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-001-SR/PSSR (2018-2022)

REPLY IN SUPPORT OF SERVICES' MOTION TO COMPEL THE COPYRIGHT OWNER PARTICIPANTS TO PRODUCE DOCUMENTS

Sirius XM Radio Inc. ("Sirius XM") and Music Choice LLC (together, the "Services") respectfully submit this reply to the Opposition of SoundExchange, Inc. ("SoundExchange"), the Recording Industry Association of America ("RIAA"'), Sony Music Entertainment ("Sony"), Universal Music Group ("UMG"), Warner Music Group ("WMG"), and the American Association of Independent Music ("A2IM") (collectively, the "Copyright Owner Participants") to the Services' Motion to Compel the Copyright Owner Participants to Produce Documents Regarding Sirius XM's Direct License Initiative, filed August 23, 2016 (the "Motion").[1]

INTRODUCTION

Through their Motion, the Services have sought the same types of internal communications among the Copyright Owner Participants regarding Sirius XM's direct license initiative that the Judges previously ordered SoundExchange to produce in the *Satellite II*

[1] As the Opposition notes, Sections A and C of the Motion, addressing documents relating to the Universal-EMI merger and certain "negotiation" documents, have been resolved by the parties. *See* SoundExchange's Opposition to Sirius XM and Music Choice's Motion to Compel the Copyright Owner Participants to Produce Documents Related to the Universal-EMI Merger and Communications Regarding Sirius XM's Direct License Initiative ("Opposition" or "Opp."), Dkt. No. 16-CRB-001-SR/PSSR (2018-2022) (Aug. 30, 2016).

proceeding. As the Motion details, these communications will shed light on the record labels' motivations for deciding whether (or not) to enter into licenses with Sirius XM, and whether they were influenced in that decision by employees or board members of the Copyright Owner Participants. Such information will provide a fuller contextual picture of the upstream licensing market in which Sirius XM deals with record labels for direct licenses and is, at minimum, ripe for discovery as the parties weigh the benchmarks they may submit in their written direct statements.

In seeking to avoid producing these materials, the Copyright Owner Participants offer a variety of arguments: (i) applying the wrong standard on a discovery motion, they assert that in the *Satellite II* proceeding, the Judges concluded that the copyright owners and trade associations had not interfered with Sirius XM's direct license initiative; (ii) conflating completely separate types of documents, they contend that because the parties have agreed to delay exchanging "negotiation documents" between record labels and digital music services, they should be excused from producing communications among themselves regarding Sirius XM's direct license initiative; and (iii) relying on an inapposite section of the Copyright Act governing discovery relating to "written direct statements," they suggest in a footnote that the Motion was "untimely" because it was filed the day after the Preliminary Discovery Period ended. As detailed below, each of these arguments fails.

ARGUMENT

I. THE JUDGES DIRECTED THE PRODUCTION OF SIMILAR COMMUNICATIONS REGARDING SIRIUS XM'S DIRECT LICENSES IN THE *SATELLITE II* PROCEEDING

As the Motion explains, the Services have sought communications regarding Sirius XM's direct license initiative because, as evidenced by the *Satellite II* proceeding, such

communications are likely to shed light on the record labels' motivations for entering and, even more notably, refusing to enter such licenses, including the extent to which Copyright Owner Participants may have urged record labels to *decline* to engage in direct licenses with Sirius XM in order to obtain higher rates in this proceeding. This request should not be controversial: the Judges ordered the production of this very same category of documents in *Satellite II*. Lacking access to such information would, among other things, impair the Services' ability to meaningfully evaluate the upstream market in which Sirius XM is negotiating with record labels for direct licenses. *See* Motion at 3, 6-7, 10.

In opposition, the Copyright Owner Participants point to a non-sequitur in the context of a discovery motion: they argue that, on the merits, the Judges in *Satellite II* ultimately "were not persuaded" that Copyright Owner Participants "materially frustrated" Sirius XM's direct license initiative at the time. Opp. at 5. While the substantial evidence marshalled in that proceeding speaks for itself, what the Judges did or did not ultimately conclude in the *Satellite II* Determination after ordering the requisite discovery has no bearing on the discoverability of the documents here in the first instance. There can be no dispute that the Judges directed SoundExchange to produce documents that "relate to activities undertaken by SoundExchange with respect to Sirius XM's direct licensing initiative,"[2] which is all the Services now request.

That the Judges directed production of these documents following Written Direct Statements, *see* Opp. at 8-9 (arguing that the Services' requests are "premature"), does not alter the documents' relevance, or preclude a similar conclusion here. As the Copyright Owner

[2] *See* Order Granting in Part and Denying in Part Sirius XM's Motion to Compel SoundExchange to Produce Communications Between and Among SoundExchange, AFM, A2IM, and Other Industry Groups Regarding Sirius XM's Direct License Initiative, Dkt. No. 2011-1CRB PSS/Satellite II ("*Satellite II*"), at 2-3 (Mar. 29, 2012) (the "*Satellite II* Order") at 2-3; Motion at 10.

