UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of	**}**	
	}	**Docket No. 2006-1 CRB DSTRA**
Determination of Rates and Terms for	**}**	
Preexisting Subscription Services and	**}**	
Satellite Digital Audio Radio Services	**}**	
	}	

ORDER DENYING MOTION FOR REHEARING

On December 3, 2007, the Copyright Royalty Judges ("Judges") issued a Determination of Rates and Terms in this matter ("Initial Determination"). Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. Part 353, SoundExchange, Inc. ("SoundExchange") filed a motion for rehearing "to reconsider the definition of Gross Revenues set forth at pages 28-31 of the [Initial] Determination; and, in light of recent predictions that approval of the XM/Sirius merger is imminent, reconsider its unwillingness to assess the impact of a merger as part of its [Initial] Determination." The Judges permitted a response and XM Satellite Radio, Inc. ("XM") and Sirius Satellite Radio, Inc. ("Sirius") (collectively, the "SDARS") filed a timely response, opposing the motion. The Judges now deny this motion. Nevertheless, as discussed below, the Judges have determined that one limited area of the Initial Determination warrants clarification.

The standard for reviewing motions for rehearing is set forth in 17 U.S.C. § 803(c)(2)(A), which states that the Judges may, in exceptional cases, upon a motion of a participant in a proceeding, order a rehearing after the determination in the proceeding is issued, on such matters as the Judges deem to be appropriate. Such exceptional cases require the movant to show that an aspect of the determination is erroneous, without evidentiary support, or contrary to legal requirements. *See* 37 C.F.R. §§ 353.1 and 353.2. SoundExchange made no such showing. Moreover, as we stated in our May 3, 2006 *Order Denying SoundExchange's Motion to Reconsider the Board's Order Requiring, in Part, the Production of Certain Income Tax Returns* in *Webcaster II* (Docket No. 2005-1 CRB DTRA), "[m]otions for reconsideration must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the Board [Judges]." Such motions should be granted only where (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice. *Regency Communications Inc. v. Cleartel Communications, Inc.*, 212 F. Supp.2d 1, 3 (D. D.C. 2002). It is also appropriate to consider these standards in reviewing motions for rehearing.

SoundExchange requests a rehearing in this proceeding based on category (3) with respect to the Initial Determination's definition of "Gross Revenues" and based on category (2) with respect to the proposed XM/Sirius merger. We find, however, that

SoundExchange has not made a sufficient showing of clear error or manifest injustice with respect to the gross revenues definition or new evidence with respect to the proposed merger that would warrant a rehearing. To the contrary, SoundExchange's arguments in support of a rehearing or reconsideration are based on the same insufficiency of evidence that caused its similar arguments to be rejected by the Judges in fashioning their Initial Determination.

SoundExchange's claim that the Initial Determination's definition of "gross revenues" excludes "numerous categories of revenue" so that the effective royalty rate will be substantially below the stated rate in the Initial Determination is not supported by the evidence of the current structure of the SDARS offering. Indeed, SoundExchange in its own motion states that "the SDARS currently offer their subscribers only a single joint music/nonmusic product." (SoundExchange Motion at 8).

There was no credible evidence submitted by SoundExchange during the proceeding that any of the types of revenue excluded from gross revenues in the Initial Determination currently constitute or are projected to account for an amount of gross revenues that would significantly impact the calculation of a percent of gross revenues royalty rate. In addition, contrary to SoundExchange's assertions, its own proposed definition of "revenues" is not all inclusive of every kind of revenue earned by XM or Sirius.[1] For example, the SoundExchange royalty proposal is stated as the greater of two alternatives: the first alternative proposes a royalty fee as a percentage of revenues but explicitly excludes "revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. §114(j)(10)," while the second alternative simply proposes a flat monthly fee related to the number of subscribers reported by the SDARS in their publicly filed financial statements. SoundExchange Third Amended Rate Proposal (August 6, 2007). SoundExchange does not provide a shred of evidence concerning the nature or magnitude of leakage suggested by its own proposed revenue exclusions and how those exclusions might compare to any exclusions found in the agreements that comprise the benchmark marketplace.

Having offered this vaguely worded definition, SoundExchange failed to introduce evidence to identify which categories of the few nonsubscription revenue accounting line entries shown in its own witness' (i.e., Butson's) models for Sirius and XM, if any, are encompassed in whole or in part by its definition. For example, the Sirius model shows line items for three nonsubscription categories of revenues: "advertising revenues net of agency fees," "equipment revenue," and "other revenue," while the XM model shows line items with these similar category labels: "net ad sales," "merchandise," and "other." SoundExchange offered no evidence to indicate what proportion of the equipment or merchandise or "other" categories of revenue, if any, might be encompassed in its definition of revenues.[2] Because SoundExchange's own

[1] SoundExchange does not refer to gross revenues in its own rate proposal but rather proposes a percentage royalty rate that would be applied to "revenues."

