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Copyright Royalty Board

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE 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)

PANDORA'S RESPONSE TO SOUNDEXCHANGE'S OBJECTIONS TO TESTIMONY AND EXHIBITS

Pandora writes to respond to SoundExchange's "objections" to the Licensee Services' testimony and exhibit lists, and corresponding briefing, submitted on April 20, 2015 ("SX Obj."). Pandora concurs with iHeartMedia ("iHeartMedia") that SoundExchange's "objections" are in reality untimely pre-hearing motions that should have been filed by the April 1, 2015 deadline for such motions, with the opportunity for written oppositions and replies delivered on the schedule set by the Judges. By failing to make these motions on April 1st – and choosing instead to dump them on the Services just days before trial, under the guise of objections to exhibits – SoundExchange has waived these arguments.[1] Although SoundExchange's brief is procedurally improper, and an unnecessary distraction on the eve of trial, Pandora nonetheless feels compelled to respond to two particular points in SoundExchange's submission.

[1] This tactic is especially egregious with respect to SoundExchange's "Pureplay Settlement" objection (Section I of SoundExchange's argument): in the days leading up to the April 1, 2015 pre-hearing motion deadline, SoundExchange informed Pandora that it was considering filing a pre-hearing motion based on that exact objection, and the parties engaged in discussions (ultimately not fruitful) as to possible stipulations allowing use of the Pureplay rates and terms in this proceeding. That SoundExchange clearly was contemplating and preparing such a motion as of the April 1 deadline, but chose instead to withhold it and then dump it on the services in the guise of objections to exhibits, is all the more reason to conclude that SoundExchange has waived this objection.

A. SoundExchange's Objection to the Admission of the Pandora-Merlin Agreement Is Unfounded and Should Be Rejected

SoundExchange's "objection" to the admissibility of the Pandora-Merlin agreement is a transparent attempt to gut Pandora's case with an unfounded evidentiary objection to Pandora's chief benchmark. While SoundExchange is coy about the relief it seeks in its briefing – the bottom line seems to be a request by SoundExchange to "provisionally" admit such evidence and cross examination on the topic, and push the issue off until post-trial briefing, *see* SX Obj. at 4 – SoundExchange's preemptive arguments on the issue are without merit.

As the testimony of Pandora witnesses Carl Shapiro and Mike Herring makes clear, the Pandora-Merlin agreement is an arm's length, marketplace agreement reached after months of hard-fought negotiation. (Indeed, at least four of SoundExchange's own witnesses work at companies that signed on to the deal.) For all the reasons supported in Pandora's direct and rebuttal case testimony, the Pandora-Merlin agreement reveals true competitive forces at work: namely, record-company licensors discounting rates in exchange for Pandora "steering" plays in their direction and away from other labels. *See, e.g.*, Written Direct Testimony of Carl Shapiro ("Shapiro WDT") at 25; Written Rebuttal Testimony of Michael Herring ¶ 48.

Admitting a private marketplace agreement into evidence does not in any way violate 17 U.S.C.¶ 114(f)(5)(C). That provision prevents the Judges from admitting into evidence or "taking account of" any provisions (including the "rate structure") of the so-called "Pureplay" agreement. *Id.* It should go without saying that the Merlin-Pandora agreement, a private agreement negotiated in 2013 and 2014, is not the Pureplay agreement, which was negotiated by SoundExchange and a group of webcasters in 2009. The rates in the Merlin-Pandora agreement are privately negotiated rates, not statutory rates. The agreement does not identify or refer to the Pureplay rates (other than to note that Pandora operates under that agreement). As Dr. Shapiro demonstrates, the rates paid by Pandora under the Merlin agreement are actually *lower* than the

Pureplay rates on account of the steering provisions, a result consistent with the expectations of both parties to that agreement. *See* Shapiro WDT at 30-31. SoundExchange's objection is not only wrong on the law, but premised on the erroneous assertion the rates are the same as those under the Pureplay agreement; they are not.

That the Merlin-Pandora agreement has as the *starting point* of its rate formula per-play rates the same as those as found under the Pureplay agreement does not alter this analysis. Section 114(f)(5)(C) does *not* say that rates approximating (or even equaling) those found in the Pureplay agreement are inadmissible. It does *not* say that rates in private agreements that were *derived* or *influenced* by the Pureplay agreement are inadmissible. It merely says the provisions of the *Pureplay agreement itself* are not admissible.[2] Again, Pandora has not sought to admit or asked the Judges to take account of any provisions of the Pureplay agreement. It has negotiated a private marketplace agreement that utilizes similar rates as one aspect of its fee formula. Adopting SoundExchange's argument would render any agreement with a rate that bears a relation to the rates found in the Pureplay agreement (or even just discounts off such rates) *per se* inadmissible. That cannot possibly be what Congress meant in Section 114(f)(5)(C).

