

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

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Copyright Royalty Board

JAN 04 2016

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In re)
)
DETERMINATION OF ROYALTY)
RATES AND TERMS FOR)
EPHEMERAL RECORDING AND)
DIGITAL PERFORMANCE OF)
SOUND RECORDINGS (<i>WEB IV</i>))
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Docket No. 14-CRB-0001-WR (2016-2020)

**LICENSEE SERVICES' OPPOSITION TO SOUNDEXCHANGE'S
MOTION TO REDACT PORTIONS OF INITIAL DETERMINATION**

Licensee participants Pandora Media, Inc. ("Pandora") and the National Association of Broadcasters ("NAB") (collectively, the "Services") respectfully request that the Copyright Royalty Judges reject certain redactions proposed by SoundExchange, Inc. in SoundExchange's Motion To Redact Portions of Initial Determination (the "Redaction Motion").

INTRODUCTION

Public access to court proceedings and the records underlying court opinions is a central aspect of a democratic society. Allowing the public to discern the reasoning behind a court's judgment provides insight into its decision-making process and helps establish precedent that can be consulted by future litigants. Accordingly, courts require parties to provide legitimate justifications to keep the contents of evidence introduced at trial and referenced in court opinions away from the public. SoundExchange's Redaction Motion inappropriately seeks to redact certain materials where it lacks such a justification, including materials whose disclosure would not place SoundExchange, or the third parties who supplied such information, at the sort of competitive disadvantage courts have recognized as a reason for redaction.

On December 23, 2015, SoundExchange submitted its Redaction Motion. The following day, counsel for Pandora sent a letter to counsel for SoundExchange noting that certain redactions in its proposal were inappropriate under prevailing law. *See* Exhibit A (Letter to Kelly Klaus). On December 29, 2015, SoundExchange responded that it would withdraw a handful of its proposed redactions.¹ SoundExchange refused to withdraw its Motion as to the majority of the challenged material, necessitating this Opposition. *See* Exhibit B (Letter to R. Bruce Rich and Bruce Joseph).²

ARGUMENT

When the Judges entered the Protective Order in this proceeding, they “reiterate[d] a strong presumption in favor of the public interest in access to the records of the subject proceeding.” Protective Order, *Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)*, at 1 (Oct. 10, 2014) (the “Protective Order”). The Judges went on to acknowledge that in prior

¹ SoundExchange agreed to drop its request for the following proposed redactions: (a) page 84: statement that Dr. Rubinfeld’s analysis of the Apple deals result in rates that are substantially above the prevailing statutory rates; (b) page 95: all proposed redactions other than the numbers; (c) page 106: the statement “essentially the same level of monetary consideration as the majors”; (d) page 134: all redactions (references to anti-steering and MFN clauses); (e) page 199: all redactions other than [REDACTED] in the Merlin deal for subscription performances and the [REDACTED]

² SoundExchange’s response further suggested that, as to the remaining challenged redactions, the Services needed to follow the procedures of Section IV.D of the Protective Order before taking the dispute to the Judges. *See* Exhibit B. Section IV.D does not apply in the current circumstances: the Services are not seeking permission to disclose Restricted materials to a person not authorized by the Protective Order (they are addressing which parts of the Judges’ Determination will be made public) and are not challenging SoundExchange’s designations on materials that it produced during discovery (they are addressing SoundExchange’s request to redact materials from the Judges’ Determination). Moreover, the Protective Order covers a situation where a Receiving Party’s challenge to a Producing Party’s designations is converted into a motion filed by the Receiving Party; here, however, SoundExchange (the Producing Party of the material at issue) has already itself filed a redaction motion concerning the material at issue, any opposition to which carries a five-day deadline under the Judges’ regulations. In any event, the Services put SoundExchange and its members on notice of the redactions they were challenging and provided the opportunity to withdraw those requests.

proceedings “participants have proposed orders that describe the protectable information as information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future.” *Id.*

The Judges’ stated rationale is consistent with numerous opinions from the D.C. Circuit which have counseled that a “court’s decision to limit access to judicial records should ... be informed ‘by this country’s strong tradition of access to judicial proceedings.’” *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991); *see also United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (internal citations omitted) (recognizing “the public’s interest in keeping ‘a watchful eye on the workings of public agencies’”).

The more important the role a document plays in the judicial process – particularly in a court order or opinion – the stronger the public’s right of access to it. *See United States v. El-Sayegh*, 131 F.3d at 163 (“We thus hold that what makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process.”); *see also United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) (Courts have recognized that “the strong weight to be accorded the public right of access to judicial documents” that play a large role in “determining litigants’ substantive rights.”). The presumption in favor of access is particularly strong in the context of judicial determinations because “[a] court’s decrees, its judgments, its orders, are the quintessential business of the public’s institutions.” *E.E.O.C. v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996).

