§ 401.67 Carrying explosives.

* * * * *

■ 18. Amend § 401.73 by revising paragraph (b) to read as follows:

§ 401.73 Cleaning tanks—hazardous cargo vessels.

* * * * *

(b) *Hot work permission.* Before any hot work, defined as any work that uses flame or that can produce a source of ignition, cutting or welding, is carried out by any vessel on any designated St. Lawrence Seaway Management Corporation (SLSMC) approach walls, Cote St. Catherine wharf or wharves in the Welland Canal, a written request must be sent to the SLSMC, preferably 24 hours prior to the vessel's arrival on the SLSMC approach walls or wharves. The hot work shall not commence until approval is obtained from an SLSMC Traffic Control Center.

(1) Permission is granted under the following conditions:

(i) Copy of vessel's ''Hot Work Permit'' is provided to the SLSMC before welding commences;

(A) In the Welland Canal, send to: *nerie@seaway.ca* and *nrshipinspectors@seaway.ca.*

(B) In the MLO Section, send to: *cdo@seaway.ca* and *inspecteursvm@seaway.ca.*

(ii) Name of company performing the hot work is provided;

(iii) Effective fire watch is maintained;

(iv) Welding operations shall temporarily cease during vessel meets and lockages;

(v) Welding operations shall cease at the direction of a Traffic Controller; and

(vi) All sparks and/or flames are to be contained on the vessel.

(2) [Reserved]

* * * * *

■ 19. Amend § 401.84 by:

■ a. Adding a semicolon at the end of paragraph (c);

■ b. Revising paragraph (d); and

■ c. Removing the parenthetical authority citation at the end of the section.

The revision reads as follows:

§ 401.84 Reporting of impairment or other hazard by vessels transiting within the Seaway.

* * * * *

(d) Any modification or malfunction on the vessel of equipment and machinery that is noted as operational in the current ''Enhanced Ship Inspection'' or ''Self-Inspection'' of the vessel;

* * * * *

■ 20. Revise § 401.94 to read as follows:

§ 401.94 Keeping copies of documents.

(a) A paper copy of the vessel's valid Ship Inspection Report shall be kept on board every vessel in transit. It must be easily accessible in the wheelhouse.

(b) A paper or electronic copy of this subpart (the ''Rules and Regulations'') and the Seaway Notices for the current navigation year shall be kept easily accessible in the wheelhouse of every vessel in transit.

(c) Onboard every vessel transiting the Seaway, a duplicate set of the vessel's Fire Control Plans shall be permanently stored in a prominently marked weather-tight enclosure outside the deckhouse for the assistance of shore side fire-fighting personnel.

Issued at Washington, DC, under authority delegated at 49 CFR 1.101.

Great Lakes St. Lawrence Seaway Development Corporation.

Carrie Lavigne,

Chief Counsel.

[FR Doc. 2024–31566 Filed 1–8–25; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 384

[Docket No. 2012–1 CRB Business Establishments II; Docket No. 2007–1 CRB DTRA–BE]

Ruling on Regulatory Interpretation for Business Establishment Services

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Ruling on regulatory interpretation.

SUMMARY: The Copyright Royalty Judges publish their ruling on regulatory interpretation in a matter that was referred to them by the United States District Court for the District of Columbia. The regulation at issue is the definition of ''Gross Proceeds'' in the rates and terms set forth through settlements in the *BES I* and *BES II* proceedings in 37 CFR 384.3(a), which is used when calculating royalty payments paid to SoundExchange, a collective for copyright owners, in relation to digital transmissions of sound recordings pursuant to the statutory license in 17 U.S.C. 112.

DATES: January 10, 2025

ADDRESSES: The ruling is posted in eCRB at *https://app.crb.gov/.* For access to the docket, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/,* and search for docket numbers 2012–1 CRB Business Establishments II and 2007–1 CRB DTRA–BES.

FOR FURTHER INFORMATION CONTACT: Anita Brown, CRB Program Specialist, at (202) 707–7658 or *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

Ruling on Regulatory Interpretation Referred by the United States District Court for the District of Columbia

Background

On February 9, 2022, SoundExchange submitted a motion [1] to the Copyright Royalty Judges (Judges) to reopen certain proceedings addressing determinations of royalty rates and terms under the 17 U.S.C. 112 license for making ephemeral copies of sound recordings for transmission by a Business Establishment Service (BES) in three proceedings, *BES I, BES II,* and *BES III.*[2]

SoundExchange's request arose from litigation before the U.S. District Court for the District of Columbia (District Court) in which SoundExchange alleged that Music Choice had failed to pay royalties due under 17 U.S.C. 112 for the license to reproduce and transmit ephemeral copies of sound recordings to business establishments. *See SoundExchange, Inc.* v. *Music Choice,* No. 19–999 (RBW) (D.D.C. Dec. 20, 2021) (District Court Action). The District Court determined it was appropriate to refer a matter of regulatory interpretation regarding 37 CFR 384.3(a) to the Judges under the doctrine of primary jurisdiction and found that the Judges have continuing jurisdiction to clarify the BES regulations, even though those regulations were originally formulated by the Copyright Arbitration Royalty Panel (CARP), a rate setting body that preceded the Copyright Royalty Board (Board). *See* District Court Action, Memorandum Opinion at 9–10 (Dec. 20, 2021) (Memorandum Opinion) (attached to the Motion as Exhibit B) (citing Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress, *Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings,* Docket No. 2000–9 CARP DTRA 1 & 2 at B–7 (Feb. 20, 2002) (*Web I* CARP Report)).

[1] Motion of SoundExchange, Inc. to Reopen Business Establishment Service Rate Proceedings for the Limited Purpose of Interpreting Regulations on Referral from the U.S. District Court for the District of Columbia (February 9, 2022) (eCRB no. 26146) (Motion).

[2] Docket Nos. 2007–1 CRB DTRA–BE (2009–2013) (''*BES I*''), 2012–1 CRB Business Establishments II (2014–2018) (''*BES II*''), and 17–CRB–0001–BER (2019–2023) (''*BES III*'').

The underlying dispute revolves around the definition of ''Gross Proceeds'' in the rates and terms set forth through settlements in the *BES I* and *BES II* proceedings in 37 CFR 384.3(a). *Id.* at 4–5.[3] ''Music Choice asserts that 'its ''Gross Proceeds'' are only an allocated portion of its actual proceeds corresponding to music channels offered *solely* as part of its BES service.''' *Id.* at 6–7. SoundExchange asserts that '''Music Choice must pay BES statutory royalties on fees and payments it receives from providing music channels used in its BES service, even if Music Choice also provides such channels as part of a different service.''' *Id.* at 7.

Stated differently, the question is whether 37 CFR 384.3(a) requires BES providers to calculate royalties using their gross proceeds derived from the use of all licensed ephemeral copies used for the operation of the BES, or whether a BES may calculate royalties using their gross proceeds derived from the use of only those licensed ephemeral copies used for the ''sole purpose'' of the operation of the BES.

The Memorandum Opinion stated that ''[a]s a preliminary matter, the Court notes that the Board's definition of 'Gross Proceeds' in 37 CFR 384.3(a)(2) is 'ambiguous and do[es] not, on [its] face, make clear whether [Music Choice's] approaches were permissible under the regulations.' '' *Id.* at 9 n.2.

On March 22, 2022, after considering the Motion, Music Choice's response [4] and SoundExchange's reply, [5] the Judges found that the claims to be addressed by the District Court only relate to time periods addressed by the *BES I* and *BES II* determinations and thus ordered the reopening of those two proceedings. The Judges ordered opening and reply briefing for the limited purpose of addressing the meaning of ''Gross Proceeds'' as defined in 37 CFR 384.3(a).[6]

The relevant provision as set forth in the *BES I* determination states:

§ 384.3(a)

For the making of any number of Ephemeral Recordings in the operation of a service pursuant to the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), a Licensee shall pay 10% of such Licensee's ''Gross Proceeds'' derived from the use in such service of musical programs that are attributable to copyrighted recordings. ''Gross Proceeds'' as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

Final rule, *Determination of Rates and Terms for Business Establishment Services,* Docket No. 2007–1 CRB DTRA–BE, 73 FR 16199, 16200 (Mar. 27, 2008) (*BES I* Determination).

