

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR EPHEMERAL COPIES OF SOUND
RECORDINGS USED BY BUSINESS
ESTABLISHMENTS (*BE III*)**

**Docket No. 17-CRB-0001-BER
(2019-2023)**

PROTECTIVE ORDER

I. The Participants

This Protective Order pertains to the captioned proceeding only and binds the Participants remaining active as of the date of this Order (Participants).

II. Authority

The Copyright Royalty Judges (Judges) reiterate a strong presumption that the public interest favors access to the records of the subject proceeding. The Copyright Act (Act) nonetheless authorizes the Judges to issue protective orders “as may be appropriate to protect confidential information . . .” 17 U.S.C. § 803(c)(5). In prior proceedings, the Judges have issued protective orders to facilitate and expedite discovery in both rate determination and distribution proceedings.¹

III. Protected Material

The Act does not define “confidential information.” The Participants, however, agree that in this proceeding (as has been proposed by participants in prior proceedings) that “confidential information” protectable under this Order shall consist of commercial or financial information disclosed by any means (including, but not limited to, through documents, testimony, or argument), by a Participant (Producing Participant) to another Participant or other Participants, that the Producing Participant has reasonably determined in good faith would, if disclosed, either (1) result in a competitive disadvantage to the Producing Participant, (2) provide a competitive advantage to another Participant or entity, or (3) interfere with the ability of the Producing Participant to obtain like information from other Participants or entities in the future.

The Participants further agree in this proceeding, as they have in prior proceedings, to exempt from the requirements of this Order any document or information that (1) may be found in the public records of the Copyright Royalty Board, the Copyright Office, or any other federal

¹ See, e.g., Protective Order, Dkt. No. 16-CRB-001 SR/PSSR (June 15, 2016) (SDARS III); Protective Order, Dkt. No. 14-CRB-0001-WR (Oct. 10, 2014) (Webcasting IV); Protective Order, Docket No. 2009-1 (Sept. 23, 2009) (Webcasting III); Protective Order, Dkt. No. 2011-1 CRB PSS/Satellite II (Nov. 16, 2011) (SDARS II).

or state governmental agency; or (2) was, is, or during the pendency of the subject proceeding becomes, legitimately, public information.

IV. Protective Measures

A. Production

The Producing Participant shall mark with a conspicuous label of “RESTRICTED – Subject to Protective Order in Docket No. 17–CRB–0001–BER (2019–2023)” all material that the Producing Participant, reasonably and in good faith, asserts to be “confidential information” protected by this order (hereinafter referred to as Restricted). The Producing Participant shall mark Restricted portions with highlights or brackets, marking information to the narrowest extent possible to achieve the goal of maintaining confidentiality.

The Producing Participant shall deliver with all Restricted materials an affidavit or declaration signed under penalty of perjury listing a description of all materials marked with the “Restricted” stamp and the basis for the designation.

B. Receipt

A Participant may receive Restricted materials only by and through outside counsel of record in this proceeding. Any Participant receiving Restricted material from another Participant or other Participants in this proceeding (Receiving Participant) shall use the Restricted material solely for the purposes of this proceeding, and shall guard and maintain the confidentiality of all Restricted materials. The Receiving Participant, by and through counsel of record in this proceeding, shall execute and abide by a Non-Disclosure Certificate, substantially in the form attached to this order as “Exhibit A.” Before revealing Restricted materials to any other entity, the Receiving Participant shall obtain from an authorized representative of the receiving entity a Non-Disclosure Certificate in like form.

The Receiving Participant shall limit access to Restricted materials to:

- outside counsel of record in this proceeding, including attorneys, paralegals and clerical employees required by involvement in this proceeding to view the Restricted materials;
- the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work, to the extent counsel deems necessary for the sole purpose of assisting in this proceeding; and
- any outside independent consultant or expert who is assisting a Participant to the proceeding and to whom counsel determines disclosure is necessary for the limited purpose of assisting in, or consulting with respect to, this proceeding.

A consultant or expert is “independent” if he or she has no interest, financial or otherwise, in the outcome of this proceeding, and is not an employee of, and plays no ongoing role in the management of, (1) any Participant or any competitor thereof, (2) a trade association that represents Participants or competitors or members of Participants or competitors, or (3) a member of a trade association or licensing agent that is a Participant. If any Participant seeks to

challenge the independence of another Participant's designated expert, the Participants shall follow the procedure described in section D of this Protective Order.

C. Use of Restricted Materials

The Receiving Participant may use Restricted materials, plainly marked in accordance with this Protective Order and filed under seal, in any portion of this proceeding, including during the examination of witnesses, at closing argument, and in its proposed findings and conclusions.

