which encourages the Judges to consider "comparable . . . voluntary license agreements" in setting rates.

SoundExchange's contrary reading of § 114(f)(5)(C) requires twisting the phrase "otherwise taken into account" well beyond its natural meaning, which is that the CRB Judges, Register, and D.C. Circuit judges may not take administrative or judicial notice of the Webcaster Settlement Agreements, even if no participant seeks to admit them into evidence. Moreover, SoundExchange's purported limiting principle — that only agreements "directly influenced" by the otherwise applicable Webcaster Settlement Agreement are excluded — is invented from whole cloth. Nothing in the statute, legislative history, or precedent supports this "directly influenced" standard, which in any event would sweep up a number of the agreements between record labels and non-statutory, interactive services on which SoundExchange relied for its rate proposal.

In sum, the answer to each of the questions the Judges have referred is "No."

ARGUMENT

A. Section 114(f)(5)(C) Excludes Only the Specific Agreements Entered Into Under § 114(f)(5)(A)

Under the plain text of the statute, § 114(f)(5)(C) is simply inapplicable to any of the 29 voluntarily negotiated, direct licensing agreements between statutory webcasters and record labels that were admitted into evidence at the hearing in this proceeding. *See* iHeartMedia Br. at 8-9. There is no dispute that the Pandora-Merlin Agreement and the 28 voluntarily negotiated direct licenses between iHeartMedia and individual record labels are not "agreement[s] entered into pursuant to [§ 114(f)(5)](A)." 17 U.S.C. § 114(f)(5)(C). Therefore, the provisions of those agreements are also not "provisions of any agreement entered into pursuant to [§ 114(f)(5)](A)." *Id.* Nothing in the text of § 114(f)(5)(C) extends its prohibition to a voluntarily negotiated direct license that contains a provision copied from, or influenced by, a Webcaster Settlement Agreement.

Congress's express rationale for § 114(f)(5)(C) confirms it excludes only the Webcaster Settlement Agreements. *See* iHeartMedia Br. at 9-11. In enacting that provision, Congress made "clear that *the agreement* will not be admissible as evidence or otherwise taken into account" in future rate-setting proceedings.[2] Congress thus confirmed that it intended § 114(f)(5)(C) to apply only to Webcaster Settlement Agreements, because they reflect "extraordinary and unique circumstances" rather than voluntary market transactions. 17 U.S.C. § 114(f)(5)(C).

Indeed, § 114(f)(5)(C) must be read to permit the Judges to rely on voluntarily negotiated direct license agreements in order to interpret § 114 as a harmonious whole and to give effect to Congress's explicit preference for marketplace agreements in § 114(f)(2)(B). *See* iHeartMedia

[2] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 2(1)-(7), 116 Stat. 2780, 2780-81 (2002) (emphasis added).

Br. at 11-14. That section encourages the Judges to consider "comparable" "voluntary license agreements" for "eligible nonsubscription transmissions" in setting rates. 17 U.S.C. § 114(f)(2)(A)-(B). The 29 in-market agreements between individual record labels and statutory services in the record here are precisely such "comparable" agreements. *See* iHeartMedia Proposed Conclusions of Law ¶ 12 (citing decisions holding that, "the more comparable" a benchmark is, "the more probative it will be of the fair market value"). Any interpretation of § 114(f)(5)(C) that would preclude the Judges from considering these agreements would put that section into irreconcilable conflict with § 114(f)(2)(B).

In addition, the Judges' prior interpretation of § 114(f)(5)(C) and judicial interpretation of a parallel provision within the same section, § 114(i), similarly limit § 114(f)(5)(C) to the Webcaster Settlement Agreements. *See* iHeartMedia Br. at 14-17. In *SDARS II*, the Judges recognized that the bar in § 114(f)(5)(C) is limited to "evidence of the content or terms of a settlement agreement."[3] Judge Cote recently interpreted § 114(i) — which mirrors § 114(f)(5)(C) by providing that the rates set by the CRB for sound recordings "*shall not be taken into account*" to set rates for musical works — to preclude only consideration of the CRB rates themselves and to allow consideration of how these rates influenced the market for musical works. *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 366-67 (S.D.N.Y. 2014).

