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Copyright Royalty Board
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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 OPPOSITION TO SOUNDEXCHANGE'S PETITION FOR REHEARING

Pandora Media, Inc. ("Pandora") respectfully submits this opposition to SoundExchange Inc.'s ("SoundExchange") Petition for Rehearing (the "Petition"). For the reasons set forth below, Pandora respectfully requests that the Copyright Royalty Judges deny the Petition for failing to meet the stringent rehearing standard and merely asking the Judges to change their minds on issues that were fully and carefully considered in the Initial Determination after a thorough examination of the relevant record evidence.

LEGAL STANDARD

The standard for granting a petition for rehearing is, properly, a demanding one, requiring the movant to identify aspects of the Initial Determination that are "without evidentiary support in the record or contrary to legal requirements." 37 C.F.R. § 353.2. As the Judges have made clear, petitions for rehearing should be granted only where "(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice." *Order Denying Mots. for Reh'g*, Docket No. 2005-1 CRB DTRA, at 1-2 (Apr. 16, 2007); *see also* 37 C.F.R. §§ 353.1, 353.2. Even where this standard is met, the statute instructs the Judges to order rehearing only in "exceptional circumstances." 17 U.S.C. § 803(c)(2). The Judges have further cautioned that petitions for rehearing "must be

subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the Board." *Order Denying Mots. for Reh'g* at 1. Simply put, such petitions are not to be used by parties in an effort either to secure a "do-over" of contested issues decided against them or to second-guess their own litigation strategies by advancing extra-record assertions or newly minted legal arguments. For the reasons discussed below, SoundExchange's Petition represents precisely such an improper effort.

ARGUMENT

I. SOUNDEXCHANGE FAILS TO DEMONSTRATE CLEAR ERROR OR LACK OF EVIDENCE SUPPORTING THE JUDGES' DETERMINATION TO RELY ON OWNERSHIP SHARES

SoundExchange asserts that the Judges erred in using indie- and major-label ownership shares as a basis for blending the rates derived from the Pandora-Merlin and iHeart-Warner benchmark agreements. In SoundExchange's view, the Judges should have used "distributed" shares because some independent labels – allegedly those played on Pandora – can "opt" to distribute their works through agreements reached by the majors. SoundExchange, however, has failed to demonstrate that the use of distributed shares was supported – much less required – by the record evidence. The Judges explicitly addressed Professor Rubinfeld's critique of owned shares and rejected it. Beyond that, there is no record evidence that supports SoundExchange's now favored 85%-15% major-indie split. Indeed, Professor Rubinfeld himself did not use the major-indie split that SoundExchange now divines.

A. SoundExchange Is Wrong that the Nonsubscription Rate Calculated by the Judges Must Reflect a Blend of Distributed Shares

The Judges relied on a 65%-35% split between performances of major- and indie-owned sound recordings on non-interactive webcasters to arrive at an appropriately blended rate. This major-indie split is fully supported by the record: it is taken directly from Pandora's own records

setting forth the respective ownership percentages of performances on Pandora. *See* Initial Determination ("Init. Det.") at 200 (citing SX Ex. 269 at 73).[1] SoundExchange now argues that any such blending must be based on distributed rather than owned shares – and an 85%-15% split – because the bulk of the indie sound recordings performed on Pandora allegedly could be licensed through an agreement reached with a major record company, rather than a direct license with the independent label that owns the sound recordings.

Neither the record evidence nor SoundExchange's prior advocacy supports the argument that the indies played on Pandora and other statutory webcasters, whose works might be subject to distribution agreements with majors, could not or would not enter into their own agreements with the service (or avail themselves of a Merlin-like agreement). In its Proposed Findings of Fact, SoundExchange carefully avoided making the argument it now presses, asserting only that some portion of the indies played on Pandora "*could*" be covered by a deal between Pandora and a major, and avoiding any testimony as to how many such recordings "could" (or "would") be so covered, and whether or not the indie owners retained the right to enter into direct deals of their own. *See e.g.*, SoundExchange Proposed Findings of Fact ("SXPFF") ¶ 541. When SoundExchange critiqued the Merlin agreement as non-representative of a major-label agreement, it did so in terms of ownership, not distribution, arguing that "the Merlin license only covers independently-*owned* sound recordings" and that "sole reliance on the Merlin license only offers information about the value of independently-*owned* sound recordings." *Id.* at ¶ 556 (emphases added). In this respect, the Judges did precisely as SoundExchange suggested in its findings, utilizing the Pandora-Merlin agreement as a benchmark for the rates for performing independently-*owned* sound recordings.

