

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:)	
)	
Determination of Rates and Terms)	Docket No. 16-CRB-0003-PR
for Making and Distributing Phonorecords)	(2018–2022) “Phonorecords III”
)	
)	

**APPLE INC.’S RESPONSE TO SOUNDEXCHANGE AND THE NATIONAL
RELIGIOUS BROADCASTERS NONCOMMERCIAL 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 LESLIE H. MARX,
JOSHUA GANS, RICHARD WATT, AND JEFFREY A. EISENACH**

Pursuant to the Copyright Royalty Judges’ (“CRJs”) July 25, 2019 Order Granting Phonorecords III Participants Leave to File Responses to SoundExchange, Inc. (“SoundExchange”) and National Religious Broadcasters Noncommercial Music License Committee’s (“NRBNMLC”) Motion for Access to Restricted Materials, Apple Inc. (“Apple”) respectfully submits the following response. In short, Apple does not oppose the relief requested in the Motion provided that the negotiated terms and limitations of the Protective Order from the Phonorecords III proceeding govern the production and use of Apple’s information in the Web V proceeding. Apple was a Participant in the Phonorecords III proceeding and negotiated with the other Participants certain protections and procedures regarding restricted information, which the CRJs approved, and which are not included in the Web V Protective Order. By its terms the Web V Protective Order does not protect information from third-party non-participants like Apple. Counsel for Apple conferred with counsel for SoundExchange and the NRBNMLC, who

do not oppose Apple’s requests herein (but do not express any view regarding the characterization of the Web V Protective Order as set forth below).

I. BACKGROUND

A. Phonorecords III Proceedings

Apple was a Participant in Phonorecords III, Dkt. 16-CRB-0003-PR (2018–2022), along with the National Music Publishers’ Association and the Nashville Songwriters Association International (collectively, the “Copyright Owners”), Amazon Digital Services LLC, Google Inc., Pandora Media, Inc., Spotify USA Inc. (“Spotify”), and George D. Johnson. The Phonorecords III Participants negotiated a Protective Order, dated July 27, 2016 (the “PRIII Protective Order”), pursuant to which Apple produced certain restricted documents and testimony, which were referenced in the Phonorecords III Determination, and certain expert materials and testimony by Spotify’s expert, Leslie H. Marx, and the Copyright Owners’ experts Joshua Gans, Richard Watt, and Jeffrey A. Eisenach. Pursuant to the PRIII Protective Order, these materials were redacted from public view. The PRIII Protective provided further terms and limitations, including, among other things:

- Defining “Producing Participant” and “Producer” to “include any entity, *whether a Participant or not*, that produces documents in connection with this Proceeding,” and expressly making productions “subject to all of the terms and protections of this Order[.]” PRIII Protective Order at 1–2 (emphasis added).
- Requiring that restricted materials be used “*solely for the purposes of this proceeding* [*i.e.*, Phonorecords III], and not for any other purpose, including competitive decision making on behalf of a Participant or a competitor of a Participant[.]” *Id.* at 2 (emphasis added).
- Defining “independent” experts and consultants as, among other things, not “an officer[] or director of, nor anticipated at the time of retention to become an employee, officer, or director of . . . any competitor [or] trade association that represents parties or competitors or members of” any Participant or any competitor thereof[.]” *Id.* at 3.

B. Web V Proceedings

Apple is not a participant in Web V, Dkt. 19-CRB-0005-WR (2021–2025). Web V Participants include movants SoundExchange and the NRBNMLC, as well as AccuRadio, LLC, American Association of Independent Music, American Federation of Musicians of the United States and Canada, College Broadcasters, Inc., Circle God Network Inc. d/b/a David Powell, College Broadcaster, Inc., Educational Media Foundation, Google Inc., ICON Health & Fitness, Inc., iHeartMedia, Inc., Jagjaguwar Inc., Live365 Broadcaster, LLC, National Association of Broadcasters, National Public Radio, Inc., Pandora Media, LLC, Radio Coalition, Inc., Radio Paradise Inc., SAG-AFTRA, Sirius XM Radio Inc., Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. The Web V Participants negotiated a Protective Order, dated June 24, 2019 (“Web V Protective Order”), which differs in several material respects from the PRIII Protective Order. In particular, the Web V Protective Order:

- Does not expressly apply to non-Participants (like Apple) who are asked to produce information in Web V, as contemplated in the Motion.
- Does not limit the use of restricted materials solely for the purposes of Web V with respect to materials produced by non-Participants, and does not prohibit use in competitive decision making on behalf of any Participant or a competitor of a Participant.
- Does not define “independent” consultants or experts to exclude individuals who may become an employee, officer, or director of competitors or trade associations that represent parties or competitors.

On July 25, 2019, SoundExchange and the NRBNMLC filed the Motion, requesting that Web V Participants be granted leave to access and use certain documents with restricted information from Phonorecords III. Mot. at 1. Specifically, the Motion requests access to, and use of, restricted information contained in the Determination in Phonorecords III, and the written, deposition, and oral testimony and appendices and exhibits of Marx, Gans, Watt, and Eisenach. *Id.* The Motion specified that “all such documents would be subject to the Web V

Protective Order[.]” *Id.* The Motion requests these materials because they “formed the foundation of the Judges’ determination of the royalty rate that interactive streaming services must pay to reproduce and distribute musical works,” and include Shapley models used by Marx, Gans, and Watt, and the benchmarking analysis performed by Eisenach. Mot. at 2–3.