Participants well know, there was no Preliminary Discovery Period in the *Satellite II* proceeding. Moreover, the documents sought by the Services fall comfortably within the broad ambit of the Preliminary Discovery Period ordered by the Judges for this proceeding, and there is thus no need to resort to the inapposite "directly related" analysis that applies to post-WDS discovery ordered pursuant to section 803(b)(6)(C)(iv). Because the documents called for by the Services' requests are germane to the Services' presentation of their benchmark evidence, *see* Motion at 3-4, they are perforce important to "streamlin[ing] the process of participants' identification of issues" and "limit[ing] the participants' need, if any, for additional discovery" later – core goals of the Preliminary Discovery Period. *See* Notice of Participants, Commencement of Voluntary Negotiating Period, and Case Scheduling Order, Dkt. No. 16-CRB-0001 SR/PSSR (2018-2020) (Mar. 14, 2016) at 2-3.[3]

II. THE COPYRIGHT OWNER PARTICIPANTS' OTHER EXCUSES FOR THEIR NON-PRODUCTION ALL FALL FLAT

The Opposition recites a litany of excuses to distract from the undisputed relevance of the requested materials, including an asserted failure by the Services to compromise and limit their

[3] The Opposition also attempts to convert the Judges' recent observation that "benchmark agreements" are "important potential evidence" into a limiting principle that such agreements are the *only* documents the Judges would consider relevant and discoverable during the Preliminary Discovery Period. *See* Opp. at 9 (citing Order Granting in Part and Denying in Part the Services' Motion to Set Specific Discovery Deadlines and Compel Copyright Owner Participants' Adherence to their Discovery Obligations, dated Aug. 23, 2016 (the "August 23 Order"), at 12). This makes no sense. The Judges have already directed the Copyright Owner Participants – including in the August 23 Order itself – to produce documents beyond "benchmark agreements" during the Preliminary Discovery Period. *See* August 23 Order at 4. The Opposition's argument also ignores the Judges' admonition in the August 23 Order that "difficulties [] ensue when they limit the discovery process based on the statutory minima." *Id.* at 12. In other words, it is in all participants' interest to have robust discovery of a broad set of relevant documents during this Preliminary Discovery Period.

purportedly "overbroad" requests, and the parties' agreement to defer producing "negotiation documents" – a completely different set of documents altogether. *See* Opp. at 5-7.

A. The Requests Should Not Be Denied on Account of Alleged Overbreadth

The Opposition argues that the Services' request would require a "pointless wild goose chase" for communications with "a wide array of people who have never communicated with record companies collectively." *Id*. at 7. As an initial matter, this exaggerates the burden involved. The Copyright Owner Participants clearly were able to run targeted searches when ordered to do so during the *Satellite II* proceeding, and there is no reason a similar search among a defined set of executives and board members, using a small set of keywords, could not be conducted again. By comparison, the Opposition's proposed "compromise" is essentially an offer to produce no responsive documents at all: they propose "to produce 'statements that SoundExchange has made to its membership as a whole' about Sirius XM's direct license campaign . . . if such documents exist (which of course they do not)." *Id.* at 7. It is little wonder that "counsel for the Services did not accept this proposal." *Id.* The proposal, such as it is, would provide only public statements and/or mass mailings, but as the Opposition openly admits, the Copyright Owner Participants' position is that there are *no such documents to produce*. *Id.*[4]

[4] Moreover, the Opposition's suggestion that communications to SoundExchange's membership "as a whole" would satisfy the Services' interest in communications "urging record labels to collectively decline to engage in direct licenses with Sirius XM," *see* Opp. at 7, evades the point. As the Motion details, the Services are not interested solely in documents addressing the record company community "collectively" (a phrase on which SoundExchange over-relies), but also seek one-on-one, bilateral communications, which could have been part of a "collective" effort within the industry to undercut Sirius XM's direct license initiative. Indeed, the *Satellite II* proceeding revealed that efforts to undermine Sirius XM's direct licensing initiative were not limited solely to "collective" communications by the trade associations. *See, e.g.*, Revised Written Rebuttal Testimony of Ronald H. Gertz, *Satellite II* (Aug. 21, 2012) at ¶¶ 6-10.

In the interest of resolving any purported concerns about the breadth of the Services' requests, the Services are prepared to limit their request to (1) non-privileged communications between and/or among executives and board members of SoundExchange, RIAA, A2IM, and any of the major labels discussing Sirius XM's direct licenses, and (2) non-privileged communications between such individuals and another record company regarding a direct license offer to that company by Sirius XM.[5] The Services are also willing, for now, to limit the date of such request to January 1, 2013 forward.

