

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

<p>In the Matter of:</p> <p>Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (<i>Web VI</i>)</p>	<p>Docket No. 23-CRB-0012-WR (2026-2030)</p>
<p>In the Matter of:</p> <p>Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (<i>Web V</i>)</p>	<p>Docket No. 19-CRB-0005-WR (2021-2025)</p>

SOUNDEXCHANGE’S MOTION TO ACCESS AND TO MAKE USE OF THE RESTRICTED *WEB V* FINAL DETERMINATION, EXPERT MATERIALS, AND PROCEEDING TRANSCRIPTS

SoundExchange, Inc. (“SoundExchange”) has retained outside counsel, Milbank LLP (“Milbank”) for the *Web VI* proceeding for the 2026-2030 period. Milbank did not participate in *Web V*. To assist Milbank in its representation of SoundExchange in *Web VI*, SoundExchange hereby requests, pursuant to 17 U.S.C. § 801(c), that the Judges allow Milbank and expert witnesses (and expert witness support staff) retained to assist SoundExchange in *Web VI* (“SoundExchange Experts”) full access to and use of the restricted versions of the following materials from the *Web V* record: (1) the Final Determination, (2) the written testimony of all parties’ economic experts, and (3) the appendices and exhibits (including underlying work papers) to the written testimony of those experts, and (4) transcripts of the proceedings in *Web V* (together,

the “Web V Materials”).¹

SoundExchange proposes that the use of the *Web V* Materials be subject to the *Web V* Protective Order, except that the provision in Section IV.B of the *Web V* Protective Order limiting the use of materials to the *Web V* proceedings shall not apply to the extent that the *Web V* Materials are used to prepare for *Web VI*. For avoidance of doubt, restrictions relating to “outside counsel of record in this proceeding” or “outside counsel” in the *Web V* Protective Order shall apply to Milbank in accessing and using the *Web V* Materials for and in the *Web VI* proceeding. To that end, the *Web V* Materials would be treated as “Restricted” under the Protective Order and would only be used on an outside-counsel-only basis by Milbank and the SoundExchange Experts, as described in Section IV.B of the Protective Order, in connection with *Web VI*.

In preparing this motion, SoundExchange conferred with the non-settling licensees that participated in the *Web V* proceeding: Google LLC (“Google”), the NAB, the National Religious Broadcasters Music License Committee (“NRBMLC”), and Sirius XM (collectively the “Services”). The Services have a similar interest in obtaining access to the *Web V* Materials for their counsel and experts in connection with *Web VI*. SoundExchange proposed to the Services

¹ Specifically, the requested documents from *Web V*, Docket No. 19-CRB-0005-WR (2021-2025), include expert testimony and associated exhibits (including underlying work papers) contained in the Written Direct Statement of SoundExchange, *et al.* (Sept. 23, 24 2019) (Jonathan Orszag, Catherine Tucker, Robert Willig, Gal Zauberman); Written Direct Statement of the National Association of Broadcasters (“NAB”), (Sept. 23, 2019) (John R. Hauser, Gregory K. Leonard); Google LLC’s Amended Written Direct Statement of Dr. Steven R. Peterson (Dec. 11, 2019); Corrected Sirius XM Radio Inc. (“Sirius XM”) and Pandora Media, LLC (“Pandora”) Written Direct Statement (Dec. 11, 2019) (Dominique M. Hanssens, Carl Shapiro, Joel Waldfogel); Corrected Written Direct Statement of the National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”), Including Educational Media Foundation (Jan. 6, 2020) (Joseph J. Cordes, Richard Steinberg); Written Rebuttal Statement of Pandora and Sirius XM (Jan. 10, 2020) (Carl Shapiro); Written Rebuttal Statement of Google LLC (Jan. 14, 2020) (Steven R. Peterson); Corrected Written Rebuttal Statement of the NAB (Jan. 28, 2020) (John R. Hauser, Gregory K. Leonard); Corrected Written Rebuttal Statement of the NRBNMLC, Including Educational Media Foundation (Jan. 31, 2020) (Richard Steinberg); and Written Rebuttal Statement of SoundExchange, *et al.* (Aug. 4, 2020) (George S. Ford, Jonathan Orszag, Itamar Simonson, Catherine Tucker, Robert Willig, Gal Zauberman), as well as the Final Determination (Sept. 20, 2021) (“Web V Final Determination”).

