

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)**

**ORDER DENYING SERVICES’ MOTION FOR PROTECTIVE ORDER TO PREVENT
CIRCUMVENTION OF DISCOVERY RULES WITH RESPECT TO DATA IN THE
POSSESSION OF THE MECHANICAL LICENSING COLLECTIVE**

On August 16, 2021, Apple Inc., Amazon.com Services LLC, Spotify USA Inc., and Pandora Media, LLC (Services) filed with the Copyright Royalty Judges (Judges) their Motion for Protective Order to Prevent Circumvention of Discovery Rules with respect to Data in the Possession of the Mechanical Licensing Collective ([Motion](#)).¹ On August 30, 2021, the National Music Publishers’ Association and the Nashville Songwriters Association International (Copyright Owners) filed their response in opposition to the Motion ([Opposition](#)), and on September 7, 2021, the Services filed their reply ([Reply](#)).

The Services ask the Judges to issue an order that would bar participants from requesting information in the possession of the Mechanical Licensing Collective (MLC), and instead require participants to “seek information directly from the participant Services through a written discovery request or move for a subpoena to obtain information from the MLC.” Motion at 1. For the reasons discussed below, the Judges **DENY** the Motion.

Background

According to the Services, in the remand proceeding in *Phonorecords III*, the Copyright Owners, when faced with resistance by the Services to certain discovery requests, requested and received the same information from the MLC. The MLC produced the requested information voluntarily, without notice to the Services, and obviated any need for the Copyright Owners to obtain a subpoena from the Judges under 37 C.F.R. § 351.9(e). See Motion at 2. The Services contend that the Copyright Owners’ action constituted an improper “end-run” around the Judges’ discovery rules, and seek, through the present motion, to prevent similar conduct in the instant proceeding. *Id.* at 3. The Services state that counsel for the Copyright Owners have “represented that they intend to continue to obtain confidential service information from the MLC, without resort to discovery requests or subpoenas.” *Id.* at 2.

Arguments of the Parties

The Services argue that when the Copyright Owners requested information from the MLC in connection with the *Phonorecords III* remand and the MLC fulfilled that request, the Copyright Owners (and the MLC) relied improperly on 37 C.F.R. § 210.34(c)(4)(iii). See *id.* at 3-5. The Services contend that that Copyright Office regulation, governing treatment of confidential information by the MLC, only authorizes the MLC to share confidential information

¹ Google LLC, another service participant, supports the request for relief set forth in the Motion. See Motion at 1 n.1.

“in response to court orders, subpoenas or other legal processes.” *Id.* at 4. They argue that similar language in the Judges’ regulations governing SoundExchange in its role as the designated Collective (37 C.F.R. § 380.5(c)(4)) has the same meaning, and that the reason SoundExchange is able to use that information in proceedings without obtaining subpoenas or using other discovery tools is because SoundExchange itself is a party to rate proceedings. *See id.* at 5. By contrast, the MLC is not (and, by statute, cannot be) a participant. *See id.* (citing 17 U.S.C. § 115(d)(8)(A)).

The Services also argue that, if the Judges do not grant the requested relief, they should instead confirm that all participants have the right to seek confidential information from the MLC (including publisher information), and that the MLC should produce the requested information to all attorneys and other authorized agents in the same proceeding. “If [37 C.F.R. § 210.34(c)(4)] is read to allow dissemination of confidential information in the MLC’s possession to participants outside of the CRB’s discovery rules, that information must be equally available to all participants.” *Id.* at 6-7.

In opposition, the Copyright Owners argue that the Judges lack authority to grant the requested relief. Opposition at 1. Noting that the Services “state that the Motion is made ‘pursuant to 17 U.S.C. §§ 801(c), 803(b)(6) and 37 C.F.R. §§ 351.5(b), 351.9(e),” the Copyright Owners argue that none of those provisions authorizes the Judges to grant the relief the Services request. *Id.* at 4. Section 351.9(e) of the Judges’ regulations implements 17 U.S.C. § 803(b)(6)(C)(ix), and establishes the procedure for obtaining a subpoena. *See id.* Section 351.5(b) of the Judges’ regulations implements 17 U.S.C. § 803(b)(6)(C)(v), and provides for discovery of participants. *See id.* The Copyright Owners acknowledge that 17 U.S.C. § 801(c) grants the Judges “broad” authority to make procedural and evidentiary rulings that they deem “necessary.” *Id.* at 5. They contend, however, that “[t]he Services offer no explanation as to how the requested relief would be a necessary procedural or evidentiary ruling.” *Id.* More generally, the Copyright Owners argue that “the Services also do not explain how it would be appropriate for the Judges to seek to prevent a participant from receiving voluntary disclosure of information from a nonparticipant in order to build its case.” *Id.*

