

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

In the Matter of:

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR  
(2018-2022) (Remand)

**SOUNDEXCHANGE’S MOTION FOR EXPEDITED ISSUANCE OF  
SUBPOENA TO PRAGER METIS CPAs**

Pursuant to 17 U.S.C. § 803(b)(6)(C)(ix) and 37 C.F.R. § 351.9(e), SoundExchange, Inc. (“SoundExchange”) hereby requests that the Copyright Royalty Judges issue the subpoena attached as Exhibit A, commanding Prager Metis CPAs (“Prager Metis”) to provide fact testimony regarding so-called “defensive audits” conducted for Music Choice. Specifically, SoundExchange seeks a declaration from Prager Metis Partner Lewis Stark, who is the lead accountant involved in SoundExchange audits of Music Choice. Mr. Stark’s testimony would describe his experience examining Music Choice’s statutory royalty payments, how Music Choice’s defensive audits affected that process, and how Music Choice’s defensive audits differ from the royalty verification procedures that Prager Metis conducts on behalf of SoundExchange.

Mr. Stark is willing to provide this testimony, if he is permitted to do so. SoundExchange seeks this subpoena to ensure that Mr. Stark’s description of Music Choice’s “defensive audits” does not run afoul of Prager Metis’ legal obligations under a non-disclosure agreement between it and Music Choice’s auditor BDO USA, LLP (“BDO”).

## BACKGROUND

Mr. Stark is a Partner in the Royalty Audit and Compliance Department of Prager Metis. Mr. Stark has conducted independent royalty verification procedures at SoundExchange’s request, pursuant to 37 C.F.R. § 382.6 (2013), including an audit of Music Choice that was intended to cover Music Choice’s 2013-2016 royalty payments for its pre-existing subscription service (“PES”), as well as its business establishment service (“BES”). *Notice of Intent To Audit*, 82 Fed. Reg. 7878 (2017); *Notice of SoundExchange's Intent To Audit Music Choice's "Preexisting" Subscription Service and Business Establishment Service for CY 2016*, 82 Fed. Reg. 34554 (2017). Citing the “defensive audit” provision previously found at 37 C.F.R. § 382.6(e) (2013) and procedures performed by BDO, Music Choice refused to comply with several of Mr. Stark’s requests for information that he believed was important to verification of Music Choice’s royalty payments. Music Choice’s position in this proceeding is that it should continue to be able to withhold such information in future SoundExchange audits. *See Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 428-29 (D.C. Cir. 2020).

In discussions concerning that refusal in 2017, Music Choice permitted Mr. Stark to review BDO’s work papers subject to a non-disclosure agreement (the “NDA”). The NDA provides that Prager Metis may disclose information derived from BDO’s work papers to SoundExchange and Music Choice, but that – unless BDO consents or a court compels disclosure – this information may not be disclosed to third parties.<sup>1</sup> Exhibit B, BDO NDA. Apparently concerned about allowing Mr. Stark to share clearly relevant information with the Judges, BDO has refused to

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<sup>1</sup> On March 31, 2021, Prager Metis contacted BDO to seek permission to provide the testimony and provided BDO with a copy of the applicable Protective Order, seeking BDO’s consent.

provide consent and threatened to enforce the NDA. Exhibit C, April 9, 2021, Letter from BDO to Prager Metis.

As a result, Mr. Stark and Prager Metis have informed SoundExchange that they are unable to provide the requested testimony absent a subpoena or order from the Judges.

### **ARGUMENT**

SoundExchange respectfully requests that the Copyright Royalty Judges (“Judges”) issue a subpoena to Prager Metis compelling Mr. Stark’s testimony. The Judges have the power to issue a subpoena pursuant to 17 U.S.C. § 803(b)(6)(C)(ix), “if the Copyright Royalty Judges’ resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things.” 17 U.S.C. § 803(b)(6)(C)(ix); *see also Order Granting in Part Licensee Services’ Motion for Expedited Issuance of Subpoenas to Apple, Inc.*, Docket No. 14-CRB-0001-WR (2016-2020), at 3 (April 10, 2015); *Order Denying Issuance of Subpoenas for Nonparty Witnesses*, Docket No. 2009-1 CRB Webcasting III, at 2 n.1 (March 5, 2010) (the Judges’ regulations do not “prohibit[] them from issuing a subpoena at [the discovery] stage, or any stage, of the proceeding”).

Two conditions must be met to establish that the Judges would be “substantially impaired” in the absence of the requested testimony:

*First*, the testimony, documents, or other materials sought in the proposed subpoena must be central to the resolution of the proceeding (or lead to the disclosure of such information).

*Second*, the party seeking a subpoena must demonstrate that it is unlikely that the testimony, documents, or other materials sought in the proposed subpoena will be obtained and presented to the Judges unless the subpoena issues.

*Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters*, Docket No. 14-CRB-0001-WR (2016-2020),

at 3 (April 3, 2014). As the Judges have previously explained, “because these proceedings are, by statute, adversarial in nature, the Judges recognize that a substantial impairment of a party’s case may result in an absence of evidence or testimony in the record that, derivatively, could substantially impair the Judges in establishing marketplace rates and terms as required by law.” *Order Granting in Part Licensee Services’ Motion for Expedited Issuance of Subpoenas to Apple, Inc.*, Docket No. 14-CRB-0001-WR (2016-2020), at 3 (April 10, 2015).

Each of these conditions is met here. The desired testimony from Mr. Stark bears on one of the two central disputes in this remand proceeding: the effect of Music Choice’s so-called defensive audits. *See Order Regarding Proceedings on Remand*, Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (Remand), at 1 (December 1, 2020) (“[T]he scope of remand proceedings is limited to the issues of the extent to which Music Choice’s Internet transmissions are covered by the PSS license *and the effect of so-called ‘defensive audits’*”) (emphasis added). Having examined BDO’s work papers, Mr. Stark is uniquely positioned to describe BDO’s procedures, compare BDO’s procedures to those that Prager Metis would have used in the absence of a defensive audit, and explain the significance of the differences to his work for SoundExchange. Mr. Stark’s testimony will thus address the effect of Music Choice’s defensive audit: On this basis, it denied Prager Metis access to information necessary to conduct an independent verification procedure and frustrated SoundExchange’s ability to get information necessary to assessing Music Choice’s PES royalty obligations and payments. Mr. Stark’s testimony will, in short, show precisely what needed information was made unavailable to SoundExchange.

