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 INITIAL BRIEF REGARDING THE LEGAL QUESTION REFERRED TO THE REGISTER

This is the first proceeding since *Webcasting I* in which the record contains voluntarily negotiated agreements between webcasters offering statutory services and individual record labels. The record contains 29 such agreements, iHeartMedia's agreements with Warner Music Group and 27 independent labels, as well as the Pandora-Merlin Agreement, which was adopted by some [redacted] Merlin members. Despite the thick record of in-market agreements reflecting the decisions of willing buyers and willing sellers, SoundExchange's rate proposal — no different from *Webcasting II* and *Webcasting III* — is based on agreements between record labels and non-statutory, interactive services (such as Spotify). SoundExchange has repeatedly tried to prevent the Judges from considering the in-market evidence from the 29 direct license agreements, so as to leave the Judges with no choice but again to take on the near-impossible task — in SoundExchange's expert's own words — of making the "bunch of adjustments"

necessary to translate those agreements with interactive services into a rate for statutory services.[1]

One of SoundExchange's efforts to preclude consideration of those in-market, voluntary agreements between statutory services and individual record labels has been to invoke 17 U.S.C. § 114(f)(5)(C). Through that statutory provision, first enacted in 2002, Congress sought to further particular, industry-wide settlement agreements entered into at discrete times that reflect "a compromise motivated by . . . unique business, economic and political circumstances . . . rather than" agreements "negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(5)(C). Congress therefore provided that "any provisions" of *those* settlement agreements shall not be "admissible as evidence or otherwise taken into account" in setting rates under § 114(f). *Id.* SoundExchange initially filed pre-hearing objections to the admission of *all 29 in-market direct license agreements* based on § 114(f)(5)(C). But SoundExchange did not object to the admission of iHeartMedia's 28 agreements during the hearing, and its post-hearing reliance on § 114(f)(5)(C) was limited to seeking to preclude consideration of the Pandora-Merlin Agreement — effectively conceding that, whatever the scope of § 114(f)(5)(C), it does not preclude the Judges from considering the voluntary marketplace deals reflected in iHeartMedia's 28 direct license agreements.

In fact, the Judges may consider *all* of the in-market, voluntary direct license agreements in the record here. The text, legislative history, and other provisions of § 114 all confirm that the prohibition in § 114(f)(5)(C) is limited to the specific settlement agreements entered into with SoundExchange pursuant to the 2008 and 2009 Webcaster Settlement Acts, and does not reach

[1] Tr. at 1795:14-17 (Rubinfeld) ("Now, I had to do a bunch of adjustments to try to make the rates for interactive services as comparable as possible to the rates for noninteractive [*i.e.*, statutory] services.").

subsequently negotiated direct license agreements between a webcasting service and a copyright holder in this marketplace. Those direct license agreements change the background rules against which the parties operate, and are precisely the type of "comparable . . . voluntary license agreements" that the statute encourages the Judges to consider. *Id.* § 114(f)(2)(B). Indeed, the Register long ago concluded that such in-market, direct license agreements provide the best "evidence of marketplace value."[2] Sections 114(f)(2)(B) and 114(f)(2)(C) must be read in harmony, and the Register must reject any interpretation of § 114(f)(5)(C) that would require the Judges to disregard — in whole or in part — voluntarily negotiated agreements between willing buyers and willing sellers in the market for statutory services.

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

BACKGROUND

A. Congress Enacted § 114(f)(5)(C) To Enable Settlement Agreements

1. Congress initially enacted § 114(f)(5)(C) as part of the Small Webcaster Settlement Act of 2002.[3] A group of small webcasters that sought rates lower than those in *Webcasting I* had reached an agreement with SoundExchange that was not meant to "approximate[] . . . rates and terms that would have been negotiated in the marketplace," but instead was specific to the "extraordinary and unique circumstances . . . [of] small webcasters" that had an "inability to pay the fees due" under *Webcasting I*.[4] Congress expressly found that it would be "in the public interest" to allow that settlement to take effect "if it is clear that *the*

[2] 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*").

[3] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 4, 116 Stat. 2780, 2781-83 (2002) (codified at 17 U.S.C. § 114(f)(5)).

[4] *Id.* § 2(1)-(4), 116 Stat. at 2780.

agreement will not be admissible as evidence or otherwise taken into account in any government proceeding involving the setting or adjustment of the royalties" under § 114.[5] Congress, therefore, enacted § 114(f)(5)(C), which then (as now), provides that:

> Neither [§114(f)(5)](A) nor any provisions of any agreement entered into pursuant to [§114(f)(5)](A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, 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 [under § 114(f)(2)].[6]

Moreover, Congress expressly included in the text of § 114(f)(5)(C) itself the reason for that rule:

> 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 small 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 . . . .[7]

2. The Webcaster Settlement Act of 2008 ("2008 WSA") and the Webcaster Settlement Act of 2009 ("2009 WSA") were Congressional responses to the rates set in *Webcasting II* — which webcasters and some members of Congress perceived to be too high — and the commencement of proceedings in *Webcasting III*. *See* H.R. Rep. No. 111-139 at 2, 3 (June 8, 2009) ("Committee Report") (Ex. A).

The 2008 WSA granted SoundExchange authority to negotiate and enter into alternative agreements with webcasters that would replace the rates set by the CRB in *Webcasting II* during

[5] *Id.* § 2(7), 116 Stat. at 2781 (emphasis added).

[6] *Id.* § 4, 116 Stat. at 2782.

[7] *Id.*

a limited time period between October 16, 2008 and February 15, 2009.[8] The 2008 WSA made ministerial changes to the text in § 114(f)(5)(C) originally enacted in 2002 (such as deleting the word "small" before "webcasters"), and added the following sentence:

> This subparagraph shall not apply to the extent that the receiving agent[9] and a webcaster that is party to an agreement entered into pursuant to [§114(f)(5)](A) expressly authorize the submission of the agreement in a proceeding under this subsection.[10]

As Representative Berman explained, the effect of this was to continue the prior rule that a "private deal" under § 114(f)(5)(A) "would not be precedential, unless, of course, the parties agreed that it should be."[11]

SoundExchange and webcasters reached three agreements within the time period allotted by the 2008 WSA, including an agreement between SoundExchange and the National Association of Broadcasters ("the NAB Settlement Agreement"), under which iHeartMedia operates. *See* Copyright Office, *Notification of Agreements Under the Webcaster Settlement Act of 2008*, 74 Fed. Reg. 9293 (March 3, 2009).

