

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 IV</i>)</p>	<p>Docket No. 14-CRB-0001-WR (2016-2020)</p>

STIPULATION REGARDING ACCESS AND USE OF THE RESTRICTED *WEB IV* FINAL DETERMINATION

The Written Direct and Written Rebuttal Testimony in this proceeding, filed on September 13, 2024, and January 17, 2025, respectively, make clear a central issue for the Judges’ consideration will be determining whether or not certain adjustments are needed to the benchmarks proposed by certain of the parties including, among other things, those related to interactivity and steering. Both topics were addressed at length in the final determinations of *Web IV* and *Web V*. SoundExchange has conferred with the non-settling licensees that participated in the *Web IV* proceeding: the National Association of Broadcasters (“NAB”), National Religious Broadcasters Music License Committee (“NRBMLC”), the Corporation for Public Broadcasting (“CPB”), National Public Radio, Inc. (“NPR” and together with CPB, the “Public Broadcasting Entities”) and Sirius XM Radio Inc./Pandora Media, LLC (“Sirius XM”) (collectively the “Services” and,

together with SoundExchange, the “Stipulating Parties”).¹ The Stipulating Parties anticipate that the presentation of their cases, including post-trial briefing, will make reference to and draw upon the Judges’ prior rulings, including in *Web IV*. Accordingly, to facilitate the presentation of their cases, and a fulsome consideration of the issues before the Judges, the Stipulating Parties now request pursuant to 17 U.S.C. § 801(c), that the Judges allow the Stipulating Parties and expert witnesses (and expert witness support staff) retained to assist the Stipulating Parties in *Web VI* full access to and use of the restricted version of the *Web IV* Final Determination, dated March 4, 2026.²

The Stipulating Parties propose that the use of the *Web IV* Final Determination be subject to the *Web IV* Protective Order (*Web IV* Dkt. 4029), except that the provision in Section IV.B of the *Web IV* Protective Order limiting the use of materials to the *Web IV* proceedings shall not apply to the extent that the *Web IV* Final Determination is used to prepare for *Web VI*. For avoidance of

¹ The Stipulating Parties represent all parties entitled to access Restricted material under the terms of the *Web VI* protective order.

The Stipulating Parties sought the consent of Word Collections and George Johnson dba Geo Music (“Johnson/GEO”). Word Collections indicated it does not consent based on the continuing designation as attorneys-eyes-only precluding disclosure to Word Collections as a pro se Participant, but does not intend to challenge the Stipulation. Johnson/GEO indicated it intends to file a motion to object, and seek access to the Restricted information.

The Stipulating Parties note that the *Web IV* Protective Order, like the *Web VI* Protective Order, provides for outside-counsel-only treatment of Restricted Material. The Judges have previously addressed the purpose of this restriction in this proceeding in their Order 8 Granting Joint Motion to Adopt Protective Order, in which they denied Word Collections’ and George Johnson’s request to access material designated Restricted under the *Web VI* Protective Order. See Dkt. No 43645 at 9-11 (“The Judges recognize that parties who do not obtain access to confidential proprietary information may be at a disadvantage relative to other parties, whose outside counsel have access to such information. However, this is a disadvantage that Word Collections and Johnson/GEO have visited upon themselves. That is, they value eschewing outside counsel, which shields them from the attendant cost. But they are seeking to use that decision as a “sword” by which they can cut away the necessary commercial and economic protection afforded by the designation of confidentiality for proprietary information.”)

² The Judges previously granted a similar stipulation permitting the Stipulating Parties to access materials from *Web V*. Order Entering Stipulation to Access and to Make Use of the Restricted *Web V* Final Determination, Expert Materials, and Proceeding Transcripts, *Webcasting VI* (“*Web VI*”), Docket No. 23-CRB-0012-WR (2026-2030) (June 5, 2024); Order Entering Stipulation to Access and to Make Use of the Restricted *Web V* Final Determination, Expert Materials, and Proceeding Transcripts, *Webcasting V* (“*Web V*”), Docket No. 19-CRB-0005-WR (2021-2025) (June 5, 2024).

doubt, restrictions relating to “outside counsel of record in this proceeding” or “outside counsel” in the *Web IV* Protective Order shall apply to SoundExchange’s counsel (“Milbank”), the NAB’s counsel (“Latham”), the NRBMLC’s counsel (“FHH”) the Public Broadcasting Entities’ Counsel (“K&S”), and Sirius XM’s Counsel (“Weil” and, together with Milbank, FHH, Latham, and K&S, the “Outside Counsel”) in accessing and using the *Web IV* Final Determination for and in the *Web VI* proceeding. To that end, the *Web IV* Final Determination would be treated as “Restricted” under the Protective Order and would only be used on an outside-counsel-only basis by the Outside Counsel and the Stipulating Parties Experts, as described in Section IV.B of the Protective Order, in connection with *Web VI*.

I. The *Web IV* Final Determination Is Relevant to the Upcoming *Web VI* Proceeding

The *Web IV* Final Determination and analyses contained therein will be relevant to the Stipulating Parties’ presentation in the forthcoming *Web VI* proceeding, as it will allow the Stipulating Parties to explore the full history and evolution of certain benchmarking approaches put forth by expert witnesses and considered by the Judges. 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,³ which included comparisons between the analyses in *Web V* to the analyses in *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020).⁴ Specifically, the Judges relied on steering evidence introduced in

³ 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).