The relevant provision as set forth in the *BES II* determination states:

§ 384.3(a)

For the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service, a Licensee shall pay 12.5% of such Licensee's ''Gross Proceeds'' derived from the use in such service of musical programs that are attributable to copyrighted recordings. ''Gross Proceeds'' as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

Final rule, *Determination of Rates and Terms for Business Establishment Services,* Docket No. 2012–1 CRB Business Establishments II, 78 FR 66276, 66277 (Nov. 5, 2013) (*BES II* Determination).

Summary of Arguments

Music Choice puts forth the initial arguments that (a) the plain meaning of the ''gross proceeds'' definition only requires royalty payments from revenue attributable to copies made solely to facilitate a BES transmission; (b) the plain meaning of the definition of gross proceeds is confirmed by the unique nature of the BES license and the Judges' prior rulings; and (c) in the absence of a specific methodology in the regulations for apportioning revenues derived from copies made for the sole purpose of facilitating a BES transmission, a BES provider is entitled to use a reasonable methodology. *See generally,* Music Choice Opening Brief (eCRB no. 26631).

Music Choice urges the Judges to apply basic principles of regulatory interpretation, including that when a regulation is unambiguous, one should not look beyond the text of the regulation itself unless the plain meaning of the regulation would lead to an absurd result (Plain Meaning Rule and Absurdity Doctrine). *Id.* at 24. Music Choice adds that the regulation explicitly calls for the inclusion of only those revenues that are derived from copies of sound recordings that are made ''for the sole purpose of facilitating a transmission to the public of a performance of a sound recording.'' 37 CFR 384.3(a)(2). Music Choice asserts that the ''sole purpose'' language in the definition must place some limitation on the revenues that are to be included in ''Gross Proceeds'' or else the ''sole purpose'' language would be superfluous—a result that is at odds with long-settled cannons of regulatory and statutory interpretation (Rule Against Surplusage). *Id.* at 24–26 (citing *e.g. U.S.* v. *Butler,* 297 U.S. 1, 65 (1936), *Lowe* v. *SEC,* 472 U.S. 181, 207 n.53 (1985) (''[W]e must give effect to every word that Congress used in the statute.''), and *Gustafson* v. *Alloyd Co.,* 513 U.S. 561, 577 (1995) (''the presence

[3] Despite the fact that the regulations at issue were not drafted by Copyright Royalty Judges, but instead are the result of settlements by the settling proceeding participants, which the Judges are generally compelled, under 17 U.S.C. 801(b)(7)(a), to adopt, the Judges find that the relevant procedural history of these and predecessor proceedings does provide adequate basis for referral by the District Court under the doctrine of primary jurisdiction and the finding that the Judges have continuing jurisdiction. *See* Final rule, *Determination of Rates and Terms for Business Establishment Services,* Docket No. 2007–1 CRB DTRA–BE, 73 FR 16199 (Mar. 27, 2008) (BES I Determination) and Final rule, *Determination of Rates and Terms for Business Establishment Services,* Docket No. 2012–1 CRB Business Establishments II, 78 FR 66276, 66277 (Nov. 5, 2013) (*BES II* Determination), citing 17 U.S.C. 801(b)(7)(a).

[4] Music Choice's Response in Opposition to SoundExchange's Motion to Reopen Business Establishment Service Rate Proceedings (Feb. 23, 2022) (eCRB no. 26201).

[5] SoundExchange's Reply in Support of its Motion to Reopen Business Establishment Service Rate Proceedings (Mar. 2, 2022) (eCRB no. 26246).

[6] Order Reopening Two Proceedings and Scheduling Briefing (Mar. 22, 2022) (eCRB no. 26360) (''Reopening Order''). The Judges observe that the Register of Copyrights has previously opined that the Judges have jurisdiction to clarify regulations that the Judges have adopted. *See, Register's Memorandum Opinion on a Novel Question of Law* (Apr. 8, 2015) (Addressing the re-opened SDARS I proceeding and questions referred from the U.S. District Court for the District of Columbia).

of limiting language in [the statute] requires a narrow construction.'').

Music Choice posits that even if one were to conclude that there was some ambiguity in the definition of Gross Proceeds, or that it was, for some other reason, appropriate to look to other evidence, such evidence only confirms that the limitation imposed by the ''for the sole purpose'' language serves valid economic and copyright policy purposes, and therefore that limitation must be given its full effect. In this regard, Music Choice points to its conception that the right to make ephemeral copies has no independent value separate and apart from the performance right. *Id.* at 27–28. Music Choice also refers to various statements urging copyright and economic policy positions calling for an outright exemption for the rights covered by the 112 license at issue. *Id.* at 29.

Music Choice then pointed to several statements by the Judges, made in the context of determinations involving different statutory licenses, urging that ''it is almost axiomatic'' that revenues unrelated to the particular statutory license at issue ''should not be included in the revenue base'' used to calculate royalties for a license where the royalty is calculated as a percentage of revenue. *Id.* at 29–31 (citing Final rule and order, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)* (Feb. 5, 2019), 84 FR 1918, 1961; Final rule and order, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services* (*PSS/Satellite II),* Docket No. 2011–1 CRB PSS/Satellite II, 78 FR 23054, 23096 (Apr. 17, 2013) (excluding ''monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service'' from the definition of ''Gross Revenues.'')).[7]

Music Choice then urges the Judges to go beyond the scope of the re-opened proceedings (provide guidance regarding the meaning of the ''Gross Proceeds'' definition) and provide guidance regarding the standard that should be used to evaluate the approach that a BES provider has taken to apportion its revenues. Music Choice argues the Judges should find that where a regulatory royalty formula at issue does not provide a specific approach for allocating revenues between those included in Gross Proceeds and those excluded, a ''reasonableness'' standard should be applied. In making this request Music Choice notes that it would be inappropriate to provide such guidance if doing so required any fact-finding. *Id.* at 34–35.

SoundExchange puts forth the initial arguments that (a) the ''gross proceeds'' definition is ambiguous, (b) Music Choice's proposed interpretation of 37 CFR 384.3(a)(2) creates incoherence with 37 CFR 384.3(a)(1), (c) Music Choice's interpretation of 37 CFR 384.3(a) produces absurd results, and (d) Music Choice's interpretation of 37 CFR 384.3(a) is inconsistent with past Determinations concerning that provision. *See generally,* SoundExchange's Opening Legal Brief Concerning the Meaning of 37 CFR 384.3(a) (eCRB no. 26639).

SoundExchange recounts the past proceedings for setting of rates and terms for BES, noting that BES rates and terms have been litigated in a ratemaking proceeding only once, in the first CARP proceeding after enactment of the DMCA. *Id.* at 7 (citing *Web I* CARP Report at 111; Final order, *Designation as a Preexisting Subscription Service,* 71 FR 64639, 64640–41 (Nov. 3, 2006)). SoundExchange notes that subsequent statutory royalty rates and terms for BES were settled in 2003, 2007, 2012, and 2018, using essentially the same wording in the relevant regulations. *Id.* at 12–14 (citing Final rule, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 69 FR 5693 (Feb. 6, 2004); *BES I* Determination, 73 FR 16199; *BES II* Determination, 78 FR 66276; Final rule, *Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (BES III),* 83 FR 60362 (Nov. 26, 2018)).

