PUBLIC VERSION

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

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Copyright Royalty Board
JAN 19 2016

In re

DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND WEBCASTING DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)

Docket No. 14-CRB-0001-WR (2016–2020)

NATIONAL ASSOCIATION OF BROADCASTERS' AND PANDORA'S OPPOSITION TO SOUNDEXCHANGE'S SUPPLEMENTAL PETITION FOR REHEARING

SoundExchange's Supplemental Petition for Rehearing ("*Supp. Pet.*") fails to meet the stringent standard for rehearing set forth in 17 U.S.C. § 803(c)(2)(A), 37 C.F.R. § 353.2, and the Judges' precedent. NAB and Pandora discussed that standard in detail in their January 12, 2016 Oppositions to SoundExchange's first Petition for Rehearing, and incorporate those discussions here. SoundExchange fails to demonstrate either that this is an exceptional case, or that there is a need to correct a clear error or prevent manifest injustice. SoundExchange's Supplemental Petition for Rehearing should be denied.

At the outset, NAB and Pandora respectfully submit that SoundExchange's second bite at the rehearing apple violates the applicable statute. The Copyright Act requires that a motion for rehearing "may only be filed within 15 days after the date on which the [Judges] deliver . . . their initial determination." 17 U.S.C. § 803(c)(2)(B). Even a timely motion must demonstrate that there is an "exceptional case[]" supporting rehearing. *Id.* § 803(c)(2)(A). The Judges have recognized that the statutory deadline is jurisdictional. *See Order Regarding Delivery of Determination to Geo* at 1, (Dec. 30, 2015). Thus, it may not be extended by the Judges. *See,*

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e.g., *Bowles v. Russell*, 551 U.S. 205, 214 (2007) (courts may not extend statutory jurisdictional deadlines). SoundExchange's footnote listing, by number only, seven provisions of the Judges' proposed regulations, with no discussion, no identification of the aspects of those provisions to which SoundExchange objected, and no demonstration that rehearing was needed or that there was any exceptional case, did not properly raise any issues for rehearing. SoundExchange's attempt to cure its defective original Petition in its Supplemental Petition did not meet the statutory deadline. For this reason alone, the Supplemental Petition should be denied.

I. SoundExchange's Petition for Rehearing of the Audit Regulations Is Contrary to the Evidence and Should Be Rejected.

SoundExchange's fourth and fifth assertions of error both relate to audit provisions in sections 380.6(d) and 380.6(g). In essence, contrary to the regulations adopted by the Judges, and without citing any supporting evidence, SoundExchange reiterates its position that audit results should be "binding" and unreviewable. SoundExchange proposed language to this effect in its Proposed Rates and Terms, and the Judges properly rejected it. SoundExchange's position was specifically rejected by SoundExchange's own expert, Dr. Lys, as "unreasonable" and "inappropriate." 5/4/2015 Tr. 1507:12-13 (Lys); *id.* at 1507:22 – 1508:2. SoundExchange's position also is contrary to benchmark agreements admitted into evidence. Thus, its attempt to rewrite sections 380.6(d) and 380.6(g) as adopted by the Judges should be rejected.

SoundExchange seeks to modify the Judges' Section 380.6(d) to provide that the result of the audit, not the selection of the auditor, is binding on the parties. *See Supp. Pet.* at 5 & Ex. A at 2-3 (proposing revision stating that "[a]ny audit shall be binding on the parties thereto").[1] SoundExchange likewise proposes to mandate the remission of underpayments determined by the

[1] Notably, when the shoe is on the other foot and SoundExchange is the audited party, SoundExchange only proposes that the audit be binding on "all Copyright Owners and Performers" (*i.e.*, the interests seeking the audit), but not on SoundExchange. Ex. A at 3.

auditor, even if there is no agreement about the auditor's findings, by asking to strike the language from the Judges' Section 380.6(g) limiting the remission obligation to "agreed-upon" underpayments according to "mutually agreed" terms. *Supp. Pet.* at 5 & Ex. A at 3-4. In sum, SoundExchange's proposed changes seek to make an auditor's conclusions unreviewable, notwithstanding legitimate disagreement, even if those conclusions were erroneous and could not withstand scrutiny in court or before an arbitrator.

