

EXHIBIT D

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**Determination of Rates and Terms for
Digital Performance of Sound Recordings
and Making of Ephemeral Copies to
Facilitate those Performances (*Web V*)**

**Docket No. 19-CRB-0005-WR
(2021-2025)**

**RESPONSES AND OBJECTIONS TO SOUNDEXCHANGE’S FIRST SET OF
INTERROGATORIES TO NATIONAL ASSOCIATION OF BROADCASTERS**

Pursuant to Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et seq., 37 C.F.R. § 351.5 and the Copyright Royalty Judges’ Order Modifying the Case Schedule dated June 27, 2019, the National Association of Broadcasters (“NAB”) responds and objects to SoundExchange, Inc.’s First Set of Interrogatories (the “Interrogatories”).¹

GENERAL OBJECTIONS

1. NAB objects to the Interrogatories to the extent they are overly broad, unduly burdensome, not proportional to the needs of this case, vague, ambiguous, duplicative, and/or cumulative.
2. NAB objects to the Interrogatories to the extent they call for the disclosure of materials protected by the attorney-client privilege, the work-product doctrine, or any other

¹ Although the Interrogatories were directed to NAB member iHeartMedia, Inc. (“iHeart”), as NAB explained in its introductory memorandum, “iHeartMedia, Inc.’s continued participation in this proceeding is in its capacity as a member of NAB.” We have therefore treated SoundExchange’s interrogatory requests to iHeart as having been directed to NAB, and respond accordingly. To respond to these interrogatories, NAB counsel made inquiries to and obtained information from iHeart.

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applicable privilege that would shield material from disclosure in whole or in part. NAB will exclude from its responses all materials protected by any applicable privilege or doctrine.

3. NAB objects to the Interrogatories to the extent that they seek information that is not directly related to NAB's written direct statement in the *Webcasting V* proceeding.

4. NAB objects to the Interrogatories to the extent that they purport to seek information not within the possession, custody, or control of NAB. Subject to and without waiving this objection, NAB will provide information only to the extent reasonably available to NAB or to persons currently employed by NAB.

5. NAB objects to the Interrogatories to the extent they seek materials that are publicly available, as readily available to SoundExchange as NAB, have already been produced by NAB to SoundExchange in this proceeding, or are otherwise in the possession of SoundExchange.

6. NAB objects to the Interrogatories to the extent they incorporate, contain characterizations of, or call for legal conclusions.

7. NAB objects to the Interrogatories to the extent they call for the creation of new analyses or data compilations that do not currently exist.

8. No response or objection to any Interrogatory is intended to be, nor shall any response be construed as, an admission of the existence of any facts set forth in or assumed by any Interrogatory, or an admission that such response or objection constitutes admissible evidence. Likewise, the production of any documents in response to the Interrogatories is not intended to be, and shall not be construed as, a waiver by NAB of all or any part of any objection to any Interrogatory, an admission of the existence of any facts set forth in or assumed by any

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Interrogatory or any document produced in response thereto, or an admission that such response, objection, or document constitutes admissible evidence.

OBJECTIONS TO DEFINITIONS

9. NAB objects to the definition of “iHeart” to the extent it includes non-iHeart witnesses “who have submitted testimony as part of the Written Direct Statement of the National Associate of Broadcaster in this proceeding” and “the entities they represent.” NAB interprets the term “iHeart” to refer to the iHeart entities implicated by iHeart’s written direct testimony in this proceeding.

10. NAB objects to the definition of “You” and “Your” as vague, ambiguous, and overbroad. NAB interprets the terms “You” and “Your” to refer to NAB.

11. NAB reserves the right to modify, supplement, or amend any or all of these responses, if necessary or appropriate.

12. Each of these general objections is incorporated in full into each response below as if restated fully therein.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

For each month since January 2017, and for each sound recording copyright owner or distributor or representative with which iHeart had one or more Direct Licenses in effect during that month, provide (a) the total number of compensable performances or plays (as applicable for reporting purposes under the relevant Direct License) of recordings owned or controlled by that copyright owner, distributor or representative used under a Direct License for each type of transmission covered by such Direct License during the month (e.g., [REDACTED]), (b) the percentage such total number represents of iHeart’s total transmissions of such type during the

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month (in the manner of calculating relevant percentages used in Paragraph 72 of the Written Direct Testimony of Dr. Gregory K. Leonard), (c) [REDACTED], and (d) the royalty payment associated therewith for the month under the applicable Direct License.

RESPONSE TO INTERROGATORY NO. 1:

NAB incorporates its General Objections and Objections to Definitions as if fully set forth herein. NAB objects to this Interrogatory to the extent it seeks materials already produced by NAB to SoundExchange in this proceeding, or otherwise in the possession of SoundExchange. NAB further objects to this Interrogatory to the extent that it requests, or calls for the creation of, data compilations that do not currently exist or are not reasonably available.