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[1] While SoundExchange appears to take issue with the use of this document (SX Ex. 269) for this purpose, Petition at 2, this same document is cited more than twenty times by SoundExchange in its own Proposed Findings of Fact.

SoundExchange's principal expert, Professor Rubinfeld, likewise testified only that a "portion" of indie-owned recordings are distributed by the majors – without providing any quantification – and that while indies may have the option to "opt-in" to deals struck by the majors with which the indie is affiliated, they also may "choose not to do so" in favor of directly negotiating themselves. *See* Corrected Written Direct Testimony of Daniel Rubinfeld ("Rubinfeld CWDT") ¶¶ 224, 222.[2] When evaluating these claims by Professor Rubinfeld, the Judges correctly concluded that his contention that certain indie-owned sound recordings can be covered by deals struck by the majors was "unsourced" and that he had failed both "logically and evidentially" to support a move away from shares based on ownership to shares based on distribution. *See* Init. Det. at 54 n.89. Simply put, SoundExchange's effort to rely on distributed rather than owned shares was evaluated by the Judges and appropriately rejected. Its effort to re-litigate this issue likewise should be rejected.

B. SoundExchange's Proposed 85%-15% Split Is Unsupported in the Record and Contradicted by Its Own Advocacy

Putting to one side the lack of sound basis for rehearing SoundExchange's distributed-share arguments, there also is no basis in the record for adopting the claimed "conservative" 85%-15% major-indie split based thereon. Petition at 3. As an initial matter, the proposed split is nowhere found in SoundExchange's post-trial briefing—it is simply too late now to press for

[2] The record suggests that indies distributed by a major are not only capable of entering into agreements with statutory webcasters, but have actually done so. For example, the independent label Concord, per Glen Barros' testimony, entered into direct deals with both iHeartMedia and Merlin. Written Rebuttal Testimony of Glen Barros ¶¶ 13, 27-28. Yet Concord's website indicates that it is "distributed worldwide" by Universal. *See* http://www.concordmusicgroup.com/distribution/. Indeed, the very congressional testimony of Darius Van Arman that SoundExchange quotes in support of its now favored 85%-15% ratio indicates that "some labels Universal distributes do not use Universal for 100% of their distribution" and argues accordingly that "copyright *ownership* is the only appropriate market share definition." SX Ex. 469 (emphasis added); *see also* Initial Memorandum of Law of A2IM, et. al., at 2 (Oct. 2, 2015) ("Some of these [indie] artists' tracks are distributed by the major recording companies. . ., but it is independent labels who are the owners of the sound recordings and who retain the exclusive right, as label, to license the recordings and collect revenues stemming from non-interactive digital performances in the United States.").

such a split. Moreover, the proposed split lacks evidentiary support. The RIAA statistics on which SoundExchange relies are not in evidence. That data emanates out of certain Congressional testimony given by Mr. Van Arman in which he noted that the RIAA "claims on its website" that the majors distribute approximately 85% of "legitimate recorded music produced and sold in the United States." SX Ex. 469 at 4. Not only is this unquestionably the wrong metric – as it relates to production and sales, not performances by statutory webcasters – but SoundExchange fails to note that on the same page of Mr. Van Arman's cited testimony, he calls into question the very statistics that SoundExchange now relies on, and concludes that "copyright *ownership* is the only appropriate market share definition." *Id.* (emphasis added). Similarly, the Billboard article cited by SoundExchange is not in evidence. It was merely mentioned in a footnote to Professor Rubinfeld's written direct testimony, and to make a very different point: that the "2013 market share of independent record companies by ownership of sound recordings was nearly 35%" (*i.e.*, the precise percentage used by the Judges). Rubinfeld CWDT ¶ 224 n.131. The final reference to Professor Katz's testimony quoting the *Web III Remand Decision* suffers similar flaws: not only does it rely on a decision based on an entirely different and long-outdated record that is not before the Judges, but it again appears to represent a measure of recordings created or sold, not performances on statutory webcasters—the relevant metric here.

Tellingly, Professor Rubinfeld did not himself rely on the 85%-15% split that SoundExchange now embraces. When performing his own blend of major and indie rates, Professor Rubinfeld instead used a 76%-24% split. Rubinfeld CWDT ¶ 225. Even had that split

been validated and used by the Judges, the resulting rate would not have varied from that calculated by the Judges – $0.0017.[3]

II. THE JUDGES' DETERMINATION TO USE A YEARLY CPI ADJUSTMENT IS FULLY SUPPORTED BY THE RECORD

SoundExchange next improperly challenges the Judges' well-reasoned decision to use changes in the Consumer Price Index (CPI) to adjust the statutory rates over the course of the license term. In SoundExchange's view, the fact that the Pandora-Merlin and iHeart-Warner agreements contain stated per-play rates that grew faster than the CPI has grown over the last few years demonstrates that the Judges committed "legal error," an error that can, in SoundExchange's view, only be corrected by providing an annual increase of "at least $.0001."[4] Petition at 3-5. SoundExchange is incorrect.

