

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
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 VI*)**

**Docket No. 23-CRB-0012-WR (2026-  
2030)**

**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)**

**PARTIAL OPPOSITION TO SOUNDEXCHANGE’S MOTION TO ACCESS  
AND TO MAKE USE OF THE RESTRICTED *WEB V* MATERIALS**

On April 18, 2024, SoundExchange, Inc. (“SoundExchange”), submitted a motion to access and make use of the restricted *Web V* final determination, expert materials, and proceeding transcripts, Doc. 42263, (the “[Motion](#)”) that was based in part on a stipulation entered into between SoundExchange and non-settling licensees that participated in *Web V*, Doc. 42262 (the “[Stipulation](#)”). Sirius XM Radio Inc. (“Sirius XM”), Pandora Media, LLC (“Pandora”), and the National Association of Broadcasters (“NAB”) (collectively, the “Opposing Services”) support the Motion to the extent it seeks permission for participants to disclose and use the identified *Web V* materials in this proceeding, but we submit this partial opposition due to the request in the Motion for an overbroad—and, in the wake of Google LLC’s recent withdrawal, unnecessary—screen.

Specifically, the Opposing Services object to SoundExchange’s attempt to impose a permanent screen of *Web V* materials from “Negotiating Individuals,” which it defines in the Motion as “individuals who are involved on behalf of digital music services in negotiating license agreements with sound recording companies.” Motion at 3. That definition, if adopted, would result in an overbroad screen that conflicts with Copyright Royalty Board precedent and procedure, is significantly broader than the proposed screen agreed to in the Stipulation, and would interfere with the participants’ representation in the current proceeding. While the proposed order submitted with the Motion contains the definition of “Non-Negotiating Individuals” agreed to in the Stipulation and also contains a carve-out to the screen for counsel and experts who already had access to the materials at issue during *Web V*, the Motion itself contains a different, narrower definition of “Non-Negotiating Individuals” and makes no reference to an exception for *Web V* counsel and experts.

The Opposing Services respectfully request that, to the extent the Judges are inclined to screen a category of “Negotiating Individuals” at all, the Judges ensure that “Non-Negotiating Individuals” and “Web V Counsel and Experts,” as those terms are defined in the Stipulation, are not subject to the screen.

### **BACKGROUND**

While the issue of certain *Web V* screening procedures was litigated in *Phono IV* (Motion at 7), SoundExchange provides an incomplete picture of the screens considered and ordered in that proceeding. There, the Judges analyzed two proposed screens concerning outside counsel’s access to restricted licensing information, both of which resulted in narrower limitations than what SoundExchange is proposing here. *See* Order Granting in Part Services’ Motion to Access and to Make Use of the Restricted *Web V* Materials at 5-6, Doc. 26377, Docket No. 21-CRB-0001-PR

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(2023-2027) (Mar. 23, 2022) (“[Web V Order](#)”); Order Granting in Part Broadcast Music, Inc.’s Motion For a Limited Modification to the Protective Order at 3-4, Doc. 26375, Docket No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022) (“[Phono IV BMI Order](#)”).

In *Phono IV*, the service-side participants filed a motion requesting access to and use of certain restricted materials from *Web V*, to which SoundExchange filed a limited opposition. [SoundExchange’s Limited Opposition to Motion for Access to Restricted Web V Materials](#), Doc. 25551, Docket No. 19-CRB-00050WR (2021-2025) (July 30, 2021). As they have here, SoundExchange demanded that the Judges require the *Phono 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 the *Web V* materials. *Id.* at 1. That opposition—similar to the present Motion—pointed to the same counsel for Google (Gary Greenstein) who “regularly is involved in license negotiations with sound recording companies on behalf of numerous digital music services.” *Id.* at 11-12. Balancing the risk of disclosure with the risk that a party will be impaired in its ability to litigate claims, the Judges ordered *Google* to implement procedures to screen certain counsel from access to the *Web V* materials. *Web V Order* at 5. The screen applied to “outside counsel . . . 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.” *Id.* Thus, the screen applied only to outside counsel *currently* involved in private license negotiations. *See id.*

In addition to the *Web V* screening order in *Phono IV*, Broadcast Music, Inc. (“BMI”), a non-party performance rights organization represented by SoundExchange’s current counsel, also requested that the Judges modify the *Phono IV* protective order and implement general procedures to screen “any outside counsel who directly participate in license negotiations with BMI” from

reviewing the relevant BMI license agreements subject to production in *Phono IV*. [BMI’s Motion for a Limited Modification to the Protective Order in the \*Phono IV\* Proceeding](#) at 1-2, Doc. 25669, Docket No. 21-CRB-0001-PR (2023-2027) (Sept. 15, 2021). Despite the initial broad language, BMI noted in its reply that its request was targeted toward outside counsel that engage in *license* negotiations with BMI, as opposed to negotiations in the course of, leading up to, or in settlement of litigation. [BMI’s Reply in Support of Its Motion for a Limited Modification to the Protective Order in the \*Phono IV\* Proceeding](#) at 5-6, Doc. 25697, Docket No. 21-CRB-0001-PR (2023-2027) (Sept. 28, 2021). On March 23, 2023, the Judges adopted this litigation carve-out in imposing a limited screen with respect to the BMI license agreements. *Phono IV* BMI Order at 3. The Judges ruled that “the screening of outside counsel shall apply to those who are *currently* directly participating in private *license* negotiations (as opposed to negotiations in litigation contexts) with BMI and those who reasonably expect to directly participate in such license negotiations during the course of this proceeding.” *Id.* (emphasis in original). This order remains the Judges’ most recent ruling regarding screening procedures that implicate outside counsel participating in the same type of CRB proceeding for which a screen is being sought.

## ARGUMENT

The Opposing Services respectfully submit that there should be a heavy presumption against screens of the nature proposed by SoundExchange, which can unfairly limit a participant’s choice of counsel and introduce an incredibly complicated and burdensome redaction process into a case (among other substantive and logistical difficulties). *See, e.g., Web V* Order at 4 (identifying the need to evaluate screening restrictions by balancing “the risk associated with disclosure with the risk that a party will be impaired in its ability to litigate claims”). That is particularly true here, where the only individual identified in the Motion as justifying a need for the screen (Mr.

Greenstein) represented a participant that has now withdrawn from the proceeding, and therefore he will not be receiving any *Web V* materials at all under the Stipulation.<sup>1</sup> In addition to SoundExchange’s concern about Mr. Greenstein being effectively mooted by Google’s withdrawal, the Opposing Services object to SoundExchange’s request for a “continued” screening of *Web V* materials from “Negotiating Individuals” (as defined in the Motion) for four additional reasons: (i) it seeks to apply a screen to dated information that not even SoundExchange sought to screen during *Web V*; (ii) it is broader than the proposed scope of screen agreed to in the Stipulation; (iii) it interferes with the participants’ representation in this proceeding, including settlement discussions; and (iv) it conflicts with the Judges’ precedent in *Phono IV* and unnecessarily imposes potential restrictions on choice of counsel.

*First*, the screen proposed by SoundExchange relates to documents and information that are now nearly five years old and for which SoundExchange did not request any “Negotiating Counsel” screen in negotiating the *Web V* protective order itself. See [Protective Order](#), Doc. 4012, Docket No. 19-CRB-0005-WR (2021-2025) (June 24, 2019). SoundExchange provides no explanation for why this information is more sensitive or why a screen is more necessary in 2024 than it was in 2019.

*Second*, in an effort to minimize the need to burden the Judges with unnecessary briefing, the Opposing Services agreed to the Stipulation submitted with the Motion, but only following negotiations on the scope of the screen SoundExchange originally requested to ensure there would

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<sup>1</sup> While Mr. Greenstein is also counsel for Stingray in this proceeding, Stingray is not party to the Stipulation allowing its counsel access to the *Web V* materials or covered by the Motion. If Stingray subsequently were to seek access to the *Web V* materials, any perceived need to screen Mr. Greenstein could be revisited at that time.

be no application to the Opposing Services in this proceeding.<sup>2</sup> See Stipulation at 2 (contrasting SoundExchange’s original request with agreed-upon scope). In the Motion, SoundExchange defines “Negotiating Individuals” that would be subject to the proposed screen merely as “individuals who are involved on behalf of digital music services in negotiating license agreements with sound recording companies” and then defines “Non-Negotiating Individuals” simply as counsel and experts who are “not Negotiating Individuals.” Motion at 3. In fact, the Stipulation has a far narrower definition of “Negotiating Individuals,” who would be screened, allowing counsel, expert witnesses, and expert witness support staff access to the *Web V* materials as long as they “are not participating in normal-course license negotiations (as opposed to negotiations to settle pending or threatened litigation) with sound recording companies and reasonably do not expect to directly participate in such negotiations during the course of this proceeding.” Stipulation at 2. Moreover, the Stipulation makes clear that individuals who “already had access to the *Web V* materials by virtue of their participation in that proceeding, or the *Phono IV* proceeding, and are bound by the *Web V* protective order may be given immediate access to the *Web V* materials for use in connection with *Web VI*.” *Id.* at 2-3.

Unlike the Motion itself, the proposed order submitted by SoundExchange in connection with its Motion correctly utilizes the agreed-upon definitions of “Non-Negotiating Individuals” and “Web V Counsel and Experts” contained in the Stipulation. If the Judges decide to impose a screen, the Judges should reject the short-hand, broader definition of “Negotiating Individuals” contained in the Motion itself, as that definition is unbounded as to the timeframe of any negotiations, contains no explicit exception for negotiations with record companies that are limited

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<sup>2</sup> The Opposing Services expressly reserve the right to oppose any further screening requests, outside the context of this narrow stipulated exchange of *Web V* materials, that would limit the full participation of, and unrestricted access to confidential materials for, any service participants’ preferred counsel and experts.

to the context of litigation, and contains no carve-out or separate reference to counsel and experts in *Web V* who already had access to the materials. In essence, the Motion describes the significantly overbroad scope of SoundExchange’s original proposal to the Services rather than the carefully tailored proposed screen that the Services were willing to agree to in the Stipulation in an effort to avoid burdening the Judges.

*Third*, as described in the Motion, SoundExchange’s proposed screen would interfere with the participants’ representation in this proceeding, including settlement discussions, and is inconsistent with CRB procedure. In particular, the Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 803(b)(3), requires a three-month voluntary negotiation period between the participants. *Accord* 37 C.F.R. § 351.2. During that three-month period, counsel for the non-settling services negotiate with sound recording companies. Those negotiations may, and often do, extend to license agreements. Without a narrower definition of “Non-Negotiating Individuals” than the one offered by SoundExchange in its Motion, counsel who participated in the current voluntary negotiation period and, in their negotiations, considered license agreements with sound recording companies, could not “review[] restricted information concerning . . . *Web V* Materials.” Motion at 3. Not only would such a screen derail the participants’ potential negotiations, it would effectively require each participant to hire *new* counsel for the limited purpose of engaging in settlement negotiations between the same parties.

*Finally*, as described in the Motion, SoundExchange’s proposed screen would be broad enough to include outside counsel who participate in license negotiations with sound recording companies in the context of litigation more generally and thus conflicts with the Judges’ recent precedent concerning similar screens in *Phono IV*. Although SoundExchange claims to “seek identical treatment” with the *Phono IV* screening procedures, *id.* at 7, neither order in that

proceeding instituted the sort of broad screen SoundExchange seeks to impose on the Services here—i.e., preventing a Service’s chosen counsel in a proceeding from accessing materials in the current proceeding or a former proceeding of the same type. For instance, the *Web V* Order in *Phono IV* concerned the ability of counsel in one type of proceeding (*Phonorecords*) to access materials in another type of proceeding (*Webcasting*) and did not warrant a litigation carve-out. However, when confronted with the factual scenario presented here—screening counsel in a proceeding from accessing materials in that current proceeding (or former proceeding of the same type)—the Judges recognized the need for a litigation carve-out. *See Phono IV* BMI Order at 3 (clarifying “that the screening of outside counsel shall apply to those who are currently directly participating in private license negotiations (*as opposed to negotiations in litigation contexts*) with BMI.” (emphasis added)). If the Judges find continued screening of *Web V* materials necessary here, they should incorporate the same litigation carve-out applied in *Phono IV*. As noted above, the Stipulation and the proposed order submitted with the Motion both contain such a carve-out, but the Motion itself makes no reference to one.

### CONCLUSION

For the foregoing reasons, the Judges should adopt the proposed order without the provisions concerning a screen or, in the alternative, ensure that any screen is no broader than the one contained in the Stipulation.

Dated: May 2, 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 Partial Opposition to Soundexchange's Motion to Access and to make use of the Restricted Web V Materials to the following:

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

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Signed: /s/ Joseph R. Wetzel