that, consistent with past orders of the Judges,² individuals who are involved on behalf of digital music services in negotiating license agreements with sound recording companies (“Negotiating Individuals”) be screened from reviewing restricted information concerning record company bargaining objectives, bargaining strategy, perceptions of bargaining power, or other similar information (“Licensing Information”) contained in the *Web V* Materials. The Services agree to the relief requested herein, other than the inclusion of such a screening provision. Accordingly, as reflected in the Stipulation filed herewith, SoundExchange, Google, the NAB, the NRBMLC, and SiriusXM, have agreed to allow counsel and experts who are not Negotiating Individuals (“Non-Negotiating Individuals”) be given immediate access to the *Web V* materials for use in connection with *Web VI* (the “Stipulation”).³ SoundExchange respectfully requests that the Judges enter the proposed order allowing Non-Negotiating Individuals immediate access to *Web V* materials to prepare for *Web VI*, and order the continued screening of *Web V* materials from Negotiating Individuals.

ARGUMENT

I. The *Web V* Materials Are Relevant to the Upcoming *Web VI* Proceeding

SoundExchange expects that the *Web V* Materials will be highly relevant to SoundExchange’s presentation in the forthcoming *Web VI* proceeding. As an initial matter, it is self-evidently important for a party’s chosen counsel to be familiar with the precedent of the body

² See *Phono IV* Order (ordering Service to implement procedures to screen from access to certain restricted *Web V* materials 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 the *Phono IV* proceeding); Order Granting Services’ Unopposed Motion to Access and Make Use of Restricted *Web V* Expert Materials and Trial Exhibits at 2, *Phono IV*, Docket No. 21-CRB-0001-PR (2023-2027) (Sept. 2, 2021) (also filed in *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Sept. 2, 2021)) (granting outside counsel and experts access to certain *Web V* materials but not permitting individuals who are involved in negotiating license agreements with sound recording companies to review Licensing Information).

³ The lead counsel for Google in *Web VI*, Mr. Gary Greenstein, is a Negotiating Individual, as he was in the *Phono IV* proceeding where the Judges screened him from receiving Licensing Information produced in *Web V*.

before which it is appearing. That is particularly so here, because in prior CRB proceedings, including *Web V*, the Judges have made extensive reference to the record in earlier proceedings. For example, in *Web V*, the Judges determined the royalty rates for the performance of sound recordings on non-interactive services in part by analyzing extensively the expert testimony of the parties' economic witnesses,⁴ which included comparisons between the analysis in *Web V* to the analysis in *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020).⁵ Access to the *Web V* Materials will allow Milbank and the SoundExchange Experts to understand fully the Judges' Final Determination in *Web V*, and its implications for SoundExchange's economic analysis in support of its position in *Web VI*. In particular, the *Web V* Materials will allow Milbank and the SoundExchange Experts to evaluate the Judges' findings about the propriety and persuasiveness of the experts' proposals and calculations. Further, the Judges often are informed in one set of royalty-setting proceedings by their decisions in proceedings setting other royalties—and are required to act on the basis of applicable prior determinations. *See* 17 U.S.C. § 803(a)(1). For example, in *Web V*, the Judges relied on steering evidence from *Web IV* to determine the appropriate steering adjustment to establish an effectively competitive rate,⁶ making it critical that Milbank and the SoundExchange Experts have access to relevant portions of the *Web V* record in the event the Judges similarly rely on them in *Web VI*.

II. The Judges' Precedents Support SoundExchange's Request

The Judges have previously granted similar requests to use restricted materials from a prior proceeding—including determinations and expert evidence—in a subsequent proceeding. *See*,

⁴ *See, e.g., Web V* Final Determination at 73-249 (evaluating the survey evidence, benchmark evidence, and game theoretic modelling evidence proffered by parties' experts to determine commercial webcasting rates).

⁵ *See, e.g., Web V* Final Determination at 102-03 (critiquing expert witnesses' attempts to faithfully follow certain economic analyses from *Web IV*).

