

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



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

**REPLY IN SUPPORT OF SOUNDEXCHANGE'S MOTION TO COMPEL PANDORA
MEDIA, INC. TO PRODUCE DOCUMENTS RESPONSIVE TO SOUNDEXCHANGE'S
REQUESTS**

Pandora's Opposition fails to provide any basis for avoiding the requested discovery.

Pandora should be ordered to produce documents that constitute, comprise, memorialize, or analyze Pandora's promotional programs, including Pandora Premieres and Pandora Presents. Such documents are directly related to testimony in Pandora's Written Rebuttal Statement ("WRS") opining on the value of Pandora as a promotional vehicle and examining the value of

[REDACTED]

Second, Pandora has refused to adequately produce documents that constitute, comprise, memorialize, or analyze the direct licenses or direct licensing program initiated by the music service known as DMX and its effect on rates or rate determination proceedings.

SoundExchange requested a specific email sent by Pandora executive Chris Harrison in December of 2013 in which Mr. Harrison highlighted the success of a strategy he implemented for DMX that involved entering into direct licenses in order to create evidence for a rate court proceeding. Evidence of a strategic motive underlying Pandora's direct licensing would

undermine the direct licenses Pandora has proffered as benchmarks. But Pandora has refused to produce the requested email and any other documents except for two. In light of their clear probative value to the key benchmarks Pandora has put at issue here, Pandora should produce all documents that constitute, comprise, memorialize, or analyze Mr. Harrison's efforts on DMX's behalf.

Because both of these categories of documents are directly related to Pandora's WRS, the Judges should grant this Motion and compel production. *See* 17 U.S.C. § 803(b)(6)(C)(v); 37 C.F.R. § 351.5(b).

I. ARGUMENT

A. Pandora Should Produce Documents Relating To Its Promotional Programs

1. Documents Relating to Pandora's Promotional Programs Are Directly Related to Dr. Shapiro's Rebuttal Testimony Regarding the Pandora-Merlin Agreement and the Pandora-Naxos Agreement

Pandora claims that requiring it to produce documents relating to Pandora Presents and Pandora Premieres would lead to “absurd” results. Pandora Media, Inc.’s Opposition to SoundExchange, Inc.’s Motion to Compel (“Opp.”) at 7. Nonsense. These documents are very closely related to [REDACTED] Pandora’s sole benchmark agreements, the Pandora-Merlin agreement and the Pandora-Naxos agreement. Both agreements are discussed in Dr. Shapiro’s written rebuttal testimony (“WRT”) and the Pandora-Naxos agreement, in particular, was introduced for the first time in Pandora’s written rebuttal case. Shapiro WRT at 37-38.

Dr. Shapiro contends that he has “calculated that the statutory rate corresponding to the Naxos Agreement is [REDACTED] for each advertising-supported performance and [REDACTED] for each subscription performance.” Shapiro WRT at 37. In order to perform this calculation, Dr. Shapiro had to consider all significant consideration exchanged in the agreement. As Dr. Shapiro admitted in his deposition, in analyzing a benchmark “one wants to identify components

that have substantial value and account for those as best they can.” Declaration of Kuruvilla Olasa (“Olasa Decl.”) Ex. A (Shapiro Dep. Tr. 239:7-240:6). With respect to the Naxos agreement, [REDACTED]

[REDACTED] Herring WRT, Ex. 15 at 5.

SoundExchange is entitled to test whether Dr. Shapiro has [REDACTED]

[REDACTED]¹ To do so, SoundExchange should be permitted to assess whether and to what extent the promotional opportunities offered by Pandora Presents or Pandora Premieres are viewed as valuable promotional opportunities by others, or by Pandora itself. And SoundExchange should be permitted to test whether these programs involve significant expenditures by Pandora that must be accounted for and whether Pandora derives any benefit from these programs.

2. Documents Relating to Pandora’s Promotional Programs Could Undermine Pandora’s Claim That It Has a Promotional Effect

Pandora misses the heart of SoundExchange’s argument. SoundExchange pointed out in its Motion to Compel that the licensee participants—including Pandora—have pursued a specific theory in this proceeding. They assert that “[i]f record labels did not view radio play as promoting sales of sound recordings and albums, they would have no incentive to devote such substantial resources to obtaining radio play of their sound recordings.” Peterson WRT ¶ 48. In other words, Pandora has argued that record companies’ efforts to promote music to terrestrial radio indicate that they believe in the promotional effect of terrestrial radio.

