

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

**DETERMINATION OF RATES AND TERMS
FOR DIGITAL PERFORMANCE OF SOUND
RECORDINGS AND MAKING OF
EPHEMERAL COPIES TO FACILITATE
PERFORMANCES (*WEB V*)**

**Docket No. 19–CRB–0005–WR
(2021–2025)**

**ORDER GRANTING IN PART MOTION FOR ACCESS TO THE RESTRICTED
PHONORECORDS III DETERMINATION AND CERTAIN RESTRICTED
PHONORECORDS III TESTIMONY**

On July 25, 2019, SoundExchange, Inc. and the National Religious Broadcasters Noncommercial Music License Committee (collectively, Movants) filed a 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 ([Motion](#)). On July 25, 2019, the Copyright Royalty Judges (Judges) entered an “[Order Granting Phonorecords III Participants Leave to File Responses to Motion for Access to Restricted Materials](#).”

On August 8, 2019, Apple Inc. (Apple) and Amazon Digital Music LLC (Amazon) – both participants in *Phonorecords III* – each filed a separate Opposition (respectively, [Apple Opposition](#) and [Amazon Opposition](#)).¹ On August 15, 2019, Movants filed a [Reply](#).

For the reasons stated herein, the Judges **GRANT IN PART** the Motion, allowing *Web V* participants prompt access to materials unrelated to Amazon, and setting forth conditions – described *infra* – regarding Movants’ requested access to materials that may contain restricted information relating to Amazon.

I. ANALYSIS

A. Apple’s Opposition

Apple does not oppose Movants’ access to its restricted material requested in the Motion. Apple Opposition at 1. However, Apple urges that the Judges also impose on all *Web V* participants the same provisions contained in the [Protective Order](#) entered in *Phonorecords III*

¹ Apple and Amazon filed their respective Oppositions in *Phonorecords III*, and they appear in the docket for that proceeding. No other *Phonorecords III* participants filed an Opposition to the Motion, and the Judges therefore find that they do not object to the relief sought by Movants. Also, according to Movants, they have conferred with the four other *Web V* participants – Google, Inc., Pandora Media, LLC, Sirius XM Radio Inc., and the National Association of Broadcasters – who, also according to Movants, “indicated through counsel that they take no position on the [M]otion.” Motion at 1. Consistent with that representation, none of those parties filed an Opposition, and the Judges therefore also find that they do not oppose the relief sought by Movants.

(in addition to the protections contained in the [Web V Protective Order](#)). *Id.* Movants do not oppose Apple’s request in this regard. Reply at 1 n.2.

Accordingly, the Judges will add the protections afforded by the *Phonorecords III* Protective Order to the protections for confidential information contained in the *Web V* Protective Order. Specifically, the Judges adopt and incorporate – in Part II of this Order – the language recommended by Apple in its Proposed Order filed in conjunction with the Apple Opposition.² In the event of any conflict between the protections afforded in the two Protective Orders, the provision that provides the greatest protection shall control, subject to any subsequent motion setting forth good cause to apply the less protective provision.

B. Amazon’s Opposition

Amazon levels several objections at Movants’ request to allow its restricted information to be made available to the *Web V* participants, even if the protections of the *Web V* Protective Order were to be extended to those materials.³ Each objection is considered below.⁴

1. Relevance

Amazon asserts that Movants failed to demonstrate that the redacted materials they seek would be relevant to the *Web V* proceeding, noting that Movants merely claim that the requested redacted material “*could* be relevant” to the *Web V* proceeding. Amazon Opposition at 2 (quoting Motion at 4 (emphasis added in Amazon Opposition)). In their Reply, Movants state that this relevance objection is meritless in part because Movants “do not seek access to *all* confidential information used in *Phonorecords III*” Reply at 3 (emphasis added). The Judges find this reply argument to be a non sequitur. The mere fact that a party requests only a portion of a larger collection of materials does not address the question whether the requested portion is relevant.

Movants also argue that the portion of the redacted materials they seek is relevant because it “pertains to the relative value of musical works (at issue in *Phonorecords III*) and sound recordings, and *Web V* participants should be able to assess the evidence and argument presented in *Phonorecords III* on this subject.” *Id.* However, Movants do not state whether their direct cases will make assertions regarding these relative values (perhaps strategically keeping their cards close to their chests for now), and, therefore, nothing in this motion record links the

² The Judges do not extend the *Phonorecords III* Protective Order provisions to the *Phonorecords III* participants who elected not to appear in opposition (or join in the Apple Opposition or the Amazon Opposition) to the Motion. The Judges exercise their discretion, however, by extending the provisions of the *Phonorecords III* Protective Order to Amazon, in light of: (1) Amazon’s appearance in opposition to the Motion, seeking an outright denial of the Motion; and (2) Movants’ willingness to accede to an extension of the *Phonorecords III* Protective Order provisions in connection with the access sought in the Motion.

