

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)**

**ORDER DIRECTING SOUNDEXCHANGE TO PROVIDE A PRIVILEGE LOG RE
MUSIC CHOICE’S DOCUMENT REQUEST NO. 12**

On April 29, 2021, Music Choice filed its Motion to Compel Production of Documents ([Motion](#)), requesting that the Copyright Royalty Judges (Judges) compel SoundExchange, Inc. 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. Motion at 1. According to Music Choice, SoundExchange seeks to have a Prager Metis accountant, Lewis Stark, provide testimony regarding his investigation and evaluation of certain defensive audits conducted for Music Choice by BDO for the 2014-2016 preexisting subscription service (PSS) royalty periods. Music Choice represents that it had 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 and final audit reports. *Id.* at 2. Music Choice asserts that at the conclusion of that investigation SoundExchange dropped its demand to perform its own verification for those royalty periods. Music Choice speculates that Mr. Stark and Prager Metis provided SoundExchange with a written report or analysis of their findings that led SoundExchange to drop its audit request. *Id.* Music Choice contends that SoundExchange had agreed to produce documents concerning any harm or burden to SoundExchange caused by Music Choice’s defensive audits, which were the subject of Mr. Stark’s 2017 investigation, but SoundExchange failed to produce any documents reflecting Mr. Stark’s actual findings or analysis from that investigation.¹ *Id.* According to Music Choice, “[n]ow that it is clear that SoundExchange seeks to have Mr. Stark give new opinions and analysis based upon that prior

¹ According to Music Choice, it had served SoundExchange with document requests on February 1, 2021, including Request No.12, which covered “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.” Motion at 3. Music Choice asserts that 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.” On March 31, 2021, SoundExchange produced 67 documents, but, according to Music Choice, it had “no reason to believe that any non-privileged documents responsive to Request No. 12 had been withheld.” *Id.* Upon learning of Mr. Stark’s intended testimony from SoundExchange’s April 27, 2021 [Motion For Expedited Issuance of Subpoena to Prager Metis CPAs](#), Music Choice’s counsel asked SoundExchange to 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. *Id.* at 4. According to Music Choice, SoundExchange did not dispute that such documents were within the scope of Request No. 12, but 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. *Id.* at 1-2, 4.

investigation, there can be no justification for withholding those documents.” *Id.* Music Choice contends that the documents it seeks are related to Mr. Stark’s proposed testimony and that SoundExchange, by seeking to place Mr. Stark’s investigation and analysis at issue in this proceeding, has waived any privilege or protection such documents might have had. *Id.* at 2-3. Music Choice acknowledges that it is possible that at some point SoundExchange believed certain of the requested documents were subject to work product protection or other privilege and that such a position could be reasonable. Music Choice contends, however, that work product protection and other privileges may not be used as both a shield and a sword. *Id.* at 5. From Music Choice’s perspective, once SoundExchange made the strategic decision to rely on Prager Metis’s 2017 investigation and introduce testimony characterizing the findings and results of that investigation, it placed that investigation at issue and waived any work product protection for documents related to that investigation. *Id.*

On May 10, 2021, SoundExchange filed its Opposition to Music Choice’s Motion ([Opposition](#)), asserting that the Motion is untimely and groundless. [Opposition](#) at 1. SoundExchange notes that the deadline for document production, serving interrogatory responses, and identifying declarants in this proceeding was March 31, 2021. *Id.* Notwithstanding this deadline, Music Choice waited until April 28, 2021, to demand that SoundExchange produce “any documents containing any analysis by Mr. Stark, or anyone else at Prager Metis, of Music Choice’s defensive audits,” which it contends are responsive to its Request for Production No. 12 (Request No. 12). *Id.* at 2. According to SoundExchange, Music Choice had not previously raised this issue or any purported deficiencies in SoundExchange’s document production. *Id.* SoundExchange represents that on the day after Music Choice’s request, SoundExchange told Music Choice that it had already produced all of the non-privileged documents responsive to Request No. 12. SoundExchange disputes Music Choice’s claim that it was not aware that SoundExchange was going to introduce testimony about Music Choice’s defensive audits, noting that SoundExchange timely disclosed Mr. Stark on March 31, 2021, as a declarant who would discuss audits. *Id.* at 2-3. SoundExchange notes that both parties had sought documents and information about defensive audits in their requests for production and interrogatories and that Music Choice had multiple opportunities to raise the issue in its Motion but chose not to. *Id.* at 3. SoundExchange contends that Music Choice cannot credibly claim that it was unable to determine the subject of Mr. Stark’s declaration until it reviewed SoundExchange’s request for a subpoena or that SoundExchange’s identification of audits as the subject of Mr. Stark’s declaration was insufficient to put it on notice that his testimony would relate to defensive audits because the only related issue that the D.C. Circuit remanded is the issue of defensive audits. *Id.*, citing the Judges’ [Order Regarding Proceeding on Remand](#) at 1 (Dec. 1, 2020). SoundExchange infers that by waiting so long to file its Motion Music Choice is attempting to “sandbag” SoundExchange to prevent it from presenting the Judges with important evidence about one of the two remaining issues in this proceeding. *Id.* at 4.

Moreover, SoundExchange represents that it has already produced all non-privileged documents that are arguably responsive to Request No. 12, even though Music Choice presumes otherwise. *Id.* at 5.² SoundExchange contends that “[t]he few additional documents that might arguably contain Mr. Stark’s analyses of the defensive audits conducted by BDO have been

² SoundExchange disputes Music Choice’s assertion that SoundExchange dropped its audit request. *See* Motion at 2. SoundExchange contends that it was unable to proceed with its audit of Music Choice because Music Choice refused to cooperate with SoundExchange’s audit. [Opposition](#) at 5 n.8.

withheld as privileged.” *Id.* SoundExchange represents that these documents include communications between Prager Metis and SoundExchange’s in-house counsel that were prepared at the request of counsel in anticipation of litigation, as well as in-house counsel’s communications about the audits, which were internal to SoundExchange. Accordingly, in SoundExchange’s view, the documents fall squarely within the bounds of work product that is protected from disclosure. *Id.* (citing Fed. R. Civ. P. 26(b)(3)(A)). SoundExchange notes that Music Choice does not appear to contest the validity of SoundExchange’s designation of these documents as protected work product, but rather argues that SoundExchange waived the privilege by offering Mr. Stark as a declarant on the defensive audits issue, a contention that SoundExchange disputes. *Id.* SoundExchange represents that it has no intention of including information about the purportedly privileged documents, their contents, or Mr. Stark’s communications with SoundExchange in Mr. Stark’s declaration. *Id.* at 6. SoundExchange states that it has not sought testimony about “Prager Metis’s actual findings, analyses and opinions expressed to [SoundExchange] in the actual investigation” as Music Choice contends, and does not intend to elicit such testimony from Mr. Stark. *Id.* at 7.

In its May 17, 2021 Reply, Music Choice argues that SoundExchange asks the Judges to enforce a fictional deadline (*i.e.*, the date documents were to be produced under the Judges’ scheduling order) of SoundExchange’s own creation, but there is nothing in the Judges’ regulations, the Copyright Act or the general practices observed in federal courts that requires parties to file motions to compel prior to receiving the production at issue. Music Choice argues that such a rule would run counter to the goals of discovery and incentivize discovery misconduct. Reply at 1-2. Music Choice asserts that to the extent that federal courts impose deadlines for filing motions to compel, the deadline is keyed to the close of all discovery, not an earlier deadline for document production. Music Choice notes that even then, such deadlines are not enforced if the need for making the motion was not apparent during the discovery period. *Id.* at 2 (citing *McFadden v. Ballard, Andrews & Ingersoll*, 243 F.R.D. 1, 11 (D.D.C. 2007)). According to Music Choice, per the Judges’ scheduling order, discovery closed on April 29, 2021, the date on which Music Choice filed its Motion. Accordingly, in Music Choice’s view, the Motion is timely. *Id.* at 2.

Music Choice also argues that SoundExchange’s “fictional rule” regarding the deadline for filing motions to compel makes no sense as applied to the Motion. Music Choice asserts that SoundExchange does not dispute in its responses to Music Choice’s document requests that it agreed to produce the category of documents covered by the Motion and that SoundExchange acknowledged that it withheld responsive documents. *Id.* Moreover, pursuant to an agreement between the parties, SoundExchange did not produce a privilege log, and even if it had, it would not have done so until after the document production date. *Id.* at 3. According to Music Choice, endorsing SoundExchange’s novel rule would make it impossible to ever move to compel production of documents improperly withheld on invalid privilege grounds. *Id.* Music Choice also notes that it is difficult to evaluate whether a motion to compel is necessary until the receiving party sees what was produced. Under SoundExchange’s proposed deadline, participants would have to make motions on every conceivable ground, even when the production may turn out to be sufficient and the motion unnecessary and the motion would be premature because the Judges could not evaluate them in the context of what was actually produced. *Id.* According to Music Choice, SoundExchange gave it no notice that it was withholding the documents that it did, so Music Choice had no reason to raise specific privilege issues during the meet and confer process.