Congress enacted the 2009 WSA to provide an additional 30 days for SoundExchange to reach settlements with additional webcasters. *See* Committee Report at 3, 5.[12] The 2009 WSA made no changes to § 114(f)(5)(C). During this 30 day window, SoundExchange reached additional agreements, including one known as the Pureplay Settlement Agreement, under which

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[8] Webcaster Settlement Act of 2008, Pub. L. No. 110-435, § 2, 122 Stat. 4974, 4974-75 (2008).

[9] SoundExchange is the "receiving agent" under 17 U.S.C. § 114(f)(5)(A).

[10] 2008 WSA, Pub. L. No. 110-435, § 2(C), 122 Stat. at 4974.

[11] 154 Cong. Rec. H10278, 279 (Sept. 27, 2008).

[12] *See also* Webcaster Settlement Agreement of 2009, Pub. L. No. § 111-36, § 2, 123 Stat. 1926 (2009).

Pandora operates. *See* Copyright Office, *Notification of Agreements Under the Webcaster Settlement Act of 2009,* 74 Fed. Reg. 34796 (July 17, 2009).

B. Events Following the 2009 WSA and *Webcasting III*

The settlement agreements reached pursuant to the 2008 WSA and 2009 WSA accounted for approximately 95 percent of the royalties paid to SoundExchange in 2008 and 2009,[13] and "[redacted]" currently pay the rates set in *Webcasting III*. Warner Digital Strategy Document (IHM Ex. 3112 at 7). Instead, iHeartMedia and other companies that offer simulcast services pay under the NAB Settlement Agreement, while Pandora — far and away the largest webcaster — and others with similar business models pay rates under the Pureplay Settlement Agreement, which are far below the rates set in *Webcasting III*.

Starting in 2012, however, individual webcasters and individual record labels began to enter direct licenses that departed from this background regime. The participants in this proceeding introduced 29 such agreements. iHeartMedia entered direct licenses with Warner Music Group and 27 independent record labels, including such players as Big Machine (Taylor Swift) and Concord (Paul McCartney). In addition, Pandora entered an agreement with the music rights collective Merlin, which acts on behalf of more than 20,000 labels and distributors, some [redacted] of which voluntarily and independently opted into that agreement. *See* Tr. at 4222:20-25, 4224:1-16 (Herring); Tr. at 6870:9-23 (Lexton). As a result, *Webcasting IV* is the first proceeding since *Webcasting I* in which the record contains evidence of voluntarily negotiated direct licenses between webcasters and record labels for statutory services.

In the *Webcasting IV* proceeding, iHeartMedia and Pandora based their rate proposals on these voluntarily negotiated, direct license agreements. SoundExchange, in contrast, based its

[13] Final Rule and Order, *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23102, 23102 n. 5 (Apr. 25, 2014).

rate proposal — as it had in *Webcasting II* and *Webcasting III* — on agreements between record labels and non-statutory, interactive services (such as Spotify) that offer "on-demand" streaming, offline storage, and other features that render those providers ineligible for the statutory license (or any of the Webcaster Settlement Agreements).

SoundExchange also repeatedly sought to preclude the Judges from considering *any* of the in-market, direct licensing agreements on which the Services relied. The Judges denied SoundExchange's motion to preclude iHeartMedia's experts from testifying about the direct license agreements underlying iHeartMedia's rate proposal.[14] SoundExchange also filed pre-hearing objections to all 29 of the direct licensing agreements, citing § 114(f)(5)(C).[15] The Judges denied those objections without prejudice at the start of the hearing. *See* Tr. at 12:1-13:4 (Chief Judge Barnett). SoundExchange did not object to the admission of the 28 iHeartMedia direct license agreements during the hearing. Although SoundExchange again invoked § 114(f)(5)(C) in its post-hearing filings and at closing argument, it did so *only* as to the Pandora-Merlin Agreement. *See* SoundExchange Proposed Conclusions of Law ¶¶ 39-48; SX Response to Proposed Conclusions of Law ¶ 3; Tr. at 7689:20-23 (Klaus). Pandora and iHeartMedia responded to SoundExchange's renewed — but more limited — argument based on § 114(f)(5)(C), explaining that this provision is inapplicable to voluntarily negotiated marketplace agreements that were entered into outside of the limited time periods under the 2008 WSA and 2009 WSA and that changed the background rules against which the parties to the

[14] Order Denying SoundExchange's Motion To Strike Testimony of Professors Fischel and Lichtman at 2 (Apr. 21, 2015).

[15] *See* SoundExchange's Objections To Testimony and Exhibits at 2-4 & Ex. A (filed Apr. 20, 2015).

agreement otherwise would operate. *See* Pandora Response to Proposed Conclusions of Law ¶¶ 43-60; iHeartMedia Response to Proposed Conclusions of Law at 8-10.

As the Judges noted in framing the questions referred to the Register, no participant has sought to admit into evidence a Webcaster Settlement Agreement itself. *See* Order Referring Novel Question of Law and Setting Briefing Schedule at 1, Docket No. 14-CRB-0001-WR (2016-2020) (July 29, 2015). Therefore, the referred questions require the Register to determine what it means to "otherwise take[] into account" any "provisions of any agreement" entered into pursuant to the 2008 WSA and the 2009 WSA. *Id.* at 1-2.

ARGUMENT

A. The Statutory Text Limits § 114(f)(5)(C) to the Webcaster Settlement Agreements Themselves

Section 114(f)(5)(C) precludes the Judges from "admi[tting] as evidence or otherwise tak[ing] into account" a specific thing: "any provisions of any agreement entered into pursuant to [§114(f)(5)](A)." 17 U.S.C. § 114(f)(5)(C).[16] Those are the specific agreements that were entered into with SoundExchange during the limited settlement periods that the 2008 WSA and 2009 WSA authorized. There can be 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). Those agreements: (1) do not involve Sound Exchange; (2) are not binding on all copyright owners; (3) were not published in the Federal Register; and (4) were entered *years* after the 2008 WSA and 2009 WSA settlement

[16] The statute goes on to confirm that "any" means "any": it "includ[es] any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein" — that is, set forth in any agreement entered into pursuant to § 114(f)(5)(A). 17 U.S.C. § 114(f)(5)(C). This additional language does not alter the already broad scope of "any" and simply exists "to make assurance double sure." *Prime Time Int'l Co. v. U.S. Dep't of Agric.*, 753 F.3d 1339, 1342 (D.C. Cir. 2014).

periods expired. *See* 17 U.S.C. § 114(f)(5)(A), (F). The provisions of the Pandora-Merlin Agreement and 28 other in-market direct license agreements are thus not "provisions of any agreement *entered into pursuant to [§ 114(f)(5)](A).*" *Id.* § 114(f)(5)(C) (emphasis added).