When a Participant refers to Restricted materials in any filings with the Judges, the Participant shall file the Restricted materials under seal and file concurrently suitably redacted papers for inclusion in the Judges' public record.

Examination of a witness concerning Restricted material shall be conducted in camera and closed to all persons except Participants authorized by the terms of this Protective Order. Any portion of the hearing transcript that refers to Restricted material shall be sealed and subject to this Protective Order. To the extent possible, the court reporter shall segregate into separate transcripts information designated as Restricted, with blank, consecutively numbered pages being provided in a non-designated main transcript. The separate transcript containing Restricted material shall have page numbers that correspond to the blank pages in the main transcript. Participants shall provide copies of all Restricted materials that the Judges admit into evidence in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

Within 21 days after the conclusion of this proceeding,² the Receiving Participant of any Restricted materials shall return to the Producing Participant all Restricted materials, including any additional copies, notes, or records in any form reflecting the contents of Restricted materials. In the alternative, the Receiving Participant may destroy all Restricted materials, additional copies, notes, and records in any form reflecting the contents of the Restricted materials and must tender to counsel for the Producing Participant an affidavit or declaration under penalty of perjury verifying that all Restricted materials, copies, notes, and records were destroyed. Nothing in these paragraphs shall prohibit a Participant's outside counsel from retaining copies of any written testimony, brief, motion, pleading, or other filed document, exhibit, transcript, or internal memorandum that reflects Restricted materials, provided that any Restricted materials retained by counsel shall remain subject to the provisions of this Protective Order.

D. Motions to Expand the Scope of the Protective Order or to Challenge Designation of Restricted Materials

All Participants shall use the following procedure to seek permission to disclose Restricted materials to a person or entity not expressly authorized by the Protective Order or to challenge the nature or extent of the Producing Participant's Restricted designation(s).

² The conclusion of this proceeding shall occur at the resolution of all available appeals or, if no Participant files an appeal, at the end of the time period allowed for noting an appeal.

1. The Receiving Participant shall notify the Producing Participant by email of the details of its request. In a document attachment to the email, the Receiving Participant shall state, in detail, the factual and legal bases for its request.

2. Within four (4) business days, the Producing Participant shall respond by email. If the Producing Participant does not agree to the Receiving Participant's request, then in a document attachment to the email, the Producing Participant shall state the factual and legal bases for its refusal to agree. If the Producing Participant fails to respond to the request or fails to attach the required document, then the Judges may grant the request.

3. On the same date as calculated for step 2, if the Producing Participant has objected to the Receiving Participant's request, in whole or in part, the Producing Participant shall file with the Judges, in accordance with the Judges' procedural regulations, the Participants' emails and attachments and shall also forward them to the Judges by email at crb@loc.gov. The Judges will consider the papers submitted by the Producing Participant to be a motion by the Receiving Participant and a response by the Producing Participant. The Judges will not accept from the Producing Participant or the Receiving Participant any papers that have not been already provided to the other Participant in interest. The Producing Participant shall deliver these emails and attachments to all Participants in this proceeding in accordance with the Judges' procedural regulations.

4. Any Participant other than the Producing Participant or the Receiving Participant wishing to make a substantive filing with regard to the request and the objection thereto shall file a written submission with the Judges within two (2) business days after receiving notice of the motion, delivering the response papers to all other Participants in this proceeding, and shall forward the submission to the Judges by email at crb@loc.gov. However, no other Participant may seek permission to disclose Restricted materials or to challenge a Restricted designation in these submissions.

5. The Judges will decide the issue(s) as soon as possible on the basis of the papers filed and delivered through the procedure described above, without reply papers or oral argument, unless the Judges order otherwise.

The Producing Participant shall bear the burden of justifying the designation or limitation it seeks to impose.

E. Inadvertent Disclosure of Privileged Material

The inadvertent production or filing of any document or other information in connection with this proceeding shall be without prejudice to any claim that the inadvertently disclosed material is privileged under the attorney-client or other privilege, or protected from disclosure as work product, and the Producing Participant or filing Participant shall not be held to have waived any rights by inadvertent production. In the event that a Producing Participant discloses or files inadvertently disclosed material that the Producing Participant or filing Participant considers to be privileged in whole or in part, the Producing Participant or filing Participant may retrieve the inadvertently disclosed material by giving written notice to the Receiving Participant(s) no later than five business days after discovery of the inadvertent production or filing of such material. The notice must state the nature of the privilege.

