

UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress

In re

DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE OF SOUND RECORDINGS AND MAKING OF EPHEMERAL COPIES TO FACILITATE PERFORMANCES (*WEB V*)

**Docket No. 19–CRB–0005–WR
(2021–2025)**

In re

DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)

**Docket No. 21–CRB–0001–PR
(2023–2027)**

**ORDER GRANTING IN PART SERVICES’ MOTION TO ACCESS
AND TO MAKE USE OF THE RESTRICTED *WEB V* MATERIALS**

Access to *Web V* Determination Materials

On July 16, 2021, Amazon.com Services LLC (Amazon), Google LLC, Pandora Media, LLC, and Spotify USA Inc. (Spotify) (collectively, the Services) filed a joint motion with the Copyright Royalty Judges (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* (Docket Number 19-CRB-0005-WR (2021-2025)) and any future substantive rulings in that proceeding, including but not limited to any decision in response to motions for rehearing or clarification, the Final Determination, and any decision by the Register (together, the *Web V* Determination Materials) on an outside-counsel-only basis, as provided in Section IV.B of the then-proposed *Phonorecords IV* Protective Order. (Services Original Motion). On July 21, 2021, the Services filed an updated version of the motion ([Updated Motion](#)).

On July 30, 2021, SoundExchange Inc., Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. (collectively, SoundExchange) filed a limited opposition to the Motion ([Limited Opposition](#)). SoundExchange accompanied its Limited Opposition with a proposed order ([SoundExchange Proposed Order](#)) to permit the requested disclosures, subject to limitations proposed by SoundExchange. Specifically, SoundExchange proposes that the Judges require the Phonorecords IV Participants to screen any outside counsel and experts involved in negotiating license agreements with sound recording companies on behalf of digital music

services from discrete portions of the Restricted Materials: those related to bargaining objectives, positions and strategy. Limited Opposition at 1.

On August 5, 2021, Amazon, Spotify, Apple Inc. (Apple) and SoundExchange entered into and filed a stipulation whereby Amazon, Spotify, and Apple agreed to be bound by the terms of the SoundExchange Proposed Order. (August 5 Stipulation). On August 9, 2021, the Judges ordered that Amazon, Spotify, and Apple may have access to and full use of the *Web V* Determination Materials, subject to certain restrictions set forth in that Order ([August 9 Order](#)).

On August 6, 2021, Google filed its Reply in support of the Updated Motion, in which it noted that SoundExchange stipulated to allow other counsel in this proceeding access to the *Web V* Determination Materials, except Google's outside attorneys. Reply at 2.

On August 20, 2021, the National Music Publishers' Association and Nashville Songwriters Association International (Copyright Owners) and SoundExchange entered into and filed a stipulation whereby the Copyright Owners agreed to be bound by the terms of the SoundExchange Proposed Order ([August 20 Stipulation](#)). The August 20 Stipulation represented that SoundExchange "confirms and agrees that it does not oppose modification of the Judges' August 9, 2021 Order, or issuance of a new Order, to provide for access to and use of the *Web V* Determination Materials by outside counsel and experts for the Copyright Owners, on the terms set out in the August 9 Order." August 20 Stipulation at 3-4.

Access to Web V Expert and Trial Exhibits

On September 2, 2021, Google filed a joint motion requesting that the Judges allow its outside counsel and experts access to and use of certain materials from the *Web V* record, namely (1) the written, deposition and trial testimony of economic experts Jon Orszag, Carl Shapiro, and Steven Peterson; (2) the appendices and exhibits to the testimony of all three of those experts, excluding agreements between the record labels and non-*Web V* participants; and (3) trial exhibits 4104 and 4105, to the extent not already captured in the two prior requests (together, the *Web V* Expert and Trial Materials) (Google Motion). Google proposed that its use of these materials would be subject to the *Phonorecords IV* and *Web V* Protective Orders.

On September 17, 2021, SoundExchange Inc., Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. (collectively, SoundExchange) filed a limited opposition to the Google Motion (Limited Opposition to Google Motion). SoundExchange accompanied its Limited Opposition with a proposed order ([SoundExchange September 21, 2021 Proposed Order](#)) to permit the requested disclosures, subject to limitations proposed by SoundExchange. SoundExchange proposed that the Judges should require Google to implement the same screening to which other eligible participants in the *Phonorecords IV* proceeding have agreed in connection with receipt and use of the requested *Web V* Expert and Trial Materials.¹ SoundExchange requested that individuals who would otherwise be permitted to review the *Web V* Expert and Trial Materials under the Protective Orders entered in *Phonorecords IV* and *Web V* but who are involved on behalf of digital music services in negotiating license agreements with sound recording companies not be permitted to review restricted information concerning record company bargaining objectives, bargaining strategy, perceptions of bargaining power, or other similar information contained in the *Web V* Expert and Trial Materials. Furthermore,

¹ See Order Granting Services' Unopposed Motion to Access and Make Use of Restricted Web V Expert Materials and Trial Exhibits, Docket No. 21-CRB-0001-PR (2023-2027) (September 2, 2021).