Under the plain text of the statute, the bar on admitting Webcaster Settlement Agreements into evidence or otherwise taking account of their provisions is simply inapplicable to the voluntarily negotiated, direct licensing agreements between statutory webcasters and record labels admitted into evidence at the hearing in this proceeding. That is true even if one or more individual provisions in one of those direct licensing agreements copies verbatim, is substantively identical to, was influenced by, or refers to a provision of any Webcaster Settlement Agreement. A direct license agreement, by definition, is not entered into under § 114(f)(5)(A), and Congress in § 114(f)(5)(C) did not preclude consideration of provisions found *outside* of a Webcaster Settlement Agreement, even where a provision is, for example, copied from or influenced by a provision in an agreement made pursuant to § 114(f)(5)(A). It would violate basic canons of statutory construction to read into § 114(f)(5)(C) words that Congress did not put there. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014) ("[A] reviewing court's task is to apply the text of the statute, not to improve upon it."); *Dean v. United States*, 556 U.S. 568, 572 (2009) ("We start, as always, with the language of the statute," and "we ordinarily resist reading words or elements into statute that do not appear on its face.").

B. Reading the Statute in Light of Congress's Expressed Purposes Confirms that § 114(f)(5)(C) Is Limited to the Webcaster Settlement Agreements Themselves

Further support for this conclusion is found in Congress's rationale for including the bar in § 114(f)(5)(C), as set forth in both the 2002 Small Webcaster Settlement Act and the text of

§ 114(f)(5)(C) itself. As shown above, when faced with an industry settlement agreement between SoundExchange and small webcasters that reflected "extraordinary and unique circumstances" — as opposed to "rates and terms that would have been negotiated in the marketplace" — Congress found that it would be "in the public interest" to be "clear that *the agreement* will not be admissible as evidence or otherwise taken into account" in future rate-setting proceedings.[17] Congress's concern, therefore, was on the admissibility of the settlement agreement itself, not on any subsequent direct license agreements that individual webcasters voluntarily negotiate with individual record labels.

Consistent with that legislative intent, § 114(f)(5)(C) precludes the admissibility into evidence of a Webcaster Settlement Agreement, and independently directs the Judges not to take administrative notice of such an agreement. Moreover, Congress expressly stated in § 114(f)(5)(C) itself *why* Webcaster Settlement Agreements should be excluded from rate-setting: those agreements are "motivated by the unique business, economic and political circumstances" and do not reflect rates and terms that "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(5)(C).

In contrast, the direct license agreements between statutory webcasters and individual record labels at issue here, which were entered into after the 2008 WSA and 2009 WSA expired, reflect rates, terms, and conditions that were "negotiated in the marketplace between a willing buyer and a willing seller." Neither the webcaster nor the record label was compelled to enter a direct license agreement — each could have continued doing business on the pre-existing terms available, whether the Pureplay Settlement Agreement (for the Merlin-represented labels) or the NAB Settlement Agreement (for the 28 labels that signed direct licenses with iHeartMedia).

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

Instead, those parties chose to enter into a direct license agreement precisely because it *changed* the background terms in a manner that each party expected would be advantageous. None of the considerations that led Congress to conclude that it would be in the public interest to exclude Webcaster Settlement Agreements from consideration in rate-setting applies to the direct license agreements that Pandora and iHeartMedia have entered. It is a basic canon of statutory construction that statutes should be read to give effect to the purposes that Congress explicitly included in the statute. *See United States v. American Trucking Ass'ns*, 310 U.S. 534, 542-43 (1940) ("In the interpretation of statutes, the function of the courts . . . is to construe the language so as to give effect to the intent of Congress. . . . There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("[T]he court must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available.").

C. Reading the Statute as a Harmonious Whole — Including Congress's Preference in § 114(f)(2)(B) for Voluntary Marketplace Agreements — Further Confirms that § 114(f)(5)(C) Is Limited to the Webcaster Settlement Agreements Themselves

Statutes are to be interpreted to "fit . . . all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Where there is more than one possible intrepretation of an isolated provision, the interpretation that will "harmonize the provisions and render each effective" must be chosen. *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014); *see also Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) ("an agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole" does not merit *Chevron* deference) (alteration in original). Section 114(f)(5)(C),

therefore, must be interpreted in a manner that harmonizes with § 114(f)(2)(B), which sets forth what the Judges should consider in setting rates and terms for statutory services.

Under § 114(f)(2)(B), the Judges are directed to "establish rates and terms that *most clearly* represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B) (emphasis added). As the Judges have held in prior *Webcasting* proceedings, this section "reflects Congressional intent for the Judges to attempt to replicate rates and terms that would have been negotiated in a hypothetical marketplace"[18] in which the "buyers and sellers operate in a free market"[19] and "no statutory license exists."[20]

In undertaking that task, the Act authorizes the Judges to "consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in [§ 114(f)(2)](A)" — that is direct licenses "covering . . . eligible nonsubscription transmissions."[21] Agreements involving the same sellers, the same buyers, and the same statutory services not only are the very agreements Congress authorized the Judges to consider, but also are critical to determining rates and terms that "most clearly" represent what a willing buyer and willing seller in this market would negotiate in the absence of the statutory license. Indeed, the Register concluded in *Webcasting I* that "it is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the

[18] *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) ("*Webcasting II*").

[19] *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 76 Fed. Reg. 13026, 13028 (Mar. 9, 2011) ("*Webcasting III*").

[20] *Webcasting II*, 72 Fed. Reg. at 24087.

[21] 17 U.S.C. § 114(f)(2)(B).

marketplace."[22] And the Judges in this proceeding noted the "important evidentiary value of actual marketplace agreements as potential benchmarks in determining the statutory rates."[23]

Any interpretation of § 114(f)(5)(C) that would preclude the Judges from considering any of the 29 direct licenses admitted into evidence in the hearing — whether in their entirety or as to parts that changed the background terms applicable to the parties[24] — would put § 114(f)(5)(C) into irreconcilable conflict with § 114(f)(2)(B), which Congress did not alter in enacting any of the Webcaster Settlement Acts.

