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In re: Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recording	)	No. 96-5 CARP DSTRA

RIAA'S OPPOSITION
TO MOTIONS TO COMPEL

The Recording Industry Association of America ("RIAA") submits the following opposition to the motions to compel filed, on December 27, 1996, by Digital Cable Radio Associates ("DCR"), DMX, Inc., and Muzak, L.P. (collectively, the "Services").

I. Motion of DMX for Documents That Support Financial Estimates in Documents Which Underlie the Kagan Report

As DMX acknowledges, RIAA produced over 200 pages of documentation in response to the Services' discovery requests. Many of the documents were taken from various publications of Paul Kagan Associates, Inc. ("Kagan"). See, e.g., DCR Motion at Attachment 3. The Kagan publications, which contain hundreds of individual financial estimates concerning cable/DBS networks,

underlie RIAA Exhibit 14. That exhibit is a report ("Analysis of Program License Fees Paid By Cable/DBS Networks") ("KMA Report") prepared for RIAA by a Kagan affiliate, Kagan Media Appraisals, Inc. ("KMA"), under the supervision of Mr. Larry Gerbrandt.

DMX served RIAA with a "follow-up" request for all "underlying documents and source data that contributed to, support, and/or verify" each and every one of the hundreds of financial estimates in the Kagan publications that RIAA had produced in discovery. See DMX Motion at Attachment A. DMX has now filed a motion to compel the production of such documents. Apparently, DMX wants Kagan to identify, locate and produce every document that might have been consulted by anyone on the Kagan staff, since before 1990, in formulating each of the hundreds of estimates contained in the Kagan publications that RIAA has already trned over in discovery.

For at least two reasons, DMX's motion should be denied.

First, RIAA has already met its obligation under the discovery rules with respect to the KMA Report. In its November 27 Order, the Copyright Office stated: "RIAA has agreed to produce the documents on which Mr. Gerbrandt relied in preparing Exhibit 14, which is what is required under § 251.45(c). . . . [A]ll bottom line

figures must be verified, and the [Services] are entitled to the underlying documents that support the figures provided in tables 1-4 and Appendix A of Exhibit 14." Order at 15. RIAA has complied with that Order.

RIAA has produced every document upon which Mr. Gerbrandt relied when preparing Exhibit 14 and the documents underlying the figures therein. Specifically, RIAA has produced relevant portions of several newsletters published by Kagan as well as portions of a proprietary Kagan database, both of which contain the data underlying the figures in Exhibit 14. The Services are not entitled to anything further.

Second, DMX's motion is based on the faulty premise that each of the hundreds of estimates in the Kagan publications can be verified by tracing that estimate directly to some specific source document. DMX is wrong. These estimates are the result of probing analyses informed by the experience and judgment of the Kagan staff. The Kagan estimates are not "hard numbers" traceable to figures that were merely added together; rather, they are projections based on knowledge and experience derived from Kagan's staff regularly reviewing financial statements and trade publications, consulting with industry executives, and attending seminars and meetings about the media industry.

Many of the networks analyzed by Kagan are private and do not make any financial information public; others are subsidiaries of large public companies for which only the parent's financial information is available. Distilling the correct information to include in an estimate requires considerable judgment rooted in years of industry experience.[1]

Indeed, Kagan's business is predicated largely on subscriptions to its unique analyses and data. The Kagan publications relied upon by KMA in preparing Exhibit 14 were created in Kagan's ordinary course of business -- not for purposes of this proceeding. Kagan's publications are utilized throughout the media industry for the financial information and sophisticated analyses that appear therein. For almost three decades, Kagan has composed financial profiles, performed growth

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[1] Both DCR and DMX have also produced documents that are the product of professional judgment. Specifically, in support of several bottom-line figures asserted by witnesses regarding the Services' alleged fiscal vulnerability, the Services produced financial statements prepared by professional auditors. DCR and DMX did not produce underlying data, such as receipts, invoices or checks, to verify every entry in the financial statements. Instead, DMX and DCR are relying on the professional judgment of their auditors -- without presenting them as witnesses for RIAA to question -- to vouch for the credibility of these figures.

and trend projections, and provided comprehensive data unavailable from any other source.

The Copyright Royalty Tribunal and the Copyright Office have stated unequivocally and repeatedly that a witness may testify on the basis of his general knowledge and experience. It would be inconsistent with these holdings to require Mr. Gerbrandt to identify every document that contributed to the judgment of the Kagan staff when developing the estimates in the Kagan publications that underlie the KMA report. It is simply unfeasible to require a witness to reach into the recesses of his mind and identify every document that may have influenced a particular estimate or other assertion.

DMX will have the opportunity to cross-examine Mr. Gerbrandt about the process by which the Kagan estimates are generated. If it so wishes, DMX may question the credibility of the Kagan estimates during Mr. Gerbrandt's cross-examination and in argument at the arbitration hearing. Ultimately, the CARP panel can determine the weight to be accorded the Kagan estimates based on the entire record.

II. Motion of DCR Complaining About Unspecified Responses to Discovery Requests

In its Motion at pp. 2-5, DCR complains about responses that RIAA made in RIAA's December 12, 1996 letter to DCR (id. at Attachment 2). DCR, however, never bothers to identify the specific responses about which it is complaining -- other than that they concern certain of DCR's 39 requests related to the Gerbrandt and Wilkofsky testimony. DCR has apparently left it to RIAA and the Copyright Office to guess as to the allegedly offending responses.