SoundExchange requested that eligible participants who receive the *Web V* Expert and Trial Materials ensure that outside counsel or experts who are involved on behalf of digital music services in negotiating license agreements with sound recording companies are screened from information about record company bargaining objectives, bargaining strategies, perceptions of bargaining power, and other similar information

On September 24, 2021, Google filed its Reply in support of the Google Motion. (Google Reply).

The arguments presented in support of and in opposition to the motions for access to the *Web V* Determination Materials and the *Web V* Expert and Trial Materials, respectively, are substantially similar. Therefore, the Judges consider and analyze the arguments together, as follows. In this analysis, the Judges refer to the requested materials collectively as the *Web V* Materials.

Services' and Google's Motions

The Updated Motion and the Google Motion² assert that the *Web V* Materials are relevant to the issues in *Phonorecords IV* and that the proceeding will be enhanced to the benefit of the Judges if the parties have access to the restricted *Web V* Materials so that they can make informed decisions as to the presentation of their direct cases. The Updated Motion and the Google Motion set forth, by way of example, that *the public, redacted aspects* of the *Web V* Materials may be insufficient because they do not reveal how the specific economic experts' analyses might have influenced the Judges' determination or how those analyses might impact this proceeding. These motions maintain that the Judges are often informed in one set of royalty rate-setting proceedings by their decisions in proceedings setting other royalties and are required to act on the basis of applicable prior determinations (17 U.S.C. § 803(a)(1)) and therefore the *Phonorecords IV* participants and their experts should have full access to the restricted *Web V* Materials.

The Updated Motion and the Google Motion additionally maintain that the Judges have previously granted access to and use of restricted material from prior proceedings. Updated Motion at 2, Google Motion at 3. The Updated Motion asserts that denying the requested access could prejudice the participants in the *Phonorecords IV* proceeding and result in needless inefficiencies. Updated Motion at 3. The Google Motion also maintains that the screening restrictions proposed by SoundExchange are extreme and unwarranted, and would severely undermine the ability of outside counsel to zealously represent its interests in the proceeding. Google Motion at 3-4.

SoundExchange's Opposition

SoundExchange urges that the Judges should require Google to implement the same screen that other eligible participants in the *Phonorecords IV* proceeding have agreed to in connection with receipt and use of the *Web V* materials, namely to screen individuals involved in negotiating license agreements with sound recording companies on behalf of digital music services from the *Web V* materials. Limited Opposition 9-13, Limited Opposition to Google Motion 9-13. SoundExchange argues that disclosing licensing information to outside counsel and experts who are involved in negotiating license agreements between sound recording

² The Google Motion incorporates by reference arguments set forth in Services Original Motion and the Updated Motion.

companies and digital music services would be highly prejudicial. SoundExchange alleges that under the current circumstances, disclosure to outside counsel and experts who negotiate digital licensing agreements is improper because it is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well intentioned the effort may be to do so. SoundExchange maintains that the proposed screening is consistent with protective measures applied to counsel and experts who play a role in the competitive decision making of clients who retain them. Limited Opposition at 1, Limited Opposition to Google Motion at 2.

SoundExchange indicates that it is aware of at least one outside counsel of record in *Phonorecords IV* who represents digital music services in negotiations with sound recording companies. Specifically, SoundExchange points to certain outside counsel among the lawyers representing Google LLC in this proceeding, that is regularly involved in license negotiations with sound recording companies on behalf of numerous digital music services. Limited Opposition at 11-12. SoundExchange, in its Limited Opposition to Google Motion, indicates that, as far as SoundExchange knows, the proposed screen would apply to just one current member of Google's litigation team, which appears to include several other seasoned litigators. Limited Opposition to Google Motion at 14.

SoundExchange urges that a failure to screen certain outside counsel or experts would create an untenable risk of severe competitive disadvantage. SoundExchange reasons that access to licensing information about the Record Companies' bargaining objectives, bargaining strategies, and perceptions of bargaining power, in addition to providing a counterparty with insight into other sensitive negotiating information. Limited Opposition at 11-13, Limited Opposition to Google Motion at 9-13.