B. The Register Should Reject SoundExchange's Effort To Read § 114(f)(5)(C) To Preclude Consideration of Voluntarily Negotiated Direct Licenses Between Statutory Services and Individual Record Labels

1. "Otherwise Taken Into Account" in § 114(f)(5)(C) Means To Take Administrative or Judicial Notice

a. The phrase "otherwise taken into account" fulfills a specific function in § 114(f)(5)(C): to preclude agencies and courts from taking administrative or judicial notice of

[3] *SDARS II* Tr. at 3235:21-3236:5 (Aug. 13, 2013) (Ex. B to iHeartMedia Br.)

the Webcaster Settlement Agreements, even if the parties do not seek to admit those into evidence. Section 114(f)(5)(C) provides that "in any administrative, judicial, or other government proceeding" concerning the setting or adjustment of rates for statutory services, neither § 114(f)(5)(A) itself — which authorized SoundExchange, during specific, limited periods, to enter into settlement agreements — nor the provisions of any agreement entered into pursuant to § 114(f)(5)(A) "shall be admissible as evidence or otherwise taken into account." The phrase "admissible as evidence" covers cases where a party seeks to introduce a Webcaster Settlement Agreement into evidence, and the phrase "otherwise taken into account" ensures that — even if no party does so — those agreements are not considered under the authority of the agency or court to take administrative or judicial notice of non-record evidence.

Indeed, in the absence of the phrase "otherwise taken into account," agreements made pursuant to § 114(f)(5)(A) would be subject to *mandatory* judicial notice by the D.C. Circuit in its review of rates and terms set pursuant to § 114(f)(2)(B). Under federal law, the "contents of the Federal Register *shall be* judicially noticed." 44 U.S.C. § 1507 (emphasis added).[4] Because *every* agreement made pursuant to § 114(f)(5)(A) must be published in the Federal Register, *see* 17 U.S.C. § 114(f)(5)(B), courts would ordinarily be compelled to take judicial notice of these agreements. Congress is presumed to have been aware of 44 U.S.C. § 1507, which was enacted in its current form in 1968, when it drafted the Small Webcaster Settlement Act in 2002. *See California Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 1354 (Fed. Cir. 2006) ("Congress

[4] *See, e.g.*, *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1179 (9th Cir. 2002) ("federal courts are required to take judicial notice of the Federal Register"); *Poindexter v. United States*, 777 F.2d 231, 236 (5th Cir. 1985) ("[The contents of regulations published in the Federal Register] were matters of which the district court was *required* to take judicial notice, as is this Court."); *United States v. Coffman*, 638 F.2d 192, 194 (10th Cir. 1980) ("Judicial notice must be taken of relevant contents of the Federal Register. This is by statute 44 U.S.C. § 1507.").

is presumed to be aware of pertinent existing law."); *see also* 17 U.S.C. § 114(f)(5)(B) (requiring that every Webcaster Settlement Agreement published in the Federal Register "shall include a statement containing the substance of [§ 114(f)(5)](C)").

Agreements made pursuant to § 114(f)(5)(A) would also ordinarily be subject to administrative or "official" notice by the CRB Judges. Agencies are generally permitted to take "official notice" of "a material fact not appearing in the evidence in the record," 5 U.S.C § 556(e),[5] and the enabling statute for the CRB specifically contemplates that the Judges may take "official notice" of evidence that would not other otherwise be admissible, *see* 17 U.S.C § 803(b)(6)(C)(xi) ("No evidence, including exhibits, may be submitted in the written direct statement or written rebuttal statement of a participant without a sponsoring witness, except where the Copyright Royalty Judges have taken official notice . . . ."). "Official notice" sweeps broadly to encompass all the facts subject to judicial notice — such as documents published in the Federal Register — as well as technical matters within the agency's area of expertise. *See Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202 (D.C. Cir. 1989) ("official notice is broader [than judicial notice]"). Thus, the phrase "otherwise taken into account" was necessary to prevent the CRB and the courts from taking administrative or judicial notice of the Webcaster Settlement Agreements themselves.

