

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR (2018–
2022) (Remand)

MUSIC CHOICE’S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

Music Choice respectfully submits this motion, pursuant to the Copyright Royalty Judges’ Order Regarding Proceedings on Remand (dated Dec. 1, 2020), 17 U.S.C. § 803(a)(1), 37 C.F.R. § 351.15 and 37 C.F.R. § 351.5(b)(1), to compel SoundExchange, Inc., *et al* (collectively, “SoundExchange”) to produce documents concerning the investigation and analysis conducted by SoundExchange’s accountants at Prager Metis with respect to Music Choice’s defensive audits conducted by BDO. These documents fall within the scope of documents requested by Music Choice in its first set of Request for Production of Documents annexed to the accompanying Declaration of Margaret Wheeler-Frothingham (the “Wheeler-Frothingham Decl.”). SoundExchange’s written Responses and Objections to the RFPs are also annexed to the Wheeler-Frothingham Decl.

The catalyst for this motion is SoundExchange’s own recent motion, filed April 27, 2021, seeking to subpoena its own witness, Lewis Stark (the accountant at Prager Metis who led the investigation and analysis at issue).¹ *See* SoundExchange’s Motion for Expedited Issuance of

¹ Music Choice does not agree that SoundExchange’s motion for a subpoena is proper, especially in the form requested, and will be filing a Response in Opposition to that Motion in due course.

Subpoena to Prager Metis CPAs, Doc No. 23886, Docket No. 16-CRB-0001 SR/PSSR (2018-2022)(Remand) (“Motion for Subpoena”). SoundExchange’s Motion for Subpoena brought to light significant deficiencies in SoundExchange’s document production which, if uncorrected, would lead to the exclusion of evidence highly relevant to an issue SoundExchange itself seeks to put at issue in this remand proceeding.

More specifically, SoundExchange seeks to have Mr. Stark provide testimony regarding his investigation and evaluation of certain defensive audits conducted by Music Choice’s independent auditors, BDO, for the 2014-2016 PSS royalty periods. Music Choice allowed Mr. Stark to conduct that investigation on SoundExchange’s behalf in 2017, and Mr. Stark was given access to the BDO auditors and their working papers, in addition to the final audit reports themselves. *Id.* at pp. 2, Ex. B. At the conclusion of that investigation, SoundExchange dropped its demands to perform its own verification for those royalty periods. Presumably, Mr. Stark and Prager Metis provided SoundExchange with some written report, communications, or other form of analysis of their findings that led SoundExchange to drop its audit request. However, although SoundExchange agreed to produce documents concerning any harm or burden to SoundExchange caused by Music Choice’s defensive audits – the very subject of Mr. Stark’s investigation in 2017 – SoundExchange failed to produce any documents reflecting Mr. Stark’s actual findings or analysis from that investigation.

Now that it is clear that SoundExchange seeks to have Mr. Stark give new opinions and analysis based upon that prior investigation, there can be no justification for withholding those documents. Those documents are plainly and directly related to his proposed testimony. And to the extent a work product or other privilege claim could be made for these types of documents under certain circumstances, now that SoundExchange seeks to place Mr. Stark’s investigation

and analysis squarely at issue in this proceeding, it has waived any such privilege or protection. It is well established that privilege may not be used as both a sword and a shield.

PROCEDURAL BACKGROUND

Music Choice served its document requests on February 1, 2021. Included in those requests was Request No. 12, which covers “All Documents concerning any harm or burden SoundExchange contends it has suffered as a result of any PSS licensee’s use of the Defensive Audit Provision at any time.” *See* Wheeler-Frothingham Decl. ¶ 2, Ex. A. Other than its boilerplate objections, such as privilege, SoundExchange generally agreed that “[s]ubject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.” *See* Wheeler-Frothingham Decl. ¶ 3, Ex. B. On March 31, 2021, SoundExchange made its document production, comprising a total of 67 documents. Music Choice had no reason to believe that any non-privileged documents responsive to Request No. 12 had been withheld.

Music Choice received notice of SoundExchange’s Motion for Subpoena when its counsel received a notification email from the eCRB system, at approximately noon on Tuesday, April 27, that the Motion had been filed. SoundExchange at no point discussed the issues raised in the Motion for Subpoena with Music Choice. Consequently, it was not until counsel was able to download and review the Motion that Music Choice became aware that SoundExchange intended to submit testimony from Mr. Stark specifically related to his 2017 investigation of the BDO defensive audits. Prior to that point, SoundExchange had merely identified Mr. Stark as someone who would submit testimony on “audits.” Wheeler-Frothingham Decl. ¶4 , Ex. C. Upon learning of this intended testimony, counsel reviewed SoundExchange’s document production and ascertained that no documents reflecting Mr. Stark’s findings or analysis during his 2017

investigation had been produced. Music Choice's counsel then promptly sent SoundExchange's counsel an email, on April 28, asking SoundExchange to promptly produce any documents reflecting Prager Metis's findings or analysis in connection with the 2017 investigation, or explain any basis upon which SoundExchange is withholding those documents. Wheeler-Frothingham Decl. ¶6, Ex. D. Given the imminent close of discovery, Music Choice requested a response by the end of that day. SoundExchange did not provide any substantive response that day. By email the evening of April 29, 2021, SoundExchange did not dispute that these documents were within the scope of Request No. 12, but nonetheless informed Music Choice that it would not produce additional documents and that it had withheld at least some of these documents based on an unspecified claim of privilege. Wheeler-Frothingham Decl. ¶ 6, Ex. D. Due to the close of discovery today, and considering the position SoundExchange took in its correspondence this evening, Music Choice needed to file this motion tonight in order to preserve its rights.

