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

In the Matter of:	)	
	)	
Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)	)	**Docket No. 14-CRB-0001-WR (2016-2020) CRB Webcasting IV**

SOUNDEXCHANGE'S MOTION TO REDACT PORTIONS OF THE ORDER ON SOUNDEXCHANGE'S MOTION FOR REHEARING

As requested by the Judges, SoundExchange submits this Motion to redact certain narrow categories of information from the Order on Rehearing[1]—statements revealing record companies' negotiating strategy and specific terms from (or adjusted from) confidential agreements. These redactions are consistent with the Judges' February 2, 2016, Order Granting in Part and Denying in Part Parties' Motions to Redact Portions of the Determination ("Redactions Order").

The balance of interests at stake favors nondisclosure of this material. If the confidential, competitively sensitive information at issue is revealed, the record labels would be at a competitive disadvantage in future negotiations, *see* Redactions Order at 5-6 (Feb. 2, 2016). Further, disclosure would risk hampering SoundExchange's ability to provide the Judges with a full and robust record in future rate-setting proceedings, *see* Protective Order at 1 (Oct. 10, 2014). These "compelling reasons" justify these narrowly-drawn redactions. Redactions Order at 2.

[1] Order Denying in Part SoundExchange's Motion for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions (Feb. 10, 2016) ("Order on Rehearing" or "Order on SoundExchange's Motion for Rehearing").

UNDERSIZED DOCUMENTS

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LEGAL STANDARD

The Judges recognize that the strong presumption in favor of disclosure is "not absolute." Redactions Order at 2. Congress gave the Judges authority to protect confidential information by "excluding [it] from the record of the determination that is published or made available to the public." 17 U.S.C. § 803(c)(5). In exercising this authority, the Judges balance the public interest of disclosure against the parties' interests in protecting the confidentiality of competitively sensitive information.

The Judges have found the six factors from *U.S. v. Hubbard* instructive in balancing the interests at stake: "(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." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (citing *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980)). As the Judges concluded in the similar context of proposed redactions to the Initial Determination, the first and the sixth factors weigh in favor of disclosure and the third factor weighs against it.[2] Redactions Order at 3. Thus, "the analysis comes down to a weighing of the parties' interests in preventing disclosure, taking into consideration whether the information has previously been legitimately available to the public"—that is, a balance of the second, fourth, and fifth factors. *Id.*

[2] Because the Judges' conclusions regarding the first, sixth, and third factors are equally appropriate in the context of proposed redactions to the Order on Rehearing, SoundExchange does not reiterate arguments as to those factors.

ARGUMENT

I. The Record Companies' Negotiating Strategy Merits Redaction Under Prior Precedent and Because Revealing Such Strategy Would Place the Record Companies at a Competitive Disadvantage.

In the Initial Determination, the Judges redacted statements reflecting confidential negotiating strategy, finding that "compelling reasons" justified the non-disclosure. The Judges should do the same in the Order on Rehearing. Statements regarding the confidential negotiating strategy of Sony Music Entertainment ("Sony") and Universal Music Group ("UMG") merit redaction for the compelling reasons that justified granting redactions of nearly identical statements in the Initial Determination.

The Judges previously determined that the following two portions of the Initial Determination referencing testimony by Dennis Kooker, President, Global Digital Business at Sony and Aaron Harrison, Senior Vice President, Business and legal Affairs of UMG Recordings, warranted redaction: "[ ] and "[ ]". Redactions Order, Exhibit A at 160; *see also id.* at 6. The Judges agreed with SoundExchange that these portions of the Initial Determination "reveal record company negotiating strategy, and would put the record companies at a competitive disadvantage if disclosed to the public." Redactions Order at 6.

SoundExchange seeks redaction of similar confidential information regarding negotiation strategy here. Mr. Kooker and Mr. Harrison testified regarding their companies' confidential negotiating strategies during restricted portions of the hearing and the Judges describe and quote from some of that testimony in the Order on SoundExchange's Motion for Rehearing. Specifically, the Order on Rehearing includes quoted testimony from Mr. Kooker regarding

Sony's view that iHeart's proposal was [redacted], it describes Sony's method of evaluating the proposal, and it characterizes Sony's reasons for rejecting that proposed deal.[3] Order on Rehearing at 12, fn. 17 (Feb. 10, 2016). Likewise, the Order on Rehearing quotes from Mr. Harrison's testimony that UMG [redacted] and specifically considered [redacted]. *Id.* at 12-13, fn. 17. These portions of the Order on Rehearing describe internal, confidential negotiating strategy and evaluations of proposed deals not previously made available to the public.[4]

