Received

FEB 25 2015

Copyright Royalty Board

RECEIVED
Library of Congress Office

FEB 25 2015

COPYRIGHT OFFICE

BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
WASHINGTON, D.C.

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)**	))))))))	**DOCKET NO. 14-CRB-0001-WR** **(2016-2020)**

Received

FEB 25 2015

Copyright Royalty Board

SOUNDEXCHANGE'S REPLY IN SUPPORT OF MOTION TO STRIKE THE TESTIMONY OF ACCURADIO WITNESS KURT HANSON

Based on AccuRadio's Response to SoundExchange's Motion to Strike, the following facts are undisputed:

- The Judges granted SoundExchange's unopposed motions to compel and directed AccuRadio to produce responsive document by January 30, 2015. Discovery Order 4, at 2; Discovery Order 13, at 2-3.
- AccuRadio failed to produce *any* documents responsive to Discovery Orders 4 and 13 by the January 30 deadline. AccuRadio's Response ("Response") at 1 n.1, 2.
- AccuRadio did not produce to SoundExchange any documents responsive to these orders until February 17, after SoundExchange was forced to file its Motion to Strike and less than a week before Written Rebuttal Statements were due.[1] Response at 2.
- As of February 23—the due date for Written Rebuttal Statements—AccuRadio had produced some documents responsive to Discovery Order 4, but it had not yet produced documents responsive to Discovery Order 13. Response at 3.
- AccuRadio does have documents responsive to Discovery Order 13 (as evidenced by its belated offer to produce them now). Response at 3.

[1] On February 12, AccuRadio apparently served the licensee participants—but not SoundExchange—certain documents responsive to Discovery Order 4.

AccuRadio's decision to disregard the Judges' express Discovery Orders continues its practice of shirking its basic discovery obligations—a practice that began when AccuRadio failed to cooperate in discovery and that persisted through its failure to even oppose SoundExchange's motions to compel. The appropriate remedy for AccuRadio's conduct is to strike Mr. Hanson's testimony. *See* Memorandum Opinion on Material Questions of Substantive Law at 7, Dkt. No. 2009-1 CRB Webcasting III (Feb. 22, 2010).

Faced with the natural consequences of its choices, AccuRadio now argues in its Response that it should receive special treatment because it is "small" and "independently owned." Its size is no excuse. If AccuRadio will not participate in discovery as every other participant must, then it should not be permitted to offer testimony that cannot be meaningfully tested or rebutted. And rewarding AccuRadio's unexplained failure to cooperate in discovery will only discourage it and other participants from cooperating in the future. AccuRadio's failure to participate in the required discovery should result in striking its testimony.

In addition to its request for special treatment, AccuRadio makes four arguments in its belated effort to comply with its discovery obligations. None change the appropriate result.

First, AccuRadio attacks as "disingenuous" SoundExchange's February 13 assertion that AccuRadio had "failed to produce a single document in response to two discovery orders compelling its cooperation." But, as AccuRadio admits in a footnote, it did not produce the documents *to SoundExchange*, the party that had requested them, until after February 13. (Response at 2). AccuRadio's failure to deliver the documents to SoundExchange does not render the sentence "disingenuous." Nor are the November productions that AccuRadio points to in any way relevant to this Motion. Those productions, which consisted of a grand total of *eleven* documents, (Olasa Decl. ¶ 5) are in no way responsive to the Judges' Orders or the

discovery requests at issue—that is why SoundExchange had to file two motions to compel in the first place. SoundExchange's Motion was entirely accurate.

Second, AccuRadio defends its failure to produce *any* documents responsive to Discovery Order 13 by stating that it "offered" a few days ago to do what the Judges ordered it to do weeks ago. What is more, while AccuRadio does not explicitly say so, that "offer" was to provide the documents three days *after* the filing of the rebuttal case. This offer comes too little, too late. AccuRadio could have simply produced these documents in November, in response to SoundExchange's second set of discovery requests. Instead, it chose to completely ignore SoundExchange's second set of requests and failed to raise any objections to the requests. Next, it could have produced the requested documents *after* SoundExchange moved to compel. Instead, AccuRadio chose to wait until the Judges issued their order. Even then, after the Judges specifically *ordered* AccuRadio to produce these documents, AccuRadio let the January 30 deadline to produce these documents lapse as well as two additional extensions.[2]

By failing to produce *any* documents responsive to this order until far later than the January 30 deadline, AccuRadio impeded SoundExchange's ability to incorporate a response to AccuRadio in SoundExchange's rebuttal case. AccuRadio contends that SoundExchange does not really need its documents, and that its "alleged dire need for them is more tactical than substantive." Respectfully, whether SoundExchange "need[s]" the documents is not up to AccuRadio, it was decided in Discovery Orders 4 and 13. If AccuRadio had an objection to these requests, it should have raised them by opposing SoundExchange's motions.

