PUBLIC VERSION

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

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

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

The National Association of Broadcasters ("NAB") and the National Religious Broadcasters Noncommercial Music License Committee (the "NRBNMLC") respectfully submit that the clear response to each of the questions referred by the Copyright Royalty Judges to the Register of Copyrights is "no"; section 114(f)(5) does not bar the Judges from considering all or any part of any license agreement between a webcaster and a record company. By its express terms, section 114(f)(5) prohibits the Judges only from admitting into evidence or taking into account certain specified agreements between SoundExchange (the "receiving agent" in the words of the statute) and a service or services that were "entered into pursuant to subparagraph (A)" – that is, agreements entered into pursuant to the authority granted by the Webcaster Settlement Act of 2008 (the "2008 WSA") or the Webcaster Settlement Act of 2009 (the "2009 WSA") (collectively, the "WSAs"). 17 U.S.C. § 114(f)(5)(C).[1] The statute explains that the reason for that bar is "the intent of Congress that any royalty rates, rate structure, . . . included in

[1] The 2008 WSA is Pub. L. No. 110-435, 122 Stat. 4974 (2008). The 2009 WSA is Pub. L. No. 111-36, 123 Stat. 1926 (2009).

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." *Id.*

The agreements that are the subject of the Judges' July 29, 2015 Order Referring Novel Question of Law and Setting Briefing Schedule (the "Referral Order") are agreements between services and individual record companies, not the receiving agent, that were entered into years after "the authority to make settlements pursuant to subparagraph (A)" provided by the WSAs expired. 17 U.S.C. § 114(f)(5)(F). In short, the agreements that are the subject of the Referral Order were not entered into pursuant to "subparagraph (A)" of either of the WSAs. Nor were they entered into "as a compromise motivated by . . . unique business, economic, [or] political circumstances"; rather, they were negotiated in the marketplace between willing buyers and willing sellers. Accordingly the prohibition of section 114(f)(5)(C) does not apply to those agreements. The Judges may consider them. Indeed, the final sentence of section 114(f)(2)(B) expressly declares that the agreements that are the subject of the Referral Order are precisely the type of agreements that the Judges "may consider." *Id.* § 114(f)(2)(B).

Moreover, section 114(f)(5)(C), by its terms, does "not apply to the extent that the receiving agent and a webcaster that is a party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection." In this case, SoundExchange, the receiving agent, itself introduced into evidence terms of the "Pureplay" WSA agreement, without objection, in its own presentation to the Judges, including in its own direct case. SoundExchange's own submission of the terms of the Pureplay WSA agreement is a clear "express[] authorization" to admit and consider that WSA

agreement in this proceeding. Thus, even if section 114(f)(5)(C) otherwise would have applied to preclude privately negotiated agreements between record companies and services – which it does not – SoundExchange, by its own conduct in this case, has expressly authorized the admission and consideration of the "Pureplay" WSA agreement, and, by extension, the privately negotiated agreements that are the subject of the Referral Order.

BACKGROUND

Under both WSAs, subparagraph (A) of section 114(f)(5) granted to SoundExchange[2] the authority to enter into agreements with any one or more commercial or noncommercial webcasters. Agreements entered into pursuant to subparagraph (A) would be binding on all copyright owners, and SoundExchange would not be liable to any copyright owner for having entered into such an agreement. 17 U.S.C. § 114(f)(5)(A).

Under both WSAs, "the authority to make settlements pursuant to subparagraph (A)" was time limited. *Id*. § 114(f)(5)(F). The 2008 WSA provided that "the authority to make settlements pursuant to subparagraph (A) shall expire February 15, 2009." *Id*., *as amended by* 2008 WSA, § 2(5), 122 Stat. at 4975. The 2009 WSA similarly provided that "the authority to make settlements pursuant to subparagraph (A) shall expire at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009." *Id*., *as amended by* 2009 WSA, § 2(3), 123 Stat. at 1926. Authority under the 2009 WSA expired on July 30, 2009. *See Notification of Agreements Under the Webcaster Settlement Act of 2009*, 74 Fed. Reg. 40614, 40614 (Aug. 12, 2009).

