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

In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2007-1 CRB DTRA-BE (2009-2013)
In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2012-1 CRB Business Establishments II (2014-2018)
In the Matter of Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (Business Establishments III)	Docket No. 17-CRB-0001-BER (2019-2023)

SOUNDEXCHANGE, INC.'S REPLY IN SUPPORT OF ITS MOTION TO REOPEN BUSINESS ESTABLISHMENT SERVICE RATE PROCEEDINGS

SoundExchange, Inc. ("SoundExchange") respectfully submits this reply to Music Choice's February 23, 2022 Opposition (the "Opposition") to SoundExchange's February 9, 2022 Motion to Reopen Business Establishment Service Rate Proceedings for the Limited Purpose of Interpreting Regulations on Referral from the U.S. District Court for the District of Columbia (the "Motion").

Music Choice's Opposition is principally notable for what it does not contest. Specifically, Music Choice does not dispute that the Judges have continuing jurisdiction to accept the referral from the district court to interpret their statutory royalty rate regulations for business establishment services ("BES"). *SoundExchange, Inc. v. Music Choice*, No. 19-999

(RBW), 2021 WL 5998382 (Dec. 20, 2021). Nor does Music Choice suggest that the Judges should decline to provide the interpretation requested by the Court and SoundExchange.

Rather, Music Choice's Opposition takes exception to only two specific procedural issues raised by the Motion: (1) whether the Judges should reopen one, two, or all three of their previous BES proceedings for purposes of providing the requested interpretation, and (2) whether there should be a limited period of discovery to illuminate Music Choice's actual BES payment practices, so the Judges can provide the Court an interpretation of the regulations that addresses the relevant issues. While Music Choice also attempts to litigate the ultimate merits of this dispute, those arguments are simply irrelevant at this stage of the proceeding.[1] For the reasons set forth below, the Judges should grant SoundExchange's Motion, reopen all three of their previous BES proceedings, and order the limited discovery requested by SoundExchange.

I. The Judges should reopen all three of their past BES proceedings.

The Judges should reopen all three of their past BES proceedings because SoundExchange's claims relate back at least to the timeframe covered by the Judges' first BES regulations, and the Judges' precedent holds that reopening the relevant proceedings is the procedure to be followed in situations like this.

[1] SoundExchange disagrees with Music Choice's arguments on the merits. *E.g.*, Opposition at 3-7. Among other issues, Section 112(a) does not apply to a BES, which relies on the exemption in Section 114(d)(1)(C)(iv) for its ability to make public performances. *See* 17 U.S.C. § 112(a)(1). However, the present briefing concerning the procedures for the referral is not the place to address the merits of Music Choice's interpretations of the Copyright Act or its implementing regulations.

Music Choice asserts that, because of the three-year statute of limitations in Section 507 of the Copyright Act, SoundExchange's claims do not relate back before 2016. So, it argues, the Judges need only reopen the proceedings covering the period 2014-2023 (docket numbers 2012-1 CRB ("*BES II*") and 17-CRB-0001-BER ("*BES III*"))—not the proceeding covering 2009-2013 (docket number 2007-1 CRB DTRA-BE ("*BES I*")). Opposition at 7-8.

Music Choice ignores that copyright claims are subject to the "discovery rule." This means that a copyright claim does not accrue until the claimant "has knowledge" of the claim "or is chargeable with such knowledge." *Tech 7 Sys., Inc. v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 83 (D.D.C. 2009); *see also Psihoyos v. John Wiley & Sons, Inc*., 748 F.3d 120, 124 (2d Cir. 2014); *Oppenheimer v. WL Mag. Grp., LLC,* No. CV 20-1451 (ABJ), 2021 WL 6849089, at *3 (D.D.C. Mar. 4, 2021). In this case, SoundExchange discovered Music Choice's reporting and payment practices only as the result of an audit of Music Choice for the period 2013 to 2016.[2] That audit commenced in late 2016 and continued into 2018. Because SoundExchange commenced this case in 2019, less than three years after commencement of the audit, and well within three years after learning of the issue as a result of the audit, none of its claims are time barred. Music Choice is free to argue the contrary to the Court if it can find any evidence that SoundExchange knew about Music Choice's BES payment practices before 2016, but for now, the Judges must assume that SoundExchange's claims relate back at least to the *BES I* period.

