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

In the Matter of: **DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023 – 2027)**
In re **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'S LIMITED OPPOSITION TO GOOGLE'S MOTION TO ACCESS AND MAKE USE OF RESTRICTED *WEBCASTING V* EXPERT MATERIALS AND TRIAL EXHIBITS

SoundExchange, Inc., Sony Music Entertainment ("SME"), UMG Recordings, Inc. ("UMG"), and Warner Music Group Corp. ("WMG") (collectively, "SoundExchange") submit this Limited Opposition to Google's Motion to Access and Make Use of Restricted *Webcasting V* Expert Materials and Trial Exhibits (the "Motion"). For the reasons set out below, the Judges should require that Google implement the same screen that other eligible participants in the *Phonorecords IV* ("*Phono IV*") proceeding have agreed to apply in connection with receipt and use of the requested materials. This narrow limitation on access and use is necessary to protect the interest of affected *Webcasting V* ("*Web V*") participants in commercially sensitive information, as well as their reasonable reliance on the *Webcasting V* Protective Order (the "*Web V* Protective Order").

INTRODUCTION

In its Motion, Google seeks access to the restricted written, deposition, and oral testimony of three experts, as well as certain exhibits ("Expert Materials"). That material contains incredibly sensitive commercial information that is closely guarded and concerns how record companies approach licensing negotiations, both generally and with particular services. Specifically, the Expert Material contains information about record company bargaining objectives, bargaining strategies, perceptions of bargaining power, and other similar information ("Licensing Information"). Disclosure of Licensing Information to individuals involved in negotiating license agreements with sound recording companies on behalf of digital music services ("Deal Attorneys and Experts") would impose severe and irreversible prejudice.

Of course, the Motion is not confined to Licensing Information. Rather, Google seeks access to all the Expert Materials, which contain a wide range of restricted material, including record company financials, deal terms, research, and other confidential commercial information. SoundExchange disagrees that any *Phono IV* participant can make a sufficient showing that it is necessary to disclose all of the requested material to outside counsel and experts for eligible participants in *Phono IV* and also disagrees that precedent supports the requested disclosure.

Nevertheless, to avoid troubling the Judges and Participants with needless motion practice, when SoundExchange was approached about access to and use of the Expert Materials it pursued a negotiated solution. Ultimately, SoundExchange agreed to refrain from interposing an objection to the request, so long as the *Phono IV* participants agreed to certain conditions now reflected in the Judges' September 2, 2021 Order. *See* September 2 Order Granting Services' Unopposed Motion to Access and Make Use of Restricted Web V Expert Materials and Trial Exhibits, Docket No. 21 CRB-0001 (Sept. 2, 2021) (hereafter "Order on *Web V* Expert Materials"). One of the conditions ultimately imposed under that Order on *Web V* Expert

Materials requires that participants screen Deal Attorneys and Experts from Licensing Information, by taking simple and common-sense measures like segregating files and otherwise refraining from sharing the information. Order on *Web* V Expert Materials at 2.

Google was unwilling to accept that reasonable screen, and now calls it "prejudicial," "unfair" and "arbitrary." Motion at 3. But the screen is none of those things. It is not prejudicial because Google acknowledges that most of its case team will not be subject to the requested screening procedures, which do not impose material burdens on the preparation and litigation of its case. It is not unfair, because the competitive harm that would result from disclosing Licensing Information to Deal Attorneys and Experts outweighs (significantly) the effect of screening those attorneys from information offered on a single set of issues in a separate proceeding, particularly given that the information was offered in that separate proceeding based on reasonable expectations about who would be permitted to access it and for what purpose. And it is not arbitrary because SoundExchange does not seek to single out any particular attorney. Rather, it seeks to address a highly prejudicial disclosure of confidential information wherever it might occur, by seeking court orders requiring that all eligible participants apply the same screening procedures to any Deal Attorney or Expert retained for purposes of the *Phono IV* proceeding. That is, SoundExchange is concerned that disclosure of the record companies' Licensing Information to any Deal Attorney or Expert would be highly prejudicial; it just happens that Mr. Greenstein is to SoundExchange's knowledge the only Deal Attorney or Expert who has appeared in *Phono IV*.[1]

[1] SoundExchange did not and does not request that any *Phono IV* Participant be required to disclose to SoundExchange each outside counsel or expert retained to assist with this case. Rather, SoundExchange requests entry of an order requiring compliance with the requested screen. As a result, in evaluating the application of the screening procedures, SoundExchange is limited to reviewing attorneys currently identified on the *Phono IV* docket.

Ultimately, this is a simple request for a reasonable screen, made only to safeguard information that is subject to an existing protective order, and that is being sought in connection with an entirely separate proceeding. The limited opposition should be granted.[2]

BACKGROUND

Background pertinent to this limited opposition overlaps heavily with that provided in SoundExchange's response to a previous motion for access to and use of the Determination. *See* SoundExchange's Limited Opposition to Motion for Access to Restricted *Web V* Materials, Docket No. 19-CRB-0005, at 6-8 (July 30, 2021) ("Initial Opposition"). For ease of reference, SoundExchange restates that background below. The only new information provided in connection with this section appears in Part II (Expert Materials), where SoundExchange discusses the very sensitive Licensing Information contained within the Expert Materials subject to this motion, and in Part III, where SoundExchange provides information concerning the posture of this dispute.

I. *Web V* Proceeding

The *Web V* proceeding commenced on January 24, 2019. To govern the disclosure of confidential information in the proceeding, the participants negotiated and jointly proposed a protective order. The Judges entered that order on June 24, 2019.