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[2] Section 114(f)(5)(A) granted the settlement authority to the "receiving agent," a defined term having the meaning set forth in 37 C.F.R. § 261.2, as published in the Federal Register in the *Web I* Final Rule, 67 Fed. Reg. 45240, 45273 (July 8, 2002). *See* 17 U.S.C. § 114(f)(5)(E)(ii). The cited C.F.R. section refers, in turn, to 37 C.F.R. § 261.4(b), which names SoundExchange. 67 Fed. Reg. at 45274.

Subparagraph (C) of section 114(f)(5) prohibits the Copyright Royalty Judges from considering either subparagraph (A) itself or certain agreements entered into pursuant to subparagraph (A). That subparagraph states in relevant part that:

> (C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), . . . shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings . . .. 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 U.S.C. § 114(f)(5)(C).

On July 29, 2015, the Copyright Royalty Judges issued the Referral Order, referring to the Register of Copyrights five specific "novel material question[s] of substantive law." Referral Order at 2-3. The questions all relate to whether section 114(f)(5)(C) bars the Judges from considering all or parts of private license agreements between a webcaster and a record company if an agreement bears one of several relationships to a WSA agreement and the WSA agreement does not include a provision expressly authorizing submission of the WSA agreement in a future rate proceeding. The Referral Order makes clear that the Judges are not asking about whether they may consider the terms of any WSA settlement agreement itself. Referral Order at 1. Rather, the Judges are asking about <u>private agreements</u> entered into between individual record labels and webcasters. *Id.* at 1-3.

The Judges presented the questions in the Referral Order in the context of SoundExchange's challenge to certain agreements presented as benchmarks by the services in the Web IV proceeding. SoundExchange was not a party to these agreements – individual record companies were. Moreover, the agreements were entered into long after the authority granted to SoundExchange under the WSAs expired.[3]

Notably, the questions presented by the Judges also apply to agreements offered as benchmarks by SoundExchange. For example, the primary interactive service benchmark analysis advanced by SoundExchange includes agreements with terms that either expressly reference or are substantively identical to the Pureplay WSA agreement. *See*, *e.g.*, SX Ex. 80 at SNDEX0022489-90 ([[ ]]); *id.* at SNDEX0019761-62, SNDEX0039071 ([[ ]]); SX Ex. 100 at SNDEX0021264, SNDEX0021294 ([[ ]]); SX Ex. 87 at SNDEX0021022 ([[ ]]). Moreover, the agreements between the major labels [[ ]] – SoundExchange's second "benchmark" – [[ ]]. *See*, *e.g.*, SX-2070 at 1-2 ([[ ]]; SX-2071 at 2 [[ ]];

[3] For example, the Agreement between Pandora and MERLIN was entered into on [[ ]]. SX Ex. 101 at 015. The earliest agreement entered into by iHeartMedia with a record company was executed on [[ ]]. IHM Ex. 3034 at 174.

see also IHM Exs. 3470, 3517 ([[[redacted]

[redacted]]]).

ARGUMENT

I. SECTION 114(F)(5)(C), BY ITS EXPRESS TERMS, DOES NOT PRECLUDE CONSIDERATION OF ANY PRIVATE AGREEMENTS BETWEEN WEBCASTERS AND RECORD COMPANIES.

The prohibition of subparagraph (C) of section 114(f)(5) is clear and limited in its scope. It applies only to "subparagraph (A)" and "any provisions of any agreement entered into pursuant to subparagraph (A)." 17 U.S.C. § 114(f)(5)(C). "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted).

The text of section 114(f)(5) makes clear that the term "agreement entered into pursuant to subparagraph (A)" of that section is limited to and means <u>only</u> settlement agreements entered into by SoundExchange during the short and specific period of the WSA authorizations. First, the whole point of subparagraph (A) is to grant authority to SoundExchange to enter into agreements with webcasters that bind all copyright owners and to relieve SoundExchange from certain potential liability for doing so. Indeed, the <u>only</u> agreements discussed in subparagraph (A) of section 114(f)(5) are agreements entered into by SoundExchange pursuant to the authority granted by each WSA.

Second, the phrase "pursuant to subparagraph (A)" also appears in other subparagraphs of section 114(f)(5). For example, the term appears in subparagraph (F), which limits the time

period during which SoundExchange is authorized to enter into agreements "pursuant to subparagraph (A)." Similarly, subparagraph (B) provides that "[t]he Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A)." 17 U.S.C. § 114(f)(5)(B).

