PUBLIC VERSION

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

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Copyright Royalty Board
JAN 12 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)

THE NATIONAL ASSOCIATION OF BROADCASTERS' OPPOSITION TO SOUNDEXCHANGE'S PETITION FOR REHEARING

INTRODUCTION AND STATEMENT OF THE STANDARD

SoundExchange's Petition for Rehearing ("Pet.") fails to meet the stringent standards for rehearing set forth in 17 U.S.C. § 803(c)(2)(A), 37 C.F.R. § 353.2, and the Judges' precedent. Under the statute, rehearing is limited to "exceptional cases." 17 U.S.C. § 803(c)(2)(A). The regulation provides that a motion for rehearing must identify aspects of the Initial Determination ("*Init. Det.*") that are "without evidentiary support in the record or contrary to legal requirements." 37 C.F.R. § 353.2. "Such motions should only be granted 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 Motion for Rehearing* at 1 (Docket No. 2006-1 CRB DSTRA) (Jan. 8, 2008) ("*SDARS I Rehearing Order*"). The Judges have cautioned that "motions for reconsideration must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the . . . Judges." *Id.* (quotation marks and citation omitted). A motion for rehearing "is not simply an opportunity to reargue facts and theories upon which a court has already ruled, nor is it a vehicle

for presenting theories and arguments that could have been advanced earlier." *Fresh Kist Produce, LLC v. Choi Corp.*, 251 F. Supp. 2d 138, 140 (D.D.C. 2003) (internal citation omitted).

ARGUMENT

I. SoundExchange's Argument that the Judges Improperly Set a Blended Rate Using Owned Rather than Distributed Market Shares Is Economically Wrong, Untimely, and Unsupported by the Evidence.

SoundExchange's first asserted ground for rehearing presents a new theory that SoundExchange never asserted during the proceeding and that is wrong as a matter of economics. Further, SoundExchange's new theory of market share computation is contrary to SoundExchange's own Proposed Findings of Fact, which discussed the share of recordings owned by the majors and cited the same Pandora document upon which the Judges relied. Moreover, there is no basis in the record to quantify distributed shares.

First, the Judges correctly determined that it is more appropriate to weight license fees based on ownership, not distribution. As the Judges recognized, price competition through steering is an important way that a label can increase its revenues and is also a way to import competitive forces into the marketplace. *See, e.g., Init. Det.* at 117. SoundExchange points to no evidence that an independent label whose recordings are distributed by a major label would be unable to enter into its own direct licenses in order to encourage services to steer towards it. To the contrary, Dr. Rubinfeld's testimony indicates that independents that are distributed by major labels have the option to make their own deals. SX Ex. 17, ¶ 222 (Rubinfeld Corr. WDT).

Second, in its proposed findings, SoundExchange argued that the majors had a [[ ]] share of label spins on Pandora, relying on Exhibit SX-269, a Pandora Board of Directors document. SX PFF ¶¶ 537, 540. SoundExchange's counsel highlighted that exhibit at closing as a [[ ]] 7/21/15 Tr. at

7750 (Pomerantz). Pandora, of course, accounts for the overwhelming majority of nonsubscription, noninteractive spins. That very same Pandora document was relied upon by the Judges to measure major label market share as [[ ]]. *See Init. Det.* at 200, citing SX Ex. 269. SoundExchange cannot now claim it was error for the Judges to rely upon a document that SoundExchange specifically urged them to rely upon.

SoundExchange did assert in its Proposed Findings that the [[ ]] share did not include the percentage of independent label recordings that are licensed and distributed by one of the three majors. SX PFF ¶ 537. But it nowhere sought to quantify the distribution percentage, relying instead on the [[ ]] figure in the Pandora document. *Id.* SoundExchange may now wish that it had attempted to quantify that number, but "[m]otions for rehearing do not support a change of tactics for a party to present a new theory of evidence after the trial is concluded." *Order Denying Motions for Rehearing* at 2, Docket No. 2005-1 CRB DTRA (April 16, 2007).

Third, given the state of the record, SoundExchange could not have quantified the distributed percentage even if it had wanted to do so. SoundExchange cites three bits of evidence in its Petition, but none supports its position. SoundExchange first cites Darius Van Arman's testimony before Congress. Pet. at 3 (citing SX Ex. 469). But Mr. Van Arman testified that the majors' practice of counting distributed rather than owned shares was "overstated" on its own terms, "misrepresent[ed] their market share," and that "A2IM believes that copyright ownership is the only appropriate market share definition." SX Ex. 469 at 4 & n.1 (emphasis added). Second, SoundExchange cites note 131 of Dr. Rubinfeld's Corrected WDT. Pet. at 3 (citing SX Ex. 17 n.131). But Dr. Rubinfeld nowhere identifies the majors' distributed share and, while SoundExchange may wish it were otherwise, the articles cited by Dr. Rubinfeld in note 131 are not in evidence. Indeed, the only number actually stated in that footnote is in the title of the