Answering "Yes" to *any* of the referred questions would create just such an impermissible conflict between § 114(f)(5)(C) and § 114(f)(2)(B). That is because every direct license agreement is necessarily negotiated against the background — or in the "shadow" — of the statutory regime, which includes the Webcaster Settlement Agreements. Indeed, SoundExchange's own expert acknowledges that even rates for "interactive" services — such as Spotify — that are ineligible for either the statutory license or a Webcaster Settlement Agreement are "affected to a certain degree by the statutory *and pureplay* settlement rates."[25]

Given that background, direct licenses for statutory services and interactive services will unsurprisingly be influenced by, or refer to, a Webcaster Settlement Agreement — and may even

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

[23] 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).

[24] For example, if a record label agreed to accept only the Pureplay rates from a webcaster (such as a simulcaster) that is ineligible for the Pureplay Settlement Agreement, that agreement would be a departure from the background rules otherwise applicable to those two entities. Any interpretation of § 114(f)(5)(C) that would preclude the Judges from considering specific provisions of a direct license agreement should not reach such a provision, which reflects an agreement between a willing buyer and a willing seller in this marketplace.

[25] Corrected Written Direct Testimony of Prof. Rubinfeld ¶ 91 (emphasis added) (filed Nov. 4, 2014) (SX Ex. 17).

copy verbatim from, or include provisions that are substantively identical to, parts of a Webcaster Settlement Agreement. The iHeartMedia and Pandora direct license agreements in the record here, however, all *depart from* those background terms in one or more respects, reflecting the expectations of willing buyers (iHeartMedia or Pandora) and willing sellers (record labels) that the direct licenses would provide a better deal. For example, all 29 of the direct license agreements in the record contain *lower* rates and 28 of them apply for a *longer* term than the otherwise applicable Webcaster Settlement Agreement.

Nothing in the statute — construed as a harmonious whole as basic principles of statutory interpretation require — compels the Judges to ignore this evidence that most clearly shows what a willing buyer and willing seller in this market would agree to in the absence of the statutory license. Indeed, SoundExchange's abandonment in its post-hearing filings and closing argument of its pre-hearing objections under § 114(f)(5)(C) to the admission of iHeartMedia's 28 direct license agreements is a concession that, notwithstanding the parties' disagreement about the meaning of that provision, the Judges may consider all of those direct licensing agreements in setting rates and terms in this proceeding.

D. The Judges Have Previously Limited § 114(f)(5)(C) to the Webcaster Settlement Agreements Themselves

In applying § 114(f)(5)(C) in the *SDARS II* proceeding, the Judges recognized that the bar in this section is limited to "evidence of the content or terms of a settlement agreement."[26] In that proceeding, a SoundExchange witness sought to testify that Pandora's payments to SoundExchange under the Pureplay Settlement Agreement, measured as a percentage of Pandora's revenues, "would not have supported [Sirius XM's witness's] benchmark analysis."[27]

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

[27] *Id.* at 3210:16-3211:9.

SoundExchange's witness sought to testify further that Pandora's payments of "approximately 50 percent of its revenues" to SoundExchange "would translate to royalty rates of 25 percent to 30 percent of gross revenues for Sirius XM."[28] SoundExchange was therefore attempting to introduce a fact derived squarely from the Pureplay Settlement Agreement as a benchmark to support its rate proposal and undermine Sirius XM's proposal. In admitting that testimony over Sirius XM's motion to exclude it, the Judges found that SoundExchange's proposed testimony "is not evidence of the content or terms of a settlement agreement, and it's not covered by the statute."[29]

Similarly, none of the provisions of the 29 in-market, voluntarily negotiated direct license agreements in the record here is "evidence of the content or terms of a settlement agreement." Instead, each reflects a voluntarily negotiated, marketplace deal that — as explained above — would not have come into existence unless both the statutory webcaster and the individual record label preferred the terms of that deal to the terms of the applicable Webcaster Settlement Agreement that had governed their relationship. Indeed, this case presents an easier question than the one presented to the Judges in *SDARS II*. There, SoundExchange explicitly sought to use the outcome of the Pureplay Settlement Agreement itself "in an[] administrative . . . proceeding involving the setting . . . of the royalties payable for the public performance . . . of sound recordings." 17 U.S.C. § 114(f)(5)(C). Here, iHeartMedia and Pandora have based their rate proposals on evidence about what willing buyers and willing sellers would agree to that can be found in direct license agreements with individual record labels and that reflect voluntary marketplace deals, not statutory settlements.

[28] *Id.* at 3213:7-16.

[29] *Id.* at 3235:21-3236:5.

E. Judicial Construction of the Text of § 114(i) Further Supports Limiting § 114(f)(5)(C) to the Webcaster Settlement Agreements Themselves

Section 114(i) provides that the rates "payable for the public performance of sound recordings" — such as those set by the CRB — "*shall not be taken into account* in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works." 17 U.S.C. § 114(i) (emphasis added). This language mirrors the relevant language of § 114(f)(5)(C). "Where Congress uses the same term in the same way in two statutes with closely related goals, basic canons of statutory construction suggest a presumption that Congress intended the term to have the same meaning in both contexts." *New Hampshire v. Ramsey*, 366 F.3d 1, 26 (1st Cir. 2004); *see also Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995, 2000 (2015) ("We are generally reluctant to give the same words a different meaning when construing statutes, . . . and we decline to do so here based on policy arguments.").

Judge Cote of the Southern District of New York recently considered § 114(i). She held that, although she could "not take the rates set by the CRB into account in determining the fair market rate for a public performance license from ASCAP to Pandora," she could consider negotiated agreements between Pandora and two music publishers that withdrew rights from ASCAP, notwithstanding "ample evidence" that the "actual driving force" behind those agreements was "music publishers' envy at the rate their sound recording brethren had extracted from Pandora through proceedings before another rate setting body, the CRB." *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 366-67 (S.D.N.Y. 2014); *see also id.* at 332-33. Indeed, at trial, Judge Cote explained her conclusion that such "testimony about motive . . . would [not] be inadmissible pursuant to Section 114":

> [I]t would be difficult to deal with the facts on the ground as they exist and to set a rate that is reasonable in the context of the facts on the ground[] [as] they exist without knowing about that [*i.e.*, the CRB-set rates]. It is just part of the landscape here.[30]

The Webcaster Settlement Agreements are similarly "part of the landscape here" and § 114(f)(5)(C) does not bar consideration of agreements negotiated against that landscape.