Subject to and without waiving the foregoing general and specific objections, NAB directs SoundExchange to NAB's October 1, 2019 expert exchange of materials, which included iHeart's royalty reports and performance data for each of iHeart's direct licenses covering services licensable under Section 114. The royalty statements from January 2017 to June 2019 are produced at the following Bates numbers: NAB-LEONARD-00000831 through NAB-LEONARD-00000996 and NAB-LEONARD-00001350 through NAB-LEONARD-00001354. The royalty statements include all direct deal partners and provide monthly payment information, along with total performances for each direct deal partner by transmission type: [REDACTED]).

NAB further directs SoundExchange to its Tableau Performance Count Data, covering the period from January 2017 to May 2019, produced at NAB-LEONARD-00001357, NAB-LEONARD-00001358, NAB-LEONARD-00001359, and NAB-LEONARD-00001361 (iHeartMedia 2017-2019 Tableau Performance Count Data). This includes the most recent available data that Dr. Leonard relied on. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In response to sub-part (b) of this Interrogatory, NAB directs SoundExchange to NAB-LEONARD-00000015 (iHeart's 2016-2018 Performances by Provider). This spreadsheet provides the total simulcast performances by direct deal partner as reported to SoundExchange. Together with the relevant tableau performance data, this constitutes the underlying data necessary to calculate the percentage figures in the manner used in paragraph 72 of Dr. Leonard's Written Direct Testimony.

INTERROGATORY NO. 2:

For each month since January 2017, provide (a) the total number of performances or plays (as applicable for reporting purposes under the Direct Licenses) of all recordings used in each type of transmission covered by the Direct Licenses (e.g., [REDACTED]), whether under a Direct License or otherwise, and (b) the number of such plays or performances of recordings from each of the catalogs of [REDACTED] (in the manner reported in Paragraph 72 and Appendix A4 of the Written Direct Testimony of Dr. Gregory K. Leonard). In each case, break down the number of performances or plays by whether use of such recordings was under a Direct License, under the statutory license, or otherwise.

RESPONSE TO INTERROGATORY NO. 2:

NAB incorporates its General Objections and Objections to Definitions as if fully set forth herein. NAB objects to this Interrogatory to the extent it seeks materials already produced by NAB to SoundExchange in this proceeding, or are otherwise in the possession of SoundExchange. NAB further objects to this Interrogatory to the extent that it requests, or calls

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for the creation of, data compilations that do not currently exist or are not reasonably available. NAB further objects to this Interrogatory to the extent it seeks information regarding NAB expert witnesses that exceed the scope of expert discovery set forth in the parties' Stipulation of the Participants Regarding the Scope of Expert Discovery.

Subject to and without waiving the foregoing general and specific objections, in response to sub-part (a), NAB directs SoundExchange to the relevant direct deal royalty statements described in NAB's Response to Interrogatory No. 1.

In response to sub-part (b), NAB again directs SoundExchange to NAB-LEONARD-00000015 (iHeart's 2016-2018 Performances by Provider). This spreadsheet identifies the total number of simulcast performances on a quarterly basis for [REDACTED]. This spreadsheet was used to generate the calculations in paragraph 72 of Dr. Leonard's Written Direct Testimony as they pertain to the exclusion of [REDACTED] catalogs. As for the number of performances from the [REDACTED] catalog, NAB directs SoundExchange to its Tableau Performance Count Data, as described above, at the following Bates numbers: NAB-LEONARD-00001357, NAB-LEONARD-00001358, NAB-LEONARD-00001359, and NAB-LEONARD-00001361 (iHeartMedia 2013-2019 Tableau Performance Count Data).

INTERROGATORY NO. 3:

For each month since January 2017, identify each basis on which iHeart excluded any digital audio transmissions of sound recordings through a service iHeart claims to be compliant with the statutory license from iHeart's reporting and payments to SoundExchange under the statutory license (e.g., coverage by a Direct License, recordings fixed prior to February 15, 1972, [REDACTED]), and for each such basis the total number of performances so excluded.

RESPONSE TO INTERROGATORY NO. 3:

NAB incorporates its General Objections and Objections to Definitions as if fully set forth herein. NAB further objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case to the extent it requires NAB to identify “each basis on which iHeart excluded any digital audio transmissions of sound recordings through a service iHeart claims to be compliant with the statutory license.” NAB further objects to this Interrogatory to the extent it seeks information that is not directly related to NAB’s written direct statement in this proceeding.

Subject to and without waiving the foregoing general and specific objections, NAB responds that the total number of performances excluded on these bases are captured in the corresponding tableau performance count data already produced at the following Bates numbers: NAB-LEONARD-00001357, NAB-LEONARD-00001358, NAB-LEONARD-00001359, and NAB-LEONARD-00001361 (iHeartMedia 2017-2019 Tableau Performance Count Data).