A2IM press release, saying that the indie share increased to 34.6% in 2013. Third, SoundExchange cites Professor Katz's quotation of the Web III Remand Decision, for the proposition that the majors "owned" 85% of the sound recordings in 2010. Pet. at 3 (citing NAB Ex. 4000 ¶ 70). Whatever the "owned" share was in 2010, the evidence is clear that in 2015 the "owned" share is in the neighborhood of the 65% relied upon by the Judges. Thus, Professor Katz's testimony does not support SoundExchange's attempt to use distributed share rather than owned share or provide evidence of the distributed share in 2015.

Fourth, Dr. Rubinfeld testified (independently of the Pandora document) that indies own "nearly 35%" of recordings by sales. SX Ex. 17 ¶ 224 (Rubinfeld Corr. WDT). In computing his own interactive service benchmark, Dr. Rubinfeld concluded that independent labels account for an average of 24% of the streams on interactive services, without specifying whether he was using owned or distributed recordings. *See* SX PFF ¶ 392, citing SX Ex. 17 (Rubinfeld Corr. WDT) ¶ 225. The 24% - 76% split adopted by Dr. Rubinfeld for his benchmark analysis would still lead to a blended rate of $0.0017. Moreover, Dr. Rubinfeld's 24% - 76% split came from a simple arithmetic average of the interactive services he reviewed. The overwhelmingly largest service, Spotify, only played recordings from the majors [[ ]] of the time. Rubinfeld Corr. WDT App. 1e. Spotify's major/indie split of [[ ]] would lead to a blended rate of [[ ]].

In short, the Judges correctly weighted rates based on the market share of owned recordings. In any event, SoundExchange failed to provide any evidence or argument on which the Judges could have reliably based a blended rate on distributed market share.

II. As the Judges Correctly Determined, There Is No Basis for Annual Rate Increases.

SoundExchange's second point is the kind of pure reargument of a thoroughly considered issue that provides no basis for reconsideration under the Judges' precedent. *See SDARS I Rehearing Order*, at 2.

As in prior proceedings, SoundExchange's rate proposal included automatic step increases for every year of the term. In a nearly two-page discussion entitled "SoundExchange's Proposed Annual Rate Increases from 2016-2020 Are Not Supported by the Evidence," *Init. Det.* at 82-83, the Judges thoroughly debunked this demand. The Judges noted: (i) Dr. Rubinfeld's admission that his argument for linear escalation "was neither based on theory nor on empirical analysis"; (ii) the presence of escalators in some agreements but not others, with no testimony explaining these differences; (iii) the fact that market forces may move rates in either direction, with no record basis for making a credible prediction; and (iv) the possibility that, even if credited, SoundExchange's "convergence" theory could result in interactive rates declining further, rather than noninteractive rates increasing. *Init. Det.* at 83. Thus, the Judges concluded, "the record does not contain a sufficient basis to adopt any prediction about the future direction of noninteractive rates." *Id.*

Instead of addressing the wealth of evidence supporting this conclusion, SoundExchange focuses on the [[ ]] agreements and argues that the Judges' consideration [[ ]] necessarily entails annual rate increases and somehow trumps all of the evidence that caused the Judges to reject such increases. Pet. at 3-5. This argument is both legally and factually unsupported.

First, NAB is unaware of any precedent that suggests that, having determined that a particular agreement is [[ ]], the Judges must slavishly adopt every aspect of

that agreement in their ultimate determination, particularly in the face of other evidence that demands a different conclusion. Here, as discussed above, the Judges found that overwhelming evidence refuted SoundExchange's demand for an automatic escalator. That evidence is not rendered meaningless by [[ ]].

Second, SoundExchange mischaracterizes the provisions of both agreements. From reading the Petition, one would gather that both the [[ ]] agreements envision continuing annual rate increases. In fact, both agreements [[ ]]. In the [[ ]] agreement, rates [[ ]]. PAN Ex. 5014 at § 3.a.ii. [[ ]] *Id.* at §§ 1.r, 3.a.ii, 3.b. Thus, contrary to SoundExchange's position, [[ ]]. Similarly, as specifically noted by the Judges (at 159) but ignored by SoundExchange, the headline rates for the [[ ]]. SX-33 at 15. Thus, in addition to being unsupported legally, SoundExchange's argument for an automatic escalator is refuted even by the agreements upon which SoundExchange relies. [1]

[1] The automatic escalation sought by SoundExchange exceeds by a factor of nearly three the 2% inflation that the Federal Reserve has set as a target for the economy, and is *more than ten times* the 0.5% inflation rate for 2015 that the Judges noted in their Initial Determination (at 199). In addition, as the Judges note with respect to interactive services, and notwithstanding SoundExchange's dream of rapid, perpetual escalation of rates for sound recordings, prices in the real world go down as well as up. *See Init. Det.* at 82 (observing that "the record evidence indicates that rates in SoundExchange's own proposed benchmark market, interactive streaming services, have *decreased* in recent years" and citing to admissions of SoundExchange's expert) (emphasis in original).