Regarding the one fully litigated determination of rates and terms for BES, SoundExchange observes that the CARP adopted as benchmarks existing direct license agreements for BES. *Id.* at 9 (citing *Web I* CARP Report at 121–23). Additionally, SoundExchange notes that the CARP relied upon benchmark agreements not only for the rates but for the terms of the statutory license. *Id.*

SoundExchange notes that the Librarian of Congress reviewed the *Web I* CARP Report and that the Librarian disagreed with the CARP's conclusions about BES rates in one respect relevant to this re-opened proceeding, namely the regulations regarding gross proceeds, specifically the inclusion of in-kind payments. *Id.* at 9–11.[8]

SoundExchange argues that the relevant provision at issue is ambiguous. *Id.* at 20–24. In doing so, it cites to the District Court Opinion. SoundExchange also points to linguistic and interpretive challenges in the regulatory text. SoundExchange focuses specific attention to the word ''including'' and to the principle of regulatory interpretation known as the ''Presumption of Nonexclusive 'Include'.'' *Id.* at 22 (citing *Am. Hosp. Ass'n* v. *Azar,* 983 F.3d 528, 534 (D.C. Cir. 2020) (quoting *Puerto Rico Mar. Shipping Auth.* v. *Interstate Com. Comm'n,* 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) (it is ''hornbook law that the word 'including' indicates that the specified list . . . that follows is illustrative, not exclusive.'')). SoundExchange asserts that the regulation is ambiguous as to whether the lengthy matter that follows the word ''including'' in paragraph (a)(2) is: (a) a list of illustrative examples; (b) just one illustrative example; or (c) one or more illustrative examples plus some words that relate back to the ''all fees and payments'' at the beginning of the definition. *Id.* at 22–23. SoundExchange also focuses on the two instances of the phrase ''derived from'' arguing that both must be given effect, if possible. *Id.* at 24–25.

SoundExchange argues that these challenges within 37 CFR 384.3(a) render the regulation capable of numerous interpretations, which cannot all be right. It then offers two interpretations, which it views as being plausible.

Under the first of SoundExchange's proposed interpretations, the relevant regulation can be parsed as follows:

all fees and payments
including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). 37 CFR 384.3(a)(2).

[7] Music Choice also noted that in the SDARS II determination the Judges decided that a downward adjustment to the royalties owed was appropriate to account for the performance of any directly licensed sound recordings as well as for the performance of any pre-1972 sound recordings which, at the time, were ''not licensed under the statutory royalty regime.'' 78 FR 23072.

[8] The relevant law at the time, section 802(f) of the Copyright Act directed that the Librarian shall adopt the report of the CARP, ''unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title.'' *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final rule and order, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings,* 67 FR 45240, 45242 (July 8, 2002) (citing 17 U.S.C. 802(f) (2002) *(DTRA Determination)*).

Read this way, the clauses following ''including those'' are not meant to be exhaustive. SoundExchange argues that neither the CARP nor the Librarian intended to include within ''all fees and payments'' only ''in kind'' revenue. It then asserts that for the same reason and under the same logic, the language does not limit ''all fees and payments'' to only those derived from the use of ephemeral copies for the ''sole purpose'' of BES transmissions. *Id* at 22–23.

Under the second of SoundExchange's proposed interpretations, the relevant regulation can be parsed as follows:

all fees and payments

including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv).

37 CFR 384.3(a)(2). Read this way, the regulation means that ''all'' ''fees and payments'' are included, and then goes on to specify what kinds of ''in kind'' consideration count as well—those that come from ''any source,'' before or after the license period, provided that the consideration was offered ''for the sole purpose'' of facilitating a BES. *Id.* at 23–24.

While offering the two interpretations, SoundExchange also maintains that other perhaps superior interpretations exist. *Id.* at 22–24. It argues that in light of the apparent ambiguity, the Judges may look elsewhere in the regulatory scheme to determine the proper interpretation. It urges that here the Judges can and should resolve ambiguities in the text of 37 CFR 384.3(a) by examining the history of the regulation and the expressed intent of the regulation's drafters. *Id.* at 24.

SoundExchange next argues that Music Choice's proposed interpretation creates incoherence. SoundExchange states that the alleged limitation by which ''all fees and payments'' ''derived from the use of'' ephemeral copies of sound recordings, is limited to only those copies that are used ''for the sole purpose of facilitating a transmission'' through a BES is inconsistent with the preceding sentence's statement in the regulation indicating that a BES provider must pay a percentage of its Gross Proceeds ''derived from the use in [a BES] of musical programs that are attributable to recordings subject to protection under title 17, United States Code.'' *Id.* at 23–24 (citing 37 CFR 384.3(a)(2) (July 8, 2019)).[9] SoundExchange argues that such an interpretation violates the ''endlessly reiterated principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.'' *Id.* at 25. SoundExchange then argues that its two proposed interpretations of the regulation are internally consistent, avoid any obvious redundancy or surplusage and give better effect to the clear intent of the regulation's drafters, as evidenced by the CARP proceeding record. *Id.* at 26.

SoundExchange also argues that Music Choice's proposed interpretation produces absurd results, namely that if Music Choice's interpretation of the word ''solely'' were correct, then the only copies for which it would owe royalties are those used in either its BES or its Preexisting Subscription Service (PSS), but not in both. The practical result would then be that Music Choice could deliver both a BES and a PSS with a high proportion of dual-use copies, most of the copies made by Music Choice would not generate any BES or PSS royalties, and Music Choice would pay less in statutory royalties when it used and profited off copies more. *Id.* at 27.

SoundExchange asserts that Music Choice's proposed interpretation is inconsistent with the Web I CARP Decision and the Librarian's review of that decision. *Id.* at 28. SoundExchange observes that the CARP set a blanket rate structure, as opposed to setting rates for separate sets of rights in multiple mini-licenses for the making of different kinds of ephemeral copies. SoundExchange argues that the CARP expressly decided not to allow BES providers to pick and choose license coverage for different types of ephemeral recordings, or to pay based on usage, approaches that the CARP referred to as ''subdivid[ing] this package of rights into multiple mini-licenses for the making of different kinds of ephemeral copies.'' *Id.* at 29–30 (citing *Web I* CARP Report at 119).

SoundExchange also argues that the benchmark agreements required payment of royalties based on a licensee's gross proceeds, and not based on a portion of gross proceeds reflecting the extent of the licensee's usage. *Id.* at 31–32. SoundExchange also notes that the CARP specifically rejected any deductions from gross proceeds, because in ''most'' agreements, ''there are no deductions from gross proceeds.'' *Id.* at 33 (citing *Web I* CARP Report at 125). SoundExchange argues that the CARP determined that there should be no deductions from gross proceeds, and that therefore Music Choice's proposed interpretation is contrary to the benchmark agreements embraced by the CARP. *Id.*

SoundExchange then addresses the Librarian's review and modification to the CARP recommendations. SoundExchange notes that the Librarian largely affirmed the CARP's decision concerning BES rates. It argues that the Librarian disagreed with the CARP's conclusions about BES rates in only one respect relevant to this proceeding, namely the specificity of the regulations as to whether gross proceeds include in-kind payments. SoundExchange states that the Librarian decided ''to expand on the CARP's approach and adopt a definition of 'gross proceeds' which clarified that 'gross proceeds' shall include all fees and payments from any source, including those made in kind, derived from the use of copyrighted sound recordings to facilitate the transmission of the sound recording pursuant to the section 112 license.'' *Id.* at 33–34 (citing Final rule and order, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings,* 67 FR 45260, 45268 (July 8, 2002) (*DTRA* Determination). SoundExchange argues that the stated purpose of the Librarian's new language was to expand rather than contract the CARP's approach, to capture in-kind payments. In SoundExchange's view, it would be contrary to the Librarian's reasoned decision to attribute to the word ''solely'' the effect of drastically refiguring the CARP's decision. *Id.* at 34.