ARGUMENT

There can be no serious question that the documents sought in this motion are highly relevant and crucial to Music Choice's ability to fairly address allegations raised by SoundExchange. SoundExchange has disclosed this week that it intends specifically to present evidence from Mr. Stark and Prager Metis regarding their 2017 investigation into the BDO defensive audits in order to allege supposed deficiencies in those audits. Motion for Subpoena, pp. 2, 4-5, Ex. A, Schedule A. The contemporaneous documents from the time of that investigation are highly probative and necessary to test the accuracy and credibility of any new testimony given or representations made by Mr. Stark today about that investigation. This is especially true given that the actual result of the investigation was that SoundExchange dropped

its demand to have Prager Metis conduct its own verification process for those PSS royalty periods. Nor did Prager Metis or SoundExchange ever present to Music Choice a single finding of error or other problem identified by the investigation into BDO's work. This conduct by SoundExchange and Prager Metis is wholly inconsistent with SoundExchange's current allegations and characterizations of Mr. Stark's proposed testimony for the purpose of this proceeding. Thus, Music Choice has good reason to believe that any documents reflecting Mr. Stark's original findings and analysis are likely to undermine SoundExchange's claims.

When Music Choice sought to meet and confer in light of the Motion for Subpoena, SoundExchange did not dispute that additional Prager Metis documents exist. Wheeler-Frothingham Decl. ¶6, Ex. D. SoundExchange did not dispute that those documents are within the scope of Request No. 12. *Id.* The only ground SoundExchange identified for withholding those documents is privilege grounds. But where SoundExchange has placed Prager Metis's 2017 investigation of the BDO audits directly at issue in this proceeding, its privilege objection cannot be sustained.

Music Choice recognizes that it is possible that, at some point, SoundExchange believed certain of the requested documents to be subject to work product protection or other privilege. Under certain circumstances, such a position could be reasonable. However, work product protection and other privileges may not be used as both a sword and a shield. Once SoundExchange made the strategic decision to rely on Prager Metis's 2017 investigation and introduce new testimony characterizing the findings and results of that investigation, it has placed that investigation at issue and waived any work product protection for documents related to that investigation.

It is well established that by placing the Prager Metis accountants' investigation directly at issue in this litigation SoundExchange has waived any privilege that might have shielded documents reflecting or related to that investigation from discovery. *See United States v. Nobles*, 422 U.S. 225, 239–40, 95 S. Ct. 2160, 2170–71, 45 L. Ed. 2d 141 (1975) (“The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. Here respondent sought to adduce the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony.”); *In re Sealed Case*, 676 F.2d 793, 817 (D.C. Cir. 1982), quoting *Nobles*, 422 U.S. at 239 (The work product privilege is waived “when its holder made ‘testimonial use’ of privileged material by adducing testimony as to some of the contents of a privileged document.”); *Hager v. Bluefield Reg'l Med. Ctr., Inc.*, 170 F.R.D. 70, 78 (D.D.C. 1997), quoting 4 J. Moore, *Federal Practice*, 26.64[4], at 26–447. (“[W]hen the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are ‘work product.’”).

The fundamental purpose of the work product doctrine is to further the effective workings of the adversarial system. When a party intentionally puts the subject matter of potentially protected work product at issue in litigation, the privilege is waived precisely to protect the integrity of that same adversarial system. SoundExchange should not be permitted to withhold documents reflecting Prager Metis's actual findings, analyses and opinions expressed to its client SoundExchange in the actual investigation that would be the very subject of Mr. Stark's proposed testimony in this proceeding. To do so would allow SoundExchange to cherry-pick the evidence that is presented to the court or even allow Mr. Stark to fundamentally alter his

analyses or conclusions to suit his client’s objectives in this case, and important contemporaneous documentation that would be highly probative of Mr. Stark’s assessments at the actual time of the audit would be excluded. Such an attempt to use privilege as both a sword and a shield should not be countenanced, because “allowing the privilege to shield documents at the heart of the proponent's case would *undermine* the adversary system, and would let the work-product privilege ‘be used as a tool for manipulation of the truth-seeking process.’” *Feld v. Fireman's Fund Ins. Co.*, 991 F. Supp. 2d 242, 252–53 (D.D.C. 2013), quoting *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

For the foregoing reasons, Music Choice respectfully requests that the Judges order SoundExchange to promptly produce all documents concerning or reflecting any findings, analyses, or assessments by Mr. Stark or Prager Metis in connection with the 2017 investigation of Music Choice’s defensive audits conducted by BDO, as discussed herein and outlined in the accompanying Proposed Order.

Dated: April 29, 2021

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Thursday, April 29, 2021, I provided a true and correct copy of the MUSIC CHOICE'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS to the following:

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

NACUBO, represented by Ronald G. Dove Jr., served via ESERVICE at rdove@cov.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

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

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

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American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Signed: /s/ Paul Fakler