INTERROGATORY NO. 4:

Explain in detail whether and how iHeart provides its programmers with (a) information and data reflecting which record companies’ and artists’ sound recordings are covered by a Direct License and (b) the information, guidance or instructions provided to programmers.

RESPONSE TO INTERROGATORY NO. 4:

NAB incorporates its General Objections and Objections to Definitions as if fully set forth herein.

Subject to and without waiving the foregoing general and specific objections, NAB responds as follows: [REDACTED]

[REDACTED]

[REDACTED]

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compensable and non-compensable performances or plays used in each type of transmission covered by the relevant direct license.

RESPONSE TO INTERROGATORY NO. 5:

NAB incorporates its General Objections and Objections to Definitions as if fully set forth herein. NAB further objects that this Interrogatory is overbroad, unduly burdensome, and not proportional to the needs of the case to the extent that it seeks information regarding the two years preceding the execution of agreements, which is not directly related to NAB's written direct statement in this proceeding. NAB further objects to this Interrogatory to the extent that it requests, or calls for the creation of, data compilations that do not currently exist or are not reasonably available.

Subject to and without waiving the foregoing general and specific objections, NAB responds that iHeart does not have records regarding the number of compensable performances or plays attributed to the licensor, the number of total performances or plays attributed to the licensor, or the total number of compensable and non-compensable performances or plays used in each type of transmission covered by the relevant direct license for the two years *preceding* the execution of the agreement. With respect to the two years postdating execution of the agreement, NAB directs SoundExchange to the royalty statements and the iHeartMedia 2013-2019 Tableau Performance Count Data, which were already provided to SoundExchange during initial disclosures and the expert exchange of materials on October 1, 2019. *See* NAB-LEONARD-00000997 through NAB-LEONARD-00001349 and NAB-LEONARD-00000104 through NAB-LEONARD-00000830 (2012-2016 iHeart Royalty Statements); NAB-LEONARD-00001355; NAB-LEONARD-00001356; NAB-LEONARD-00001357, NAB-LEONARD-00001358, NAB-LEONARD-00001359, and NAB-LEONARD-00001361 (iHeartMedia 2013-2019 Tableau Performance Count Data).

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INTERROGATORY NO. 6:

For the period beginning with the inception of iHeart's direct license campaign in 2012 and through the present, identify any record company, distributor, representative, or other copyright owner that iHeart has approached, discussed, or otherwise communicated with about the possibility of executing a direct license for any type of transmission (including, but not limited to, internet simulcasts, custom webcasts, standard webcasts, and terrestrial broadcasts).

RESPONSE TO INTERROGATORY NO. 6:

NAB incorporates its General Objections and Objections to Definitions as if fully set forth herein. NAB further objects that this Interrogatory is overbroad, unduly burdensome, and not proportional to the needs of the case. NAB further objects to this Interrogatory because it seeks documents equally available to SoundExchange. In addition, NAB objects to this Interrogatory to the extent it seeks internal information regarding unexecuted direct licenses, which are not directly related to NAB's written direct statement in this proceeding. As made clear by the CRB in *Web IV*, materials that seek information regarding unexecuted licenses are not discoverable when they are not "directly related to" the written direct statement. *See* Jan. 15, 2015 *Web IV* Discovery Order 11 at 2-3. As a result, NAB will not respond to the extent this Interrogatory seeks information regarding the record companies, distributors, representatives, or other copyright owners that iHeart approached, discussed, or otherwise communicated with about direct licenses that were never executed.

Subject to and without waiving the foregoing general and specific objections, to the extent Interrogatory No. 6 requires a response with respect to executed Direct Licenses, NAB directs SoundExchange to iHeart's direct licenses, which NAB already produced to SoundExchange during initial disclosures. *See* NAB00000001 through NAB00001738; NAB00002285. The direct licenses contain the information necessary to compile a complete list

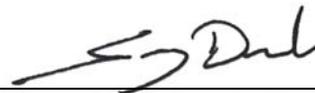
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of record companies, distributors, representatives, or other copyright owners that iHeart approached, discussed, or otherwise communicated with about direct licenses that were subsequently executed.

November 4, 2019

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, November 26, 2019, I provided a true and correct copy of the Exhibit D to the following:

iHeartMedia, Inc., represented by John Thorne, served via Electronic Service at jthorne@kellogghansen.com

National Public Radio, Inc., represented by David P Mattern, served via Electronic Service at dmattern@kslaw.com

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Corporation for Public Broadcasting, represented by Kenneth L Steinthal, served via Electronic Service at ksteinthal@kslaw.com

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Signed: /s/ Previn Warren