The private agreements at issue in the Referral Order cannot be construed to have been "entered into pursuant to subparagraph (A)" of section 114(f)(5). Those agreements were not entered into by SoundExchange; rather, they were entered into by individual record companies. The agreements were not entered into during the time period for settlements authorized by subparagraph (A) as defined in subparagraph (F); rather, they were entered into years later. The agreements do not bind all copyright owners as provided in subparagraph (A); rather, they are private agreements between private parties. The agreements were not published in the Federal Register as required by subparagraph (B). Finally, the agreements at issue do not provide any immunities from liability to the record companies that entered them, as provided in subparagraph (A).

Similarly, the phrase "or otherwise taken into account" cannot be read to expand the subject of the subparagraph (C) prohibition. In plain English, the subject of the applicable sentence is "subparagraph (A) [or] any provisions of any agreement entered into pursuant to subparagraph (A)." The agreements that are the subject of the prohibition are those entered into by SoundExchange pursuant to subparagraph (A). The private marketplace agreements that are the subject of the Referral Order are not such agreements. In short, section 114(f)(5)(C), by its terms, does not preclude the Judges from considering the terms of those agreements.[4]

[4] SoundExchange has argued that the effect of the Pureplay agreement reduces the weight that should be given to the agreements that are the subject of the Referral Order. While the parties disagree about the significance of that effect, all parties remain free to make their arguments to the Judges for the Judges to evaluate.

Nor would it be reasonable to construe the prohibition of subparagraph (C) to extend to the terms of private agreements that include terms that were copied from, are substantively identical to, refer to, or have been influenced by a WSA agreement. As discussed in Part II, below, such a construction would be inconsistent with the stated purpose of subparagraph (C). And, as discussed in Part III, such a construction would be inconsistent with section 114(f)(2)(B), which expressly authorizes the Judges to consider such private agreements.

Moreover, such a construction would be inconsistent with the text of section 114(f)(5) itself. As discussed above, subparagraph (B) requires the Register to publish in the Federal Register "agreements entered into pursuant to subparagraph (A)," the very same expression used in subparagraph (C). The private agreements at issue in the Referral Order were not published in the Federal Register. Nor could it be credibly argued that they were required to have been so published. Subparagraph (B) cannot be construed to require the Register to publish agreements entered into by individual record companies, even if they include terms that were copied from, are substantively identical to, refer to, or have been influenced by a WSA agreement.

Similarly, subparagraph (F) expressly limits the authority of SoundExchange "to make settlements pursuant to subparagraph (A)." The phrase "settlements pursuant to subparagraph (A)" means the same thing as the phrase "agreements pursuant to subparagraph (A)" elsewhere in section 114(f)(5). It cannot credibly be argued that subparagraph (F) in any way alters the rights of individual record companies to enter into settlements or agreements with webcasters at any time. Nor can it be argued that subparagraph (F) places limitations on the terms that individual record companies may include in their private agreements – individual record companies are entirely free at any time to enter into agreements with terms that were copied from, are substantively identical to, refer to, or have been influenced by a WSA agreement.

Where Congress uses the same term in the same statute, it is presumed to mean the same thing. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (finding that the act there at issue, "like every Act of Congress, should not be read as a series of unrelated and isolated provisions" and adhering to "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" (citations and quotation marks omitted)); *accord Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2004-05 (2012). Just as it makes no sense to construe the limitations and requirements of subparagraphs (B) and (F) to apply to the agreements at issue in the Referral Order, even if they include terms that were copied from, are substantively identical to, refer to, or have been influenced by a WSA agreement, it makes no sense to construe the preclusion of subparagraph (C) to apply to those agreements.

