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

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

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

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I. INTRODUCTION

SoundExchange respectfully submits this Initial Brief in response to the Judges' July 29, 2015, Referral of a Novel Question of Law to the Register of Copyrights.

Section 114(f)(5)(C) provides that an agreement entered into pursuant to a Webcaster Settlement Act ("WSA") shall not be "admissible" or "otherwise taken into account" in an administrative or judicial rate proceeding. As the statute expressly states, Congress's purpose was to allow parties to reach "a compromise" in light of "unique business, economic and political circumstances." 17 U.S.C. § 114(f)(5)(C). To induce such compromise, Congress made a commitment that nothing in such "compromise" agreements could be used against the settling parties in future proceedings.

Given § 114(f)(5)(C)'s command, it is clear that the Judges may not admit the WSA settlement agreements themselves. No participant disputes this point. By its express terms, however, the statutory prohibition goes further in two respects. First, it is not limited to the WSA settlement agreements themselves. Second, the prohibition is not limited to the question of admissibility. Rather, the Judges may not "take[] into account" "any provisions" of such agreements.

If a license agreement is directly influenced by, is based on, or incorporates—in other words, "take[s] into account"—the provisions of a WSA settlement agreement, then the Judges' consideration of that license agreement would, in effect, cause the Judges to take into account the terms and provisions of the WSA settlement agreement. Thus, if the Judges determine that a license agreement is directly influenced by the provisions of a WSA settlement agreement, the Judges should refrain from considering that agreement pursuant to § 114(f)(5)(C) and give effect to Congress's stated intent to preclude the use of the "compromise" provisions of WSA

settlement agreements as evidence of the provisions willing buyers and willing sellers would agree upon.

A contrary interpretation would turn the statute on its head. A party would be free to introduce an agreement that was directly influenced by a WSA settlement agreement. At the same time, § 114(f)(5)(C), by its terms, would prevent the opposing party from introducing the WSA agreement itself to show the extent of that influence and to demonstrate why the license agreement should be given no weight. This approach would, in effect, *strengthen* the evidentiary force of the "compromise" provisions in WSA settlement agreements and eviscerate Congress's stated intent that these provisions not be treated as "as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller." § 114(f)(5)(C).

II. SECTION 114(f)(5)(C)

A. The Statutory Text

Statutory interpretation "begins with the statutory text." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 741 (2014). Here, § 114(f)(5)(C) provides:

> Neither [the WSA] nor any provisions of any agreement entered into pursuant to [the WSA], 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 phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). . . . 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) (emphasis added).

In § 114(f)(5)(C), Congress did not simply provide that WSA agreements themselves would be *inadmissible* as evidence. Congress went further. It decreed that, absent mutual agreement (discussed below), nothing in those agreements would be "admissible" *or* "*otherwise taken into account* in any administrative, judicial, or other government" rate proceeding. *Id*. (emphasis added).

As the statutory text makes clear, the scope of § 114(f)(5)(C)'s exclusion is significantly broader than the rule of admissibility that ordinarily applies to settlements or compromises. The Federal Rule of Evidence pertaining to compromise offers and negotiation, for example, provides that evidence of such offers and negotiation is "not admissible" for particular purposes. Specifically, no party in federal court may introduce such evidence "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Fed. R. Evid. 408(a). However, "[t]he court may admit this evidence for another purpose." Fed. R. Evid. 408(b).

By contrast, § 114(f)(5)(C) goes well beyond this limited rule of inadmissibility. In addition to declaring inadmissible the provisions of WSA agreements, § 114(f)(5)(C) commands that such provisions may not be "otherwise taken into account." This command must be given effect. If Congress was interested solely in proscribing the admissibility of the WSA agreements themselves (or their provisions), there would have been no need for the term "otherwise taken into account." *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal citations omitted). That Congress imposed an additional limitation—"otherwise taken into account"—signifies that Congress was not concerned solely with the admissibility of the WSA agreements themselves.

The plain meaning of "take into account" is to "take into consideration; allow for." American Heritage Dictionary of the English Language (5th ed. 2015); *see also JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, 370 (Colo. App. 2007) ("'take into account' means simply 'to consider'") (quoting American Heritage Dictionary (4th ed. 2004)); *see also Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1103 (N.D. Cal. 2008). Thus, to the extent evaluating a license agreement would, in effect, require the Judges to consider any provision negotiated in the context of a WSA settlement agreement, that license agreement falls within the ambit of § 114(f)(5)(C)'s exclusion.