Under the *Web V* Protective Order, sensitive commercial or financial information could be produced as restricted and protected from public view. *See* Protective Order at III-IV.

There may be other outside counsel who are Deal Attorneys working on *Phono IV*, and there may be experts who are Deal Experts working on *Phono IV*. SoundExchange simply does not know.

[2] Should the Judges grant the request for a screen as to Google's outside counsel and experts, SoundExchange respectfully requests the Judges require Google to rely on any redactions already negotiated between SoundExchange and the *Phono IV* participants other than Google, rather than requiring SoundExchange to undertake a separate meet and confer process. Doing so is particularly appropriate because Google could have participated in any meet and confers regarding redactions, had it accepted SoundExchange's proposal to apply the requested screen subject to resolution of the pending dispute. Trepp Decl. ¶¶ 5, 9.

Participants themselves were unable to see restricted information. Instead, access to restricted information was limited to outside counsel of record in the proceeding,[3] certain independent contractors, and independent experts. *Id.* at IV.B. Moreover, participants were only permitted to use the restricted information for purposes of the *Web V* proceeding. *Id.* at IV.B; *accord id.* at IV.C.

SoundExchange relied on the *Web V* Protective Order in making decisions about use of sensitive commercial and financial information during the *Web V* proceeding. For example, it relied on the protections in that Order when offering written testimony that was designated as restricted and concerned incredibly sensitive commercial information, such as bargaining objectives, bargaining strategy, perceptions of bargaining power, and similar information. SoundExchange also relied on the *Web V* Protective Order in taking positions concerning discovery requests that sought some of the most sensitive documents held by record company participants, such as a large number of closely held internal emails related to negotiations with particular music services.

II. The Expert Materials

The Expert Materials requested in the Motion include expert testimony with granular analysis of fact witness testimony and documents related to licensing objectives, positions and strategy, including with respect to negotiations between particular sound recording companies and interactive services. These portions of the Experts Materials include, among other things, quotations and characterizations of fact witness testimony and internal company emails that

[3] Firms retained in the *Web V* proceeding are identified on the docket for that proceeding, 19-CRB-0005-WR (2021-25). To the Record Companies' knowledge, none of the counsel of record are currently involved in negotiating license agreements between digital music services and sound recording companies. *See* Declaration of Aaron Harrison at ¶ 5; Declaration of Mark Piibe at ¶ 5; Declaration of Jon Glass at ¶ 5.

discuss bargaining strategy, identify bargaining objectives, and contain other similar (and highly sensitive) information.[4] *See, e.g.*, Orszag WDT at ¶¶ 14, 21 n.34; Orszag WRT at ¶¶ 14-15, 48; Shapiro WRT at 9, 17-19; Peterson WRT at 3, 32, and 37-38; 8/11/20 Tr. 1283:20-25, 1284:17-25 (Orszag); 8/12/20 Tr. 1718:19-1719:2 (Orszag); 8/20/20 Tr. 3095:20-24 (Shapiro).

Significantly, the Services in their motion also seek access to exhibits to the expert testimony. Some of those exhibits are internal record company emails that concern the negotiation of license agreements with digital music services and would divulge closely-guarded information of considerable value to a counterparty. *See, e.g.*, SoundExchange written rebuttal statement Exs. 240, 284, 341; Pandora written rebuttal statement Exs. 5-9; 11, 13-16; 18; 20. And in addition to these internal negotiation emails, the requested exhibits also include other internal record company documents that reveal bargaining strategy, objectives, and other similar information. *See, e.g.*, SoundExchange written rebuttal Ex. 275; Pandora written rebuttal statement Ex. 12.

III. *Phono IV* Proceeding

SoundExchange, Inc. is not a participant in *Phono IV*. SME, UMG, and WMG (the "Record Companies") jointly filed a petition to participate in that proceeding, but have reached a settlement and do not expect to be materially involved in that proceeding. Participants eligible to obtain access to and use the Restricted Materials include Amazon, Apple, Google, Pandora, Spotify, the Nashville Songwriters Association International ("NSAI"), and the National Music Publishers' Association ("NMPA"). Outside counsel representing the eligible participants include several firms that did not appear in the *Web V* proceeding, including counsel for Google,

[4] Counsel for the Record Companies in *Phonorecords IV* has not reviewed the restricted testimony or exhibits cited in this opposition. Additionally, if it would assist the Judges in resolving the pending motion, the Record Companies will identify examples of the Licensing Information that they seek to protect in a restricted notice on the *Web V* docket.

Apple, and the Copyright Owners (NSAI and NMPA). SoundExchange does not know, and to its knowledge the *Phono IV* participants have not disclosed, the identity of any experts retained for purposes of the *Phono IV* proceeding.

On August 30, 2021, the Stipulating Services filed a motion seeking access to and use of the Expert Materials. Prior to filing, those Services conferred with SoundExchange. Notwithstanding SoundExchange's reservations about the merits of the motion for access to Expert Materials, and based on good faith efforts to negotiate an outcome tolerable to all parties, SoundExchange agreed to refrain from opposing access so long as the Stipulating Services agreed to again be bound by certain conditions, including (among others) screening restrictions imposed under the Judges' August 9, 2021 Order Granting Access To and Use of the *Webcasting V* Initial Determination and Future Substantive Rulings (hereafter "Initial Order on Access to *Web V* Determination"). *See* Amazon, Pandora, Apple, and Spotify Motion to Access and to Make Use of Restricted *Webcasting V* Expert Materials and Trial Exhibits at 2 n.2, Docket No. 21-CRB-0001 (8/30/2021). As indicated in the Stipulating Services' motion, SoundExchange maintained its opposition to access and use of the Expert Materials by any eligible *Phono IV* participant that refused to be bound by the screening restrictions imposed under the Initial Order on Access to the *Web V* Determination. *Id.* The only eligible participant that refused to be so bound was Google. *Id.*

On September 2, 2021, the Judges granted the Stipulating Services' motion and ordered that the Stipulating Services and Copyright Owners be permitted to access and use the Expert Materials on the terms negotiated with SoundExchange. *See* Order on *Web V* Expert Materials. Because Google had not agreed to be bound by all of those terms and, more specifically, had not

agreed to adopt the screening restrictions, it was not granted access under the Order. *See* Order on *Web V* Expert Materials. The Motion followed.

ARGUMENT

In evaluating requests for relief from a protective order, the Judges have required that moving parties demonstrate good cause.[5] Order Granting in Part Motion for Access to the Restricted Phonorecords III Determination and Certain Restricted Phonorecords III Testimony, *Web V*, 19-CRB-0005, at 4 (Sept. 13, 2019) (hereafter "Amazon Order"). Indeed, is it is well-established that parties seeking to modify an existing protective order bear the burden of demonstrating that good cause supports the modification. *See United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. Civ. 99-3298, 2004 WL 2009414, at *2 (D.D.C. May 17, 2004). And modification of a protective order entered by the Judges is only appropriate where the utility of accessing particular restricted materials outweighs the need for continued restrictions. Amazon Order at 4.

SoundExchange's opposition to Google's requested modification is limited. In connection with disclosure of the Expert Materials to Google's outside counsel and experts, SoundExchange requests only that the Judges require Google to screen Deal Attorneys and Experts from the Licensing Information. As set out below, the proposed screen is appropriate because disclosing the Licensing Information to Deal Attorneys and Experts would be highly prejudicial to the Record Companies,[6] because the proposed screen would not prejudice Google,

[5] In its incorporated Original Reply, Google attempts to shift the burden on its motion to SoundExchange by citing *Jennings v. Family Mgmt.*, 201 F.R.D. 272 (D.D.C 2001). Motion at 4; Original Reply at 3. But its reliance on that case is misplaced. *Jennings* concerned a motion for protective order, filed by a plaintiff seeking to preclude the defendant from taking her own deposition. Those facts bear no resemblance to present circumstances, where Google seeks relief from an existing protective order to use restricted information in an entirely separate proceeding (and contrary to the terms of the existing protective order). Google's reliance on *English v. Washington Metropolitan Area Transit Authority* is unavailing for similar reasons. *See* 323 F.R.D. 1, 8 (D.D.C. 2017) (discussing standard applicable when party moves for protective orders on matters related to a deposition).

[6] *See* Declaration of Aaron Harrison ¶¶ 3-4; Declaration of Mark Piibe ¶¶ 3-4; Declaration of Jon Glass ¶¶ 3-4.

and because there has been no particularized showing that persons involved in license negotiations need access to the Licensing Information for purposes of *Phono IV*.

I. Disclosing the Licensing Information to Deal Attorneys and Experts Would Be Highly Prejudicial

Google's Motion focuses on the asserted prejudice to Google of having to screen Deal Attorneys and Experts from the Licensing Information. To the extent Google contemplates possible prejudice to sound recording companies at all, it does so only through incorporation by reference of Google's Reply in Support of Services' Motion to Access and to Make Use of the Restricted Webcasting V Initial Determination and Future Substantive Rulings, Phonorecords IV, Dkt. No. 21-CRB-0001-PR (2023-2027) (August 6, 2021) ("Original Reply"). *See* Motion at 1-2 n.2, 4. Yet a key decision relied on by Google in its Original Reply makes clear that decisions concerning protective orders "entail[] conflicting interests," which "suggest that a balancing test will best resolve protective order disputes." *Brown Bag Software v. Symantec Corp*., 960 F.2d 1465, 1470 (9th Cir. 1992). Specifically, it is necessary to balance (1) the asserted risk that Google's ability to litigate a case against the Copyright Owners will be impeded if Deal Attorneys and Experts are screened from the Licensing Information[7] against (2) the risk to the Record Companies if Deal Attorneys and Experts access the Licensing Information and use it against them (even if inadvertently). *See id.*; *see also* Amazon Order at 4.

Disclosing the Licensing Information to Deal Attorneys and Experts would be highly prejudicial. Sound recording companies and the artists with whom they work are increasingly dependent on revenues and exposure from digital music services. SoundExchange Proposed Findings of Fact and Conclusions of Law ¶¶ 306-308, Docket No. 19-CRB-0005. Except for the

[7] As set out above, SoundExchange is not a participant in *Phono IV* and the Record Companies do not expect to be materially involved in the proceeding.

services that rely on the statutory license, the relationships between sound recording companies and those services are addressed in long and detailed agreements that are generally heavily negotiated. Under these circumstances, information concerning sound recording companies' bargaining objectives, positions and strategy once learned by Deal Attorneys and Experts would necessarily inform subsequent negotiations, prejudicing the record companies' ability to negotiate and working serious commercial harm. *See* Opposition at 9-13. Google's incorporated attempts to argue otherwise are mistaken, and the balance of harm favors protecting the record companies' Licensing Information from disclosure to Deal Attorneys and Experts.

