

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)

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

On April 18, 2024, SoundExchange filed its Motion to Access and to Make Use of the Restricted *Web V* Final Determination, Expert Materials, and Proceeding Transcripts (Dkt. 44263 (“Motion” or “Mot.”)) and an accompanying stipulation, among SoundExchange and the Services (Dkt. 42262 (“Stipulation” or “Stip.”)).<sup>1</sup>

As detailed in the Motion, prior to its filing, SoundExchange conferred with the Services—non-settling licensees that participated in the *Web V* proceeding. The Services agreed to stipulate to SoundExchange and the Services accessing the *Web V* Materials, subject to a screening restriction limiting access to certain of the *Web V* Materials for individuals “involved on behalf of digital music services in negotiating license agreements with sound recording companies.”

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<sup>1</sup> Unless otherwise specified, capitalized terms used herein have the same meaning as defined in the Motion.

Despite agreeing to the screen in the Stipulation, the Services refused to consent to the entry of an order screening certain portions of the *Web V* Materials from other individuals involved in license negotiations with sound recording companies (the “Proposed Screen”), requiring SoundExchange to file the Motion. Through the Motion, SoundExchange seeks to modify the *Web V* protective order to allow confidential *Web V* Materials to be used in this *Web VI* proceeding, subject only to screening competitively sensitive record company licensing information from individual attorneys or expert witnesses who regularly negotiate licenses with record companies on behalf of music user clients.

Sirius XM, Pandora,<sup>2</sup> and the NAB (the “Opposing Services”) oppose SoundExchange’s request for a limited screen (Dkt. 42277 (the “Opposition”)) and have submitted an alternative proposed order which would broadly allow access and use of the *Web V* materials to the Stipulating Parties. Dkt. 42278 (the “Opposing Proposed Order”).<sup>3</sup> The Opposing Services are all parties to the Stipulation, which itself contains a screen of Licensing Information from Negotiating Individuals associated with the Services. They nonetheless object to modification of the *Web V* Protective Order to allow use of the *Web V* Materials in *Web VI*, subject to the screen, which would ensure that the narrow limitation applies equally to any other similarly situated individual involved in licensing negotiations who may subsequently be in a position to receive access to *Web V*

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<sup>2</sup> Pandora is a wholly-owned subsidiary of Sirius XM, and the two Services jointly filed a petition to participate in *Web VI*. See *Sirius XM Completes Acquisition of Pandora*, Sirius XM, <https://investor.siriusxm.com/news-events/press-releases/detail/1084/siriusxm-completes-acquisition-of-pandora> (last visited May 10, 2024); Sirius XM Radio Inc./Pandora Media, LLC Pet. To Participate, Determination of Rates and Terms for Digital Performance of Sound Recordings and Makings of Ephemeral Copies to Facilitate those Performances (*Web VI*) (Jan. 26, 2024) (No. 23-CRB-0012-WR (2026-2030)).

<sup>3</sup> The other two parties to the Stipulation, Google—which withdrew its Petition to Participate before the Opposing Parties filed the Opposition—and the NRBMLC, did not join in the Opposition.

confidential licensing information. Opposing Proposed Order at 2. No participants in *Web VI* that are not parties to the Stipulation have objected to the Proposed Screen, including Gary Greenstein, counsel for Stingray Music USA Inc. (“Stingray”), who would most directly be affected by the proposed screen.

The principal argument in the Opposition is that the terms of the Proposed Screen differ from the Stipulation. But there is good reason for that. The Stipulation addresses a narrow issue: access to the *Web V* Materials for individuals who already had access to them (whether in screened and unscreened form) by virtue of their participation in *Web V* or *Phono IV*. The Motion addresses a broader issue: access to the *Web V* Materials for individuals who may not have received them previously and who negotiate directly with record companies. SoundExchange reasonably expects that, once the *Web V* Materials are permitted to be used in *Web VI*, individuals other than the parties to the Stipulation are likely to receive access to the Materials. For example, it is likely that filings in this proceeding—which, without the screen, would be available in unredacted form to all participants—will incorporate and reference sensitive Licensing Information contained in the *Web V* Materials. Modification of the *Web V* Protective Order to include a screen is necessary to protect the record companies.