Section 114(f)(5)(C) includes a specific, limited exception to the statute's broad reach. Specifically, the default rule of exclusion "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). The statute does not make any other allowance for a WSA agreement or its terms to be "taken into account."

B. Congressional Intent

The goal of statutory interpretation is to discern the "Legislature's intent." *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Here, both the statutory text as well as the relevant legislative history make clear that Congress's primary goal was to prevent the terms of a "compromise" agreement from being used against a settling party in subsequent proceedings.

Unlike most statutes § 114(f)(5)(C)'s statutory text clearly expresses Congress's intent:

> 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).

Given this clear language, there is no need to guess what Congress intended with § 114(f)(5)(C). Congress intended that the parties to a WSA agreement would have the freedom to enter into "compromise" agreements, "motivated by the unique business, economic and political circumstances" then facing the settling parties, without fear that the agreement or any of its terms and conditions would later be used in any way to be indicative of terms to which willing buyers and willing sellers would agree. *Id*. Any interpretation of § 114(f)(2)(B) must give effect to this purpose and prevent a participant from arguing today that a provision that was directly influenced by the terms of a WSA settlement agreement is, in reality, indicative of terms to which willing parties would agree.

Interpreting § 114(f)(5)(C) to permit a participant to rely on an agreement that was directly influenced by a WSA agreement would create a system that is contrary to the stated purpose of the statute and basic fairness in the presentation of evidence. In evaluating negotiated agreements as potential benchmarks for the statutory rate, the Judges must consider the extent to which such agreements have been influenced by the "shadow" of the statutory license. This is because the hypothetical market for the willing buyer-willing seller transaction is one in which no statutory license exists. *In re Determination of Royalty Rates for Digital Performance Rights in Sound Recordings and Ephemeral Recordings* (*Web III Remand*), 79 Fed. Reg. 23102, 23110 (Apr. 25, 2014) ("The hypothetical marketplace is one in which no statutory license exists."). WSA agreements themselves are in place of the otherwise applicable statutory license and therefore cast their own shadow over negotiations for direct licenses.

Allowing a participant to rely on an agreement that was directly influenced by a WSA agreement would prevent the opposing participant from introducing the WSA agreement itself to show the extent of the WSA agreement's influence and to demonstrate why the license agreement should be given no weight. In such a case, the participant proffering the agreement would be using the WSA agreement as a sword and a shield. The participant could use the WSA agreement as a "sword," i.e., as leverage to negotiate terms it wants to present to the Judges as evidence of a willing buyer-willing seller transaction. The participant could then use the bar of § 114(f)(5)(C) as a "shield" to prevent the opposing party from demonstrating that the license was infected by the shadow of the WSA agreement. Section 114(f)(5)(C)'s express purpose is to *prevent* WSA settlement agreements from being used against settling parties, not to encourage the use of these agreements as leverage to negotiate agreements that can later be presented as evidence before the Copyright Royalty Judges.

Moreover, it is well established in the law that a party may not use privileges that preclude cross-examination as both sword and shield. *See, e.g.*, *In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987); *United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998). There is no evidence that, in § 114(f)(5)(C), Congress intended to abrogate this basic principle of fairness.

The legislative history confirms that Congress's purpose in enacting the WSA was to allow the parties to negotiate settlements that would not be used against them in the future. Congress added subsection (f)(5)(C) to § 114 in 2002, in the first of the three WSAs—the Small Webcaster Settlement Act of 2002 (the "SWSA"), 116 Stat. 2780, Pub. L. No. 107-321 (Dec. 4, 2002).[1] Congress passed the SWSA to authorize agreements that parties had voluntarily

[1] Congress enacted the other WSAs in 2008 and 2009, *see* 122 Stat. 4974, Pub. L. No. 110-435 (2008); 123 Stat. 1926, Pub. L. No. 111-36 (2009). The 2008 WSA amended subsection
(footnote continued)

negotiated in the wake of the first Webcasting proceeding and the Librarian's Final Decision. Congress made clear its understanding that the parties to a WSA agreement faced unique and extraordinary circumstances that militated toward a settlement. *Id*. § 2(3) ("Congress finds—(3) The representatives [of small webcasters and copyright owners] have arrived at an agreement that they can accept in the extraordinary and unique circumstances here presented."). Congress also expressly found that settling parties needed assurance that their decision to enter into a voluntary agreement would not later be used against them in a future rate proceeding:

> It is, nevertheless, in the public interest for the parties to be able to enter into such an agreement without fear of liability for deviating from the fees and terms of the July 8 order, *if it is clear that the agreement will not be admissible as evidence or otherwise taken into account in any government proceeding involving the setting or adjustment of the royalties payable* to copyright owners of sound recordings for the public performance or reproduction in ephemeral phonorecords or copies of such works, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements.

