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

In the Matter of	)	**Docket No. 14-CRB-0001-WR**
DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	)	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PANDORA'S MOTION FOR ISSUANCE OF SUBPOENAS

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Pandora Media, Inc. ("Pandora") respectfully submits this reply memorandum of law in further support of its motion pursuant to 17 U.S.C. § 803(b)(6)(C)(ix) for the Copyright Royalty Judges ("Judges") to issue subpoenas.

INTRODUCTION

Pandora's motion for issuance of subpoenas laid bare the limited access that service-side participants such as Pandora and the National Association of Broadcasters ("NAB") have to marketplace information and data that warrant full consideration as a part of this proceeding. That motion further described the deep informational advantage that SoundExchange presently enjoys over service-side participants by its own access to that very information. Unsurprisingly, SoundExchange, desirous of not relinquishing that advantage, opposes the motion. In doing so, however, it fails fundamentally to challenge the core, indisputable premise of this motion: that Pandora will be compromised in its ability to prepare a direct case that is fully informed by the range of marketplace agreements, while SoundExchange, because of its preferential access to marketplace agreements, will be able to rely on and disclose only those agreements most favorable to its position, leaving the balance in the dark for both participants and the Judges.[1] What is more, SoundExchange—which is not the actual target of the subpoenas, and which will have no role in producing or reviewing documents in response to them—does not (and cannot) identify any prejudice or burden it would suffer were the motion granted.

Rather than join issue with those fundamental realities, SoundExchange resorts to *ipse dixit* assertions that the proceedings will be "fair" without the information requested in the subpoenas, old-fashioned threats of engaging in tit-for-tat discovery, and highly selective

[1] Tellingly, SoundExchange does not attempt to refute Pandora's showing that, even before this proceeding began, its lawyers had access to and were analyzing confidential license agreements, the very agreements that remain undisclosed to Pandora. *See* Declaration of Christopher Harrison ("Harrison Decl.") ¶ 5.

citations to relevant precedent. In merely asserting that the post-direct-case-filing discovery process will remedy any information discrepancy, SoundExchange is simply mistaken. The practical reality of the discovery process, revealed time and again in prior proceedings, dictates otherwise. As Pandora's motion demonstrated, limitations inherent in the discovery process prevent it from fully curing the *ex ante* imbalance of information between the parties; whatever information may eventually be obtained through that process comes too late in the proceeding to be meaningfully analyzed and incorporated into amendments and rebuttals. SoundExchange also mistakes the prevailing standard governing the discovery process, which will allow Pandora to direct discovery requests to *SoundExchange* (as the "opposing" party), but *not* from its fellow service-side participants. Finally, SoundExchange glosses over the fact that only a small number of Pandora's co-participants have actually taken licenses with sound recording owners, and that such licenses typically prevent the sort of voluntary disclosure SoundExchange recommends absent a court order—yet another roadblock to discovery that has surfaced repeatedly in prior proceedings.[2] Indeed, where SoundExchange does engage with the records of prior proceedings, it proves Pandora's point: when Sirius XM, in the 2012 *Satellite II* proceeding, relied on two 2007 Slacker and Last.fm agreements it happened to find in the online filings related to *Web III*, SoundExchange sought to discredit those agreements as being too outdated and too unrepresentative a sample to serve as reliable benchmarks for rate-setting.

[2] As the Judges have recognized in past proceedings, those agreements contain confidentiality provisions that restrict unilateral disclosure, which leads one to wonder how it is that the record company signatories to them have apparently seen fit to share them with SoundExchange for use in these proceedings. *See* Order Granting in Part and Denying in Part Music Choice's Motion to Compel SoundExchange to Produce Certain License Agreements and Other Documents, Docket No. 2011-1 (*Satellite II*) (March 13, 2012) ("March 2012 Order") (ordering production of agreements in response to SoundExchange's argument that it did not have authority to disclose the agreements absent a court order). Whatever the circumstances or propriety of such activity, SoundExchange has all but admitted that it has access to the range of such agreements, while Pandora does not.