III. SoundExchange's Arguments Concerning the Shadow of the Statutory License Simply Rehash Arguments that the Judges Have Rejected.

SoundExchange's third point – concerning the "shadow" of the statutory rate – likewise is nothing more than reargument of a point that was thoroughly addressed and considered by the Judges in their decision. It provides no basis for reconsideration.

The parties argued extensively about the effect of the statutory rate on the various benchmarks at issue. The Services demonstrated that the statutory rate pulled negotiated rates up to levels higher than they would have been absent the statutory license. *See, e.g.*, Pandora PFF ¶¶ 164-71 (showing how Pandora/Merlin rates were pulled up by the shadow of the statutory license); NAB PFF ¶ 218 (same); *id.* ¶¶ 234-39 (discussing effect of shadow generally). SoundExchange argued the opposite. The Judges weighed all of this evidence and found that it did not support a conclusion that the Pandora/Merlin and iHeart/Warner benchmark agreements required adjustment to account for the effects of the shadow. *Init. Det.* at 32-35.

SoundExchange simply argues that the Judges should have adopted its view, reiterating the citations to its Proposed Findings. *See, e.g.*, Pet. at 6 (rearguing SoundExchange's Proposed Findings); *id.* at 7 (reiterating its argument that Professor Talley was correct). Such arguments are not a basis to grant rehearing. *SDARS I Rehearing Order* at 2 ("[M]otions for reconsideration must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the Board [Judges]." (quotation marks and citation omitted)).

SoundExchange's argument that the rates set out in the Pandora/Merlin and iHeart/Warner agreements were not representative of "the rates to which, absent special circumstances, most willing buyers and willing sellers would agree," Pet. at 7, again reprises arguments that SoundExchange has already made. *See, e.g.*, SX PFF Part VIII.B.2 (arguing that Pandora/Merlin agreement is "Not Representative of the Broader Market"); *id.* Part IV.D (arguing that

Pandora/Merlin agreement is not "Representative Of The Rates and Terms Most Willing Buyers And Willing Sellers Would Agree Upon"); *id.* ¶ 763 n.27 ([[ ]]); *id.* ¶¶ 853-54 (arguing that the iHeart/Warner deal cannot be replicated across the industry). It is not ground for rehearing.

Notably, SoundExchange also fails to state the correct standard, which contemplates rates to which most willing buyers and willing sellers would agree in an effectively competitive market. *See, e.g., Init. Det.* at 37-42. The Judges examined this issue and concluded that their chosen benchmark agreements reflected competitive forces. *See, e.g., id.* at 115-23, 158.[2]

IV. SoundExchange's Other Asserted "Errors" Do Not Justify Rehearing, But NAB Agrees that the CPI Mechanism Should Be Clarified.

A. NAB Supports Clarification that Any CPI Inflation Adjustment Should Be Based on Cumulative Inflation.

Using a hypothetical CPI figure of 2.94%, SoundExchange argues that, if the inflation adjustment were conducted separately each year, there would be no rate adjustment during the term because each year the $0.0017 would be increased to $0.00174998, which would round down to $0.0017. Similarly, however, if the CPI rate were 2.95%, the calculated outcome would be $0.00175015, and would be rounded up to $0.0018. If this happened repeatedly, the rate would end up far above where it should be. NAB expects that such a result (in either direction) was not intended and therefore agrees that the Judges should clarify that any CPI adjustment should reflect cumulative inflation using the Consumer Price Index (for all consumers and for all items) (CPI-U) from the most recent CPI-U published by the Secretary of Labor before December

[2] To the extent SoundExchange is arguing that it is inappropriate to set rates based on two agreements, that argument has long been rejected. The Librarian held in *Web I* that it can be appropriate to set rates based on a single agreement. *Web I Final Rule and Order*, 67 Fed. Reg. 45,240, 45,248-249, Docket No. 2000-9 CARP DTRA 1 & 2) (accepting the CARP's reliance on a single agreement between Yahoo! and the RIAA to set rates).

1 of 2015 to the most recent Consumer Price Index (for all consumers and for all items) (CPI-U) published by the Secretary of Labor before December 1 of the year preceding the applicable year.