Id. § 2(7) (emphasis added); *see also* 148 Cong. Rec. S11725, at S11726 (daily ed. Nov. 14, 2002) (Senator Leahy) ("The rates, terms and record-keeping provisions are applicable only to the parties that qualify for and elect to be governed by this alternative royalty structure and no broad principles should be extrapolated from the rates, terms and record-keeping provisions contained in the bill.").

Since 2002, Congress has twice enacted legislation to authorize WSA agreements as an alternative to the rates that otherwise would apply as the result of Webcasting proceedings. *See* n.1, *supra*. This includes the Webcaster Settlement Act of 2009, which authorized the

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(f)(5)(C) by adding the final sentence (concerning the ability of parties to a WSA to agree mutually to its admissibility) and inserting "Copyright Royalty Judges" in place of "Librarian of Congress" and "webcasters" in place of "small webcasters." The language of subsection (f)(5)(C) otherwise is unchanged from 2002.

"Pureplay" settlement agreement that underlies the Copyright Royalty Judges' questions to the Register. In each of these cases, Congress has maintained the broad expression of its intent in the language of § 114(f)(5)(C). Congress has thus made clear that the affected parties could enter into WSA agreements without any fear that those agreements or their provisions would later be claimed to be relevant to the rate-setting standards.

III. SOUNDEXCHANGE'S POSITION ON EACH OF THE FIVE QUESTIONS REFERRED TO THE REGISTER

A. Does section 114(f)(5)(C) of the Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that agreement includes any terms that are *copied verbatim* from a WSA settlement agreement?

Yes. Section 114(f)(5)(C) bars the Judges from considering a license agreement *in its entirety* if the license contains terms that were copied verbatim from a WSA settlement agreement. The principles that guide the answer to this question also inform the answers to the Judges' other questions.

As an initial matter, § 114(f)(5)(C) bars the Judges from considering the terms of a license agreement if the entire agreement was copied verbatim from a WSA agreement and was simply relabeled as a direct license. As demonstrated above in Section II, Congress deliberately enacted a very broad rule of exclusion in § 114(f)(5)(C) that bars the Judges from taking into account any of the terms of a WSA agreement. Where a license agreement is simply a verbatim copy of a WSA settlement agreement, considering the terms of the license agreement is effectively considering all the terms of the WSA agreement from which these terms were copied.

The same result holds if the agreement includes some but not all terms copied verbatim from a WSA agreement: § 114(f)(5)(C) would bar the Judges from considering the copied terms as well as the *other*, non-copied terms. This result follows for several reasons.

First, where a license agreement intentionally copies certain terms and conditions from a WSA agreement but also includes other non-copied terms, the act of taking those non-copied terms into account implicitly "takes into account" the copied terms. This follows from the fundamental rule of contract interpretation that the terms of any agreement are presumed to be dependent and interrelated. *See, e.g.*, Restatement (Second) of Contracts § 232 (1981) ("Where the consideration given by each party to a contract consists in whole or in part of promises, all the performances to be rendered by each party taken collectively are treated as performances to be exchanged under an exchange of promises, unless a contrary intention is clearly manifested."); 15 Williston on Contracts § 44:11 (4th ed.) ("promises in a contract are generally presumed to be dependent unless a contrary intent is shown"); *Bank of Columbia v. Hagner*, 26 U.S. 455 (1 Pet. 455, 7 L. Ed. 219) (1828) ("Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident the intimation of Courts have strongly favoured the latter construction, as being obviously the most just.").

Accordingly, in considering non-copied terms in a license, the Judges necessarily would be considering the terms copied from the WSA settlement agreement. As the foregoing authorities make clear, it is improper to assume that the parties would have reached the same deal terms absent the terms copied from a WSA agreement. Removing some of the terms of an agreement presumptively affects all the other terms in the agreement. It would be practically impossible and procedurally unworkable for the Judges to disentangle the non-copied provisions from those that were copied.