SoundExchange's own expert, Dr. Lys, explicitly testified that such provisions would be "unreasonable." Dr. Lys agreed that a copyright owner could hire an "overly aggressive auditor." 5/4/2015 Tr. 1499:4-7 (Lys). And for multiple reasons, it would be improper and unreasonable to make even an unbiased auditor's findings determinative and unreviewable:

> JUDGE STRICKLER: Do you understand that SoundExchange is proposing a term in the license whereby what the auditor determines with regard to payments is dispositive or that just becomes the contractual result subject to potential litigation in some other court between the parties if they disagree with the auditor's finding not having the equivalence of a finding by an arbitrator, for example?
>
> THE WITNESS: I'm not sure. It seems that the former would be unreasonable.
>
> JUDGE STRICKLER: "The former" meaning?
>
> THE WITNESS: The former being that whatever the auditor determines is the final word. It would seem to me that what if the auditor misunderstood a file or something you may want to give Pandora or any other services, say, to point out, wait a second, you are reading the numbers wrong, this is not what they say. So it would seem to me that some form of arbitration or ultimately dispute resolution in one form or another should be appropriate. Again, I did not study that, but my economic training tells me that giving the auditor that much power would be inappropriate. In fact, even in the public arena, there are disagreements between the company and its auditor how to report, and it's okay. It's not like my way or the highway.
>
> JUDGE STRICKLER: Would you agree that if both sides, the copyright owner and the services, had input in the selection of the auditor, then that would reduce the likelihood of there being disputes going forward with regard to what the auditor determined?

> THE WITNESS: I would have to think about it, but, you know, in the end, you can't serve two masters. You typically serve the master that signs the check, so --
>
> JUDGE STRICKLER: That's in favor of your argument.
>
> THE WITNESS: Yes. As an economist, I have to say that.

5/4/15 Tr. 1507:4 – 1508:19 (Lys) (emphasis added).

Dr. Lys's testimony, which SoundExchange completely ignores, belies SoundExchange's assertion that the Judges' proposed regulations are "not supported by evidence in this proceeding," *Supp. Pet.* at 1-2, and justifies rejection of SoundExchange's proposed revision to the Judges' audit regulations. But SoundExchange also ignores commercial agreements that it introduced into evidence, which likewise decline to make auditors' determinations conclusive. *See, e.g.*, [[ ]] Thus, not only is SoundExchange's proposed change to the regulation "unreasonable" and "inappropriate," in the words of Dr. Lys, it is contrary to SoundExchange's purported market evidence as well.[2]

[2] Although the parties to the agreements cited in the text reserved their rights following an audit, there may be other situations in which commercial parties with ongoing relationships decide to make an audit fully determinative. Such individualized determinations to effectively waive the right to litigate a dispute with a known commercial partner are very different from imposing such a waiver on the entire class of webcasters subject to the statutory license. In the latter situation, the considerations discussed by Dr. Lys apply with particular force.

II. SoundExchange May Not Object to the Judges' Reasonable Revision of the Confidentiality Standard (Point II of Its Supplemental Petition), Because It Did Not Address This Issue at Trial or in Its Proposed Findings and Conclusions.

SoundExchange's objection to the Judges' insertion of the words "written" and "directly" into the regulation governing the treatment of confidential licensee information, section 380.5(c)(1), is untimely and misplaced. *Supp. Pet.*, Part II. NAB proposed this language in its Proposed Rates and Terms, yet SoundExchange never addressed it. Further, SoundExchange points to no evidence in the record, or to anything in its Proposed Findings, to support its claim that the Judges' changes "would require additional administrative efforts" or introduce "uncertainty." SoundExchange should not be heard to make those claims now. Rehearing is not a proper "vehicle for presenting theories or arguments that could have been advanced earlier." *Fresh Kist Produce, LLC v. Choi Corp.*, 251 F. Supp. 2d 138, 140 (D.D.C. 2003). The Judges' changes to section 380.5(c)(1) were reasonable and do not give rise to an "exceptional case."[3]

III. SoundExchange's Objections to the Search Requirements (Point I of Its Supplemental Petition) Are Not Supported by the Record.

SoundExchange's objections to the Judges' imposition of reasonable search obligations to locate copyright owners and performers – obligations that already exist in 37 C.F.R. §370.5(d) – improperly reprises arguments that SoundExchange already made and the Judges rejected. Further, its new assertion that searches of the required directories would not be effective is unsupported by any evidence in the record and, thus, cannot form a basis for rehearing.

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[3] NAB and Pandora would not object, however, to inclusion of an exception to the requirement of a written confidentiality agreement where there is a professional "ethical obligation to maintain the Confidentiality Information" in confidence. NAB proposed such an exception in section 380.14 of its June 19, 2015 Proposed Rates and Terms.

NAB and Pandora similarly do not object to SoundExchange's request to clarify section 380.5(d) (Part III of the Supplemental Petition), which would change the language from "distributees of the Collective" to "person" or "the recipient of the confidential information." The proposed change appears to be consistent with the Judges' intent to require recipients of confidential information to protect that information as they protect their own.

Respectfully submitted,

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January 19, 2016

NAB and Pandora's Opposition to
SoundExchange's Supplemental Petition For Rehearing

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Pg. 4, ll. 12-18	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.

CERTIFICATE OF SERVICE

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