The Copyright Owners also argue that the requested relief contravenes the MMA² and the Copyright Office’s implementing regulations governing the MLC. They contend that Congress conferred on the MLC authority to “gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section.” *Id.* at 6 (quoting 17 U.S.C. § 115(d)(3)(C)(i)(XI)). They argue further that the Services “misquote an additional provision confirming this authority, 17 U.S.C. § 115(d)(8)(A),” when they argue that the MLC’s provision of information in rate proceedings is “subject to ‘applicable statutory and regulatory provisions and rulings of the [Judges].”” *Id.* at 6-7 (quoting Motion at 5). The Copyright Owners contend that “the MLC’s statutory authority to gather and provide information for the use of a party in this proceedings [sic] is *not* subject to rulings of the Judges.” *Id.* at 7. Rather, there are two different sets of circumstances when the MLC may provide information for a proceeding. First, the MLC may provide information voluntarily to a participant in a Phonorecords proceeding. *See id.* Second, the MLC may also “comply with requests for information as required under applicable statutory and regulatory provisions and rulings of the [Judges].” *Id.* The Copyright Owners contend that “[t]he Motion improperly asks the Judges to

² Music Modernization Act, Public Law 115-264 (Oct. 11, 2018)

try to eliminate the first statutory authority, precluding the MLC from voluntarily gathering and providing information for the use of a party, and limiting the MLC to complying with subpoena rulings of the Judges.” *Id.*

Regarding the Copyright Office regulations, the Copyright Owners argue that 37 C.F.R. § 210.34(c)(4)(iii), like section 115 of the Copyright Act, provides two means by which the MLC may disclose confidential information: voluntarily to “[a]ttorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges” or in response to a court order or subpoena, ““subject to an appropriate protective order or agreement.”” *Id.* (quoting regulation).

Additionally, the Copyright Owners argue that the requested relief is not consistent with the Judges’ limited subpoena power. The Copyright Owners point out that the “substantial impairment” standard is a very high threshold, and contend that “[l]imiting Copyright Owners’ private, lawful gathering of information to this standard has no authority in law, and turns the subpoena process on its head.” *Id.* at 10. A subpoena is a tool for obtaining information that cannot be obtained voluntarily. The Copyright Owners suggest that “issuing a subpoena commanding production by a nonparty of information that the nonparty is willing to provide without a subpoena would seem to be an abuse of the Judges’ subpoena power.” *Id.* The Copyright Owners characterize the Services’ request as asking the Judges “to themselves prevent Copyright Owners from obtaining information from a nonparticipant voluntarily, forcing a subpoena request” where one would otherwise be unnecessary. *Id.* The Copyright Owners contend “[t]his would be a nonsensical process that would fly in the face of the law and serve only to obstruct, delay and prejudice Copyright Owners” and result in an injudicious use of the Judges’ subpoena power. *Id.* at 10-11.

As to the Services’ alternative request for relief, the Copyright Owners argue that that relief is indistinguishable from the stipulation that the Copyright Owners offered, and the Services rejected, in their meet-and-confer to avoid the present motion practice. *See id.* at 14-15. The Copyright Owners urge the Judges to reject the Services’ alternative request for relief “on the principle of incentivizing parties to accept reasonable compromises to avoid wasteful litigation” *Id.* at 15.