The redactions that SoundExchange proposes protect confidential negotiating strategy that, if revealed, would give future counterparties a window into the reasoning behind record companies' negotiating positions. Doing so would create an information asymmetry that disadvantages the record companies and could result in their receiving less favorable terms. *See* SoundExchange's Reply in Support of Motion to Redact Portions of Initial Determination at 13-14; Declaration of Aaron Harrison (Jan. 6, 2016) ("Harrison Decl.") ¶ 4; Declaration of Charlie Lexton (Jan. 6, 2016) ("Lexton Decl.") ¶ 4. Accordingly, the record companies' interests in preventing disclosure strongly favor redaction and the information has not previously been made public. Redactions Order at 3, 6.

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[3] SoundExchange disagrees with the Judges' factual conclusion that the iHeart proposals to Sony and UMG were [redacted] proposals and disagrees with the Judges' characterization of why Sony and UMG may have rejected those proposals. In justifying the proposed redactions (which, if taken as true, reflect record companies' confidential negotiating strategy), SoundExchange is not conceding that the Judges accurately described those proposals or strategies.

[4] The Order on Rehearing admits as much, noting that Mr. Harrison was particularly "candid" in his testimony. *Id.* at 12, fn. 17.

II. Confidential Contractual Terms Merit Redaction Under Prior Precedent and Because Revealing Confidential Terms Would Place the Parties to Those Agreements at a Competitive Disadvantage.

The Order on Rehearing includes a few specific references to confidential contract terms that warrant redaction.[5] The Judges have previously granted redactions when the descriptions of confidential contract terms are "sufficiently specific to reveal important confidential information about the agreements." Redactions Order at 6; *see also id.* at 5-6. For example, the Judges granted redaction of the Initial Determination's description of a confidential deal term from the major record companies' agreements with Apple—that they included [redacted]. *Id.* at 6. The Judges concluded that this description was "sufficiently specific to reveal important confidential information about the agreements with Apple that could, if divulged, result in competitive harm to the record companies or to Apple." *Id.*

If confidential contract terms are disclosed, future counterparties in negotiations with the impacted record company would have a competitive advantage because they would come to the negotiation with knowledge of the terms to which that record company has previously agreed. *See* Harrison Decl.¶ 3; Lexton Decl.¶ 3; Declaration of Jeff Walker (Jan. 7, 2016) ("Walker Decl.") ¶ 3; Declaration of Ron Wilcox (Jan. 6, 2016) ("Wilcox Decl.") ¶ 3. Likewise, the record companies would be disadvantaged vis-à-vis their competitors (each other) because they would be privy to confidential information about contractual provisions and could either demand similar or more advantageous provisions from the same counterparties or use that knowledge to counteract any competitive advantage the record company may have gained from that provision.

[5] As described more fully below, these are: page 14 [redacted] and, on page 22, redaction of the parties names [redacted] in the discussion of their confidential deal terms regarding the treatment of confidential information.

The Redactions Order, consistent with the Protective Order, recognizes that these interests strongly favor redaction. *See* Redactions Order at 5-6; Protective Order at 1; *see also Nixon v. Warner Commc'n*, 435 U.S. 589, 598 (noting that records may be restricted from public access when it would be used "as sources of business information that might harm a litigant's competitive standing."). For the same reasons that the Judges' granted SoundExchange's proposed redactions to similar terms in the Initial Determination, SoundExchange's proposed redactions of confidential contract terms to the Order on Rehearing should be granted here.

On page 14 of the Order on Rehearing, the Judges describe a specific provision of the Pandora/Merlin Agreement that requires [redacted]." This is a specific reference to a contract term from a particular confidential agreement that has not previously been disclosed to the public. Just as the specific description of a confidential term from the majors' agreements with Apple warranted redaction, so too does this confidential term from the Pandora/Merlin Agreement.