Ultimately, Mr. Stark’s testimony will show that Music Choice’s defensive audits are not an adequate replacement for audits conducted by SoundExchange, particularly where procedures with a narrow scope are used to block procedures with a broader scope. This information will

assist the Judges in evaluating the proposed changes to the defensive audit provision at issue in this remand proceeding. *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 430 (D.C. Cir. 2020).

Absent a declaration from Mr. Stark, it is unlikely that this testimony will be presented to the Judges. Both BDO and Music Choice have refused to provide documents or information sufficient to assess the scope of the examination by BDO.<sup>2</sup> Thus, the testimony from Mr. Stark—which would depend on information derived from BDO work papers and covered by the NDA—is the only possible source of this evidence.

There is also little risk that Mr. Stark’s testimony would harm or prejudice BDO. SoundExchange would designate any such testimony about Music Choice’s defensive audit conducted by BDO as Restricted, pursuant to the Protective Order entered on June 15, 2016. A Restricted designation would effectively limit such testimony to outside counsel for SoundExchange, outside counsel for Music Choice, and the Copyright Royalty Judges and their staff.<sup>3</sup> As noted, under the NDA, Prager Metis is already permitted to disclose the information to both SoundExchange and Music Choice. Exhibit B, BDO NDA. Thus, if this subpoena were to

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<sup>2</sup> BDO has refused to consent to use of information derived from its work papers in this proceeding. And, after conferring with counsel for SoundExchange, Music Choice has refused to provide any discovery about its defensive audits, except engagement letters and final reports that provide insufficient insight into the scope and procedures employed. *See* Exhibit D, April 5, 2021 Email from M. Wheeler-Frothingham to A. Cherry (calling documents related to defensive audits “irrelevan[t]” and stating that “Music Choice believes that it is totally inappropriate for SoundExchange to try to use this remand discovery to engage effectively in a meta-audit, including for periods that have already long closed and new periods for which an audit has already been noticed”).

<sup>3</sup> The other party that participated in the underlying proceeding, SiriusXM, Inc., is no longer participating in this remand proceeding since the remaining issues on remand do not concern it. As a result, there is no reason SiriusXM should be served with the Restricted versions of SoundExchange’s briefing in this proceeding or have access to Mr. Stark’s declaration.

issue, the only persons that would be permitted to review this testimony that are not permitted to do so under BDO's NDA are the Copyright Royalty Judges and their staff. It is difficult to see how BDO could possibly be harmed by the Judges being permitted to hear Mr. Stark's testimony about Music Choice's defensive audits that includes some information he learned from reviewing BDO's work papers. By contrast, refusing to grant this subpoena and thus preventing SoundExchange from introducing this testimony would prejudice SoundExchange's ability to fairly litigate the defensive audit issue.

BDO should not be permitted to hold Mr. Stark's testimony hostage in this proceeding. Permitting BDO to do so violates the spirit of the Protective Order that is in place in this proceeding. The Protective Order instructs that Participants in the proceeding are not allowed to withhold documents based on private agreements with third parties:

Responsive, non-privileged, discoverable documents will not be withheld from production solely because they are subject to confidentiality restrictions imposed by private agreement with another entity, whether or not that entity is a Participant to this proceeding. Participants are hereby ordered not to withhold from production responsive, non-privileged, discoverable documents on the grounds that they are subject to confidentiality provisions in private agreements with third parties.

Protective Order, *In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)*, Docket No. 16-CRB-0001 SR/PSSR (2018-2022), at 6 (June 15, 2016) (noting that "such documents may be designated Restricted" and be subject to the Protective Order"). There is no reason why the same logic behind this provision should not also apply to testimony based on confidential documents.

### **CONCLUSION**

For the foregoing reasons, the Judges should grant this motion and issue the subpoena attached as Exhibit A, ordering Prager Metis to make available Mr. Stark's testimony, including testimony the relies on information derived from BDO's work papers, notwithstanding the BDO

NDA. In light of the upcoming deadlines in this case, including a June 30, 2021 deadline for filing substantive briefs, SoundExchange requests that the Judges issue the subpoena promptly after conclusion of the briefing, to the extent possible.

Dated: April 26, 2021

Respectfully submitted,

/s/ Emily L. Chapuis

Emily L. Chapuis (D.C. Bar # 1017600)

JENNER & BLOCK LLP

1099 New York Avenue NW, Suite 900

Washington, DC 20001

(202) 639-6000

*Counsel for Plaintiff SoundExchange, Inc.*

# **EXHIBIT A**



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

In the Matter of:

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR  
(2018-2022) (Remand)

**SUBPOENA TO SUBMIT TESTIMONY**

<b>THE COPYRIGHT ROYALTY BOARD TO:</b>	<i>(name and address of person being subpoenaed)</i>  Prager Metis CPAs 14 Penn Plaza, Suite 1800 New York, NY 10122
At the Request of: <i>(party name)</i>  <b>SoundExchange, Inc.</b>	<i>(name, address, and telephone number of contact person)</i>  Emily Chapuis Jenner & Block LLP 1099 New York Ave, NW, Suite 900 Washington, D.C. 20001 (202) 638-6000

**YOU ARE COMMANDED** to appear at the time, date, and place set forth below to submit testimony in this royalty rate-setting proceeding. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the matters set forth in **Schedule A**.

