

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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)

**SOUNDEXCHANGE AND THE NATIONAL RELIGIOUS BROADCASTERS
NONCOMMERCIAL MUSIC LICENSE COMMITTEE'S
MOTION FOR ACCESS TO THE RESTRICTED *PHONORECORDS III*
DETERMINATION AND THE RESTRICTED *PHONORECORDS III* TESTIMONY,
EXHIBITS, AND APPENDICES, OF EXPERT WITNESSES LESLIE H. MARX,
JOSHUA GANS, RICHARD WATT, AND JEFFREY A. EISENACH**

Pursuant to 17 U.S.C. § 801(c), SoundExchange, Inc. and the National Religious Broadcasters Noncommercial Music License Committee (collectively, “Moving Participants”) respectfully request that the Copyright Royalty Judges (“Judges”) rule that all eligible participants in this proceeding may access and use the restricted version of the Judges’ Determination in *Phonorecords III*, as well as the restricted versions of the written, deposition, and oral testimony—and appendices and exhibits—of Leslie H. Marx, Joshua Gans, Richard Watt, and Jeffrey A. Eisenach from that proceeding. The use of all such documents would be subject to the *Web V* Protective Order, which contains provisions very similar to the *Phonorecords III* Protective Order pursuant to which these documents were originally produced.¹

¹ The Moving Participants have conferred with Google, Inc., Pandora Media, LLC, Sirius XM Radio Inc., and the National Association of Broadcasters, who indicated through counsel that they take no position on the motion.

The assumptions, supporting data, and economic analyses from testimony in prior proceedings have often been considered and repurposed in later proceedings.² For that reason, the Judges have previously granted motions like this one to permit parties in a later proceeding to access and utilize restricted material entered into evidence in a prior proceeding.³

In *Phonorecords III*, a trio of economic experts presented Shapley analyses on behalf of Spotify USA, Inc. (Professor Leslie Marx) and the Copyright Owners (Professor Joshua Gans and Professor Richard Watt). The Shapley values derived by these experts formed the foundation of the Judges' determination of the royalty rate that interactive streaming services must pay to reproduce and distribute musical works. *See generally* Final Rule and Order at 62-75, *Phonorecords III*, Docket No. 16-CRB-0003-PR (2018-2022) (Nov. 5, 2018).

Importantly, in the course of relying on these Shapley analyses, the Judges also considered various claims made by these experts about the royalty rate that should be paid by interactive services for the public performance of sound recordings. For example, the Judges agreed with Professor Gans that it is "reasonable" to assume that "publishers and record companies must have

² *See, e.g.*, Determination at 50, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Mar. 4, 2016) (relying on the standards applied in *Web III Remand* to support the benchmark analysis in *Web IV*); Initial Determination at 28, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Dec. 14, 2017) (relying on the reasoning expressed in *SDARS II* to examine Music Choice's proposal for *SDARS III*).

³ *See, e.g.*, Order on SoundExchange Motion for Access to Restricted Web-IV Evidence at 3, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Jan. 25, 2017) (granting access to Web IV restricted materials); Motion to Set Specific Discovery Deadlines and Compel the Copyright Owner Participants' Adherence to their Discovery Obligations at 4, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Aug. 23, 2016) (same); Order Granting in Part and Denying in Part Services' Omnibus Motion to Compel SoundExchange to Produce Documents at 5, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Jan. 15, 2015) (granting access to prior unredacted testimony in *Web II* and *Web III*).

equal Shapley values (*i.e.*, must recover equal profits from total surplus), because musical compositions and sound recording performances are perfect complements and essential components of the streamed performance.” *Id.* at 68-69. The Judges also observed that, under all three experts’ Shapley models, “the ratio of sound recording to musical works royalty rates should decline.” *Id.* at 70 (emphasis omitted). Finally, the Judges observed that, in at least Professor Marx’s and Professor Watt’s models, the musical works royalty rate should increase even as the combined royalties paid by the services should fall—and “[m]athematically that is possible only because the models also yield *lower* royalties for sound recordings at all levels of total royalties.” *Id.* at 71 (emphasis in original). The Judges identified the presumably-lowered “Implied Sound Recording Royalty” for various services resulting from each expert’s model, but the Moving Participants do not know what that implied royalty rate was, because the numbers are redacted from the public version of the Determination. *See id.*

The record in *Phonorecords III* also contained benchmarking analysis presented by Dr. Jeffrey Eisenach. In his testimony, Dr. Eisenach derived a range of ratios that purportedly reflected the relative value of rights for sound recordings and musical works in different market segments. In reaching their determination, the Judges found some of those ratios to be a “useful benchmark.” *Id.* at 50. However, the Moving Participants do not know what that ratio was, because the numbers are redacted from the public version of the Determination and the Eisenach testimony. *See id.* at 50.

Of course, *Phonorecords III* did not purport to set a sound recording royalty rate for interactive subscription services or establish an appropriate ratio for the value of sound recording and musical works rights, and the record companies had no input into the analysis. *See id.* at 34

(rejecting argument that the all-in feature of the mechanicals rate “constitute[s] a regulation of the performance rate”). Moreover, the instant proceeding concerns royalty rates for the performance of sound recordings on *non*-interactive services. Nonetheless, the analyses considered and weighed by the Judges in *Phonorecords III* could be relevant to this proceeding. Given the centrality of the sound recording royalty rate to the Shapley analyses of the experts in *Phonorecords III*, and given the Judges’ predictions about the impact of *Phonorecords III* on sound recording royalty rates, the Moving Participants should have full and unrestricted access to these analyses. Moreover, given that the relative value of the sound recording right was central to Dr. Eisenach’s benchmarking analysis, the Moving Participants should likewise have full and unrestricted access to his testimony. The heavily-redacted public versions of these documents do not suffice for the Moving Participants to understand and evaluate how those analyses may have influenced the Judges’ Determination, or how – if at all – those analyses might impact the present proceeding.

CONCLUSION

For the foregoing reasons, the Moving Participants respectfully request that the Judges rule that eligible parties in this proceeding may have access to and use, subject to the Protective Order in *Web V*, the restricted versions of the written, deposition, and oral testimony—and appendices and exhibits—of Leslie Marx, Joshua Gans, Richard Watts, and Jeffrey Eisenach, as well as the restricted version of the *Phonorecords III* determination.

Respectfully submitted,

Dated: July 25, 2019

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Proof of Delivery

I hereby certify that on Thursday, July 25, 2019, I provided a true and correct copy of the Motion for Access to the Restricted Phonorecords III Determination and the Restricted Phonorecords III Testimony, Exhibits, and Appendices, of Expert Witnesses Leslie H. Marx, Joshua Gans, Richard Watt, and Jeffrey A. Eisenach to the following:

iHeartMedia, Inc., represented by John Thorne, served via Electronic Service at jthorne@kellogghansen.com

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

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Radio Coalition, Inc., represented by Kevin M Goldberg, served via Electronic Service at goldberg@fhhlaw.com

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