Unable to counter the force of Pandora's motion on its merits, SoundExchange attempts to block it on the asserted basis that it is procedurally improper. It is not. For all of its zealous advocacy, SoundExchange omits advising the Judges that its precise argument was rejected as a matter of law in a prior proceeding, in which the Judges found that they do, in fact, have the authority, exercisable in their discretion, to issue subpoenas at "any stage" in the proceeding. *See* Order Denying Issuance of Subpoenas for Nonparty Witnesses, Docket No. 2009-1 (*Web III*) (Mar. 5, 2010), at 2 n.1 ("March 2010 Order"). SoundExchange's further contention that the requested subpoenas are unduly burdensome and speculative is wide of the mark. To the contrary, the subpoenas are narrowly tailored to uncover precisely the type of marketplace data that has proven relevant in prior proceedings and that is necessary to respond to the questions posed by the Judges' notice initiating this proceeding. *See* Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings ("*Web IV*"), 79 Fed. Reg. 412 (Jan. 3, 2014) ("*Web IV Notice*").

Accordingly, for the reasons set forth in Pandora's opening motion papers, as further amplified herein, the Judges should grant the motion and issue the requested subpoenas.

ARGUMENT

I. NEITHER THE DISCOVERY PERIOD NOR COLLABORATION AMONG SERVICES CURES THE INFORMATIONAL DISADVANTAGE DESCRIBED IN PANDORA'S MOTION AND ACCOMPANYING DECLARATIONS

SoundExchange's chief argument is that the discovery process and inter-service collaboration can remedy the effects of the informational deficits and asymmetry. This contention ignores the practical realities of these proceedings—as documented in Pandora's moving papers and supporting declarations—as well as a fundamental misunderstanding of the strictures of the discovery process.

First, SoundExchange asserts that the discovery process is "fair and makes sense" because "[t]he discovery period addresses any concerns about information disparity because the parties exchange all relevant information once their respective initial positions have been staked out." SoundExchange's Opposition to Motions for Issuance of Subpoenas ("SX Mem.") at 8. This argument simply ignores the very basis for this motion: the prejudice to Pandora and other service-side participants in "stak[ing] out" their "initial positions" – by filing their written direct cases, without access to the range of potential marketplace benchmarks that, in contrast, SoundExchange uncontestedly possesses. *See* Declaration of R. Bruce Rich ("Rich Decl.") ¶¶ 18-19; Harrison Decl. ¶ 5.

Once behind the information eight-ball, Pandora cannot rely upon either the post-direct-case-filing discovery process or the overall structure of proceedings to remedy this imbalance. From a substantive prospective, discovery is limited in scope only to that which is "directly related" to the *opposing* party's written direct testimony. *See* 17 U.S.C. § 803(b)(6)(C)(v); 37 C.F.R. § 351.5(b)(1). As Pandora has shown, this limitation raises the prospect that a service (and, thus, the Judges) will receive access only to a subset of the potentially relevant marketplace data that includes only those agreements on which SoundExchange and its experts have chosen to rely. *See* Rich Decl. ¶ 24 & n.2. SoundExchange also ignores the procedural limitations of the discovery period. In particular, as Pandora explained, the compressed discovery window—an abbreviated period of sixty (60) days—and the extraordinarily limited 15-day period after close of discovery within which to submit amended testimony, are simply inadequate to remediate the problem. *See* Pandora's Motion for Issuance of Subpoenas ("Pandora Mem.") at 15-16. Among other things, Pandora and its experts have too little time to fully and meaningfully analyze the marketplace data provided to them for the first time in the discovery

process (but concededly available to SoundExchange for months, if not years, beforehand). *Id.* Moreover, protracted discovery disputes mean that as a practical matter, and as past practice has shown, there is a realistic possibility that evidence will arrive late in the discovery period—or even after the deadline for amending direct statements. *See* Rich Decl. ¶¶ 25-26. Moreover, any last-minute modifications to a party's position based on information obtained in discovery, including during the rebuttal phase, can carry far less weight given that it arrives well after the party's positions have been "staked out" and the Judges have engaged with the case. Tellingly, SoundExchange's opposition ignores all of these considerations.