Place:  TBD	Date and Time:
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Issuing Officer Signature and Title:  <i>On behalf of the Copyright Royalty Judges</i>	Date:
Issuing Officer’s Name, Address, and Telephone Number:	

<b>Proof of Service</b>		
	Date	Place
Served on (Print Name)		Manager or Service
Served by (Print Name)		Title
<b>Declaration of Server</b>		
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.</p> <p>Executed on this ____ day of _____, 2021</p> <div style="text-align: right; margin-top: 20px;"> <p>_____</p> <p>Signature of Server</p>    <p>_____</p> <p>Address of Server</p> </div>		

## **Schedule A**

### **Definitions**

1. “Defensive Audit” refers to an audit or any similar verification procedure initiated by Music Choice in the ordinary course of business that Music Choice contends served or should serve as an acceptable verification procedure in lieu of a verification of Music Choice’s statutory royalty payments by an auditor selected by SoundExchange pursuant to audit regulations adopted by the Copyright Royalty Judges.

### **Topics for Testimony**

1. Prager Metis CPAs’ royalty verification procedures on behalf of SoundExchange, including the effect of Music Choice’s use of so-called Defensive Audits on Prager Metis CPAs’ ability to conduct such royalty verification procedures.
2. The Defensive Audit conducted by BDO USA, LLP (“BDO”) for Music Choice and the effect of any such audit on Prager Metis CPAs’ ability to conduct a royalty verification procedure intended to reflect the period from 2013 to 2016.
3. The scope of the royalty verification procedures Prager Metis conducts on behalf of SoundExchange, as compared to the scope of Defensive Audits conducted for Music Choice.

# **EXHIBIT B**



Tel: 215-564-1900  
Fax: 215-564-3940  
www.bdo.com

1801 Market Street, Suite 1700  
Philadelphia, PA 19103

October 6, 2017

Prager Metis CPAs, LLC  
14 Penn Plaza  
Suite 1800  
New York, NY 10122

Ladies and Gentlemen:

Music Choice has given us permission to allow Prager Metis CPAs, LLC ("Prager Metis"), who has been engaged by SoundExchange, Inc. ("SoundExchange") to conduct a royalty examination of Music Choice's "Pre-Existing Subscription Services", access to our working papers prepared in connection with our audits of the monthly residential gross revenue of Music Choice and the monthly statutory royalties owed and paid to SoundExchange for the years ended December 31, 2016, 2015 and 2014 in accordance with the applicable regulations under Title 37 of the Code of Federal Regulation Part 382 ("SoundExchange PESS Regulations"). Subject to the following, we will allow Prager Metis access to our working papers.

Our residential royalty audits for years ended December 31, 2016, 2015 and 2014 were conducted in accordance with auditing standards generally accepted in the United States of America, the objective of which is to form an opinion on whether the schedules of monthly residential gross revenue and statutory royalties owed and paid to SoundExchange, which are the responsibility of Music Choice's management, present fairly, in all material respects, the residential royalty amounts owed and paid to SoundExchange in accordance with SoundExchange PESS Regulations. Under those standards, we have the responsibility, within the inherent limitations of the auditing process, to plan and perform our audits to obtain reasonable assurance about whether the schedules of monthly residential statutory royalties owed and paid to SoundExchange are free of material misstatement, whether caused by error or fraud, and to exercise due care in the conduct of our audits. The concept of selective testing of the data being audited, which involves judgment regarding both the areas to be tested and the nature, timing, and extent of the tests to be performed, has been generally accepted as a valid and sufficient basis for an auditor to express an opinion on the schedules of monthly residential royalties. Thus, our audits, based on the concept of selective testing, is subject to the inherent risk that material errors or fraud, if they exist, will not be detected. In addition, an audit does not address the possibility that material errors or fraud may occur in the future.

#### **ACKNOWLEDGMENTS AND AGREEMENTS**

Because Prager Metis' review of our working papers is undertaken solely for the purpose described above, Prager Metis agrees that (a) the information obtained from the review will not be used for any other purpose, (b) it is unable to, and will not, comment orally or in writing to anyone, other than SoundExchange and Music Choice, as a result of that review as to whether our audits were performed in accordance with auditing standards generally accepted in the United States of America except as required by law. Furthermore, Prager Metis agrees that this information is proprietary and confidential and that BDO USA, LLP retains all rights, title, and interest in this information.

**NO RIGHTS AS A RESULT OF ACCESS**

Upon request and reimbursement of associated costs, copies will be provided to Prager Metis of those working papers that provide factual information about Music Choice's residential royalty payments to SoundExchange for the years ended December 31, 2016, 2015 and 2014. Prager Metis agrees to subject any such copies or information otherwise derived from our working papers to its normal policy for retention of working papers (if more restrictive retention is requested, so describe) and protection of client confidential information consistent with Prager Metis' obligation under its separate Non-Disclosure Agreement with Music Choice. Furthermore, in the event of a third-party request for access to its working papers prepared in connection with your audit, it agrees to obtain our permission before voluntarily allowing any such access to our working papers or information otherwise derived from our working papers, and to obtain on our behalf any releases that it obtains from such third party. Prager Metis also agrees to advise us promptly of and, in any event, in advance of compliance with, any request by subpoena, summons, or court order for access to its working papers that include copies of our working papers or information otherwise derived therefrom.

Please confirm your agreement with the foregoing by signing and dating a copy of this letter and returning it to us.

Very truly yours,

*BDO USA, LLP*

The foregoing is accepted:

Prager Metis CPAs, LLC

By:  Date: 10/6/17

# **EXHIBIT C**



Tel: 212-515-5404  
Fax: 212-885-8116  
[abunn@bdo.com](mailto:abunn@bdo.com)

100 Park Avenue  
New York, NY 10017

**Andrew O. Bunn**  
Associate General Counsel

April 9, 2021

(By email [jfox@pragermetis.com](mailto:jfox@pragermetis.com))

Joseph Fox  
General Counsel  
Prager Metis CPAs  
14 Penn Plaza, Suite 1800  
New York, NY 10122

Re: ***Request for Testimony- SoundExchange and Music Choice, United States Copyright Royalty Judges- Docket No. 16-CRB-0001***

Dear Mr. Fox:

This is in response to your email correspondence to Judith Grimmer, Deputy General Counsel of BDO USA, LLP (“BDO”), dated March 31, 2021, and its attachments. In that correspondence, you asked if BDO has any objection to Prager Metis CPAs’ proposed production of its auditor, Lewis Stark, for testimony before the United States Copyright Judges, in response to a demand from Sound Exchange.