Accordingly, as the Judges have recognized, when parties to a CRB proceeding seek to keep material off the public record, they must provide a compelling reason to redact it. *See*

Order Responding to SoundExchange's Motion to Redact, *Docket No. 2005-1 CRB DSTR*A, at 1 (Mar. 28, 2007) (declining to redact certain material that SoundExchange requested be redacted). In considering whether to accept proposed redactions, the Judges have chiefly considered whether the information was competitively sensitive, the potential commercial and/or competitive damage that the disclosure of the information could have, and, relatedly, whether the information was dated such that any potential damage was blunted. *See id.* at 2 ("Moreover, the NPR Agreement is no longer in effect, thereby diminishing the potential harm disclosure regarding that agreement might have on the parties to that agreement. Therefore we deny SoundExchange's request for redaction"); *see also id.* ("We reject SoundExchange's request because we do not believe this information is commercially sensitive as that term is used in the Protective Order."); *id.* ("Moreover, to the extent that this information is proprietary, we do not believe that its disclosure is likely to have a materially adverse impact on the parties to these agreements.").

The Services have reviewed SoundExchange's Redaction Motion and submit that there is no compelling reason, under the above-stated principles, to redact the following information (listed in the order it appears in the Initial Determination and then addressed categorically):

- Page 23: Redaction of [REDACTED] rate in the Pandora-Merlin Agreement (same information redacted on p. 93 and p. 105).
- Page 56: Identity of [REDACTED] and [REDACTED] as entities whose agreements with Apple were offered into evidence (same at bottom of p. 84).
- Page 61-62: All redactions of quotations from the submissions to the FTC in support of the Universal/EMI merger or discussions noting that [REDACTED] in their agreements with interactive services.
- Page 70: Quote in the statement that a [REDACTED]
- Page 83: General reference to [REDACTED] in Apple agreements (p. 83) and Majors' agreements with interactive services (p. 87 fn. 114).

- Page 92: Reference to the [REDACTED] in the citation for the unredacted sentence “Pandora notes that one of the Majors has acknowledged that Merlin is a ‘virtual [] major.’”
- Page 94 (other than the footnote): All proposed redactions other than the specific numbers in discussion of Pandora-Merlin Agreement (discussion of [REDACTED] and the impact on effective rates).
- Page 99: Redaction of heading regarding [REDACTED]
- Page 113-114 (top half): All proposed redactions discussing [REDACTED] other than the names of the contracting parties.
- Page 118: Proposed redaction of statement that [REDACTED] with other entities during the negotiation of the Pandora-Merlin Agreement.
- Page 125: Lexton block quote at bottom regarding potential impact of the Pandora-Merlin deal on the CRB proceedings.
- Page 127: Proposed redaction of [REDACTED]
- Page 160: citations noting the precedential impact of direct deals on CRB proceedings.³

These requested redactions are overbroad, deprive the public of the ability to discern the full extent of the evidence supporting the Judges’ decision, and redact information, much of which is quite dated, the disclosure of which cannot legitimately be claimed to be competitively damaging.⁴

1. Statements of Universal to FTC in Support of EMI Merger (Pages 61-62, 92, and 127)

Most egregiously, SoundExchange seeks to redact in full statements made to the FTC by or on behalf of Universal regarding the merger with EMI in 2012 and [REDACTED]

³ The Services’ letter to SoundExchange (Exhibit A) identified several other proposed redactions that the Services have determined not to oppose.

⁴ Although various materials may have been marked “Restricted” when they were produced during discovery, the fact that such materials were admitted during trial and used by the Judges in reaching their Initial Determination necessitates that the parties provide a sufficient justification to continue shielding the portions of these materials that the Judges discuss in their Initial Determination from the public. *E.E.O.C. v. Nat’l Children’s Ctr.*, 98 F.3d at 1409. SoundExchange has failed to provide such a reason for the foregoing redactions it proposes.

██████████ in the market for licensing interactive music services. SoundExchange has made no showing that there is a compelling need for such redactions, especially considering the importance of these concessions to the Judges' rate determination. The fact that a statement was contained in a filing with the FTC, standing alone, is simply not a sufficient reason to justify its redaction. Indeed, the centrality of these statements to Universal's rationale for permitting the merger to be consummated, with the significant attendant consequences for commerce and competitive conditions in the recorded music industry, if anything argues in *favor* of public access. Further, the statements in issue were written three or more years ago. There is no reason to believe that a Universal rival could use these years-old statements to the competitive disadvantage of Universal; certainly none has been identified by SoundExchange in any event. *Cf. E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (noting that in deciding whether records should be sealed, courts in the D.C. Circuit consider six factors: "(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings."). Given the importance of these statements to the Determination, both the public and future CRB litigants should be able to see this material. The statements constitute critical evidence evaluated by the Judges in determining the weight to be given to SoundExchange's key benchmark (the interactive service licenses) – indeed, to a benchmark that SoundExchange has relied on in every major CRB proceeding dating back to *Web II* in 2006.

