UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

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)**

ORDER DENYING, WITHOUT PREJUDICE, MOTIONS FOR ISSUANCE OF SUBPOENAS FILED BY PANDORA MEDIA, INC. AND THE NATIONAL ASSOCIATION OF BROADCASTERS

I. PENDING MOTIONS

On March 10, 2014, Pandora Media, Inc. (Pandora) filed with the Copyright Royalty Judges (Judges) a Motion for the Issuance of Subpoenas.[1] In support of its Motion, which requested that the Judges issue nine subpoenas, Pandora filed the Declaration of Christopher Harrison, Esq., the Assistant General Counsel for Pandora, and the Declarations of R. Bruce Rich, and Todd Larson, Esqs., members of the law firm of Weil, Gotshal & Manges, LLP, counsel for Pandora in this proceeding

On March 13, 2014, Pandora filed a separate Motion seeking leave to submit an Amended Declaration from Mr. Larson, adding a tenth subpoena that Pandora is asking the Judges to issue (identified as proposed Exhibit J to Pandora's March 10th Motion).[2]

On March 13, 2014, the National Association of Broadcasters (NAB) filed with the Judges a consolidated brief supporting: (a) NAB's joinder in Pandora's Motion; and (b) NAB's separate Motion for Issuance of Subpoenas.[3] NAB did not submit any supporting Declarations.

On March 18, 2014, SoundExchange filed an "Opposition to Motions for Issuance of Subpoenas" (Opposing Brief), and a supporting Declaration from Melinda LeMoine, Esq., an attorney with Munger, Tolles & Olson LLP, the law firm representing SoundExchange in this proceeding.[4]

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[1] Attached as Exhibits A through I to Pandora's Motion are the nine subpoenas that Pandora is asking the Judges to issue.

[2] Pandora's Motion for Leave was unopposed and granted by the Judges in an Order entered on March 21, 2014.

[3] Attached as Exhibits A through D to NAB's Motion are the four subpoenas that NAB is asking the Judges to issue.

[4] The Judges also received an email communication on March 14, 2014, from A. John P. Mancini, Esq., an attorney with Mayer Brown LLP, counsel to Google Inc., requesting that the Judges set a briefing schedule on Pandora's motion and provide an enlargement of the time set forth in 37 C.F.R. § 350.4(f) for Google to file an opposition to the Motion. In light of the present Order, Mr. Mancini's request is moot. Nevertheless, the Judges note that

On March 24, 2013, Pandora and NAB each filed reply briefs.

II. RULING

For the reasons stated in this Order, the Judges hereby **DENY, WITHOUT PREJUDICE,** both the Pandora and NAB motions.

III. ANALYSIS

A. The Objects and Scope of the Requested Subpoenas

1. Pandora's Motion

Pandora requests (as does NAB by virtue of its joinder) that the Judges issue subpoenas to: Spotify USA Inc.; Google Inc.; Beats Music, LLC; Rhapsody International, Inc.; Cricket Communications, Inc.; Rdio, Inc.; Google Inc. (as successor to YouTube); Vevo, LLC; Slacker, Inc.; and Clear Channel Communications, Inc. [5] *See* Pandora Motion, Exs. A through J. In each of the proposed subpoenas, Pandora seeks copies of license agreements between the subpoena targets and copyright owners of sound recordings, for noninteractive webcasting. *Id.* In addition, Pandora seeks related information such as numbers of subscribers or users, royalty statements and computations, numbers of streams or performances of sound recordings, and amounts of revenue from various sources (*e.g.*, subscription fees and advertising). *Id.* Pandora seeks the agreements and related information as potential benchmarks to present to the Judges as part of its Written Direct Statement and rate proposal. *Id.* at 5-6.

