

KING & SPALDING

King & Spalding LLP
50 California Street
Suite 3300
San Francisco, CA 94111
Tel: +1 415 318 1200
Fax: +1 415 318 1300
www.kslaw.com

Via eCRB

April 14, 2021

United States Copyright Royalty Judges
Library of Congress
James Madison Memorial Building
101 Independence Ave, S.E.
Washington D.C. 20559-6000

Re: Copyright Owners' Improper Letter Motion in *Phonorecords III*

Dear Copyright Royalty Judges:

We write on behalf of each of the Services participating in the *Phonorecords III* remand proceeding. Last night, the Copyright Owners filed a more than 5-page, single-spaced letter brief, requesting that the Judges convene a conference call to resolve a discovery issue that “may avoid motion practice.” The Services respectfully ask that the Judges deny this request and not hold any conference until after the participants have met and conferred on their respective requests for production and responses and objections to those requests. That process will either obviate the need for guidance from the Judges on a conference call or identify more specifically where the Judges’ input is needed, whether through a conference call or properly-filed discovery motions.

To start, the Copyright Owners’ letter, while dressed up as a request for a discovery conference, is a discovery motion. Therefore, the Copyright Owners should have followed the procedures in the Judges’ Scheduling Order and served that motion on the Services, giving the Services five days to respond and the Copyright Owners one day to reply. Only then should the Copyright Owners have submitted their motion, our opposition, and their reply to the Judges. Staking out their position in a lengthy writing—while seeking to deprive the Services of the same opportunity and the Judges of a full elaboration of the issues they raise—violates the Scheduling Order.

The Copyright Owners’ argument is also without merit. The Copyright Owners take the position that the Services were obligated to produce—contemporaneously with their opening submission and prior to discovery—all agreements with *any* record labels, all drafts of those agreements, all correspondence related to the negotiation of those agreements, the Service’s records of actual financial performance and growth before, during and after the period when the Service was paying royalties at the Phonorecords III rates, and all forecasts, modeling and other analysis of expected performance and growth under the period of the Phonorecords III rates. The Copyright Owners contend that such contemporaneous production was required regardless of whether the new evidence submitted by the Services “relied upon” any of those other documents and no matter how untethered those other documents are to the subject matter of any new testimony. But the Scheduling

Order required only the “[p]roduction of all documents relied upon in connection with the [new] evidence” submitted in the remand proceeding, listing in a parenthetical information that might be among the information relied upon. Order Adopting Schedule for Proceedings on Remand, at 1. Nor are the Services giving “relied upon”—a phrase with a well-established legal meaning—an unduly narrow scope. It is the Copyright Owners that seek to expand the scope of that term, as though it means “relating to”—a phrase the Scheduling Order uses in connection with discovery requests. (Indeed, many of the documents the Copyright Owners claim should have already been produced do not even relate to any new evidence submitted.)

To be clear, the Services have already produced the documents actually “relied upon,” including numerous license agreements with major labels. At the same time, the Copyright Owners produced nothing. The Copyright Owners read the Scheduling Order as though the Judges had accepted their position that the Services bear the burden of proof in this remand proceeding and so only the Services had the obligation to come forward with evidence as part of their April 1, 2021 submissions. In fact, the Judges “decline[d] to adopt” that proposal. Order Regarding Proceedings on Remand, Dec. 15, 2020.

Finally, the Copyright Owners’ request is premature. The Copyright Owners have served two separate sets of requests for production and more than 50 distinct requests for documents on each of the Services; the Services provided their respective responses and objections to the first set (covering the vast majority of the requests) yesterday and will respond to the others on Friday. The Copyright Owners’ requests cover—in addition to numerous other topics—all of the documents at issue in their letter. The Services also served discovery requests on the Copyright Owners; their responses and objections are also due on Friday. In accordance with the Scheduling Order, meet-and-confers regarding all participants’ requests and objections will take place promptly. The Services respectfully submit that it would be a waste of the Judges’ and the participants’ time and resources to further brief the discovery issues the Copyright Owners’ letter-motion raises or to hold a conference call until the parties meet and confer and either obviate the need for guidance from the Judges or allow the parties to jointly identify the areas where such guidance, rather than discovery motions, will best resolve them.

Accordingly, the Judges should reject the Copyright Owners’ letter as an improper discovery motion and deny the request for a discovery conference as premature, subject to revisiting after the participants have met and conferred on their respective discovery requests and have determined that there are specific issues that would best be addressed at such a conference rather than through discovery motions.

Sincerely,

/s/ Kenneth L. Steinthal

Kenneth L. Steinthal

Proof of Delivery

I hereby certify that on Wednesday, April 14, 2021, I provided a true and correct copy of the Services' April 14, 2021 Letter to CRB to the following:

National Music Publishers' Association (NMPA) et al, represented by Frank Scibilia, served via ESERVICE at fscibilia@pryorcashman.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Spotify USA Inc., represented by A. John P. Mancini, served via ESERVICE at jmancini@mayerbrown.com

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kellogghansen.com

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

Signed: /s/ David P Mattern