¹ With respect to the Pandora-Merlin agreement, for example, Dr. Shapiro concluded that Merlin’s [REDACTED] Shapiro WDT, Appendix D, D-17- D-18.

As relevant here, if Pandora’s theory regarding terrestrial radio promotion is valid, it should also work in reverse. If the record companies do not promote to Pandora—as the evidence currently suggests—it could indicate that Pandora does not have a promotional effect. Additional evidence that supports this theory would undermine Pandora’s claim to be promotional—a claim that its witnesses make repeatedly in Pandora’s written rebuttal case. For instance, Dr. Peterson claims that there is “substantial evidence” that Pandora is promotional. Peterson WRT at 20. Similarly, Dr. Shapiro testifies that Pandora has a net promotional impact on record sales. Shapiro WRT at 26-27.

Pandora claims that Pandora Premieres and Pandora Presents are not within “the ambit of the statutory license” and, as a result, do not relate to Pandora’s written rebuttal testimony. Opp. at 5-6. But Pandora itself has previously discussed these programs in its testimony when describing Pandora’s promotional effects. Fleming-Wood WDT ¶¶ 29, 30. If these programs were unrelated to Pandora’s statutory service, Pandora would have had no occasion to discuss them. The documents should be produced.

B. Documents Relating to Direct Licensing Strategies Initiated by Pandora Executive, Chris Harrison

Pandora refuses to acknowledge the connection between the documents sought in this category—which relate to Pandora’s Chris Harrison and its direct licensing strategies in general—and the evidence Pandora has proffered in this proceeding. Pandora has put two direct licenses front and center in this proceeding and asserted that they “reflect the workings of competition” and “reflect what Pandora as a willing buyer has demonstrated it is willing to pay to willing sellers for the very rights at issue in this proceeding.” Herring WRT at 23. Dr. Shapiro testifies that the Pandora-MERLIN license offers a valuable benchmark despite the effect of the statutory shadow. Shapiro WRT at 32-35.

To test these assertions, SoundExchange seeks documents relating to Pandora's strategy in entering into direct licenses. In particular, SoundExchange requested that Pandora produce a particular email that Chris Harrison authored relating to a direct licensing strategy and its effect in later rate court proceedings. This email was read into the record during the opening statement in the recent federal court proceeding involving Pandora and BMI. Mot. at 1-2. But Pandora has refused to provide that email—or others like it—on the ground that the email related to negotiations regarding the rights in compositions and not sound recordings. And although Pandora searched Mr. Harrison's emails for “certain” documents, it has pointedly refused to provide documents that relate to its direct licensing strategy in general. It has admittedly withheld all documents that it contends do not relate to the rights at issue in this proceeding. Opp. at 10.

This is an inappropriate limitation for this request. SoundExchange seeks to test whether Pandora has adopted a program aimed at creating benchmark evidence for this proceeding. If evidence exists establishing that Pandora has done so on the composition side of the equation—and the email Pandora produced in the BMI rate court proceeding certainly appears to SoundExchange to constitute such evidence²—then SoundExchange is entitled to use that evidence to demonstrate that Pandora likely adopted a similar strategy to create evidence for this proceeding. The fact that different rights are at issue does not eliminate the probative value of the email SoundExchange seeks, or others like it. If Pandora sought to engage in direct licensing in order to attempt to drive rates down in a rate court proceeding, that would be evidence that is

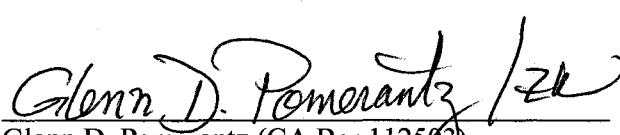
² Pandora takes SoundExchange to task for mischaracterizing the email, arguing that SoundExchange has not seen the actual document. SoundExchange provided the transcript of the Opening Statement that read the email into the record. If Pandora believes that the email does not say what SoundExchange understands it to say, Pandora should simply produce it so that all parties can read it for themselves and decide.

directly related to the value of Pandora's direct licenses as benchmarks. Pandora should produce the documents relating to the strategy underlying its direct licensing program.

Dated: April 7, 2015

Respectfully submitted,

By:



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.