2. NAB's Motion

In its Motion, NAB requests[6] that the Judges also issue subpoenas to the following entities: Apple Inc. (Apple); Sony Music Entertainment, Inc. (Sony); Universal Music Group, Inc. (UMG); and Warner Music Group Corp. (WMG).[7]

In each of the subpoenas that name the three record companies—Sony, UMG, and WMG—NAB seeks any direct licenses with webcasters, along with related information such as royalty statements, statements of account and other reports. NAB also seeks information about any advances or equity grants paid or provided by a webcaster (or other related entity) to the record company. *See* NAB Motion, Exhs. B-D. The subpoena that NAB seeks to have served on Apple pertains only to Apple's iTunes Radio service, and seeks information similar to that sought by Pandora from other webcasting services. *See id.* at Exh. A. As with Pandora, NAB seeks to use the subpoenaed information as potential benchmarks to present to the Judges as part of its direct case. *Id.* at 2.

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requests for action by the Judges are to be made in motions, and that email is not among the acceptable means of delivering motions to the Judges under 37 C.F.R. § 301.2.

[5] Spotify, Beats, Rhapsody and Clear Channel are participants in this proceeding; the remaining entities are not. The Judges have statutory authority to issue subpoenas to non-participants. *See Register's Memorandum Opinion on Material Questions of Substantive Law*, Docket No. 2009-1 CRB Webcasting III (Feb. 22, 2010).

[6] Pandora has not joined in NAB's Motion.

[7] Apple is a participant in this proceeding; the remaining entities are not.

B. Background and Context

On January 3, 2014, in accordance with 17 U.S.C. § 803(b)(1)(A)(i)(III), the Judges published a Notice commencing this proceeding to determine the rates and terms for the period January 1, 2016, through December 31, 2020. *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV): Notice Announcing Commencement of Proceedings,* 79 FR 412 (Jan. 3, 2014) (Web IV Notice). The Judges published the Web IV Notice pursuant to provisions of the Copyright Act (Act) that require the Judges to determine rates and terms for public performances of sound recordings by eligible nonsubscription services and new subscription services every five years. 17 U.S.C. § 804(b)(3)(A). The Judges are required to set rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace by a willing buyer and a willing seller. *See* 17 U.S.C. § 114(f)(2)(B); 17 U.S.C. § 112(e)(4).

The three previous webcaster royalty determinations by the Judges (or their predecessors) have all noted the important evidentiary value of actual marketplace agreements as potential benchmarks in determining the statutory rates. *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings,* Docket No. 2009-1 CRB Webcasting III, 79 FR __ , __(Jan. 9, 2014) ("[I]t is appropriate to rely on benchmarks to establish rates in this section 114 proceeding."); *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* Docket No. 2005-1 CRB DTRA, 72 FR at 24091 (May 1, 2007) (*Web II*) ("general agreement that a benchmark approach is the best way to setting rates in this hypothetical marketplace"); and *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings,* Docket No. 2000-9 CARP DTRA 1&2, 67 FR 45240, 45249 (July 8, 2002) (*Web I*).

IV. DISCUSSION

A. The Judges' Authority to Issue Subpoenas at this Stage of the Proceeding

The Judges' consideration of the instant motions begins with the provision of the Act that grants the Judges subpoena power:

> In proceedings to determine royalty rates, the Copyright Royalty Judges may issue a subpoena commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents and other tangible things, if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things.

17 U.S.C. § 803(b)(6)(C)(ix).[8]

Pandora asserts that the Judges have authority to issue subpoenas now. In support of that assertion, Pandora cites a prior decision of the Judges denying a subpoena motion in support of the Judges' authority to issue subpoenas at this stage of the proceeding, quoting the statement "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." Pandora Reply Brief, at 8 (quoting *Order Denying Issuance of Subpoenas for Nonparty Witnesses,*

[8] This provision is implemented in the Judges' rules at 37 C.F.R. § 351.9(e).

Docket No. 2009-1 CRB Webcasting III, at 2 n.1 (March 5, 2010) (*Web III Subpoena Order*),). NAB also asserts that "[i]n granting subpoena authority to the Judges in 17 U.S.C. § 803(b)(6)(C)(ix), Congress did not limit that power to a particular stage of the proceedings ...." NAB Reply Brief, at 1.