The Opposing Services also argue that Google’s withdrawal from the *Web VI* proceeding obviates the need for the Proposed Screen because the Motion focused on the presence of Gary Greenstein, Google’s lead counsel, in the proceeding. But Mr. Greenstein remains counsel of record for Stingray, itself a participant in *Web VI*. The Opposing Services minimize this in a footnote and suggest the Judges address it if and when Stingray requests access to the *Web V* Materials. This runs counter to the very purpose of the Protective Order, to establish appropriate guidelines that ensure protection of competitively sensitive and confidential information without

the need for the Judges to revisit this question every time a new lawyer or expert wants access to information. It should be clear to all participants that Licensing Information from the *Web V* Materials may not be used in this proceeding in a manner that would result in it being disclosed to individuals who regularly negotiate with record companies. At most, Google's withdrawal removes the need for a screen with respect to the Services—of which Google was one—but exacerbates the broader issue, as Mr. Greenstein will not be subject to a screen in his capacity as Stingray's counsel. The Stipulation and modification of the *Web V* Protective Order will allow the Opposing Services to submit expert analyses that include details of confidential licenses, and to produce those licenses in this proceeding. Without a limited screen included in the Protective Order itself, Mr. Greenstein would receive the full suite of confidential licenses, despite his role in negotiating licenses with record companies.<sup>4</sup>

Finally, the Opposing Services contend that the Proposed Screen was overbroad for various reasons, including the lack of such a screening mechanism in the *Web V* Protective Order, its lack of a time limitation, and the lack of a litigation carve-out. As explained below, the presence of Mr. Greenstein—who was not involved in *Web V*—highlights the need for the Proposed Screen here, and SoundExchange is amenable to a modification of the Proposed Screen to address the time limitation and litigation carve-out concerns.

## ARGUMENT

### I. The Proposed Screen Is Necessarily Broader than the Stipulation

The bulk of the objections of the Opposing Services turn on the fact that the language of the Proposed Screen is somewhat broader than that of the screen agreed to in the Stipulation. This

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<sup>4</sup> Mr. Greenstein may not be the only individual involved in this proceeding that negotiates licenses with record companies, and SoundExchange may learn of other counsel or experts who necessitate the Proposed Screen as this proceeding progresses.

is necessary. The Stipulation is an agreement between SoundExchange and the Services, each of which litigated the *Web V* proceeding to its conclusion. With the exception of Milbank, counsel to each of the Stipulating Parties already has access to much of or all of the *Web V* Materials by virtue of their participation in *Web V* or *Phono IV*. The Stipulation allowed the Stipulating Parties and their counsel to use *Web V* Materials already in their possession (or, in Milbank's case, in the possession of its predecessor counsel), including in the case of Mr. Greenstein, materials that were already screened in *Phono IV*.<sup>5</sup>

However, as described above, it is all but certain that participants who are not Stipulating Parties will at some point receive some or all of the *Web V* Materials, and SoundExchange seeks to ensure that appropriate protections are in place to protect the record companies from the disclosure of their highly sensitive Licensing Information to a negotiating counterparty. The Proposed Screen is intended to be that protection. As detailed in the Motion, it is an appropriate one: it is both consistent with limitations previously imposed by the Judges and will not impose a significant burden on the participants. *See* Mot. at 10-11.

## **II. Mr. Greenstein's Continued Participation in *Web VI* Highlights the Need for the Proposed Screen**

Though SoundExchange cannot anticipate the full universe of individuals that the Proposed Screen would apply to, there is at least one that makes clear the screen is needed: Mr. Greenstein, a "Technology Transactions" partner who "focuses on IP, licensing, and commercial transactions" and who "regularly represents companies in transactions with record labels." *See Gary R. Greenstein*, Wilson Sonsini, <https://www.wsgr.com/en/people/gary-r-greenstein.html> (last visited

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<sup>5</sup> Mr. Greenstein's co-counsel in *Phono IV* who were not Negotiating Individuals had access to the full set of *Web V* Materials produced in that proceeding and, to the extent his co-counsel representing Stingray are not Negotiating Individuals, they would have full access to the materials under the Proposed Screen for *Web VI*.