[2] For example, contrary to SoundExchange's new claims that its witness' (i.e., Butson's) royalty percentage was calculated as a percentage of "*total* SDARS revenues" (SoundExchange Motion

proffered definition of revenues explicitly excludes "revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10)," and because it failed to introduce any evidence to identify what proportion of the equipment or merchandise and "other" nonsubscription revenue line items noted hereinbefore are encompassed by that definition, its *new* argument that the "witnesses on whose testimony the Court relied to determine royalty rates used the SDARS *entire* revenues as the basis to calculate percentages of revenue" (emphasis in original) is neither credible nor supported by the evidentiary record.[3] Moreover, as we stated in our April 12, 2007 *Order Denying Motions for Rehearing* in *Webcaster II* (Docket No. 2005-1 CRB DTRA), "motions for rehearing do not support a change of tactics for a party to present a new theory or evidence after the trial is concluded. See *Good Luck Nursing Home Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) ("a party that…has not presented known facts helpful to its cause when it had the chance cannot ordinarily avail itself on [Federal Rule of Civil Procedure 60(b) permitting relief from judgment based on a previously undisclosed fact] after an adverse judgment has been handed down"). Indeed, SoundExchange presented no similar claims with respect to these two categories of nonsubscription revenues either in the proceeding or in its proposed findings of fact; therefore, we deem these new claims to have been waived. *See* 37 C.F.R. § 351.14(b) ("A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party.")

A third category of nonsubscription revenue that is specifically excluded by the Initial Determination is advertising revenue associated with channels that use only "incidental" performances of sound recordings as part of their programming. SoundExchange offered no convincing evidence at trial that such excluded revenues were significant. Indeed, the category of advertising revenues identified in the Butson models consists of a broader scope of potential revenues inasmuch as they may be attributed to

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at 3) (emphasis in original), the "SX royalty" line in the Butson models in fact was calculated by applying the SoundExchange rate proposal to revenue that was limited to subscription revenue, activation revenue, and advertising revenue and, thus, specifically excluded the SDARS' equipment or merchandise revenue or "other" revenue. *See* royalty formula in each model's respective Excel spreadsheet at WRT App. A in Native Format (XLS) (Sirius Radio Model) and App. B in Native Format (XLS) (XM Radio Model). In the case of Sirius, the same calculation also ignored the negative impact of mail-in rebates. *See* WRT App. A in Native Format (XLS) (Sirius Radio Model).

[3] In addition to the Butson example noted hereinabove, as XM and Sirius correctly observe (XM and Sirius Response to SoundExchange Motion at 6-7), SoundExchange's new argument that the testimony of Dr. Ordover "used the SDARS' entire revenues as the basis to calculate percentages of revenue" (SoundExchange Motion at 2) is neither an accurate representation nor a fair characterization of the record. For example, with respect to the 13% upper bound derived from Dr. Ordover's testimony, both the Initial Determination and Dr. Ordovers's testimony make clear, it was calculated on a "percentage of subscriber revenue" basis and thus excludes all advertising revenue, equipment sales revenue, and other nonsubscriber revenue. Initial Determination at 51; see also SX PFF ¶ 639 (discussing average subscription price); Ordover WDT at 51 (identifying $11.25 as the SDARS' "average monthly subscriber price").

such revenues from *any* channel (i.e. no channel excluded). These advertising revenues are shown in the Butson models to be the largest category of nonsubscription revenues. Nevertheless this advertising revenue category only comprises a small fraction of SDARS revenues from all sources–so small that even if *all* 2007 advertising revenues estimated by Mr. Butson were excluded from the Initial Determination's definition of gross revenues, the resulting recalculated 2007 royalty percentage rate would barely budge. Moreover, notwithstanding SoundExchange's exaggerated claims of potential revenue losses that the application of the Initial Determination's exclusion would cause copyright owners, these narrowly drawn exclusions permit copyright owners to claim revenues associated with advertising not just from purely music channels but also from mixed content channels where the use of music is more than merely "incidental." In contrast to the marketplace benchmark where some contracts that comprise the benchmark may relate only to pure music content situations, copyright owners may well enjoy a somewhat greater revenue potential from the SDARS by including advertising associated with mixed content channels where the use of music on those channels is more than merely "incidental."

SoundExchange's assertion that future offerings of a merged XM/Sirius entity may be structured differently in order to reduce the effective sound recording royalty rate below the rate set in the Initial Determination is not supported by sufficient evidence to allow us to estimate the magnitude of such purported actions.[4] (See also *infra* re the insufficiency of SoundExchange's evidence at trial on the magnitude and timing of purported merger costs/benefits).