CONCLUSION

In sum, the text of § 114(f)(5)(C), its history, Congress's purpose in enacting the provision, the need to read § 114(f) as a harmonious whole, prior CRB rulings, and judicial construction of a parallel provision of § 114 all demonstrate that the Register should answer "No" to each of the questions the Judges referred.

Dated: August 7, 2015

Respectfully submitted,

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[30] Tr. at 731:4-7, *In re Petition of Pandora Media, Inc.*, No. 1:12-cv-08305-DLC (Feb. 18, 2014) (Ex. C). To the extent Judge Cote struck any evidence regarding the CRB rates, it was because "it's not relevant . . . to the setting of the rate," not because § 114(i) posed any bar. *Id.* at 733:2-5.

CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing PUBLIC version of the Initial Brief Regarding the Legal Questions Referred to The Register of iHeartMedia, Inc. has been served on this 7th day of August 2015 on the following persons:

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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)**

DECLARATION AND CERTIFICATION OF JOHN THORNE ON BEHALF OF iHEARTMEDIA, INC.

1. I am one of the counsel for iHeartMedia, Inc. ("iHeartMedia") in this proceeding, and I submit this Declaration in support of the restricted version of the Initial Brief Regarding the Legal Questions Referred to The Register of iHeartMedia, Inc.

2. On October 10, 2014, the CRB adopted a Protective Order that limits the disclosure of materials and information marked "RESTRICTED" to outside counsel of record in this proceeding and certain other parties described in subsection IV.B of the Protective Order. *See* Protective Order (Oct. 10, 2014). The Protective Order defines "confidential" information that may be labeled as "RESTRICTED" as "information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future." *Id.* The Protective Order further requires that any party producing such confidential information must "deliver with all Restricted materials an affidavit or declaration . . . listing a description of all materials marked with the 'Restricted' stamp and the basis for the designation." *Id.*

3. I submit this declaration describing the materials iHeartMedia has designated "RESTRICTED" and the basis for those designations, in compliance with Sections IV.A of the Protective Order. I have determined to the best of my knowledge, information and belief that the materials described below, which are being produced to outside counsel of record in this proceeding, contain confidential information.

4. The confidential information comprises or relates to information designated RESTRICTED by other participants in this proceeding. iHeartMedia has designated such information as RESTRICTED to maintain its confidentiality in accordance with the Protective Order's command to "guard and maintain the confidentiality of all Restricted materials." Protective Order at 2.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that the foregoing is true and correct.

August 7, 2015

Respectfully submitted,

/s/ John Thorne

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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)**

REDACTION LOG FOR iHEARTMEDIA, INC.'S
INITIAL BRIEF REGARDING THE LEGAL QUESTIONS
REFERRED TO THE REGISTER

iHeartMedia hereby submits the following list of redactions from the Initial Brief Regarding the Legal Questions Referred to The Register, filed August 7, 2015, and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration of John Thorne submitted herewith, that the listed redacted materials are properly previously designated confidential and "RESTRICTED."

Document	Response to Paragraph(s)	General Description
Initial Brief Regarding the Legal Question Referred to The Register	P. 1, ¶ 1, line 5	Contains information previously designated restricted by other participants.
	P. 6, ¶ 1, line 3	Contains information previously designated restricted by other participants.
	P. 6, ¶ 2, line 7	Contains information previously designated restricted by other participants.

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EXHIBIT A

111TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
111–139

WEBCASTER SETTLEMENT ACT OF 2009

JUNE 8, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2344]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2344) to amend section 114 of title 17, United States Code, to provide for agreements for the reproduction and performance of sound recordings by webcasters, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 2344 would amend section 114 of title 17, United States Code, to allow the recording industry to negotiate and enter into alternative royalty fee agreements with webcasters within thirty

days of its enactment. Any agreement reached would replace the rates established under the Copyright Royalty Board's 2007 decision.

BACKGROUND AND NEED FOR THE LEGISLATION

BACKGROUND

In 1998, in the Digital Millenium Copyright Act ("DMCA"),[1] Congress amended several statutory licensing statutes to provide for and clarify the treatment of different types of Internet broadcasting, or webcasting. As a result, two categories of webcasting qualify for a compulsory license—"preexisting" subscription services existing at the time of the DMCA's enactment and "an eligible nonsubscription transmission."[2] A subscription service is one that is limited to paying customers. The broader category of webcasters who may qualify for the statutory license under 17 U.S.C. §114(d) are those who transmit music over the Internet on a nonsubscription, noninteractive basis.

The initial ratemaking proceeding for statutory royalty rates for webcasters for the period 1998 through 2005 proved to be controversial. The Librarian of Congress, under the guidance of the U.S. Copyright Office, rejected the recommendation issued by the Copyright Arbitration Royalty Panel ("CARP") and revised rates downward. Congress intervened as well with enactment of the Small Webcasters Settlement Act of 2002 ("SWSA"), Pub. L. No. 107–321, which permitted more options than the royalty rates established by the Librarian's order.

Subsequent to passage of the SWSA and the initial ratemaking proceeding, Congress substantially revised the underlying adjudicative process. Enactment of the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108–419, abolished the CARP system and substituted a Copyright Royalty Board ("CRB") composed of three judges. As required by law, in March 2007, the CRB announced royalty rates for the period from January 1, 2006, through December 31, 2010.

COPYRIGHT ROYALTY BOARD RATES

The final determination of the CRB establishes new rates for commercial and noncommercial webcasters who qualify for the §114 compulsory license under the "willing buyer/willing seller" standard.[3] The CRB considered the proposals by representatives of smaller webcasters that rates be structured as a percentage of revenue, but ultimately rejected them in lieu of a minimum-payment-per-song-per-listener formula.

The new rates were not well received in the small webcasting business community. Some Members of Congress voiced concern as well. Several parties filed suit to appeal the CRB decision. Upon consolidation of the appeals, oral argument was heard on March 19, 2009. A decision is likely to be issued by summer 2009.

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[1] Pub. L. No. 105–304 (October 28, 1995).

[2] Under the DMCA, while satellite radio and Internet radio providers pay performance royalties in addition to publishing royalties, traditional radio broadcasters pay only publishing royalties.