⁶ *See Web V* Final Determination at 66-72.

e.g., Order Granting in Part Services’ Motion to Access and to Make Use of the Restricted *Web V* Materials at 5-6, *Phonorecords IV* (“*Phono IV*”), Docket No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022)⁷ (“*Phono IV* Order”) (granting access to restricted *Web V* final determination and expert testimony, and permitting screening of Negotiating Individuals); Order Granting in Part Services’ Motion to Access and to Make Use of the Restricted *Webcasting V* Initial Determination and Future Substantive Rulings at 2, *Phono IV*, Docket No. 21-CRB-0001-PR (2023-2027) (Aug. 9, 2021)⁸; Order Granting in Part Motion for Access to the Restricted *Phonorecords III* Determination and Certain Restricted *Phonorecords III* Testimony at 1, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Sept. 13, 2019) (“*Web V* Order”) (granting access to restricted *Phono III* determination and expert testimony, exhibits, and appendices).

In *Web V*, the Judges granted a motion by SoundExchange and the NRBNMLC to access restricted *Phono III* expert materials—including testimony, exhibits, and appendices—for use in its written direct case. *See Web V* Order. As in this motion, there, SoundExchange and the NRBNMLC argued that the values derived by the experts “formed the foundation of the Judges’ determination” and, therefore, “the analyses considered and weighed by the Judges in *Phonorecords III* could be relevant to [the *Web V*] proceeding.” SoundExchange and the National Religious Broadcasters Commercial Music License Committee’s Motion for Access to the Restricted *Phonorecords III* Determination and the Restricted *Phonorecords III* Testimony, Exhibits and Appendices of Expert Witnesses at 2, 4, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (July 25, 2019). The Judges granted the request, recognizing that the ability of participants in a later proceeding to elaborate fully on the relevance of restricted materials from a

⁷ Also filed in *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Mar. 23, 2022).

⁸ Also filed in *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Aug. 9, 2021).

prior proceeding is constrained by the restricted nature of those materials. *Web V* Order at 3 (“Movants would need access to the redacted relative value material in order *first* to decide whether and how to make their own assertions regarding such relative values in their Written Direct Statements.” (emphasis in original)). The Judges also found that the request was not overbroad, because “[f]or the experts’ analyses to be properly understood . . . Movants would need access to the documents that underlie the opinions of the experts and the findings of the Judges.” *Id.* Thus, as was the case with SoundExchange and the NRBNMLC’s prior request in *Web V*, the *Web VI* proceeding will be “enhanced, to the benefit of the Judges,” if SoundExchange’s outside counsel has access to the restricted *Web V* Materials so they “can make informed decisions as to the presentation of [SoundExchange’s] direct case[.]” *Id. Accord Phono IV* Order at 5.

III. Permitting Access to the Restricted Materials Would Avoid Prejudice and Unnecessary Inefficiencies and Delay

Denying SoundExchange’s outside counsel such access could prejudice SoundExchange in the *Web VI* proceeding and result in needless inefficiencies and delay. The public, redacted versions of the *Web V* Materials do not allow Milbank and the SoundExchange Experts to fully understand and evaluate the implications of the *Web V* determinations for *Web VI*. For example, the redacted versions of the *Web V* Materials do not reveal the full extent of how the specific economic analyses presented in *Web V* may have influenced the Judges’ determinations, or how—if at all—those analyses might impact *Web VI*. And, as discussed, since the Judges’ decisions are often informed by their prior determinations,⁹ limits on Milbank and the SoundExchange Experts

⁹ See, e.g., Order Granting in Part and Denying in Part Motions for Rehearing (Amended) at 18, *Phonorecords III*, Docket No. 16-CRB-0003-PR (2018-2022) (Jan. 4, 2019) (commenting that notwithstanding differences in the evidentiary records of *Web IV* and *SDARS III*, the Judges “are informed in their approach . . . by those prior rulings” due to common economic issues between the instant case and those proceedings).

access to those determinations will hamper SoundExchange’s presentation to the Judges in *Web VI*.