To the extent SoundExchange expresses concerns about potential cross examination, Pandora respectfully submits that this is not the place to issue an advisory opinion on the propriety of any line of cross-examination SoundExchange might choose to pursue in the future. If SoundExchange's attempts to invoke the Pureplay rates in its cross examination (if and when made) run afoul of Section 114(f)(5)(C), the answer is not preemptively to strike the private agreement that may lead to such potential (but as-yet-unmade) lines of cross. Rather, it is to

[2] The motivation, made obvious by the latter half of Section 114(f)(5)(C), is that the Pureplay Agreement itself was negotiated in 2009 under "unique circumstances" where Congress questioned whether the parties might not be taken as willing buyers and sellers. That concern is irrelevant to a private agreement struck five years later by two parties who did not need to enter an agreement if they didn't want to.

consider at the time of the cross examination whether some leeway is warranted given the nature of the agreement.

B. SoundExchange Cannot Assert Hearsay as a Basis to Shield Critical Evidence and Admissions of the Record Companies—The Real Parties in Interest

Pandora concurs with the points made by iHeartMedia in response to SoundExchange's incorrect assertion that statements made by "SoundExchange members, [including] Merlin, UMG, and Warner" should be excluded as hearsay. SX Obj. at 6. We write separately to highlight several additional legal and equitable defects in SoundExchange's position. SoundExchange, the "collective representing the major record companies and independent record companies,"[3] attempts to pave a permanent one-way street whereby it can use statements made by witnesses for the Services against them, while shielding any statements made by its record company members on the artificial basis that such statements were not made by SoundExchange itself.[4] SoundExchange's argument is legally unsupportable, flatly contrary to its own prior positions, and wholly inequitable. It should be rejected.

First, as iHeartMedia previously articulated, SoundExchange's position flies in the face of Fed. R. Evid. 801(d)(2), which expressly classifies statements by "an opposing party" as non-hearsay, including statements made by parties "in an individual *and representative capacity*." *See* Fed. R. Evid. 801(d)(2)(A) (emphasis added). In interpreting the scope of Rule 801, courts have routinely "recognized the established principle that admissions by the beneficial party or real party in interest . . . are admissible in evidence against the nominal plaintiff representing his interests." *Roberts v. City of Troy*, 773 F.2d 720, 726 (6th Cir. 1985); *see also U.S. ex rel. Milam v. Regents of Univ. of California*, 912 F. Supp. 868, 880 (D. Md. 1995) (statements of United

[3] *See Order on iHeartMedia's Motion to Compel SoundExchange to Produce Documents in Response to Discovery Requests and On Issues Common to Multiple Motions* ("*Discovery Order 1*"), dated Jan. 15, 2015, at 7.

[4] SoundExchange readily admits that the documents and statements at issue are derived "from employees of record companies *who are members of SoundExchange*." *See* SX Obj. at 6 (emphasis added).

States in a *qui tam* case in which the United States had not intervened as a party are admissible under Rule 801(d)(2) because "the United States is the real party in interest"); *cf. Donovan v. Crisostomo*, 689 F.2d 869, 876 (9th Cir. 1982) ("We hold that the district court properly excluded this evidence. The testimony did not fall within Fed. R. Evid. 801(d)(2) because the admissions were not by parties or *real parties in interest.*") (emphasis added). Clearly, the record labels and their witnesses are the real parties in interest in this proceeding: it is they who hold the rights at issue, not SoundExchange, and it is they who will be affected by rates set in this proceeding, not SoundExchange.[5] Their statements, therefore, are "non-hearsay" under Fed. R. Evid. 801(d)(2).

Second, the record companies have uniformly been treated as "parties" throughout this proceeding, including by SoundExchange itself. Among other things, SoundExchange produced documents from the files of the record companies' executives, both willingly and by Order of the Judges,[6] and made company witnesses available for depositions without requiring the Services to pursue such discovery by way of subpoena. What is more, in opposing the Services' motion for issuance of subpoenas as purportedly premature prior to the commencement of party discovery, SoundExchange argued that subpoenas should not be propounded on "record companies that litigate through SoundExchange," as "[d]iscovery will be available from these entities *as parties.*" *See* SoundExchange's Opposition to Motions for Issuance of Subpoenas, dated March

[5] When a record company signs SoundExchange's membership agreement, it specifically grants SoundExchange the right to "represent it" in CRB proceedings. See ¶ 3, http://www.soundexchange.com/wp-content/uploads/2015/04/Rights-Owner-Membership-Agreement-FORM-FINAL_Rev-4.10.15.pdf.