BDO does not waive any of the terms of the Access Letter from BDO to Prager Metis CPAs dated October 6, 2017, and countersigned by your firm on the same date, a copy of which was attached your email correspondence to Ms. Grimmer (the “Access Letter”). To the extent Prager Metis produces, or Mr. Stark divulges in his testimony, any information or documents provided by BDO pursuant to the Access Letter, BDO reserves all rights, claims and remedies against Mr. Stark and Prager Metis for any claim, loss, damages, or expenses, including any and all litigation costs or attorneys fees that may be incurred by BDO as a consequence thereof.

Prager Metis should, at a minimum, ensure that any documents it obtained pursuant to the Access Letter are designated as Restricted Materials pursuant to the terms of the Protective Order that was attached to your email correspondence. This instruction, as with the remainder of this letter, should not be construed as consent by BDO to any such disclosure, which consent is expressly denied.

Very truly yours,

*Andrew O. Bunn*

**Andrew O. Bunn**  
Associate General Counsel



# **EXHIBIT D**

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**From:** Wheeler-Frothingham, Margaret <MWheelerFrothingham@mayerbrown.com>  
**Sent:** Monday, April 5, 2021 5:36 PM  
**To:** Cherry, Andrew B.; Fakler, Paul  
**Cc:** Chapuis, Emily L.  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**External Email – Exercise Caution**

Andrew,

I write in response to your emails regarding our meet and confer calls. Our responses to the issues highlighted in your emails, or clarifications to the memorialization of our calls, are below:

**I. Time Frame:**

Music Choice agrees not to limit (and has not limited) the timeframe for the audit-related documents it has agreed to produce. But while the temporal scope of these documents is not limited to 1996-1998 and 2018-present, the nature of the documents Music Choice has agreed to produce (e.g., final audit reports and audit engagement letters), remains unchanged.

With respect to non-audit related documents, Music Choice has only agreed to search for and produce documents from the time periods 1996 – 1998 and 2018 to the present. However, with respect to affiliate agreements, amendments and related documents, Music Choice’s search and production includes any agreements and amendments that were in effect during those time periods – and so the produced affiliate agreements also cover much of the interim time periods, as these affiliate agreements are often long-term agreements.

SoundExchange still has not explained how information regarding changes to the internet-related parts of the Music Choice consumer-facing service during the intervening time period 1999-2017 could be relevant to the issues on remand. And Music Choice is under no obligation to search for or produce documents that are not relevant to the limited scope of the remand. This is not only a burden issue – it is first and foremost a relevance issue. However, to the extent Music Choice has found documents from that interim time period that include any substantive information about the internet transmissions as they actually existed in 1998 or before, Music Choice has not withheld those documents based on its time frame objection, because it recognizes that such documents would be relevant. With respect to SoundExchange’s proposal to limit the scope of documents during the irrelevant interim time period to those related to the introduction of “major features,” Music Choice notes that this would not significantly lessen the burden of the request. There is no practical way to limit a search to capture only documents related to “major features” (even if that term had a clear meaning in this context, which it does not). Thus, responding to this request would still require the manual review of a large volume of documents to determine whether any references to internet features were “major” or not, or if the applicable keywords actually related to the service at issue in the remand.

**II. Communication RFPS:**

You have proposed a narrowed scope of requests for certain categories of communications. As explained for each category below, the proposed scope is not acceptable to Music Choice.

**- Communications regarding the eligibility of Music Choice’s PSS Internet Service for the grandfathered PSS rate**

Music Choice stands on its objection to producing communications regarding the eligibility of Music Choice’s PSS Internet Service for the grandfathered PSS rate. First, such communications – if they existed- would inherently be communications about a legal issue, and thus most likely would be privileged. Second, even if such communications were not privileged, they would not be relevant. There is no “willfulness” or other intent component to the factual questions the Judges must

evaluate on remand. The relevant factual determinations are what Music Choice was *actually doing via internet in 1998* and what they are doing in the current rate period. If, hypothetically, there existed an internal e-mail or memorandum between Music Choice employees stating their belief that the internet transmissions fell within the scope of the PSS license, or if there were an email with an employee's opinion that the internet transmissions fell outside the scope, neither would be relevant to the legal determination of whether those transmissions were eligible for the license. Only facts about the actual service offering itself would be relevant. Put differently, the Judges must make their determination based on what Music Choice was in fact doing – not how its employees assessed what it was doing – in 1998 and today. And so the lack of relevance alone renders this request objectionable. But even if SoundExchange were able to provide some argument (which it has not) that these documents are tangentially relevant to the evaluation of the questions on remand, the facts that 1) this requests seeks communications spanning 26 years, and 2) any responsive documents would almost certainly be privileged, render the request inappropriate. To be clear, Music Choice has agreed to produce (and now has produced) a large number of more formal documents, such as its board presentations, that reference the nature of its internet transmissions in the 1996-1998 period. Music Choice will not also search for communications about legal opinions that would not contain relevant information and would likely contain privileged information.

- **Communications Regarding Music Choice's PSS Internet Service as it existed in 1998**

Music Choice has produced numerous documents, such as board presentations, minutes, and business plans, to the extent those documents discuss Music Choice's internet transmissions as they existed in 1998. Searching for any internal communications (which would, by nature, be from 25 years ago) that *might* reference those transmissions or features of the service would be looking for a needle in a haystack, and would be inherently burdensome. And that search would be unlikely to provide any *additional* relevant evidence beyond what is already memorialized in the more formal documents we have produced. Any such search would be especially unlikely to result in the discovery of any relevant, non-duplicative information because our client no longer has its emails from the 1996-1998 period. And non-privileged communications by the Music Choice business *about* the 1996-1998 period are not likely to have been generated in recent years. Music Choice will stand on its objections that a search for these documents would be unduly burdensome in proportion to the relevant information that might be discovered – which is likely to be duplicative, if it exists at all – and in light of the fact that any such documents from recent times that do exist are likely privileged.