⁴ See, e.g., *Web V* Final Determination at 102-03 (addressing expert witnesses’ attempts to follow certain economic analyses from *Web IV*).

Web IV to determine the appropriate steering adjustment to establish an effectively competitive rate,⁵ and the Judges again discussed this steering adjustment in *Web V*.⁶

Although the prior order granting the Stipulating Parties access to materials from the *Web V* proceeding (Dkt. 42875) provided access to expert testimony in *Web V* that referenced such *Web IV* analyses, the Stipulating Parties cannot currently reference any Restricted portions of the *Web IV* Final Determination discussing these analyses, and Milbank has never had access to the Restricted version of the *Web IV* Final Determination at all because it did not represent a participant in *Web IV* or *Web V*. Access to the Restricted version of the *Web IV* Final Determination will allow Milbank and the expert witnesses (and expert witness support staff) retained to assist SoundExchange (the “SoundExchange Experts”) to fully understand the Judges’ Final Determination in *Web IV*, better understand the use of that determination in *Web V*, and understand their collective implications for case presentation in *Web VI*. Thus, the parties request that the Outside Counsel and the Stipulating Parties Experts have access to and use of the *Web IV* Final Determination in the event the Judges similarly rely on it in *Web VI*.

II. The Judges’ Precedents Support the Stipulating Parties’ Request

The Judges have previously granted similar requests to use restricted materials from a prior proceeding in a subsequent proceeding, including previously granting the Outside Counsel and the Stipulating Parties Experts access to and use of restricted materials from *Web V*. Order Entering Stipulation to Access and to Make Use of the Restricted Web V Final Determination, Expert Materials, and Proceeding Transcripts at 3, *Webcasting VI* (“Web VI”), Docket No. 23-CRB-0012-WR (2026-2030) (June 5, 2024)⁷; *see also, e.g.*, Order Granting in Part Services’ Motion to Access

⁵ *E.g.*, *Web IV* Final Determination at 208.

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

⁷ Also filed in *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (June 5, 2024).

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)⁸ (“*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)⁹; 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 stipulation, 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 prior proceeding is constrained by the restricted nature of those materials. *Web V Order* at 3

⁸ Also filed in *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Mar. 23, 2022).

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

(“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 the Outside Counsel have access to and use of the restricted *Web IV* Final Determination so they “can make informed decisions as to the presentation of [the Stipulating Parties’] direct cases.” *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. The public redacted version of the *Web IV* Final Determination does not allow Milbank and the SoundExchange Experts to fully understand and evaluate the implications of the *Web IV* determinations for *Web VI*. For example, the redacted version of the *Web IV* Final Determination does not reveal the full extent of how the specific economic analyses presented in *Web IV* may have influenced the Judges’ determinations, or how—if at all—those analyses might impact *Web VI*. And since the Judges’ decisions are often informed by their prior determinations,¹⁰ limits on the Stipulating Parties’ ability to incorporate the *Web IV* Final Determination into their presentations and submissions to the Judges in *Web VI*

¹⁰ 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).

will hamper the resolution of this proceeding and run the risk of unnecessarily limiting the universe of materials presented to the Judges for their consideration.

CONCLUSION

Accordingly, the Stipulating Parties respectfully requests that the Judges (i) grant the proposed order as promptly as reasonably possible to allow the Stipulating Parties, their outside counsel, and the access to and use of the Restricted *Web IV* Final Determination in, and to prepare for, *Web VI*.¹¹

Dated: March 11, 2025

Respectfully submitted,

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¹¹ SoundExchange further requests that the Judges permit Milbank to collect copies of the Restricted version of the *Web IV* Final Determination from either its *Web IV* predecessor counsel and, to the extent that predecessor counsel do not have such materials in their possession, direct that the counsel of record for the other parties in *Web IV* provide any of the requested *Web IV* Final Determination to Milbank upon request.

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Proof of Delivery

I hereby certify that on Wednesday, March 12, 2025, I provided a true and correct copy of the Stipulation Regarding Access and Use of the Restricted Web IV Final Determination to the following:

AccuRadio, LLC, represented by Jeffrey Jarmuth, served via Email

Apple Inc., represented by Dale Cendali, served via Email

Beats Music, LLC, represented by Dale Cendali, Esq., served via Email

College Broadcasters Inc. (CBI), represented by David Golden, served via Email

Digital Media Association (DiMA), represented by Lee Knife, served via Email

GEO Music Group, represented by George Johnson, served via Email

Harvard Radio Broadcasting Co., Inc. (WHRB), represented by William Malone, served via Email

Intercollegiate Broadcasting System, Inc. (IBS), represented by William Malone, served via Email

National Association of Broadcasters (NAB), represented by Suzanne Head, served via Email

National Public Radio, Inc. (NPR), represented by Gregory Lewis, served via Email

National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC), represented by Harv Hendrickson, served via Email

Pandora Media, Inc., represented by Sabrina Perelman, served via Email

Sirius XM Radio Inc., represented by Paul Fakler, served via Email

SoundExchange, Inc., represented by Steven Englund, served via Email

iHeartMedia, represented by Mark Hansen, served via Email

Signed: /s/ Scott Edelman