

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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
PERFORMANCES (*WEB VI*)**

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

**SIRIUS XM RADIO LLC AND PANDORA MEDIA, LLC'S OPPOSITION TO
SOUNDEXCHANGE'S MOTIONS TO ADMIT EXHIBITS INTO EVIDENCE FOR THE
WEB VI HEARING**

Sirius XM Radio LLC and Pandora Media, LLC (collectively, "Sirius XM") respectfully submit this opposition to the motion (the "Motion") and supplemental motion (the "Supplemental Motion," collectively, the "Motions") by the SoundExchange Joint Petitioners ("SoundExchange") to Admit Exhibits into Evidence for the *Web VI* Hearing.

INTRODUCTION

On the final day of a nearly month-long hearing, SoundExchange filed its Motion asking the Judges to, among other things, admit over 1,000 separate documents comprising Mr. Orszag's and Professor Dubé's backup files, claiming without credibility that these files somehow constitute only four exhibits. Motion at 1–2. While Sirius XM does not object to the admission of expert backup files generally, the Judges should reject SoundExchange's attempt to circumvent the clear language of the pre-trial order limiting each party to adding no more than 100 exhibits following the original April 18, 2025 submission of the exhibit list (and no more than 750 exhibits total) by purporting that it is merely adding four exhibits. The pre-trial order requires that, to be appropriately submitted as a compilation exhibit at trial, the compilation exhibit must be numbered as a single exhibit in a witness's written testimony. SoundExchange, however, did not number its

expert backup files as single exhibits in its written testimony. Not only is SoundExchange's attempt therefore inconsistent with the pre-trial order, it is inconsistent with SoundExchange's *own* prior position that Sirius XM could not list its expert backup files as compilation exhibits. SoundExchange argued that each individual document from those files needed to be counted as a separate exhibit for purposes of the limitations on the overall number of exhibits and on adding new exhibits during trial. SoundExchange has no explanation for its change of position, and the Judges should not countenance this blatant gamesmanship.

SoundExchange also now seeks to admit exhibits that it claims are "relevant documents from its witnesses," despite the fact that none of its purported "sponsoring witnesses" for these documents were even shown those exhibits during the hearing—let alone able to authenticate them—and many of the exhibits were never mentioned in the "sponsor's" written testimony. Motion at 2. In the Supplemental Motion, SoundExchange asks the Judges to admit certain additional exhibits, again despite the fact that none of these documents were mentioned by a sponsoring witness at the hearing and many were never cited by a witness in written testimony. Sirius XM maintains its objections included in the exhibit list (the "Exhibit List," the most current version of which is eCRB No. 58231), particularly to the extent that SoundExchange failed to demonstrate during trial that a sponsoring witness had any knowledge of the facts included in the document he or she is purported to sponsor. Indeed, in many of its written responses to Sirius XM's objections, SoundExchange represented that it would lay a foundation for these exhibits at trial, yet it entirely failed to do so. The Motions provide no justification for its failure to do so.

Thus, the Judges should deny SoundExchange’s attempt to overcome the holes in its trial presentation and decline to admit these exhibits into evidence.¹

BACKGROUND

Order 37 limits each Participant Group to no more than 750 exhibits. Order 37 Establishing a Schedule for Prehearing and Hearing Matters and Setting Forth Proposed Hearing Procedures, *Web VI*, eCRB No. 55273 (Apr. 17, 2025) (“Order 37”) at § IV(14). Pursuant to Order 37, the parties were required to submit a joint exhibit list on April 18, 2025, although each Participant was permitted to reserve up to 100 exhibits, subject to the 750-exhibit cap, for amendments to the list during trial. *Id.* at § IV(15). Order 37 also states that “[c]ompilation exhibits numbered as a single exhibit in written testimony shall count as one exhibit against each participants’ limit. With respect to any other compilation exhibits, each separately produced document within a compilation exhibit will be counted as a separate exhibit.” *Id.* at § IV(14) n.9. On April 26, 2025, Sirius XM notified SoundExchange that it was adding certain exhibits to the joint exhibit list, including two exhibits: one identified as the “Backup Files to Written Direct Testimony of Fiona Scott Morton” and another identified as “Backup Files to Written Rebuttal Testimony of Fiona Scott Morton” (collectively, the “Scott Morton Backup Files”). *See* Declaration of Blake Steinberg (“Steinberg Decl.”), Ex. A at 5–6. The following day, SoundExchange replied that because the two zip files of Scott Morton Backup Files that Sirius XM sought to add included 28 individual documents, “[e]ach exhibit should count toward Sirius XM/Pandora’s 100 reserve exhibit cap.” Steinberg Decl., Ex. A at 2, 5. In opposing Sirius XM’s treatment of the Scott Morton Backup Files as