[3] 17 U.S.C. §114(f)(2)(B).

Parallel to the judicial proceedings, private negotiations are ongoing between SoundExchange, the organization charged with collecting and distributing performance royalties, and both large and small webcasters, in an attempt to reach a compromise royalty rate agreement that would serve as an alternative to the payment scheme provided by the CRB decision.

THE WEBCASTER SETTLEMENT ACT OF 2008

H.R. 7084, the Webcaster Settlement Act of 2008 ("2008 WSA"), which became law in October 2008, provided limited statutory authority for SoundExchange to negotiate and enter into alternative royalty fee agreements with webcasters that would replace the rates established under the CRB's decision.

Three negotiated royalty agreements have been made under the authority of the 2008 WSA. The Corporation for Public Broadcasting and SoundExchange announced on January 15, 2009, that they had reached consensus on the royalty rates to be paid for by approximately 450 public radio webcastings, including NPR and Public Radio International.[4] On February 15, 2009, the National Association of Broadcasters ("NAB") and SoundExchange informed the Copyright Office that they had made an agreement that covers an extended royalty period for terrestrial AM or FM radio broadcasters who simulcast their signal or stream other programming over the Internet.[5] On February 15, 2009, a limited number of small webcasters reached an agreement with SoundExchange for the same royalty period as the NAB's license.

Other small and large webcasters were not able to successfully negotiate a new rate agreement with the recording industry within the time allotted by the 2008 WSA.

On January 5, 2009, the CRB announced that it would soon begin the third proceeding to determine royalty rates for the statutory license covering Internet transmissions of sound recordings, applicable to the next royalty period that runs from January 1, 2011, through December 31, 2015.[6]

THE WEBCASTER SETTLEMENT ACT OF 2009

H.R. 2344, the Webcaster Settlement Act of 2009, would allow those small and large webcasters who have yet to reach an agreement with SoundExchange another opportunity to do so. It permits them to negotiate alternative rates within thirty days of its enactment.

HEARINGS

The Committee held no hearings on H.R. 2344.

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[4] Corporation for Public Broadcasting, Agreement Reached for Public Radio's Webcasting Royalty Rates, available at http://www.cpb.org/pressroom/release.php?prn=699.

[5] U.S. Copyright Office, Library of Congress, Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9293, 9299 (Mar. 3, 2009).

[6] Copyright Royalty Board, Library of Congress, Digital Performance in Sound Recordings and Ephemeral Recordings, 74 Fed. Reg. 318 (Jan. 5, 2009).

COMMITTEE CONSIDERATION

On May 13, 2009, the Committee met in open session and ordered the bill H.R. 2344 favorably reported without amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2344.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2344, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 18, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2344, the Webcaster Settlement Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 2344—Webcaster Settlement Act of 2009.

H.R. 2344 would allow entities that broadcast audio content over the Internet (Webcasters) to continue to negotiate royalty rates with SoundExchange, the entity designated to collect royalties for the music industry. Under provisions of the Webcaster Settlement Act of 2008 (Public Law 110–435), SoundExchange was given limited authority to enter into royalty fee agreements with Webcasters that would differ from the rates established by the Copyright Royalty Board. This limited authority expired on February 15, 2009; H.R. 2344 would extend the authority for 30 days after the date of enactment of the bill.

Because royalties collected and paid out by SoundExchange do not flow through the federal budget, CBO estimates that implementing H.R. 2344 would have no effect on federal receipts or spending.

H.R. 2344 contains no intergovernmental or private-sector mandates as defined in the Unfunded mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2344 would permit the recording industry and webcasters to negotiate alternative royalty rates within thirty days of its enactment.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2344 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Webcaster Settlement Act of 2009."

Sec. 2. Authorization of Agreements. Section 2 allows for the implementation of any agreement(s) reached between SoundExchange and webcasters by 11:59 p.m. on the thirtieth day after the bill's enactment.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omit-

ted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SECTION 114 OF TITLE 17, UNITED STATES CODE

§ 114. Scope of exclusive rights in sound recordings

(a) * * *

* * * * * * *

(f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.—

(1) * * *

* * * * * * *

(5)(A) * * *

* * * * * * *

(D) Nothing in the Webcaster Settlement Act of [2008] *2008, the Webcaster Settlement Act of 2009,* or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Copyright Royalty Judges of May 1, 2007, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—

(i) * * *

* * * * * * *

(iii) the term "webcaster" means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor [to make eligible nonsubscription transmissions and ephemeral recordings].

(F) The authority to make settlements pursuant to subparagraph (A) shall expire [February 15, 2009] *at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009*.

* * * * * * *

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EXHIBIT B

UNITED STATES COPYRIGHT ROYALTY JUDGES

WASHINGTON, D.C.

In the Matter of:	)	
Determination of Rates and Terms	)	Docket No. 2011-1
for Preexisting Subscription	)	CRB PSS/Satellite II
Services and Satellite Digital	)	
Audio Radio Services	)	Volume XI
		Pgs. 2954 - 3238

Washington, D.C.

Monday, August 13, 2012

The following pages constitute the proceedings held in the above-captioned matter, held at the Library of Congress, Madison Building, 101 Independence Avenue, S.E., Washington, D.C., before Vicky Reiner, RMR, CRR of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 9:30 a.m.

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Q And Dr. Ordover, again, for the record, you testified here previously in this proceeding, correct?
A Yes.
MR. HANDZO: And I'm going to assume, but I hope the Court will correct me if I'm wrong, that I do not need to offer Dr. Ordover as an expert again?
JUDGE BARNETT: Not for purposes of the Court.
MR. RICH: Not from our perspective.
MR. HANDZO: Thank you.
JUDGE BARNETT: Mr. Rich, where are we on your motion to restrict or strike portions of Dr. Ordover's testimony?
MR. RICH: It's pending, Your Honor. I would like to be heard on it. It's very specific and targeted to specific portions. In fact it will be something I would like to supplement based on certain of this morning's rulings as well.
JUDGE BARNETT: Okay. Do you want to be heard on it now?
MR. RICH: That would be wonderful. Thank you.