IV. Licensing Information Should be Screened from Web V Materials Provided to Negotiating Individuals

The issue of whether materials produced under the *Web V* protective order should be screened from Negotiating Individuals was already litigated before the Judges in *Phono IV*, where the Judges determined such screening was appropriate. *See Phono IV Order*. SoundExchange seeks identical treatment here. As SoundExchange explained in its brief in *Phono IV*, in *Web V* SoundExchange and the licensee participants in that proceeding negotiated a protective order that extended important protections to the participants. *See SoundExchange’s Limited Opposition to Google’s Motion to Access and Make Use of Restricted Webcasting V Expert Materials and Trial Exhibits at 4-5, Phono IV, Docket No. 21-CRB-0001-PR (2023-2027) (Sept. 17, 2021) (“SoundExchange Phono IV Limited Opp.”)*.¹⁰ The *Web V* Protective Order permitted participants to designate sensitive commercial and financial information as restricted, limiting its disclosure to outside counsel and experts for participants in the *Web V* proceeding. *See Web V Protective Order at Part III-IV*. The *Web V* Protective Order also precluded individuals who received restricted information from using it for any purpose other than the *Web V* proceeding. *Id.* at IV.B-C. During the course of *Web V*, SoundExchange introduced or produced restricted information pursuant to protections in the *Web V* Protective Order. In doing so, SoundExchange relied on its understanding

¹⁰ Also filed in *Web V*, Docket No. 19–CRB–0005–WR (2021–2025) (Sept. 17, 2021).

of who would be permitted to access the information and for what purpose, including the identities of the particular individuals involved in the proceeding.

For example, the restricted version of the Determination in *Web V* quotes, paraphrases, and analyzes highly confidential internal documents related to Sony Music Entertainment (“SME”), UMG Recordings, Inc. (“UMG”), and Warner Music Group Corp. (“WMG”) (the “Record Companies”) negotiations with digital music services. Those documents, and the passages incorporated in the determination, contain closely-guarded information about how the Record Companies approach licensing negotiations in general and with particular digital music services, including bargaining objectives, bargaining strategies, perceptions of bargaining power and responses thereto. Disclosure of this Licensing Information to individuals involved in negotiating license agreements between sound recording companies and digital music services would impose severe and irreversible prejudice.

The *Web V* Protective Order ensured that employees of the *Web V* participants who are involved in negotiating license agreements with sound recording companies will not have access to any of the Restricted Material, including the Licensing Information. However, the Protective Orders did not contain any provision to limit access for Negotiating Individuals otherwise involved in those negotiations. Disclosing the Licensing Information to Negotiating Individuals who are involved in negotiation of license agreements with sound recording companies would be just as damaging to the competitive interests of the disclosing participants as disclosure to personnel employed by the *Web V* Participants. Indeed, it could be worse, because outside counsel may

represent in negotiations digital music services other than the participants they represent in proceedings before the Judges, perhaps many of them.

Here, as in *Phono IV*, SoundExchange is aware of at least one outside counsel of record who is regularly is involved in license negotiations with sound recording companies on behalf of numerous digital music services, Mr. Greenstein, who, as in *Phono IV*, is among the counsel representing Google LLC. See SoundExchange *Phono IV* Limited Opp. at 11-12; Google LLC Petition to Participate, *Web VI*, Docket No. 21-CRB-0001-PR (2023-2027) (Feb. 2, 2024); Google LLC Petition to Participate, *Phono IV*, Docket No. 21-CRB-0001-PR (2023-2027) (Feb. 1, 2021). As when this topic was litigated before the Judges in *Phono IV*, SoundExchange does not mean to call Mr. Greenstein's ethics into question or suggest that he would not try to comply with his obligations under the Protective Orders, but SoundExchange is deeply concerned about revealing the negotiating playbook of the Record Companies to someone who is often involved in negotiating on behalf of counterparties. It simply is not reasonable to expect that anyone who learned about the sound recording companies' bargaining objectives, positions and strategy from the Determination could so compartmentalize their thinking as to avoid having that information inform their negotiations. Failure to screen Mr. Greenstein or any similarly situated outside counsel or experts would create an untenable risk of severe competitive disadvantage, including because access to the Licensing Information would provide a counterparty with access to information about the Record Companies' bargaining objectives, bargaining strategies, and perceptions of bargaining power, among other things.

The participants in *Web V* made determinations about whether to offer Licensing Information based in part on their expectation that the information would not be disclosed to individuals involved in negotiating license agreements on behalf of digital music services. Those

expectations instilled confidence that information could be provided without working substantial prejudice in future negotiations with digital music services and allowed the Participants to build a robust record. But granting relief from the *Web V* Protective Order to allow Negotiating Individuals to access Licensing Information will force the Record Companies in subsequent proceedings—including *Web VI*—to weigh whether the value of using similar information outweighs the risk that any rules governing use of that information may be overridden to provide access to those individuals in future proceedings (including in proceedings where the Record Companies are not participating or actively participating).

Moreover, implementing the screening procedure that SoundExchange seeks is also appropriate because it would not prejudice *Web VI* participants. In determining whether and to what extent a protective order should bar one party's attorney access to information, courts balance the risk associated with disclosure and the risk that a party will be impaired in its ability to litigate claims. *See U.S. Steel Corp.*, 730 F.2d at 1468. SoundExchange only seeks to screen a limited set of outside counsel and experts from a limited amount of material. Based on its review of the docket, SoundExchange has determined that each participant eligible to receive restricted information will have outside counsel with access to all of the *Web V* Materials (should the Judges grant the Motion but require the requested screen). The screen will also not require that any participant disclose its outside counsel or experts to other *Web VI* participants in advance of any public filing. Rather, each *Web VI* participant will be obligated to ensure that it complies with the terms of the Order entered on the Motion by implementing a screen as to any outside counsel or expert covered by the terms of the Order.

Further, implementation of a screen will not impose significant burdens. It will simply require ensuring that Negotiating Individuals do not have access to Licensing Information,

materials that make use of the Licensing Information, or conversations that disclose Licensing Information, just as was done in *Phono IV*. In law firms, this is common practice, and it is less constraining than the more prophylactic measures adopted in other contexts. See, e.g., *Methodes Elecs., Inc. v. DPH-DAS LLC*, 679 F. Supp. 2d 828, 834 (E.D. Mich. 2010) (imposing patent prosecution bar where access to information would enable counsel to “write patent application claims that he wouldn’t otherwise write and get patent rights for” his client (quoting counsel at hearing)); *Commissariat A L’Energie v. Dell Computer Corp.*, No. Civ. A. 03-484, 2004 WL 1196965, at *3 (D. Del. May 25, 2004) (holding that where CEA’s patent attorneys were prosecuting patents in the field of technology involved in the litigation, they must be barred from having access to Dell’s highly confidential information or be prohibited from prosecuting patents in that field of technology for one year following conclusion of the litigation). Further, Given the overlap in counsel between *Web V*, *Phono IV*, and *Web VI*, SoundExchange expects that *Web V* Materials that are redacted for Licensing Information already exist, and are in the possession of counsel for several of the Parties participating in *Web VI*.

CONCLUSION

Milbank and the SoundExchange Experts require sufficient time to analyze the *Web V* Materials in preparation for the SoundExchange’s direct case. For that reason, SoundExchange respectfully requests that the Judges (i) grant the proposed order accompanying the Stipulation as promptly as reasonably possible to allow Milbank and the SoundExchange Experts (along with the counsel and experts of the Services that are parties to the Stipulation) access to and use the restricted *Web V* Materials in, and to prepare for, *Web VI*,¹¹ and (ii) set a schedule for responses (if

¹¹ SoundExchange further requests that the Judges permit Milbank to collect copies of the restricted versions of the *Web V* Materials from either its *Web V* predecessor counsel, Jenner & Block LLP (“Jenner”), and, to the extent that Jenner does not have such materials in its possession, direct that the counsel of record for other parties in *Web V* provide any of the requested *Web V* Materials to Milbank upon request.

any) to this motion so that the issue of screening can be resolved in a timely fashion. In addressing the screening issue, SoundExchange requests that the Judges (i) implement an identical screening measure to that of *Phono IV*, (ii) direct that outside counsel for any party in *Web VI* that receives or uses the *Web V* Materials ensure Negotiating Individuals are screened from the Licensing Information, and (iii) direct non-settling licensees that participated in the *Web V* proceeding and also filed a Petition to Participate in *Web VI*—Google, NAB, NRBMLC, Pandora, and Sirius XM—to meet and confer with SoundExchange to identify Licensing Information and prepare suitably redacted versions of the *Web VI* Materials for any individuals to be screened.

Dated: April 18, 2024

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Friday, May 03, 2024, I provided a true and correct copy of the SoundExchange's Motion to Access and to Make Use of the Restricted Web V Final Determination, Expert Materials, and Proceeding Transcripts to the following:

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

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

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

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

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

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

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Signed: /s/ Scott Edelman