- **Communications Music Choice's development and expansion of its Internet service**

As stated above, any development or expansion of the internet based offerings during the period 1998 through 2018 are not relevant to the determination the Judges have been instructed to undertake: what Music Choice's internet transmissions were like in 1998, and what they are like in the rate period at issue. For the periods relevant to this remand, Music Choice has already produced its board presentations, business planning documents, screenshots of its service over the relevant periods of time, marketing presentations, and other formal documents describing or showing changes to its service. Significant new features of and other changes to Music Choice's services are typically discussed in these types of documents. They are not typically discussed, other than tangentially, in e-mails and other communications. The additional search for and review of communications that are likely to provide at best a handful of tangential references to the same features discussed in the more formal documents already produced, would not be likely to result in the production of additional relevant information. And such a search would be very burdensome for the period 2018 through the present. Given the nature of email communication in this day and age, emails happening to mention "internet" would need to be manually reviewed to determine whether they contain responsive information related to any actual features at issue in this remand, and the search and review for such documents would thus be extremely burdensome. And such an effort would not be likely to provide useful information beyond that already provided in the more formal documents Music Choice has produced. Music Choice will stand on its objections.

**III. SoundExchange's RFPs:**

On our March 19 call, we discussed several of SoundExchange's specific requests. Below I have clarified some points in your memorialization of that discussion.

- **RFPs 5 and 6 (Features of Internet Service)**

- o Music Choice has objected that producing *all* documents in response to these requests would be unduly burdensome and disproportionate to the needs of the case, and has stated that it will instead produce

representative documents sufficient to show the information sought. You have asked for a written follow-up explaining why producing all documents responsive to Requests 5 and 6 would be too burdensome.

As I have explained on our meet and confer calls, and in our written objections, a search for *all* documents, of any kind, in any way related to the internet offerings, marketing materials, or press releases – all from 25 years ago – is *inherently* burdensome. As I have previously explained to you, the search for those documents would require re-opening the currently closed Music Choice office and having employees go into that office during a still-ongoing pandemic to search (again) through boxes of decades old documents to identify each one that touches upon the subject matter in some way. And SoundExchange has not explained how the request for *all* documents is likely to increase the production of non-duplicative relevant information as compared to the production of representative documents or documents sufficient to show the information sought. That said, as a compromise, Music Choice agrees to produce (and has produced) any actual marketing materials or press releases for the internet service offered during the 1996 – 1998 timeframe, to the extent it was able to locate any such documents through a reasonable search.

Regarding documents that Music Choice has agreed to produce showing what its internet service was like in 1998, you have asked us to confirm in writing what this category of documents includes and what it excludes. This category of documents includes formal documents such as board presentations, minutes, screen design documents (including advertising, internal marketing documents, screenshots, and the like), and other internal strategy documents or partner-facing documents that substantively describe any aspect of the internet service as offered in 1996 - 1998. As noted above this includes any marketing presentation materials or press releases related to the internet offering, to the extent these documents still exist and could be located by a reasonable search. With respect to detailed, back-end engineering documents, SoundExchange has not explained how these documents would be likely to provide relevant information.

- **RFP 13 (PSS Eligibility)**

- o You have asked us to confirm that any documents responsive to this request are either privileged or already in SoundExchange's possession, custody, and control. As we have previously noted, eligibility for the PSS license is a legal question. And, again, it is inherently unlikely that Music Choice would have a non-privileged communication on a legal topic of that nature. More important, if any Music Choice employees *did* have, e.g., communications providing their personal opinions on that legal question, those would not be relevant – nor has SoundExchange explained how Music Choice's employees' opinion on that legal question could be relevant. To the extent you refer to third-party communications which we have identified to be in your possession, we refer you to the correspondence with RIAA regarding Music Choice's internet transmissions, produced and used at trial.

- **RFP 14 (Allocation of Costs and Revenues Among Service Types):**

- o Regarding SoundExchange RFP 14, which seeks "[d]ocuments sufficient to show and substantiate Music Choice's allocation of costs and revenues between lines of business and different types of service offerings," you have clarified that this RFP seeks information regarding Music Choice's noninteractive audio-only subscription transmissions only, with costs and revenues broken down by type of transmissions (e.g. internet or non-internet based) and distributor. Music Choice does not agree to produce documents responsive to this RFP, even as clarified. First, even this slightly more narrow subset of information is irrelevant to the question of Music Choice's internet transmissions' eligibility for the PSS license rate and terms. Second, as the affiliate agreements Music Choice has produced show (and as Music Choice has stated repeatedly throughout the underlying proceeding, referral briefing, and on appeal), there are no separate payments for the internet transmissions, so Music Choice does not separately track revenue or costs for the internet transmission in its financial statements. SoundExchange can verify this by looking at the years of financial documents Music Choice has already produced in this proceeding.

- **RFPs 15 and 16 (Audit Documents):**

- o Music Choice has taken the position that it will only produce final audit reports and audit engagement letters. This limitation is not acceptable to SoundExchange. SoundExchange argues that it is entitled to any audit-related documents that reflect the scope and conduct of the auditors, including all documents from its defensive audits that Music Choice or its auditors provided to the independent auditors engaged by SoundExchange.