[6] When SoundExchange refused to produce certain categories of documents from the record company witnesses, the Judges ordered SoundExchange to do so. *See Discovery Order 1* at 8 ("SoundExchange should search files of the record labels' promotional departments for documents responsive to [the Services'] requests"); *id.* at 9 ("SoundExchange shall, therefore, direct a search of the record labels' marketing and sales departments"); *Order Granting in Part and Denying in Part Joint Motion by [Services] to Compel SoundExchange to Produce Negotiating Documents*, dated Jan. 15, 2015, at 5 (ordering production of "new partner questionnaires" described in the Written Direct Testimony of "Aaron Harrison, Senior Vice President, Business & Legal Affairs, Global Digital Business, UMG Recordings, Inc.").

18, 2014, at 10 (emphasis in original). This admission that the record companies that litigate through SoundExchange are parties stands in stark contrast to SoundExchange's *current* tactical assertion that the status of the record companies "as members [of SoundExchange] does not render them parties." *See* SX Obj. at 6.

Third, even if such statements are hearsay—and they are not—under the governing regulations, "[h]earsay may be admitted to the extent deemed appropriate by the Copyright Royalty Judges." *See* 37 C.F.R. §351.10(a); *see also* SX Obj. at 5 (acknowledging same). Pandora respectfully submits that the present circumstances present the most compelling case possible for the admission of such "hearsay," as the evidence SoundExchange seeks to bury is among the most relevant (and damaging to SoundExchange) in this proceeding. Among the documents SoundExchange challenges are statements made by the record companies' counsel and economists (the same counsel and economists currently representing SoundExchange here) to the FTC and European Commission concerning the competitive attributes of the interactive services market. *See, e.g.*, PAN Ex. Nos. 5331-5357 (statements, letters and presentations to the FTC and EC by Universal Music Group and its representatives). At bottom, SoundExchange seeks to inoculate its own proffered witnesses, including three executives that sit on SoundExchange's Board of Directors,[7] from having to answer for their companies' admissions, on the sole purported basis that "SoundExchange does not . . . direct the actions of the record labels." SX Obj. at 7. That position should be summarily rejected.

Fourth, SoundExchange ignores that there are other exceptions to hearsay that would apply to many of the statements and documents it seeks to exclude. These include the "business

[7] SoundExchange witnesses Ray Hair, Jeffrey Harleston, and Darius Van Arman "all have a seat at the SoundExchange table." *See* http://www.soundexchange.com/about/our-team/board-of-directors/ (last accessed Apr. 22, 2015).

records" exception codified under Fed. Rule Evid. 803(6),[8] as well as the "statements against interest" exception for unavailable witnesses under Fed. Rule Evid. 804(b)(3).[9] As SoundExchange well knows, it decision to present only a limited selection of record label executives as witnesses renders the others unavailable for purposes of Fed. Rule Evid. 804(a). *See* 37 C.F.R. §351.10(b) (limiting witness testimony at the hearing to "the testimony of the witness in the written statements"). Moreover, other exclusions—including the "residual exception" set forth in Fed. R. Evid. 807 for statements that have "guarantees of trustworthiness"—would also apply to various statements contained in exhibits that SoundExchange currently challenges. These include, among others, official statements made on the record to the FTC and EC by sophisticated and well-counseled record companies, including statements made by these companies' counsel. *See, e.g.*, PAN Ex. Nos. 5331-5357.

Finally, SoundExchange's position that the record companies are disinterested "non-parties"—notwithstanding its prior submissions to the Judges in which it expressed precisely the opposition position—not only would exalt form over substance, but would yield absurd and inequitable results. SoundExchange essentially contends that its own proffered witnesses should be able to freely testify at the hearing without having to face any contrary evidence from the files of their employers, even though such evidence was sought and produced in discovery. SoundExchange should not be permitted to present a completely one-sided view of the evidence in this case by whitewashing from the evidentiary record any inconvenient statements made by its own members.

[8] *See, e.g.*, PAN Ex. 5171 (UMGI Senior Executive Committee Meeting Notes).

[9] *See, e.g.*, PAN Ex. 5112 (email chain among MERLIN executives).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2015, I caused a copy of the foregoing *Pandora's Response To SoundExchange's Objections To Testimony And Exhibits* to be served by e-mail and first-class mail upon the participants listed below:

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