This reading is confirmed by the fact that the bar imposed by § 114(f)(5)(C) applies not only to agreements made pursuant to § 114(f)(5)(A), but also to the statutory provision authorizing Webcaster Settlements — that is, § 114(f)(5)(A). *See* 17 U.S.C. § 114(f)(5)(C).

[5] *See Nat'l Classification Comm. v. United States*, 779 F.2d 687, 695 (D.C. Cir. 1985) ("It is beyond dispute that an agency may provide the factual predicate for a finding by taking 'official notice' of matters of common knowledge, of evidence available to it from other proceedings, and of matters known to the agency through its cumulative experience and consequent expertise.") (citations omitted).

That statutory provision was unlikely to be submitted as "evidence" by the parties — indeed, it is hard to imagine a proper "sponsoring witness" for a statute, 37 C.F.R. § 351.10(a) — but could be "taken into account" by the Judges, the Register, or the D.C. Circuit through administrative or judicial notice.

b. SoundExchange, in contrast, asserts (at 1, 4) that the phrase "otherwise taken into account" means to consider in any way, shape, or form — so that, if a webcaster and individual record label in some way acknowledged the applicable Webcaster Settlement Agreement while voluntarily negotiating a direct license, the Judges would be taking that Webcaster Settlement Agreement into account when looking to the direct license for evidence of what a willing buyer and willing seller would do in this market, absent the statute. That is, SoundExchange draws a false equivalence between *the parties* to a direct license taking into account the otherwise applicable Webcaster Settlement Agreement during negotiations to reach a voluntary, marketplace agreement, with *the Judges* taking into account that Webcaster Settlement Agreement in setting rates. *See* SoundExchange Br. at 1.[6]

SoundExchange points to no evidence that Congress intended the phrase "otherwise taken into account" to prevent the Judges from considering future marketplace agreements in setting rates. To the contrary, the legislative history of § 114(f)(5)(C) confirms that Congress intended to prevent only "the agreement" — that is, the specific settlement agreements entered

[6] SoundExchange hypothesizes a direct license between a statutory service and an individual record label that "copie[s] verbatim" the entire Webcaster Settlement Agreement governing the relationship between those parties and "simply relabel[s] [it] as a direct license." SoundExchange Br. at 8. As an initial matter, no such direct license exists. But even if one did, the Judges would properly exclude such an agreement from evidence on the ground that it constitutes an impermissible end run around the final sentence of § 114(f)(5)(C), which grants the power to "expressly authorize" the use of Webcaster Settlement Agreement to set rates to "the receiving agent" — *i.e.*, SoundExchange — and a webcaster subject to that agreement. 17 U.S.C. § 114(f)(5)(C). An individual record label cannot evade Congress's grant of that authority to SoundExchange rather than to the individual labels SoundExchange represents.

into under § 114(f)(5)(A) — from being used to set rates.[7] SoundExchange cites this very provision of the Small Webcaster Settlement Act of 2002, even italicizing Congress's use of "*the agreement*," SoundExchange Br. at 7, but does not explain — nor could it — how Congress's specific intent is consistent with SoundExchange's reading of § 114(f)(5)(C) to preclude consideration of subsequently negotiated direct licenses, which are plainly not "*the agreement*" Congress had in mind.

2. SoundExchange Invents a Test with No Statutory Basis

If taken to its logical conclusion, SoundExchange's interpretation of "otherwise taken into account" would preclude the Judges from considering *every* agreement between a streaming service and an individual record label. That is because, as SoundExchange's expert testified and SoundExchange admits in its opening brief, *every* such agreement is necessarily influenced by the Webcaster Settlement Agreements, including the agreements between record labels and "interactive" services — such as Spotify — on which SoundExchange based its rate proposal.[8]

In an effort to protect its rate proposal, SoundExchange invents a limiting principle, claiming that an agreement cannot be considered only if it is "directly influenced by the provisions of a WSA settlement agreement." SoundExchange Br. at 1. This test has no basis in the statute, legislative history, or precedent. Indeed, SoundExchange does not even claim it does; incredibly, SoundExchange offers *no* basis for the line it urges the Register to draw, other