[2] SoundExchange has reason to believe that Music Choice may have engaged in the same conduct before and after the 2013 to 2016 period as well. Complaint at ¶ 7, *SoundExchange, Inc. v. Music Choice*, No. 19-999 (RBW) (D.D.C. filed Apr. 10, 2019).

Because SoundExchange's claims relate back at least to the *BES I* period, it is important that the Judges interpret 37 C.F.R. § 384.3(a) in all its forms; that is, during all time periods covered by the Judges' BES proceedings.[3]

SoundExchange does not wish to overemphasize the significance of the various changes to 37 C.F.R. § 384.3(a). The changes are editorial in nature and do not change the intention of the CARP and Register, who initially crafted the predecessor language. That language was based on marketplace benchmarks and designed to capture "the amount the Business Establishment Services receive from their customers for use of the music," including "in-kind payments of goods, free advertising or other similar payments." *Web I*, 67 Fed. Reg. at 45,268. However, it would defeat the purpose of the Court's referral if Music Choice were to argue here that the Judges should focus only on the current version of the regulations, and leave itself room to later argue to the district court that earlier versions of the regulations should be interpreted differently. This proceeding before the Judges should provide a forum for the parties to make whatever arguments they wish concerning any version of the regulations and for the Judges to consider whether the changes have had any substantive effect.

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[3] Music Choice is simply wrong when it asserts that there have been no changes to the definition of "Gross Proceeds" since the CARP proceeding commonly referred to as *Web I*. Opposition at 4 & n.1. *Compare Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,273 (July 8, 2002) [hereinafter *Web I*] *with* 37 C.F.R. § 384.3(a) (2022); *see also Copyright Royalty Board Regulations Regarding Procedures for Determination and Allocation of Assessment to Fund Mechanical Licensing Collective and Other Amendments Required by the Hatch-Goodlatte Music Modernization Act*, 84 Fed. Reg. 32,296, 32,313 (July 8, 2019). Moreover, the context of the definition of "Gross Proceeds" has changed over time as well, and the definition must be interpreted in context. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

In the one prior situation where the Judges were called upon to interpret regulations they had previously adopted, they chose to do so by reopening the proceeding in which those regulations were adopted. *Order Reopening Proceeding for Limited Purpose* in Docket No. 2006-1 CRB DSTRA (Dec. 9, 2014). That made perfect sense; it reflected the reality that the Judges were interpreting their regulations in an exercise of their continuing jurisdiction from the prior proceeding. *See* 17 U.S.C. § 803(c)(4). This precedent indicates that the three relevant BES dockets should be reopened here.

Ultimately, what matters is that the Judges interpret the BES regulations in all their various forms to provide the Court the guidance it has requested. The docket number or numbers associated with that interpretive activity are merely administrative tools to organize the proceeding. For example, opening a new docket number for this referral would not be inconsistent with the concept of continuing jurisdiction, so long as the Judges are clear about what they are doing.[4] SoundExchange does not dispute that it is within the Judges' power to decide that they would like to depart from their prior precedent and administer this referral under a single docket number if they would find that more administratively convenient. *See* 17 U.S.C. § 801(c). With that said, simply reopening all three *BES* proceedings would not create

[4] The ASCAP "rate court" sits pursuant to jurisdiction retained in a 1941 antitrust case against ASCAP. *U.S. v. ASCAP*, 485 F. Supp. 2d 438, 440-41 (S.D.N.Y. 2007), *aff'd*, 627 F.3d 64 (2d Cir. 2010). For decades, the Court carried out individual rate proceedings in exercise of that jurisdiction under the original 1941 docket number. *See id*. at 438. To isolate filings relating to one individual proceeding from those relating to another, the Court has more recently assigned new docket numbers to each proceeding under the ASCAP consent decree, and treated those cases as related to the original 1941 action. The rate court's jurisdiction is nonetheless still predicated on the amended judgment in the original case. *See, e.g., In re MobiTV, Inc*., 712 F. Supp. 2d 206, 228 (S.D.N.Y. 2010), *aff'd*, 681 F.3d 76 (2d Cir. 2012).

significant inefficiency, since it is not materially more difficult to upload a filing to three dockets in eCRB than one.

II. The Judges should order limited discovery.

The Judges should order limited discovery to illuminate Music Choice's actual BES payment practices so the Judges can provide the Court an interpretation of the regulations that is relevant to the issues at hand.