The Judges' decision with regard to redaction of the anti-steering and MFN provisions from the Initial Determination provides additional guidance. *See* Redactions Order at 4-5. Although the Judges declined to grant redactions of non-specific discussions of anti-steering and MFN provisions because they found the existence of those terms as a general matter to be "public knowledge," *id.* at 4, the Judges nonetheless concluded that "the references in the Determination to *specific* anti-steering and MFN language in *particular* agreements are confidential" and warranted redaction, *id.* at 5 (emphasis added).[6]. Likewise, even if the fact that

[6] As a result, the Judges granted proposed redactions of specific descriptions of the anti-steering and MFN terms, including that one term covers "[redacted]" and that another term includes [redacted]". Redactions Order, Exhibit A at 113.

many agreements include annual escalations is generally known, the precise amount of an increase or measure of that increase [redacted]" Order on Rehearing at 14, is a specific confidential contract term and disclosure of that specific term would cause competitive harm. *See* Harrison Decl.¶ 3; Lexton Decl.¶ 3; Walker Decl. ¶ 3; Wilcox Decl. ¶ 3.

Later on page 14 of the Order on Rehearing, the Judges discuss the specifics of the annual rate escalations in the Pandora/Merlin and iHeart/Warner agreement noting that they [redacted] and [redacted]. These references also go beyond a general acknowledgement of annual escalations and instead [redacted]. The specific nature of the annual escalations, including [redacted] is confidential and has not previously been publicly disclosed. As with the redactions of similarly specific references to confidential contract provisions in the Initial Determination, the record companies' interests in nondisclosure—to prevent competitors and counterparties from gaining competitively advantageous knowledge as to the confidential contract provisions to which they have previously agreed—strongly favor redaction of these terms from the Order on Rehearing. *See* Harrison Decl.¶ 3; Lexton Decl.¶ 3; Walker Decl. ¶ 3; Wilcox Decl. ¶ 3.

On page 22, the Judges describe evidence of confidential contract provisions from two specific direct licenses—[redacted] and [redacted]—that the Judges determined support the changes to regulations regarding the handling of confidential information. Rather than redacting the descriptions of the confidential contract terms, SoundExchange proposes redaction of the identities of the parties to those confidential agreements. This is consistent with

the Judges' guidance to elect "only one method of redaction"—as between confidential contractual information and the identities of the parties to that contract. Redactions Order at 7.

III. Rates Adjusted from Confidential Agreements Merit Redaction Under Prior Precedent and Because Revealing Such Rates Would Place the Parties to Those Agreements at a Competitive Disadvantage.

The Judges should redact the references[7] to $[redacted] and $[redacted] from the Order on Rehearing because the Judges redacted these same rates in the Initial Determination. *See* Redaction Order, Exhibit A at 200. These rates have not previously been available to the public and, if disclosed, would place the parties to the agreements from which they are derived at a competitive disadvantage.

As explained above, the record companies have a compelling interest in maintaining the confidentiality of competitively sensitive contract terms that strongly favors redaction. These interests are heightened when the term in question is a rate—one of the more important terms in any licensing agreement and certainly one of the most heavily negotiated terms. If revealed, a competitor or future counterparty could use the specific rate as a benchmark or anchor rate to leverage the negotiation. This information asymmetry would place the party whose rates were made public at a competitive disadvantage.

That these rates are adjusted, rather than mirror images of the rates that appear in the agreements, does not change the analysis. The competitive impact is the same for two reason: (1) the adjustment is relatively minor and, if disclosed, would give competitors and counterparties a near estimation of the confidential rates to which they agreed; and (2) coupled with the Determination's reasoning, a counterparty would be able to back out any adjustment (or

[7] These references appear in the first paragraph on page 3, footnote 6 on page 6, the last paragraph on page 9, the last paragraph on page 10 continuing onto page 11, and twice in the first full paragraph on page 11.

even use that adjustment to their advantage in negotiations). Revealing these rates would arm counterparties (either record company or digital streaming service) with an exact rate figure to use as leverage in future negotiations—whether for a similar, higher or lower rate depending on their negotiating position. *See* Harrison Decl.¶ 3; Lexton Decl.¶ 3; Walker Decl. ¶ 3; Wilcox Decl. ¶ 3.

CONCLUSION

For the foregoing compelling reasons, SoundExchange requests that the Judges grant its Motion to Redact Portions of the Order on SoundExchange's Motion for Rehearing as identified in the attached Exhibit A.

Dated: February 16, 2016

Respectfully submitted,

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EXHIBIT A

RESTRICTED – Subject to Protective Order in Docket No. 14-CRB-0001-WR (2016-20) (Web IV)

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I caused a copy of the foregoing [PUBLIC] — **SOUNDEXCHANGE'S MOTION TO REDACT PORTIONS OF THE ORDER ON SOUNDEXCHANGE'S MOTION FOR REHEARING** to be served via electronic mail and first-class, postage prepaid, United States mail, addressed as follows:

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