By way of example, if a license with a webcaster otherwise eligible to use a WSA agreement deliberately copies the contract term (duration) of that WSA agreement, so that the

license and the WSA agreement expire on the same date, it would be practically and procedurally impossible to determine that other terms of the agreement—including any per-performance rate or other financial commitment—would have been the same absent the copied WSA agreement term. A license is an agreement to pay particular monetary amounts during a defined period of time. The length of the term has a direct relationship to the amount paid. All else being equal, a copyright owner likely would demand a higher per-performance rate in exchange for a longer contract term, so as to ameliorate the risk that the market price will move up during the lengthier term. The webcaster may be willing to pay a higher rate in order to have greater certainty and predictability for the amount it will pay. The parties' respective considerations would move in the other direction if the parties agreed to a shorter term. The point of the example is that the term and payment provisions are inter-related, and excising the term provision while explicitly considering the payment provision means the excised provision still is being considered or "taken into account," at least implicitly.

Second, while it theoretically may be possible that a party could show the copied and non-copied terms were not interdependent, even that possibility should be foreclosed where the webcasting party could have opted into the WSA agreement. Where the webcaster could simply "fall back" on the WSA agreement, the verbatim inclusion of WSA agreement terms should be conclusive proof that the WSA agreement rates directly affected the negotiation of all of the non-copied terms in the agreement. In such a case, consideration of even non-copied terms would not reflect the terms that willing buyers and willing sellers would agree to absent a statutory license regime; rather, the overarching shadow of the WSA agreement rates would have affected the entire negotiation.

As the Judges have noted, "'[i]t *is difficult to understand* how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, *could truly reflect 'fair market value*.'" *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings (Web II)*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) (quoting 63 Fed. Reg. 49823, 49835 (September 18, 1998)) (emphases added). *See also* Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Sixth Congress, First Session, Pursuant to S. Res. 53: The Compulsory License Provisions of the U.S. Copyright Law 49, 51 (1956)[2] (discussing the compulsory license provisions under the 1909 Copyright Act for the mechanical reproduction rights in musical compositions: "Once mechanical reproduction rights are exercised, anyone, under the compulsory license provision, may make 'similar use' of the work at the statutory royalty rate. This consequence, of course, means that the statutory royalty rate operates as a ceiling for any negotiated royalty rate," and "[i]f the availability of the compulsory license provision is doubtful, the possibility of its being available undoubtedly encourages the negotiation of licenses at royalty rates comparable to the statutory royalty."). The webcaster's outside option of electing the WSA rate would infect all negotiated terms in the license agreement, barring consideration of the agreement as a whole under § 114(f)(5)(C).

Third, as discussed in Section II, above, consideration of terms—even non-copied terms—from a license agreement derived even in part from a WSA agreement would make the negotiated license immune from attack on the ground it was influenced by the WSA agreement, because the opposing party could not even discuss, much less introduce, the barred WSA agreement to show its effect on the negotiation. This result would, in effect, *strengthen* the

[2] Available at http://copyright.gov/history/studies/study5.pdf.

evidentiary value of these licenses. Congress certainly did not intend this result when it encouraged compromise negotiations by promising that any compromises would not be taken into account in future proceedings.

B. Does section 114(f)(5)(C) of the Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that agreement includes any terms that are *substantively identical to* terms of a WSA settlement agreement?

Yes. For the reasons set forth in response to the first question above, § 114(f)(5)(C) bars the Judges from considering a license in its entirety if it contains terms that are copied verbatim from a WSA settlement agreement. If the terms are substantively identical, although not copied verbatim, the result should be no different. Otherwise, the party seeking to submit the license agreement could simply slightly re-word the relevant terms to avoid the prohibitions of § 114(f)(5)(C).

Section 114(f)(5)(C) broadly provides that the provisions of a WSA agreement, including "any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein," shall not be "admissible" or "otherwise taken into account." 17 U.S.C. § 114(f)(5)(C). Obviously, agreements can share rate structures, fees, terms, conditions and other provisions even if those provisions are not worded identically. Just as obviously, allowing a party to make non-substantive "tweaks" to the language of a WSA agreement in order to inject the substance of the provisions into a rate proceeding would be contrary to Congress's intent. Indeed, Congress deliberately drafted the WSA to foreclose all uses of the terms that emerged from that particular process.

It is possible, though highly unlikely, that parties could agree to terms that are substantively identical to those in a WSA agreement but do so entirely independent of the

influence of the WSA agreement. To the extent that a party proffering an agreement makes such a claim, the Judges have straightforward methods to test the veracity of the claim.