Second, SoundExchange argues that subpoenas are unnecessary because Pandora can collaborate with other service-side participants. This argument misses the mark for at least two reasons. For one, the services *cannot* collaborate by sharing their own privately negotiated license agreements because those agreements are protected by confidentiality provisions and non-disclosure agreements; disclosure is permissible only under court order or pursuant to other legal processes. *See* March 2012 Order (ordering SoundExchange to produce documents withheld on confidentiality grounds). In addition, the underlying assumption is simply wrong. Few of the participants in the proceeding appear to have entered into voluntary agreements with the record industry, and they represent but a small fraction of those to have done so (and only a portion of the services targeted by the proposed subpoena); only the record companies (and, for purposes of this proceeding, their agent SoundExchange) have access to comprehensive marketplace information. *See* Pandora Mem. at 13. Further, these types of agreements have figured into the key benchmarks in every prior rate-setting proceeding. *See* Pandora Mem. at 11 & n.15. So, as a practical matter, the services cannot collaborate or otherwise share data to

arrive at anything approximating the universe of potentially relevant agreements to which SoundExchange has all but admitted it presently may access.

Third, SoundExchange's suggestion that the subpoenas are redundant or premature (at least as to other participants) because Pandora can obtain this information through the party discovery process (SX Mem. at 11-12) also is mistaken. The discovery process only permits a party to seek discovery from its adversaries. *See* 17 U.S.C. § 803(b)(6)(C)(v) ("Any participant . . . may request of an *opposing* participant nonprivileged documents . . .") (emphasis added); 37 C.F.R. 351.5(b)(1) (same). Pandora cannot direct discovery requests to other service-side participants under these rules. And, SoundExchange's additional suggestion that Pandora can easily get information from non-participants via discovery requests to SoundExchange in the ordinary course simply ignores the problems highlighted by Pandora's motion.

Finally, SoundExchange contends that there is good (enough) internal or publicly available data to Pandora to enable it to sufficiently develop its direct case and respond to the Judges' questions. This is simply not so. Indeed, the two anecdotes on which SoundExchange relies in fact prove Pandora's point. SoundExchange observes that in the recent SDARS proceeding, Sirius XM relied on 2007 agreements between Slacker and Last.fm and one record label (Warner Music) to inform its own benchmark analysis. SX Mem. at 16. Yet, in that proceeding, SoundExchange repeatedly attacked Sirius XM's proposed benchmarks as out-of-date, unrepresentative, and incomplete. *See, e.g.*, *Satellite II*, SoundExchange Proposed Findings of Fact at ¶¶ 26-29, 215-249 (Sept. 26, 2012); *Satellite II*, 10/16/12 Tr. at 4977:4-10 (SoundExchange closing argument). SoundExchange, by contrast, was able to present, in its written direct statement, proposed benchmarks that reflected access to *hundreds* of agreements. *See generally Written Direct Statement of SoundExchange*, Testimony of Janusz Ordover,

Satellite II at 18-20 (Nov. 29, 2011) *available at* http://www.loc.gov/crb/proceedings/2011-1/pss/sx_vol_2.pdf. SoundExchange also notes that in *Web III*, Live365 used its own internal financial data to develop its proposed model. Those models, lacking access to the marketplace deals to which SoundExchange is privy, were roundly rejected by the Judges, as SoundExchange is forced to admit. SX Mem. at 16. All the more frivolous is the suggestion that Pandora should be content with reliance on publicly available material on the Internet. Not to belabor the obvious, newspaper articles providing only summary (often incomplete and/or inaccurate) information about certain services are hardly substitutes for the actual private and voluntarily negotiated deals with record companies that will comprise a significant portion of the universe of data points considered by the Judges.