In reply, the Services contend that the Judges have authority under 17 U.S.C. § 801(c) to grant the requested relief, and should exercise it “to prevent the Copyright Owners from continuing to make an end-run around the CRB’s well-established discovery rules.” Reply at 2. They deny that they are seeking to limit information gathering, and argue that the Copyright Owners are seeking an unfair litigation advantage through their relationship with the MLC and representation by the same law firm as the MLC. *See id.* at 3-4. In particular, the Services object to the Copyright Owners’ receiving the Services’ confidential information from the MLC without any prior notice or opportunity to object. *See id.* at 4. Finally, the Services argue that the stipulation the Copyright Owners offered is not equivalent to the alternative relief they request—“simultaneous production of requested MLC data to all participants”—because the Copyright Owners’ offer allowed a five business day delay before information would be shared with other participants. *See id.* at 5.

Discussion

Motion

Section 801(c) of the Copyright Act grants the Judges authority to “make any *necessary* procedural or evidentiary rulings in any proceeding under” chapter 8 of Title 17. 17 U.S.C. § 801(c) (emphasis added). As discussed below, the Judges find the requested relief neither necessary nor appropriate on the present facts. Consequently, the Judges need not resolve the question whether, if they found the relief to be “necessary,” they would have authority to grant it.

The protective order that the Services request would require the Copyright Owners to “seek information directly from the participant Services through a written discovery request or move for a subpoena to obtain information from the MLC.” [Proposed] Protective Order to Prevent Circumvention of Discovery Rules with respect to Data in the Possession of the Mechanical Licensing Collective at 1 (Aug. 17, 2021) ([Proposed Protective Order](#)). The Services rely on two principal arguments: the order is needed (a) to prevent the Copyright Owners from circumventing the Judges’ discovery rules and (b) to prevent the MLC from violating its regulations concerning confidential information.

The discovery rules applicable to royalty rate proceedings govern the discovery schedule, document production, depositions, and interrogatories. *See* 37 C.F.R. § 351.5. The provision focuses solely on the process by which one participant may obtain information from another participant. Additionally, the statute and regulations authorize the Judges to issue subpoenas to compel testimony or production of documents or tangible things by a third party. *See* 17 U.S.C. § 803(b)(6)(C)(ix); 37 C.F.R. § 351.9(e). While it is quite true that none of these provisions addresses the voluntary production by a third party of information in its possession, the Services have cited no legal authority for the proposition that the statute or rules preclude such production. The Judges find no reason on the motion record before them to limit a participant’s ability to obtain information from willing third parties.

Regarding the MLC’s conduct vis-à-vis the Copyright Office regulations that govern it, neither party has provided a basis for the Judges to determine that they have a role in interpreting or enforcing those regulations in this matter, and the Judges therefore decline to assume such authority. If the Services believe that the MLC has violated or misapplied its governing regulations, they must seek relief elsewhere.

The Judges also find no basis to grant the alternative relief that the Services seek. Whether or not the MLC can honor a request from the Services for publisher information is likely governed by the same Copyright Office regulations that the Copyright Owners relied on in the *Phonorecords III* remand proceeding. Again, the motion record does not provide a basis for the Judges to determine that it is within their purview to interpret or enforce 37 C.F.R. § 210.34(c)(4).³

Protective Order

The Judges note that the term “Producer,” as defined in the July 20, 2021 [Protective Order](#) in this proceeding, encompasses non-participants, including the MLC. Consequently, any disclosures made by the MLC to a participant are subject to the *Protective Order*. The

³ The Judges do not suggest that the Services are precluded from pursuing their question regarding the MLC’s conduct in another forum.

Protective Order designates the Producer as the individual or entity that determines whether information is to be designated as “Restricted.” The information that the MLC possesses that is at issue here is the confidential business information of the Services, who are obligated to provide that information to the MLC. The Judges thus recognize that a participant whose information is produced by the MLC has a primary interest, even before it has submitted its information to the MLC, to ensure the proper designation of its confidential material as Restricted. Consequently, the Judges direct the participants to propose amended language that allows all participants to have an adequate opportunity to ensure that their confidential information is properly designated, whether produced by them directly, or indirectly by the MLC. Until the Judges have adopted any amendments to the *Protective Order*, the participants shall treat all information provided by the MLC as Restricted materials under the *Protective Order*.

Conclusion

For the foregoing reasons, the Motion is **DENIED**.

The Judges **ORDER** the participants to meet and confer and submit to the Judges no later than ten days from the date of this Order a joint proposal for amendments to the *Protective Order* to ensure the proper designation of confidential information produced by the MLC, consistent with this Order.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

DATED: October 13, 2021