As an initial matter, the Judges thoroughly evaluated the competing proposals set forth by the parties discussing how rates should change over the course of the five-year statutory period. In so doing, the Judges concluded that "SoundExchange has failed to make a sufficient factual showing" that would support the *lower*, linear $0.00008 annual rate increase proposed by Professor Rubinfeld. Init. Det. at 83. The Judges went on to note that they "find it dispositive that Dr. Rubinfeld acknowledged that his opinion in this regard was neither based on theory nor on empirical analysis." *Id.* In contrast, the Judges evaluated the rate escalator proposed by Professor Shapiro – changes in inflation – and found that approach to be reasonable. *Id.* at 104, 198; *see also* Written Direct Testimony of Carl Shapiro ("Shapiro WDT") at 32-35. That

[3] What is more, Professor Rubinfeld improperly used a simple rather than weighted average to calculate the major-indie split across on-demand services, a choice that ignored the heavier use of certain services and artificially heightened the purported share of major label performances across all services. Rubinfeld CWDT at Appendix 1e.

[4] Notably, a "correction" of this asserted manifest error would yield the record industry annual increases 25% higher than those proposed by Professor Rubinfeld and explicitly rejected by the Judges. Rubinfeld CWDT ¶ 139 (proposing an annual increase of $0.00008).

SoundExchange prefers that this evaluation of competing experts' analyses had come out the other way (and then some, apparently) simply does not form a legitimate basis for rehearing.

SoundExchange's contention that the Judges ignored the annual rate escalations in the iHeart-Warner and Pandora-Merlin deals also is unfounded. The rate escalations provided for in those agreements were fully accounted for by the Judges. With respect to the iHeart-Warner agreement, the Judges' analysis looked to the highest stated per play rate in the agreement – that for the last year of the agreement – as the starting point for their analysis.[5] Init. Det. at 159. With respect to the Pandora-Merlin agreement, the Judges embraced the analysis provided by Professor Shapiro that fully accounted for the year-over-year rate increase provided for in the Pandora-Merlin deal. Shapiro WDT at 31.

More centrally, SoundExchange's challenge to the Judges' determination to use the CPI as a rate escalator for the forward looking period ignores the relevant inquiry: an assessment of how per-play rates negotiated under competitive market conditions might be expected to change over the 2016-2020 period. It focuses instead solely on how rates have changed historically. But there is simply no reason *a priori* to assume that stated rate increases embodied in certain prior deals would necessarily continue.[6] This is precisely the faulty logic used by Professor Rubinfeld that was explicitly rejected by the Judges. Init. Det. at 83. Unlike Professor Rubinfeld, Professor Shapiro did analyze the relevant question, *see* Shapiro WDT at 32-35, and concluded that the use of a CPI adjustment factor is the most reliable method for approximating anticipated changes in per-play rates over time. SoundExchange has failed utterly to make the requisite

[5] In this regard, the Judges noted that there is no record evidence explaining why the stated per-play rates escalate over the term of the iHeart-Warner deal. Init. Det. at 159.

[6] This is particularly true when changes in rates in direct deals vary widely and do not reveal a uniform practice of year-on-year increases: some have rate escalators, others contain no increases, and, with respect to SoundExchange's preferred interactive benchmark, the rates have been *declining* over time. *See* Rubinfeld CWDT ¶140.

showing that the Judges' evaluation of the record evidence on this issue constitutes clear error warranting rehearing.[7]

III. THE JUDGES DID NOT COMMIT LEGAL ERROR IN THEIR ANALYSIS OF THE IMPACT OF THE STATUTORY LICENSE ON THE RELEVANT BENCHMARK AGREEMENTS

In the guise of "legal error," SoundExchange seeks to re-litigate an issue that implicated a significant volume of economic testimony, comprehensive briefing, and meticulous consideration in the Determination: the interplay between the willing buyer/willing seller standard and the "shadow" of the statutory license. SoundExchange predicates its argument on a newly crafted two-part test that the Judges assertedly failed to heed—one that is nowhere found in SoundExchange's proposed findings. Petition at 5-6. It is wholly improper for SoundExchange to posit a supposedly governing legal framework for the first time in a rehearing petition. Regardless of the formulation, the substance of SoundExchange's contentions were addressed by the Judges at length in the Determination and dispatched. *See* Init. Det. at 32-35.