Music Choice believes that the documents it has agreed to produce – and has produced – are sufficient to show the scope and conduct of the auditors, and that production of, e.g., auditor work papers is not called for. Without agreeing that the scope and methodology employed in specific historical audits are relevant to the narrow scope of this remand, Music Choice confirms that the scope and methodologies for these audits are clearly set out in the audit reports themselves – which Music Choice has produced. The engagement letters with the auditors, which letters Music Choice has also produced, provide additional detail on these issues. But this proceeding is not an audit. Any of the additional detailed information SoundExchange seeks is even less relevant to the only audit-related question on remand: whether the defensive audit provision in the PSS license terms should be changed. Music Choice believes that it is totally inappropriate for SoundExchange to try to use this remand discovery to engage effectively in a meta-audit, including for periods that have already long closed and new periods for which an audit has already been noticed. And while you represented by phone that a meta-audit was not SoundExchange’s intent, given the irrelevance of this information to the current remand, that is certainly the effect of these requests.

Even if SoundExchange believed that Music Choice’s audits have not satisfied the regulatory requirements for a defensive audit (a proposition Music Choice would emphatically reject), a rate proceeding is not the appropriate forum to resolve such a dispute – nor do the Judges have jurisdiction to resolve that kind of dispute. Music Choice has agreed to produce the audit reports and engagement letter, notwithstanding their irrelevance, as a good faith compromise. But it will not allow SoundExchange to go on a fishing expedition to revisit substantive issues from closed audit periods or to preview substantive issues related to the upcoming audit of Music Choice’s PSS, which we understand is scheduled to begin next week.

- **RFP 18 (Direct Licenses)**

- o You have asked us to confirm whether Music Choice will produce all direct licenses for its PSS that were in effect in 1998 (regardless of when the agreement was entered), as well as those that are in effect for the current rate period. Music Choice will stand on its objections to this request. SoundExchange has not explained how any direct licenses would be relevant. Music Choice therefore does not agree to waive its objections. However, we can represent that Music Choice has never entered into any direct licenses (as it understands that term) for its PSS and has only relied on the statutory PSS license for transmissions covered by that license.

- **RFP 19 (Agreements)**

- o For RFP 19, you have asked us to “please provide the same confirmation requested with respect to RFP18.” We are confused by your statement. RFP 19 only asks for agreements between Music Choice and its affiliates. Direct licenses have nothing to do with that – and that topic is covered in RFP 18 above.

For clarity, we confirm that we have produced all agreements with Music Choice’s affiliates/distributors that relate to Music Choice’s consumer-facing non-interactive audio channels – including amendments, extensions, renewals, notices, and the like. To the extent there are any such documents specific to trial programs or program roll-outs for that consumer subscription service, they have been produced.

- **RFP 22 (Financial Analyses)**

- o Regarding documents concerning financial analyses, you propose that if Music Choice will agree to produce documents responsive to SoundExchange’s proposed compromises for RFPs 14, 15, and 16, then SoundExchange would accept Music Choice making no further production in response to Request 22.

Music Choice does not so agree. SoundExchange has not explained how the documents enumerated in RFP 22 would be relevant to the inquiry in this remand. They are not. Nor are the documents Music Choice has objected to and refused to produce in response to RFPs 14 – 16. Music Choice will stand on its objection.

Best,

**Margaret L. Wheeler-Frothingham**

*Associate*

*Pronouns: she/her*

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**From:** Cherry, Andrew B. <ACherry@jenner.com>

**Sent:** Friday, March 26, 2021 12:29 PM

**To:** Wheeler-Frothingham, Margaret <MWheelerFrothingham@mayerbrown.com>; Fakler, Paul <PFakler@mayerbrown.com>

**Cc:** Chapuis, Emily L. <EChapuis@jenner.com>

**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**\*\*EXTERNAL SENDER\*\***

Hi Margaret,

Thanks for taking the time to talk last week. Please find below a summary of our discussion last week, including the outstanding points of dispute regarding document production:

**Timeframe:** Please confirm that Music Choice is amenable to the following agreement with regard to timeframe:

- For non-audit-related requests, SoundExchange is open to a timeframe limitation that applies equally to both parties.
- **We are open to limiting the parties' respective searches for non-audit-related documents to encompass (1) 1996-2000, (2) 2004-05, and (3) 2018-present.** As you know, there was an exchange of letters regarding Music Choice's internet service in 2004 and 2005; a search for other documents from that time period is necessary to assess the state of Music Choice's service and any changes that may have informed that exchange.
- The foregoing limitation – which is intended to mitigate the burden of document collection and review – is not itself a basis for withholding responsive documents. In other words, if - incident to other search efforts - the parties discover responsive documents outside of the identified date ranges, they agree not withhold such documents on the basis of timeframe alone.
- Neither party will impose a time frame limitation on its searches for audit-related documents.

**Communication RFPs:** The parties discussed possible limitations to each side's broad requests for communications. See SX RFP 2-3, MC RFP 2. As stated in our March 17 email, SoundExchange is open to mutually narrowing these requests to encompass non-privileged communications related to:

- (1) The eligibility or ineligibility of Music Choice's PSS Internet Service for the grandfathered PSS rate;
- (2) Music Choice's PSS Internet Service as it existed in 1998; and
- (3) Music Choice's development and expansion of its Internet service.

**Please confirm that this scope is acceptable to Music Choice.**

**SoundExchange's RFPs:** On our March 19 call, we also discussed several of SoundExchange's specific requests. The following memorializes that discussion as well as outstanding questions from our March 11 call.

