

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

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

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

MEMORANDUM IN OPPOSITION OF MOTION TO COMPEL COPYRIGHT OWNERS TO PRODUCE SUBPART B SETTLEMENT DOCUMENTS

National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI") (collectively, "Copyright Owners") respectfully submit this memorandum in opposition to the motion of Amazon.com Services LLC ("Amazon"), Spotify USA Inc. ("Spotify") and Pandora Media, LLC ("Pandora" and, together with Amazon and Spotify, the "Services") to compel Copyright Owners to produce Subpart B Settlement Documents (the "Motion").

INTRODUCTION

In *Phonorecords III*, the Judges denied a motion by the Services seeking to compel the production of documents concerning the then-Subpart A settlement. *Order Denying Services' Motion to Compel Copyright Owners to Produce Documents Relating to Subpart A Settlement*, CRB Docket No. 16-CRB-0003-PR (2018-2022) (*Phonorecords III*) (Feb. 14, 2017) (the "Phono III Order"). In that Order, the Judges found:

the settlement communications sought by the Services are not "directly related" to the Copyright Owners' WDS as required by the Judges' procedural rules, and are therefore not discoverable. *See* 37 C.F.R. § 351.5(b)(1). The Copyright Owners do

not offer the subpart A settlement as a benchmark. Nor does their rate proposal rely on or refer to the settlement in any way. Dr. Eisenach’s expert report, which underlies the Copyright Owners’ rate proposal, likewise does not rely on, or refer to the subpart A settlement. Finally, the Services do not suggest that any of the Copyright Owners’ witnesses considered the subpart A settlement in preparing their testimony.

Id. at 1-2 (footnote omitted).

Every one of the bases on which the Judges justified their denial of the Services’ motion in *Phonorecords III* remains true with respect to Copyright Owners’ Written Direct Statement in this proceeding. The same result – denial of the Services’ motion – is therefore warranted.

ARGUMENT

I. SUBPART B SETTLEMENT DOCUMENTS ARE NOT DISCOVERABLE

Pursuant to 37 C.F.R. § 351.5(b)(1), a participant in a proceeding “may request of an opposing participant nonprivileged documents directly related to the written direct statement . . . of that participant.” As they did in *Phonorecords III*, the Services attempt to spin Copyright Owners’ Written Direct Statement to fit the discovery they seek. Indeed, the Services recycle many of the same arguments that the Judges previously rejected on this issue. The settlement of Subpart B rates is not directly related to Copyright Owners’ Written Direct Statement; indeed, it is not related at all. Moreover, the Services have made no attempt to satisfy the heightened standards applicable to discovery of settlement-related documents. Each of those reasons warrants denial of the Services’ motion.

A. The Discovery Sought by the Motion is Not Directly Related to the Copyright Owners’ Written Direct Statement

The Services advance four arguments as to why Subpart B settlement and negotiation documents are discoverable. None meet the standard of discoverability in this proceeding.

First, the Services argue that the adoption of the willing buyer-willing seller standard governing this proceeding “must [] permit[] [the Services] to explore why, then, Copyright Owners

agreed with the record labels to retain the *same* Subpart B rates. . . .” (Mot. at 4 (emphasis in original).) But the change in the standard does not change 37 C.F.R. § 351.5(b)(1), the discovery rule applicable in this matter. And the Services made this same argument, “why the Copyright Owners did not seek a better deal,” in *Phonorecords III* and it was explicitly rejected by the judges as not “directly related” to Copyright Owners’ Written Direct Statement to entitle the Services to discovery. Phono III Order, at 3. In the Phono III Order, the Judges did not rely on (or, indeed, even cite) the then-governing Section 801(b) legal standard to reach their conclusion that the discovery sought was not “directly related” to the Copyright Owners’ Written Direct Statement. The then-governing 801(b) legal standard was irrelevant to that conclusion, and the change in the standard is equally irrelevant and does not warrant a different result.