Upon receipt of notice, each Receiving Participant shall promptly return to the Producing Participant or filing Participant the original and all copies of the material to which the notice pertains. In the event that only part of the material is claimed to be privileged, the Producing Participant or filing Participant shall furnish redacted copies of the material (removing only those parts claimed to be privileged) to all Receiving Participants, together with the written notice. Upon receipt of the redacted copy, each Receiving Participant shall return promptly to the Producing Participant or filing Participant the original and all copies of the unredacted material.

F. Inadvertent Failure to Designate

The inadvertent failure by a Producing Participant to designate any document or other information as Restricted under this Protective Order shall not waive that designation provided that within five business days of the Producing Participant learning of the inadvertent failure to designate, the Producing Participant notifies all Receiving Participants that such document or other information is protected under this Protective Order. The Producing Participant shall reproduce the document or other information with the correct confidentiality designation concurrently with its notification to the Receiving Participants. Upon receiving the document or other information with the correct confidentiality designation, the Receiving Participants shall return or securely destroy, at the Producing Participant's option, all documents or other information that were not designated properly.

A Receiving Participant shall not be in breach of this Protective Order for any use of the documents or other information before the Receiving Participant receives notice that such material is protected under this Protective Order, unless an objectively reasonable person would have realized that the material should have been appropriately designated as Restricted under this Protective Order. Once a Receiving Participant has received notice of the correct designation for the material, the Receiving Participant shall treat the material as Restricted under this Protective Order, reserving all rights to assert that the re-designation is not proper under the procedures set forth herein regarding the challenging of designations.

Notwithstanding the above, the inadvertently disclosed material shall bear the designation of Restricted going-forward.

G. Inadvertent Disclosure to Unauthorized Persons

In the event of a disclosure of any Restricted materials pursuant to this Protective Order to any person or persons not authorized under this Protective Order, the Participant responsible for having made the unauthorized disclosure, and each Participant with knowledge thereof, shall notify immediately counsel for the Producing Participant whose Restricted materials have been disclosed and provide to said counsel all known relevant information concerning the nature and circumstances of the disclosure. The responsible disclosing Participant shall also promptly take all reasonable measures to retrieve the improperly disclosed Restricted materials, and to ensure that no further or greater unauthorized disclosure and/or use thereof occurs.

Unauthorized or inadvertent disclosure shall not change the status of Restricted materials or waive the right to designate the disclosed document or information as Restricted.

V. Production of Documents Subject to Confidentiality Restrictions

Responsive, non-privileged, discoverable documents will not be withheld from production solely because they are subject to confidentiality restrictions imposed by private agreement with another entity, whether or not that entity is a Participant to this proceeding. Participants are hereby ordered not to withhold from production responsive, non-privileged, discoverable documents on the grounds that they are subject to confidentiality provisions in private agreements with third parties. Such documents may be designated Restricted hereunder, and shall be subject to the provisions and protections of this Protective Order. The Judges do not intend this Protective Order to override any obligation a Participant might have to inform the third party of any disclosure or discovery request relating to the third party's allegedly confidential information.

VI. Failure to Comply

The Judges may sanction violations of this Protective Order as they deem appropriate to the fullest extent permitted by law, including by excluding evidence obtained, developed, or handled in any way contrary to the requirements of this Order.

VII. Order

Based upon the foregoing agreements of the Participants, the Judges adopt the definition of "confidential information" subject to the terms of this Protective Order as detailed in part III above. The Judges hereby ORDER compliance with parts IV and V of this Protective Order and endorse the sanctions described in part VI.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: February 23, 2018.

EXHIBIT A

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NON-DISCLOSURE CERTIFICATE

I certify that:

1. Restricted materials provided to me in connection with the captioned proceeding are subject to the terms and restrictions of the Protective Order entered on December __, 2017;
2. I have received and read the Protective Order, and I have no unanswered questions regarding the content or implications of the Protective Order;
3. I and any firm designated below qualify under the Protective Order to have access to Restricted materials;
4. I and any firm designated below agree to be bound by the Protective Order;
5. I shall not disclose or use the contents of Restricted materials, or any notes, memoranda, or other form of information reflecting the contents of the Restricted materials, other than in accordance with the terms of the Protective Order;
6. When informed by counsel for my client, I shall return or destroy Restricted materials as provided by the Protective Order; and
7. I understand that a violation of this certificate constitutes a violation of an order of the Copyright Royalty Judges.

I certify that I am authorized to represent and sign on behalf of any "Organization" that is identified below and to bind agents and employees of the Organization to the terms of the Protective Order.

DATED:

SIGNATURE
ORGANIZATION:

PRINT NAME
TITLE: