

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

<i>In re</i> 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)
<i>In re</i> Determination of Rates and Terms for Business Establishment Services	Docket No. 2012-1 CRB Business Establishments II
<i>In re</i> Determination of Rates and Terms for Business Establishment Services	Docket No. 2007-1 CRB DTRA-BE

ORDER REOPENING TWO PROCEEDINGS AND SCHEDULING BRIEFING

SoundExchange, Inc. (SoundExchange) filed a collection action against Music Choice in the U.S. District Court for the District of Columbia (District Court). *See SoundExchange, Inc. v. Music Choice*, No. 19-999 (RBW) (District Court Action). In the District Court action, SoundExchange alleged that Music Choice had failed to pay royalties due under 17 U.S.C. § 112 for the license to reproduce and transmit ephemeral copies of sound recordings to business establishments. SoundExchange based its claims on interpretation of 37 C.F.R. § 384.2. After receiving briefs from the parties, the District Court referred the question of regulatory interpretation under the doctrine of primary jurisdiction. *See generally* District Court Action, Memorandum Opinion (Dec. 20, 2021).

On February 9, 2022, SoundExchange, Inc. (SoundExchange) filed a motion (Motion) with the Copyright Royalty Judges (Judges) to reopen the captioned proceedings. The captioned proceedings were before the Judges to determine statutory royalty rates and terms for business establishment services (BES). SoundExchange seeks to reopen all three proceedings for the limited purpose of interpreting the definition of “Gross Proceeds” as codified in 37 C.F.R. § 384.3(a), adopted pursuant to the agreed-upon settlements in those proceedings.

SoundExchange asserts that the Judges should reopen all three Business Establishment proceedings and allow discovery to guide the Judges in preparing their advisory opinion. SoundExchange asserts that, should the Judges agree with its interpretation of Gross Proceeds, it should be able to apply that interpretation retrospectively. Citing the regulatory limitation on SoundExchange audits of licensees, Music Choice opposes reopening any proceeding that covers royalty years outside SoundExchange's audit authority. *See* Music Choice's Response in Opposition (Feb. 23, 2022) (Opposition). Music Choice also opposes discovery, asserting that fact-finding by the Judges would usurp the role of the District Court. Opposition at 2. Music Choice proposes instead limited, simultaneous briefing on the narrow question referred. *Id.*

SoundExchange, in reply, cites legal authority to support its position that statutes of limitations for "copyright claims" are subject to the "discovery rule." *See* SoundExchange, Inc.'s Reply in Support of its Motion (Mar. 2, 2022) at 3 (Reply). The case authority invoked by SoundExchange is inapposite. Both cited cases deal with copyright infringement. Those cases are of no value in this context.

The Judges agree with Music Choice that the issue referred is narrow. The claims to be addressed by the District Court only relate to time periods addressed by the Business Establishments I and II determinations. The Judges are tasked with interpreting their regulations. Whatever that interpretation, the parties shall pursue remedies or relief in the underlying District Court action, to the extent permitted by that court.

The Judges therefore **GRANT in part** SoundExchange's motion to the extent it seeks to permit briefing on questions of statutory interpretation. Pursuant to the District Court's referral, the Judges hereby reopen two of the three captioned proceedings, Business Establishments I and II, for the limited purpose of addressing the meaning of "Gross Proceeds" as defined in 37 C.F.R. 384.3(a). The Judges **DENY** SoundExchange's Motion in all other respects.

The Judges **FURTHER ORDER:**

1. Within 45 days after the date of this Order, the parties shall submit simultaneously opening legal briefs, not to exceed 20,000 words of substantive material on the issue of interpretation of the language of 37 C.F.R. § 384.3(a) as relevant to the term "Gross Proceeds" within that regulation.
2. Thirty days after the filing of opening submissions, the parties may submit simultaneous reply briefs, not to exceed 12,500 words of substantive material. After the filing of reply briefs, the Judges will determine, in their discretion, whether to hear oral argument.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: March 22, 2022.