

COPYRIGHT ROYALTY JUDGES
The Library of Congress

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) (Remand)**

**ORDER GRANTING SOUNDEXCHANGE’S MOTION TO
SUBPOENA PRAGER METIS CPAs**

On April 27, 2021, SoundExchange, Inc. filed a Motion for Expedited Issuance of Subpoena to Prager Metis CPAs ([Motion](#)). In its Motion, SoundExchange requested that the Copyright Royalty Judges (Judges) issue a subpoena (attached as Ex. A to the Motion) commanding Prager Metis CPAs (Prager Metis) to provide fact testimony regarding so-called “defensive audits” conducted for Music Choice. Motion at 1. SoundExchange seeks a declaration from Prager Metis Partner, Lewis Stark, who SoundExchange states is the lead accountant involved in SoundExchange audits of Music Choice. *Id.* SoundExchange states that 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. *Id.* SoundExchange represents that Mr. Stark is willing to provide this testimony if he is permitted to do so. SoundExchange states that it seeks the 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 (NDA) between it and Music Choice’s auditor, BDO USA, LLP (BDO). *Id.*

SoundExchange represents that 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 (PSS) and its business establishment service (BES). *Id.* at 2. According to SoundExchange, Music Choice—citing the “defensive audit” provision previously found at 37 C.F.R. § 382.6(e) (2013)—refused to comply with several of Mr. Stark’s requests for information that he believed were important to verify Music Choice’s royalty payments. *Id.* SoundExchange asserts that Music Choice’s position in this proceeding is that it should continue to be able to withhold such information in future SoundExchange audits. *Id.* (citing *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 428-29 (D.C. Cir. 2020)). According to SoundExchange, in 2017, Music Choice permitted Mr. Stark to review BDO’s work papers subject to an NDA, which 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. Motion at 2. SoundExchange represents that 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, but BDO refused to provide consent and threatened to enforce the NDA. *Id.* at 2-3 and n.1. As a result, SoundExchange states that 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. *Id.* at 3.

SoundExchange argues that the Judges have the power to issue a subpoena pursuant to 17 U.S.C. § 803(b)(6)(C)(ix) if the Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things. *Id.* at 3 (citing 17 U.S.C. § 803(b)(6)(C)(ix), among other sources). According to SoundExchange, two conditions must be met to establish that the Judges would be "substantially impaired" in the absence of the requested testimony: (1) 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); and (2) the party seeking the subpoena must demonstrate that it is unlikely that the testimony, etc. sought in the proposed subpoena will be obtained and presented to the Judges unless the subpoena issues. *Id.* (citing *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) (Apr. 3, 2014)). SoundExchange contends that each of the conditions is met in this case. According to SoundExchange, 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. *Id.* at 4 (citing *Order Regarding Proceedings on Remand* (Dec. 1, 2020)).

From SoundExchange's perspective, "[h]aving 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." Motion at 4. SoundExchange believes that Mr. Stark's testimony will address the effect of Music Choice's defensive audit (*i.e.*, it was the basis for denying 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 PSS royalty obligations and payments). SoundExchange asserts that Mr. Stark's testimony will show what information was made unavailable to SoundExchange and will show that Music Choice's defensive audits are not an adequate replacement for audits conducted by SoundExchange. *Id.* SoundExchange contends that this information will assist the Judges in evaluating the proposed changes to the defensive audit provision at issue in this remand proceeding. *Id.* at 4-5 (citing *Music Choice*, 970 F.3d at 430).

SoundExchange believes that, absent a declaration from Mr. Stark, it is unlikely that this testimony will be presented to the Judges. *Id.* at 5. According to SoundExchange, both BDO and Music Choice have refused to provide documents or information sufficient to assess the scope of the examination by BDO. *Id.* at 5 & n.2. Thus, from SoundExchange's perspective, Mr. Stark's testimony is the only possible source of this information. *Id.* at 5. SoundExchange contends that there is little risk that Mr. Stark's testimony would harm or prejudice BDO because SoundExchange would designate such testimony as restricted pursuant to the *Protective Order* entered on June 15, 2016. *Id.* Moreover, SoundExchange represents that under the NDA, Prager Metis is already permitted to disclose the information to SoundExchange and Music Choice so the only other persons that would be permitted to view the information that are not already permitted to do so are the Judges and the CRB staff. *Id.* at 5-6. SoundExchange asserts that refusing to grant the subpoena would prevent SoundExchange from introducing the anticipated

testimony, which would prejudice SoundExchange's ability fairly to litigate the defensive audit issue. *Id.* at 6. Furthermore, SoundExchange contends that allowing BDO to prevent Mr. Stark's testimony from being introduced in the proceeding would violate the spirit of the Protective Order in place in the proceeding, which states:

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.

Id.; [Protective Order](#) at 6 (Jun. 15, 2016). SoundExchange contends that there is no reason why the same logic behind this provision in the *Protective Order* should not apply to testimony based on confidential documents. Motion at 6.