³ The Amazon Opposition did not raise the possibility – raised for the first time in Apple’s Opposition – that the *Phonorecords III* Protective Order provisions could be extended to Amazon’s restricted information. Accordingly, the Judges do not assume that this further protection (which, as noted *supra*, the Judges are extending in this Order) in any way moots Amazon’s objections.

⁴ Movants claim that Amazon also objects to Movants’ request for access to restricted information relating to *all other Phonorecords III participants*. Reply at 2. The Judges do not read the Amazon Opposition as making that broad argument. In any event, the Judges would not entertain on this Motion an argument by Amazon that the *Web V* participants should not be permitted access to the restricted information pertaining to *other Phonorecords III participants*, when the latter have either consented to such access with additional restrictions (*i.e.*, Apple) or decided not to oppose such access.

requested relative value evidence in *Phonorecords III* to the legal, economic or other factual arguments Movants will be making in this *Web V* proceeding.⁵

Nonetheless, the Judges recognize that 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. Indeed, the requested materials relate to the ratio of sound recording royalties to musical works royalties, and sound recording royalties are obviously at issue in this *Web V* proceeding.⁶ The evidentiary record will be enhanced, to the benefit of the Judges, if the parties have access to such redacted materials that the Judges weighed in a prior proceeding, so that the parties can make informed decisions as to the presentation of their direct cases. In this sense, therefore, Movants' request is relevant.

2. Overbreadth

Next, Amazon claims that Movants' request is overbroad. It argues that not only do Movants seek redacted materials containing the analyses of the identified experts, but that they also seek redacted information in documents upon which the experts relied to formulate their opinions, as well as the exhibits relied on by the Judges in issuing the *Phonorecords III* Determination. Movants' reply does not address the assertion that their request is overbroad.

Nonetheless, the Judges do not find the requests overbroad. For the experts' analyses to be properly understood – for the purposes identified as relevant in the previous section – Movants would need access to the documents that underlie the opinions of the experts and the findings of the Judges.

3. Precedential Effect

Amazon argues that the document access sought by Movants, if permitted, would set a “dangerous precedent” by establishing a de facto ‘CRB Record’ rather than a proceeding-specific record” – that is, “a single record of materials for all CRB proceedings ...” Amazon Opposition at 4. Movants disagree, replying that they are seeking only “carefully selected, targeted documents from a single proceeding for use in a single, other proceeding related to an issue that repeatedly has been raised in predecessor proceedings to *Web V*.” Reply at 4.

The Judges agree with Movants. The *Phonorecords III* documents the Movants are seeking pertain to the Judges' determination of a royalty rate (for mechanical royalties) through a consideration of the relationship between those royalties and the royalties that interactive streaming services pay for the use of sound recordings. As noted *supra*, sound recording royalties paid by interactive streaming services have been proffered and analyzed and used by parties and the Judges in establishing the appropriate royalty rate for noninteractive streaming services– which is a subject of this proceeding. That history renders this Order *case specific*, and does not establish a slippery slope precedent for the creation of an automatic or de facto “CRB Record,” as Amazon has argued.

⁵ Movants cannot demonstrate the relevance of their request by relating it to the positions taken in this *Web V* proceeding by the noninteractive services, because those parties have not yet filed their Written Direct Statements, and are not required to do so until September 23, 2019.

⁶ It is true that in *Phonorecords III* the sound recording royalty rates at issue in the relative value analyses were *interactive* royalty rates, but evidence regarding the interactive rates has been advanced in previous webcasting proceedings as a potential predicate for the noninteractive rate. Also, the *Phonorecords III* materials include data regarding relative sound recording royalty rates in various service categories, any or all of which could be relevant analogues in this proceeding.

4. Amazon-Specific Information

Amazon urges the Judges to provide it with the right to redact Amazon-specific material from any documents shared with the *Web V* parties. Amazon Opposition at 5. Amazon notes that such a right is needed to protect “confidential business information,” including several “license agreements” and “internal analyses.” *Id.* Movants reply that such concerns are unfounded, because any person who would gain access to the Amazon-specific documents would be covered by the protective provisions of both the *Phonorecords III* and *Web V* Protective orders. Reply at 2.

The Judges find merit in Amazon’s position, despite the presence of the protections in the respective Protective Orders. Movant are seeking an Order that would provide the *Web V* participants access to all Amazon-specific information in the requested documents that had been redacted. The Judges are concerned that such access, if granted, would occur without considering whether good cause existed to keep any *particular* Amazon-specific information restricted, and without balancing the potential usefulness in *Web V* of such itemized materials against any *particular* needs for continued restrictions.⁷ To alleviate this concern, the Judges’ have ordered specific procedures, set forth *infra*, regarding the handling of Amazon-related information prior to any dissemination or use of that information.⁸

II. ORDER

Movants’ motion is hereby **GRANTED IN PART**, to the extent described below.