¹ SoundExchange also seeks to move into evidence designated testimony subject to Sirius XM and the National Religious Broadcasters Music License Committee’s line-by-line objections. Motion at 7–8. Sirius XM does not oppose SoundExchange’s Motion in this limited regard, but it stands on the line-by-line objections that it filed separately. *See* SXM-PAN Amended Line-by-Line Objections, *Web VI*, eCRB No. 58176 (May 17, 2025).

compilation exhibits, SoundExchange also contended that “[m]arking these files as a single exhibit [would] be unduly cumbersome and difficult for both the Judges and the Participants.” Steinberg Decl., Ex. A at 2. In response, Sirius XM updated its exhibit list to offer a narrower set of documents from the Scott Morton Backup Files, and listed these individual documents as separate exhibits. Steinberg Decl., Ex. A at 1.

As trial progressed, SoundExchange sought to add to the exhibit list its own expert backup files (the “SoundExchange Backup Files”), which include over 1,000 individual documents. Steinberg Decl. ¶ 2. Rather than list individual files as separate exhibits—as Sirius XM did following SoundExchange’s objection to this proposed deviation from the pre-trial order—SoundExchange listed all of its expert backup files as merely four exhibits in the Exhibit List. Steinberg Decl., Ex. B at 3. Consistent with Order 37 and the exchange regarding Professor Scott Morton’s Backup Files, Sirius XM replied that the SoundExchange Backup Files count as separate exhibits for the same reasons that SoundExchange raised when objecting to Sirius XM’s proffer of the Scott Morton Backup Files. Steinberg Decl., Ex. B at 1. SoundExchange did not reply to Sirius XM and instead waited until the final day of the hearing to address this issue in its Motion.

In addition, as noted above, SoundExchange now asks the Judges to admit into evidence documents that were not authenticated at the hearing, including many that were never discussed in its witnesses’ prior written testimony. But SoundExchange did not even try to lay a proper foundation for the admission of these documents into evidence during trial.

ARGUMENT

I. SoundExchange’s Attempt To Circumvent Order 37—And Its Own Prior Position Regarding Proper Admission of Expert Backup Files—Should be Denied

A. SoundExchange’s Expert Backup Files Do Not Constitute Single Compilation Exhibits

In an attempt to evade both Order 37’s restriction on adding more than 100 exhibits to the original exhibit list and the Order’s cap on 750 total exhibits, SoundExchange includes in the Exhibit List the four overarching Bates numbers of the *zip files* it used to produce the more than 1,000 individual documents comprising the SoundExchange Backup Files to Sirius XM. This does not make the SoundExchange Backup Files proper single compilation exhibits under Order 37, as neither Mr. Orszag nor Mr. Dubé “number[] as a single exhibit” the backup materials cited in their testimony. Order 37 § IV(14) n.9. Indeed, SoundExchange included an index of exhibits as part of the introductory materials to its written direct and written rebuttal statements, and these indexes do not number the SoundExchange Backup Files as single exhibits. *See* Corrected Index of Exhibits, Corrected Written Direct Statement of the SoundExchange Joint Petitioners Volume I: Introductory Materials, *Web VI*, eCRB No. 44875 (Dec. 30, 2024); Index of Exhibits, Written Rebuttal Statement of the SoundExchange Joint Petitioners Volume I: Introductory Materials, *Web VI*, eCRB No. 45813 (Jan. 17, 2025). If SoundExchange had wanted to include the SoundExchange Backup Files numbered as a single exhibit, it could have done so by identifying those documents in these indexes, but it did not.

Recognizing that Order 37 requires compilation exhibits to have been numbered as single exhibits in written testimony, SoundExchange incorrectly asserts that the SoundExchange Backup Files are *cited* as a single source throughout the written testimonies of Mr. Orszag and Prof. Dubé. Motion at 3. But as explained, the question is whether the exhibits were numbered as a single

exhibit (which they were not).² Moreover, contrary to SoundExchange’s assertion that the backup files are cited as a single source throughout its witnesses’ written testimony (Motion at 3), files from within the SoundExchange Backup Files are in fact cited individually throughout Mr. Orszag and Prof. Dube’s written testimonies. Mr. Orszag cites to individual Bates numbers and document file names to reference documents in his backup files in the “Materials Relied Upon” attachment to his written testimony and throughout his written testimony. *See e.g.*, Orszag CWDT Attachment 2 at p. 16 (listing certain individual documents with “SOUNDWEB” Bates numbers included in his backup materials); *see also* Orszag CWDT ¶ 294 n.451 (citing individual Bates numbers and file names of documents in his backup materials). Similarly, Prof. Dubé lists in the “Materials Relied Upon” Appendix to his Written Rebuttal Testimony individual documents by title and Bates number that appear in his backup materials. *See* Dubé WRT Appendix C at C-1–C-5 (listing certain court proceedings, academic articles, publicly available materials, and Bates stamped documents included in his backup materials).