Music Choice offers reply arguments that (a) any attempt to find ambiguity regarding the meaning of gross proceeds do not withstand scrutiny; (b) the plain meaning of the definition of gross proceeds set forth by Music Choice does not produce absurd results; (c) SoundExchange's proposed reading of the definition of gross proceeds is at odds with its own discussion of cannons of regulatory interpretation; and (d) flawed fact-finding and analysis from the CARP proceeding are irrelevant, but in any event are not inconsistent with the plain meaning of gross proceeds. *See generally,* Music Choice Reply Brief (eCRB no. 26791).

Music Choice offers that SoundExchange is incorrect when it argues that Music Choice's interpretation of Gross Proceeds would indicate ''the only copies for which it

[9] The Judges note that SoundExchange is citing to the BES III regulation, which, while structurally and substantively similar, is slightly different from the regulations in BES I and BES II, which are at issue in this proceeding.

would owe royalties are those used in either its BES or its PSS, but not in both.'' *Id.* at 9. Music Choice notes that the PSS and BES regulations are separate and distinct and that the regulations applicable to PSS and BES are not analogous. *Id.* at 10. Music Choice argues that neither the word ''solely'' in the PSS regulation, nor the rest of the Gross Revenues definition, allows a PSS to make the sort of ''absurd'' carve-out that SoundExchange is suggesting. *Id.* at 10–11.

Music Choice argues that SoundExchange's proposed interpretations do not provide any plausible meaning for the ''sole purpose'' limiting language. It maintains that SoundExchange's interpretations largely reads out the ''sole purpose'' limiting language. However, Music Choice allows that SoundExchange offers the view that the ''sole purpose'' language is applicable only to ''in kind'' consideration, and that the ''sole purpose'' language does not apply to any other form of consideration. But Music Choice argues that this interpretation from SoundExchange is internally inconsistent, stating that if ''all fees and payments'' must be included, then it cannot also be the case that only a subset of ''in kind'' consideration (those ''offered 'for the sole purpose' of facilitating a BES transmission'') must be included. *Id.* at 11–12.

Music Choice asserts that SoundExchange's interpretation is not sensical, positing that under SoundExchange's interpretation the '''for the sole purpose' of facilitating a BES transmission'' language was meant to refer to payments, and not ephemeral copies. Music Choice maintains that payments cannot ''facilitate'' a transmission. *Id.* at 12.

Music Choice argues that SoundExchange's interpretation renders meaningless 37 CFR 384.3(c), which addresses ephemeral recordings other than those governed by 384.3(a). Music Choice reasons that if a BES provider is required to pay for all ephemeral copies, whether made solely to facilitate a transmission by a BES or not, then all copies made by a BES would be covered by section 384.3(a) and there would be no copies left for section 384.3(c) to address. *Id.* at 13.

Music Choice suggests that the Judges' Order Reopening Two Proceedings and Scheduling Briefing, as well as sound practice for referrals from a District Court, indicate that it would be inappropriate for the Judges to draw any factual conclusions from these statements from Music Choice's Answer in the District Court proceeding. It adds that it would be inappropriate for the Judges to make factual findings regarding the manner and extent to which Music Choice actually makes various types of channels or intermediate copies in connection with its BES. *Id.* at 14–20.

Music Choice then intimates that the Judges should not make factual determinations about the record of the CARP proceeding. *Id.* at 20–24. Music Choice suggests that the record in the CARP proceeding was too dated, narrow and sparse to provide useful guidance in this proceeding. *Id.* at 21. Music Choice then adds that it is possible that the evidentiary records between the CARP and other proceedings may be sufficient justifications for the Judges to come to different conclusions than those reached by the CARP and Librarian. *Id.* at 21–23.

Music Choice further attacks reliance on the CARP proceeding by suggesting that it was rife with legal errors, and that the analysis within that determination can no longer withstand scrutiny. It argues that the benchmarking analysis is insufficient in comparison to more recent proceedings. *Id.* at 26–30. Music Choice then revisits its assertion that the CARP proceeding does not consider ephemeral copies in a proper manner consistent with the policy views of Music Choice and others. *Id.* at 30–35. Music Choice goes on to suggest that legal interpretations now suggest that buffer copies are now per se not legally recognizable copies or use of them is per se fair use. *Id.*

Music Choice asserts that a blanket license may allow deductions from the revenue pool to which a percent of revenue royalty rate is applied. *Id.* at 36–37. Music Choice adds that the benchmarks used by the CARP were unreliable, and non-comparable to its BES, and included vastly different rights. *Id.* at 37–38.

In its Reply Brief, SoundExchange asserts that Music Choice's policy-based arguments against statutory recognition of ephemeral copies are misplaced. *Id.* at 3–12. It adds that similar policy-based arguments as to the value of ephemeral copies are misplaced. SoundExchange's Reply Brief Concerning the Meaning of 37 CFR 384.3(a) at 12–13. (eCRB no. 26794).

SoundExchange reiterates its arguments that the ''gross proceeds'' definition is ambiguous. *Id.* at 17–20. It adds that the Judges should interpret the ambiguous provisions based on its context and its drafters' intent. *Id.* at 20–22.

SoundExchange urges the Judges not to place undue weight on the rates and terms for different licenses nor on the structure of such regulations for different licenses. Instead, it again urges the Judges to look to the intent of the drafters of the provision at issue. *Id.* at 23–26.

SoundExchange then challenges Music Choice's suggestion that the Judges should wade into addressing the propriety of a licensee relying on a '''reasonableness''' standard that might allow a BES provider to apportion revenues in a way that makes sense for their particular circumstances. *Id.* at 27–31.

Analysis

A. Regulatory Analysis

Several of the arguments put forward by Music Choice proceed from the position that the language of 37 CFR 384.3(a) is unambiguous, in contrast to the finding of the District Court that the provision ''is ''ambiguous and do[es] not, on [its] face, make clear whether [Music Choice's] approaches were permissible under the regulations.'' Memorandum Opinion at 9 n.2. The Judges do not take issue her with the District Court's finding of ambiguity, which is also persuasively asserted by SoundExchange. Furthermore, the Judges note that the parties have put forward various plausible interpretations of the provision, which is consistent with the District Court's finding of ambiguity. Based on the entirety of the record, including the briefing received in response to the Reopening Order as well as the record of the underlying proceedings, the Judges find that the relevant language of 37 CFR 384.3(a) is at least arguably ambiguous. Based on the entirety of that record, the Judges analysis and findings clarify this apparent ambiguity.

The Judges find that resolution of the parties' policy-based arguments regarding the provisions of the 112 license and the value of ephemeral copies is largely unnecessary with regard to the referred question.[10] The Judges can, and do, find it sufficient to address the referred question in light of the regulations in the relevant proceedings and the statute, as set forth by Congress, without influence of policy positions for alternative statutory provisions.[11]

[10] Although the Judges find it unnecessary to also address the parties' policy-based arguments, the Judges do find it instructive to address the parties' incomplete and incorrect economic arguments on which they rely in their attempts to buttress their legal and policy arguments. The Judges address those arguments *infra.*

[11] The Judges note that the Librarian's review of the *Web I* CARP Report clarified:

During the proceeding, the Services argued that these 'ephemeral' copies have no economic value

Confronted with an apparent ambiguous regulation, the Judges are informed by the arguments by Music Choice and SoundExchange regarding regulatory interpretation, as well as the history of and analysis underlying the regulations at issue from the CARP proceeding.

The Judges find that Music Choice is incorrect in arguing that the CARP findings and analysis from the CARP proceeding are irrelevant.[12] As the Court accurately observed: ''The original formulation of ''Gross Proceeds'' was determined by a Copyright Arbitration Royalty Panel (''CARP'') in a 2002 royalty-rate setting proceeding.'' Memorandum Opinion at 3. The Judges observe that relevant provisions in the CARP determination are substantively identical to the language set forth in BES I and BES II, which form the basis for Music Choice's asserted exclusion from gross proceeds.[13] The Judges logically look to the CARP proceeding's analysis and findings to address the referred question. As suggested by the Court, the CARP proceeding findings are essential to understand the basis for, and the meaning of, the language in the BES I and BES II rates and terms.

The CARP determination of BES rates and terms adopted as benchmarks certain direct license agreements for BES. *Web I* CARP Report at 121–23. The CARP noted that the benchmark agreements generally called for a royalty payment that was a stated percentage ''of gross proceeds derived by the background music company from the licensed service.'' *Id.* at 124. The CARP noted that in most of the benchmark agreements it considered, there are no deductions from gross proceeds. *Id.* at 125. The CARP determined that the royalty should simply be 10% ''of the Licensee's annual gross proceeds derived from the use in such broadcast service of the musical programs which are attributable to copyrighted recordings.'' *Id.* at B–7.[14]

The Librarian of Congress, upon and through recommendations of the Register of Copyrights, reviewed the CARP's decision. *See DTRA* Determination, 67 FR at 45240. The Librarian rejected the argument advanced by a licensee in that proceeding that it was arbitrary for the CARP to set a rate for a blanket license covering all ephemeral copies used to provide a BES. *Id.* at 45263. The Librarian found it ''consistent with the purpose of the section 112 license'' for CARP to have set a Section 112(e) rate for a blanket license of ''all the rights necessary'' for a BES. *Id.* The Librarian also affirmed the CARP's reliance on existing BES direct license agreements as benchmarks, finding the CARP's adoption of a 10% rate based on those agreements to be ''well-founded and supported by the record.'' *Id.* at 45243.

The Librarian took issue with aspects of the CARP's regulatory language regarding gross proceeds, finding that it ''does not necessarily appear to capture in-kind payments of goods, free advertising or other similar payments for use of the license.'' *Id.* at 45268. The Librarian decided ''to expand on the CARP's approach and adopt a definition of 'gross proceeds' which clarifies that 'gross proceeds' shall include all fees and payments from any source, including those made in kind, derived from the use of copyrighted sound recordings to facilitate the transmission of the sound recording pursuant to the section 112 license. *Id.* (citing RIAA Exhibit No. 60A DR [15]).

The Librarian added the following definition for ''gross proceeds'' to the final rule:

> ''Gross Proceeds'' as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv).

See generally, DTRA Determination, 67 FR at 45240.

The proposed benchmark agreement that the Librarian looked to in support of this clarification regarding gross proceeds, RIAA Exhibit No. 60A DR, itself includes a notable exclusion from gross proceeds. An exclusion in the cited benchmark agreement targets a specific type of in-kind payment, namely in-kind payments [REDACTED]. RIAA Exhibit No. 60A DR.

The Librarian's decision to adopt the aforementioned regulatory definition of ''gross proceeds'' did not specifically address the addition of the language ''for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv)'' but the decision to adopt that specific language appears to incorporate exclusions from certain in-kind payments that may reasonably approximate the exclusions for in-kind payments found in RIAA Exhibit No. 60A DR. Interpretation of this exclusion as an approximation of exclusions for in-kind payments in the benchmark agreements is supported by the Librarian's finding that it would be unwise to include even an illustrative list of what specific types of revenues should be considered in the calculation of gross proceeds. *DTRA* Determination, 67 FR at 45268. The Library also stated its intent to adhere to the revenue streams contemplated by the CARP and

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apart from the value of the performance they facilitate. Webcasters Petition at 67; Broadcasters Petition at 50. In support of this position, the Services cite with approval a Copyright Office Report which stated that the Office found no rationale for 'the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value, and are made solely to enable another use that is permitted under a separate license.''

Web I CARP Report at 98 citing U.S. Copyright Office, DMCA Section 104 Report at 114 n.434 (August 2001).

The Panel also contended that experts on both sides took this view. Webcasters Petition at 66 citing Jaffe W.D.T. 52–54; Tr. at 6556; Tr. at 2632 (Nagle). Had there been nothing more, the Panel might have agreed with the Services and adopted the Office's position. In construing the statute, however, the Panel found that Congress did not share the Copyright Office's view. Instead, the Panel found that Congress required that a rate be set for the making of ephemeral copies in accordance with the willing buyer/willing seller standard. Report at 98–99.'' 67 FR 45261 (footnote omitted).

[12] Furthermore, the Judges decline to second guess the evidentiary and legal conclusions within the CARP proceeding.

[13] Relevant language from each determination states:

CARP—''for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).'' *DTRA* Determination, 67 FR at 45268.

BES I—''for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv.).'' *BES I* Determination, 73 FR at 16200.

BES II—''for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv).'' *BES II* Determination, 78 FR 66277.

[14] The *Web I* CARP Report would have set forth the BES rate as follows:

For the making of unlimited numbers of ephemeral recordings in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(l)(C)(iv), a Business Establishment Service shall pay a § 112(e) ephemeral recording royalty equal to ten percent (10%) of the Licensee's annual gross proceeds derived from the use in such broadcast service of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings shall be made on the basis of:

(i) for classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and

(ii) for all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

[15] See Transcript, 2000–9 CARP DTRA 1&2 (WEB 1998–2002 (consolidated)) (eCRB no.7947 pp 242–267).

the relied upon benchmark agreements. *Id.*

The expansive exclusion posited by Music Choice does not closely adhere to the revenue streams contemplated by the CARP and the Librarian and reflected in the relied upon benchmark agreements. As previously stated, the CARP noted that in most of the benchmark agreements it considered, there are no deductions from gross proceeds. *Web I* CARP Report at 125. The agreements with deductions from gross proceeds include only narrow deductions. *See, e.g.* RIAA Exhibit No. 60A DR.

In light of these findings by the CARP and the Librarian, and considering the entirety of the record, the Judges find that the Librarian's gross proceeds definition intended a narrow exception for a limited scope of in-kind payments, which are narrow to a degree corresponding to those in the benchmark agreements. Specifically, the Judges find that the meaning of ''Gross Proceeds'' as defined in 37 CFR 384.3(a) is that ''all'' ''fees and payments'' are included, and that following the words ''including those'' the definition then specifies/limits what kinds of ''in kind'' consideration count as well—those that come from ''any source,'' before or after the license period, provided that such in-kind consideration was offered ''for the sole purpose'' of facilitating a BES. That is, the second interpretation offered by SoundExchange is the correct one, under which the relevant regulation are to be read as follows:

all fees and payments

including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv).[16]

Read this way, the regulation means that ''all'' ''fees and payments'' are included,

and then goes on to specify what kinds of ''in kind'' consideration count as well—those that come from ''any source,'' before or after the license period, provided that the consideration was offered ''for the sole purpose'' of facilitating a BES.

In addition to reflecting an appropriately narrow scope of an exception approximating those in the benchmark agreements, the Judges agree with SoundExchange that this interpretation follows and complies with relevant canons of interpretation.

This proper interpretation adheres to the presumption of the non-inclusive ''include'' whereby the word ''include'' indicates that the specified items that follow are illustrative and not exclusive. *See Am Hosp. Assoc.* v. *Azar,* 983 F.3d 528, 534 (D.C. Cir. 2020). In this case, that which follows ''include'' are those payments made ''in-kind'' albeit only if those in-kind payments are derived from the *use* of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). In adhering to this approach to the word ''including'' as well as the language which follows, the regulation is not ungrammatical.

This proper interpretation is not in tension with the rule against surplusage. *See Qi-Zhuo* v. *Meissner,* 70 F.3d 136, 139 (D.C. Cir. 1995). The ''for the sole purpose'' limitation has specific and effective meaning. Additionally, the proper interpretation does not create surplusage with regard to section 384.3(c), regarding ''other royalty rates and terms'', because the limitation within the definition of gross proceeds in 384.3(a) is an economic limitation on the scope of the term gross proceeds, and not a limitation on the scope of rights applicable to Licensees or particular types of ephemeral recordings, such as ephemeral recordings made under different licenses.

