

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
WASHINGTON, D.C.

FEB 23 2015

In the Matter of)
)
DETERMINATION OF ROYALTY)
RATES FOR DIGITAL PERFORMANCE)
IN SOUND RECORDINGS AND)
EPHEMERAL RECORDINGS)
)
_____)

Docket No. 14-CRB-0001-WR (2016-2020)
CRB Webcasting IV

Received

FEB 23 2015

Copyright Royalty Board

**ACCURADIO'S RESPONSE TO SOUNDEXCHANGE'S
MOTION TO STRIKE THE TESTIMONY OF ACCURADIO
WITNESS KURT HANSON**

AccuRadio LLC ("AccuRadio") submits this Response to SoundExchange's Motion to Strike the Testimony of AccuRadio Witness Kurt Hanson filed on February 13, 2015 (the "Motion"). AccuRadio respectfully requests that the Judges deny SoundExchange's motion to strike Mr. Hanson's testimony because (i) SoundExchange's claim that AccuRadio "has failed to produce a single document in response to two discovery orders compelling its cooperation" is disingenuous,¹ (ii) SoundExchange's claim that AccuRadio has not otherwise participated in the discovery process of this proceeding is false and absurd, (iii) SoundExchange's claim that AccuRadio's alleged failure to produce documents or otherwise participate in the discovery process prejudices its ability to rebut Mr. Hanson's testimony is greatly exaggerated in light of

¹ AccuRadio has produced numerous documents in response to SoundExchange's requests, the most recent being on February 12, 2015, the day previous to SoundExchange's filing its Motion. However, AccuRadio admits that it inadvertently served only the webcaster (i.e., copyright user) participants and didn't become aware of the error until it received notice of the Motion. The error has been corrected and, as noted *infra*, SoundExchange has been served with the documents and has acknowledged same.

the fact that his testimony is based upon comprehensive generalities about the “willing buyer/willing seller” standard in the webcasting industry, and (iv) the removal of AccuRadio from the proceedings would be a draconian remedy and would silence the voice of the only remaining small, independently owned-and-operated webcaster remaining in this proceeding.

I. AccuRadio Has Produced Documents to SoundExchange in Response to the Judges’ Discovery Order 4.

Having produced documents to SoundExchange previously on November 14, 2014 and November 19, 2014 in response to SoundExchange’s First Set of Requests for Production of Documents to AccuRadio LLC, AccuRadio also produced responsive additional financial documents to SoundExchange on February 12, 2015 in respect of the Judges’ Discovery Order 4 issued on January 15, 2015. AccuRadio concedes that there was a glitch in the distribution of the documents and that the production was initially made only to counsel of record on the webcaster (i.e., copyright user) side of the proceedings, but this mistake was rectified by February 17, 2015. Thereafter, SoundExchange contended that some of the documents provided were not sufficiently legible and AccuRadio provided to it new, complete sets of documents on February 18, 2015 – the very next day.

SoundExchange had the ability to cull through AccuRadio’s financial documents in a very short time after it received them. Moreover, unlike some of the other participants in the Web IV proceeding who are publicly-traded or who maintain complicated and nuanced financials, AccuRadio is a small, independently owned-and-operated webcaster with only six full-time employees, and its straight-forward and uncomplicated financial documents reflect this reality.

Moreover, Mr. Hanson, as the Judges noted in Discovery Order 4, “did not testify specifically about the profitability of his own business.” Consequently, it strains credulity for

SoundExchange to argue that it is prejudiced by the lack of production when such production has in fact occurred and other participants, including SoundExchange, were still producing documents relevant to the Web IV proceeding as late as February 11, 2015.