---

[2] AccuRadio failed to produce the documents on January 30 as the Judges' ordered, on February 6 as AccuRadio promised when SoundExchange inquired, and on February 11 as it promised again after it missed the deadline of February 6.

In addition, AccuRadio contends that SoundExchange does not intend "to fashion a lengthy or important argument" rebutting Mr. Hanson's testimony, because SoundExchange has not sought his deposition. Again, respectfully, SoundExchange faces an array of witnesses from the licensee participants and has only a limited number of depositions and a limited amount of time to conduct them. Without reviewing AccuRadio's documents, SoundExchange lacks the information to make an informed decision as to whether a deposition of Mr. Hanson would be necessary.[3]

Third, AccuRadio insists that the remedy SoundExchange seeks is "draconian." Not so. Striking the testimony is the only way to address the failure to provide the discovery the Judges have already ordered and redress the prejudice that would otherwise result. And it is not a remedy SoundExchange sought until it had no other choice. SoundExchange afforded AccuRadio numerous opportunities to produce the material, but it did not do so. AccuRadio also believes the remedy is "draconian" because it questions whether it should have to provide the discovery in the first place, contending that the remedy of striking the testimony should only apply to a participant "whose direct testimony specifically makes references to its ability to pay. . ." (Response at 4). This is an effort to belatedly oppose the motion to compel. The time for that has passed.

---

[3] Moreover, even without a deposition, SoundExchange's rebuttal witnesses would have been able to review and respond to Mr. Hanson's broad claims about the webcasting industry and the appropriate rates. For instance, SoundExchange's finance expert, Professor Thomas Lys, provided a detailed analysis of webcaster finances that was informed by documents produced by Pandora and iHeartMedia. Reviewing AccuRadio's financial documents could have allowed Professor Lys to incorporate AccuRadio's finances as well. Similarly, Professor Rysman provided an analysis of the webcasting industry that was informed by internal Pandora and iHeartMedia documents. Had AccuRadio produced its documents in a timely manner, Professor Rysman may have been able to comment on AccuRadio's forecasts.

AccuRadio should not be able to immunize itself against its failure to participate by pointing to its status as a "small" webcaster. In order for its participation as such to be valuable, AccuRadio actually has to participate throughout. It cannot just lob in its direct statement and then count the days until it shows up at the hearing. SoundExchange is entitled to test AccuRadio's assertions so that it may effectively respond on rebuttal and cross-examination. And even if AccuRadio's claim to be the representative of small webcasters in this proceeding were true, it only accentuates the need for AccuRadio to play by the same discovery rules as everybody else. AccuRadio has only itself to blame for failing to comply with the Judges' Orders.

Fourth, AccuRadio asks the Judges to allow it to revise its testimony, but its offer is insufficient to redress the prejudice to SoundExchange or to cure AccuRadio's refusal to cooperate in discovery. AccuRadio's suggested minor modifications do not narrow the breadth or substance of Mr. Hanson's testimony. For instance, AccuRadio suggests inserting the word "presumably" into paragraph 26 of Mr. Hanson's testimony so that the sentence would read: "Rather than affordably licensing their sound recordings to webcasters, thereby encouraging a large and diverse set of players in the field and thereby [presumably] increasing consumer enthusiasm for music in a wide variety of genres . . . ." It is not clear what this proposed edit seeks to accomplish or how it will remedy the prejudice to SoundExchange.

AccuRadio also suggests striking paragraphs 61 through 65 of Mr. Hanson's testimony, which discuss the price Mr. Hanson believes a willing buyer would pay. But Mr. Hanson's testimony contains other broad statements regarding the webcasting industry, including his claim that there is a dearth of willing buyers (paragraphs 46 – 59) and that the *Web II* and *Web III* royalty rates have "scared off" potential willing buyers (paragraph 55).

for Eligible Transmissions by Covered Entities for the period 2016-2020. The Parties specifically request that the Judges endeavor to decide before the hearing in this Proceeding whether or not they will adopt the Settlement.