This proper interpretation is not nonsensical. Contrary to Music Choice's assertions, it is those in-kind payments derived from the *use* of copyrighted sound recordings which are subject to the ''for the sole purpose'' limitation. The proper interpretation does not indicate that payments facilitate a transmission. Rather, it is the *use* of sound recordings that facilitates a transmission.

This proper interpretation is not internally inconsistent, as it is accepted that specific provisions, here those regarding in-kind payments, do not govern the general, here a general statement of inclusiveness regarding fees and payments. *See Nitro-Lift Techs., L.L.C.* v. *Howard,* 568 U.S. 17, 21 (2012) (addressing the interpretive principle *generalia specialibus non derogant).* This proper interpretation is consistent in that the specific does not govern the general with regard to the scope of fees and payments within gross proceeds as well as subset of in-kind proceeds, and with regard to the term ''derived from'' used to apply generally as well as specifically with regard to certain in-kind payments.

This proper interpretation does not produce absurd results, as it adheres to the economic intent of the CARP and the Librarian and is consistent with the narrow exclusions from gross proceeds in the relevant relied upon benchmark agreements. This interpretation is also supported by the Judges' economic analysis of the BES license.

B. Economic Analysis

The Parties' Economic Arguments Fail to Clearly Capture the Legal and Economic Value of the Section 112 Ephemeral License Applicable to a BES—Value Which Supports the Judges' Construction of the Gross Proceeds Definition

The foregoing regulatory analysis is sufficient to make clear that the drafters of the disputed regulatory language did not intend to allow a BES to use its PSS ephemeral license to effectuate plays at business establishments by a BES without a separate ephemeral license and the payment of the section 112 royalties. To buttress that legal statutory argument, it is instructive to demonstrate the economic unreasonableness of Music Choice's position.

Music Choice relies on the fact that, when a section 114 service, such as a PSS, requires *both* the section 114 performance license and the section 112 ephemeral license, the Judges, SoundExchange and other licensees, have traditionally assigned a carved-out 5% of the section 114 performance license royalty as attributable to the ephemeral license. This, Music Choice maintains, is an acknowledgement of the absence of any actual value in the ephemeral license. *See e.g.* Music Choice Opening Brief at 16–20.

By contrast, SoundExchange argues that the ephemeral right under section 112 has inherent and independent economic value. *See, e.g.,* SoundExchange Reply Brief at 13. Thus, SoundExchange argues that the consensual carve-out of the section 112 ephemeral royalty from the section 114 royalty is irrelevant. SoundExchange Reply Brief at 15.

Both of these arguments miss the mark. More particularly, SoundExchange's argument is incomplete. That is, although SoundExchange is correct in that the ephemeral license has value, provided it can and must be used in order to operate a music service, that value is *either an independent value or a joint*

[16] This relevant regulatory text is identical across BES I and BES II. The corresponding regulatory text from the underlying Web I CARP proceeding is substantively and structurally identical.

(perfect complement) value, depending on whether one is evaluating the BES license, on the one hand, or the noninteractive license, on the other.

By contrast, Music Choice's position is not simply incomplete, but rather clearly incorrect. Music Choice asserts that because SoundExchange and others (including the CRB Judges) have noted the absence of any *independent* value in the section 112 ephemeral license in other statutory licensing contexts, it therefore has *no stand-alone value* in the BES context. Relying on this assertion, Music Choice argues that its statutory duty to pay any royalties under the section 112 ephemeral license is economically inappropriate. *See, e.g.,* Music Choice Opening Brief at 16–20. Music Choice seeks to utilize this economic argument as justification for the indication that its BES royalty obligation should be zero for sound recordings played on its PSS service for which it has already utilized a section 112 ephemeral license. As explained *infra,* in this regard, Music Choice conflates the concepts of ''*no independent value*'' *and* ''*no value.*'' For Services that by Law Must Utilize the Sections 112 and 114 Licenses, these Two Licenses are ''Perfect Complements.''

Economists define '' '[p]erfect complements' [as] goods that are always consumed together in fixed proportions . . . A nice example is that of right and left shoes. . . . Having only one out of a pair of shoes doesn't do the consumer a bit of good.'' H. Varian, *Intermediate Microeconomics: A Modern Approach* 40 (8th ed. 2010). Thus, a customer purchasing a pair of shoes for $80 would be indifferent to any allocation of that $80 as between the left and right shoe (which is why it is obviously efficient that the shoes are priced as a pair).[17]

In similar fashion, a noninteractive service cannot operate its service unless it possesses both the ephemeral and the performance licenses for sound recordings. As the Judges have noted, when two licensed rights are perfect complements, the licensees are indifferent as to how much they pay for each individual license, and instead are focused on the total cost of the two licenses. *See* Final rule and order, *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings,* Docket No. 14–CRB–0001–WR (2016–2020), 78 FR 26316 (May 2, 2016) (*Web IV* Determination) (''willing buyers and willing sellers would prefer that the rates for the [Sections 112 and 114] licenses be bundled and . . . would be agnostic with respect to the allocation of those rates to the Section 112 and 114 license holders,'' allowing for ''the minimum fee for the Section 112 license [to be] subsumed under the minimum fee for the Section 114 license, 5% of which shall be allocable to the Section 112 license holders, with the remaining 95% allocated to the Section 114 license holders.''), *aff'd SoundExchange, Inc.* v. *Copyright Royalty Bd.,* 904 F.3d 41 (D.C. Cir. 2016).

However, in the context of a BES service, this perfect complementarity is non-existent; indeed, there is no complementarity at all. The BES service by law is not required to obtain a section 114 performance license to transmit sound recordings, but is required to obtain the section 112 ephemeral license to do so.

The foregoing point is actually a subset of a larger point made clear in scholarly literature integrating economics and law. A claimed ''property right'' only has exchange or asset value to its claimant if it is protected by law. For tangible and intangible resources to generate such economic value that can be appropriated by private actors, the resources must be ''excludable,'' *i.e.,* the possessor need be able to invoke the law to prevent someone else from misappropriating his or her resource or seek compensation for its taking. *See, e.g.,* G. Hodgson, *Much of the* ''*Economics of Property Rights*'' *Devalues Property and Legal Rights,*11 J. Inst. Econ. 683, 684 (2015) (''The term 'property' should be reserved for cases of institutionalized possession with legal mechanisms of adjudication and enforcement. Property involves acknowledged rights granted by legitimate legal authority.'').[18] For example, what value would one's car have if anyone could simply steal it without legal consequence or remedy? [19] Legal authority is in accord. *See U.S.* v. *Willow River Power Co.,* 324 US 499, 502 (1945) (Jackson, R., J.) (''[N]ot all economic interests are 'property rights'; . . . We cannot start the process of decision by calling such a claim as we have here a 'property right' [that] is really the question to be answered. Such economic uses are rights only when they are legally protected interests.'')

Thus, a necessary element for protecting the intellectual property right of sound recording copyright owners is a legal regime that both acknowledges that right and prohibits infringement, *regardless of which license is designated as representing that right and is enforced by law*. In the present BES context, via the statutory compulsory license, Congress has elected to *acknowledge* that right by attaching it to the section 112 ephemeral right only, and to *enforce* that right by requiring a BES to pay royalties as set by the Judges.[20]

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[17] One of the Judges previously taught an intermediate microeconomics course, in which he utilized this ''pair of shoes example.'' After class, one of the students came up to him, raised one pantleg and explained that his left foot had been blown off in Afghanistan by an IED while he was serving in combat in the United States military. (The Judge was appropriately chagrined, but the student/former soldier was quite understanding.) The student's economic point was that when he bought shoes, even though he needed just one shoe out of a pair, he had to pay the for the complete pair, despite the fact that the left shoe provided him no value. This anecdote has analogous economic meaning in the context of the single-license BES context, discussed herein, because the value of the two combined perfect complements was the same as the value of only one of the items when the other had no actual value.