II. THE JUDGES HAVE THE AUTHORITY TO ISSUE SUBPOENAS AT THIS STAGE OF THE PROCEEDING

SoundExchange also erroneously contends that the requested subpoenas "contradict the text, interpretive precedents, and legislative history underlying the statute governing this proceeding." SX Mem. at 4. In support, SoundExchange primarily relies on a March 2010 decision by the Judges declining to issue subpoenas during the *Web III* proceeding. *See generally* March 2010 Order. The Judges there concluded that, given the particular circumstances of that proceeding, it was premature to conclude that their ultimate resolution of the proceeding would be substantially impaired absent the requested information. *Id.*

But as Pandora's motion shows, the Judges' decision in the *Web III* proceeding was made against a different factual backdrop, on the basis of a different record, and in a different procedural posture. *See* Pandora Mem. at 17-18. And unlike the *Web III* proceeding, the Judges here have already interposed highly specific questions asking the parties to address a variety of topics in their submissions, including "within in the[ir] written direct statements." *See Web IV*

Notice, 79 Fed. Reg. at 413-14. As Pandora has shown, it cannot meaningfully and effectively respond to the Judges' questions at the critical, initial issue-joinder phase of these proceedings given the limited marketplace information that is presently available to it. SoundExchange's self-interested contention that Pandora and the other service-side participants can address these questions at later points in the proceeding, *see* SX Mem. at 15, misses the entire point. At bottom, unlike *Web III*, where it was "not possible to determine whether the sought-after" information would figure into the Judges' determination, here there is no question—the Judges have already requested it.

SoundExchange, repeating an argument it advanced in *Web III*, further contends that the placement of the subpoena provision in the portion of the regulations regarding hearing procedures "suggests that the subpoenas are expected to issue after discovery has concluded." SX Mem. at 7. The Judges in *Web III* rejected this argument: "The Judges disagree with SoundExchange that the absence of a corresponding subpoena provision in the discovery provision for rate adjustment proceedings, 37 C.F.R. § 351.5, prohibits them from issuing a subpoena at that stage, *or any stage*, of the proceeding." March 2010 Order, at 2 n.1 (emphasis added). The Judges should again reject SoundExchange's argument. The statute and regulations do not restrict the issuance of subpoenas to a particular stage of the proceeding. The only requirement Congress imposed is that the "substantial impairment" standard be met. That requirement has been met here.

SoundExchange also relies on legislative history in support of its contention that the issuance of subpoenas is inappropriate at this stage of the proceeding. But the same House Report on which SoundExchange relies (*see* SX Mem. at 2) illuminates that a core concern motivating Congress was the historical experience of cherry-picking: "Historically, the process

has allowed parties to circumscribe the type and amount of evidence considered by limiting discovery to the documents underlying a party's direct case and by liming the decisionmakers' authority to request additional evidence." H.R. Rep. No. 108-408 at 33 (2004).[3] As Pandora has shown—and SoundExchange has not contested—past practice has revealed that such cherry-picking is a demonstrable concern. *See* Rich Decl. ¶ 24. Given that likelihood, the legislative history strongly suggests that Congress would have supported the issuance of subpoenas in this circumstance as a way to circumvent such gamesmanships and ensure the integrity of these proceedings.

SoundExchange's further suggestion that the subpoena motion upsets the voluntary negotiation process and was undertaken in bad faith is a red herring. It is obvious that the parties can continue to negotiate while the motion is pending, as is the case in the ordinary course of federal litigation. Indeed, as the NAB has pointed out, the subpoenas may spur settlement, or at the very least, encourage the parties to discuss the voluntary exchange of information prior to the submissions of direct statements. Finally, as a practical matter, the motion could not have waited until the voluntary negotiation period ended because, if the subpoenas are to issue and the responding parties are given a reasonable amount of time to make their productions, there must still be sufficient time for Pandora to incorporate the information into its analyses and submissions.