2. Discussion of [REDACTED] (Pages 113-114)

Similar concerns infect SoundExchange's attempt to redact the Judges' discussion of [REDACTED] the interactive service agreements on which SoundExchange fundamentally relied. Those clauses are integral to the Judges' conclusions about the lack of suitability of those agreements as benchmarks. Moreover, the discussion that the Services challenge here is couched at a general level, and does not reveal the specific contractual language of any particular agreement – undercutting the suggestion that disclosure of the information could be used by any rival record company to the competitive disadvantage of SoundExchange's witness companies. And since the record reveals – indeed relies on – the fact that [REDACTED] [REDACTED] it can scarcely be argued that public disclosure of this part of the Determination is revealing information that is not well known across the industry. *See* Initial Determination at 113 [REDACTED] [REDACTED] *id.* at 133-34 [REDACTED]; SX Proposed Findings of Fact (Public) ¶ 391 (stating that Prof. Rubinfeld “assumed that ‘in separately negotiated agreements independent record companies would not receive any of the non-per-play financial or other unquantified consideration major record companies receive (e.g., MFNs, advertising guarantees, or upfront guaranteed fees)’”; *id.* at ¶ 738 (“UMG has disabled this threat of steering by negotiating for contractual protections from steering.”); SX Reply Proposed Findings of Fact (Public) ¶¶ 300-303 (acknowledging the existence of MFNs in interactive services agreements and alleging there is a lack of evidence such provisions have been triggered).

3. Other Information Regarding Benchmark Agreements (Pages 56, 83, 84, 87, and 160)

On pages 56 and 84 of the Initial Determination, SoundExchange seeks to redact the fact that it provided evidence of license agreements with [REDACTED] and [REDACTED] for the Apple iTunes Radio service. Simply indicating that evidence of such agreements was offered would not place [REDACTED] or [REDACTED] at any sort of disadvantage where specific terms of the agreements are not revealed. *See* Order Responding to SoundExchange's Motion to Redact, *Docket No. 2005-1 CRB DSTR*, at 3 (Mar. 28, 2007) ("SoundExchange requests that we shield from the public the very fact that a third party has entered into an agreement. While we cannot say that in no circumstances would such information, once entered into evidence, be excluded from the public, SoundExchange certainly has not made a compelling case for why it should be excluded in this instance."). The Licensee Services propose that the names [REDACTED] and [REDACTED] should be unredacted where the Judges are simply discussing the existence of these agreements, their negotiation, and/or general terms used across multiple licenses.

SoundExchange also seeks to redact certain other statements that simply are too general for their disclosure to result in any competitive risk. On pages 83 and 87 (fn 114), SoundExchange seeks to redact references to [REDACTED] in certain agreements, while on page 160 it seeks to redact statements that acknowledge the precedential impact of direct licenses. Such general statements are at too high a level of abstraction to pose any risks from their disclosure.

4. Information Regarding the Pandora-Merlin Agreement (Pages 23, 93, 94, 99, 105, 118, 125)

Other information that SoundExchange seeks to redact came out on the record during the public session of the trial proceedings without objection. For example, SoundExchange has sought to redact [REDACTED] from the agreement between Pandora and Merlin (pp.

23, 93, 105) despite there already being testimony on the public record regarding that percentage. See 5/18/15 Tr. 4209:10-13 (Herring) (“It’s actually one of the reasons when Merlin proposed the 25 percent floor as a percent of revenue, we were okay with that level.”). Along the same lines, at page 94 of the Initial Determination, SoundExchange seeks to redact more than the specific numbers set forth in the Pandora-Merlin Agreement, including the fact that the Pandora-Merlin Agreement [REDACTED]. Not only is this already part of the public record, it, too, is central to the Judges’ Determination.

Other proposals by SoundExchange are similarly too general to redact. For instance, on page 99, SoundExchange seeks to redact the portion of a heading generally referencing [REDACTED]. The fact that the Merlin agreement addresses [REDACTED] – absent the details of the specific provisions – is too general to redact. On pages 118 and 125, SoundExchange seeks to redact quotes regarding the negotiation of the Pandora-Merlin Agreement that do not go into any of the specific aspects of the deal. It cannot credibly be suggested that disclosing the fact that an [REDACTED] will result in any competitive harm to that label.

5. Other Proposed Redactions

On page 70, SoundExchange seeks to redact the fact that [REDACTED]. The record has numerous instances of support for this same proposition, including the Wilcox parenthetical quote that follows. Unredacting this statement cannot reasonably be claimed to result in any competitive harm to Warner.

CONCLUSION

For the foregoing reasons, the Services respectfully request that the Judges decline to redact the above-referenced portions of SoundExchange's Redaction Proposal.

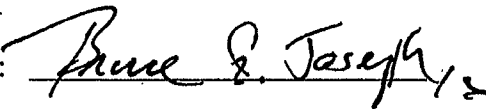
Dated: December 31, 2015

Respectfully submitted,

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Exhibit A

(RESTRICTED)

Exhibit B

(RESTRICTED)

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, I caused a copy of the foregoing public version of Licensee Services' Opposition to SoundExchange's Motion to Redact Portions of Initial Determination to be served by email to the participants listed below:

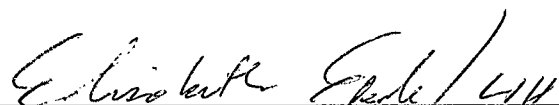
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