B. There Is No Equivalence Between the Requested Communications and the "Negotiation Documents" That the Parties Have Agreed to Defer

The Opposition also posits that no production should be ordered here because the parties have agreed to defer exchanging an entirely different set of documents until after Written Direct Statements are filed, *i.e.*, those documents reflecting negotiations between digital music services and record companies, and between Sirius XM and record companies. As already explained in the Motion, the negotiating documents that will be produced later (Sirius XM's licensor-licensee negotiations) and the documents the Services seek here (the Copyright Owner Participants' intra-industry communications regarding Sirius XM's direct license efforts) are not equivalent – and indeed are similar only in the loose sense that each category addresses Sirius XM's direct licenses in some fashion. *See* Motion at 10 n.8. That loose similarity is far too general to excuse production of the discrete category of relevant documents sought here.

[5] Contrary to the Copyright Owner Participants' suggestion, this will not require them to know or search for the name of every such record company approached by Sirius XM. It should be sufficient to search for "Sirius" and "SXM" among the communications of the targeted individuals.

III. THE SERVICES' MOTION WAS TIMELY FILED

Finally, the Opposition also argues (although relegated to a footnote) that the Motion was "untimely" by a day. *See* Opp. at 2-3 & n.1. In pressing this argument, the Copyright Owner Participants do not identify even a hint of prejudice, but simply rely on section 803(b)(6)(C)(iv) of the Copyright Act, arguing that section 803 permits the Judges to consider only motions filed as of the last day of the discovery period. *Id.* This argument ignores the obvious fact that section 803 is limited by its explicit terms to discovery related to "written direct statements."[6] No such deadline was set for the Preliminary Discovery Period ordered by the Judges pursuant to their authority under section 801(c) of the Copyright Act.[7]

In fact, the Judges' August 23 Order clarified that the Preliminary Discovery Period is separate and distinct from the "post-WDS statutory discovery period." *See* August 23 Order at 1. In the same Order, the Judges also made clear that they anticipated discovery motions might be filed after August 22, 2016. *Id.* at 2 ("The parties have exchanged some discovery, but have not informed the Judges that the substantive issues regarding the discovery disputes have been resolved. Accordingly, the Judges consider the substantive discovery issues the parties have joined."). This makes sense in light of the Judges' ruling that all discovery could have been produced on the final day of the Preliminary Discovery Period (*i.e.*, August 22). *Id.* If the

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[6] 17 U.S.C. § 803(b)(6)(C)(iv) ("Discovery *in connection with written direct statements* shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders, and disputes pending at the end of such period.") (emphasis added).

[7] This clearly distinguishes the current preliminary discovery period from discovery periods in prior proceedings, where the Judges have explicitly identified the last day of the (post-WDS) discovery periods as the deadline for motions to compel. *See* Order on Discovery Schedule, *Satellite II* (Jan. 3, 2012) at 1-3 (stating that the Judges will consider motions to compel filed *on or before the end of the discovery period*). The Judges set no such deadline here.

deadline for motions to compel was also set for August 22, the parties would have been left without any opportunity to meaningfully review incoming document productions and assess whether any motions to compel were necessary.

What is more, the Copyright Owner Participants themselves, elsewhere in the Opposition, acknowledge the difference between the post-WDS statutory discovery period governed by section 803(b)(6)(C)(iv) and the Preliminary Discovery Period governed by section 801(c): as noted above, one of the reasons the Copyright Owner Participants argue that the *Satellite II* Order is inapposite is because that Order addressed the discovery period following Written Direct Statements, as compared to the preliminary discovery period we are in here. Opp. at 8. The Copyright Owner Participants cannot have it both ways.

CONCLUSION

For the foregoing reasons and those set forth in the Motion, the Services respectfully request that the Judges issue an Order compelling the Copyright Owner Participants to provide (1) non-privileged communications between and/or among executives and board members of SoundExchange, RIAA, A2IM, and any of the major labels discussing Sirius XM's direct licenses, and (2) non-privileged communications between such individuals and another record company regarding a direct license offer to that company by Sirius XM in response to Request No. 40 in the Services' First Requests to SoundExchange, Request No. 29 in the Services' First Requests to the Majors and A2IM, and Request No. 28 in the Services' First Requests to RIAA.

Dated: September 6, 2016
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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, I caused a copy of Sirius XM Inc. and Music Choice LLC's Reply in Support of the Services' Motion to Compel the Copyright Owner Participants to Produce. Documents Related to the Universal-EMI Merger and Communications Regarding Sirius XM's Direct License Initiative, to be served by email and overnight mail to the participants listed below:

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