

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

In the Matter of:

DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16-CRB-0003-PR
(2018-2022)

**AMAZON DIGITAL MUSIC LLC’S RESPONSE TO MOTION
FOR ACCESS TO RESTRICTED PHONORECORDS III MATERIALS**

Amazon Digital Music LLC, (“Amazon”) submits this Response to SoundExchange, Inc. and the National Religious Broadcasters Noncommercial Music License Committee’s Motion (the “Movants”) 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 Eisenach (the “Motion”). Amazon submits its Response pursuant to the Judges’ Order Granting *Phonorecords III* Participants Leave to File Responses to Motion for Access to Restricted Materials dated July 25, 2019 (the “Order”).

INTRODUCTION

In their Motion, the *Web V* Movants ask the Judges to permit access to a variety of material designated as RESTRICTED pursuant to the Protective Order entered into in *Phonorecords III*. This request should be denied for several reasons. The Movants seek to access materials related to Amazon—an entity not participating in the *Web V* proceeding. Allowing this disclosure would not only be procedurally improper, but it would also set a dangerous precedent.

Additionally, the Movants make no showing of how the restricted materials sought are relevant to the issues or analyses before the Board in the *Web V* proceeding. Finally, the Movants make no showing that access to the entirety of the materials is necessary. Movants' request is therefore not proportional to the needs of the case compared to the compelling need for privacy in the present case, or that it justifies establishing a precedent whereby participants in any proceeding may access the complete record of another. As discussed in greater detail below, the Motion should be denied.

I. The Movants Fail to Demonstrate How the Materials Are Relevant to the *Web V* Proceeding.

In their Motion, the Movants recite the various findings of the *Phonorecords III* Determination that rely upon the analyses conducted by a handful of experts retained by a few of the *Phonorecords III* participants. While this recitation demonstrates that the Judges found such testimony compelling, it fails to identify *how* such materials are relevant to the *Web V* proceeding. This is because the Movants do not know.

Indeed, in their Motion, the Movants argue that the “analyses considered and weighed by the Judges in *Phonorecords III* could be relevant to this proceeding.” Mot. at 4 (emphasis added). Movants do not argue that such materials must be made available for the purposes of benchmarking or comparative study, but instead propound baseless and conclusory assertions that they “should have full and unrestricted access to these analyses” without explaining why. Mot. at 4. Such a request should be rejected. While Shapley analyses were no doubt central to the *Phonorecords III* Determination, the expert reports submitted by the *Phonorecords III* parties were based on participant evidence, including commercially sensitive business data, specific to the interactive streaming market. As such, these analyses were tailored to evidence and

participants not at issue in the *Web V* proceeding, and would therefore be of little relevance or significance to the *Web V* proceeding.

Moreover, while prior panels have considered evidence from other proceedings, a closer examination of the authority relied upon by the Movants demonstrates that the panel typically relies on materials from a prior rate-setting proceeding for the same category of service offering. *See, e.g.*, Mot. at 2, n. 2 (“Determination at 50, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Mar. 4, 2016) (relying on the standards applied in *Web III* Remand to support the benchmark analysis in *Web IV*); Initial Determination at 28, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018- 2022) (Dec. 14, 2017) (relying on the reasoning expressed in *SDARS II* to examine Music Choice’s proposal for *SDARS III*”). Movants in this matter have failed to demonstrate how materials from a prior *phonorecords* proceeding might be relevant to the present *Web V* proceeding.

Because Movants have failed to demonstrate the relevance of these highly-sensitive materials, Movants’ request should be denied.

II. The Movants’ Request is Overbroad.

Even if there was some colorable basis for access, Movants seek more than just the analyses of the identified experts. Movants have even gone so far as to request the underlying documents and exhibits used in formulating such opinions as well as the exhibits relied upon by the Judges in issuing the Determination. Such a request circumvents common tenets of Civil Procedure, as it would permit Movants access to Amazon’s commercially sensitive data without ever issuing a subpoena. *See, e.g.*, Fed. R. Civ. P. 45. As discussed above, the materials sought are not relevant due to the limited applicability outside of the *Phonorecords III* context. Given

the over breadth of the request and minimal relevance of these materials, Movants' request should be denied.

III. Granting the Movants' Request Sets a Dangerous Precedent

If granted, Movants' request would also set a dangerous precedent by essentially creating a single record of materials for all CRB proceedings, rather than restricting the use of data to the proceeding in which it was produced. Materials produced in the course of the *Phonorecords III* proceeding were produced for the limited purpose of establishing the proper rates for interactive streaming during the 2018-2022 period. Many of the materials relied upon by experts are confidential agreements between participants and third-parties, as well as sensitive business records and financial information. By permitting parties outside of the *Phonorecords III* proceeding to review this data, the judges are expanding the scope of permissible use beyond the Protective Order entered into between the participants. This action would essentially create a de facto "CRB Record" rather than a proceeding-specific record. Such an action has the potential to chill participation in the rate proceedings; indeed, given the broader exposure, companies and industry participants would be less willing to produce sensitive information, as it would be subject to disclosure beyond the limited scope in which it was first produced. The CRB should therefore not take such an action here, and deny Movants request.

IV. Amazon's Sensitive Information Should Be Protected.

Should the Board find any merit to Movants' request, at a minimum, Amazon's commercially sensitive information should remain redacted. While the Movants have conferred with several of the participants in the *Phonorecords III* proceeding, such a request was not discussed with Amazon. Mot. at 1, n1. Amazon objects (and has objected outside the context of this proceeding) to unfettered access to its data as reflected in the expert reports sought by

Movants. Movants should be able to glean what they are seeking without the removing the redactions protecting Amazon's proprietary information, exposure of which may cause Amazon significant commercial harm and disadvantage. Preserving the Amazon-specific redactions, the participants in *Web V* would still be able to review the unreacted values of the Shapley analyses. Otherwise, confidential business information would be revealed to outside counsel to third-parties that are not party to the protective order. The Amazon-specific materials sought by Movants include various license agreements between Amazon and third-parties, as well as internal analyses that are highly confidential. To that end, should Movants' request be granted, Amazon respectfully requests the right to redact Amazon-specific protected material from any versions of the documents shared with the *Web V* participants.

CONCLUSION

Amazon respectfully requests that the Judges deny the *Web V* Movants' request, or, in the alternative, permit Amazon to redact or withhold from inspection its sensitive commercial data.

Dated: August 8, 2018

Respectfully submitted,

WINSTON & STRAWN LLP

/s/ Michael S. Elkin

Michael S. Elkin
Thomas Patrick Lane
Stacey Foltz Stark
200 Park Avenue
New York, NY 10166
Phone: (212) 294-6700
Fax: (212) 294-4700
melkin@winston.com
tlane@winston.com
sfstark@winston.com

Attorneys for Amazon Digital Services LLC

Proof of Delivery

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

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

Apple Inc., represented by Mary C Mazzello, served via Electronic Service at mary.mazzello@kirkland.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

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

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

Signed: /s/ Stacey L Foltz Stark