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

**DECLARATION OF KURUVILLA J. OLASA IN SUPPORT OF REPLY IN SUPPORT
OF SOUNDEXCHANGE'S MOTION TO COMPEL PANDORA MEDIA, INC. TO
PRODUCE DOCUMENTS RESPONSIVE TO SOUNDEXCHANGE'S REQUESTS**

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 Reply In Support of SoundExchange's Motion to Compel Pandora Media, Inc. To Produce Documents Responsive to SoundExchange's Requests.
3. This Declaration is made based upon my personal knowledge.
4. Exhibit A is an excerpt of the transcript of the deposition of Carl Shapiro which was taken pursuant to these proceedings on March 31, 2015.
5. Exhibit A and portions of the Reply contain information designated as "Restricted" by Pandora. Pursuant to the terms of the October 10, 2014, Protective Order, SoundExchange is filing these Restricted materials under seal and is redacting these materials from its Public filing.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: April 7, 2015

Kuruvilla J 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.

EXHIBIT A

**RESTRICTED – Subject to Protective Order in
Docket No. 14 – CRB – 0001 – WR (2016-2020)(Web IV)**

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2015, I caused a copy of the foregoing PUBLIC —

**REPLY IN SUPPORT OF SOUNDEXCHANGE'S MOTION TO COMPEL PANDORA
MEDIA, INC. TO PRODUCE DOCUMENTS RESPONSIVE TO SOUNDEXCHANGE'S
REQUESTS** to be served via electronic mail and United States Mail, first class, postage prepaid
addressed as follows:

<p>Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com Telephone: (312) 284-2440 Facsimile: (312) 284-2450 <i>AccuRadio, LLC</i></p>	<p>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 <i>George D. Johnson (GEO), an individual and digital sound recording copyright creator d.b.a. Geo Music Group</i></p>
<p>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 <i>Educational Media Foundation</i></p>	<p>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 <i>iHeartMedia, Inc.</i></p>
<p>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 <i>Intercollegiate Broadcasting System, Inc. (IBS)</i></p>	<p>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 <i>National Association of Broadcasters (NAB)</i></p>

<p>Russ Hauth, Executive Director Harv Hendrickson, Chairman 3003 Snelling Avenue, North Saint Paul, MN 55113 russh@salem.cc hp'hendrickson@unwsp.edu Telephone: (651) 631-5000 Facsimile: (651) 631-5086 <i>National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)</i></p>	<p>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 <i>National Public Radio, Inc. (NPR)</i></p>
<p>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 <i>Sirius XM Radio Inc.</i></p>	<p>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 <i>Sirius XM Radio Inc.</i></p>
<p>Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com Telephone: (510) 858-3049 Facsimile: (510) 451-4286 <i>Pandora Media, Inc.</i></p>	<p>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 <i>Counsel for Educational Media Foundation and National Association of Broadcasters (NAB)</i></p>
<p>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 <i>Counsel for AccuRadio, LLC</i></p>	<p>William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 Malone@ieee.org Telephone: (203) 966-4770 <i>Counsel for Harvard Radio Broadcasting Co., Inc. (WHRB) and Intercollegiate Broadcasting System, Inc. (IBS)</i></p>

<p>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</p> <p>Telephone: (202) 719-7000 Facsimile: (202) 719-7049 <i>Counsel for National Association of Broadcasters (NAB)</i></p>	<p>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</p> <p>Telephone: (415) 318-1200 Facsimile: (415) 318-1300 <i>Counsel for National Public Radio, Inc. (NPR)</i></p>
<p>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</p> <p>Telephone: (202) 326-7900 Facsimile: (202) 326-7999 <i>Counsel iHeartMedia, Inc.</i></p>	<p>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</p> <p>Telephone: (212) 310-8170 Facsimile: (212) 310-8007 <i>Counsel for Pandora Media, Inc.</i></p>
<p>Karyn Ablin Jennifer Elgin WILEY REIN LLP 1776 K St. N.W. Washington, DC 20006 kablin@wileyrein.com jelgin@wileyrein.com</p> <p>Telephone: (202) 719-7000 Facsimile: (202) 719-7049 <i>Counsel for National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)</i></p>	<p>Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com</p> <p>Telephone: (212) 872-7483 Facsimile: (212) 872-1002 <i>Counsel for Pandora Media Inc.</i></p>

<p>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 <i>Counsel for Pandora Media Inc.</i></p>	<p>Paul Fakler Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Telephone: (212) 484-3900 Fax: (212) 484-3990 <i>Counsel for Sirius XM Radio Inc.</i></p>
<p>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 <i>Counsel for Sirius XM Radio Inc.</i></p>	<p>Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com Telephone: (202) 642-2849 <i>Counsel for College Broadcasters Inc. (CBI)</i></p>
<p>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 <i>Counsel for National Public Radio, Inc. (NPR)</i></p>	<p>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 <i>Counsel for College Broadcasters Inc. (CBI)</i></p>

Vickie Leyson MLL
Vickie Leyson