May 10, 2024). As it made clear both when this issue arose in *Phono IV*, and in the Motion, SoundExchange does not intend to question Mr. Greenstein’s ethics, or suggest that he would not attempt to comply with his obligations under the Protective Orders. *See* Mot. at 9. But the reality is that an individual cannot split his or her brain, and if the licensing information was shared with Mr. Greenstein, either by request, or by reference in a filing, it would create a significant risk of harm for the record companies in their future negotiations with Mr. Greenstein and his clients. Mr. Greenstein will remain involved in *Web VI* through his representation of Stingray. As such, Google’s withdrawal does not “effectively moot” the screening issue (Opp. at 5), and the Proposed Screen remains necessary.

### **III. The Proposed Screen Is Necessary Despite the Additional Objections Raised by the Opposing Services**

The additional objections raised by the Opposing Services amount to three arguments for why the Judges should not implement the Proposed Screen: (i) the fact that there was no screening of the *Web V* Materials when they were produced in *Web V*, (ii) that there is no time limitation in the Proposed Screen, and (iii) that the Proposed Screen does not include a litigation carve-out. Opp. at 5-8.

The first argument is meritless. Although labeled as an objection related to the age of the *Web V* Materials, the Opposition makes clear that the first objection is actually that there was no screen in *Web V*, but that SoundExchange now requests one. *See* Opp. at 5 (“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.”). A screen was not necessary in *Web V* because there were no individuals involved in that proceeding who, at the time, were regularly involved in negotiating licenses with record companies. Any suggestion that a screen of *Web V* Materials is not appropriate because the licensing information is too old to be competitively sensitive is based on

pure speculation and is inconsistent with the licensing realities in this market. The record companies and Services with which they negotiate are repeat players, and the licenses they enter into are often modifications or extensions of prior agreements.

The second argument—that the Judges should limit the Proposed Screen to negotiations reasonably expected to take place “during the course of this proceeding” (Opp. at 6-7)—misconstrues the Motion, which seeks to exclude “individuals who *are involved* on behalf of digital music services in negotiating license agreements with sound recording companies . . . .” Motion at 3 (emphasis added). Thus, the definition of “Negotiating Individuals” in the Motion is expressly limited to those who *are involved* currently, or who reasonably expect to be involved during the course of this proceeding, in negotiating with record companies. To the extent an individual receiving the *Web V* Materials is not currently involved in such negotiations and does not reasonably expect to be involved before the issuance of a final determination in this proceeding, there would be no screen, and no impact on them. With respect to the third argument, SoundExchange does not believe the Proposed Screen—which is limited to “negotiating license agreements with sound recording companies” (Mot. at 3)—encompasses individuals involved in negotiating settlement of litigation, but is amenable to clarifying the proposed screen to explicitly carve out such negotiations.<sup>6</sup>

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<sup>6</sup> See, e.g., Order Granting in Part Broadcast Music Inc.’s Motion for a Limited Modification to the Protective Order at 3, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords IV*), Docket No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022) (“The Judges clarify 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, up to issuance of the Final Determination in this proceeding.”).

## CONCLUSION

For the foregoing reasons, and those in the Motion, SoundExchange requests that the Judges enter the Stipulation, and order that any use of the *Web V* Materials in *Web VI* be subject to the Proposed Screen, as modified to clarify that only individuals involved in negotiations with sound recording companies during this proceeding be considered Negotiating Individuals, and that individuals involved in negotiations with sound recording companies exclusively in litigation contexts would not be considered Negotiating Individuals.

Dated: May 10, 2024

Respectfully submitted,

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# Proof of Delivery

I hereby certify that on Friday, May 10, 2024, I provided a true and correct copy of the Soundexchange's Reply in Support of Its Motion to Access and to Make Use of the Restricted Web V Final Determination, Expert Materials, and Proceeding Transcripts to the following:

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Google Inc., represented by Kenneth L Steinthal, served via E-Service at [ksteinthal@kslaw.com](mailto:ksteinthal@kslaw.com)

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Signed: /s/ Scott Edelman