SoundExchange argues that there has been no showing that disclosing licensing information to individuals who negotiate digital license agreements is necessary. Limited Opposition at 13-15, Limited Opposition to Google Motion at 17.

SoundExchange then argues that screening individuals involved in the negotiation of digital license agreements with sound recording companies will not prejudice any *Phonorecords IV* participants. It asserts that the limited relief that SoundExchange seeks is appropriate because it reflects a balance of the risk associated with disclosure with the risk that a party will be impaired in its ability to litigate claims. SoundExchange maintains that screening a limited set of outside counsel and experts from a limited amount of material is reasonable. Furthermore, SoundExchange indicates that based on its review of the docket, each participant eligible to receive restricted information will have outside counsel with access to all of the restricted *Web V* Material, notwithstanding this restriction. Limited Opposition at 15-16, Limited Opposition to Google Motion at 13-16.

Google Replies

In response, Google asserts that SoundExchange does not identify any prejudice that would result from unscreened production of the *Web V* materials, to which the *Web V* and *Phonorecords IV* protective orders already apply. Reply at 3-6, Google Reply at 2-4. It asserts that the proposed screening would cause irreparable prejudice to Google. Google Reply at 4-6. Google also offers that the proposed screening would unfairly target its chosen counsel. Reply at 7-8.

Analysis and Conclusion

Taking into account all of the arguments and information presented in the motions and subsequent briefing, the Judges find that the materials at issue are relevant to the *Phonorecords IV* proceeding, in that the record will be enhanced, to the benefit of the Judges, if the parties have access to such unredacted materials so that the parties can make informed decisions as to the presentation of their cases.

Furthermore, the Judges find that the proper path in evaluating the proposed screening restrictions is to balance the risk associated with disclosure with the risk that a party will be impaired in its ability to litigate claims. Applying this test, which the Judges have previously applied when considering analogous proposed modifications to protective orders,³ the Judges find that good cause exists to modify the Protective Order with regard to the production of the *Web V* materials, namely restricted versions of (1) the *Web V* Final Determination; (2) the written, deposition, and trial testimony of economic experts Jon Orszag, Carl Shapiro, and Steven Peterson; (3) the appendices and exhibits to the testimony of those experts, excluding agreements between the record labels and non-*Web V* participants; and (4) trial exhibits 4104 and 4105, to the extent not already captured in the two prior requests.

The Judges find, without any inference that counsel practicing before the Judges may violate the existing protective orders or otherwise act unprofessionally, that knowledge of details within the *Web V* record by certain outside counsel poses an identifiable risk of prejudice to SoundExchange.⁴ The Judges find that clarification and variation to the proposed screening will protect against such prejudice to SoundExchange and record companies, while at the same time will not substantially or unduly impair the Services' ability to litigate this proceeding. The Judges clarify that the screening of outside counsel shall apply to those who are who are *currently* involved on behalf of digital music services in negotiating license agreements with sound recording companies. Such outside counsel shall not be permitted to review restricted information concerning record company bargaining objectives, bargaining strategy, perceptions of bargaining power, or other similar information contained in the *Web V* Materials.

The Judges **ORDER** Google to implement procedures to screen from access to the *Web V* materials any outside counsel who are involved on behalf of digital music services in negotiating license agreements with sound recording companies, and those who reasonably expect to directly participate in such negotiations during the course of this proceeding, up to the date of issuance of Final Determination, namely restricted versions of (1) the *Web V* Final Determination; (2) the written, deposition, and trial testimony of economic experts Jon Orszag, Carl Shapiro, and Steven Peterson; (3) the appendices and exhibits the testimony of those experts, excluding agreements between the record labels and non-*Web V* participants; and (4) trial exhibits 4104 and 4105, to the extent not already captured in the two prior requests.

³ Order Granting in Part Motion for Access to the Restricted Phonorecords III Determination and Certain Restricted Phonorecords III Testimony, Docket No. 21-CRB-0005-WR (2021-2025) (September 13, 2019).

⁴ The Judges were not presented with an adequate basis to find a similar risk with regard to outside experts.

The Judges **FURTHER ORDER** Google to segregate the *Web V* materials and to ensure that screened outside counsel do not have access to the *Web V* materials and are not informed of their contents.

The Judges **FURTHER ORDER** that Google ensure that all individuals with access to the *Web V* materials are aware they are prohibited from sharing or discussing the details of restricted aspects of the *Web V* materials with screened outside counsel.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: March 23, 2022