Such a construction also would force the Judges to engage in arbitrary line-drawing and second-guessing regarding parties' intent in entering into license agreements in a manner nowhere contemplated or discussed in the statutory prohibition. For example, if private agreements including rates or terms that are "copied verbatim" from an inadmissible WSA agreement are themselves inadmissible, would that prohibition bar consideration of all agreements that include rates and terms that are identical to such a WSA agreement, whether by happenstance or by design? If not, the Judges would have to assess parties' subjective intent in including particular rates and terms to determine whether the inclusion of such rates was intentionally done to mirror a WSA agreement or occurred by coincidence. If private agreements that "refer to" inadmissible WSA agreements are inadmissible, would that block all such private agreements from consideration regardless of the reason for such a reference? If not, the Judges would have to determine why the parties included such references and whether those reasons sufficed to bar consideration of the implicated agreements. And if private agreements

that are "influenced" by a nonprecedential WSA agreement are barred from admission, the Judges would have to determine – for each and every proffered agreement – whether the rates and terms were influenced by such a WSA agreement – regardless of whether they are identical to a WSA agreement's rates and terms. These examples highlight the perils of unmooring an evidentiary prohibition from its carefully delineated textual basis in the statute.

II. SECTION 114(F)(5)(C), BY ITS EXPRESSLY STATED PURPOSE, DOES NOT PRECLUDE CONSIDERATION OF PRIVATE AGREEMENTS BETWEEN WEBCASTERS AND RECORD COMPANIES.

The conclusion mandated by the plain and limited language of subparagraph (C) is confirmed by the stated purpose of that subparagraph. Congress did not leave that purpose to speculation; it expressly stated its reasons for including subparagraph (C) both in the statute that initially added that subparagraph to section 114 and directly in the subparagraph itself.

Subparagraph (C) was added to section 114(f)(5) as part of the Small Webcaster Settlement Act of 2002. Pub. L. No. 107-321, 116 Stat. 2780 (2002) (the "SWSA"). Congress explained in the text of that Act that representatives of both small webcasters and copyright owners of sound recordings had reached a settlement agreement in light of specific considerations: "as to the small webcasters, their belief in their inability to pay the fees due pursuant to [the Web I Final Order]" and "as to the copyright owners of sound recordings and performers, the strong encouragement of Congress to reach an accommodation with the small webcasters on an expedited basis." *Id.* § 2(3), 116 Stat. at 2780. Thus, Congress declared that it was in the public interest "for the parties to be able to enter into such an agreement . . . if it is clear that the agreement will not be admissible as evidence or otherwise taken into account in any government proceeding." *Id.* § 2(7), 116 Stat. at 2781 (emphasis added).

As discussed above, Congress then stated its purpose directly in subparagraph (C), saying that:

> 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).

17 U.S.C. § 114(f)(5)(C).

Agreements between individual record companies and services that were negotiated long after the periods during which SoundExchange was authorized to enter WSA agreements are not like "the agreement" that gave rise to the SWSA. They were not reached due to WSA authority. Nor were they motivated by the "strong encouragement of Congress to reach an accommodation." Nor can such agreements be said to have been "compromise[s] 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)." To the contrary, the agreements offered by the services as benchmarks were freely "negotiated in the marketplace." As such, they are not the type of agreements that Congress had in mind in subparagraph (C) of section 114(f)(5).

III. SECTION 114(F)(5)(C) MUST BE CONSTRUED IN LIGHT OF THE FINAL SENTENCE OF SECTION 114(F)(2)(B), WHICH EXPRESSLY INVITES THE JUDGES TO CONSIDER THE PRIVATE AGREEMENTS AT ISSUE IN THE REFERRAL ORDER.

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if

possible, all parts into an harmonious whole.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treas.*, 489 U.S. 803, 809 (1989), *Gustafson*, 513 U.S. at 569, and *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)); *accord Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015); *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012); *United States v. Wilson*, 290 F.3d 347, 355 (D.C. Cir. 2002).

"'[S]tatutory language has meaning only in context.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 289 (2010) (*quoting Graham Cnty. Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 415 (2005)). "It is the classic judicial task of construing related statutory provisions to make sense in combination." *Wilson*, 290 F.3d at 355 (quotation marks and citation omitted) (construing statute as a whole and in manner consistent "with the history and background against which Congress was legislating").

Section 114(f)(2)(B) expressly identifies the agreements presented by the services that are the subject of the Referral Order as agreements of the type that the Judges <u>may</u> consider. According to the last sentence of section 114(f)(2)(B), "[i]n establishing such rates and terms, the Copyright Royalty Judges <u>may consider</u> the rates and terms for comparable types of digital audio transmission services and comparable circumstances <u>under voluntary license agreements described in subparagraph (A)</u>." 17 U.S.C. § 114(f)(2)(B)(emphasis added).