- **RFPs 5 and 6 (Features of Internet Service)**

- Music Choice has objected that producing all documents in response to these requests would be unduly burdensome and disproportionate to the needs of the case, and has stated that it will instead produce only a subset of sufficient or representative documents.
  - SoundExchange notes that your objection is particularly puzzling, given that we tailored the requests narrowly and we requested only documents "sufficient to show" for all but a limited subset. SoundExchange requested "all" documents" responsive to 5 (internet service offerings you provided on or before July 31, 1998), 6(b) (marketing materials re your internet service) and 6(c) (press releases re your internet service.)
  - **You committed to providing written follow-up explaining why producing additional documents responsive to Requests 5 and 6 would be too burdensome. Will you please provide us with that information so that we can assess Music Choice's objection?**
- Additionally, you explained that, regardless of the foregoing objection, Music Choice does intend to produce all documents showing what its internet service was like in 1998. **Will you please confirm in writing what this category of documents includes (documents describing consumer-facing features, major technological changes, etc.) and what it excludes?**

- **RFP 13 (PSS Eligibility)**

- **You indicated that it might be the case that any documents responsive to this request are either privileged or already in SoundExchange's possession, custody, and control. Will you please confirm?**

- **RFP 14 (Allocation of Costs and Revenues Among Service Types):**

- Music Choice has to date refused to provide any documents in response to this request, which seeks "[d]ocuments sufficient to show and substantiate Music Choice's allocation of costs and revenues between lines of business and different types of service offerings." While we believe this request is already quite narrow, in that it seeks only documents "sufficient to show," you asked us to clarify in writing what it entails.
- To be clear, RFP 14 seeks information on Music Choice's noninteractive audio-only subscription transmissions only, with costs and revenues broken down by type of transmissions (e.g. internet or non-internet based) and distributor.
- **Please let us know whether Music Choice will produce responsive documents in light of that clarification.**

- **RFPs 15 and 16 (Audit Documents):**

- Music Choice has taken the position that it will only produce final audit reports and audit engagement letters. This limitation is not acceptable to SoundExchange. At a minimum, SoundExchange is entitled to any audit-related documents that reflect the scope and conduct of the auditors, including all documents from its defensive audits that Music Choice or its auditors provided to the independent auditors engaged by SoundExchange. We understand that at the time of the 2016 audit, Music Choice provided its work papers to SoundExchange's auditors, among other documents.
- Music Choice said they would take our position under advisement. **Please let us know if your position on this limitation has changed, or if we are at an impasse with regard to documents beyond engagement letters and final reports.**

- **RFP 18 (Direct Licenses):**

- **Were you able to confirm that Music Choice will produce all direct licenses that were in effect in 1998 (regardless of when the agreement was entered), as well as those that are in effect for the current**

**rate period?** As we discussed, this request is only intended to cover Music Choice's noninteractive audio-only subscription transmissions.

- **RFP 19 (Agreements):**
  - o **Will you please provide the same confirmation requested with respect to RFP18 here?**
  - o You stated that you plan to produce agreements with MVPDs and direct licensees, in response to other RFPs, and asked what other agreements this request aims to capture.
  - o With the clarification that we are seeking these two forms of agreements related to trial programs as well as full-scale roll-outs of your service, SoundExchange accepts that compromise.
  
- **RFP 22 (Financial Analyses)**
  - o If you will produce documents responsive to our proposed compromises for RFPs 14, 15, and 16, the SoundExchange would accept no further production in response to this Request.

One last note. In conducting our own document review, it has come to SoundExchange's attention that we do not have the Restricted materials, including Music Choice's written testimony, oral and deposition transcripts, and exhibits, from either the *Web I* or *PSS I* proceedings. To the extent that the Restricted testimony or other materials would be responsive to any of SoundExchange's RFPs, please do not withhold that testimony on the theory that it is already within SoundExchange's possession, custody, and control.

Thank you,  
Andrew

---

**From:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>  
**Sent:** Thursday, March 18, 2021 8:43 PM  
**To:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**External Email – Exercise Caution**

Hi Andrew,

I'll be responding to the rest of your email under a separate cover. But regarding the RFPs we were not able to address on our last call, I'm glad to set up a continuation of that call. Tomorrow I am free from 10 AM -12 noon, and after 3 PM Eastern. Is there a time in there that works for you? If not, we can look at availability for next week.

**Margaret L. Wheeler-Frothingham**

*Associate*

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**From:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>  
**Sent:** Wednesday, March 17, 2021 4:37 PM  
**To:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**\*\*EXTERNAL SENDER\*\***



Hi Margaret,

I'm writing to memorialize what we agreed on during our meet and confer call last week, as well as to propose a narrowed scope for each parties' requests for all communications. Please let us know if you agree.

#### Privilege logs

- We agreed that we are at an impasse. Music Choice believes that privilege logs would not be appropriate, given the parties' agreements and actions in the underlying proceeding. SoundExchange needs some ability to evaluate the parties' claims of privilege, and does not view the decision not to exchange logs in the underlying proceeding binding on this new stage of the proceeding.

#### The term, Music Choice PSS Internet Services

- For discovery purposes, when referring to Music Choice PSS Internet Services, Music Choice's services, or other similar terms, the parties agreed that they are seeking and will produce documents about Music Choice's consumer audio service, however delivered to subscribers.

#### Timeframe of SoundExchange's Requests

- Music Choice made clear that their proposed limitation to documents from 1998, and 2018-present – which is based on relevance and burden grounds – only applies to the requests about the internet issue.
  - Music Choice is not proposing to limit the timeframe with regard to the audit issue.
  - Music Choice is not proposing any limitation on reliance on documents that were produced in discovery in the underlying proceeding, including documents outside of its proposed timeframe that describe the features of its service.
  - Music Choice further clarified that, under its proposal, it would consider responsive an agreement or other similar document about a service that was in effect in 1998 or 2018-present, even if the agreement was signed or came into effect in a prior year.
- SoundExchange proposed a compromise timeframe of (1) 1996-2000, (2) 2018-present, and (3) a limited subset of documents in the interim period for some of the requests that relate to major aspects of Music Choice's service, such as documents relating to the introduction of major features of Music Choice's internet service.
- Music Choice will circle back on this. Please let us know.

