

Before the  
UNITED STATES COPYRIGHT ROYALTY BOARD  
Washington, D.C.

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In the Matter of: )

DETERMINATION OF ROYALTY RATES )  
AND TERMS FOR EPHEMERAL COPIES )  
OF SOUND RECORDINGS USED BY )  
BUSINESS ESTABLISHMENTS )  
(*Business Establishments III*) )  
\_\_\_\_\_ )

Docket No. 17-CRB-0001-BER  
(2019-2023)

**MOTION TO COMPEL DISCLOSURE**  
**OF PRIOR COPYRIGHT ROYALTY BOARD DETERMINATIONS**

Mood Media Corporation (“Mood”) hereby respectfully moves for an order compelling production from SoundExchange, Inc. (“SoundExchange”) of unredacted copies of all prior determinations and orders on motions issued by the Copyright Royalty Board or its predecessors (collectively, “CRB”) in which SoundExchange or any major record company was a participant. Mood has met and conferred with SoundExchange regarding this motion. SoundExchange does not believe that it is permitted to produce unredacted Determinations or orders under the protective orders governing the proceedings in which the Determinations or orders were issued, as those Determinations may contain proprietary information that belongs to third parties who are not participants here; however, SoundExchange does not oppose this motion so long as the Determinations and orders are designated as Restricted material under the current Protective Order. Participants Sirius XM Radio Inc. (“Sirius”) and Music Choice also do not oppose this motion.

Mood, SoundExchange, Sirius, and Music Choice agreed to exchange limited categories of documents as part of the preliminary disclosure and discovery period ordered by the CRB. Among other things, SoundExchange agreed to produce, if permitted by order of the CRB upon a

motion by Mood, “unredacted copies of all Determinations issued by the CRB in which SoundExchange or any major record company was a participant.” This information is necessary for Mood and other participants because, under 17 U.S.C. § 803(a)(1), the Copyright Royalty Judges are required to “act in accordance with ... prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels ..., and the Copyright Royalty Judges ... under this chapter[.]” As such, any prior Determinations or orders issued by the CRB or its predecessors may constitute binding precedent in this proceeding. Mood and other participants must have a full understanding of how the CRB interpreted prior evidence and came to any conclusions in those proceedings. Such information is particularly important for the expert witness retained by Mood and the company’s outside counsel, who will need to understand how the Judges interpreted and weighed *all* evidence from prior proceedings.

An order requiring SoundExchange to produce prior Determinations and orders will also reduce the asymmetry created by the fact that SoundExchange and its member record companies are repeat participants before the CRB. In light of its participation in numerous prior proceedings, SoundExchange has access to far more precedential material than any other party in this case. SoundExchange and third parties participated in those proceedings with full knowledge that, under Section 803(a)(1), the CRB is bound to rule consistently between past, present, and future cases. For instance, in *Web IV*, the Court thoughtfully analyzed the parties’ submissions regarding steering. But Mood is unable to fully appreciate the Board’s position regarding the parties’ steering theories and expert submissions without seeing the numbers considered. *E.g., Terms for Ephemeral Recording and Webcasting Digital Performance of*

*Sound Recordings (Web IV)*, 81 Fed. Reg. 26,316, 26,404-05 (2016).<sup>1</sup> Thus at a minimum, the equities require that all participants in this proceeding have full and equal access to the same information as SoundExchange that may be binding on the CRB as a matter of law. *See* 37 C.F.R. § 351.5(b) (“A participant in a royalty rate proceeding may request of an opposing participant nonprivileged documents that are directly related to the written direct statement or written rebuttal statement of that participant.”). The fact that one party—but not others—has access to precedent raises serious due process concerns.

No party or third party would be competitively disadvantaged by requiring SoundExchange to produce the prior CRB Determinations and orders unredacted because those Determinations and orders would all be subject to the Protective Order governing “Restricted” material in this proceeding. Among other things, the Protective Order will limit access only to outside counsel, independent contractors hired by outside counsel, or independent consultants or experts. *See* Protective Order § IV(B). The participants themselves will not see any of this information. *Id.*<sup>2</sup>

While SoundExchange does not believe that it is permitted to produce unredacted Determinations or orders under the protective orders governing the proceedings in which the

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<sup>1</sup> As another example, in *SDARS III*, one party pointed to a “conce[ssion]” that another party had made in *SDARS II*, which is redacted. *See* SDARS/PSS Determination, *In re SDARS III*, No. 16-CRB-0001 SR/PSSR, at 103-04 n.188. Presumably that party had access to an unredacted version that it effectively used.

<sup>2</sup> The redactions were made to protect the confidential business interests of the varying participants. *See, e.g.*, Notice of Request to Redact Additional, Limited Portions of the Judges’ Initial Determination, *In re SDARS III*, No. 16-CRB-0001 SR/PSSR (Dec. 22, 2017), Dkt. No. 1695 (referencing request by SoundExchange to redact information from the Board’s Initial Determination “if it is commercial or financial information that, if disclosed, would result in a competitive disadvantage to the disclosing Participant, provide a competitive advantage to another Participant or entity, or interfere with the ability of the disclosing Participant to obtain like information in the future”). Because the redacted information will remain subject to the Protective Order in this case, the business interests of all concerned will remain protected.

Determinations or orders were issued, it does not oppose this motion so long as the Determinations and orders are designated as Restricted material under the current Protective Order. Mood agrees that this designation is necessary and appropriate in order to protect third-party confidential information while, at the same time, ensuring a level playing field between all participants in this proceeding.

Accordingly, Mood respectfully requests an order compelling production of all Determinations or orders on motions issued by the CRB or its predecessors in which SoundExchange or any major record company was a participant, with such information designated as “Restricted” under the February 23, 2018 Protective Order.

Dated: April 5, 2018

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

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*Counsel for Mood Media Corporation*

# Certificate of Service

I hereby certify that on Thursday, April 05, 2018 I provided a true and correct copy of the Motion to Compel Disclosure of Prior Copyright Royalty Board Determinations to the following:

Sirius XM Radio Inc, represented by Bruce Rich served via Electronic Service at  
bruce.rich@weil.com

Rahn, David, represented by David Rahn served via Electronic Service at  
dave@customchannels.net

SoundExchange, Inc., represented by Steven R. Englund served via Electronic Service at  
senglund@jenner.com

Music Choice, represented by Paul M Fakler served via Electronic Service at  
pfakler@orrick.com

Powell, David, represented by david powell served via Electronic Service at  
davidpowell008@yahoo.com

Signed: /s/ Jason B Mollick