Dated: February __, 2015

Respectfully submitted,

Glenn D. Pomerantz / ZK

Glenn D. Pomerantz (CA Bar 112503)
Kelly M. Klaus (CA Bar 161091)
Anjan Choudhury (DC Bar 497271)
MUNGER, TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Glenn.Pomerantz@mto.com
Kelly.Klaus@mto.com
Anjan.Choudhury@mto.com
Counsel for SoundExchange, Inc.

Kenneth L. Steinthal (CA Bar No. 268655)
Antonio E. Lewis (NC Bar No. 35409)
KING & SPALDING LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
Telephone: 415-318-1211
Facsimile: 415-318-1300
ksteinthal@kslaw.com
Counsel for National Public Radio, Inc. and the Corporation for Public Broadcasting

Olasa Decl.

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

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**DOCKET NO. 14-CRB-0001-WR (2016-2020)**

DECLARATION OF KURUVILLA J. OLASA

I, Kuruvilla J. Olasa, declare as follows:

1. I am an attorney with Munger, Tolles & Olson LLP and am counsel for SoundExchange, Inc., in Docket No. 14-CRB-0001-WR (2016-2020).

2. I submit this Declaration in support of SoundExchange's Reply in Support of Motion to Strike the Testimony of AccuRadio Witness Kurt Hanson.

3. This Declaration is made based upon my personal knowledge.

4. On the morning of February 17, 2015, AccuRadio's counsel, Jeff Jarmuth, contacted me to inform me that AccuRadio had produced to the other licensee participants certain profit and loss statements for AccuRadio. Mr. Jarmuth informed that SoundExchange was inadvertently not provided these documents. Later that day, Mr. Jarmuth sent me a copy of AccuRadio's production.

5. Prior to this February 17, 2015, production, AccuRadio had produced only eleven documents in discovery.

Dated: February 25, 2015

Kuruvilla Olasa

Kuruvilla J. Olasa
MUNGER, TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Kuruvilla.Olasa@mto.com

Counsel for SoundExchange, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2015, I caused a copy of **SOUNDEXCHANGE'S REPLY IN SUPPORT OF MOTION TO STRIKE THE TESTIMONY OF ACCURADIO WITNESS KURT HANSON** to be served via electronic mail and first-class, postage prepaid, United States mail, to the Participants as indicated below:

Participants

Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com Telephone: (312) 284-2440 Facsimile: (312) 284-2450 *AccuRadio, LLC*	George D. Johnson, an individual d.b.a. Geo Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 E-mail: george@georgejohnson.com Telephone: (615) 242-9999 *George D. Johnson (GEO), an individual and digital sound recording copyright creator d.b.a. Geo Music Group*
Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com Telephone: (916) 251-1600 Facsimile: (916) 251-1731 *Educational Media Foundation*	Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Basse Rd. San Antonio, TX 78209 DonnaSchneider@iheartmedia.com Telephone: (210) 832-3468 Facsimile: (210) 832-3127 *iHeartMedia, Inc.*
Frederick Kass Intercollegiate Broadcasting System, Inc. (IBS) 367 Windsor Highway New Windsor, NY 12553-7900 ibs@ibsradio.org ibshq@aol.com Telephone: (845) 565-0003 Facsimile: (845) 565-7446 *Intercollegiate Broadcasting System, Inc. (IBS)*	Jane Mago, Esq. Suzanne Head 1771 N Street, NW Washington, DC 20036 jmago@nab.org shead@nab.org Telephone: (202) 429-5459 Facsimile: (202) 775-3526 *National Association of Broadcasters (NAB)*