With respect to the first prong of SoundExchange's new test – that the Judges must determine whether a proposed benchmark was materially affected by the "shadow" of the statutory license – the Judges addressed at length and rejected SoundExchange's assertions that the Pandora-Merlin and iHeart-Warner agreements are improper benchmarks because they are tainted by the "shadow" of the statutory license. As the Judges noted, the very fact that the contracting parties agreed to rates that were below the prevailing statutory rates obviates the "shadow" concerns raised by SoundExchange. Init. Det. at 34; *see also* Written Rebuttal Testimony of Carl Shapiro at 32-34. SoundExchange's own witness, Professor Talley, conceded

[7] Separately, in Section IV of its petition, SoundExchange argues that the proposed regulations are ambiguous as to how the CPI adjustment is to be applied. While Pandora does not find the regulations ambiguous, Pandora does agree with SoundExchange that the rate adjustment should reflect the cumulative change in inflation, so that neither licensors nor licensees are prejudiced by the rounding up or down of the rate in a prior year.

as much. On cross examination, Professor Talley testified that if the effective rates called for in the direct licenses are below the prevailing statutory rates – as they plainly are in the case of the Pandora-Merlin and iHeart-Warner deals – then, according to his model, the "shadow" of the statutory license had *no effect whatsoever* on those agreements; Pandora and Merlin and iHeart and Warner would have reached precisely the same deals as they actually did in a hypothetical world in which there is no statutory license available. 5/27/15 Tr. 6115:24-6116:18 (Talley); *see also* Pandora Reply Proposed Findings of Fact and Conclusions of Law ("PRPFFCL") ¶ 210.

With regard to the second prong of SoundExchange's purported test – that the Judges must assess whether the "shadow" makes the proposed benchmark unreliable and unrepresentative – the Judges fully analyzed whether the Pandora-Merlin and iHeart-Warner benchmark agreements are reliable and representative, and concluded, based on overwhelming record evidence, that they are for the portions of the market that they represent. Init. Det. at 136-137, 157-159. Unable to point to any empirical evidence that undermines these conclusions in any way, SoundExchange instead claims that the Judges erred in dismissing Professor Talley's theory that the "shadow" of the statutory license crowds out deals that would have, but for the shadow, taken place at rates above the prevailing statutory rates. Petition at 7; Init. Det. at 33 (concluding that Professor Talley's theory was "too untethered from the facts to be predictive or useful in adjusting for the supposed shadow of the existing statutory rate"). The Judges made no such error. As was made clear at the hearing, Professor Talley was completely uninformed as to the actual workings of the marketplace about which he was theorizing and failed to account for significant aspects of that marketplace, most crucially the role that competition plays. PRPFFCL ¶¶ 96-103; Init. Det. at 33. As Professor Talley conceded, he made no effort to "calibrate [his] model with market data." PRPFFCL ¶ 99. SoundExchange, in its rehearing petition, has pointed

to nothing that salvages Professor Talley's failure to tie his theory to reality. It is, instead, simply asking the Judges to reconsider their well-reasoned conclusion. Such advocacy utterly fails to meet the strict standards for rehearing.

IV. THERE WAS NO ERROR IN THE JUDGES' DECISION TO ALLOW CREDITS FOR OVERPAYMENTS IN AUDITS

SoundExchange is incorrect that the Judges erred in allowing credits for overpayments revealed in audits in Section 380.6(b). Petition at 10. SoundExchange's argument is that the Judges rejected "almost exactly" this proposal with respect to statements of account. *Id.* But there is no *a priori* reason that the process applied to one-time audits covering a three-year period must mimic the process applied to monthly statements of account, and no reason that forbidding services from revising and restating statements of account on a monthly basis (motivated in part by the Judges' concern over the frequency of such adjustments) should prevent an auditor – charged with calculating the *proper* total payments for a licensee across a single three-year period – from identifying a net overpayment as well as a net underpayment. If anything, that licensees cannot revise their statements on a regular basis to correct for overpayments in a prior period supports using the audit to identify and rectify errors (whether under- or over-payments) that could not be adjusted during the audit period.

CONCLUSION

For the foregoing reasons, Pandora respectfully requests that the Judges deny SoundExchange's Petition for Rehearing in relation to the points addressed in this memorandum.

Dated: January 12, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2016, I caused a copy of Pandora's Opposition to SoundExchange's Petition for Rehearing to be served by email to the participants listed below:

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