

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords IV)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

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) “confidential information” protectable under this Order shall consist of commercial or financial information a Participant (a “Producing Participant”) or other Producer (defined below) discloses to another Participant (a “Receiving Participant”) by any means (including, but not limited to, through documents, testimony, or argument) and that the Producer has reasonably determined in good faith would, if disclosed, either: (1) result in a competitive disadvantage to the Producer; (2) provide a competitive advantage to another Participant or entity; or (3) interfere with the ability of the Producer to obtain like information in the future. interfere with the ability of the Producer to obtain like information in the future.

A “Producer” shall mean any person or entity, whether a Participant or not, that produces documents or testifies in connection with this proceeding, whether by subpoena or

¹ See, e.g., *Protective Order*, Docket No. 19-CRB-0005-WR (June 24, 2019) (Webcasting V); *Protective Order*, Docket No. 16-CRB-001 BER (Dec. 27, 2017) (Business Establishments III); See also, *Protective Order*, Docket No. 16-CRB-001 SR/PSSR (June 15, 2016) (SDARS III); *Protective Order*, Docket No. 14-CRB-0001-WR (Oct. 10, 2014) (Webcasting IV); *Protective Order*, Docket No. 2009-1 (Sept. 23, 2009) (Webcasting III); *Protective Order*, Docket No. 2011-1 CRB PSS/Satellite II (Nov. 16, 2011) (SDARS II).

consent. For the avoidance of doubt, a “Producer” includes but is not limited to a Producing Participant. Any Producer may designate documents it produces or its testimony as Restricted in accordance with the terms of this Order, and those documents or testimony shall be subject to all of the terms and protections in this Order. The instruction in Section V of this Order prohibiting withholding of documents from production on the grounds that they are subject to confidentiality provisions in private agreements shall apply to all Producers.

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 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 Producer shall mark in the top left-hand corner with a conspicuous label of “RESTRICTED — Subject to Protective Order in Docket No. 21-CRB-0001-PR (2023-27) (Phonorecords IV)” all material that the Producer, reasonably and in good faith, asserts is confidential information protected by this Order (such information hereinafter referred to as “Restricted”). The Producer shall mark Restricted portions with highlights or brackets, marking information to the narrowest extent possible to achieve the goal of maintaining confidentiality. such information hereinafter referred to as “Restricted”). The Producer shall mark Restricted portions with highlights or brackets, marking information to the narrowest extent possible to achieve the goal of maintaining confidentiality.

The Producer 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.

Any material or testimony provided in Phonorecords III, CRB Docket No. 16-CRB-0003-PR (“Phonorecords III”) may be used in this Proceeding, and any such materials or testimony that were designated as Restricted pursuant to the Protective Order in Phonorecords III shall be deemed designated as Restricted under the terms of this Order.

Participants shall treat transcripts of deposition testimony taken in connection with this proceeding as presumptively Restricted for a period of 30 days from the date of the completion of the deposition. Within such 30-day period, Deponent’s counsel and/or any Participant may designate as Restricted any Restricted portion of the deposition testimony by delivering to Receiving Participants a copy of the deposition transcript with Restricted portions marked accordingly, along with an affidavit or declaration signed under penalty of perjury listing a description of the transcript portion(s) marked “Restricted” and the basis for the designation(s).

B. Receipt

Restricted materials may only be received by a Receiving Participant’s outside counsel of record in this proceeding, and may only be accessed by the persons and entities identified in the next paragraph of this subsection. Such persons and entities shall use the Restricted material solely for purposes of this proceeding, and shall guard and maintain the

confidentiality of all Restricted materials. Each 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.

Access to Restricted materials shall be limited to:

1. Outside counsel of record in this proceeding, including attorneys, paralegals and clerical employees required by their involvement in this proceeding to view the Restricted materials, provided that the outside counsel shall use the Restricted materials solely for the purposes of this proceeding, and not for any other purpose, including competitive decision-making on behalf of a Participant or a competitor of a Participant;

2. The personnel supplied by any independent contractor (including litigation support service personnel) with whom outside counsel of record work, to the extent counsel deems them necessary for the sole purpose of assisting in this proceeding;

3. Any outside independent consultant or expert (“Expert”) who is assisting a Participant in the proceeding and to whom counsel determines disclosure is necessary for the limited purpose of assisting in, or consulting with respect to, this proceeding;

4. The Copyright Royalty Board and its staff;

5. Any person who it appears, based on the face of the document, other documents, or prior testimony, authored, received, or had prior knowledge of the Restricted materials or the information contained therein, or who is a present director, officer, or employee of the Producing Participant; and

6. Any other person with the prior written consent of the Producing Participant.

This Protective Order does not bar outside counsel of record in this proceeding, in rendering legal advice to its client in this proceeding, from sharing with its client solely in connection with this proceeding and for no other purpose such counsel’s evaluation of issues that may be based in whole or in part on Restricted material, so long as such counsel does not disclose to its client the substance of the Restricted material.

An Expert is “independent” if he or she has no interest, financial or otherwise, in the outcome of this proceeding, and is not an employee, officer, or director of, nor anticipated at the time of retention to become an employee, officer, or director of, and plays no ongoing role in the management of, nor has involvement in competitive decision-making on behalf 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.