On May 7, 2021, Music Choice filed its Opposition to SoundExchange's Motion for Issuance of a Subpoena ([Opposition](#)). Music Choice accuses SoundExchange of trying to "abuse the Judges' subpoena power by turning on their heads the very purposes and objectives meant to be served by that power" by seeking to provide its own willing witness with an excuse to violate a nondisclosure agreement, rather than to compel testimony from an unwilling third-party witness. Opposition at 1. Music Choice asks the Judges not to allow SoundExchange to "misuse their subpoena power in this way." *Id.* In the alternative, Music Choice asks the Judges to expand the subpoena to also require Prager Metis to provide any documents related to its investigation and evaluation of the BDO audits. *Id.* at 2.

Music Choice contends that although SoundExchange claims to want to provide the Judges with a full and balanced record, SoundExchange actually seeks to withhold its own documents related to Mr. Stark's investigation of Music Choice's defensive audits while asking the Judges to allow Mr. Stark to provide one-sided testimony on the same topic in the form of an attorney-drafted declaration, which would provide only cherry-picked evidence of Prager Metis's evaluation of BDO's audits. *Id.* at 4.

Music Choice acknowledges that evidence concerning the sufficiency of its defensive audits may be relevant. *Id.* Music Choice contends, however, that SoundExchange refuses to produce documents in its own custody that pertain to that issue, which Music Choice now seeks in its April 29, 2021 [Motion to Compel](#). Music Choice contends that the proposed subpoena that SoundExchange seeks is insufficient to provide the Judges a complete and balanced record of Mr. Stark's investigation, which would need to include documents that SoundExchange possesses but has refused to produce. *See id.* at 5. Music Choice contends that the Judges' subpoena power should not be so selectively invoked to serve one participant's litigation strategy. *Id.* at 6. While Music Choice believes that the Judges are within their authority to deny SoundExchange's motion because it is inconsistent with the limited scope of the Judges' subpoena authority, Music Choice contends that if the Judges decide to grant the request, they should, at the least, modify it to require the production of Prager Metis's working papers and other documents reflecting its investigation, analysis, and evaluation of the BDO audits, which would allow Music Choice and the Judges to better evaluate Mr. Stark's proffered testimony. *Id.*

In its May 14, 2021 Reply, SoundExchange asserts that “it is not obvious that Music Choice has the authority to oppose the issuance of a subpoena directed at another party.” Reply at 1. SoundExchange contends that the issue that prompted the instant dispute over defensive audits was Music Choice’s refusal to provide information to Prager Metis. *Id.* at n.1. SoundExchange further asserts that the standards that Music Choice propounds (*e.g.*, limited to unwilling parties) for issuing a subpoena have no basis in law. *Id.* at 1. SoundExchange also disputes that the proposed subpoena would give Prager Metis an excuse to violate the NDA; to the contrary, issuance of the subpoena would ensure that the safeguards of the NDA are properly attended. *Id.* at 2. SoundExchange also contends that Music Choice’s suggestion that third-party discovery is permissible only if it will benefit both parties is unfounded, there being no obligation for a participant in an adversarial proceeding to make the other side’s arguments for them. *Id.* SoundExchange notes that Music Choice could have sought or provided additional discovery but chose not to. *Id.*

Judges’ Analysis and Conclusion

SoundExchange and Music Choice agree that information about Music Choice’s defensive audits is relevant to the proceeding. The Judges agree and find that their resolution of the proceeding would be substantially impaired without a full record on the issue of those defensive audits. *See* 17 U.S.C. § 803(b)(6)(C)(ix). Music Choice does not dispute SoundExchange’s contention that, without Mr. Stark’s testimony on defensive audits, the information in his testimony would not otherwise be available to the Judges. Prager Metis is willing to provide Mr. Stark’s testimony but is currently precluded from doing so without violating its NDA with BDO. *See* Motion at 2-3 and n.1. By SoundExchange’s estimation, which the Judges credit, providing Mr. Stark’s testimony pursuant to a subpoena would be in compliance with the terms of the NDA. Reply at 2. Moreover, in light of the Protective Order, the information in Mr. Stark’s testimony, which SoundExchange represents it would mark “Restricted,” would be made available, incrementally, only to the Judges and the CRB staff, thereby limiting disclosure of any sensitive information that might be contained in the testimony. Motion at 5-6. While the Judges support Music Choice’s interests in ensuring that a complete record is developed, Music Choice has not yet shown that the additional information that it would like the Judges to include in the subpoena cannot be obtained in another manner (*i.e.*, through Music Choice’s pending motion to compel). Therefore, the Judges **GRANT** SoundExchange’s request to issue the proposed subpoena to Prager Metis (attached as Ex. A to the Motion), without Music Choice’s proffered modifications.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: May 25, 2021