- (A) *Web V* participants represented by counsel are entitled to obtain access to all materials sought in their Motion that are marked as “restricted,” subject to: (1) the limitations and protections applicable to materials produced by participants in *Web V* pursuant to the Protective Order in *Web V*; and (2) the provisions of this Order set forth below.
- (B) With regard to *Phonorecords III* materials requested by Movants in their Motion and marked as “restricted” *that contain information regarding Apple or Amazon*, *Web V* participants represented by counsel are entitled to obtain access to such materials: (1) subject to paragraph (A) above; (2) subject to the limitations and protections applicable to materials produced by Participants in *Phonorecords III* pursuant to the Protective Order in *Phonorecords III*; and (3) **with regard to “restricted” information relating to Amazon**, subject also to the provisions in paragraph (F) below.
- (C) To avoid doubt, the *Phonorecords III* Protective Order is amended, as it relates to “restricted” information pertaining to Apple or Amazon to the extent necessary to permit *Web V* Participants to access and use such materials solely in *Web V* proceedings subject to the remaining terms in the *Phonorecords III* Protective Order. In the event of any conflict in the applicable provisions of the Protective Order in *Phonorecords III* and *Web*

⁷ The Judges emphasize that they have no present reason to believe that the protections in the respective Protective Orders would be insufficient to protect any Amazon-specific materials. The problem is that – absent an itemized challenge by Amazon to the release of certain information, and absent Movants’ response – the Judges do not know what Amazon-specific material would be made available to the *Web V* participants, and the Judges are loath to order the divulgence of restricted materials in that way without a more pointed inquiry.

⁸ These procedures relate only to Amazon, because the other *Phonorecord III* parties have agreed (expressly, in the case of Apple, or tacitly, by declining to file an Opposition) to permit the *Web V* participants to access their redacted information.

V, the provisions of the *Phonorecords III* Protective Order shall control with regard to information marked as “restricted” that pertains to either Apple or Amazon.

- (D) Within five days of the date of the date this Order is entered on eCRB, each *Phonorecords III* participant (with the exception of Amazon) shall provide Movants with access to all information *pertaining only to that participant* and marked as “restricted” that is contained in the testimonies, exhibits and appendices, sought by Movants, and all restricted information *pertaining only to that participant* in the *Phonorecords III* Final Determination.
- (E) Within two days of receiving any requested materials, Movants shall serve the requested materials on outside counsel for all *Web V* participants eligible to receive them, who shall receive and maintain such materials in a manner consistent with the provisions of the Protective Order entered in this *Web V* proceeding and, with regard to Apple, consistent as well with the Protective Order entered in the *Phonorecords III* proceeding. Any such materials relating to Amazon to which *Web V* participants may ultimately obtain access (after the procedures identified in paragraph (F) below have been completed) shall likewise be received and maintained by them in a manner consistent with the provisions of the Protective Order entered in this *Web V* proceeding and with the Protective Order entered in the *Phonorecords III* proceeding.
- (F) With regard to **the *Phonorecords III* materials designated as “restricted” by Amazon:**
- (1) Within five days of the entry of this Order, Amazon shall identify and describe in a writing delivered to Movants all restricted portions of the *Phonorecord III* testimonies, exhibits, and appendices which Movants want access to, and in the *Phonorecords III* Final Determination, that Amazon claims contain restricted Amazon information that Amazon believes should remain withheld from *Web V* participants, and explain in writing why, on an itemized basis, it believes that each prophylactic provision in the *Web V* and *Phonorecords III* Protective Orders is insufficient to protect the restricted information.
 - (2) Within five days of receiving the written statement required in paragraph (F)(1), Movants shall provide Amazon with a written response in which they either agree with Amazon’s position or explain, also on an itemized written basis, why Movants believe Amazon-specific information should be released to the *Web V* participants.
 - (3) Within two days of providing Amazon with the writing required in paragraph (F)(2) above, if any disputes remain outstanding, Movants shall provide the Judges (via email rather than through eCRB) copies of the written statements required by paragraphs (F)(1) and (F)(2) above, noting which provisions identified in that correspondence remain in dispute. Unless the Judges enter a subsequent order to the contrary, the parties shall not file any further submissions, and no oral argument shall be scheduled.

(4) The Judges shall decide by separate order whether to allow the *Web V* participants access to any or all of the information still in dispute.

SO ORDERED.

Dated: September 13, 2019

Jesse M. Feder
Chief Copyright Royalty Judge