To the extent that DCR's complaints are the same as DMX's, the discussion above provides a complete answer. To the extent that DCR has something else in mind, RIAA is unable to discern what it is. A party should not be permitted to file motions to compel the production of documents without, at the very least, clearly identifying the specific discovery requests and responses at issue -- which DCR has failed to do.

III. Motion of DCR for Documents Supporting the Knowledge And Experience of Zachary Horowitz

DCR has also moved to compel RIAA to produce documents that verify Mr. Horowitz' testimony that (1) a sound recording for a "superstar" artist usually costs more than $1,000,000 to produce; and (2) it typically

costs between $50,000 and $100,000 to produce a music video.[2]

RIAA explained to DCR that Mr. Horowitz relied upon his general knowledge and experience for these assertions. Mr. Horowitz is the President of MCA Music Entertainment Group, which owns one of the six major record companies in the United States. He has almost twenty years of experience in the music industry, including extensive dealing with recording and other industry contracts, and therefore is familiar with the costs required to create, market and promote sound recordings and music videos.

Given Mr. Horowitz's position and experience, one would expect that he could estimate the costs of sound recordings and music videos without relying upon any particular documents. Mr. Horowitz cannot possibly, nor do the rules governing this proceeding require him to, identify each piece of paper with information that contributed to his knowledge over a twenty year career.

During cross-examination DCR is free to point out that Mr. Horowitz's testimony concerning on costs

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[2] DCR also has moved to compel the production of documents concerning the "marketing cost per CD" and the "CD cost breakdown" in the videotape produced by the Canadian Recording Industry Association ("CRIA"). The Copyright Office previously denied the very same motion, stating that "[t]he validity of the assertions made in the videotape may be tested by the [Services] on cross-examination." Order of November 27, 1996, at 13.

was not based upon any contemporaneous review of documents, but his general knowledge and experience as MCA Music Entertainment Group's president. The CARP can determine the weight to accord that testimony.

IV. Motion of Muzak Concerning RIAA's Retainer Letters With Expert Witnesses

The introduction to the KMA Report states at p. 5 that: "RIAA asked KMA to estimate the percentage of revenues that cable/DBS networks spend to acquire the programming they transmit." Likewise, the introduction to the WGA Report states at p. 1 that WGA "was retained . . . to provide [his] professional opinion on the amount of license fees digital music services should pay record companies for the right to perform sound recordings."

Muzak seized upon these two statements to demand "all documents reflecting, constituting, and supporting [the] request[s]" that RIAA made to its experts. Letter of December 12, 1996, from Muzak Counsel to RIAA Counsel, quoted in Muzak Motion at 2. The only documents that are arguably responsive to Muzak's discovery demands are two letters in which KMA and WGA were retained by RIAA counsel.

Muzak's requests for these letters is outside the scope of discovery in this proceeding. "Discovery is

intended to produce only the documents that underlie the witness' factual assertions." Order of November 27, 1996, at 6 (emphasis added). "A party does not have to produce documents that it provided to a witness, unless such documents underlie the direct testimony." Id. at 11. Neither of the letters at issue was relied upon by RIAA's experts to provide any substantive factual assertions. As such, they are not required to be produced under the CARP discovery rules.[3]

V. Motion of Muzak For Documents Regarding "Marketplace Negotiations"

Muzak also moves to compel RIAA to produce documents responsive to two Muzak requests relating to "marketplace negotiations." First, Muzak requested that RIAA produce all documents underlying Mr. Wilkofsky's assertion in the "Introduction" section of his report that: "Our analysis identifies what these fees would be if they were determined by marketplace negotiations." RIAA Exhibit 15 at 1. RIAA responded that the remainder of Mr. Wilkofsky's report explains his analysis. There

[3] Indeed, retainer letters are similar in nature to other background materials that are not discoverable, such as items listed on a witness' resume. Moreover, the letters, written by RIAA counsel, necessarily contain information protected by the attorney work product doctrine.

are no documents other than those already provided that are responsive to Muzak's request.

Second, Muzak requested that RIAA provide documents supporting the statement by Jason Berman that RIAA's requested rate is based on "negotiations that take place in the free marketplace between willing buyers and willing sellers." RIAA explained that this statement was based upon Mr. Berman's knowledge and experience. Muzak's protestations that there must be documents underlying Mr. Berman's statement is merely argument, and is not a proper basis for a motion to compel.

VI. Motion of Muzak For Documents Supporting Legislative History

Muzak has moved to compel RIAA to produce documents concerning certain statements made by Mr. Berman before the House Judiciary Subcommittee on Courts and Intellectual Property in 1993. Muzak's argument is that (1) Mr. Berman made a statement before the House subcommittee in 1993; (2) that statement is part of the legislative history of the Digital Performance Rights Act of 1995 ("DPRA"); and (3) RIAA witness Hilary Rosen "references" the legislative history on page 8 of her testimony and the House and Senate Reports attached to her testimony. Muzak thus argues that RIAA "must be

prepared to produce documents underlying th[e] legislative history" of the DPRA if it references it in its Direct Case.

Muzak's request does not seek documents that underlie any factual assertion made in the testimony of any RIAA witness. It is, therefore, beyond the scope of discovery in this proceeding. RIAA is not required to produce documents that underlie every statement in the legislative history of the DPRA merely because it references the legislative history somewhere in its Direct Case.

In fact, Ms. Rosen stated nothing about Mr. Berman's testimony or the investment in DCR by Time Warner and Sony. She merely stated: "Beginning in 1993, a series of bills regarding a performance right in sound recordings were introduced and debated." Rosen Testimony at 8.

Respectfully submitted,

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Certificate of Service

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