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Let me break this in two parts if I may. The first is the subject of the filed motion, Your Honor. As you know, there has been periodic testimony about a company named Pandora. And Pandora for its part pays its sound recording performance royalties pursuant to something called the Webcaster Settlement Act of 2009, about which there has been some passing reference.
By law, the Webcaster Settlement Act prescribes, unless waived by both parties to an agreement reached under it, as follows: That neither -- no agreement entered into pursuant to that act, including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein 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 recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and recordkeeping

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requirements by the copyright royalty judges as set forth. 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).
And to punctuate that, in the agreement that actually implemented the rates and terms in place for Pandora, section 6.3, which is cited in our brief, use of agreements in future proceedings, there is set forth almost in identical language and in legal effect exactly the same language, a reiteration of the bar on any use of the rates and terms as follows: The rates and terms, it says that neither the Webcaster Settlement Act, from which I just read, nor any provisions of these rates and terms shall be admissible as evidence or otherwise taken into account

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in any administrative, judicial or other government proceeding, and so forth.
Now, why do we raise that? We raise that because in three separate and distinct places in Professor Ordover's testimony, and here I'll work with his proposed amended rebuttal testimony. If we could first look, Your Honors, at footnote 16 of that testimony, which appears at page 9, you have that in front of you, you will see midway down there's a sentence that begins "That is particularly so." And it reads, "That is particularly so because the only nonprecedential deal of any real relevance is that which set the rates for Pandora and certain other webcasting services." I can't quarrel with that proposition.
"As I explain below, we know from public sources that Pandora pays approximately 50 percent of its revenues in sound recording royalties. And this nonprecedential agreement would not have supported Dr. Noll's benchmark analysis."
So in the very same paragraph in which Professor Ordover is conceding the nonprecedential

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use, he's pulling an extrapolation of a deal reached under the auspices of the Webcaster Settlement Act, claiming that because the information is physically pulled from a public filing which characterizes it as 50 percent, he is free to criticize rate proposals being offered by Dr. Noll in this case by specific reference to an agreement, the terms of which expressly, expressly may not be, quote, taken into account in any administrative proceeding, meaning --

JUDGE WISNIEWSKI: Mr. Rich, what rates and terms are quoted here?

MR. RICH: The extrapolation that it is paying a rate of 50 percent of its revenues.

JUDGE WISNIEWSKI: I think you're misreading that. Take another look at it. There's no mention of a rate of 50 percent, is there?

MR. RICH: Pandora pays approximately 50 percent of its revenues in sound recording royalties, Your Honor.

JUDGE WISNIEWSKI: That's not a rate, sir, any more than what Dr. Ordover used in his own testimony.

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MR. RICH: I'm failing -- can't understand --

JUDGE WISNIEWSKI: It may be the percent of revenues that they pay. It's not necessarily the rate.

MR. RICH: It is the effective rate they're paying. And so the point --

JUDGE WISNIEWSKI: That's a different story.

MR. RICH: The point --

JUDGE WISNIEWSKI: If that's your contention, that that's what's encompassed by the act, then why don't you say so?

MR. RICH: Well, I -- I will then adopt that. And my point is simply this, that while it may not be the literal prescribed rate structure from the act, the fee itself, by definition, and the statement by Pandora is by definition the extraction mathematically of what was prescribed by that agreement. It doesn't matter, it seems to me, if it was .00123 cents per play or the greater of formula, if the effect is that that is -- what Pandora is paying its source inevitably is what came out of an

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agreement which is to be completely nonprecedential -- it's just one step removed.

JUDGE WISNIEWSKI: If it's a greater of formula, then that might vary from quarter to quarter or month to month, wouldn't it? That's hardly the same thing as a rate.

MR. RICH: Take a look, if you don't mind, Your Honor, at paragraph 59, because this is not the only place in the testimony where there's an effort to indirectly get Pandora in through the side door. In paragraph 59, Professor Ordover talks again about the public reports regarding Pandora's financials, would it equal approximately 50 percent of its revenues.

And then at the top of page 26, "These figures would translate to royalty rates of 25 percent to 30 percent of gross revenues for SiriusXM."

So it is again doing exactly what the statute prohibits, which is to use an estimate or an extrapolation of fees reached on a without prejudice basis in a compromised setting where Congress said it shall never be used or taken account of in a proceeding. And he is using it, translating it to

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critique Professor Noll and indirectly to support his own thesis as to what reasonable rates are.

He goes so far as to criticize Professor Noll for himself, not, quote, taking account of rates that are specifically prohibited by statute from being taken account of.

JUDGE WISNIEWSKI: Again, you keep talking about rates, Mr. Rich. But there are no rates cited here. In fact, this 50 percent number cited in the first line and 60 percent to the first quarter of 2012, which is the same point I made earlier.

MR. RICH: But, Your Honor, with all due respect, it's -- it is absolutely a distinction without a difference, I would submit to you, because the only reason Pandora is paying whatever it is paying, the dollars it is paying by definition come from a resolution with SoundExchange which was the subject of the webcasting agreement and the rates prescribed in that agreement.

The fact that Pandora earned so little revenue that the effect is what it is is irrelevant to the fact that it's clear beyond a doubt, it would seem

record in this case. Mr. Frear just testified about it. There was testimony about it in the direct case. So the fact that a -- there might be a citation to Mr. Eisenberg doesn't necessarily mean that's the only source of the information.

But I just haven't had a chance to go through and address all of that. So I would ask the Court to deny the motion or at least give me an opportunity to respond to it more fully in the morning.

JUDGE WISNIEWSKI: And you wanted to testify today.

THE WITNESS: I -- I am champing at the bit because I can prove mathematically that you cannot infer anything about the rates or terms for --

JUDGE WISNIEWSKI: That's okay. You'll have to champ a little longer.

JUDGE BARNETT: Excuse us for a few moments.

(Whereupon, a recess was taken between 4:06 p.m. and 4:13 p.m.)

JUDGE BARNETT: With regard to SiriusXM's motion relating to the introduction of evidence of

Pandora costs or the percent of Pandora revenue that is devoted to royalties, we do not believe that is contrary to the statute. It is not evidence of the content or terms of a settlement agreement, and it's not covered by the statute.

With respect to the other motion that arose as a result of our ruling this morning, we are going to give SoundExchange until tomorrow morning to be able to respond to that.

You can let us know if Dr. Ordover will be back to testify at 10:30 in the morning or whether there's going to be some massive rescheduling. I don't know.

As you -- as you know, ladies and gentlemen, from the direct case, we are just profligate with trial time and we'll just waste it whenever we can. So we're going to recess early today unless there's something discrete that we can take care of before we go today. Mr. Handzo, you were on your feet?

MR. HANDZO: No. But that was just anticipating starting with Dr. Ordover. But I don't have anything pressing that the Court needs to take up

right now.

JUDGE BARNETT: Thank you. We will recess and be back in session at 10:30 in the morning.

(Whereupon, at 4:17 p.m., the hearing recessed, to be reconvened at 10:30 a.m. on Tuesday, August 14, 2012.)

CERTIFICATE

I, Vicky Reiner, RMR, CRR, and Notary Public for the District of Columbia, duly commissioned and qualified, do hereby certify that the proceedings in the cause aforesaid was taken down by me in stenotype and subsequently transcribed into English text, and that the foregoing is a true and accurate transcript of the proceedings so held.

I do hereby certify that the proceedings were taken at the time and place as specified in the foregoing caption.

I do hereby further certify that I am in no way interested in the outcome of this action.

VICKY REINER
Notary Public in and for the
District of Columbia

My commission expires:
September 30, 2012

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

IN RE PETITION OF PANDORA MEDIA, INC. 12 CV 8035 (DLC)

----------x

Related to

UNITED STATES OF AMERICA,

Plaintiff,

v. 41 CV 1395 (DLC)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant.

----------x

New York, N.Y.
January 28, 2014
9:37 a.m.

Before:

HON. DENISE COTE,

District Judge

think this comes up in a couple of the objections, Mr. Steinthal, so why don't you talk to that. I think it comes up at page 67, also.

MR. STEINTHAL: Your Honor, as I indicated in my opening, we're not seeking a rate determination for the Pandora Premieres part of our services. It's irrelevant.

MR. STONE: Your Honor, the witness's opinion addresses the way in which the market is changing. There's been testimony from several witnesses about Pandora Premieres cross-examination on the subject as well. To the extent that this is a fact that she thinks is significant in giving her understanding of Pandora today, that they are not seeking a license for that particular part of it might go to the weight of its importance. But she is simply testifying about how she sees Pandora today, and we're not offering it to prove they should be paying an on-demand fee.

THE COURT: Overruled.

Let's go to page 48, paragraph 91. This has to do with the payments made to SoundExchange for the right to perform sound recordings. This brings us potentially up against the 114 issue.

MR. STEINTHAL: Exactly.

THE COURT: Excuse me one second.

(Pause)

THE COURT: So in 1995 Congress passed the Digital

Conformance in Sound Recording Act which provided for the first time a public performance copyright in sound recordings, 17 U.S.C., Sections 114 to 15.

As part of the act creating this right, Congress also established a compulsory licensing regime whereby rates would be set every five years by a tribunal in Washington, D.C. Congress also provided that this rate court may not take into account the sound recording licensing fees in setting a rate for the licensing of the compositions themselves. And that's set forth in Section 114(i).

It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by Section 1066, a reference to the sound recording right.

So at various times in this proceeding, Counsel in examining witnesses or in presenting evidence have referred to a motivation of the publishers who are ASCAP members of their dissatisfaction with the public performance fees obtained by ASCAP for services like Pandora, and in particular Pandora, when compared to the fees that Pandora has to pay for this sound recording right.

And no one has objected to me hearing that testimony about that fundamental envy or comparison, and so it's in this case to that extent without objection from the parties.

And I don't understand that that testimony about motive in negotiations and turmoil within ASCAP over these different rates would be inadmissible pursuant to Section 114. Indeed, I think it would be difficult to deal with the facts on the ground as they exist and to set a rate that is reasonable in the context of the facts on the grounds they exist without knowing about that. It just is part of the landscape here.

And I'm not hearing objection from counsel with respect to what I've said so far. Of course you have a right to bring any objection to my attention at any moment, but I'm moving on to the next issue then, which is: Is it permissible for me to know what percentage of its revenue Pandora is actually paying pursuant to the requirements of Section 114? And know that comparison itself for Pandora, the amount it will pay pursuant to any public performance rate and the amount it is paying under Section 114. And that's what's encompassed by the material at page 49.

MR. STONE: I'm hesitant to interrupt, your Honor.

THE COURT: No, go ahead.

MR. STONE: Thank you. I think it is permissible for the Court to know it, but I think it is relevant, and I'll explain why in a second, but we're not offering it for the purpose that the statute would forbid: Namely, helping to set a rate here.

Your Honor is right that there has been testimony that

the publishers at a minimum were motivated in part by the issue your Honor raises. If Pandora, for example, paid more money to ASCAP than it paid to the music publishers, that might go to suggest that this whole fear or feelings may not have been wrong. So I think it is in that sense confirmatory of at least some of the testimony, but we're not offering it to prove a rate. I think that would be inappropriate.

MR. STEINTHAL: Your Honor, if I may. I totally agree with everything you've said on this subject so far. And I think our objection may not be evident by simply the numbers here. Our objection is that this witness shouldn't be permitted to testify about-- like the first sentence, "Although both public performance licenses are equally essential to Pandora's business." She's got no foundation to say that. And that the subject matter of her testimony here does start getting to the point where you rub up against 114(i).

Your Honor, the disparity point is in the record. No problem with that. The motivation point is in the record. No problem with that. The actual amounts, your Honor, are public. If you look at Pandora's public filings, you'll see what the numbers are.

The argument about the numbers and their impact in this case, other than on the motivation issues, that's where we start drawing the line. And I think this paragraph starts arguing the numbers from a witness, frankly, that doesn't have

the foundation to be making this statement in the first place.

THE COURT: I'm going to strike paragraph 91 and 92. If it's not relevant, and ASCAP's counsel says it's not relevant, it's not relevant to the setting of the rate, then it's not relevant. Because that's all I'm doing, is setting the rate. I'm not making a judgment beyond that.

I mean, I've been fairly liberal in the receipt of expert testimony because I have such able counsel before me and they're able to point out very efficiently the proper and improper uses of testimony. But there does come a point where I think the potential for misuse of the testimony becomes extreme, and this is such an example and I will strike these two paragraphs.

Looking at page 52 and the objection at paragraph 97, that's overruled for reasons already discussed.

Page 67 to 68, material at page 120, that's overruled.

And with those rulings, the witness is tendered for cross.

MR. STEINTHAL: Thank you, your Honor.

THE COURT: And just so everyone knows what's happening here, because I hope to be even-handed in my allocations here, I assumed generally that time was divided equally among you for that evidentiary argument, since I heard from both sides, and so I'm not charging anybody.

Okay. Proceed.