First, if the proffering party was eligible for and could opt into the WSA agreement, that should be conclusive proof that the substantively identical rates were derived directly from the WSA agreement. The terms of that agreement, after all, were the outside option that such a webcaster had at its disposal. As discussed above, and as the Judges have recognized, such an outside option would significantly dictate the negotiated rates in the license agreement.

Second, if a proffering party was not eligible to opt into a WSA agreement, that party could attempt to prove the independent derivation of its agreement and terms through evidence of the parties' negotiating history. That history likely would show whether the substantively identical terms were in fact derived from the prohibited WSA agreement.

C. Does section 114(f)(5)(C) of the Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if that agreement includes terms that the Judges conclude have been *influenced* by terms of a WSA settlement agreement?

Yes, if the terms have been *directly* influenced by the terms of a WSA agreement. In this circumstance, consideration of the directly influenced terms, along with other provisions in the license, necessarily would take "into account" the terms of the WSA agreement, in violation of § 114(f)(5)(C).

To some extent, any agreement in the webcasting space may be said to be influenced by existing statutory rates as well as rates that apply under some WSA agreements. Indeed, the Judges have "question[ed] whether any agreements regarding sound recording rights could be purely market-based given the current statutory framework." *In re Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services (SDARS II)*, 78 Fed. Reg. 23054, 23065 (April 2013) (Copyright Royalty Board, 37 CFR Part 382,

Determination of Rates and Terms for Preexisting Subscription Services, and Satellite Digital Audio Radio Services; Final Rule). But this does not mean that the shadow of a WSA settlement agreement influences all negotiations to an equal extent. *See* Peter DiCola and David Touve, "Licensing in the Shadow of Copyright," 17 Stan. Tech. L. Rev. 397, 453-54 (2014) (noting that the law's "shadow is not sharp" for voluntarily licensed interactive services as compared to statutory services). That influence will be direct in some cases, and in those circumstances, taking the terms of the license whose negotiation and terms were directly affected by the WSA agreement effectively takes account of the WSA agreement's terms.

The clearest test to determine whether the terms in a license are directly influenced by the terms of a WSA agreement is to consider whether the webcaster would be eligible to opt into the WSA agreement and fall back on that option in the absence of a directly-negotiated license. The availability of that option should create a very strong presumption that the terms of the WSA agreement directly influenced the resulting rates in the proffered license agreement. *See* Section III.A, *supra*.

An example illustrates the direct influence that a WSA agreement has where the webcasting party can opt into that settlement rate. Suppose that a webcaster eligible to opt into a WSA agreement enters into a direct license with a copyright owner. Suppose further that the agreement provides stated per-performance rates that are identical to those in the WSA agreement, but subject to a discount if the webcaster increases the number of performances of that copyright owner's repertoire over the performances that otherwise would match the copyright owner's market share. The effective per-performance rate would be directly influenced by the WSA agreement rates, even if those effective rates were not identical to the stated rates. By considering the discounted rate, the Judges necessarily would be "taking into

account" and considering the WSA agreement rate; the WSA agreement rate would provide the baseline.

Thus, if the terms have been *directly* influenced by the terms of a WSA settlement agreement, consideration of the directly influenced terms, along with other provisions in the license, would "take into account" and consider the terms of the WSA settlement agreement, in violation of § 114(f)(5)(C).

D. Does section 114(f)(5)(C) of the Act bar the Judges from considering *in its entirety* a license agreement between a webcaster and a record company if the agreement *refers to* a WSA settlement agreement in provisions unrelated to the rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein?

We read this question to ask whether the statute bars the Judges from considering a negotiated license agreement that refers to a WSA agreement in provisions of the negotiated license that are unrelated to that license's rate structure, fees, terms, conditions, or notice and recordkeeping requirements. Generally, § 114(f)(5)(C) would bar consideration of the negotiated license in this circumstance.

If the license agreement is referring to a provision within a WSA agreement, then the license is doing so somewhere within its own "terms" or "conditions." Thus, a reference to a WSA agreement in any provision of a license is a reference to a WSA agreement's "terms" and "conditions." There are no provisions of a license that are "*unrelated*" to its "terms" and "conditions." *Cf. New Edge Network, Inc. v. F.C.C.*, 461 F.3d 1105, 1112 & n.38 (9th Cir. 2006) ("reject[ing]" the "contention that the phrase 'same terms and conditions as those provided in the agreement' must refer to discrete terms and conditions" and "not to the entire agreement" given that the "'same terms and conditions as those provided in the agreement' could refer to *all* the terms and conditions in the agreement").