[18] *Cf.* Y. Barzel, *What are* ''*Property Rights', and Why do they Matter? A Comment on Hodgson's Article,* 11 J. Inst. Econ. 719 (2015) (distinguishing between ''legal'' and ''economic'' conceptions of property rights, but acknowledging that ''[w]hen legal rights are granted and enforced, it *enhances the corresponding economic rights,*'' even though the law might not provide the most efficient or complete protection of a claim of rightful possession and property) (emphasis added); *see generally* R. Posner, *Economic Analysis of Law* at 34, 529 (6th ed. 2003) (''It is no surprise that property rights are less extensive in primitive societies than in advanced societies where there is an ''increase[ ] in the ratio of the benefits of property rights to their costs . . . '' ''[T]he . . . question [of] what allocation of resources . . . maximize[s] efficiency . . . is given to the legal system to decide in situations where the costs of a market determination would exceed those of a legal determination.'')

[19] A music industry analogy is instructive in the context of *intellectual* property goods. There was no adequate ability to sufficiently police, prevent and remedy piracy that diminished the economic return to the owners of sound recording copyrights. In the absence of such protections, the private economic value of music copyrights as property rights was significantly diminished. *See Phonorecords III,* Final Determination 84 FR 1918, 1978 (Feb. 5, 2019) (Strickler, J. dissenting) (''When piracy is uncontrolled, copies of sound recordings . . . resemble pure *public* goods [which] ha[ve] a zero marginal production cost (formally, they are 'non-rivalrous in consumption)' [and] the provider of the public good cannot prevent consumption of the good by non-payers (formally, 'non-excludability'). *See Nicholson & Snyder, supra,* at 679 (subsequent history omitted)); *see also* N. Tyler, *Music Piracy and Diminishing Revenues: How Compulsory Licensing for Interactive Webcasters Can Lead the Recording Industry Back to Prominence,* 161 U. Pa. L. Rev. 2101, 2108 (June 2013) (''the labels abandoned [their] litigation strategy because of the high costs, the lack of a significant deterrent effect on the general public, and the judgment-proof status of many of the named defendants.'').

[20] As a matter of law and economics, the statutory and compulsory license provides a ''liability'' right as opposed to a ''property'' right, in that the payment of royalties is sufficient for a BES to utilize sound recordings, without first obtaining the consent of the owner of the sound recording copyright. (By contrast, the performances of sound

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Accordingly, a BES's obligation under the section 112 ephemeral license, as opposed to the section 114 performance license, as a condition for performing sound recordings, does not affect the economic value of the required licensing.

The foregoing analysis undermines Music Choice's attempt to narrowly construe the ''gross proceeds'' definition on economic grounds. That is, there is insufficient economic predicate to support Music Choice's reliance on legislative history, statutory construction, regulatory rulings and judicial precedents as bases for limiting ''gross proceeds'' in the manner Music Choice proposes.

So, in our Title 17 context, under section 114, the ephemeral right and the performance right are perfect complements in the legal and the economic sense, in that neither has any value independent of the other. This is why SoundExchange is on record in previous non-BES proceedings as acknowledging that—in those contexts—the ephemeral license has no ''*independent*'' value. Thus, a licensee would be disinterested in how the total royalty is legally allocated as between the ephemeral and the performance license.

Pursuant to this analysis, the word ''solely'' cannot rationally be construed as disconnected from the fact that the ephemeral license is the only license that allows for a BES to legally generate ''Gross Proceeds.'' Music Choice is simply trying to unfairly obtain a ''free ride'' on the use of the copyrighted sound recordings. The fact that Music Choice's use of the ephemeral license also allows it to generate further proceeds when used to operate a PSS does not negate this fundamental point.[21]

Music Choice's Attempt to Obtain a ''Free Ride'' on the Statutory Ephemeral License it Obtained for its PSS—by Extending its Reach to Music Choice's BES—is Economically Meritless

As noted *supra,* Music Choice's legal argument, if adopted, would allow it to 'free ride'' on the statutory ephemeral license applicable to its PSS service. That is, although the section 112 PSS ephemeral license was established in a separate proceeding pursuant to economic analyses unrelated to the BES statutory license, there was insufficient evidence adduced to account for the value added by the of that ephemeral license to facilitate a BES.[22] Moreover, because the section 112 ephemeral license is a perfect complement to the section 114 performance license for a PSS, the ephemeral license could be—and was—set as a percentage (5%) of the section 114 license. Final rule and order, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* Docket No. 2011–1 CRB PSS/Satellite II, 78 FR 23054, 23056 (Apr. 17, 2013) (*SDARS II* Final Determination); *see also* 37 CFR 382.12(b). That is, as long as the total royalty rate was supported by the evidence, the apportionment of the royalty as between the section 112 and 114 licenses was economically irrelevant, as discussed *supra*. Thus, there was insufficient economic evidence proffered in the PSS actions to establish an *independent* value for the PSS section 112 license. (As explained *supra,* the absence of an independent value for one of two perfect complements, does not mean that either has no value.)

Of course, it cannot be disputed that, legally, the ephemeral license which a BES must obtain has economic value. That is, but for the existence of the section 112 license, a BES would not be able to operate, absent a separate license such as a direct license. And, as explained *supra,* the sound recording copyright owner's *legal* right is what ensures and generates the economic value in the BES license.

Music Choice's statutory argument boils down—economically—to the claim that the section 112 ephemeral license it obtained in the PSS proceedings adds no value to Music Choice in the BES context—or at least no value for which Music Choice must compensate sound recording copyright owners—for sound recordings also played on Music Choice's PSS service. This ''free rider'' argument ignores the relevant economics of the matter, as discussed below.

The economic context of Music Choice's argument lies in what economists recognize as involving the concept of ''economies of scope.'' Succinctly stated, ''economies of scope'' are cost savings realized by a firm that can utilize one of its inputs to produce two inputs. *See* R. Pindyck & D. Rubinfeld, *Microeconomics* at 258 (8th ed. 2013).[23] More particularly, ''economies of scope'' will exist when, *inter alia,* a firm's two products are closely linked to one another, and are produced ''from the joint use of inputs . . . .'' *Id.*

Before considering the actual statutory context, for pedagogical purposes, consider a hypothetical market-based scenario, *i.e.,* absent statutorily required compulsory licensing. Music Choice would be required to obtain licensing rights—whether bundled or separate—to allow it to operate both its PSS subscription service and its BES. In this market scenario, Music Choice would need to negotiate with the sound recording copyright owners. As a matter of basic economics, bargaining and price-setting, the copyright owners would need to estimate Music Choice's willingness to pay (''WTP'') for the inputs, *i.e.,* the licensing rights to the sound recordings. Applying the economic axiom that businesses seek to maximize profits [24] in the negotiations the copyright owners would not ignore the value added to Music Choice by a business establishment service when proposing a license. This point not only follows from the axiomatic microeconomic assumption of profit maximization, but also from the concept of ''derived demand,'' which holds that the ''upstream demand . . . for . . . sound recordings . . . known as 'factors' of production or 'inputs' . . . [is] derived from the downstream demand of listeners . . . and users . . . .'' *Phonorecords III* Determination, 84 FR at 1977 (Strickler, J. dissenting) (subsequent history omitted).'' *See also Phonorecords III* Final Determination after Remand, Appx. A (Initial Ruling and Order after Remand at 111 (restating the foregoing and adding: ''[D]emand for the factor is derived from the downstream firm's output choice''). Here, the downstream distribution firm is Music Choice, and its ''output

recording by an interactive (''on-demand'') streaming service, which are unregulated and subject to market forces, are ''property'' rights, in that the streaming service can be enjoined from transmitting these performances unless it has obtained a license to do so, typically in exchange for the service's agreement to pay royalties to the copyright owners.)