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

[8] *See* Corrected Written Direct Testimony of Prof. Rubinfeld ¶ 91 (filed Nov. 4, 2014) ("Rubinfeld WDT") (SX Ex. 17) (testifying that all direct licenses are "affected to a certain degree by the statutory *and pureplay* settlement rates") (emphasis added); SoundExchange Br. at 13 ("To some extent, any agreement in the webcasting space may be said to be influenced by existing statutory rates *as well as the rates that apply under some WSA agreements*.") (emphasis added).

than SoundExchange's apparent hope that this line will weaken the Services' cases, while leaving its case intact. Reading words into § 114(f)(5)(C) that Congress did not put there violates basic canons of statutory construction. *See* iHeartMedia Br. at 9 (citing cases).

In all events, the "directly influenced" test SoundExchange urges the Register to adopt would not achieve SoundExchange's transparent purpose of preventing the Judges from considering in-market evidence while protecting the admissibility of the agreements underlying SoundExchange's own rate proposal. First, even under SoundExchange's erroneous interpretation of the statute, § 114(f)(5)(C) would not bar the Judges from considering any of iHeartMedia's 28 direct license agreements with individual record labels. Indeed, SoundExchange has effectively conceded this point, having abandoned the pre-hearing objections to those agreements based on § 114(f)(5)(C) that it filed. SoundExchange did not object to the admission of iHeartMedia's 28 direct license agreements during the hearing, and its post-hearing arguments concerning § 114(f)(5)(C) were limited to the Pandora-Merlin Agreement. *See* iHeartMedia Br. at 2. SoundExchange also offered no evidence at the hearing that any provision of any of iHeartMedia's 28 direct license agreements with individual record labels was influenced — "directly" or otherwise — by the NAB Settlement Agreement under which iHeartMedia operates absent a direct license.[9]

Second, some of the agreements on which SoundExchange based its own rate proposal fail SoundExchange's invented "directly influenced" test. For example, the Sony-Slacker Agreement copies the rates and payment terms for Slacker's "basic radio" feature [redacted]

[9] Nor could SoundExchange claim that any of iHeartMedia's direct licenses was "directly influenced" by the Pureplay Settlement Agreement because iHeartMedia "would [not] be eligible to opt into the WSA agreement and fall back on that option in the absence of a directly-negotiated license." SoundExchange Br. at 14.

[redacted],[10] and incorporates by reference the definition of "Gross Revenue" [redacted][11] Similarly, the Warner-Spotify Agreement copies the rates for Spotify's mobile feature [redacted].[12] SoundExchange's effort to read § 114(f)(5)(C) to allow the Judges to consider these agreements — but not one or more of the in-market direct licenses — renders its construction of the statute incoherent.

3. SoundExchange's "Sword and Shield" Concern Has Already Proven False

SoundExchange argues (at 6, 11) that, if a participant were permitted to introduce a direct license that was "directly influenced" by a Webcaster Settlement Agreement, opposing participants would be unable to demonstrate the influence of the Webcaster Settlement Agreement on that direct license. SoundExchange puts this argument in abstract terms, as if the hearing in this proceeding had not already occurred. But the record of the hearing shows that SoundExchange's concern is false.

During the hearing, SoundExchange was given a full opportunity to put in evidence and to cross-examine Pandora's witnesses concerning the influence of the Pureplay Settlement Agreement on the Pandora-Merlin Agreement and make its — wrong, but admissible — case

[10] Sony-Slacker Agreement (SX Ex. 80 at SNDEX0022489) [redacted]).

[11] Sony-Slacker Agreement (SX Ex. 80 at SNDEX0022489) ([redacted]).