Under well settled rules of statutory construction, the reference in section 114(f)(2)(B) to "subparagraph (A)" is a reference to subparagraph (A) of paragraph (2) section 114(f).[5] That subparagraph (A) provides that "[a]ny copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Copyright Royalty Judges licenses covering such eligible nonsubscription transmissions and new subscription

[5] The reference should not be confused with the references in paragraph (5) of section 114(f) to subparagraph (A) of that paragraph.

services with respect to such sound recordings." "Eligible nonsubscription transmissions" and transmissions made by "new subscription services" refer, in turn, to noninteractive digital audio transmissions that are subject to statutory licensing under section 114(d)(2). *See* 17 U.S.C. § 114(j)(6), (8). In other words, section 114(f)(2)(B) expressly authorizes the Judges to consider voluntary direct license agreements entered into by record companies and services that cover noninteractive webcasting – precisely the type of agreements introduced by Pandora and iHeartMedia in Web IV.[6]

Any construction of section 114(f)(5)(C) that foreclosed consideration of the very types of agreements that section 114(f)(2)(B) expressly authorizes the Judges to consider would not construe the statute as a harmonious whole. Such a construction must be avoided.

IV. SOUNDEXCHANGE EXPRESSLY AUTHORIZED CONSIDERATION OF THE PUREPLAY WSA AGREEMENT BY INTRODUCING PUREPLAY WSA AGREEMENT RATES INTO EVIDENCE, SO THE ISSUES RAISED BY THE REFERRAL ORDER ARE MOOT.

The prohibition of section 114(f)(5)(C) does 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 U.S.C. § 114(f)(5)(C). Here, there appears to be no question that Pandora, a webcaster that is a party to the Pureplay WSA agreement, has expressly authorized its submission in this proceeding.

SoundExchange now purports to object to any reference to agreements that may refer to or be based on the Pureplay WSA agreement. *See* Proposed Conclusions of Law of

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[6] Notably, section 114(f)(2)(B) does not authorize the Judges to consider the WSA agreements that are the express subject of section 114(f)(5)(C). Congress declared that those agreements were not negotiated "under comparable circumstances." Congress made no similar declaration with respect to the voluntary direct license agreements on which Pandora and iHeartMedia relied. Those agreements fall squarely within the express invitation of section 114(f)(2)(B).

SoundExchange, Inc. Part III (June 19, 2015). The record, however, shows that SoundExchange itself expressly authorized submission of the Pureplay WSA agreement into the record of Web IV.

The written direct testimony of one of SoundExchange's own expert witnesses explicitly set forth the rate that Pandora was paying under the Pureplay WSA agreement. Specifically, footnote 117 of the written direct testimony of Dr. David Blackburn, a SoundExchange witness, stated, in part, that the payments made to the record labels for the sale of an iTunes download "dwarfs that of a non-subscription stream, which on Pandora yields payment of only 0.12 cents in 2013." SX Ex. 3 at 066 n. 117. The 0.12 cents rate quoted by Dr. Blackburn is the Pureplay WSA agreement per-performance rate for 2013. *See Notification of Agreements Under the Webcaster Settlement Act of 2009*, 74 Fed. Reg. 34796, 34799 (July 17, 2009).

SoundExchange had complete control over whether to submit Dr. Blackburn's testimony or whether to ask him to remove any statement of the Pureplay WSA per-performance rates. It opted to offer the Pureplay rate into evidence as the rate paid by Pandora. That was a voluntary decision on SoundExchange's part. Having offered the Pureplay rate into evidence, SoundExchange cannot be heard to object to the services' discussion of the rates established under the Pureplay WSA agreement. Moreover, SoundExchange's own use of the Pureplay rate in its direct case is a clear "authorization" to use those rates.

Moreover, as discussed on pages 5-6, above, SoundExchange also relied on (and offered into evidence) agreements that themselves expressly referred to (or were influenced by) the Pureplay WSA agreement. If, as SoundExchange claims, such conduct would fall within the scope of the prohibition of section 114(f)(5)(C), SoundExchange's own reliance on, and introduction of, such agreements itself constitutes express authorization to engage in the

challenged conduct and to rely on the Pureplay WSA agreements. SoundExchange should not be permitted to have it both ways.

In other words, SoundExchange expressly authorized reliance on the Pureplay WSA agreement. Thus, SoundExchange's objection to the services' use of the agreements that are the subject of the Referral Order is moot, and the Referral Order itself is moot.

V. THE ISSUES REFERRED ARE MORE PROCEDURAL THAN SUBSTANTIVE, AND ARE MORE PROPERLY RESOLVED BY THE JUDGES IN THE CONTEXT OF THE RECORD THAN BY THE REGISTER ON A REFERRAL.

Finally, while NAB and the NRBNMLC recognize that the Judges have referred the questions identified in the Referral Order to the Register, NAB and the NRBNMLC respectfully submit that the questions raised are more procedural than substantive and are best decided by the Judges in the context of the full record before them. Thus, NAB and the NRBNMLC believe that the Register should decline the referral and allow the Judges to answer the questions.

As discussed above, the answer to the questions presented by the Judges is clear as a matter of law. The full ramifications of the issues presented and how those issues came to be raised by SoundExchange in an untimely manner, however, can only be understood in the context of the record in the case and the proceedings before the Judges. The Judges are in the best position to assess those issues in context.

SoundExchange's challenge to Pandora's submission of the Pandora-Merlin agreement and iHeartMedia's submission of its direct license agreements should have been raised before the deadline for motions *in limine* that was set by the Judges as April 1. Order Extending Discovery Period and Revising Case Schedule (Dec. 10, 2014). It makes no sense for the parties to have tried the entire case with the Pandora and iHeart agreements among the significant foci only to have the questions about consideration of those agreements presented after trial. The Judges are

in the best position to assess the impact of SoundExchange's improper approach on the trial and to evaluate whether SoundExchange has waived its objections or effectively authorized use of the agreements by its own behavior.

Moreover, the Judges are in the best position to know how any answer other than an unambiguous "no" could affect their consideration of the case. The difficulties and ambiguities inherent in applying any answer to the referred questions are reflected in the questions themselves – what is the difference between terms "copied verbatim" and terms that are "substantively identical"? What is the significance of that difference? Why should there be any significance? What does it mean for terms to be "influenced" by the terms of a WSA agreement? What kind or degree of influence is required? What kind of reference is required in order for an "agreement [to] refer[] to a WSA settlement agreement"? It makes little sense to address such questions in the abstract.

Similarly, only the Judges are in a position to know what agreements and analyses would be disqualified by any answer other than an unambiguous "no" and how such an answer could affect their ability to determine rates that are "reasonable," as mandated by section 801(b)(1),[7] and satisfy the willing buyer/willing seller standard of section 114(f)(2).

NAB and the NRBNMLC further submit that the Referral Order is not proper as a matter of law. Section 802(f)(1)(B) only requires referral of "a novel material question of substantive law." The purpose of the limitation to "substantive" questions is to mandate referral only of matters of substantive copyright law that are within the special expertise of the Register. The questions presented in the Referral Order are not substantive questions of copyright law. They are, rather, procedural in nature – relating primarily to the admissibility of evidence in a

[7] Notably, the "reasonable" rate requirement of section 801(b)(1) expressly applies to all CRB rate-setting, not just those under the four policy factors set forth later in that section.

proceeding under the Judges' control and authority. *See*, *e.g.*, *Tucker v. Comm'r*, 676 F.3d 1129, 1135 (D.C. Cir. 2012) (characterizing the authority "to rule on admissibility of evidence" as a "procedural power[]"); *Wright v. Farouk Sys., Inc.*, 701 F.3d 907, 910 n.6 (11th Cir. 2012) (observing that "'the admissibility of evidence is a procedural issue'" (quoting *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396 (11th Cir. 1997))). Moreover, they are not matters within the special expertise of the Register; as discussed above, construction of section 114(f)(5)(C) is a task best performed by the Judges, who have had the benefit of having managed the process and are intimately familiar with the record.

CONCLUSION

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

Respectfully submitted,

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August 7, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2015, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

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