[21] Indeed, this is an example of an ''absurd'' result that Music Choice's statutory interpretation argument would permit if followed.

[22] *See SDARS II* Final Determination 78 FR 23054. Indeed, the SDARS regulations have expressly excluded from PSS 'Gross Revenues'', *inter alia,* ''[r]evenues recognized by the licensee for the provision of . . . [c]hannels, [and]programming, products . . . for which . . . *the making of Ephemeral Recordings . . . is separately licensed, including by a statutory license and, for the avoidance of doubt . . . transmissions to business establishments.*'' 37 CFR 382.11 (Definitions . . . Gross Revenues (3)(vi)((D). Clearly, no revenue, and no value, attributable to the sound recordings transmitted through a BES has been included in the PSS royalty base.

[23] ''Economies of scope'' should be distinguished from ''economies of scale,'' in that the latter refers to diminishing average unit costs for a *single product* produced by a firm.

[24] *See Varian, supra* at 357 (identifying ''profit maximization as an economic ''axiom''); C.E. Ferguson & S.C. Maurice, *Economic Analysis* 234 (It is a ''fundamental assumption . . . that entrepreneurs try to maximize profits'') 234.

choice'' requires use of licenses as factors of production to facilitate its (1) its PSS transmissions and (2) its BES transmissions. Thus, a copyright owner would rationally estimate the downstream demand for noninteractive and business establishment services, and incorporate each separate demand into the royalty it would seek for each respective license.[25]

Although the foregoing textbook analysis applies to a world which does not include statutory compulsory licenses, that distinction neither negates nor alters the applicability of this analysis in the present context where statutory compulsory licensing exists. This is so because the PSS and BES royalty standards applicable during the BES I and BES rate periods (2009–2013 and 2014–2018, respectively) and the BES royalty standards themselves invoke the economics of the hypothetical unregulated market—before considering any potential adjustments.

More particularly, the PSS rate determinations which applied during these BES rate proceeding periods were largely the product of the SDARS I and SDARS II proceedings, respectively.[26] In these proceedings, the Judges approach was first to identify *marketplace* benchmarks between willing sellers (licensors) and willing buyers (licensees), and then consider whether adjustments to these market-based rates is needed to achieve one or more of the four ''objectives'' listed in section 801(b)(1). *See SDARS II* Final Determination, 78 FR at 23054–56, (explaining that the Judges ''evaluat[ed] the evidence to determine . . . reasonable royalty rates based on market benchmarks'' . . . as a ''useful starting point,'' before weighing the four statutory objectives ''required by 17 U.S.C. 801(b) . . . .''). And although the PSS rates established via settlement, see Final rule and order, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* Docket No. 2006–1 CRB DSTRA, 73, 4080, 4081 & n.8 (Jan. 24, 2008) (*SDARS I* Final Determination), in the companion SDARS rate case which was adjudicated under the same section 801(b)(1) rate standard, the Judges likewise determined that ''comparable *marketplace* royalty rates are ''a good starting point'' before separately considering the four section 801(b)(1) factors). *Id.* at 4088. Thus, marketplace economics were part and parcel of the Judge's section 801(b)(1) rate analysis, and marketplace conduct includes the fundamental assumption that licensors seek to maximize their profits, and, as explained *supra,* would not simply *give away* their licensing rights to a BES/PSS service merely because it had already provided that service a PSS license for separate royalty payments.

In the BES context, the applicability of market forces is statutorily prescribed (rather than inferred by the Judges, as in the section 801(b)(1) proceedings discussed *supra*). That is, for a BES service to access copyrighted sound recordings, it must utilize the section 112 ephemeral license and pay royalty rates ''that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer [*i.e.,* licensee] and a willing seller [*i.e.,* licensor].'' 17 U.S.C. 112(e)(4). Accordingly, any rational profit-maximizing licensor of a BES license in the marketplace—for the reasons set forth *supra*—would seek the highest royalty it could obtain by estimating the maximum WTP of the potential licensee with which it is bargaining [27]—and certainly would not irrationally provide the BES license for free merely because that potential licensee would like to appropriate for itself the entire value of the ''economies of scope'' it could realize by using its PSS license for its BES service.

Conclusion

Based on the entirety of the record as well as the foregoing findings and reasoning, the Judges answer the District Court by concluding that 37 CFR 384.3(a) directs Business Establishment Service providers to calculate royalties using their gross proceeds derived from all fees and payments for the use of all licensed ephemeral copies used for the operation of the Business Establishment Service, *except* that in-kind payments must only be included in gross proceeds when such in-kind payments are derived from the *use* of copyrighted sound recordings during the licensing period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv).[28]

The Judges issue this decision to the parties in restricted format. The Judges will separately order the participants in the proceedings to confer and jointly file a notice of proposed redactions, if any are needed, no later than December 20, 2024.

So ordered.

David P. Shaw,
Chief Copyright Royalty Judge.

David R. Strickler,
Copyright Royalty Judge.

Steve Ruwe,
Copyright Royalty Judge.

Dated: December 4, 2024.

The Judges issued this Ruling on Regulatory Interpretation to the parties in interest on December 4, 2024. This publication of the Ruling on Regulatory Interpretation redacts confidential information that is subject to a protective order in the proceedings.

Dated: December 31, 2024.

David P. Shaw,

Chief Copyright Royalty Judge.

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[25] Additionally, the copyright owners would want to estimate the separate opportunity costs of licensing to the PSS and to the BES, *i.e.,* whether licensing to each would be likely to cause listeners to leave a different royalty-bearing service that generated higher revenues. In this context, a licensor would not provide the BES license gratis to a licensee who paid separately for the PSS license—especially if a stand-alone BES would pay a market-based royalty for the BES license.

One wrinkle in this otherwise standard economic point is that additional (marginal) digital copies of a sound recording are essentially zero. Basic economics provides that in a competitive market for a private good, price will equal marginal cost, but at a marginal cost of zero, price cannot equal zero, or else the copyright owners would not recover their significant fixed costs and earn a profit. Thus, for a licensor of sound recording copyrights, ascertaining the demand from various distribution channels is needed to generate a schedule of royalty rates. (As the Judges have noted on prior occasions, the sound recording copyright owners are ''complementary oligopolists,'' which affords them substantial market power beyond that of ordinary competing oligopolists, but that complication is not relevant to the present discussion.)

[26] The PSS rates were set (as is customary) in the same proceedings that established the SDARS rates, which is why the Determinations are identified as ''SDARS I'' and ''SDARS II.''

[27] If the market for licenses was competitive and price discrimination was absent, the licensor might be compelled by market forces to accept a royalty rate lower than the licensee's maximum WTP, providing that licensee with what economists term a ''consumer surplus.'' On the other hand, if the sound recording licensor had complementary oligopoly power in the BES market, the Judges might need to adjust downward a marketplace benchmark rate to adjust for that specific market-power. *See e.g., Web IV* Determination, 81 FR at 26344; Phonorecords III 84 FR at 1953 (subsequent history omitted); Web V 86 FR at 59478. However, those potential adjustments do not impact the analysis in the text *supra,* which applies the axiomatic assumption of ''profit maximization'' to the economic analysis of any market structure.

[28] Having addressed the referred question regarding the meaning of the ''Gross Proceeds'' definition, the Judges decline to go beyond the scope of the re-opened proceedings or the directive in the Court's Memorandum Opinion. The Judges did not request briefing on the standard that should be used to evaluate the approach that a BES provider has taken to apportion its revenues, and therefore do not address that matter.