B. The Judges Properly Required that Auditors Be CPAs Licensed in the Jurisdiction.

The Judges have now rejected for a second time SoundExchange's attempt to remove the requirement that audits be performed by a CPA from the regulations. *See Init. Det.* at 193-94 ("SoundExchange has argued in past proceedings for a change to allow in-house auditors to perform audits. The Judges rejected that change. For the same reasons, they do not adopt a change to the requirement that the auditor be a CPA") (citation to *Web II* omitted). In fact, the Judges strengthened the provision by "further insert[ing] the qualifier 'independent' into the definition of 'Qualified Auditor' for the sake of regulatory efficiency" and "adopt[ing] language proposed by the NAB and NRBMLC concer[n]ing the licensing of an auditor." *Id.*

SoundExchange complains that this latter change is unsupported by record evidence. Pet. at 8. But Professor Weil explained that one advantage of having a CPA conduct an audit is that "CPAs are governed by the principles, rules, and requirements promulgated by their applicable state accountancy boards and the professional organizations with which they affiliate, including state CPA organizations." NAB Ex. 4011 at 11 (Weil WRT). In discussing the consequences that could be faced by an unqualified CPA who conducted an audit, Professor Weil testified that "[i]n addition to sanctions that may be imposed by the AICPA and state professional societies, state accountancy boards may also take action with respect to the CPA's license." *Id.* at 13 n.16. The language at issue helps to ensure the efficacy of these protections by requiring that the CPA conducting the audit be licensed in the jurisdiction and thereby subject to applicable state authorities. This is an eminently reasonable requirement, as the Judges determined, and should not be removed. For all the reasons that the CPA requirement is important, as the Judges have

repeatedly determined, that requirement should be tied to the jurisdiction where the audit takes place, not some potentially random state that has no relationship to the audit at issue.

C. Asserted "Additional Errors" (Petition at 9-10)

In the final section of the Petition, SoundExchange briefly addresses what it terms "Additional Errors" in the Judges' Initial Determination. NAB submits that SoundExchange's brief discussion of these issues does not demonstrate manifest injustice or clear error, or that this is an "exceptional case." Beyond that, NAB takes no position as to the First (holding period), Second (number of audits), and Fourth (definition of Commercial Webcaster) assertions of error in this section of the Petition.

Contrary to SoundExchange's Third assertion of error, the Judges were correct to provide a credit, with interest, for overpayments discovered during audits. An independent audit is a two-way street and imposes significant burdens on its subject. If SoundExchange imposes such a burden in a case where the licensee has overpaid and SoundExchange has had the use of those funds, the licensee should recover its overpayment plus interest, as SoundExchange would recover interest in the event of an underpayment.

Finally, in a catchall section, SoundExchange complains of unidentified language changes to various regulatory provisions. Pet. at 10 & n.16. SoundExchange does not identify the specific language about which it complains or explain why this language constitutes manifest error. Thus, SoundExchange has not met the requirements of 37 C.F.R. § 380.2, which mandates a statement of the aspects of the determination believed to be without evidentiary support. The NAB otherwise defers any response as permitted by the Judges in their January 11, 2016 Order.

For the foregoing reasons, the Petition should be denied, except for a clarification of the CPI adjustment, as set out above.

Respectfully submitted,

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January 12, 2016

NAB Opposition to SoundExchange's Petition For Rehearing
Redaction Log

Page. Line	Description
Pg. 2, l. 21	Information designated RESTRICTED by Pandora, contained in a Pandora Board of Directors document.
Pg. 2, l. 24	Information from the *Web IV* Hearing transcript designated as RESTRICTED during session.
Pg. 3, l. 3	Information designated RESTRICTED by Pandora, contained in a Pandora Board of Directors document.
Pg. 3, l. 6	Information designated RESTRICTED by Pandora, contained in a Pandora Board of Directors document.
Pg. 3, l. 9	Information designated RESTRICTED by Pandora, contained in a Pandora Board of Directors document.
Pg. 4, l. 16	Reflects information designated RESTRICTED by SoundExchange. Information reflects performance data of Spotify and other services.
Pg. 4, l. 17	Reflects information designated RESTRICTED by SoundExchange. Information reflects performance data of Spotify and other services.
Pg. 4, l. 18	Reflects information designated RESTRICTED by SoundExchange. Information reflects performance data of Spotify and other services.
Pg. 5, l. 18	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 5, l. 19	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 5, l. 23	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 6, l. 4	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.

Pg. 6, l. 6	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 6, ll. 7-8	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 6, l. 8	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 6, ll. 8-9	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 6, ll. 9-11	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 6, ll. 12-13	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 6, ll. 14-15	Reflects information designated RESTRICTED by other parties in this matter. Information reflects the terms of record label/service agreement.
Pg. 8, ll. 2-3	Reflects information designated RESTRICTED by SoundExchange and quotation from the *Web IV* Hearing transcript designated as RESTRICTED during session. Information reflects the reasons for the business decisions of major labels.

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2016, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

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