Further, the broad language Congress used in § 114(f)(5)(C) demonstrates its intent for the provision to apply expansively, effectively encompassing *all* provisions in a WSA agreement, and not simply those provisions specifically governing rates, fees, or rate structures. Section 114(f)(5)(C) states that "*any provisions* of any agreement entered into pursuant to subparagraph (A), *including any* rate structure, fees, *terms*, *conditions*, or notice and recordkeeping requirements set forth therein" shall not "be admissible as evidence or otherwise taken into account." The use of "*including*" as a preface to "any rate structure, fees, terms, conditions, or notice and recordkeeping requirements" indicates that Congress plainly intended for "any provisions" to encompass and bar consideration of any and all elements of a WSA settlement agreement. *See, e.g., Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968) ("The word 'includes' is usually a term of enlargement, and not of limitation. It therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statutes.").

Likewise, the statute's use of "*any* provisions" and "*any*…terms" or "conditions" further confirms Congress's intent to preclude effectively *all* provisions of a WSA settlement agreement from being considered. *See, e.g., United States v. Rodriguez*, 775 F.3d 533, 537 (2d Cir. 2014) ('"*Webster's Third New International Dictionary* provides that the word 'any' means 'all.' . . . . Specifically, *Webster's Third New International Dictionary* provides that when the word 'any' is 'used as a function word to indicate the maximum or whole of a number or quantity,' for example, 'give me [any] letters you find' and 'he needs [any] help he can get,' the word 'any' means 'all.'" (quoting *United States v. Maxwell*, 285 F.3d 336, 341 (4th Cir. 2002))).

It is difficult to imagine that a license could make a *reference* to a term or condition of a WSA agreement without incorporating that term or condition or otherwise being directly influenced by that term or condition. A negotiated agreement's *reference* to a WSA agreement likely will be strong evidence that the WSA agreement directly influenced that agreement's terms. For example, a negotiated agreement might contain a provision that terminates the agreement if the webcaster loses its eligibility for the WSA agreement. Or a negotiated agreement might contain provisions that are triggered depending on the webcaster's eligibility for, or opting into, a WSA agreement with other copyright owners. The references to the WSA agreement would be strong evidence that the WSA agreement directly influenced the negotiated agreement.

If a party proffering a negotiated agreement that refers to a WSA agreement contends the WSA agreement did not have a direct influence, the Judges could examine the actual terms of the license, and the evidentiary record, including testimony and documentary evidence from the parties, to test the claim.

E. If the answer to any of the previous questions is "no," does section 114(f)(5)(C) of the Act bar the Judges from considering specific provisions of a license agreement between a webcaster and a record company that are the same as, are copied from, influenced by or refer to provisions of a WSA settlement agreement?

SoundExchange submits that § 114(f)(5)(C) bars the Judges from considering the provisions of a license whose terms are copied verbatim from, substantively identical to, directly influenced by, or that refer to provisions of a WSA agreement, as indicated in the response to the preceding questions. There are three limited circumstances in which § 114(f)(5)(C) may not serve as a bar.

First, if the provisions of a license are not directly influenced by the terms or conditions of a WSA agreement, the license provisions may be considered. As discussed, the clearest sign

that a license is directly influenced by a WSA agreement is whether the webcaster could opt into the WSA agreement. Determining whether an agreement was directly influenced by the WSA agreement is a factual question that the Judges would have to resolve based on the record presented.

Second, it is theoretically possible that a license could *reference* a term or condition of a WSA agreement without directly incorporating that term or condition or otherwise being directly influenced by that term or condition. To the extent a submitting party claims this is the case, the Judges can evaluate that claim by examining the actual terms of the license, and the evidentiary record, including testimony and documentary evidence from the parties.

Third, even if the provisions of a license are the same as, are copied from, influenced by or refer to provisions of a WSA settlement agreement, § 114(f)(5)(C) permits the webcaster and receiving party to "expressly authorize the submission of the agreement in a proceeding under this subsection."

Dated: August 7, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2015, I caused a copy of the foregoing – PUBLIC **SOUNDEXCHANGE INC.'S INITIAL BRIEF REGARDING NOVEL QUESTION OF LAW REFERRED TO THE REGISTER** to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

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