First, Google incorporates by reference its attempt to establish a bright line rule that only persons involved in competitive decision-making should be screened from sensitive information, and that only in-house counsel meet that standard. *See* Original Reply at 4. However, the judicial decisions relied on by Google for this supposed rule say no such thing, and instead engage in a fact-specific, case-by-case effort to strike the required balance, regardless whether a particular attorney is in-house or outside. *See Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992) ("[P]roper review of protective orders in cases such as this requires the district court to examine factually all the risks and safeguards surrounding inadvertent disclosure by any counsel, whether in-house or retained"); *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) ("Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined, as above indicated, by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained."); *see also Fairchild Semiconductor Corp. v. Third Dimension Semiconductor Corp.*, No.08-158-P-H, 20009 WL 120638, at *9 (D. Maine Apr. 30, 2009) ("A trial attorney's status as a competitive decisionmaker is not alone dispositive of the question of

whether it is appropriate to create or modify a protective order to bar him or her from accessing proprietary information."). In short, evaluating whether Google is entitled to modify the existing protective order to obtain restricted information, including Licensing Information, for use in a separate proceeding requires a careful evaluation of risk and harm, one that favors SoundExchange.

Second, Google incorporates by reference its characterization of SoundExchange's concerns as "fears" and "what-ifs," along with its assertion that such concerns about the "inevitable disclosure" of sensitive information have been rejected. *See* Original Reply at 5-6. But it can cite only two cases, and neither is apposite. *See ADP, LLC v. Rafferty*, 923 F.3d 113, 130 (3d Cir. 2019) (partially enforcing restrictive covenants without any discussion of inevitable disclosure); *Saturn Wireless Consulting, LLC v. Aversa*, Civ. No. 17-1637 (KM/JBC), 2017 WL 1538157 at *13-16 (D.N.J. Apr. 26, 2017) (distinguishing plaintiff's protectable interest in certain specific information from general knowledge). In fact, numerous courts have restrained activity based on inevitable disclosure of the kinds of sensitive business information at issue here. *See, e.g.*, *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F. 3d 102, 109-18 (3d Cir. 2010) (substantial threat of disclosure of strategies and other secrets when executive left for competitor); *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1267-71 (7th Cir. 1995) (inevitable misappropriation of plans, strategic goals and other secrets when executive left for competitor); *Integrated Cash Mgmt. Serv. v. Digital Transactions*, 732 F. Supp. 370, 377-78 (S.D.N.Y. 1989) (impossibility of software developers' developing system competitive with former employer's system). The threat here that Deal Attorneys and Experts with access to Licensing Information will inevitably (even if inadvertently) use that information against the interests of the sound recording companies warrants a similar response.

Third, Google asserts that disclosing Licensing Information to Deal Attorneys and Experts is not problematic because employees in the recording industry occasionally move to competitors. *See* Original Reply at 6 & n.3. However, as SoundExchange has previously explained, the prejudice imposed by disclosing *Web V* Licensing Information to *Phono IV* Deal Attorneys and Experts is considerably more severe. That is because the Deal Attorneys and Experts would receive access to the Licensing Information of not one, but all three major record companies, and may themselves represent not one, but a significant number of digital music services. And a record company employee who moves to another record company will not be sitting across the table from his or her former employer negotiating digital licenses. Put differently, the disclosure at issue in this limited opposition is nothing like one record company employee involved in negotiations with digital music services hypothetically departing for another record company, or even for a single service, because the disclosure at issue provides a much broader window into the negotiating playbook of record companies, and because it may result (again, even if inadvertently) in the disclosure of that playbook to, or use of that playbook on behalf of, a wide range of record company counterparties.

Finally, Google asserts that the record companies have not objected to transactional attorneys, including Mr. Greenstein, having access to restricted information in previous proceedings. *See* Original Reply at 7. However, the Licensing Information at issue here represents a much deeper dive into record company bargaining objectives, bargaining strategies, perceptions of bargaining power, and similar information than has been undertaken in prior proceedings, and infinitely more so than in the *BES II* and *BES III* proceedings mentioned by

Google, which settled before the filing of written direct statements. 83 Fed. Reg. 60,362 (Nov. 26, 2018); 78 Fed. Reg. 66,277 (Nov. 5, 2013).[8]

In sum, the Record Companies face significant prejudice if the Licensing Information adduced in *Web V* is provided to Deal Attorneys and Experts in *Phono IV*, and Google has not provided any substantial argument to the contrary.

II. The Requested Screen Is Narrow, Reasonable, and Will Not Prejudice Google

SoundExchange has proposed a limited screen acceptable to all but one participant in *Phono IV*. The requested screen only applies to Deal Attorneys and Experts. The requested screen only applies to a limited portion of the Expert Materials. And the requested screen can be implemented through straightforward measures already ordered by the Judges that are similar to the kinds of ethical screens regularly implemented in law firms. None of Google's attempts to paint this narrow request as "extreme and unwarranted" have merit.

First, Google argues that requiring it to use redacted versions of the Expert Materials will undermine its outside counsel's ability to engage in zealous representation. In support of that argument, Google points to the public version of the *Web V* Determination, claiming that the redacted public version "makes it impossible to discern the record facts or Judges' reasoning, let alone to apply its holdings to [*Phono IV*]." Motion at 3-4.

This argument makes no sense. SoundExchange does not ask that Google's outside counsel and experts be required to use the public version of the Determination or Expert

[8] Google also takes issue with the representation that SoundExchange relied on the *Webcasting V* Protective Order in making decisions about the use of information in that proceeding. *See* Original Reply at 3-4. But Google misses the point. It is true that the *Webcasting V* and *Phonorecords IV* Protective Orders will apply to the Expert Materials. And that protection is critical. But applying those orders to the requested access and use does *not* protect the reliance that SoundExchange placed on provisions that preclude disclosure outside the context of *Web V*, and thus provided participants with a measure of comfort about precisely who was going to see material produced as restricted under the protective order entered in that proceeding.

Materials. And SoundExchange does not ask that all of Google's outside counsel and experts be required to use versions of the Determination or Expert Materials that redact Licensing Information. SoundExchange only asks that Deal Attorneys and Experts be screened from that material.

So far as SoundExchange knows,[9] that screen will apply to just one current member of Google's litigation team, which at this early stage of the *Phono IV* proceeding already appears to include several seasoned litigators. *See* Party List for *Phono IV*.[10] And the Google litigation team appears to have nearly sixty years of experience between them. *See* Victor Jih;[11] Maura Rees;[12] Lisa Zang;[13] Ryan Benyamin,[14] and Rebecca Davis.[15] If, as Google appears to suggest,[16] these litigators do not negotiate license agreements with sound recording companies on behalf of digital music services, each could *already* have the restricted version of the *Web V* Determination and the Expert Materials in hand. That is because SoundExchange proposed to permit Google to access the *Web V* Determination and Expert Materials while each motion was pending, so long as it applied the requested screen measures during that period.[17] *See* Trepp Declaration ¶¶ 5, 9. Google rejected both proposals.[18] *See* Trepp Declaration ¶¶ 5,9; *see also* Original Reply at 2 (stating rejection of initial proposal).

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[9] *See* Declaration of Aaron Harrison at ¶ 6; Declaration of Mark Piibe at ¶ 6; Declaration of Jon Glass at ¶ 6.
[10] https://app.crb.gov/case/detail/19-CRB-0005-WR%20%282021-2025%29
[11] https://www.wsgr.com/en/people/victor-jih.html#credentials
[12] https://www.wsgr.com/en/people/maura-l-rees.html#credentials
[13] https://www.wsgr.com/en/people/lisa-d-zang.html#credentials
[14] https://www.wsgr.com/en/people/ryan-s-benyamin.html#credentials
[15] https://www.wsgr.com/en/people/becca-davis.html#credentials
[16] Reply at 2.
[17] Had Google accepted that proposal and prevailed, the screen would simply dissolve.
[18] For reasons set forth in this paragraph, and because the requested screen only applies to a narrow set of information offered on a discrete issue in a separate proceeding, the requested screen certainly will not deprive Google of due process. *See* Motion at 3; Original Reply at 2. In fact, Google's cited authority makes clear that the right to due process in civil cases applies only in "extreme scenarios" that bear no resemblance to these facts. *See Adir International, LLC v. Starr Indemnity and Liability Company*, 994 F.2d 1032, 1039 (9th Cir. 2021) (noting that application of due process in civil cases has been limited to circumstances involving substantial interference with the

Even with respect to the attorney (or attorneys) that would be subject to the screen, Google's claims are hyperbolic. SoundExchange does not propose that such attorneys be screened from all restricted information in the *Web V* Determination and Expert Materials. It certainly does not seek to disqualify all attorneys with transactional experience from participating in the *Phono IV* proceeding, or to preclude any participant from engaging an outside lawyer with transactional experience. Original Reply at 6; Motion at 4 (incorporating same). Rather, SoundExchange seeks to screen certain of those attorneys (*i.e.* those involved in negotiating against sound recording companies for digital music services) from a limited set of highly sensitive information produced in an entirely separate proceeding.

The notion that this narrow and tailored effort to protect confidential information—made in response to Google's effort to modify an existing protective order so that it may access and use information in an entirely separate proceeding—somehow "denies Google its right to choose counsel" has no merit. To support it, Google incorporates by reference its citation to two cases: *In re Cendent Corp. Sec. Litig.*, 404 F.3d 173, 186 (3d Cir.) and *SEC v. Csapo*, 1974 WL 432 (D.D.C. July 30, 1974). Neither case is apposite. *Cendent* concerned an issue entirely unlike the one presented by the Motion: Whether attorneys could recover fees for work they performed during a class action litigation if they were not chosen as lead counsel. *Cendent*, 404 F.3d at 180. Although the court made a passing remark about the right to select counsel, that language is not accompanied by authority. More importantly, the remark refers to a litigant's ability to choose who their counsel is. It says absolutely nothing about how courts should balance one parties' purported need to access information and another party's right to protect it. For that reason, and

communications between the litigant and retained counsel or with the litigant's ability to retain any counsel at all); *cf. id*. (acknowledging that other circuits take an even more narrow view of the due process right to retain counsel in civil cases and collecting cases). Just as there is no due process violation in ordinary cases involving the application of protective orders to counsel, *see* Initial Opposition at 10-11, there is no such violation here.

additional ones, Google's reliance on *Csapo* is also misplaced. *See Csapo,* 533 F.2d 7, 8 (D.C. Cir. 1976) (addressing whether SEC violated *statutory* right to counsel for individuals compelled to appear before an agency because it precluded target of subpoena from bringing chosen counsel to deposition). Put simply, neither case comes close to establishing that Google would be denied the right to counsel in *Phono IV* if the Judges were to require that particular members of its case team be screened from a narrow category of requested information.

Second, Google incorporates by reference its argument that SoundExchange's objection is arbitrary because other attorneys negotiate license agreements, and SoundExchange has stipulated to their access. Original Reply at Section IV; Motion at 4 (incorporating same). That argument is a non-sequitur. As discussed above, the stipulations that SoundExchange has executed require participants eligible to receive restricted information to apply the requested screen to all Deal Attorneys and Experts. In other words, the stipulations that SoundExchange executed require application of precisely the same screen at issue in this limited opposition to the Motion. SoundExchange does not seek to single out Mr. Greenstein (or any other individual); it seeks to address a highly prejudicial disclosure of confidential information wherever it might occur, by seeking a court order requiring that all eligible participants apply the same screening procedures.

Finally, Google incorporates by reference an argument that the requested screen will impose practical burdens on Google and Google alone. Original Reply at Section II; Motion at 3 (incorporating same). Even if Google is the only Participant that has at present retained Deal Attorneys or Experts, the straightforward screening procedures ordered by the Judges hardly impose burdens that outweigh the harm associated with disclosure. *See supra* Part I. In fact,

Google has not supplied any concrete evidence that the screening procedures impose material burdens at all.

III. Google Still Has Not Shown That Disclosing the Licensing Information to Deal Attorneys and Experts Is Necessary

The limited relief that SoundExchange seeks is particularly appropriate where, as here, there has been no showing that disclosure of Licensing Information to Deal Attorneys and Experts is even necessary. As SoundExchange has previously explained, no Licensing Information should be disclosed unless Google can make an itemized and particularized showing that access to particular pieces of Licensing Information by screened individuals is needed to facilitate preparation of its written cases, and make a further showing that the need for those pieces of Licensing Information outweighs the need for continued restrictions on disclosure (including to avoid prejudice to the Record Companies).[19] *See* Original Opposition at Section III.

Requiring that showing is particularly appropriate here, because disclosure of any Expert Materials is not needed as to any counsel, let alone Deal Attorneys and Experts. The *Web V* Determination contains very granular analysis of the benchmarking testimony and evidence. The Stipulating Services recognize this, at least with respect to certain testimony and evidence. *See* Public Version of Stipulating Services Motion for Access to Expert Materials at 4 (noting that certain analysis is "extensive"). Under the circumstances, reliance on the Determination would be more than sufficient, whether or not the Judges order Google to apply the requested screen to its access and use.[20]

CONCLUSION

[19] The Judges have previously ordered specific procedures intended to ensure that parties seeking and opposing access can address these particularized showings in briefing. Amazon Order at 4.

[20] That Google does not currently have access to and use of a restricted version of the *Web V* Determination, for use by outside counsel and experts not subject to the screening procedures, is a problem of Google's own making. Trepp Decl. ¶¶ 5, 9.

For the foregoing reasons, SoundExchange respectfully requests that the Judges require Google to screen any Deal Attorneys and Experts from Licensing Information contained in the Restricted Materials.

Dated: September 17, 2021

Respectfully submitted,

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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)

DECLARATION OF AARON HARRISON
(On behalf of UMG Recordings, Inc.)

1. My name is Aaron Harrison, and I am Senior Vice President, Business & Legal Affairs, Digital, UMG Recordings, Inc. ("UMG"). I submitted written testimony and testified at the hearing in this proceeding. I submit this declaration in support of SoundExchange's Limited Opposition to Google's Motion to Access and to Make Use of Restricted Webcasting V Expert Materials and Trial Exhibits.

2. As I testified in my written direct testimony, I have negotiated more than 100 significant agreements with digital music services on behalf of UMG as part of the Digital Business and Legal Affairs ("BLA") team in the last fourteen years. Negotiating agreements with digital music services is one of the main responsibilities of the BLA team.

3. I would be deeply concerned, and believe UMG would suffer serious commercial harm, if any outside counsel or experts who are involved in negotiating license agreements with UMG on behalf of digital music services could access restricted portions of the Judges' determination in Webcasting V, or restricted portions of the materials requested in Google's Motion, to the extent they contain information about our bargaining objectives, positions and strategy in negotiations with digital music services. Our agreements with digital music services are heavily negotiated. And while the terms of each agreement are extremely sensitive, we view

our negotiating objectives, the back-and-forth over particular provisions, and our assessment of various positions and contractual language as even more sensitive. Anyone with access to that information would understand where we have negotiating flexibility and could (even unintentionally) use that information to the advantage of our counterparties in future negotiations.

4. In developing my testimony in this proceeding, UMG and I were very mindful of the extremely sensitive nature of our negotiations with digital music services. Our willingness to address details of those negotiations in my testimony depended on our comfort and reliance that the protective order in the proceeding provided, including that the material would be used only for purposes of this proceeding, and would not prejudice future business negotiations. Disclosing any detailed and closely guarded information about how UMG approaches license negotiations—including bargaining objectives, bargaining strategies, perceptions of bargaining power, and responses thereto—to someone involved in negotiating license agreements with UMG on behalf of digital music services would prejudice us in any future negotiations involving that person.

5. To my knowledge, none of the counsel who have entered appearances in Webcasting V are currently involved in negotiating license agreements between digital music services and sound recording companies.

6. I have reviewed a list of counsel who have entered appearances for Google in the Phonorecords IV proceeding, Docket No. 21-CRB-0001-PR ("*Phono IV*"). To my knowledge, just one of those counsel, Mr. Gary Greenstein, is someone who negotiates agreements with UMG on behalf of various clients. While I do not mean to call Mr. Greenstein's ethics into question or suggest that he would intentionally fail to comply with his obligations under applicable protective orders, I would be very concerned about his having access to information about our bargaining

objectives, positions and strategy, because that knowledge would (despite all best intentions) affect his approach to future negotiations.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: September 17, 2021

/s/ Aaron Harrison
Aaron Harrison
Senior Vice President
Business & Legal Affairs, Digital
UMG Recordings, Inc.
2220 Colorado Avenue
Santa Monica, CA 90404

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)

DECLARATION OF MARK PIIBE
(On behalf of Sony Music Entertainment)

1. My name is Mark Piibe, and I am the Executive Vice President for Global Business Development and Digital Strategy at Sony Music Entertainment ("SME"). I submitted written testimony and testified at the hearing in this proceeding. I submit this declaration in support of SoundExchange's Limited Opposition to Google's Motion to Access and to Make Use of Restricted Webcasting V Expert Materials and Trial Exhibits.

2. As I testified in my written direct testimony, I participate directly in a substantial number of our negotiations with digital services. During the course of my employment at Sony, I have led or contributed to hundreds of negotiations with digital music services.

3. I would be concerned, and believe SME would suffer potentially serious commercial harm, if outside counsel or experts who are involved in negotiating license agreements with SME on behalf of digital music services could access restricted portions of the materials requested in Google's Motion, to the extent they contain information about our bargaining objectives, positions and strategy in negotiations with digital music services. Our agreements with digital music services are heavily negotiated. And while we view the terms of each agreement as extremely sensitive, our negotiating objectives, the back-and-forth over particular provisions, and our assessment of various positions and contractual language are even more so. Anyone with

access to that information would understand where we have negotiating flexibility and could (even unintentionally) use that information to the advantage of our counterparties in future negotiations.

4. In developing my testimony in this proceeding, SME and I were very mindful of the extremely sensitive nature of our negotiations with digital music services. Our willingness to address details of those negotiations in my testimony depended on our comfort that the material included would be used only for purposes of this proceeding, and would not prejudice future business negotiations. Disclosing detailed and closely guarded information about how SME approaches license negotiations—including bargaining objectives, bargaining strategies, perceptions of bargaining power and responses thereto—to someone involved in negotiating license agreements with SME on behalf of digital music services would prejudice us in any future negotiations involving that person.

5. To my knowledge, none of the counsel who have entered appearances in Web V are currently involved in negotiating license agreements between digital music services and sound recording companies.

6. I have reviewed a list of counsel who have entered appearances for Google in the Phonorecords IV proceeding, Docket No. 21-CRB-0001-PR ("*Phono IV*"). To my knowledge, just one of those counsel, Mr. Gary Greenstein, is someone who negotiates agreements with SME on behalf of various clients. While I do not mean to call Mr. Greenstein's ethics into question or suggest that he would not try to comply with his obligations under applicable protective orders, I would be concerned about his having access to information about our bargaining objectives, positions and strategy, because that knowledge would (despite all best intentions) inform his approach to future negotiations.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: September 17, 2021

/s/ Mark Piibe

Mark Piibe
Executive Vice President
Global Business Development and Digital Strategy
Sony Music Entertainment
25 Madison Ave
New York, NY 10010

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)

DECLARATION OF JON GLASS
(On behalf of Warner Music Group)

1. My name is Jon Glass and I am Senior Vice President and the Head of Digital Legal Affairs at Warner Music Group ("WMG"). I submit this declaration in support of SoundExchange's Limited Opposition to Google's Motion to Access and to Make Use of Restricted Webcasting V Expert Materials and Trial Exhibits.

2. I participate directly in a substantial number of WMG's negotiations with digital services. During the course of my employment at WMG, I have negotiated or assisted in negotiating hundreds of agreements with digital music services.

3. I would be deeply concerned, and believe WMG would suffer serious commercial harm, if any outside counsel or experts who are involved in negotiating license agreements with WMG on behalf of digital music services could access restricted portions of the materials requested in Google's Motion, to the extent they contain information about WMG's bargaining objectives, positions and strategy in negotiations with digital music services. WMG's agreements with digital music services are heavily negotiated. And while WMG views the terms of each agreement with a digital music service as extremely sensitive, WMG's negotiating objectives, the back-and-forth communications over particular provisions, and WMG's assessment of various positions and contractual language are even more so. Anyone with access to that information

would understand where WMG has negotiating flexibility and could (even unintentionally) use that information to the advantage of WMG's counterparties in future negotiations.

4. I was involved in assisting with the presentation of evidence on behalf of WMG in this proceeding. During that process, WMG witnesses and personnel were very mindful of the extremely sensitive nature of WMG's negotiations with digital music services. WMG's willingness to address details of those negotiations in testimony and through documentary evidence depended on WMG's comfort that the material included would be used only for purposes of this proceeding, and would not prejudice future business negotiations. Disclosing any detailed and closely guarded information about how WMG approaches license negotiations—including bargaining objectives, bargaining strategies, perceptions of bargaining power, and responses thereto—to someone involved in negotiating license agreements with WMG on behalf of digital music services would prejudice WMG in any future negotiations involving that person.

5. To my knowledge, none of the counsel who have entered appearances in *Web V* are currently involved in negotiating license agreements between digital music services and sound recording companies.

6. I have reviewed a list of counsel who have entered appearances for Google in the Phonorecords IV proceeding, Docket No. 21-CRB-0001-PR ("*Phono IV*"). To my knowledge, just one of those counsel, Mr. Gary Greenstein, is someone who negotiates agreements with WMG on behalf of various clients. To be clear, I am not calling Mr. Greenstein's ethics into question or suggesting that he would not try to comply with his obligations under applicable protective orders, as I hold him in high regard. But WMG has serious concerns about Mr. Greenstein having access to information about WMG's bargaining objectives, positions and strategy, because that knowledge would (despite all best intentions) affect his approach to future negotiations.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: September 17, 2021

/s/ Jon Glass

Jon Glass
SVP, Head of Digital Legal Affairs
Warner Music Group
1633 Broadway
New York, NY 10019

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

In the Matter of: **DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023 – 2027)**
In re **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 ALEX TREPP IN SUPPORT OF SOUNDEXCHANGE'S OPPOSITION TO GOOGLE'S MOTION TO ACCESS AND MAKE USE OF RESTRICTED *WEBCASTING V* EXPERT MATERIALS AND TRIAL EXHIBITS

1. I am counsel for SoundExchange, Inc., Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp. (together "SoundExchange") in the above-captioned case. I am familiar with the facts, circumstances, and proceedings in this case. I am also familiar with Google's pending Motion to Access and Make Use of Restricted *Webcasting V* Expert Materials and Trial Exhibits (the "Motion"). I submit this declaration in support of SoundExchange's Limited Opposition to Google's Motion to Access and Make Use of Restricted *Webcasting V* Expert Materials and Trial Exhibits.

2. On July 16, 2021, Amazon.com Services LLC (Amazon), Google LLC (Google), Pandora Media LLC (Pandora), and Spotify USA Inc. (Spotify) filed a joint motion with the Judges requesting that the Judges allow all eligible participants in the *Phonorecords IV*

proceeding full access to and use of the restricted version of the Judges Initial Determination in *Web V* and any future substantive rulings in that proceeding (the "Initial Motion").

3. On July 30, 2021, SoundExchange filed a limited opposition to the Initial Motion. In its limited opposition, SoundExchange requested that the Judges require the *Phonorecords IV* participants to screen any outside counsel and experts involved in negotiating license agreements with sound record companies on behalf of digital music services ("Deal Attorneys and Experts") from material concerning record company bargaining objectives, bargaining strategies, perceptions of bargaining power, and other similar information ("Licensing Information").

4. After SoundExchange filed its opposition, it was approached about negotiating a resolution to the Initial Motion. Thereafter, Amazon, Spotify, Apple, and SoundExchange conferred and reached an agreement. Under the agreement, Amazon, Spotify, and Apple agreed to be bound by the limitations that SoundExchange requested in its limited opposition, and that were reflected in the proposed order accompanying that limited opposition. Amazon, Spotify, Apple, and SoundExchange subsequently entered a stipulation reflecting their agreement (the "Stipulation"). *See* Stipulation Regarding Access to and use of *Web V* Materials in *Phono IV* (Aug. 5, 2021).

5. Also after SoundExchange filed its opposition, and after learning that Google would not join the Stipulation, I contacted outside counsel for Google in the *Phonorecords IV* proceeding. I informed outside counsel that if Google was willing to apply the terms in the proposed order accompanying SoundExchange's limited opposition, subject to resolution of the Initial Motion, then SoundExchange would not object to such access and use while the motion was pending. Outside counsel for Google subsequently informed me that Google was not willing to accept that proposal.

6. On August 9, 2021, the Judges partially granted the Initial Motion, finding good cause to permit Amazon, Spotify, and Apple to access and make use of materials requested in the Initial Motion. Under the Order, Amazon, Spotify, and Apple may access and make use of materials requested in the Initial Motion subject to several conditions, including (among others) that Deal Attorneys and Experts be screened from Licensing Information, and that Amazon, Spotify, and Apple be required to implement various procedures to effectuate the screen. *See* Order Granting in Part Services' Motion to Access and to Make Use of the Restricted *Webcasting V* Initial Determination and Future Substantive Rulings ("August 9 Order").

7. After the National Music Publishers' Association and Nashville Association International ("Copyright Owners") and SoundExchange entered into and filed a stipulation whereby the Copyright Owners also agreed to be bound by terms in the proposed order accompanying the SoundExchange limited opposition, the Judges found good cause to permit the Copyright Owners to access and make use of materials requested in the Initial Motion. Accordingly, the Copyright Owners were permitted to access and make use of materials requested in the Initial Motion subject to several conditions, including (among others) that Deal Attorneys and Experts be screened from Licensing Information, and that the Copyright Owners be required to implement various procedures to effectuate that screen. *See* Second Order Granting in Part Services' Motion to Access and to Make Use of the Restricted *Webcasting V* Initial Determination and Future Substantive Rulings (Aug. 25, 2021).

8. On August 27, 2021, Amazon, Pandora, Apple, and Spotify filed a joint motion requesting that the Judges allow their outside counsel and experts in *Phonorecords IV* full access to and use of the restricted versions of certain materials ("Expert Materials") from the *Web V* record (the "Second Motion"). *See* Order Granting Services' Unopposed Motion to Access and

Make Use of Restricted Web V Expert Materials and Trial Exhibits. In connection with the Second Motion, the moving services agreed to be bound by the August 9 Order.

9. On September 2, the Judges granted the Second Motion. Later that day, Google filed its Motion to Access and to Make Use of Restricted *Webcasting V* Expert Materials and Trial Exhibits.

10. On or around September 15, I contacted outside counsel for Google in the *Phonorecords IV* proceeding. I informed outside counsel that if Google was willing to apply the terms of the September 2, 2021 Order to access and use of the Expert Materials, subject to resolution of its motion for access, then SoundExchange would not object to such access and use while the motion was pending. On or around September 16, 2021, I met and conferred with outside counsel for Google in the *Phonorecords IV* proceeding, who informed me that Google was not willing to accept that proposal.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: September 17, 2021

/s/ Alex Trepp

Alex Trepp (D.C. Bar No. 1031036)
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Proof of Delivery

I hereby certify that on Friday, September 17, 2021, I provided a true and correct copy of the SoundExchange's Limited Opposition to Google's Motion to Access and Make Use of Restricted Webcasting V Expert Materials and Trial Exhibits to the following:

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

National Association of Broadcasters, represented by Sarang V Damle, served via ESERVICE at sy.damle@lw.com

Jagjaguwar Inc., represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Association of Independent Music ("A2IM"), The, represented by Steven R. Englund, served via ESERVICE at senglund@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

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

American Federation of Musicians of the United States and Canada, The, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

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

Signed: /s/ Alex S. Trepp