SoundExchange argues that the Act does not confer authority on the Judges to issue subpoenas prior to the participants' filing of their Written Direct Statements—and possibly, not even until the close of the discovery period. Opposing Brief, at 6-7. SoundExchange contends that this view is supported by the placement of the subpoena provision after the provisions dealing with Written Direct Statements and discovery in section 803 of the Act. *Id.* SoundExchange notes that the Act permits discovery only after Written Direct Statements are filed, and argues that Pandora and NAB seek to circumvent the restrictions that Congress placed on discovery through the subpoena mechanism. Opposing Brief, at 1. Finally, SoundExchange also cites the *Web III Subpoena Order*, but for the proposition that the Judges lack authority to issue subpoenas at this early stage of a proceeding. *Id.* at 5. In particular, SoundExchange quotes the Judges' statement (arguably dictum) that "[s]ubpoenas are not permitted for purposes of building one or more party's direct cases." *Web III Subpoena Order*, at 3.

The Judges find it unnecessary to resolve the question whether section 803(b)(6)(C)(ix) confers authority to issue a subpoena at this stage of the proceeding. The Judges do not need to reach this question because they conclude that, even if the Judges have the authority to issue a subpoena at this stage of the proceeding, the Judges currently do not know whether they would be "substantially impaired" in their ability to resolve the proceeding absent issuance of the requested subpoenas at this stage.

B. Substantial Impairment

Pandora, NAB, and SoundExchange are all in agreement that section 803(b)(6)(C)(ix) requires the Judges to find that their "resolution of the proceeding would be substantially impaired by the absence" of the information sought in the proposed subpoenas. The Act, however, does not establish any standard for determining substantial impairment, and the Judges have not previously articulated a standard.

The Judges find that the party seeking a subpoena must demonstrate at least two elements in order to establish that the Judges would be "substantially impaired" as contemplated in section 803(b)(6)(C)(ix):

> *First*, the testimony, documents, or other materials sought in the proposed subpoena must be central to the resolution of the proceeding (or lead to the disclosure of information that is).
>
> *Second*, the party seeking a subpoena must demonstrate that it is unlikely that the testimony, documents, or other materials sought in the proposed subpoena will be obtained and presented to the Judges unless the subpoena issues.

In evaluating these (and any other relevant) elements, the Judges' focus will be on the purported substantial impairment of the Judges, not that of the moving party.

Pandora and NAB seek potential benchmark agreements and information regarding the performance of those agreements. As noted, *supra*, benchmarks can play a central role in determining the rates and terms that most closely represent those that would be established in the marketplace between willing buyers and sellers. SoundExchange does not contest this point.

The Act requires the Judges to "establish rates and terms that *most clearly*" reflect the marketplace. 17 U.S.C. § 114(f)(2)(B) (emphasis added). The importance to the Judges of receiving evidence of a "thick market" (*i.e*, as much contract information as exists) cannot be overstated. The Judges, therefore, believe that the information sought by Pandora and NAB could be central to the resolution of this proceeding.[9]

The participants differ sharply, however, over whether the material sought in the subpoenas is unlikely to be obtained and presented to the Judges if the subpoenas are not issued. SoundExchange argues that alternative means are available for the movants to obtain the information they seek, albeit not before the commencement of the discovery period.[10] Opposing Brief, at 15-18. Pandora and NAB counter that some of the agreements they seek would not be available through discovery, and that any material disclosed during the discovery period would be received too late for Pandora or NAB to evaluate properly and incorporate it into their respective Written Direct Statements.[11] Pandora Reply Brief, at 4-7; NAB Reply Brief, at 4-7. Consequently, the moving parties argue, important benchmark contract information *ultimately*—or even *inevitably*—may not be introduced in evidence and utilized sufficiently by the participants, thus substantially impairing the Judges.

Contrary to the assumptions of Pandora and NAB, such "substantial impairment" is not inevitable because the documents and information sought by the subpoenas may be obtainable pursuant to the extant statutory procedures. Specifically, the Act provides that "[a]ny participant ... may request of an opposing participant nonprivileged documents *directly related* to the written direct statement ... of that participant." 17 U.S.C. § 803(6)(C)(v) (emphasis added). Thus, Participant A may seek in discovery potential benchmark contract information that opposing Participant B possessed but chose not to include in its own benchmark analysis. Participant B's decision regarding the benchmark information it chooses to omit from its Written

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[9] The moving parties' assertion that the information they seek is necessary to respond to the questions the Judges posed in the *Web IV Notice, see, e.g.,* Pandora Motion, at 7-9; NAB Reply Brief, at 7-8, also tends to underscore the centrality of this information to the Judges' resolution of the proceeding.

[10] SoundExchange also argues that it is not possible for the Judges even to determine whether they will be substantially impaired at such an early procedural stage, noting that, in *Web III*, the Judges refused to issue subpoenas after filing of Written Direct Statements and before discovery because "it is not possible" to assess substantial impairment. Opposing Brief, at 2 (quoting *Web III Subpoena Order*, at 3). "At this point in the proceeding, the Judges and the parties are even more bereft of information to allow them to determine 'substantial impairment' than the Judges that considered the potential subpoenas in 2010." *Id.* at 6. The Judges do not view their earlier decision as stating a categorical rule of general application. The Judges note, however, that it will generally be far more difficult to determine whether materials are likely to be obtained through means other than a subpoena at earlier stages of a proceeding than at later stages. Of course, as stated *supra*, the Judges do not decide whether the Act confers authority to issue subpoenas as this procedural stage.

[11] Underlying the movants' arguments is the presumption that SoundExchange will include in its direct case only those agreements (among the many presumably at its disposal) that support higher rates. The movants argue that in previous proceedings SoundExchange has "cherry-picked" certain contracts as its proposed benchmarks, while failing to identify and produce other potential benchmark contracts within its care, custody or control, and can therefore be expected to do so in this proceeding. Pandora Motion, at 12-14; NAB Motion at 5-6. The Movants briefs provide insufficient support for this historical characterization of SoundExchange's prior actions. In any event, the Judges conclude that the benchmark selection processes a participant may have engaged in during *prior* proceedings cannot serve to demonstrate that the participant will engage in the same processes in a subsequent proceeding.

Direct Statement and/or testimony may be as "directly related" to that Written Direct Statement and/or testimony as the benchmark information it elects to include in those submissions.[12]

Following the existing statutory procedure could obviate the concerns raised by Pandora and NAB in this proceeding, *viz.*, their claimed need to obtain the information sought in the subpoenas in sufficient time for use in a manner that would avoid the "substantial impairment" of the Judges in their resolution of this proceeding. If the discovery requests were permitted and/or the subpoenas did issue at a later time (*e.g.*, after the filing of Written Direct Statements), the moving participants might have the information available for use by their witnesses and for inclusion in their rebuttal cases. The information would also be available to support a participant's revised claim or revised requested rate. *See* 37 CFR § 351.4(b)(3) ("No party will be precluded from revising its claim or requested rate at any time during the proceeding up to, and including the filing of the proposed findings of fact and conclusions of law.").

The adequacy of this potential procedure is clear in light of the Scheduling Order entered in this proceeding. The discovery period closes on December 5, 2014. The Written Rebuttal Statements are not due until May 7, 2015. If a participant receives information and documents during the discovery period, or even shortly thereafter in response to an order compelling discovery or a subpoena, the moving participants would have sufficient time to incorporate and utilize the new information and documents in their respective rebuttal cases and in a revised claim or rate, to the extent otherwise permitted by the Act and the regulations.

V. CONCLUSION

For the foregoing reasons, the Judges **DENY** the Motions for Subpoenas filed by Pandora and NAB **WITHOUT PREJUDICE.**[13]

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

Dated: April 3, 2014.

[12] The Judges can only decide whether such discovery would be appropriate in this or any other proceeding in a specific factual context in which Participant B has declined to provide such discovery and Participant A has filed a motion to compel.

[13] By denying the motions without prejudice, the Judges do not preclude Pandora and NAB from future requests for subpoenas should the "substantial impairment" claim become more compelling. In evaluating that claim the Judges ideally would be provided with competent evidence (as distinguished from declarations of attorneys) in addition to cogent legal argument.