Music Choice also argues that the availability of a deposition of Mr. Stark does not justify depriving Music Choice or the Judges of key documentary evidence. Music Choice contends that contemporaneous documents from the time of the investigation will yield far more concrete, detailed information than would a deposition taken years after the fact. *Id.* at 4. According to Music Choice, SoundExchange has not produced a single document containing any findings, evaluations, or analysis related to the BDO audits. *Id.* at 5.

Music Choice admits that it does not know whether any of the documents sought in the Motion were privileged before SoundExchange placed Mr. Stark's 2017 investigation at issue. *Id.* at 6. Music Choice asserts, however, that it is SoundExchange's burden to demonstrate that privilege applies and, to meet that burden, SoundExchange as the proponent "must offer more than just conclusory statements, generalized assertions, and unsworn averments of its counsel." *Id.* (quoting *In re Veiga*, 746 F. Supp.2d 27, 34 (D.D.C. 2010)). Music Choice contends that SoundExchange asserts "vague generalities" about the nature of the supposedly privileged documents rather than the requisite showing that the privilege applies to each communication for which it is asserted. *Id.* (citing *In re Veiga* and *United States v. Legal Servs. For New York City*, 249 F.3d 1077, 1082 (D.C. Cir. 2001)).

Music Choice disputes SoundExchange's claim that it has not sought testimony about Prager Metis's actual findings, analyses and opinions expressed to SoundExchange in the actual investigation. According to Music Choice, in its proposed subpoena of Mr. Stark, SoundExchange seeks testimony specifically regarding Mr. Stark's evaluation of the defensive audits conducted by BDO for Music Choice and the effect of such audits on Prager Metis's CPAs' ability to conduct a royalty verification procedure intended to reflect the period from 2013 to 2016. In Music Choice's view, this was the very subject of Mr. Stark's 2017 investigation. According to Music Choice, Mr. Stark could not have personal knowledge of this topic independent of that investigation. *Id.* at 7. Music Choice accuses SoundExchange of trying to "rig the evidentiary record" by creating a whole new set of findings in Mr. Stark's testimony, solely for SoundExchange's purposes, potentially inconsistent with what he found at the time he performed his investigation. *Id.* at 7-8.

Judges' Analysis and Conclusions

As a threshold matter, the Judges find that the Motion was timely. The Judges' *Order Approving Joint Proposed Schedule for Proceedings on Remand* (Dec. 8, 2020) ([*Remand Scheduling Order*](#)) sets a March 31, 2021, deadline for production of documents. See *Remand Scheduling Order* at 1. It does not set a March 31 deadline for filing motions to compel. SoundExchange's inference that the Judges intended March 31 to be the cutoff date for discovery motions is not reasonable because it would require parties to file motions to compel before they have received and reviewed document productions. The Judges find Music Choice's filing of its motion by the date of last discovery-related deadline in the *Remand Scheduling Order* to have been reasonable, and accept the Motion as timely.

The Judges have reviewed the parties' submissions and determined that they would be assisted in their consideration of the substantive issues raised in the Motion if SoundExchange were to provide them with a privilege log that identifies each item covered by Music Choice's Request No. 12, and includes the following:

1. The preparer of any such material.
2. The sender of any such material.

3. The recipient(s) of any such material.
4. The titles and duties of each person identified in (1) – (3) above.
5. The specific identification of any attorney listed in response to (1) –(3) above.
6. The date any such material was prepared.
7. The date(s) any such material was transmitted to any recipient(s).
8. The particular privilege(s) asserted, on a per item (document or other material) basis.
9. An explanation of why each privilege asserted in response to (8) above is applicable to each document or other item, with sufficient detail to allow Music Choice and the Judges to ascertain whether the asserted privilege appears to be applicable or inapplicable.

The Judges note that the parties’ agreement to waive the production of a privilege log (1) cannot and does not bind the Judges, who must make a determination as to whether an assertion of a privilege is appropriate; and (2) is not the equivalent of the waiver of a privilege.

Moreover, the Judges reserve the right to order an *in camera* review of any and all documents as to which a privilege is asserted, if the Judges are unable to ascertain the applicability, *vel non*, of a privilege from a reading of the Privilege Log.

SoundExchange must produce the requested information within ten (10) days after the date of this Order.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: May 27, 2021