Also on July 25, 2019, the CRJs issued an Order granting Phonorecords III Participants Leave to File Responses to the Motion. In that Order, the CRJ’s deemed the Motion “to be a request for relief from the PIII Protective Order.” *Id.* at 1.

II. ARGUMENT

A motion for relief from a protective order is generally assessed with a factor-based analysis, including (1) the nature of the protective order, (2) the foreseeability, at the time of the issuance of the order, of the modification requested, (3) the parties’ reliance on the order, and, most significantly (4) whether good cause exists for the modification.” *Reedycalog UK, Ltd. v. Baker Huges Oilfield Ops. Inc.*, No. 6:06-cv-222, 2009 WL 10184564, at *1 (E.D. Tex. Apr. 8, 2009); *see also Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1268 (10th Cir. 2009); *Murata Mfg. Co. v. Bel Fuse, Inc.*, 234 F.R.D. 175, 179 (N.D. Ill. 2006).

Apple’s response to the Motion is narrow.¹ Before Apple’s restricted materials from Phonorecords III are disclosed to Web V Participants, Apple requests that the CRJs impose the protections Apple and other Phonorecords III Participants negotiated for, and the CRJs approved, in the PIII Protective Order, which are not provided in the Web V Protective Order, with the

¹ The Motion does not specifically request materials from Apple or its witnesses except to the extent they are cited in the Determination or relied upon by the relevant experts. Subject to being bound by the Web V Protective Order (as requested in the Motion), Apple takes no position on the disclosure of restricted materials (1) from other Phonorecords III Participants that do not disclose Apple’s restricted information, or (2) that mix Apple’s protected information with the information from other Participants in such a way that Apple’s respective information cannot be separately identified.

modification that the disclosed materials may be used solely for purposes of the Web V proceeding.

The Participants in Phonorecords III, including Apple, specifically negotiated the provisions of the PRIII Protective Order, which included terms that extend protections to non-Participants, limited use to the specific proceeding, and prevented the use of experts who may become employed by competitors or relevant trade associations. Given the nature of the PRIII Protective Order, it was specifically contemplated that others, including participants in other proceedings like Web V, would not be able to access or use the restricted materials other for Phonorecords III. Apple, and other Phonorecords III Participants relied on the PRIII Protective Order when producing and using information with the understanding that such information would be protected from disclosure and other uses. The Motion requests leave for Web V Participants to access and use such information, contrary to the terms of the PRIII Protective Order.

While the Motion requests that the Web V Protective Order govern such use, its terms are insufficient for several reasons. **First**, Apple is not a Web V Participant and had no involvement in crafting the terms of the Web V Protective Order. **Second**, the Web V Protective Order does not expressly apply to this situation, *i.e.*, where Apple is effectively being asked as a non-Participant to produce its restricted information. If the Web V Protective Order governs, then Apple's sensitive information would arguably be free from restriction once produced in Web V because the Web V Protective Order does not, by its terms, grant protection to information produced by non-Participants. **Third**, the Web V Protective Order is unclear as to whether it limits use of protected information from non-Participants to the Web V proceedings. In other words, once Apple's sensitive information is produced in Web V, the Web V Protective Order

does not expressly prohibit use for other purposes, including in competitive decision making.

Finally, the Web V Protective Order does not prohibit the use of experts who may become affiliated with competitors or trade associations representing competitors. As such, the Web V Protective Order may permit the use of such experts, who would then be exposed to Apple's sensitive information.

As such, the CRJs should only grant the Motion if the reasonable limitations negotiated in the PRIII Protective Order are applied to Web V (including a restriction that those materials be used solely for purposes of Web V and not for any other purpose). This is the only way to protect Apple's interests in its restricted information, and its reasonable expectations in light of the PRIII Protective Order.

III. CONCLUSION

In light of the foregoing, Apple does not oppose the relief requested in the Motion provided that the negotiated terms and limitations of the PRIII Protective Order govern the production, access, and use in Web V of Apple's restricted information from Phonorecords III.

Dated: August 8, 2019

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Thursday, August 08, 2019, I provided a true and correct copy of the Apple Inc.'s Response to SoundExchange, Inc. and National Religious Broadcasters Noncommercial Music License Committee's Motion for Access to Restricted Materials to the following:

Amazon Digital Services, LLC, represented by Stacey L Foltz Stark, served via Electronic Service at sfstark@winston.com

Google Inc., represented by Katherine Merk, served via Electronic Service at kmerk@kslaw.com

Pandora Media, Inc., represented by Benjamin E. Marks, served via Electronic Service at benjamin.marks@weil.com

Spotify USA Inc., represented by Anita Lam, served via Electronic Service at alam@mayerbrown.com

Johnson, George, represented by George D Johnson, served via Electronic Service at george@georgejohnson.com

National Music Publishers Association (NMPA) et al, represented by Benjamin Semel, served via Electronic Service at Bsemel@pryorcashman.com

Signed: /s/ Mary C Mazzello