

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

Determination of Rates and Terms for
Digital Performance of Sound Recordings
and Making of Ephemeral Copies to
Facilitate those Performances (*Web V*)

Docket No. 19-CRB-0005-WR
(2021-2025)

**DECLARATION OF CAROLINE N. ESSER IN SUPPORT OF BRIEF RE
SOUNDEXCHANGE'S WITHHOLDING OF NON-PRIVILEGED COMMUNICATIONS
TO AND FROM COUNSEL ACTING IN A BUSINESS ROLE AND DESIGNATION OF
CERTAIN MATERIALS AS "RESTRICTED"**

I, Caroline N. Esser, declare as follows:

1. I am a member in good standing of the State Bar of California. I am an associate at Latham & Watkins LLP and counsel for the National Association of Broadcasters ("NAB") in this proceeding. I submit this Declaration in support of the Services' Brief Re SoundExchange's Withholding of Non-Privileged Communications To and From Counsel Acting in a Business Role ("Brief") and the Services' designation of certain portions of the Brief and the exhibit in support thereof as "Restricted." I have personal knowledge of the facts set forth in this Declaration and, if called to testify as a witness, I could and would testify competently thereto.

2. In November 2019, the Participants were engaged in meet and confers regarding written discovery via teleconference and email. During this meet and confer process, the Services requested that SoundExchange produce a privilege log pertaining to negotiation related

Esser Decl. in Support of Brief re SoundExchange's
Withholding of Non-Privileged Communications
To and From Counsel Acting in a Business Role
& Designation of Materials as "Restricted"
Dkt. No. 19-CRB-0005-WR (2021-25)

documents. SoundExchange refused, claiming that producing a privilege log would be a substantial burden.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the Services' November 2019 meet-and-confer correspondence with SoundExchange that discusses, *inter alia*, SoundExchange's refusal to produce a privilege log.

4. I also submit this Declaration in support of the Services' designation of certain portions of its Brief and the exhibit in support of this Brief as "Restricted."

5. On June 24, 2019, the Copyright Royalty Board ("CRB") entered a protective order that limits the disclosure of "confidential information" to outside counsel of record and their staff, personnel supplied by any independent contractor with whom such attorneys work, and any outside independent consultant or expert who is assisting a participant to this proceeding ("Protective Order"). *See* Dkt. No. 4012. The participants agreed that, in this proceeding, "confidential information" protectable under the Protective Order (hereinafter referred to as "Restricted materials") "shall consist of commercial or financial information disclosed by any means (including, but not limited to, through documents, testimony, or argument), by a Participant (Producing Participant) to another Participant or other Participants, that the Producing Participant has reasonably determined in good faith would, if disclosed, either (1) result in a competitive disadvantage to the Producing Participant, (2) provide a competitive advantage to another Participant or entity, or (3) interfere with the ability of the Producing Participant to obtain like information from other Participants or entities in the figure." *Id.* § III. Prior to the production of Restricted materials, participants must (1) mark these materials "with a conspicuous label of 'RESTRICTED – Subject to Protective Order in Docket No. 19-CRB-0005-WR (2021-25)'" ; (2)

mark these materials “with highlights or brackets”; and (3) “deliver with all Restricted materials an affidavit or declaration signed under penalty of perjury listing a description of all materials marked with the ‘Restricted’ stamp and the basis for the designation.” *Id.* § IV.A.

6. I have reviewed the Services’ Brief and the exhibit in support thereof. I have determined to the best of my knowledge, information, and belief that portions of the Services’ Brief and the exhibit in support thereof contain non-public Restricted material protected under the Protective Order. Portions of these documents are protected under the Protective Order because they contain commercial information that is not publicly available and that, if disclosed, would competitively disadvantage participants in this proceeding, provide a competitive advantage to another participant or entity, and interfere with the ability of participants to obtain like information from other participants or entities in the future. Restricted material is redacted in the public copies of the Services’ filing and highlighted in gray and bracketed in the restricted copies of the Services’ filing.

7. I declare in good faith, and to the best of my knowledge, that all information designated as restricted meets the definition of “confidential information” as set forth in the Protective Order.

I declare under penalty of perjury that the foregoing is true and correct, and that I executed this Declaration on September 8, 2020 in San Francisco, California.



Caroline N. Esser

Exhibit 1

**RESTRICTED IN ITS ENTIRETY - NO REDACTED VERSION AVAILABLE
SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 19-CRB-0005-WR (2012-25)**

Proof of Delivery

I hereby certify that on Tuesday, September 08, 2020, I provided a true and correct copy of the Declaration of Caroline N. Esser in Support of Brief re SoundExchange's Withholding of Non-Privileged Communications To and From Counsel Acting in a Business Role [Public Version] to the following:

American Federation of Musicians of the United States and Canada, The, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Educational Media Foundation, represented by David Oxenford, served via ESERVICE at doxenford@wbklaw.com

American Association of Independent Music ("A2IM"), The, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Google Inc., represented by Kenneth L Steinthal, served via ESERVICE at ksteinthal@kslaw.com

UMG Recordings, Inc., represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Warner Music Group Corp., represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

SoundExchange, Inc., represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Sirius XM Radio Inc., represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Jagjaguwar Inc., represented by David A. Handzo, served via ESERVICE at

dhandzo@jenner.com

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via ESERVICE at ablin@fhhlaw.com

Sony Music Entertainment, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Signed: /s/ Sadik Huseny