[12] Warner-Spotify Agreement (SX Ex. 100 at SNDEX0058523) ([redacted]).

that the Pandora-Merlin Agreement is a poor basis for rate-setting because it was negotiated in the "shadow" of the Pureplay Settlement Agreement.[13] In fact, SoundExchange devoted an entire section of its Proposed Findings of Fact to arguing that the Pandora-Merlin Agreement was derived from the Pureplay Settlement Agreement.[14]

4. Agreements Negotiated in the "Shadow" of the Statute Are Evidence of the Rates and Terms to which a Willing Buyer and Willing Seller Would Agree

SoundExchange's effort (at 6) to exclude in-market, voluntarily negotiated direct license agreements is based on the premise that any agreement "directly influenced by a WSA agreement . . . should be given no weight" in setting rates under § 114(f)(2)(B). But this is an argument for ignoring *all* marketplace deals, not an argument based on § 114(f)(5)(C). As explained above, *every* direct license between a statutory service and an individual record label will be influenced, to some extent, by the "shadow" of the statutory regime, which includes the Webcaster Settlement Agreements that currently provide the background rates for nearly the entire statutory webcasting industry. *See* iHeartMedia Br. at 6. But, contrary to SoundExchange's suggestion, the "shadow" has not resulted in direct licenses that are carbon copies of the Webcaster Settlement Agreements. Each of the 29 in-market agreements in the record provides for *lower* rates than the otherwise applicable Webcaster Settlement Agreement, and 28 of them provide those lower rates over *longer* terms that reach into the 2016-2020 period. The willingness of individual record labels and statutory services to agree voluntarily to such terms is strong evidence that the rates in the otherwise applicable Webcaster Settlement

[13] Pandora's Reply Conclusions of Law ¶¶ 52-54 (collecting examples).

[14] SX's Proposed Findings of Fact § VIII.B ("Pandora Failed to Provide An Appropriate And Representative Benchmark By Relying Upon a Single, Experimental License That Derives From Non-Precedential Statutory Rates And Applies To A Sliver Of The Market").

Agreements are too high and that willing buyers and willing sellers would agree to — indeed, have agreed to — lower rates for the 2016-2020 period.

The task of the Judges under § 114(f)(2)(B) is to conduct an economic analysis, based on the fact and expert testimony provided in the record, to remove the effect of the shadow and to identify the evidence these direct licenses reveal about the rates and terms to which a willing buyer and willing seller would agree in the absence of the compulsory license. Unlike SoundExchange, iHeartMedia has given the Judges a reliable economic methodology for removing the shadow and identifying the rate agreed to outside of that shadow by the willing buyers and willing sellers that entered those direct license agreements.

These actual, voluntarily negotiated direct licenses between individual record labels and statutory services thus provide the best evidence available to the Judges. Indeed, in *Webcasting I* — the last CRB proceeding in which the Judges had access to in-market deals for statutory services — the Register concluded "it is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the marketplace."[15] And the Judges in this proceeding noted the "important evidentiary value of actual marketplace agreements as potential benchmarks in determining the statutory rates."[16] The need to remove the effect of the shadow is part of the analysis under § 114(f)(2)(B), and provides no basis to discard from the evidentiary record — in whole or even in part — any voluntarily negotiated direct license between a statutory service and an individual record label.[17]

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[15] *Webcasting I Remand*, 67 Fed. Reg. at 45252.

[16] Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters at 3 (Apr. 3, 2014).

[17] Indeed, because *all* marketplace deals are negotiated in the shadow of the compulsory license and Webcaster Settlement Agreements to some extent, the Judges must remove the effect of the shadow before using *any* marketplace deal to set rates, including the agreements between

CONCLUSION

In sum, the Register should answer "No" to each of the questions the Judges referred.

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Respectfully submitted,

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individual record labels and non-statutory, interactive services on which SoundExchange relies. However, SoundExchange did not propose any methodology for removing the shadow from those agreements, and SoundExchange's expert admitted that, while he was aware of the effect of the shadow, he made no attempt to remove it in analyzing the agreements on which he relied. *See* Rubinfeld WDT ¶ 133 ("Ideally, one should adjust such agreements [with interactive services] to remove the effects of the shadow before using them as the basis for a benchmark. . . . [H]owever, I do not make any such adjustment.").