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'S RESPONSE TO PANDORA MEDIA, INC.'S FILING REGARDING SOUNDEXCHANGE'S EVIDENTIARY OBJECTIONS

Pandora "concurs" in iHeart's arguments that SoundExchange waived objections to evidence that SoundExchange did not raise by way of motion *in limine* by April 1. SoundExchange has already responded to most of the points Pandora raises in its "concurrence," and so responds here only to address Pandora's new arguments. *See* SoundExchange's Response to iHeartMedia, Inc.'s Filing Regarding SoundExchange's Evidentiary Objections (Apr. 24, 2015).

First, Pandora contends that SoundExchange waived its objection regarding evidence that SoundExchange contends is barred by statute – the rates and rate structure in the Pureplay Settlement Agreement. 17 U.S.C. 114(f)(5)(c). Like iHeart, Pandora does not cite any rule or court order that would have required SoundExchange to raise this objection regarding the Pureplay Settlement Agreement in a motion *in limine*. Rather, Pandora claims that SoundExchange had to raise the issue by motion *in limine* because Pandora and SoundExchange's counsel discussed a potential stipulation about the admissibility of this

evidence – a stipulation that Pandora concedes did not come to fruition.[1] Pandora does not explain why this discussion triggered a waiver absent the filing of a motion *in limine*. Indeed, Pandora cites no authority that would permit Pandora and SoundExchange to stipulate to admit evidence Congress has deemed inadmissible.[2] So it is even more difficult to understand how the failure to do so could trigger a waiver of the statute's requirements.

SoundExchange was not required to raise this issue in a motion *in limine* because SoundExchange concluded the issue would better be considered in context rather than precluded in advance of trial. That is an entirely proper reason to decline to burden the Judges with an inappropriate motion *in limine*. "Often, whether evidence should be admissible will depend upon the factual context in which it is placed." *Intelligent Verification Sys., LLC v. Microsoft Corp.*, No. 2:12-cv-525, 2015 WL 1518099, at *13 (E.D. Va. Mar. 31, 2015). "A better practice is to deal with questions of admissibility of evidence as they arise." *Id.* (quotation marks and citation omitted). In such cases, an "improper reason" to bring a motion *in limine* would be "[t]o resolve issues prematurely before they are viewed in the context of trial." *Mixed Chicks LLC v. Sally Beauty Supply LLC*, 879 F. Supp. 2d 1093, 1095 (C.D. Cal. 2012). When the Judges requested that all objections be filed in advance of the hearing in the parties' exchanged exhibit lists, SoundExchange complied by the date the Judges set – but was not obligated to raise the issue any sooner than it did.

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[1] SoundExchange declines to engage in a back-and-forth as to who approached whom and said what with regard to the potential stipulation. Suffice it to say, SoundExchange does not agree with Pandora's counsel's description of events.

[2] While parties to the Pureplay Settlement Agreement may expressly authorize the admission of the agreement's rates and terms, Pandora was not a party to the Pureplay Settlement Agreement. Thus, Pandora cannot authorize the admission of the terms.

Second, Pandora also "concurs" with iHeart's hearsay arguments as to the documents produced from the files of record companies, relying on a selection of the same outdated principles. Pandora's arguments prove that it is useless to argue these issues in the abstract, because each depends on the context and the particular piece of evidence the proponent seeks to admit.

Again like iHeart, Pandora contends that SoundExchange plans to assert these evidentiary objections in order to distort the record and "inoculate" its witnesses who sit on SoundExchange's Board of Directors. Not so. SoundExchange has no intention to distort the record here, and the Judges may make evidentiary rulings in the course of the hearing in the event that becomes a concern. In any event, if there is a document in which one of the witnesses speaks in his capacity as a SoundExchange Board member, then that document would be admissible non-hearsay under Federal Rule of Evidence 802(d)(2). A declarant speaking as a representative of SoundExchange would be covered by the carve-out for statements made by a party representative, if the statements were made within the scope of the representation. Fed. R. Evid. 802(d)(2)(a).

Pandora claims that because SoundExchange represents the record companies in this proceeding then the record companies' statements are not hearsay. But that is not what FRE 802(d)(2)(a) permits. While a representative's statements may not be hearsay as against the party represented, the opposite is not true. Every statement of the represented record company may not be admitted against the representative – but that is what Pandora and iHeart claim. Pandora and iHeart have it backwards. An individual member's statement is not non-hearsay as against the organization:

> [I]n the absence of authority conferred, a single member has no power to bind the association by his declarations or statements. It follows, therefore, that the

> statements of individual members are not the statements of the association and, so far as that entity is concerned, are within clearly announced rules purely hearsay.

Superior Engraving Co. v. N.L.R.B., 183 F.2d 783, 794-95 (7th Cir. 1950) (citations omitted); *see also Concerned Citizens of Belle Haven v. The Belle Haven Club*, No. Civ. 3:99CV1467 (AHN), 2004 WL 3246719, at *2 (D. Conn. Mar. 22, 2004) (statement by country club member was not admissible in lawsuit against country club where there was no showing that member "was authorized to speak ... on behalf of the Club" about the matter at issue "or that the matters he spoke about were within the scope of his authority as treasurer of the Club").

Finally, Pandora and iHeart both contend that the documents are admissible because the Judges deemed them discoverable. That a document is discoverable does not make it admissible, and vice versa. *See, e.g.*, *Banks v. Fendt*, No. 12-CV-1063, 2013 WL 2475860, at *1 (E.D. Wis. June 7, 2013) (compelling production of medical records but emphasizing that "[t]his does not mean that all of the medical records will be admissible"); *Baumgardner v. Louisiana Binding Serv., Inc.*, No. 1:11-cv-794, 2013 WL 765574, at *3 (S.D. Ohio Feb. 28, 2013) ("whether or not the discovery is hearsay has no bearing on whether it is discoverable"); *Anderson v. City of Naples*, No. 2:10-cv-111-FtM-36SPC, 2010 WL 4853916, at *3 (M.D. Fla. Nov. 22, 2010) ("discoverable evidence is not limited only to what is admissible at trial"); *Nakajima v. Gen. Motors Corp.*, 857 F. Supp. 100, 105 n.10 (D.D.C. 1994) ("Defendant's contention that the communications are not discoverable because they are inadmissible hearsay is without merit.")

SoundExchange looks forward to addressing these issues with the Judges at the hearing.

Dated: April 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I caused a copy of the foregoing **SOUNDEXCHANGE'S RESPONSE TO PANDORA MEDIA, INC.'S FILING REGARDING SOUNDEXCHANGE'S EVIDENTIARY OBJECTIONS** [NR] to be served via electronic mail and United States Mail, first class, postage prepaid addressed as follows:

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