Russ Hauth, Executive Director Harv Hendrickson, Chairman 3003 Snelling Avenue, North Saint Paul, MN 55113 russh@salem.cc hphendrickson@unwsp.edu Telephone: (651) 631-5000 Facsimile: (651) 631-5086 *National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)*	Gregory A. Lewis National Public Radio, Inc. 1111 North Capital Street, NE Washington, DC 20002 glewis@npr.org Telephone: (202) 513-2050 Facsimile: (202) 513-3021 *National Public Radio, Inc. (NPR)*
Patrick Donnelly Sirius XM Radio, Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com Telephone: (212) 584-5100 Facsimile: (212) 584-5200 *Sirius XM Radio Inc.*	Cynthia Greer Sirius XM Radio, Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com Telephone: (202) 380-1476 Facsimile: (202) 380-4592 *Sirius XM Radio Inc.*
Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com Telephone: (510) 858-3049 Facsimile: (510) 451-4286 *Pandora Media, Inc.*	David Oxenford WILKINSON BARKER KNAUER, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com Telephone: (202) 373-3337 Facsimile: (202) 783-5851 *Counsel for Educational Media Foundation and National Association of Broadcasters (NAB)*
Jeffrey J. Jarmuth Law Offices of Jeffrey J. Jarmuth 34 E. Elm Street Chicago, IL 60611-1016 Telephone: (312) 335-9933 Facsimile: (312) 822-1010 Jeff.jarmuth@jarmuthlawoffices.com *Counsel for AccuRadio, LLC*	William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 Malone@ieee.org Telephone: (203) 966-4770 *Counsel for Harvard Radio Broadcasting Co., Inc. (WHRB) and Intercollegiate Broadcasting System, Inc. (IBS)*

Bruce Joseph, Karyn Ablin Michael Sturm, Jillian Volkmar WILEY REIN LLP 1776 K Street, NW Washington, DC 20006 bjoseph@wileyrein.com kablin@wileyrein.com msturm@wileyrein.com JVolkmar@wileyrein.com Telephone: (202) 719-7000 Facsimile: (202) 719-7049 *Counsel for National Association of Broadcasters (NAB)*	Kenneth L. Steinthal, Joseph R. Wetzel Ethan Davis KING & SPALDING LLP 101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com edavis@kslaw.com Telephone: (415) 318-1200 Facsimile: (415) 318-1300 *Counsel for National Public Radio, Inc. (NPR)*
Mark Hansen, John Thorne Evan Leo, Scott Angstreich, Kevin Miller, Caitlin Hall, Igor Helman, Leslie Pope, Matthew Huppert KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C. 1615 M Street, NW, Suite 400 Washington, DC 20036 Mhansen@khhte.com Jthorne@khhte.com eleo@khhte.com sangstreich@khhte.com kmiller@khhte.com chall@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com Telephone: (202) 326-7900 Facsimile: (202) 326-7999 *Counsel iHeartMedia, Inc.*	R. Bruce Rich, Todd Larson Sabrina Perelman, Benjamin E. Marks WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue New York, NY 10153 r.bruce.rich@weil.com todd.larson@weil.com sabrina.perelman@weil.com benjamin.marks@weil.com Telephone: (212) 310-8170 Facsimile: (212) 310-8007 *Counsel for Pandora Media, Inc.*
Karyn Ablin Jennifer Elgin WILEY REIN LLP 1776 K St. N.W. Washington, DC 20006 kablin@wileyrein.com jelgin@wileyrein.com Telephone: (202) 719-7000 Facsimile: (202) 719-7049 *Counsel for National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)*	Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com Telephone: (212) 872-7483 Facsimile: (212) 872-1002 *Counsel for Pandora Media Inc.*

Gary R. Greenstein WILSON SONSINI GOODRICH & ROSATI 1700 K Street, NW, 5th Floor Washington, DC 20006 ggreenstein@wsgr.com Telephone: (202) 973-8849 Facsimile: (202) 973-8899 *Counsel for Pandora Media Inc.*	Paul Fakler Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Telephone: (212) 484-3900 Fax: (212) 484-3990 *Counsel for Sirius XM Radio Inc.*
Martin F. Cunniff Jackson D. Toof Arent Fox LLP 1717 K Street, N.W. Washington, D.C. 20006-5344 Martin.Cunniff@arentfox.com Jackson.Toof@arentfox.com Telephone: (202) 857-6000 Fax: (202) 857-6395 *Counsel for Sirius XM Radio Inc.*	Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com Telephone: (202) 642-2849 *Counsel for College Broadcasters Inc. (CBI)*
Antonio E. Lewis King & Spalding, LLP 100 N. Tryon Street, Suite 3900 Charlotte, NC 28202 Tel: 704-503-2583 Fax: 704-503-2622 E-Mail: alewis@kslaw.com *Counsel for National Public Radio, Inc. (NPR)*	David Golden CONSTANTINE CANNON LLP 1001 Pennsylvania Ave. NW, Suite 1300N Washington, DC 20004 dgolden@constantinecannon.com Telephone: (202) 204-3500 Facsimile: (202) 204-3501 *Counsel for College Broadcasters Inc. (CBI)*

Vickie Leyson

Vickie Leyson