III. THE REQUESTED SUBPONEAS ARE NARROWLY TAILORED

SoundExchange finally contends that the requested subpoenas are "unacceptably and unnecessarily broad" and that Pandora seeks "unfettered" access to discovery material. SX

[3] SoundExchange criticizes Pandora for relying on the House Report considering a prior version of the statute, but then proceeds itself to rely on the same report. *See, e.g.*, SX Mem. at 2, 8. There is no House (or Senate) Report accompanying the final version of the bill. Nonetheless, the comments recorded therein shed light on the policy concerns motivating Congress to replace the then-existing CARP system with the present framework.

Mem. at 19. As Pandora explained, however, the subpoenas are narrowly tailored to request only that information that historically has been critical to the Judges' determination of appropriate benchmarks, that will be essential in responding to the questions posed by the Judges in the *Web IV Notice*, and that Pandora cannot obtain from other sources. *See* Pandora Mem. at 9-11. Indeed, the requested subpoenas are far more limited in scope, and request far more specific pieces of information, than the wish list of "reams of material" SoundExchange would "love" to have from the services in preparing its direct statement. *See* SX Mem. at 17.

CONCLUSION

For the foregoing reasons, and those set forth in Pandora's moving papers, the Judges should issue the subpoenas.

Dated: March 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **March 24, 2014,** I caused a copy of the Reply Memorandum of Law in Further Support of Pandora's Motion for Issuance of Subpoenas to be served, unless otherwise specified, by overnight mail and email to the participants and by overnight mail to the proposed targets of the subpoenas listed below:

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Proposed Targets of Subpoenas

Google Inc. c/o Corporation Service Company which will do Business in California as CSC – Lawyers Incorporating Service 2710 Gateway Oaks Drive, Suite 150N Sacramento, CA 95833 *Google Play All Access*	Google Inc. c/o Corporation Service Company which will do Business in California as CSC – Lawyers Incorporating Service 2710 Gateway Oaks Drive, Suite 150N Sacramento, CA 95833 *YouTube*
Beats Music, LLC c/o Luke Wood 1601 Cloverfield Boulevard, Suite 5000N Santa Monica, CA 90404 *Beats Music, LLC*	Rhapsody International, Inc. c/o David Rosenberg 1420 Fifth Avenue, Suite 1500 Seattle, WA 98101 *Rhapsody International, Inc.*
VEVO, LLC c/o CT Corporation System 111 Eighth Avenue New York, NY 10011 *VEVO, LLC*	Rdio, Inc. c/o New Season Corporate Services 4600 Larson Way Sacramento, CA 95822 *Rdio, Inc.*
Cricket Communications, Inc. c/o Corporation Service Company which will do Business in California as CSC – Lawyers Incorporating Service 2710 Gateway Oaks Drive, Suite 150N Sacramento, CA 95833 *Cricket Communications, Inc.*	Slacker, Inc. c/o Jack Isquith 16935 W. Bernardo Drive, Suite 270 San Diego, CA 92127 jisquith@slacker.com *Slacker, Inc.*

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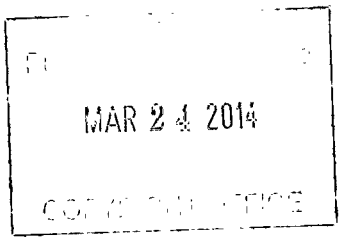
March 24, 2014



United States Copyright Royalty Judges
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101 Independence Ave., S.E.
Washington, D.C. 20559-6000

Re: In the Matter of Determination Of Rates And Terms For Digital Performance In Sound Recordings And Ephemeral Recordings, Docket No. 14-CRB-0001-WR ("Web IV")

To the Copyright Royalty Judges:

We represent Pandora Media, Inc. ("Pandora") in the above-referenced proceeding. Enclosed please find Pandora's Reply Memorandum of Law in Further Support of Pandora's Motion for Issuance of Subpoenas.

Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully submitted,

Todd D. Larson 19M4

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Encl.

cc: All participants