II. AccuRadio Has Offered to Comply with Discovery Order 13.

Discovery Order 13 specifically compels AccuRadio to provide SoundExchange with (1) communications between Kurt Hanson and RAIN: Radio and Internet News (RAIN); (2) communications between Mr. Hanson and webcasters regarding the latter's profitability; (3) documents reflecting AccuRadio's financial status, including business plans and forecasts; and (4) all writings by Mr. Hanson on the subject of webcasting. While AccuRadio was in consultation with SoundExchange regarding certain of its financials production during late January and early February, AccuRadio offered to comply with additional Discovery Order 13 documents on February 18, 2015 during a telephone conversation between counsel for SoundExchange and AccuRadio, at which time AccuRadio received some clarification from SoundExchange as to what exactly might meet the requirements of its requests. AccuRadio's offer was rejected the following morning.

While AccuRadio concedes that producing documents to comply with Discovery Order 13 as late as the 26th of this month, the earliest date that AccuRadio's minimal support staff and its counsel (who is currently travelling in Southeast Asia in regions with limited Internet access) can reasonably produce them, may seem like it is coming late to the party with respect to the requests, it also seems equally reasonable to contend that SoundExchange's alleged dire need for them is more tactical than substantive.

In fact, if SoundExchange intended to fashion a lengthy or important argument rebutting Mr. Hanson's testimony regarding his observations on the "willing buyer/willing seller"

standard, it certainly would have demanded to depose him prior to fashioning such an argument, which it has not.

Finally, while SoundExchange has, as of the date of this Response, not requested more time from the Judges to fashion its rebuttal case, it seems unfair that AccuRadio could be cast out from the Web IV proceeding if an extension of time is granted to SoundExchange (or to any participant in Web IV, for that matter).

III. SoundExchange's Proposed Relief is Disproportionate to the Alleged Harm.

SoundExchange's Motion leads to a draconian result where the alleged harm to SoundExchange is not commensurate to the harm that results to AccuRadio and to the completeness of the Web IV proceeding. Additionally, while AccuRadio is cognizant of the Judges' statement in Discovery Order 4 that its "financial performance is directly related to Mr. Hanson's assertions concerning what a "willing buyer" would be willing to pay for music licences," SoundExchange's requested "elimination remedy" seems more appropriate for a participant whose direct testimony specifically makes references to its ability to pay (or not to pay) royalties to rights holders and its effect on the profitability of its business.

Finally, as noted earlier in this Response, AccuRadio is the only small, independently owned-and-operated webcaster left in the Web IV proceeding and, as such, is the sole representative of its class of webcaster that remains.

IV. If Necessary AccuRadio Will Withdraw Portions of Its Testimony.

Finally, if necessary, AccuRadio is willing to withdraw or strike any portions of Mr. Hanson's testimony that can reasonably be presumed to initiate SoundExchange's requirement for any of the documents it has requested but have not yet been produced. To that end, if necessary, AccuRadio suggests that Paragraph 26 of Mr. Hanson's direct testimony could be

revised by inserting the word “presumably” before the phrase “increasing consumer enthusiasm” in the fourth sentence, and also by deleting in its entirety the parenthetical “(which has historically increased sales of both recorded music and attendance at live performances).”

AccuRadio also proposes, if necessary, deleting in their entirety Paragraphs 61 through 65 of Mr. Hanson’s direct testimony plus the phrase “[i]n support of this argument, note that” appearing in the first sentence of Paragraph 66.

While AccuRadio understands that this is an unusual request, it sincerely hopes that the Judges’ will consider this compromise and weigh its uniqueness against the importance of a small webcaster’s participation in the Web IV proceeding.

V. Conclusion.

For all of the reasons set forth above, AccuRadio respectfully requests that the Judges deny SoundExchange’s Motion to Strike the Testimony of AccuRadio Witness Kurt Hanson.

Respectfully submitted,

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Date: February 23, 2015

CERTIFICATE OF SERVICE

I, Kurt Hanson, do hereby certify that copies of the foregoing “**ACCURADIO’S RESPONSE TO SOUNDEXCHANGE’S MOTION TO STRIKE THE TESTIMONY OF ACCURADIO WITNESS KURT HANSON**” were sent via electronic email and via first-class, postage prepaid, United States mail, this 23rd day of February 2015 to the following:

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