Second, the Services quote from portions of Copyright Owners’ witnesses for the proposition that “interactive streaming has cannibalized the mechanical royalties associated with purchasing activity.” (Mot. at 5.) But, as the Judges previously observed when analogous testimony was identified by the Services in connection with their motion in *Phonorecords III*, “[e]ach of these witnesses testifies about changes in the way that music is consumed, revenue is generated, and songwriters’ careers are financed. The subpart A settlement does not inform that testimony; nor are the settlement documents needed to understand it.” Phono III Order, at 3. Further, in support of this argument, the Services cite songwriter comments in response to the noticed Subpart B settlement as ground for obtaining discovery from Copyright Owners (Mot. at 7), despite the applicable standard of discovery being those things that directly relate to the Copyright Owners’ Written Direct Statement. 37 C.F.R. § 351.5(b)(1). The Services’ requested “explor[ation]” (Mot. at 7) via discovery that is not directly related to the Copyright Owners’ Written Direct Statement should be denied.

Third, the Services identify the Copyright Owners’ proposed rate structure for interactive streaming, which includes a TCC component, as supportive of their request to obtain discovery concerning a settlement of the royalty rates applicable to physical sales and permanent digital downloads. (Mot. at 7-8.) They argue that the inclusion of a TCC component somehow “put[s] the ratio between sound recording and publishing royalties directly at issue,” (Mot. at 8) completely inventing a correlation between the royalty rate to be paid by labels for physical product and digital downloads with the ratio between sound recordings and musical works to be paid by the Services. Not only is there no correlation, but the fact that these ratios are “at issue” is not new, as they were also litigated by the very same participants in *Phonorecords III*. Indeed, in moving to compel similar documents in *Phonorecords III*, the Services argued that Dr. Eisenach’s benchmark analysis, which was “based on the ratio of royalties paid for sound recordings to royalties paid for musical works” made the then-Subpart A settlement documents “unquestionably relevant to this line of inquiry.” Phono III Order, at 3 (quoting Services’ motion to compel). There, the Judges recognized this argument for the pretext it was and denied the motion. The Services’ invocation of the same argument five years later does not change the conclusion.

Moreover, even if one were to assume there was a correlation, the Subpart B Settlement Documents sought, which include “all negotiation documents,” are not necessary to show or argue anything relating to the sound recording/musical work ratio with respect to permanent digital downloads or physical products. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*), 84 Fed. Reg. 1918, 1946 (Feb. 5, 2019) (rejecting Subpart A settlement as a benchmark for rates because of the “difference in access value between a download or a CD and a streaming service subscription”); *id.* at 2011 (Dissent) (finding that “the

facially different access value in Subpart A constitutes a fatal flaw in its usefulness as a benchmark in this proceeding”); *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 386 (D.C. Cir. 2020) (affirming Board’s rejection of the benchmark). The musical work rate for permanent digital downloads and physical products, 9.1 cents, as agreed to in the final Subpart B settlement is public information. The Services do not need anything more even if there were a correlation, and there is none.

Finally, the Services cite a “core theme” of the Copyright Owners’ Written Direct Statement – “that publishers protect songwriters’ interests, often at significant cost” (Mot. at 8) – as a basis for the Judges to order discovery into the Subpart B settlement. The cited testimony, which is identical in kind to the testimony introduced by Copyright Owners in *Phonorecords III* and identified by the Services in their motion to compel there, addresses the “way revenue is generated” by music publishers and the costs they incur; but the Services’ argument concerning this testimony was rejected as insufficient to enable discovery into the then-Subpart A settlement in *Phonorecords III*. Phono III Order, at 3; *e.g.*, compare Phono III Order, at 3 (“Songwriters, including singer-songwriters, are increasingly looking to music publishers, and particularly independent music publishers, for the financial support that labels used to provide. We not only furnish advances to songwriters, but also often finance the creation of recordings for our singer-songwriters prior to their obtaining a record deal. Even artist-songwriters with record deals are increasingly looking to us for other forms of financial support, including tour support, which we have regularly provided.” (quoting Kalifowitz WDT ¶ 17)) with Mot. at 8 (“Peter Brodsky (SMP) stated their publishers ‘protect songwriters’ interests,’ ‘help songwriters realize the economic value from their creative works,’ and ‘incur significant costs to engage in [these] activities.’” (quoting Brodsky WDT ¶¶ 8-9)). And, in any event, the Services are not seeking the Subpart B