All individuals entitled to see Restricted materials agree to gain access to those materials only via a secure network connection and to store Restricted materials at a location and in a manner that ensures that access is limited to persons authorized under this 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, except that the Participants will be permitted two additional business days to file suitably redacted versions of their Written Direct Testimony, Amended Written Direct Testimony, Written Rebuttal Testimony, Proposed Findings of Fact and Conclusions of Law, and Replies to Findings of Fact and Conclusions of Law, and any legal brief or other submission that refers to Restricted material.

Examination of a witness concerning Restricted material shall be conducted *in camera* and closed to all persons except those 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 or media as the Judges may direct endorsed to indicate 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 Producer 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 Producer 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 or its Expert(s) from retaining copies of any written testimony, brief, motion, pleading, or other filed document, exhibit, transcript, internal memorandum, or other attorney work product, Expert work product, or internal correspondence that reflects Restricted materials, provided that any Restricted materials retained by such counsel or Expert shall remain subject to the provisions of this Protective Order.

D. Motions to Permit Disclosure of Restricted Materials to Others 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).

1. The Receiving Participant shall notify the Producing Participant by email of

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 noticing an appeal.

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 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, fails to attach the required document, or fails to comply timely with the filing requirements of step 3, then the Judges may grant the request.

3. On the same date as calculated for step 2 or within one business day thereafter, 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. 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 entitled to receive through outside counsel Restricted material in accordance with the Judges' procedural regulations. This procedure shall not apply to any attempt by a Receiving Participant to disclose Restricted materials of a Producer that is not a Participant. Rather, with respect to Producers' information, the Receiving Participant shall provide the Producer at least five business days' notice of its intent to disclose the material identified by the Producer as Restricted, to afford the Producer an opportunity to challenge the pending disclosure in a court of competent jurisdiction.

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 business days after receiving notice of the motion, delivering the response papers to all other Participants in this proceeding. However, no other Participant responding in this context 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.

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

E. Inadvertent Disclosure of Privileged Material

Nothing in this Order shall require production of information that a party contends is protected from disclosure by the attorney-client privilege, the work product privilege, the common interest privilege, or any other privilege, doctrine, right, or immunity. Disclosures by or among Producers' or Participants' attorneys of work product or other communications relating to issues of common interest shall not affect or be deemed a waiver of any applicable privilege or protection from disclosure. 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 Producer or filing Participant shall not be held to have waived any rights by such inadvertent production in this proceeding or in any other proceeding. In the event that a Producer or Participant discloses or files inadvertently disclosed material that the Producer or filing Participant considers to be privileged in whole or in part, the Producer 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 asserted privilege or protection and include a privilege log for each item of privileged material.

Upon receipt of notice and solely with respect to inadvertently disclosed material disclosed by a Producing Participant or filing Participant, each Receiving Participant shall promptly destroy the original and all copies of the material to which the notice pertains, subject to the Receiving Participant's right to challenge the designation in such notice. The affected Participant(s) shall meet and confer within five (5) business days of receipt of such notice and, absent satisfactory resolution, the Receiving Participant may file a motion challenging the designation in such notice within five (5) business days thereafter. 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, subject to Receiving Participants' right to challenge such designations as provided herein. Should a Receiving Participant make a motion to challenge the notice, the challenged information shall be treated consistently with an order of the Judges on such challenge. With respect to (a) inadvertently disclosed material disclosed by a Producer that is not a Participant, and (b) inadvertently disclosed material disclosed by a Producing Participant or filing Participant as to which no Receiving Participant files a motion challenging the notice of inadvertent production provided as described herein, each Receiving Participant shall return promptly to the Producer the original and all copies of the unredacted material or destroy the original and all copies, whichever the Producer requests, within five (5) business days after receipt of the notice and/or resolution of the dispute following any meet and confer conducted pursuant to this section.

A Participant inadvertently filing privileged or protected material bears responsibility for seeking, by motion on notice to all Participants, action by the Judges to seal a document. The moving Participant shall also file a redacted document to assure a complete public record.

F. Inadvertent Failure to Designate

The inadvertent failure by a Producer 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 Producer 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 Producer 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 Producer'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.

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 Producer 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. Subpoenas

If at any time documents containing Restricted materials are subpoenaed by any court, arbitral, administrative, or legislative body, or are otherwise requested in discovery, the Receiving Participant to whom the subpoena or other request is directed shall promptly give written notice thereof to every Producer who has produced the requested or subpoenaed documents through its counsel, if known, and shall provide each affected Producer an opportunity to object to the production of the subject documents, provided, however, that nothing contained in this Protective Order shall modify or limit any confidentiality provisions imposed separate and apart from this Order. If, within ten days of receiving written notice, a Producer does not take steps to prevent disclosure, the Receiving Participant to whom the subpoena or request is directed may produce the subject documents. In producing the subject documents, the Receiving Participant shall take all reasonable measures to have the documents treated in accordance with the terms of this Protective Order.

VII. 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.

VIII. 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 VII.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

Dated: July 20, 2021

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*PHONORECORDS IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

EXHIBIT A: 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 July 20, 2021;
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

PRINT NAME

ORGANIZATION:

TITLE: