

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)**

**SERVICES' SUR-REPLY IN FURTHER OPPOSITION TO BROADCAST MUSIC,
INC.'S MOTION FOR A LIMITED MODIFICATION TO THE PROTECTIVE ORDER
IN THE *PHONORECORDS IV* PROCEEDING**

Amazon.com Services, LLC, Google, LLC, Pandora Media, LLC, and Spotify USA, Inc. (collectively, the “Services”) respectfully submit this sur-reply in further opposition to Broadcast Music, Inc.’s motion to modify the protective order.

* * *

In its reply, BMI substantially revised the scope of the relief it seeks and proffered, for the first time, a declaration to support its request. The revised relief and declaration underscore how unwarranted, impractical, and unfair BMI’s requested relief would be:

First, BMI’s reply reveals that the relief it seeks is unnecessary. BMI acknowledges that all of the lawyers it seeks to preclude from access to BMI agreements had access to BMI’s agreements with music streaming services that were produced in *Phonorecords III*, see BMI Reply Br. at 4, and at least two of the three have represented many other clients in negotiations with BMI, see Parness Decl. at ¶¶ 4-5, 7.¹ Yet BMI cannot identify a single instance—across dozens of license negotiations—in which it suffered any competitive harm as a result of that prior access to other BMI agreements or in which any lawyer in this proceeding violated a confidentiality provision or protective order. Vague, speculative assertions of potential harm cannot justify BMI’s unprecedented attempt to restrict outside counsel from accessing to concededly relevant material. See *infra* at 3.

Second, BMI’s requested relief is arbitrary. BMI admits that the Protective Order is sufficient to address any concerns it has by acknowledging that any of the dozens of other

¹ With respect to the third, Mr. Wetzel, the assertions in the declaration are threadbare at best and misleading at worst. Spotify respectfully asks that if, notwithstanding the services’ submissions, the Judges are inclined to grant a version of BMI’s motion, they reserve judgment on the issue of Mr. Wetzel’s role until such time as the factual record can be properly established, rather than ruling on the basis of a three-sentence allegation in a declaration submitted in connection with a reply brief.

outside lawyers in this proceeding are free to negotiate licenses with BMI *after* receiving access to the BMI licenses that will be produced in this proceeding. *See* BMI Reply at n.6. That should end the story. BMI offers no explanation for why the sufficiency of the Protective Order to protect BMI’s interests in the future depends on what outside counsel have done *in the past*. BMI cannot even explain how it would be harmed by Mr. Greenstein, Mr. Marks, and Mr. Wetzel having access to other agreements between BMI and Services—the best it can muster is a vague concern about “potentially subject to an unfair disadvantage” in future negotiations. *Id.* at 5. Given the number of different licenses that the affected counsel have negotiated with BMI, reviewed in the course of litigating rate court proceedings against BMI or *Phonorecords III*, or seen in connection with advising clients during various Department of Justice reviews of the ASCAP and BMI antitrust consent decrees, seeing a handful of additional agreements with other Services here does not move the needle.

Third, BMI’s arguments are self-contradicting. BMI acknowledges that its consent decree prohibits it from engaging in discriminatory licensing practices. If, as BMI suggests (at 6), the Services here are not similarly situated and different rates are justified by differing business factors, then knowledge of rates in these agreements would not provide any advantage (and BMI cannot articulate what that advantage would be in any event). BMI’s two mutually exclusive arguments cannot be combined to support the requested relief.

Fourth, BMI’s requested relief, although revised, remains impractical. For example, BMI’s relief would require one of the affected lawyers—having conducted the direct examination of an expert witness without reference to the BMI agreements—to leave the trial room during cross-examination if another lawyer poses questions about those agreements and be replaced by a colleague. BMI also underestimates the difficulty of implementing effective

screens. It is not merely a matter of segregating the agreements themselves in a document management system. BMI's requested relief also apparently would require the creation of additional, partially redacted documents so that Mr. Greenstein, Mr. Marks, and Mr. Wetzel can review fact and expert written direct statements, hearing transcripts, and post-hearing proposed findings of fact and conclusions of law that refer to or excerpt provisions of BMI agreements. Given the especially weak proffer from BMI as to the harm it would allegedly potentially suffer and the arbitrary nature of the relief BMI seeks, there is no basis to subject the Services' counsel to additional screens and redactions or to complicate trial in this proceeding.

Fifth, the unprecedented nature of the relief requested by BMI is underscored by BMI's inability to cite any decision imposing this type of selective protective order screen against an individual outside counsel of record. An outside-counsel-only tier in a protective order is the gold standard for protecting commercially sensitive business information, and BMI must do more than raise generalized, amorphous concerns. *See, e.g., N. Harris Computer Corp. v. DSI Investments, LLC*, 1:19-CV-00142-GNS-HBB, 2020 WL 6066172 (W.D. Ky. Oct. 14, 2020); *English v. Washington Metro. Area Transit Auth.*, 323 F.R.D. 1, 8 (D.D.C. 2017). BMI does not satisfy the stringent "competitive decision-maker" standard that courts have developed to assess whether an "inadvertent disclosure" theory of harm could apply in the context of a disclosure under a protective order to a particular lawyer.² *See, e.g., Brown Bag v. Symantec Corp.*, 960 F2d 1465, 1471 (9th Cir. 1992). Accordingly, BMI has not carried its burden to show good

² Particularly because the lawyers at issue are outside counsel who provide legal advice, rather than in-house counsel who have a business role, there is no basis to suggest that the Services' outside counsel make competitive decisions on behalf of their clients. *See, e.g., Declaration of Gary R. Greenstein in Support of Google's Motion to Access and Make Use of Restricted Webcasting V Initial Determination and Future Substantive Rulings*, No. 21-CRB-0001-PR (filed Aug. 6, 2021) at ¶ 5.

cause to modify the Protective Order, and the unprecedented relief BMI requests against individual outside counsel of record should be rejected.

Sixth, the Judges should give no weight to BMI's new and disingenuous suggestion (at 3 n.8) that it would not object to Mr. Greenstein, Mr. Marks, and Mr. Wetzel seeing BMI's agreements produced in this proceeding if they agree to forgo participating in license negotiations on behalf of any other digital licensee going forward. There is no basis to require counsel to abandon other existing, unrelated client engagements as a condition of continuing to fully represent their clients in this proceeding.

For all the foregoing reasons and those set forth in the Services' opposition brief, BMI's motion should be denied.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

DATED: October 8, 2021

Respectfully submitted,

By: /s/ Gary R. Greenstein

Gary R. Greenstein (DC Bar No. 455549)
WILSON SONSINI GOODRICH &
ROSATI, P.C.
1700 K Street, N.W., 5th Floor
Washington, DC 20006
Tel. (202) 973-8849
Fax: (202) 973-8899
ggreenstein@wsgr.com

– and –

Ryan Benjamin (Cal. Bar No. 322594)
Victor H. Jih (Cal. Bar No. 186515)
Lisa D. Zang (Cal. Bar No. 294493)
Rebecca E. Davis (Cal. Bar No. 322765)
WILSON SONSINI GOODRICH &
ROSATI, P.C.
633 West Fifth Street, Suite 1550
Los Angeles, CA 90071-2027
Tel.: (323) 210-2900
Fax: (866) 974-7329
rbenjamin@wsgr.com
vjih@wsgr.com
lzang@wsgr.com
becca.davis@wsgr.com

Counsel for Google LLC

By: /s/ Joseph R. Wetzel

Joseph R. Wetzel (Cal. Bar No. 238008)
Andrew M. Gass (Cal. Bar No. 259694)
LATHAM & WATKINS LLP
505 Montgomery Street
San Francisco, California 94111
Tel.: (415) 391-0600
joe.wetzel@lw.com
andrew.gass@lw.com

– and –

Allison L. Stillman (N.Y. Bar No. 4451381)
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Tel.: (212) 906-1200
alli.stillman@lw.com

– and –

Sarang Vijay Damle (D.C. Bar No. 1619619)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
Tel.: (202) 637-2200
sy.damle@lw.com

Counsel for Spotify USA Inc.

By: /s/ Joshua D. Branson

Joshua D. Branson (D.C. Bar No. 981623)
Scott H. Angstreich (D.C. Bar No. 471085)
Aaron M. Panner (D.C. Bar No. 453608)
Leslie V. Pope (D. C. Bar No. 1014920)
KELLOGG, HANSEN, TODD, FIGEL, &
FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
jbranson@kellogghansen.com
sangstreich@kellogghansen.com
apanner@kellogghansen.com
lpope@kellogghansen.com

Counsel for Amazon.com Services LLC

By: /s/ Benjamin E. Marks

Benjamin E. Marks (N.Y. Bar No. 2912921)
Todd Larson (N.Y. Bar No. 4358438)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
benjamin.marks@weil.com

Counsel for Pandora Media, LLC

Proof of Delivery

I hereby certify that on Friday, October 08, 2021, I provided a true and correct copy of the Services' Sur-Reply in Opposition to BMI Motion for Protective Order Modification_ to the following:

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

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

Signed: /s/ Todd Larson