Sirius XM’s approach of selecting certain documents from the Scott Morton Backup Files to include as exhibits was taken in direct response to SoundExchange’s own objection and indeed creates a less “cumbersome” approach than listing the files as a single compilation. Steinberg Decl., Ex. A at 2. Additionally, it is not even clear how SoundExchange could upload the over 1,000 documents included in the SoundExchange Backup Files to eCRB while only using four exhibit numbers. Steinberg Decl., Ex. B at 1. By moving for the admission of its backup files as compilation exhibits, SoundExchange is now in essence asking the CRB not only to re-write the caps on reserved exhibits and total exhibits in Order 37 after the hearing is over, but also to develop

² Indeed, SoundExchange’s reference to Prof. Dubé’s one-off general citation to “backup materials” in his Written Rebuttal Testimony is unavailing for this reason. Motion at 3.

a mechanism for accepting over 1,000 documents as four exhibits, and asking the Judges to navigate through the numerous folders-within-folders comprising the SoundExchange Backup Files if they want to reference a specific document. Rather than limit its proffer of exhibits to only what is relevant and necessary for the rate-setting task at hand, SoundExchange is attempting to create an undue burden that SoundExchange itself sought to eliminate in opposing the entry of the Scott Morton Backup Files as compilation exhibits, even though those proposed compilation exhibits comprised only 28 individual documents, rather than over 1,000. Steinberg Decl., Ex. A at 2.

Finally, despite SoundExchange's contention that the SoundExchange Backup Files include "interconnected file pathways and code, which are reliant on internal foldering pathways and references," many of the documents in the SoundExchange Backup Files, such as excel spreadsheets and PDF files, are readily legible when looked at individually without any code backup or reference to additional documents. Motion at 2–3. Therefore, SoundExchange's attempt to thwart Order 37's limit on each parties' exhibit allocation and dump into evidence over 1,000 files without regard to their relevance or necessity for this proceeding should be denied.

B. SoundExchange's Expert Backup Files Are Not Appendices to Written Testimony

Order 37 additionally states, "any appendices to written testimony that consist of material generated by the witness (i.e., curriculum vitae, tables or charts reflecting the witness's analyses)" do not count toward a party's exhibit limit. Order 37 § IV(14) n.9. SoundExchange tries to utilize this provision to argue that, if the Judges order that the SoundExchange Backup Files be offered into evidence as individual exhibits, they should not count toward SoundExchange's exhibit limit. Motion at 4. That files within the SoundExchange Backup Materials were generated by witnesses does not make them appendices, which are "supplementary material[s] at the end of a . . . text."

Appendix, Dictionary.com, <https://www.dictionary.com/browse/appendix> (last visited May 30, 2025). Mr. Orszag and Prof. Dubé do include numerous appendices to their written testimony, and those appendices are already in evidence, but none comprise the backup materials that SoundExchange now seeks to admit as additional exhibits. *See* Orszag CWDT, Appendix A–G; Orszag WRT, Appendix A–G; Dubé WRT, Appendix A–D. Because the expert backup files are not appendices to written testimony, each document from the SoundExchange Backup Files should be listed as an individual exhibit.

II. The Judges Should Deny SoundExchange’s Belated Bid to Admit Exhibits Not Referenced by a Sponsoring Witness at the Hearing

Under 37 C.F.R. § 351.10(a) “[n]o evidence, including exhibits, may be submitted without a sponsoring witness, except for good cause shown.” The Copyright Royalty Board has explained that this “provision ensures that documentary evidence is subject to proper authentication by a witness who may be cross-examined by opposing counsel.” Order Denying MGC Motion to Permit Remote Appearance by Witness, *Distribution of Cable and Satellite Royalty Funds*, eCRB No. 47506 (Aug. 1, 2018) at 2. Further, even for unobjected to exhibits, Order 37 specifies that if a participant intends to rely on such exhibits post-hearing, “it shall identify such exhibit(s) during the hearing and explain its (their) alleged evidentiary value, either through a witness or through counsel, as appropriate” when moving to admit them *en masse* in order to avoid a party being “blindsided” by evidence and afford participants the opportunity to submit evidence in response. Order 37 § IV(16) (citing *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020)). SoundExchange’s practice of labeling documents in the Motions as sponsored by a witness post-hearing does not properly lay foundation for these exhibits as envisioned by Order 37, nor does it

make documents admissible that were not otherwise properly authenticated. The Judges should not admit these exhibits into evidence.³

SoundExchange seeks in its Motions to admit numerous exhibits Sirius XM objected to in the Exhibit List by: (i) labeling a witness as the sponsor of the document after the hearing without demonstrating that the witness has any knowledge of the document, or (ii) arguing good cause exists under 37 CFR § 351.10(a). Motion at 6. Appendix A to each of the Motions lists documents that SoundExchange has deemed, post-hearing, to have a sponsoring witness. However, numerous documents listed were never referenced by the “sponsoring witness” *at all* before or during the hearing, including: Exhibits 1001, 1083, 1095, 1112, 1116, 1136, 1199, 1216, 1220, 1222, 1225, 1281, 1283, 1284, 1287, 1311, 1318, 1349, 1351, 1357, 1359, 1360, 1363, 1482, 1483, 1495, 1496, 1497, 1498, 1499, 1500, 1502, 1503, 1504, and 1530. As these exhibits were not authenticated and SoundExchange has failed to demonstrate good cause exists to admit documents not referenced until now, these exhibits should not be admitted into evidence.

Additionally, SoundExchange seeks to admit numerous documents that, while referenced by what it now deems a “sponsoring witness” in written testimony, were never discussed, much less authenticated, by the “sponsoring witness” at the hearing. These include: Exhibits 1014, 1015, 1017, 1022, 1033, 1108, 1114, 1120, 1149, 1159, 1162, 1164, 1173, 1174, 1175, 1176, 1178, 1200, 1202, 1215, 1218, 1232, 1244, 1246, 1266, 1267, 1268, 1339, 1383, 1416, and 1455. SoundExchange argues that “there is no reason to doubt [these exhibits’] authenticity” and points to 37 C.F.R. § 351.10(a)’s requirement that authenticity be shown by “evidence sufficient to

³ Sirius XM does not oppose the admission of documents it did not object to on the Exhibit List that SoundExchange now seeks to move into evidence. These include: Exhibits 1019, 1039, 1107, 1130, 1131, 1132, 1142, 1163, 1172, 1181, 1196, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, and 1507. For all other documents, Sirius XM maintains its objections included in the Exhibit List.

support a finding the matter in question is what its proponent claims” to suggest that these exhibits should be admitted. Motion at 6. But, merely stating a document is authentic in a brief does not suffice, particularly as Sirius XM objected to exhibits on authenticity grounds in the Exhibit List and SoundExchange replied it “can and will establish personal knowledge and authenticity through witness(es) at trial.” *See generally* Motions, Appendix A. Yet, for the contested exhibits, it never even attempted to do so. Having failed to demonstrate the requisite personal knowledge or authenticity through a sponsoring witness of these exhibits during the hearing, SoundExchange cannot satisfy the requirements of § 351.10(a) or Order 37 and these exhibits should not be admitted.⁴

CONCLUSION

For the reasons stated above, Sirius XM respectfully requests that the Judges deny SoundExchange’s Motions to the extent they seek to admit the SoundExchange Backup Files as single compilation exhibits and the exhibits that were not referenced by a sponsoring witness at the hearing. If the Judges allow SoundExchange to select certain backup materials to include as exhibits, Sirius XM respectfully requests that it be permitted to offer documents from the SoundExchange Backup Materials as exhibits in response as necessary to ensure that all relevant materials are included in the record.

⁴ Alternatively, to the extent the Judges find SoundExchange has made an adequate showing of a sponsoring witness or other good cause exists to admit these exhibits—which it should not for the reasons set forth above—Sirius XM asks that the Judges consider its other objections noted on the Exhibit List in deciding on the admissibility of these exhibits.

Dated: June 4, 2025

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Wednesday, June 04, 2025, I provided a true and correct copy of the Sirius XM Radio LLC And Pandora Media, LLC's Opposition To SoundExchange's Motions To Admit Exhibits Into Evidence for The Web VI Hearing to the following:

American Association of Independent Music, represented by Andrew Porter, served via E-Service at aporter@milbank.com

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