Furthermore, we do not find SoundExchange's arguments persuasive regarding future "gaming the system" by artificially reducing the revenue associated with the currently dominant single joint music/nonmusic subscription product. If SoundExchange is concerned about potentially greater future competition from nonmusic content, it has not provided sufficient evidence to show how and in what magnitude such competition should affect the royalty rates or under what theory the applicable copyright law provides for an adjustment in the royalty rate for sound recordings in order to compensate such copyright owners for competition from nonmusic content. On the other hand, the exclusions as stated in our Initial Determination are not stated so as to diminish the basic subscription product's revenues. For example, the Initial Determination clearly states in subsection (3)(vi)(B) of the definition of *Gross Revenues* (i.e. § 382.11 Definitions) that one category of gross revenues excluded by definition are "Channels, programming, products and/or other services *offered for a separate charge* where such channels use only incidental performances of sound recordings." (emphasis added). Initial Determination at 89. Further, to avoid any doubt as might be suggested by SoundExchange's arguments, we hereby clarify that subsection (3)(vi)(A) of the definition of *Gross Revenues* at § 382.11 Definitions, dealing with data services also does

[4] For example, SoundExchange's own witness, Mr. Butson, explained that he did not model merger scenarios in the rebuttal phase because "there is not enough good data out there, either provided by analysts or by the companies themselves and, for that matter, or in the materials, the non-public materials that I reviewed as part of this case. I didn't see anything that was substantial enough, actually, to build a financial model off of." 8/27/07 Tr. 273:13-22 (Butson).

not contemplate an exclusion of revenues from such data services, where such data services are not offered for a separate charge from the basic subscription product's revenues.[5]

Similarly, SoundExchange's arguments that the Judges erred because of an alleged misuse of benchmark market data simply ignore the evidence actually presented. Contrary to the implicit assumption in SoundExchange's argument, there was no credible evidence presented to show that all of the relevant marketplace comparators relied on by the Judges in their Initial Determination provide for *no* exclusions from gross revenue in the application of a revenue-based rate.[6]

SoundExchange, on the one hand, also argues that the definition of Gross Revenues adopted in the Initial Determination is defective because it fails to provide an explicit definition of the term "incidental performances of sound recordings" thereby giving rise to ongoing disputes because of the ostensibly clouded meaning of the term. Yet, on the other hand, SoundExchange argues that it does have clear understanding of the term based on a specific webcasting regulatory definition which should also be added to the SDARS regulations. The first argument is not credible because of the lack of evidence produced by SoundExchange at trial to support it. SoundExchange offers bare post-trial speculation, rather than evidence. The second argument is erroneous because the webcasting regulations do not define "incidental performance," but rather define the term *performance* to include "incidental performances" which possess two specific characteristics. See 37 C.F.R. § 380.2 (i)(3). Moreover, we rejected an alternative SDARS proposal for a 50% music/nonmusic breakpoint and, instead, explicitly adopted the "incidental performance" formulation because, based on the record before us, we found the "latter definition is more consistent with current SDARS programming." Initial Determination at 30 n.22.

For all these reasons, SoundExchange does not demonstrate the need to correct a clear error or to prevent manifest injustice in the instant matter.

With respect to SoundExchange's purported offer of new evidence that was not presented during the proceeding, we find no new relevant evidence with respect to the proposed XM/Sirius merger that would persuade us to give more weight to the potential merger in our ultimate decision on the royalty rates. Indeed, it is not new evidence at all, only speculation as to what federal regulators might do with respect to approval of the merger. Contrary to SoundExchange's assertions, the Judge's Initial Determination did not "exclude the effect of the merger from its analysis." Rather we clearly indicated that

[5] The phrase "offered for a separate charge" will be added to the regulatory language of subsection (3)(vi)(A) of the definition of *Gross Revenues* at § 382.11 Definitions and published in the Federal Register together with our Final Determination in order to implement this clarification.

[6] For example, SoundExchange offered little or no evidence to indicate what proportion of the equipment or merchandise or "other" categories of revenue, if any, might be encompassed in the definition of gross revenues of the comparables that comprise the marketplace benchmark.

the record before us at trial provided insufficient evidence on issues such as the precise date when the merged entity would become a single operation and related projections of "the likelihood, magnitude and timing of any synergistic benefits of the merger in terms of costs savings." Initial Determination at 68 n.41. SoundExchange's purported offer of new evidence does not address any of these relevant issues. In the absence of an adequate showing of new evidence, SoundExchange's argument amounts to nothing more than a rehash of the argument that the Judges considered in the Initial Determination. As such, the motion does not present the type of exceptional case that would warrant a rehearing or reconsideration. *See Messina v. Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006) (motion to vacate a judgment that did nothing more than rely on the same arguments made prior to entry of the judgment was properly denied).

Wherefore, SoundExchange's motions for rehearing or reconsideration are **DENIED**.

SO ORDERED.

James Scott Sledge
Chief Copyright Royalty Judge

DATED: January 8, 2008