#### Communications RFPs

- The parties agreed that they would be amenable to each party producing in response to narrowed requests for their respective RFPs for communications that more closely tailored to the issues on remand. The parties agreed to discuss a compromise proposal via email.
- SoundExchange believes its request for communications related to the audit issue is covered in the discussion of audit documents below. As to the internet issue, at a minimum, SoundExchange believes the production should encompass non-privileged communications related to:
  - The eligibility or ineligibility of Music Choice's PSS Internet Service for the grandfathered PSS rate,
  - Music Choice's PSS Internet Service as it existed in 1998
  - Music Choice's development and expansion of its Internet service. (As discussed on the call, we are not seeking emails about the minutia of every change to the programming or other details of the service. Rather, we are seeking communications that evince which partners offered Music Choice's consumer audio service, how many subscribers accessed such service, and any significant changes to the delivery of the service.)
- Is Music Choice amenable to this compromise?

#### Music Choice RFPs to SoundExchange

- RFP 3 – SoundExchange explained their burden objections and made clear that while it is not conducting a separate search for these documents, SoundExchange believes it knows when it first became aware of Music

Choice's Internet PSS and will be producing documents showing this, as those documents are responsive to other requests.

- Music Choice explained that it was not clear if SoundExchange intended to limit its searches or withhold documents based on its objections, for requests where it stated it would produce subject to its objections. SoundExchange explained it would not produce privileged documents or duplicative documents, and that we would be happy to answer questions or concerns from Music Choice about specific objections. Please let us know if there are specific RFPs for which you would like further clarification.

#### SoundExchange RFPs to Music Choice

- Audit documents – SoundExchange explained its view that final reports and engagement letters may not provide sufficient information, as SoundExchange is seeking information regarding the scope of the audits as well as how they were conducted (e.g., what information was made available to the auditors, did the scope of the audit change or evolve, did the auditors follow certain accounting principles, etc.). Music Choice believes that much of this information is likely to be reflected in the final reports and engagement letters, but could not confirm. SoundExchange maintains that it is entitled to audit-related documents, including communications with the auditors, that reflect the scope and conduct of the auditors. Music Choice said they would take it under advisement. Please let us know if your position on this limitation has changed.
- RFPs 5 and 6: Music Choice explained its concerns about the burden of giving all documents in response to these requests instead of documents sufficient or representative documents. It explained that it would produce any documents showing what its internet service was like in 1998, including documents describing consumer-facing features and major technological changes, but not detailed backend technical specifications. Music Choice agreed to follow up in writing to explain the burden of producing all responsive documents.
- Additional RFPs: We ran out of time before we got to the following additional RFPs: 9-10 (usage data), 13 (PSS eligibility), 14 (allocation of costs), 18-19 (direct licenses / agreements), 22 (financial analyses / royalty calculations). The parties agreed to continue conferring on these issues. Would you like to schedule another call to discuss? We are open to discussing over email instead, but a call might be more efficient given the number of outstanding issues.

Thanks,  
Andrew

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**From:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>  
**Sent:** Monday, March 8, 2021 3:23 PM  
**To:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**External Email – Exercise Caution**

Hi Andrew,

Would Thursday at 11 AM work for a meet and confer to discuss all of the above? We will also circulate some high-level notes on our concerns regarding SoundExchange's objections and responses.

**Margaret L. Wheeler-Frothingham**

Associate

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**From:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>  
**Sent:** Monday, March 8, 2021 12:57 PM  
**To:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**\*\*EXTERNAL SENDER\*\***

Hi Margaret,

Thank you for your email. SoundExchange cannot agree to forego the exchange of privilege logs. Nor do we agree that the decisions of participants about the necessity of such logs in the underlying rate-setting proceeding is binding on this new remand discovery period. While we are open to conferring about reasonable limitations on the exchange of privilege logs, we must insist on a process by which we can meaningfully evaluate any claims of privilege that Music Choice might make.

We suggest discussing this issue as well as Music Choice's responses and objections to SoundExchange's document requests later this week. We are available to meet and confer on Thursday 3/11 from 10-12 EST, or Friday 3/12 from 2-5 EST. Please let us know if a time within one of those ranges would work for you.

In advance of that call, we will circulate an email highlighting the objections that we wish to discuss.

Thank you,  
Andrew

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**From:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>  
**Sent:** Friday, March 5, 2021 1:51 PM  
**To:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**External Email – Exercise Caution**

Hi Andrew,

Thanks for sending this. Overall, it looks fine to us, with one exception. Music Choice cannot agree to the new privilege log requirement in Section II. Neither side produced privilege logs during the original proceeding. It does not make sense to suddenly change that practice on remand. And, given the asymmetry in the expected volume of each side's document review and production due to the limited scope of the remand, Music Choice would be disproportionately impacted by the addition of such a new requirement on remand. We would prefer to continue with the practice the parties agreed to during the original proceeding, which did not require the logging of privileged materials.

If that Section II is removed, we are fine to move forward with the remainder of the proposed stipulation.

**Margaret L. Wheeler-Frothingham**

*Associate*

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**From:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>  
**Sent:** Wednesday, March 3, 2021 11:18 PM  
**To:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** SDARS III Remand Discovery Protocol

**\*\*EXTERNAL SENDER\*\***

Hi Margaret,

Please find attached our proposed draft of the discovery protocol. As mentioned in my prior email, we also included language incorporating our agreement re the prior protective order.

Please let us know your thoughts/comments/revisions.

Thanks,  
Andrew

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## Andrew B. Cherry

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# Proof of Delivery

I hereby certify that on Tuesday, April 27, 2021, I provided a true and correct copy of the SoundExchange's Motion for Expedited Issuance of Subpoena to Prager Metis CPAs to the following:

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Music Choice, represented by Paul M Fakler, served via ESERVICE at [pfakler@orrick.com](mailto:pfakler@orrick.com)

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Johnson, George, represented by George D Johnson, served via ESERVICE at [george@georgejohnson.com](mailto:george@georgejohnson.com)

Sirius XM, represented by Todd Larson, served via ESERVICE at [todd.larson@weil.com](mailto:todd.larson@weil.com)

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

NACUBO, represented by Ronald G. Dove Jr., served via ESERVICE at [rdove@cov.com](mailto:rdove@cov.com)

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Signed: /s/ Emily Chapuis