settlement documents because of the cited testimony, underscoring that their discovery request is not “directly related” to Copyright Owners’ Written Direct Statement.

Rather, the Services point to several objections filed to the published Subpart B settlement to argue that the discovery is needed to explore the opinions commenting that Copyright Owners do not represent songwriters’ interests.¹ The Services then assume, without explanation, that such evidence lies with the Subpart B settlement. The fact that the Services need to rely on information wholly outside of Copyright Owners’ Written Direct Statement to even articulate an argument for discovery into the Subpart B settlement demonstrates that such discovery is not directly related to Copyright Owners’ Written Direct Statement. And the Services’ closing attempt to distinguish their instant motion from the Judges’ prior ruling on this very topic fails to address the almost identical arguments that the Judges previously rejected, ascribing the distinction entirely to the new willing buyer-willing seller standard (despite the fact that the 801(b) legal standard governing the *Phonorecords III* proceeding had no bearing on Judges’ Order in that proceeding) and the Copyright Owners’ current Written Direct Statement (the portions of which identified by the Services are directly analogous to those from *Phonorecords III*).

B. The Services Wholly Fail to Address the Heightened Standard Applicable to Discovery of Settlement Documents

Independent of the Services’ demonstrably false assertion that the discovery sought is “directly related” to Copyright Owners’ Written Direct Statement, the Services also fail to meet the heightened standard typically applied to discovery requests seeking settlement communications. This issue was briefed by the participants in connection with the *Phonorecords III* motion, known to the Services, yet completely unaddressed here –

¹ This is another obviously pretextual argument. If the Services wish to explore the opinions of the objectors, they are free to communicate with the objectors. But the discovery sought has nothing to do with the Copyright Owners’ Written Direct Statement.

“A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality.” *Id.* (citing *Iridium India Telecom Ltd. v. Motorola, Inc.*, 165 Fed App’x 878, 880 (2d Cir. 2005)).

Fully aware of this argument, the Services deliberately ignored this requirement because they cannot satisfy it. That alone independently warrants denial of their Motion.²

CONCLUSION

Copyright Owners respectfully request that the Judges deny the Services’ motion in its entirety.

Dated: January 19, 2022

PRYOR CASHMAN LLP

By: Marion R. Harris
Benjamin K. Semel (N.Y. Bar No. 2963445)
Frank P. Scibilia (N.Y. Bar No. 2762466)
Donald S. Zakarin (N.Y. Bar No. 1545383)
Marion R. Harris (N.Y. Bar. No. 4774600)
7 Times Square
New York, New York 10036
(212) 421-4100
bsemel@pryorcashman.com
fscibilia@pryorcashman.com
dzakarin@pryorcashman.com
mharris@pryorcashman.com

Attorneys for Copyright Owners

² In *Phonorecords III*, the Judges did not reach the question of whether this standard – typically applied in federal courts – applies in rate-setting proceedings because they found that the discovery sought was not directly related to Copyright Owners’ Written Direct Statement. See Phono III Order, at 2.

Proof of Delivery

I hereby certify that on Wednesday, January 19, 2022, I provided a true and correct copy of the Copyright Owners' Opposition to Motion to Compel Production of Subpart B Settlement Documents to the following:

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

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

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

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

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

Signed: /s/ Lauren B Cooperman