Music Choice's opposition to such discovery relies heavily on selective quotations from the Judges' prior decision interpreting the SDARS rate regulations in a dispute between SoundExchange and Sirius XM. Opposition at 8-10. Music Choice ignores that the Sirius XM referral proceeding counsels *in favor* of discovery—which was taken in that case—and not against it. *See, e.g., Case Scheduling Order* in Docket No. 2006-1 CRB DSTRA (Oct. 6, 2015) (ordering discovery to include document production, interrogatories, depositions and expert reports).

Limited discovery is necessary here to allow the Judges and SoundExchange to understand the basic factual context in which the Judges have been asked to interpret their regulations. Music Choice would no doubt prefer to keep the Judges and SoundExchange in the dark about what it is that Music Choice has been doing, forcing them to rely on Music Choice's own curated version of the facts. That is untenable, especially given that Music Choice's explanations have shifted. Until filing its Opposition, Music Choice's position was that it allocated the payments it receives from providing its BES based on the number of channels it provides. Complaint at ¶ 26, *SoundExchange, Inc. v. Music Choice*, No. 19-999 (RBW) (D.D.C. filed Apr. 10, 2019); Answer at ¶ 26, *SoundExchange, Inc. v. Music Choice*, No. 19-999 (RBW) (D.D.C. filed June 24, 2019). Music Choice argued that it is not required to pay BES royalties

on those payments to the extent that it allocates such payments to channels that are also included in its preexisting subscription service. *Id.* In its Opposition, however, Music Choice departed from the explanations it has provided to SoundExchange's auditor and in its Answer filed with the Court, suggesting that (1) it may have made some copies that it has treated as non-compensable, (2) the number of copies it makes varies with the identity of the subscriber, and (3) in calculating Gross Proceeds, it made allocations based on the copies made for a subscriber. Opposition as 3, 5, 6.

Music Choice's shifting explanations leave it quite unclear what specific questions need to be answered in this referral. Is it whether 37 C.F.R. § 384.3(a) permits allocation of BES proceeds based on channels provided as part of a preexisting subscription service? Or whether that provision permits allocation based on copying practices for particular subscribers? These are the kinds of questions the Judges addressed in the Sirius XM referral in a manner that was precise and targeted and fully informed by an understanding of what Sirius XM was actually doing. *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. 56,729-35 (Nov. 30, 2017). The Judges could not have done so if they had not known basic facts about how Sirius XM accounted for subscriber revenue, *id*. at 56,729, the different methods it used to estimate revenue attributable to its performance of pre-1972 recordings, *id*. at 56,732, and the offering of Sirius XM's subscription packages, *id*. at 56,733.

Here, Music Choice asks the Judges to interpret their regulations without any context concerning the relevant issues except that which Music Choice might volunteer. But it would be pointless for the Judges to consider whether 37 C.F.R. § 384.3(a) permits allocation of BES proceeds based on channels provided as part of a preexisting subscription service if that is not

actually what Music Choice has done. And it would be pointless for the Judges to consider whether 37 C.F.R. § 384.3(a) permits allocation based on copying practices for particular subscribers without some knowledge of the copying and allocations involved. Proceeding in a complete information vacuum simply does not make sense. For the Judges to be able to provide the Court a useful interpretation of their regulations, and for SoundExchange to brief the issues for the Judges, all must have a basic understanding of what Music Choice has been doing. The Judges should order limited discovery to provide such an understanding, as happened in the Sirius XM referral proceeding.

III. Conclusion.

For the reasons set forth above, the Judges should grant SoundExchange's Motion.

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Respectfully submitted,

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Proof of Delivery

I hereby certify that on Wednesday, March 02, 2022, I provided a true and correct copy of the SoundExchange, Inc.'s Reply in Support of Its Motion to Reopen Business Establishment Service Rate Proceedings to the following:

Sirius XM Radio, Inc., represented by Todd Larson, served via MANUALEEMAIL

DMX, Inc., represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Music Reports, Inc., represented by William Colitre, served via MANUALEEMAIL

Pandora Media, Inc., represented by Milton E. Olin, Jr., served via COURIER

Muzak LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Music Choice, represented by Jacob B Ebin, served via ESERVICE at jebin@mayerbrown.com

Clear Channel Communications, Inc., represented by Bruce Joseph, served via COURIER

Signed: /s/ Steven R. Englund