

**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)

**Brief re SoundExchange's  
Withholding of Non-Privileged Communications  
To and From Counsel Acting in a Business Role**

**BRIEF RE SOUNDEXCHANGE'S WITHHOLDING OF NON-PRIVILEGED COMMUNICATIONS TO AND FROM COUNSEL ACTING IN A BUSINESS ROLE**

After conducting *in camera* review of Trial Exs. 5468, 5512, and 5515, the Copyright Royalty Judges requested briefing on “the body of case law” addressing the attorney-client privilege and “attorneys who are operating in their business capacity.” Rough Hr’g. Tr. at 287:22-290:21 (9/3/20). Pursuant to that request, the Services submit the following.

“In the corporate context, the attorney-client privilege applies to communications between corporate employees and a corporation’s counsel made for the purpose of obtaining or providing legal advice.” *FTC v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018). Where a corporation’s counsel has “responsibilities outside the lawyer’s sphere,” the corporation “can shelter [counsel’s] advice only upon a clear showing that [counsel] gave it in a professional legal capacity.” *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). The client must be seeking and receiving legal advice rather than solely business advice. *See e.g., Smith v. Ergo Sols., LLC*, 2017 WL 2656096, at \*2 (D.D.C. June 20, 2017); *see also Judicial Watch, Inc. v. U.S. Dep’t of State*, 2019 WL 2452325, at \*1 (D.D.C. June 12, 2019) (“[T]he communication must somehow engage the attorney in resolving a legal issue.”). Where the communications at issue have *both* business and legal purposes, the question for the adjudicative body is “whether obtaining or providing legal advice was one of the significant purposes of the communications at issue.” *Boehringer*, 892 F.3d at 1268.

The burden is on the party invoking the privilege to demonstrate that it applies. *Boehringer*, 892 F.3d at 1267. And, to be sure, “[n]either a general statement that the lawyer wore both lawyer and businessperson ‘hats’ during the communications nor a blanket assertion

of legal purpose is enough” to establish privilege. *Id.* at 1270 (Pillard, J., concurring) (citing *In re Sealed Case*, 737 F.2d at 99; *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998). “Nor is it sufficient to offer as support privilege logs with bare, conclusory assertions that the listed communications were made for the purpose of securing legal advice.” *Id.* (citing *United States v. Legal Servs. for N.Y.C.*, 249 F.3d 1077, 1081-82 (D.C. Cir. 2001)). “The claimant must instead ‘present to the court sufficient facts to establish the privilege’ so that the court is in a position independently to review the legal-purpose assertion for each relevant communication.” *Id.* (quoting *In re Sealed Case*, 737 F.2d at 99).

The documents submitted by SoundExchange for *in camera* review illustrate SoundExchange’s failure to properly apply these rules in this proceeding. Trial Ex. 5468 redacts bullet points concerning the pros and cons of [REDACTED] [REDACTED] in an email written by Mr. Mark Piibe (who does not serve in a legal role) on which Mr. Stuart Levene, a business and legal affairs executive who was the lead business-side negotiator for the deal, was copied. Hr’g. Tr. at 5272:15-18 (9/2/20) (Piibe, M.). Trial Ex. 5515 appears to redact Mr. Levene’s comments as to the [REDACTED] [REDACTED], and Mr. Piibe’s response. It appears, then, that Mr. Levene’s primary purpose in corresponding with Mr. Piibe was to assist in evaluating the [REDACTED]. Indeed, Mr. Piibe testified during the hearing that Mr. Levene was “one of the key people negotiating the [REDACTED] Hr’g. Tr. at 5272:15-18 (9/2/20). And Mr. Levene is copied on 8 of the 12 emails on SoundExchange’s “reserve” exhibit list regarding

██████████. While the Services' counsel are obviously unable to review redacted text, both the context and the unredacted portions of these documents suggest that Mr. Levene was acting in a solely business role in his discussions with Mr. Piibe—in the least, it does not appear that providing legal advice was a “significant purpose” of these communications.

These select documents are likely only the tip of the iceberg. If the Judges agree that SoundExchange's assertion of privilege was improper as to these documents, then, without a privilege log for all the communications SoundExchange has redacted or withheld in full, it is impossible to know the full scope of relevant evidence SoundExchange has denied the Services access to.<sup>1</sup> Indeed, these documents are the handful that SoundExchange cherry-picked for presentation in its case, and as such present a one-sided narrative of the ██████████ negotiations. The Services therefore request that, in order to prevent SoundExchange from improperly using the attorney-client privilege as a sword and shield in this proceeding, the Judges either: (1) deny admission of Ex. 5112—the document that SoundExchange has carefully selected as beneficial to its case from the full universe of “privileged” documents tainted by its improper application of the attorney-client privilege, or (2) order that SoundExchange produce all materials previously withheld, in whole or in part, based on Mr. Levene's alleged “legal” role as the principal business negotiator of the ██████████.

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<sup>1</sup> The Services requested a privilege log for negotiation documents. SoundExchange refused. Esser Decl. Ex. A at 4 (“Licensees also understand that SoundExchange refuses to produce a privilege log pertaining to negotiation related documents.”).

DATE: September 8, 2020

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# Proof of Delivery

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

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